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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 JEFFREY PAUL HECHLER,
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Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

Civil No.: 16cv02473 JAH
Criminal No.: 11cr03702 JAH

**ORDER DENYING MOTION TO
VACATE**

Petitioner Jeffrey Paul Hechler filed a motion challenging his conviction under 28 U.S.C. section 2255. Respondent filed a response and Petitioner filed a traverse. After a thorough review of the record and the parties' submissions, and for the reasons set forth below, this Court DENIES Petitioner's motion.

BACKGROUND

On August 19, 2011, Petitioner was charged in a two count indictment with distribution of images of minors engaged in sexually explicit conduct in violation of 18 U.S.C. section 2252 and possession of matters containing images of minors engaged in sexually explicit conduct in violation of 18 U.S.C. section 2253. See Doc. No. 1. On July 25, 2012, a nine count superseding indictment was filed charging Petitioner with distribution of images of minors engaged in sexually explicit conduct in violation of 18 U.S.C. section 2252 and possession of matters containing images of minors engaged in

1 sexually explicit conduct in violation of 18 U.S.C. section 2253. On the third day of
2 testimony in his criminal trial, Petitioner changed his plea to guilty. See Doc. No. 52.

3 At the sentencing hearing, this Court sentenced Petitioner to 168 months on counts
4 1 through 5 and 120 months on counts 6-9 to be served concurrently, followed by five years
5 of supervised release. See Doc. No. 68. Petitioner appealed the sentence and the Ninth
6 Circuit Court of Appeals affirmed the Court's judgment.

7 DISCUSSION

8 Petitioner moves to vacate or modify his sentence on the ground he was denied
9 effective assistance of counsel.

10 I. Legal Standard

11 A section 2255 motion may be brought to vacate, set aside or correct a federal
12 sentence on the following grounds: (1) the sentence "was imposed in violation of the
13 Constitution or laws of the United States," (2) "the court was without jurisdiction to impose
14 such sentence," (3) "the sentence was in excess of the maximum authorized by law," or (4)
15 the sentence is "otherwise subject to collateral attack." 28 U.S.C. § 2255(a).

16 II. Analysis

17 Petitioner argues he was denied his Sixth Amendment right to effective assistance
18 of counsel when trial counsel failed to conduct adequately research and present legal
19 authority in support of a request for a downward variance. He contends counsel was
20 unaware of and failed to refer to United States v. Henderson, 649 F.3d 955 (9th Cir. 2011),
21 in which the Ninth Circuit instructed that in child pornography cases, the sentencing court
22 should consider the unique history of the Sentencing Guidelines for child pornography and
23 how they were driven by political pressure in Congress to override recommendations of
24 the Sentencing Commission and result in guidelines near the statutory maximum for the
25 "generic" offender.

26 Respondent argues there is nothing to indicate counsel's performance was deficient
27 or that counsel failed to adequately and effectively present mitigating factors in support of
28 a lower sentence. Respondent contends counsel filed a sentencing memorandum

1 articulating mitigating factors, had Petitioner evaluated by a psychologist and argued the
2 guidelines were advisory while urging the Court to impose a lower sentence. Additionally,
3 Respondent argues there is no reasonable probability the Court would have imposed a
4 different sentence had counsel raised Henderson at the sentencing hearing. Respondent
5 maintains the case was decided more than two years prior to the sentencing hearing and
6 Petitioner only assumes the Court was unaware of the case, and both counsel and the Court
7 were aware the guidelines were advisory. Respondent further maintains even if counsel
8 raised Henderson, it can be distinguished from the instant case because it concerned an
9 individual charged with possession of children pornography, not distribution and
10 possession which carries a mandatory minimum sentence and a higher base offense level;
11 the pre-sentence report in Henderson recommended a below guideline sentence unlike here
12 where the probation department sought a higher sentence than that sought by the
13 government; and Petitioner's background falls short of the tragic physical and sexual abuse
14 suffered by Henderson as a child.

