APPENDIX "A"

Seventh Circuit Court of Appeals
Opinion
&
Denial of Certificate Of Appealability

March 5, 2024

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted March 1, 2024
Decided March 5, 2024

Before

THOMAS L. KIRSCH II, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 23-2265

TROY STEVEN RICHTER,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:21-cv-01330-JRS-MG

James R. Sweeney II,
Judge.

ORDER

Troy Richter has filed a notice of appeal from the denial of his motion under 28 U.S.C. § 2255 and an application for a certificate of appealability. We have reviewed the final order of the district court and the record on appeal and find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED. Richter's motion to proceed in forma pauperis also is DENIED.

APPENDIX "B"

United States District Court
Of The
Southern District of Indiana

Order and Denial of Certificate of Appealability

May 5, 2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

TROY STEVEN RICHTER,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 1:21-cv-01330-JRS-MG
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

Order Discussing Motion for Relief Pursuant to 28 U.S.C. § 2255 and Denying Certificate of Appealability

For the reasons explained in this Entry, the motion of Troy Steven Richter for relief pursuant to 28 U.S.C. § 2255 must be **denied** and the action dismissed with prejudice. In addition, the Court finds that a certificate of appealability should not issue.

I. The § 2255 Motion

A motion pursuant to 28 U.S.C. § 2255 is the presumptive means by which a federal prisoner can challenge his conviction or sentence. *See Davis v. United States*, 417 U.S. 333, 343 (1974). A court may grant relief from a federal conviction or sentence pursuant to § 2255 "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). "Relief under this statute is available only in extraordinary situations, such as an error of constitutional or jurisdictional magnitude or where a fundamental defect has occurred which results in a complete miscarriage of justice." *Blake v. United States*, 723 F.3d 870, 878-79 (7th

Cir. 2013) (citing *Prewitt v. United States*, 83 F.3d 812, 816 (7th Cir. 1996); *Barnickel v. United States*, 113 F.3d 704, 705 (7th Cir. 1997)).

II. Factual Background

The facts of Richter's criminal offenses are provided in his presentence report at *USA v. Richter*, No. 1:18-cr-00184-JRS-MJD-1 (S.D. Ind.) (hereinafter "Crim. Dkt."), dkt. 54, and the United States' application for a federal search warrant, filed under seal as an Exhibit A to the United States' response brief. *See* dkt. 15. The United States has summarized these facts in its response brief as follows.

> Beginning in 2012, federal authorities investigated an online website name imgsrc.ru ("Website A"). (Ex. A at 18; PSR ¶ 5.) Website A was known by law enforcement as a "online website that was used extensively by person interested in exchanging images depicting child pornography to meet and become trading partners." (Ex. A at 18.)
>
> In September 2017, a lead from the Queensland Australia Police Service ("QPS") was received relating to a Website A user Tbiscuit who had updated two albums on Website A. (*Id.* at 22.) The account information showed that Tbiscuit had an email address of mustang79pace@hotmail.com. (*Id.* at ¶ 54.) The albums were named "Niece" and "Niece and Friend." (*Id.* at 23.)
>
> Niece contained fifty-six images of a pre-pubescent female child ("Child 1") where the child appeared to be undressing from a swimsuit and one of the images showed the bare breast of the child. (*Id.*) Niece and Friend contained thirteen images, twelve of which depicted Child 1 and another female child ("Child 2"). (*Id.*) Six of these images depicted Child 1 with pants pulled [d]own to her knees as she sits on a toilet and the other images depicted Child 2 in the same scenario. (*Id.*) Both of the series of images appeared to be screen shots or image captures from videos and positioned in such a way as it appeared to be hidden and aimed in a manner that would allow for the capture of sexually explicit images or vides of both Child 1 and 2. (*Id.* at 24.) The continuation of the video from which both sets of images were captured would logically contain sexually explicit conduct as both Child 1 and 2 would stand from the toilet and Child 1 would continue to undress. (*Id.*)
>
> On the foreword of the Niece album, the user typed "Have more but won't let me post here" which is indicative of a user who has additional material of the victim in the album. (Id.) Website A bans users for trafficking in child abuse material if the material is deemed by Website A moderators to be "child

pornography." The statement, in addition to the user making his email address publicly available, indicated that the user was attempting to advertise and traffic in child pornography in this material via email and with an attempt to sexually exploit Child 1 through the dissemination of her images online to other persons with a sexual attraction to minors. (*Id.*)

The email address on this account was associated with Troy Richter of Covington, Indiana and a search of public records showed it to be associated with his residence. (*Id.* at ¶ 25.) In reviewing publicly viewable social media, Child 1 appeared to be Richter's niece and Child 2 appeared to be Child 1's friend. (*Id.*)

The recovered computer from Richter's bedroom had additional images of Child 1 changing clothes in a bathroom in Florida. (PSR ¶ 15.) The computer also contained images of Child 1 and Child 2 using a toilet in Richter's home. (PSR ¶ 16.)

