United States Court of Appeals
For the Eighth Circuit

No. 23-3236

Curtis James McGarvey

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from United States District Court
for the District of North Dakota - Western

Submitted: August 19, 2024
Filed: August 22, 2024
[Unpublished]

Before SMITH, BENTON, and GRASZ, Circuit Judges.

PER CURIAM.

After a preliminary determination by the district court at defense counsel's request that relevant materials involved the "lascivious exhibition" of the genitals or pubic area and thus depicted "sexually explicit conduct," Curtis McGarvey pled guilty to two counts of attempted sexual exploitation of a minor and one count of cyberstalking. The district court sentenced him to 240 months in prison. On direct

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appeal, this court affirmed, rejecting McGarvey's challenges to the factual basis for his guilty pleas to the exploitation offenses. United States v. McGarvey, 2 F.4th 783, 784-85 (8th Cir. 2021) (per curiam). McGarvey then moved for relief under 28 U.S.C. § 2255, arguing, inter alia, that counsel performed deficiently by failing to object to the district court's preliminary lasciviousness determination before he pled guilty and failing to challenge that determination on direct appeal. The district court[1] denied relief but granted a certificate of appealability as to that claim, and it is the only one we will consider. See Collins v. United States, 28 F.4th 903, 906 (8th Cir. 2022) (confining review to claim in certificate of appealability).

Following careful review, we conclude that McGarvey's claims of ineffective assistance lack merit. See Meza-Lopez v. United States, 929 F.3d 1041, 1044 (8th Cir. 2019) (standard of review). Any effort to object to or seek reconsideration of the preliminary lasciviousness determination would likely have been unsuccessful, and thus counsel did not perform in a deficient fashion by failing to take additional actions in that regard. See Thai v. Mapes, 412 F.3d 970, 978 (8th Cir. 2005) (counsel did not perform deficiently by failing to raise meritless argument). Similarly, given McGarvey's guilty plea, counsel did not perform deficiently by failing to raise a challenge to the preliminary lasciviousness determination on direct appeal, particularly in light of counsel's decision to raise a similar challenge to the sufficiency of the pleas. See Walker v. United States, 810 F.3d 568, 579-80 (8th Cir. 2016) (when appellate counsel competently asserts some arguments, it is difficult to sustain claim that counsel performed deficiently by failing to assert others).

Accordingly, we affirm the judgment of the district court.

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[1]The Honorable Daniel L. Hovland, United States District Judge for the District of North Dakota.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-3236

Curtis James McGarvey

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the District of North Dakota - Western
(1:23-cv-00056-DLH)

ORDER

The petition for rehearing is denied as overlength.

October 25, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

United States of America, Plaintiff, vs. Curtis James McGarvey, Defendant.	**ORDER DENYING DEFENDANT'S MOTION FOR HABEAS RELIEF** Case No. 1:18-cr-130
Curtis James McGarvey, Petitioner, vs. United States of America, Respondent.	Case No. 1:23-cv-056

Before the Court is Defendant's "Motion to Vacate under 28 U.S.C. § 2255" filed on March 15, 2023. See Doc. No. 90. The Government filed a response in opposition to the motion to vacate on April 6, 2023. See Doc. No. 92. The Defendant filed a reply brief on May 1, 2023. See Doc. No. 93. For the reasons outlined below, the motion is denied.

I. BACKGROUND

The Defendant, Curtis McGarvey, was charged by complaint on July 13, 2018. See Doc. No. 1. McGarvey was arraigned on July 13, 2018, and the federal public defender was appointed to represent him. See Doc Nos. 3 and 4. On August 1, 2018, the grand jury returned a five-count indictment against McGarvey charging him with two counts of attempted sexual exploitation of a child in violation of Title 18 U.S.C. §§ 2251(a) and 2251(e), one count of possession of images

depicting the sexual exploitation of a child in violation of Title 18 U.S.C. §§ 2252(a)(2) and 2252(b)(1), one count of cyberstalking in violation of Title 18 U.S.C. §§ 2261A(2)(B) and 2261(b), and one count of transfer of obscene materials to minors in violation of Title 18, U.S.C. § 1470. See Doc. No. 16. On August 12, 2019, McGarvey filed a motion for substitute counsel. See Doc. No. 33. The Court granted the motion on September 25, 2019. See Doc. No. 37. Attorney William Harvey Skees was appointed to represent McGarvey on October 2, 2019. See Doc. No. 38.

