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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

MICHAEL EUGENE STEWART,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

Case No.: 12-cr-00461-H-1
12-cr-01688-H-1
17-cv-00822-H

ORDER:
**(1) DENYING MOTION TO
VACATE, SET ASIDE, OR
CORRECT THE SENTENCE; AND**
[Doc. No. 34 in 12-cr-461.]
**(2) DENYING CERTIFICATE OF
APPEALABILITY**

On April 24, 2017, Petitioner/Defendant Michael Eugene Stewart, proceeding *pro se*, filed in the United States District Court for the Southern District of California a motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct the sentence by a person in federal custody. (12-cr-461-Doc. No. 34.) On May 17, 2017, the Government filed a response in opposition to Defendant’s motion. (12-cr-461-Doc. No. 36.) On July 10, 2017, Defendant filed a reply. (12-cr-461-Doc. No. 37.) For the reasons discussed below, the Court denies Defendant’s § 2255 motion.

1 **Background**

2 On May 1, 2012, a grand jury returned an indictment charging Defendant with: (1)
3 distribution of images of minors engaged in sexually explicit conduct in violation of 18
4 U.S.C. § 2252(a)(2); and (2) possession of matters containing images of sexually explicit
5 conduct in violation of 18 U.S.C. § 2252(a)(4)(B). (12-cr-1688-Doc. No. 1.) On
6 November 27, 2012, Defendant pled guilty pursuant to a written plea agreement to count
7 one of the indictment, distribution of child pornography in violation of § 2252(a)(2). (12-
8 cr-1688-Doc. Nos. 37, 39, 43.)

9 In the plea agreement, the parties agreed that Defendant would be subject to a 2-
10 level enhancement to his guideline calculations pursuant to U.S.S.G. § 2G2.2(b)(3). (12-
11 cr-1688-Doc. No. 39 at 7.) In addition, in the plea agreement, Defendant waived “any right
12 to appeal or to collaterally attack his sentence, except a post-conviction collateral attack
13 based on a claim of ineffective assistance of counsel, unless the Court impose[d] a custodial
14 sentence above the high end of the guideline range . . . recommended by the Government
15 pursuant to this agreement at the time of sentencing.” (Id. at 10.)

16 On June 10, 2013, Defendant filed a sentencing summary chart calculating his total
17 offense level as 32 and his criminal history category as II and requesting an 8-level
18 departure, resulting in an advisory guideline range of 57 to 71 months, and recommending
19 a custodial sentence of 60 months. (12-cr-1688-Doc. No. 62.) In calculating Defendant’s
20 total offense level, Defendant applied a 2-level enhancement for distribution under
21 U.S.S.G. § 2G2.2(b)(3). (Id.; see also 12-cr-1688-Doc. No. 61 at 2.) On June 12, 2013,
22 the Government filed a sentencing summary chart calculating Defendant’s total offense
23 level as 34 and his criminal history category as III, resulting in an advisory guideline range
24 of 188 to 235 months, and recommending a custodial sentence of 188 months. (12-cr-
25 1688-Doc. No. 66.) In calculating Defendant’s total offense level, the Government applied
26 a 2-level enhancement for distribution under U.S.S.G. § 2G2.2(b)(3)(F). (Id.; see also 12-
27 cr-1688-Doc. No. 67 at 10.)

28 On August 12, 2013, the Court held a sentencing hearing. At the hearing, the Court

1 calculated Defendant’s total offense level as 34 and his criminal history category as III,
2 resulting in an advisory guideline range of 188 to 235 months. In calculating Defendant’s
3 offense level, the Court applied a 2-level enhancement for distribution under U.S.S.G. §
4 2G2.2(b)(3)(F). The Court then considered the § 3553(a) factors and ultimately sentenced
5 Defendant to 108 months in custody for count one of the indictment, distribution of child
6 pornography in violation of 18 U.S.C. § 2252(a)(2). (12-cr-1688-Doc. Nos. 71-72.) The
7 Court granted the Government’s oral motion to dismiss count two of the indictment. (Id.)
8 The Court subsequently entered judgment on August 14, 2013. (12-cr-1688-Doc. No. 72.)