The computer also contained visual depictions of multiple minors engaging in sexually explicit conduct through actual or simulated sexual intercourse, masturbation, or a lascivious exhibition of their genitals or pubic area. (PSR ¶ 17.) These files included minor victims as young as babies and content included sadistic abuse and other depictions of violence. (*Id.*)

A second computer in Richter's home contained additional child pornography files. (PSR ¶ 18.) This content was older and consistent with Richter's admission that he has viewed child pornography for approximately 10 years. (*Id.*) Over 600 images of child pornography were discovered. (*Id.*)

Richter admitted he produced the images of Child 1 and Child 2 without their knowledge and posted those images to imgsrc.ru to obtain child pornography from others. (PSR ¶ 19.) He stated that the images were taken with an iPhone that had an application installed that would take photos when motion was detected. (*Id.*)

Richter provided that images of Girl 1 in the "Niece" album were taken in Navarre Beach, Florida in the summer of 2015 and that additional pictures of Child 1 and Child 2 were taken at his home in Vermillion County, Indiana. (PSR ¶ 20.) Richter posted the images in approximately January 2016. (PSR ¶ 21.)

Dkt. 14 at 1-4.

On June 12, 2018, Richter was charged in a five-count indictment with travel with intent to engage in sexual conduct, in violation of 18 U.S.C. § 2423(b) (Count 1); three counts of sexual exploitation of a child, in violation of 18 U.S.C. § 2251(a) (Counts 2-4); and possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) (Count 5). Crim. Dkt. 31. The Court

appointed Dominic Martin of the Federal Community Defenders to represent Richter. Crim. Dkt. 7. On April 22, 2019, Richter filed a petition to enter a plea of guilty agreeing to plead guilty as charged. Crim. Dkt. 50.

The United States Probation Office prepared a presentence report. Crim. Dkt. 54. Richter was found to have a combined adjusted offense level of 42. *Id.* at 9. Five levels were added because Richter was found to be a repeat and dangerous sex offender against minors, pursuant to U.S.S.G. § 4B1.5(b)(1), which raised his offense level to 47. *Id.* Pursuant to U.S.S.G. § 3E1.1, three levels were subtracted for acceptance of responsibility. *Id.* at 9-10. Richter was found to have a total offense level of 44, which was reduced to the maximum level 43. *Id.* at 10. Because Richter was found to have a criminal history category of I, *id.*, his guideline imprisonment range was life, *id.* at 15. Because the statutorily authorized maximum sentence was less than the maximum applicable guideline range, the guideline range became 1,680 months. *Id.* (citing USSG § 5G1.2(b)).

On August 21, 2019, the Court held Richter's change of plea and sentencing hearing. Crim. Dkt. 59. Following a colloquy, the Court accepted the plea agreement finding that Richter was fully competent and capable of entering an informed plea, was aware of the nature of the charges and the consequences of each of his pleas, and that his pleas of guilty were knowing and voluntary supported by an independent basis of fact containing each of the essential elements of the offenses. Crim. Dkt. 69 at 17. During the sentencing portion of the hearing, both Richter and his counsel addressed the Court to request a sentence of 18 years' imprisonment (well below the 140-year guideline). *Id.* at 27-35; 56-58. The United States requested a sentence of 30 to 35 years' imprisonment. *Id.* at 35-56. The Court sentenced Richter to 360 months' imprisonment (360 months on Counts 1 through 4 and 240 months on Count 5). *Id.* at 62.