On January 31, 2020, counsel for McGarvey filed a "motion for evidentiary hearing pursuant to *Rayl*." See Doc. No. 42. The defense sought a pretrial hearing and determination by the Court as to whether the images surreptitiously captured by McGarvey depict "sexually explicit conduct" as a matter of law. The Court denied the motion on March 2, 2020, explaining that it would follow its usual procedure in such cases and review the Government's evidence *in camera* in order to make the lasciviousness determination. See Doc. No. 49. Upon review of the images and videos submitted by the Government, the Court issued an order finding the material satisfied the *Dost* factors and met the definition of "sexually explicit conduct" as defined in 18 U.S.C. § 2256(2)(A)(v). See Doc. No. 51.

With trial set to begin on March 24, 2020, McGarvey notified the Court of his desire to change his plea. A change of plea hearing was held on March 9, 2020, at which McGarvey entered an open plea of guilty to Counts One, Two, and Four. See Doc. No. 56. The Government dismissed Counts Three and Five. On June 23, 2020, the Court sentenced McGarvey to 210 months imprisonment, on Counts One and Two, to run concurrent with one another, and 30 months imprisonment on Count Four, to run consecutive to Counts One and Two, for a total sentence of 240 months imprisonment and a 10-year term of supervised release. See Doc. Nos. 68 and 70.

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McGarvey filed a notice of appeal on June 26, 2020. See Doc. No. 73. On appeal, McGarvey challenged whether there was a sufficient factual basis to support his guilty plea and whether it was error for the Court to impose consecutive sentences. On June 29, 2021, the Eighth Circuit Court of Appeals affirmed McGarvey's conviction and sentence. See United States v. McGarvey, 2 F.4th 783 (8th Cir. 2021). McGarvey filed a petition for rehearing or rehearing *en banc* which was denied by the Eighth Circuit on August 20, 2021. Id. McGarvey filed a petition for a writ of certiorari which was denied by the United States Supreme Court on February 22, 2022. McGarvey v. United States, 142 S.Ct. 1163 (2022). Now before the Court is McGarvey's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. See No. 90.

II. STANDARD OF REVIEW

"28 U.S.C. § 2255 provides a federal prisoner an avenue for relief if his 'sentence was imposed in violation of the Constitution or laws of the United States, or . . . was in excess of the maximum authorized by law.'" King v. United States, 595 F.3d 844, 852 (8th Cir. 2010) (quoting 28 U.S.C. § 2255(a)). This requires a showing of either constitutional or jurisdictional error, or a "fundamental defect" resulting in a "complete miscarriage of justice." Davis v. United States, 417 U.S. 333, 346 (1974); Hill v. United States, 368 U.S. 424, 428 (1962). A 28 U.S.C. § 2255 motion is not a substitute for a direct appeal, and is not the proper way to complain about simple trial errors. Anderson v. United States, 25 F.3d 704, 706 (8th Cir. 1994). A 28 U.S.C. § 2255 movant "must clear a significantly higher hurdle than would exist on direct appeal." United States v. Frady, 456 U.S. 152, 166 (1982). Section 2255 is "intended to afford federal prisoners a remedy identical in scope to federal habeas corpus." Davis, 417 U.S. at 343.

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A prisoner is entitled to an evidentiary hearing on a Section 2255 motion unless the motion, files, and records of the case conclusively show that the prisoner is not entitled to relief. 28 U.S.C. § 2255; Engelson v. United States, 86 F.3d 238, 240 (1995). A Section 2255 motion "may be dismissed without hearing if (1) movant's allegation, accepted as true, would not entitle the petitioner to relief, or (2) [the] allegations cannot be accepted as true because they are contradicted by the record, are inherently incredible, or are conclusions rather than statements of fact." See Winters v. United States, 716 F.3d 1098 (2013); see also, Holloway v. United States, 960 F.2d 1348, 1358 (8th Cir. 1992) (a single, self-serving, self-contradicting statement is insufficient to render the motions, files and records of the case inconclusive); Smith v. United States, 618 F.2d 507, 510 (8th Cir. 1980) (mere statement of unsupported conclusions will not suffice to command a hearing).

III. LEGAL DISCUSSION

A. THE ONE YEAR PERIOD OF LIMITATIONS

The Government contends McGarvey's motion is untimely. McGarvey maintains otherwise.

28 U.S.C. § 2255(f) requires a movant to file a motion within one year of the judgment becoming final. Specifically, the statute reads:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –
>
> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

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(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f).