9 On April 24, 2017, Defendant filed the present motion pursuant to 28 U.S.C. § 2255
10 to vacate and correct his federal prison sentence.¹ (12-cr-00461-Doc. No. 34.) In the
11 motion, Defendant argues that his sentence is unlawful in light of Amendment 801, which
12 clarified the distribution enhancement set forth in U.S.S.G. § 2G2.2(b)(3). (Id. at 1-2.)

13 Discussion

14 **I. Legal Standards**

15 A sentencing court may “vacate, set aside or correct the sentence” of a federal
16 prisoner if it concludes that “the sentence was imposed in violation of the Constitution or
17 laws of the United States.” 28 U.S.C. § 2255(a). Claims for relief under § 2255 must be
18 based on a constitutional or jurisdictional error, “a fundamental defect which inherently
19 results in a complete miscarriage of justice,” or a proceeding “inconsistent with the
20 rudimentary demands of fair procedure.” United States v. Timmreck, 441 U.S. 780, 783-
21 84 (1979) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)). A district court may
22 deny a § 2255 motion without holding an evidentiary hearing if “the petitioner fails to
23 allege facts which, if true, would entitle him to relief, or the petition, files and record of the
24 case conclusively show that he is entitled to no relief.” United States v. Rodriguez-Vega,
25 797 F.3d 781, 792 (9th Cir. 2015); see 28 U.S.C. § 2255(b); United States v. Quan, 789
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28 ¹ The Court notes that Defendant filed the present § 2255 motion in Case No. 12-cr-461 even though his conviction and sentence was entered in Case No. 12-cr-1688.

1 F.2d 711, 715 (9th Cir. 1986) (“Where a prisoner’s [§ 2255] motion presents no more than
2 conclusory allegations, unsupported by facts and refuted by the record, an evidentiary
3 hearing is not required.”).

4 **II. Analysis**

5 In the present §2255 motion, Defendant states that the United States Sentencing
6 Commission recently issued and enacted a clarifying amendment, Amendment 801, which
7 clarifies the scope of the 5-level enhancement provision set forth in U.S.S.G. § 2G2.2(b)(3).
8 (12-cr-461-Doc. No. 34 at 1.) Defendant argues that following that amendment, a 5-level
9 enhancement under U.S.S.G. § 2G2.2(b)(3) should only be applied if the defendant
10 knowingly distributed unlawful images for the specific purpose of obtaining something of
11 valuable consideration from the other person. (Id. at 1-2, 5.) Petitioner argues that in light
12 of Amendment 801, he should not have received an enhancement under U.S.S.G. §
13 2G2.2(b)(3), and, therefore, his sentence should be corrected. (Id. at 5-7.)

14 Here, Defendant has failed to state a cognizable claim for relief under § 2255.
15 “Although collateral review under section 2255 is . . . quite broad, ‘it does not encompass
16 all claimed errors in . . . sentencing.’ If a petitioner does not allege lack of jurisdiction or
17 constitutional error, an error of law will not provide a basis for habeas relief unless that
18 error ‘resulted in a complete miscarriage of justice or in a proceeding inconsistent with the
19 rudimentary demands of fair procedure.’” Hamilton v. United States, 67 F.3d 761, 763–
20 64 (9th Cir. 1995) (citations omitted). Defendant’s contention that he should be
21 resentenced in light of Amendment 801 raises neither a claim of constitutional nor
22 jurisdictional error. Further, a “‘district court’s failure to apply a guideline that was not
23 effective at the time of sentencing does not give rise to a complete miscarriage of justice.’”
24 Id. at 764. Accordingly, Defendant’s claim is not cognizable under § 2255, and the Court
25 lacks authority to resentence Defendant under § 2255 on this basis. See id. at 764 (holding
26 that the district court lacked authority to resentence the defendant under §2255 where “[the
27 defendant]’s contention below—that he be resentenced in light of Amendment 433—raised
28 neither a claim of constitutional nor jurisdictional error”).