15 In his traverse, Petitioner argues he was sentenced two years after the decision in
16 Henderson and there is no reason for trial counsel's failure to cite the case. Although trial
17 counsel requested a sentence of seven years in prison and the Court imposed a sentence of
18 fourteen years, twenty months below the guideline minimum of 188 months, he contends
19 the same disparity was present in Henderson. Petitioner maintains only this Court can
20 determine if the sentence imposed would have been lower had the Court been aware that
21 the guidelines for this offense were themselves inflated and should be viewed with a
22 scrutiny that other guidelines do not require.

23 The Sixth Amendment to the Constitution provides that every criminal defendant
24 has the right to effective assistance of counsel. In Strickland v. Washington, 466 U.S. 668
25 (1984), the Supreme Court articulated the test for determining whether a criminal
26 defendant's counsel rendered constitutionally ineffective assistance. To sustain a claim of
27 ineffective assistance, a petitioner has the burden of showing (1) that his or her defense
28 counsel's performance was deficient, and (2) that the deficient performance prejudiced his

1 or her defense. Id. at 690-92; Hendricks v. Calderon, 70 F.3d 1032, 1036 (9th Cir. 1995).
2 Petitioner must prove both elements. The court may reject his claim upon finding either
3 that counsel’s performance was reasonable or that the claimed error was not prejudicial.
4 Strickland, 466 U.S. at 697. The Strickland test applies to federal collateral proceedings.
5 Id.

6 The Court finds Petitioner fails to demonstrate prejudice. While counsel did not cite
7 to Henderson during sentencing, this Court was aware that the Sentencing Guidelines are
8 advisory and the Court was free to depart downward from the recommended range. Absent
9 any indication otherwise, the presumption is that the Court was aware that it had discretion
10 to depart below the low-end of the guideline range and Petitioner provides nothing to
11 suggest that the Court would have departed further had defense counsel cited Henderson.

12 Accordingly, Petitioner fails to demonstrate ineffective assistance of counsel.

13 **B. Hearing**

14 Respondent maintains Petitioner’s claim does not merit a hearing. This Court finds
15 the record conclusively establishes Petitioner is not entitled to relief. Accordingly, there is
16 no basis for an evidentiary hearing. See 28 U.S.C. § 2255(b).

17 **III. Certificate of Appealability**

18 Pursuant to Rule 11 of the Rules following 28 U.S.C. section 2254, a district court
19 “must issue or deny a certificate of appealability when it enters a final order adverse to the
20 applicant” in Section 2255 cases such as this. A habeas petitioner may not appeal the denial
21 of a Section 2255 habeas petition unless he obtains a certificate of appealability from a
22 district or circuit judge. 28 U.S.C. § 2253(c)(1)(B); see also United States v. Asrar, 116
23 F.3d 1268, 1269-70 (9th Cir. 1997) (holding that district courts retain authority to issue
24 certificates of appealability under AEDPA). A certificate of appealability is authorized “if
25 the applicant has made a substantial showing of the denial of a constitutional right.” 28
26 U.S.C. § 2253(c)(2). To meet this threshold showing, a petitioner must show that: (1) the
27 issues are debatable among jurists of reason, (2) that a court could resolve the issues in a
28 different manner, or (3) that the questions are adequate to deserve encouragement to

1 proceed further. Lambright v. Stewart, 220 F.3d 1022, 1025-26 (9th Cir. 2000) (citing
2 Slack v. McDaniel, 529 U.S. 473 (2000); Barefoot v. Estelle, 463 U.S. 880 (1983)).

3 Based on this Court's review of the record, this Court finds no issues are debatable
4 among jurists of reason and no issues could be resolved in a different manner. This Court
5 further finds that no questions are adequate to deserve encouragement to proceed further.
6 Therefore, Petitioner is not entitled to a certificate of appealability.

7 **CONCLUSION AND ORDER**

8 Based on the foregoing, IT IS HEREBY ORDERED:

- 9 1. Petitioner's motion to vacate, set aside or correct his sentence is **DENIED**;
10 and
11 2. Petitioner is **DENIED** a certificate of appealability.

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13 Dated: November 19, 2018

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HON. JOHN A. HOUSTON
15 UNITED STATES DISTRICT JUDGE
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