The Eighth Circuit Court of Appeals affirmed McGarvey's conviction on June 29, 2021. United States v. McGarvey, 2 F.4th 783 (2021). McGarvey filed a motion for rehearing and rehearing *en banc* which the Eighth Circuit denied on August 20, 2021. Id. McGarvey filed a petition for a writ of certiorari with the United States Supreme Court which was denied on February 22, 2022. See McGarvey v. United States, 142 S.Ct. 1163 (2022). McGarvey then had one year, or until February 22, 2023, to timely file a Section 2255 habeas motion. McGarvey filed his motion on February 16, 2023, when he signed his motion and placed it in the prison mail system. See Doc. No. 90, p. 12; United States v. Harrison, 469 F.3d 1216, 1217 (8th Cir. 2006) ("Under the prison mailbox rule, a pro se pleading is deemed filed upon deposit in the prison mail system prior to the expiration of the filing deadline."). Thus, the motion is timely.

B. MCGARVEY'S CLAIMS

McGarvey makes three claims of ineffective assistance of counsel in his motion. The Court addresses each ground in turn.

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. To be eligible for habeas relief based on ineffective assistance of counsel, a defendant must satisfy the two-part test announced in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, a defendant must establish that defense counsel's representation was constitutionally deficient, which

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requires a showing that counsel's performance fell below an objective standard of reasonableness. Id. at 687-88. This requires showing that counsel made errors so serious that defense counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. Id. at 687-88. In considering whether this showing has been accomplished, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689. If the underlying claim (i.e., the alleged deficient performance) would have been rejected, defense counsel's performance is not deficient. Carter v. Hopkins, 92 F.3d 666, 671 (8th Cir. 1996). Courts seek to "eliminate the distorting effects of hindsight" by examining defense counsel's performance from counsel's perspective at the time of the alleged error. Id.

Second, it must be demonstrated that defense counsel's performance prejudiced the defense. Strickland, 466 U.S. at 687. In other words, under this second prong, it must be proven that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 694. A reasonable probability is one "sufficient to undermine confidence in the outcome." Wiggins v. Smith, 539 U.S. 510, 534 (2003). An increased prison term may constitute prejudice under the *Strickland* standard. Glover v. United States, 531 U.S. 198, 203 (2001).

There is a strong presumption that defense counsel provided "adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690; Vogt v. United States, 88 F.3d 587, 592 (8th Cir. 1996). A court reviewing defense counsel's performance must make every effort to eliminate hindsight and second-guessing. Strickland, 466 U.S. at 689; Schumacher v. Hopkins, 83 F.3d 1034, 1036-37 (8th Cir. 1996). Under the *Strickland* standard, strategic decisions that are made after a thorough investigation of both the law and facts regarding plausible options are virtually unchallengeable. Strickland, 466 U.S. at 690. Strategic

decisions and trial strategy are generally entrusted to defense counsel as a matter of professional discretion. United States v. Orr, 636 F.3d 944, 952 (8th Cir. 2011).

When the defendant asserts that there are multiple deficiencies, each claim is reviewed independently. Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006). There is no "cumulative error" rule applied to assistance of counsel claims. United States v. Robinson, 301 F.3d 923, 925 n.3 (8th Cir. 2002).

1. The Lasciviousness Determination

McGarvey's first claim of ineffective assistance of counsel in that defense counsel failed to object to the Court's *in camera* determination that the surreptitious recordings of the minor victim met the definition of "lascivious." McGarvey argues counsel should have objected and the determination was legally incorrect.

The statute involved provides "sexually explicit conduct" is defined as the "lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. § 2256(2)(A)(v). The meaning of the phrase "lascivious exhibition of the genitals or pubic area" is a matter of law, however nudity alone is insufficient. United States v. Horn, 187 F.3d 781, 789 (8th Cir. 1999). The Eighth Circuit has adopted the *Dost* factors to aid and assist in determining whether images are "lascivious". See United States v. Johnson, 639 F.3d 433, 439 (8th Cir. 2011) (citing United States v. Dost, 636 F. Supp. 828 (S.D. Cal. 1986)). The *Dost* factors are as follows: (1) whether the focal point of the picture is on the minor's genitals or pubic area; (2) whether the setting of the picture is sexually suggestive; (3) whether the minor is depicted in unnatural poses or inappropriate attire considering the minor's age; (4) whether the minor is fully or partially clothed or is nude; (5) whether the picture

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suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the image is intended to elicit a sexual response in the viewer. Id. In addition to the six *Dost* factors, the Eighth Circuit has suggested two additional factors be analyzed; (7) whether the image portrays the minor as a sexual object; and (8) any captions on the images. United States v. Petroske, 928 F.3d 767, 773 (8th Cir. 2019).