1 Although the Court could construe Defendant’s *pro se* motion and a request for
2 resentencing under 18 U.S.C. § 3582, see id., the Court declines to do so because Defendant
3 would also not be entitled to relief under that provision. The changes to the sentencing
4 guidelines set forth in Amendment 801 had no effect on Defendant’s guideline calculations.
5 Amendment 801 amended U.S.S.G. “§ 2G2.2(b)(3)(F) to provide that the 2-level
6 distribution enhancement applie[s] if ‘the defendant knowingly engaged in distribution.’”
7 United States Sentencing Guidelines, Supplement to Appx. C, Am. 801 at 145 (Nov. 1,
8 2016) (“[T]he Commission determined that the 2-level distribution enhancement is
9 appropriate only in cases in which the defendant knowingly engaged in distribution.”).²
10 Here, Defendant admitted that he knowingly distributed child pornography. In his written
11 plea agreement, Defendant admitted: “That on or about August 2, 2010, [he] knowingly
12 distributed at least 254 images and 5 videos of visual depictions of minors engaged in
13 sexually explicit conduct via a commercially available file-sharing program.” (12-cr-1688-
14 Doc. No. 39 at 3; see also Doc. No. 37.) Thus, the 2-level distribution enhancement under
15 § 2G2.2(b)(3)(F) remains applicable to Defendant following Amendment 801.

16 In his motion, Defendant notes that Amendment 801 also clarified the scope of the
17 5-level distribution enhancement set forth in U.S.S.G. § 2G2.2(b)(3)(B). (12-cr-461-Doc.
18 No. 34 at 4-5.) But this fact is of no consequence because the Court did not apply a 5-level
19 enhancement under U.S.S.G. § 2G2.2(b)(3)(B) at Defendant’s sentencing. At sentencing,
20 the Court applied a 2-level enhancement for distribution under § 2G2.2(b)(3)(F), not
21 subsection (B). Accordingly, Defendant is not entitled to relief under §2255 in light of
22 Amendment 801.

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28 ² Available at https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/APPENDIX_C_Supplement.pdf (last visited July 25, 2017).

1 **III. Waiver**

2 In addition, as part of his written plea agreement, Petitioner waived his right to
3 challenge his sentence under § 2255. (12-cr-1688-Doc. No. 39 at 9-10.) The Ninth Circuit
4 has upheld the enforceability of waivers in plea agreements like Defendant’s, explaining
5 that the right to appeal or collaterally attack one’s sentence is derived by statute, and “[a]
6 knowing and voluntary waiver of a statutory right is enforceable.” United States v. Abarca,
7 985 F.2d 1012, 1014 (9th Cir. 1993). The Ninth Circuit has further explained that “public
8 policy strongly supports” plea agreements containing such waivers, reasoning that finality
9 is “perhaps the most important benefit of plea bargaining.” United States v. Navarro–
10 Botello, 912 F.2d 318, 322 (9th Cir. 1990).

11 A waiver of the right to appeal or collaterally attack a sentence or conviction is “is
12 enforceable if (1) the language of the waiver encompasses his right to appeal on the grounds
13 raised, and (2) the waiver is knowingly and voluntarily made.” United States v. Lo, 839
14 F.3d 777, 783 (9th Cir. 2016) (internal citations omitted) (citing United States v. Medina–
15 Carrasco, 815 F.3d 457, 461 (9th Cir. 2016)); see, e.g., United States v. McTiernan, 552 F.
16 App’x 749, 750 (9th Cir. 2014). Further, an otherwise valid waiver is not rendered
17 unenforceable by a subsequent change in the applicable sentencing law. See United States
18 v. Johnson, 67 F.3d 200, 202 (9th Cir. 1995) (“The fact that [a defendant] did not foresee
19 the specific issue that he now seeks to appeal does not place the issue outside the scope of
20 the waiver.”); see also United States v. Bownes, 405 F.3d 634, 636 (7th Cir. 2005)
21 (collecting case and stating “there is abundant case law that appeal waivers worded as
22 broadly as this one are effective even if the law changes in favor of the defendant after
23 sentencing”).