On August 22, 2019, the Court entered final judgment on August 22, 2019. Crim. Dkt. 59. On September 5, 2019, Richter filed a notice of appeal to challenge only the length of his sentence. *See* Crim. Dkt. 62. Richter's appellate counsel filed a brief analyzing the potential issues Richter's sentencing challenge could involve and concluded in her brief that because none of the potential arguments applied to Richter's sentence, the appeal should be dismissed. *See United States v. Richter*, 805 F. App'x 420, 421 (7th Cir. 2020). The Seventh Circuit agreed and dismissed the appeal. *Id.*

On May 21, 2021, Richter filed a motion to vacate his sentence under § 2255. Dkt. 1. Richter claims his counsel was ineffective because he failed: 1) to file a motion to suppress evidence from the search warrant; 2) to investigate whether the search warrant was returned to include an inventory of the items recovered; and 3) obtain a sentence of 18 years. *Id.* at 4-9. Richter also claims that his convictions for Count 1 through 4 are unconstitutional because "lascivious exhibition of the genitals or pubic area of any person" as it is held in 18 U.S.C. § 2256 is unconstitutionally vague. *Id.* at 9. The United States filed its response, *see* dkt. 14, and Richter filed a reply, *see* dkt. 20.

III. Discussion

A. Ineffective Assistance of Counsel

A petitioner claiming ineffective assistance of counsel bears the burden of showing (1) that trial counsel's performance fell below objective standards for reasonably effective representation and (2) that this deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 688–94 (1984); *United States v. Jones*, 635 F .3d 909, 915 (7th Cir. 2011). If a petitioner cannot establish one of the *Strickland* prongs, the Court need not consider the other. *Groves v. United States*, 755 F.3d 588, 591 (7th Cir. 2014). To satisfy the first prong of the *Strickland* test, a

petitioner must direct the Court to specific acts or omissions of his counsel. *Wyatt v. United States,* 574 F.3d 455, 458 (7th Cir. 2009). The Court must then consider whether in light of all of the circumstances counsel's performance was outside the wide range of professionally competent assistance. *Id.* To satisfy the prejudice component, a petitioner must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

1. Failing to Move to Suppress Search Warrant

First, Richter argues that his trial counsel was deficient for failing to move to suppress his search warrant. Dkt. 1 at 4. In response, the United States argues that probable cause existed for the search warrant and any motion to suppress would have been frivolous. Dkt. 14 at 16-17. The United States further points out that Richter's counsel's decision to negotiate favorable plea terms and not challenge the warrant was a strategic decision after a thorough investigation, and Richter cannot demonstrate deficient performance under these circumstances. The Court agrees.

"Trial counsel's strategic decision is 'virtually unchallengeable' when there is no allegation that the strategy was based on a failure to investigate." *Pierce v. Brown*, No. 2:20-CV-00177-JPH-MG, 2022 WL 2064653, at *4 (S.D. Ind. June 7, 2022) (quoting *Strickland*, 466 U.S. at 690). *See also Perez v. United States*, 286 F. App'x 328, 332 (7th Cir. 2008) (acknowledging the " reasonable strategic decision not to pursue a motion to suppress—regardless of its underlying merit—because doing so would have undermined the plea agreement being negotiated at that time with the government.").

Here, Richter does not allege that his trial counsel failed to investigate the validity of the United States' search warrant, and he acknowledges that "the probable cause in the affidavit [involved] an image of the bare breast of a female minor." Dkt. 1 at 4. As explained above,

Richter's dissatisfaction with his trial counsel's strategic decision not to pursue a motion to suppress cannot support a claim of ineffective assistance of counsel absent an allegation of failure to investigate. *Strickland*, 466 U.S. at 690. Furthermore, any such motion would have been frivolous given the affidavit supporting its issuance, and Richter's trial counsel cannot be deemed ineffective for failing to file a frivolous motion. *See Warren v. Baenen*, 712 F.3d 1090, 1104 (7th Cir. 2013). Accordingly, Richter is not entitled to relief on this ground.

2. Failing to Investigate the Search Warrant Return

Second, Richter argues that his counsel was deficient for failing to investigate whether the search warrant was returned along with an inventory of the items seized from his house. Dkt. 1 at 6. He claims that he could not "properly mount a defense" because he did not have knowledge of what evidence the United States had seized. *Id.*

When alleging claims of failure to investigate, a defendant "must prove that evidence uncovered during that investigation would have led [his] attorney to change [his] recommendation to [plead guilty]." *Warren*, 712 F.3d at 1097. Richter's arguments on this ground are solely that he could not properly "mount a defense" without an inventory of items seized. Dkt. 1 at 6. But Richter does not challenge the knowing and voluntary nature of his guilty plea, nor does he explain how any additional investigation would have changed his trial counsel's recommendation to plead guilty. Furthermore, Richter was not constitutionally entitled to discovery. *United States v. Shrake*, 515 F.3d 743, 745 (7th Cir. 2008) (citing *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *Gray v. Netherland*, 518 U.S. 152, 168 (1996)). Rather, the United States has verified that during discovery of the case, Richter's counsel was provided a disk on July 3, 2018, that contained the search warrants and applications for the search warrants for the residence and Richter's person and

that Richter's counsel was aware of and "discussed these items during discovery." *See* Crim. Dkt. 74 at 2.