The Eighth Circuit Court of Appeals has advised that "the district court should conduct a preliminary review of whether materials offered by the government for this purpose depict sexually explicit conduct as a matter of law." United States v. Rayl, 270 F.3d 709, 714 (8th Cir. 2001); United States v. Kain, 589 F.3d 945, 951 (8th Cir. 2009) ("in a jury trial, the district court should make a preliminary review of whether materials offered by the government depict sexually explicit conduct as a matter of law, to avoid the potential prejudice of submitting to the jury a large volume of prurient materials that could not properly be found to be child pornography"). The lasciviousness determination contemplated by *Rayl* is typically conducted *in camera* and the Court finds no error in having done so in this case. The recordings in this case were of a nude minor female entering and exiting a shower. The Court remains convinced the recordings meet the definition of "sexually explicit conduct" and the factual basis for McGarvey's guilty plea was adequate. Had McGarvey gone to trial the jury would have had the ultimate say in deciding whether the surreptitious recordings in question met the definition of "sexually explicit conduct." Having pled guilty, McGarvey has admitted as much and the Eighth Circuit has determined the factual basis for the plea was adequate. McGarvey, 2 F.4th at 785. Whatever objections defense counsel might have raised regarding the Court's lasciviousness determination would have been rejected.

It is important to remember that McGarvey was charged with and pled guilty to two counts of attempted sexual exploitation of a minor in violation of 18 U.S.C. § 2251(a). The Court finds the video recording of a minor female undressing and entering and exiting a shower while nude is evidence of an intent to create child pornography and is a substantial step toward the completion of the offense of sexual exploitation of a minor. See United States v. Johnson, 639 F.3d 433, 439-40 (8th Cir. 2011) (focusing on the defendant's attempt to obtain lascivious nude images of teenage girls). In this case, the focus of the recordings was on the victim's pubic area and the victim was nude. The recordings were clearly intended to elicit a sexual response in the viewer given McGarvey's admitted pornography addiction. See Doc. No. 80, p. 25. In addition, still images were taken from the recordings and edited to focus on the victim's breast and genital area which objectified the victim. See Doc. No. 50, ¶ 16; Horn, 187 F.3d at 790 (noting that focusing, editing, and freeze-framing of recording on a child's genitals meets the definition of "lascivious exhibition"). Thus, the recordings and images in this case satisfy three of the six *Dost* factors (1, 4, and 6) and one of the additional factors (7). Johnson, 639 F.3d at 440 (noting all six *Dost* factors need not be present in order for a recording to meet the definition of lascivious). The *Dost* factors remain the relevant non-exclusive test in the Eighth Circuit. Petroske, 928 F.3d at 773 (8th Cir. 2019) (approving the *Dost* factors along with whether the images portray the minor as a sexual object and any captions on the images); but see, United States v. Hillie, 39 F.4th 674, 689 (D.C. Cir. 2022) (declining to adopt the *Dost* factors). McGarvey's reliance on *United States v. McCoy*, 55 F.4th 658 (8th Cir. 2022) is misplaced as that opinion has been vacated. See United States v. McCoy, No. 21-3895, 2023 WL 2440852 (8th Cir. Mar. 10, 2023) (granting petition for rehearing *en banc*).

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The Court's opinion of the recordings has not changed since its initial determination. See Doc. No. 51. While defense counsel may have directly raised the issue on direct appeal, such a determination as to which claims to pursue on appeal are a matter of professional discretion. See Link v. Luebbers, 469 F.3d 1197, 1205 (8th Cir. 2006) (noting the decision as to which claims to pursue on appeal is a strategic one entitled to deference). The Court believes the Eighth Circuit would have affirmed the Court's lasciviousness determination and rejected McGarvey's argument that the recordings cannot be considered lascivious as a matter of law as it did in *Johnson*. Consequently, the Court finds McGarvey has failed to demonstrate both deficient performance and prejudice on this claim.

2. Failure to Meet with Client

In his second claim of ineffective assistance of counsel, McGarvey contends defense counsel failed to meet with him to discuss important decisions and developments in the case; defense counsel failed to tell him the Government would seek consecutive sentences; and defense counsel failed advise him properly regarding the advisory Sentencing Guideline reductions available for acceptance of responsibility.