24 Defendant’s plea agreement states in relevant part:

25 In exchange for the Government’s concessions in this plea agreement, . . .
26 defendant also waives, to the full extent of the law, any right to appeal or to
27 collaterally attack his sentence, except a post-conviction collateral attack
28 based on a claim of ineffective assistance of counsel, unless the Court imposes
a custodial sentence above the high end of the guideline range . . .

1 recommended by the Government pursuant to this agreement at the time of
2 sentencing.

3 (12-cr-1688-Doc. No. 39 at 9-10.) Here, Defendant does not allege a claim of ineffective
4 assistance of counsel in the present § 2255 motion. (See 12-cr-461-Doc. No. 34.) In
5 addition, the Court did not impose a sentence above the high end of the guideline range
6 recommended by the Government. Pursuant to the plea agreement, the Government
7 recommended that the Court sentence Petitioner to 188 months in custody based on an
8 advisory guideline range of 188 to 235 months. (12-cr-1688-Doc. No. 66.) The Court
9 sentenced Petitioner to 108 months in custody after considering the advisory sentencing
10 guidelines and the 18 U.S.C. § 3553(a) factors. (12-cr-1688-Doc. Nos. 71-72.) Because
11 the present § 2255 motion is not based on a claim of ineffective assistance of counsel, and
12 the Court imposed a sentence well below the high end of the guideline range recommended
13 by the Government, Defendant’s waiver encompasses the present § 2255 motion. See Lo,
14 839 F.3d at 783.

15 Further, in his plea agreement, Defendant represented that his waiver of his right to
16 appeal or collaterally attack his conviction and sentence was knowing and voluntary, and
17 Defendant does not argue otherwise. (12-cr-1688-Doc. No. 39 at 6, 12; see also Doc. No.
18 37.) Accordingly, Defendant waived his right to appeal or collaterally attack his sentence.
19 See Abarca, 985 F.2d at 1014. Thus, even if Defendant’s § 2255 claim had merit, it would
20 be barred by the waiver in his plea agreement. Accordingly, the Court also denies
21 Defendant’s §2255 motion on the grounds that it is barred by the waiver in his written plea
22 agreement.

23 **IV. Certificate of Appealability**

24 An appeal cannot be taken from the district court’s denial of a § 2255 motion unless
25 a certificate of appealability is issued. See 28 U.S.C. § 2253(c)(1); Muth v. Fondren, 676
26 F.3d 815, 818 (9th Cir. 2012). A certificate of appealability may issue only if the defendant
27 “has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. §
28 2253(c)(2). When a district court has denied the claims in a § 2255 motion on the merits,

1 a defendant satisfies the above requirement by demonstrating “that reasonable jurists would
2 find the district court’s assessment of the constitutional claims debatable or wrong.” Slack
3 v. McDaniel, 529 U.S. 473, 484 (2000).

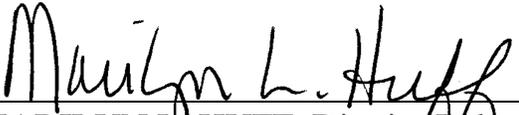
4 The Court concludes that reasonable jurists would not find the Court’s assessment
5 of Defendant’s claims debatable or wrong. Accordingly, the Court declines to issue a
6 certificate of appealability.

7 **Conclusion**

8 For the reasons above, the Court denies Defendant’s motion under 28 U.S.C. § 2255
9 to vacate, set aside, or correct his sentence. In addition, the Court denies Defendant a
10 certificate of appealability.

11 **IT IS SO ORDERED.**

12 DATED: July 26, 2017

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15 MARILYN L. HUFF, District Judge
16 UNITED STATES DISTRICT COURT
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