Richter has therefore failed to demonstrate that any further investigation by his trial counsel would have changed his recommendation to plead guilty, as is required of him. *Warren*, 712 F.3d at 1097. He is not entitled to relief on these grounds.

3. Failing to Properly Advise Regarding Sentencing

Third, Richter argues that his trial counsel was ineffective for predicting that Richter would receive an 18-year sentence if he pleaded guilty. To make out a claim for ineffective assistance of counsel in the context of a guilty plea, Richter must show "(1) that counsel's performance fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's errors, [he] would not have pled guilty and would have insisted on going to trial." *Bethel v. United States*, 458 F.3d 711, 716 (7th Cir. 2006). "When assessing counsel's performance, [the Seventh Circuit has noted] that a reasonably competent lawyer will attempt to learn all of the relevant facts of the case, make an estimate of a likely sentence, and communicate the results of that analysis to the client before allowing the client to plead guilty." *Id.* at 717 (citing cases, including *United States v. Cieslowski*, 410 F.3d 353, 358-59 (7th Cir. 2005)) (to prove inadequate performance, a defendant must show that counsel did not attempt to learn the facts of the case and failed to make a good-faith estimate of a likely sentence). Therefore, "[t]he salient question is whether counsel undertook a good-faith effort to determine the applicable facts and estimate the sentence. An inaccurate prediction of a sentence alone is not enough to meet the standard." *Bethel*, 458 F.3d at 717.

Here, Richter only argues his trial counsel informed him that "his probable sentence would be 18 years," but instead he received a higher sentence. Dkt. 1 at 8. At trial, both Richter and his

counsel asked the Court for a term of 18 years' imprisonment. Crim. Dkt. 69 at 26, 35. Richter's counsel's sentencing memorandum similarly advocated for an 18-year sentence. *See* Crim. Dkt. 58 at 14. The Court ultimately sentenced Richter to a term of 30 years' imprisonment, *see* Crim. Dkt. 60, but as the United States correctly points out, Richter cannot prevail on a claim of ineffective assistance of counsel simply by claiming that his trial counsel's prediction was inaccurate. *See* dkt. 14 at 21 (citing *Bethel*). Nowhere does Richter represent that his trial counsel's prediction was in bad faith or that his counsel failed to learn the facts of his case. Short of that showing, Richter has failed to demonstrate how his trial counsel performed deficiently when advising him on possible sentencing. *Bethel*, 458 F.3d at 716. Accordingly, the Court finds that Richter is not entitled to relief on this ground. *Groves*, 755 F.3d at 591.

B. Constitutional Challenge to 18 U.S.C. § 2251

Finally, Richter claims that 18 U.S.C. § 2251(a) is unconstitutionally vague. Dkt. 1 at 9. In response, the United States argues that Richter's constitutional claim is procedurally defaulted because he failed to present it for direct appellate review. *See* dkt. 14 at 11-12. For the reasons below, the Court agrees.

"Any claim that could have been raised originally in the trial court and then on direct appeal that is raised for the first time on collateral review is procedurally defaulted." *Delatorre v. United States*, 847 F.3d 837, 843 (7th Cir. 2017) (citing *Hale v. United States*, 710 F.3d 711, 713–14 (7th Cir. 2013); *Massaro v. United States,* 538 U.S. 500, 504 (2003)). A § 2255 petition is not a substitute for direct appeal. *United States v. Bania*, 787 F.3d 1168, 1172 (7th Cir. 2015); *Prewitt v. United States*, 83 F.3d 812, 816 (7th Cir. 1996). However, constitutional claims may be raised for the first time in a collateral attack if the petitioner can show cause for the procedural default and prejudice from the failure to appeal. *Massaro,* 538 U.S. at 504. To show cause for a procedural

default, the petitioner must demonstrate that some objective factor external to the record impeded his efforts to bring a claim on direct appeal. *Coleman v. Thompson,* 501 U.S. 722, 753 (1991). If a petitioner is unable to demonstrate both cause and prejudice, he may be able to obtain habeas review only if he can persuade the court that the dismissal of his petition would result in a fundamental miscarriage of justice – that is, "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 495 (1986).