The record reveals defense counsel met with McGarvey on numerous occasions. Defense counsel submitted a declaration which clearly sets forth numerous in person meetings, telephone calls, and other correspondence by mail or electronic means. See Doc. No. 92-1. It must also be remembered this case took place during the height of the COVID-19 pandemic which made in-person meetings challenging.

At the change of plea hearing, the Court questioned McGarvey about whether he had sufficient time to review the case with defense counsel and other aspects of the charges and penalties and revealed no problems with the performance of defense counsel. See Doc. No. 80. The relevant portions of the exchange went as follows:

> THE COURT: And do you feel that you've had sufficient time to review this case with Mr. Skees?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Have you been afforded the opportunity to review the evidence or the discovery that the government would've been required to turn over?
>
> THE DEFENDANT: Yes, sir. It's been some time since I reviewed it, but, yeah, I have.

See Doc. No. 80, p. 7.

> THE COURT: Is it fair for me to assume that you have made the conscious, voluntary decision to plead guilty to these three charges because you are, indeed, guilty of what you've been charged with?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: All right. Then let's talk about the sentencing guidelines, and I trust that you've had an opportunity to talk to Mr. Skees about the federal sentencing guidelines?
>
> THE DEFENDANT: Yes, I have.

See Doc. No. 80, p. 13.

> THE COURT: And I trust that you've had a chance to talk to Mr. Skees about the pros and cons of proceeding to a trial in a case of this nature?
>
> THE DEFENDANT: Yes, sir.

See Doc. No. 80, p. 27.

At sentencing, McGarvey told the Court he had been given the opportunity to read over the Presentence Investigation Report ("PSR") and go over it with his attorney. See Doc. No. 81, pp. 9-10. McGarvey expressed no displeasure with his court-appointed attorney at the change of plea or sentencing hearings. Even assuming some lack of communication, McGarvey has failed to explain how the lack of communication prejudiced him.

McGarvey also contends defense counsel erred by not informing him that the Government was asking for the sentence in Count Four to run consecutive to Counts One and Two until shortly before the sentencing hearing. McGarvey contends he should have been given the option to withdraw his plea. However, McGarvey entered an open plea to Counts One, Two, and Four. There was no plea agreement requiring any advanced notice as to what the Government would recommend as far as a sentence. The burden is on the defendant to establish a fair and just reason for the court to allow a withdrawal of a guilty plea. See United States v. Cruz, 643 F.3d 639, 642 (8th Cir. 2011). McGarvey acknowledged at his change of plea hearing that he had not been promised anything in exchange for his guilty plea. See Doc. No. 80 p. 13. The Government was free to make any sentencing recommendation within the statutory maximum that it felt appropriate. The Court would not have permitted McGarvey to withdraw his guilty plea based on the Government's sentence recommendation. McGarvey has failed to articulate any fair and just reason for withdrawal of his guilty plea. Thus, even if deficient performance is assumed, McGarvey has filed to demonstrate prejudice.

McGarvey also contends defense counsel erred in a manner that almost lost him the three-level reduction for acceptance of responsibility. However, the contention fails as a matter of law as

McGarvey was given a three-level reduction for acceptance of responsibility. See Doc. No. 81, pp. 11-12.

3. Failure to Investigate

In his third claim of ineffective assistance of counsel, McGarvey contends defense counsel failed to investigate the case, call character witnesses, file letters of support, and failed to provide a psycho-sexual evaluation report to the Court.

McGarvey fails to explain his failure to investigate claim. He does not offer the name of any person defense counsel should have interviewed or the name of any person who would have been willing to testify on his behalf at sentencing. These allegations are unsupported and conclusory. The record reveals eight support letters were filed on behalf of McGarvey. See Doc. Nos. 63 and 66. In his declaration, defense counsel stated that McGarvey told him he was estranged from most of his friends and family and thus he could not provides the names of any persons willing to testify on his behalf at sentencing. See Doc. No. 92-1, ¶¶ 8 and 9. This is understandable since the victim in the case was his niece.

The reference to the hundreds of text messages to the victim as being a factor that could have been explained away by making the Court aware he used a repeater program on his phone to send the messages does not lessen the impact of the conduct on the victim. Such an argument would not have changed the Court's sentence in any way.