Richter's challenge to 18 U.S.C. § 2251(a) could have been raised on direct appeal but was not. Therefore, because the claim is procedurally defaulted, *see Delatorre*, 847 F.3d at 843, the Court must consider whether Richter adequately points to cause and prejudice to warrant a waiver of the procedural default. *Smith v. McKee*, 598 F.3d 374, 385 (7th Cir. 2010).

Here, Richter fails in his initial brief to acknowledge the procedural default or address why this Court should consider the procedurally defaulted claim. *See* dkts. 1, 2. Furthermore, in reply to the United States' argument concerning procedural default, Richter offers no counterargument that the issues are not defaulted, nor does he demonstrate cause and prejudice to overcome the default. *See* dkt. 20. Rather, in his reply Richter directs the Court to his "Motion for Extension of Time" at Docket No. 2, *see id.* at 8, but that filing seeks an extension of time to file his § 2255 motion due to his housing placement, transfer, and limited access to legal materials. *See* dkt. 2; dkt. 20-1 at 39-40 ("Exhibit E"). Even if the Court were to infer from that filing that Richter also had limited law library access when preparing his appeal, such arguments are unavailing because he was represented by appellate counsel, and he raises no challenge to the effectiveness of his appellate counsel in this action. *See Buelow v. Dickey* (7th Cir. 2010) ("So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard

established in *Strickland...*, we discern no inequity in requiring him to bear the risk of attorney error that results in procedural default.... 'Attorney error short of ineffective assistance of counsel does not constitute cause for a procedural default even when that default occurs on appeal rather than at trial.'") (quoting *Taylor v. Illinois*, 108 S.Ct. 646, 657 (1988)).

Because Richter cannot show cause for the procedural default, nor does he argue that he is actually innocent such that dismissal of his petition would result in a "fundamental miscarriage of justice," *Murray*, 477 U.S. at 495, habeas relief is not available to Richter on these claims. *Delatorre*, 847 F.3d at 843.

IV. Conclusion

For the reasons explained in this Order, Richter is not entitled to relief on his § 2255 motion. There was no ineffective assistance of counsel, his vagueness challenge to § 2251(a) is procedurally defaulted, and no evidentiary hearing is warranted. Accordingly, his motion for relief pursuant to § 2255 is **DENIED** and this action is dismissed with prejudice. Judgment consistent with this Entry shall now issue and the Clerk shall **docket a copy of this Entry in No. 1:18-cr-00184-JRS-MJD-1.** The motion to vacate at Crim. Dkt. 91 shall also be **terminated** in the underlying criminal action.

V. Denial of Certificate of Appealability

A habeas petitioner does not have the absolute right to appeal a district court's denial of his habeas petition, rather, he must first request a certificate of appealability. *See Miller–El v. Cockrell*, 537 U.S. 322, 335 (2003); *Peterson v. Douma*, 751 F.3d 524, 528 (7th Cir. 2014). Pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing § 2255 proceedings, and 28 U.S.C. § 2253(c), the Court finds that Richter has failed to show that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of a constitutional

right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). The Court therefore **denies** a certificate of appealability.

IT IS SO ORDERED.

Date: 05/22/2023

JAMES R. SWEENEY II, JUDGE
United States District Court
Southern District of Indiana

Distribution:

All ECF-registered counsel of record via email

TROY STEVEN RICHTER
15966-028
MARION - USP
MARION U.S. PENITENTIARY
Inmate Mail/Parcels
P.O. BOX 1000
MARION, IL 62959

APPENDIX "C"

Seventh Circuit Court of Appeals

Denial of Petition for Rehearing/En Banc

May 17, 2024

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

May 17, 2024

Before

THOMAS L. KIRSCH II, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 23-2265

TROY S. RICHTER
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:21-cv-01330

James R. Sweeney II,
Judge.

ORDER

Petitioner-Appellant filed a petition for rehearing and rehearing en banc on April 30, 2024. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all judges on the original panel have voted to deny the petition for rehearing.

Accordingly, the petition for rehearing and rehearing en banc is **DENIED**.

Additional material from this filing is available in the Clerk's Office.