As for the psycho-sexual evaluation, it was referenced in the PSR and the Court was aware of it. See Doc. No. 89. Obviously then, defense counsel was also aware of it. That defense counsel chose not to file the entire report is a matter of professional discretion and tactics. McGarvey

speculates it would have been helpful but fails to develop the argument. Instead, McGarvey offers a conclusion without any substance. The offense conduct in this case lasted almost two years and cannot be explained away as a single manic event. The Court finds McGarvey has failed to demonstrate deficient performance or prejudice in relation to any of the arguments made on his third claims for relief.

C. MOTION TO APPOINT COUNSEL

McGarvey has requested he be appointed counsel to assist with his motion. There is neither a constitutional right nor statutory right to counsel in habeas proceedings. See Morris v. Dormire, 217 F.3d 556, 558 (8th Cir. 2000); United States v. Craycraft, 167 F.3d 451, 455 (8th Cir. 1999); Blair v. Armontrout, 916 F.2d 1310, 1332 (8th Cir. 1990); see also Boyd v. Groose, 4 F.3d 669, 671 (8th Cir. 1993) (explaining that a habeas corpus proceeding is a civil proceeding to which the Sixth Amendment right to counsel afforded for criminal proceedings does not apply). The Court may nevertheless appoint counsel for a habeas petitioner at any time if it finds that the "the interests of justice so require." See 18 U.S.C. § 3006A(a)(2). If a court conducts an evidentiary hearing on the motion, the interests of justice require that the movant be appointed counsel. See Rule 8(c), Rules Governing Section 2255 Cases in the United States District Courts; see also Abdullah v. Norris, 18 F.3d 571, 573 (8th Cir. 1994). "If no evidentiary hearing is necessary, the appointment of counsel is discretionary." Id.

When exercising its discretion, a court should determine whether, given the particular circumstances of the case, "the appointment of counsel would benefit the petitioner and the court to such an extent that 'the interests of justice so require' it." Id. (citing 18 U.S.C.A. § 3006A(a)(2) and

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Battle v. Armontrout, 902 F.2d 701, 702 (8th Cir.1990)). Thus, a court should consider a number of relevant factors, including the factual complexity of the case and the movant's ability to investigate and present his claim. See Abdullah, 18 F.3d at 573; see also Battle, 902 F.2d at 702; Johnson v. Williams, 788 F.2d 1319, 1322-23 (8th Cir.1986).

McGarvey has submitted a well-researched and articulate motion, brief, and reply brief in which he clearly states why he believes he is entitled to habeas relief. The issues presented are not factually complex and an evidentiary hearing is not required to address the issues presented in the motion. The Court finds that the interests of justice do not require the appointment of counsel.

D. REQUEST FOR HEARING

McGarvey has requested the Court hold an evidentiary hearing on his motion. 28 U.S.C. § 2255 provides a hearing is required "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). No hearing is required when the claim is inadequate on its face or if the record, files, and motion conclusively demonstrate the defendant is not entitled to the relief he seeks. Anjulo-Lopez v. United States, 541 F.3d 814, 817 (8th Cir. 2008). In this case, the record is well-established and McGarvey's allegations are not factually complex. A careful review of all the materials submitted by the parties, the transcripts, the PSR, and the record as a whole leads the Court to conclude that an evidentiary hearing is unnecessary for a full consideration of the issues raised in the motion.

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IV. CONCLUSION

The Court has carefully reviewed the entire record, the parties' filings, and the relevant case law. For the reasons set forth above, the Defendant's motion to vacate, set aside, or correct a sentence pursuant to 28 U.S.C. § 2255 (Doc. No. 90) is **DENIED**. The requests for appointment of counsel (Doc. No. 95) and a hearing (Doc. No. 94) are also **DENIED**. In addition, the Court issues the following **ORDER**:

The Court certifies that an appeal may be taken in forma pauperis because such an appeal would not be frivolous. The Court further grants a certificate of appealability with respect to the following claims:

Claim One: Whether the Court's lasciviousness determination was legally correct.[1]

IT IS SO ORDERED.

Dated this 18th day of September, 2023.

/s/ *Daniel L. Hovland*
Daniel L. Hovland, District Judge
United States District Court

[1] See United States v. Matthew McCoy, Case No. 21-3895 (whether a defendant's surreptitious recording of a naked minor, taken from a distance without recording sexual activity, is "sexually explicit conduct" sufficient to support a conviction for production of child pornography); set for oral argument in St. Louis, Missouri on Tuesday, September 19, 2023 before the *en banc* Eighth Circuit Court of Appeals.

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