No._____

IN THE UNITED STATES SUPREME COURT

BRIAN EDWARD REYNOLDS, ----- PETITIONER

vs.

UNITED STATES OF AMERICA ----- RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BRIAN EDWARD REYNOLDS

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QUESTION PRESENTED

Whether a certificate of appealability (COA) should have been granted to consider whether a federal prisoner's failure to file a timely amended 2255 motion is excused, where counsel was not appointed until after the statute of limitations had run and where the federal procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal.

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

CASES **PAGE NUMBER**

STATUTES AND RULES

OTHER

PETITION FOR WRIT OF CERTIORARI

Petitioner, Brian Edward Reynolds, respectfully requests that this Court grant a writ of certiorari, vacate the judgment of the Eighth Circuit Court of Appeals denying a certificate of appealability and remand for consideration of his claims of ineffective assistance of trial counsel.

OPINIONS BELOW

For cases from federal courts:

The decision of the United States Eighth Circuit Court of Appeals denying a certificate of appealability appears at Appendix A to the petition and is unpublished.

The order of the United States District Court dismissing 2255 motion and denying certificate of appealability appears at Appendix D to the petition and is unpublished.

STATEMENT OF JURISDICTION

A panel of the Eighth Circuit Court of Appeals denied an application for a Certificate of Appealability June 18, 2018. Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

"Cases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." 28 U.S.C. § 1254(1). "[T]his Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a panel of a court of appeals." *Hohn v. United States*, 524 U.S. 236, 253 (1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

28 U.S.C. § 2253(c)(1)(B):

> Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from – the final order in a proceeding under section 2255.

28 U.S.C. § 2253(c)(2):

> A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

Brian Edward Reynolds, a federal prisoner serving a 384 month prison sentence, seeks review of the Eighth Circuit's denial of his request for a certificate of appealability (COA) on his claim that he was denied the effective assistance of trial counsel, when trial counsel prevented him from testifying on his own behalf at trial.

A. JURISDICTION.

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released 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, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a).

> An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

28 U.S.C.A. § 2255(d).

B. BACKGROUND.

Reynolds was sentenced August 15, 2012, to 120 months for Receiving Child Pornography, to 384 months for Enticing a Minor to Engage in Illicit Sexual Activities, and to 180 months for Production of Child Pornography, with all sentences running concurrently. Crim. No. 3:11-cr-00042 [ECF 148].

His conviction and sentences were affirmed July 11, 2013. *United States v. Reynolds*, 720 F.3d 665 (8th Cir. 2013) *reh'g denied* July 30, 2013.

On October 20, 2014, Reynolds filed a pro se 2255 motion and brief in support. [ECF 1 & 2]. On January 13, 2015, he filed a pro se amended motion, which included a

request for appointment of counsel. [ECF 4]. On March 23, 2015, the District Court entered an initial review order and appointed counsel. [ECF 6].

On January 8, 2018, the District Court determined that, with the exception of only his Rule 48 claim, the remaining claims in Reynolds' amended motion were not timely. Order pp. 3-5 [ECF 36] (Appendix D). With respect to those remaining claims, the District Court determined that the exception recognized by the United States Supreme Court in *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013) in regard to ineffective assistance of counsel claims challenging state court convictions pursuant to 28 U.S.C. § 2254 could not be applied to a motion challenging a federal conviction pursuant to 28 U.S.C. § 2255. Order pp. 5-8 [ECF 36] (Appendix D). The District Court denied a Certificate of Appealability. Order p. 22 [ECF 36] (Appendix D).

Reynolds filed a timely notice of appeal February 16, 2018. [ECF 38] (Appendix C). An application for a Certificate of Appealability was filed February 20, 2018. (Appendix B). A panel of the Eighth Circuit denied the application and dismissed the appeal without explanation June 18, 2018. (Appendix A).

REASONS FOR GRANTING CERTIORARI

The Court of Appeals "has decided an important question of federal law that has not been, but should be, settled by this Court." *See* U.S. Sup. Ct. R. 10(c). This Court has failed to accord a Federal prisoner pursuing claims of ineffective assistance of trial counsel the same protection accorded State prisoner where the federal procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal.

Reynolds' deadline for filing his 2255 motion was October 28, 2014. Order p. 5 [ECF 36]. His initial pro se motion was filed October 20, 2014. [ECF 1]. That initial motion substantially conformed to the form prescribed by the Rules Governing Section 2255 Proceedings. *See* Appendix of Forms. However, neither the form that he used nor the form prescribed by the rules specifically advised him of his right to request counsel or included a provision for requesting the appointment of counsel. By way of comparison, the instructions specifically state that a person under a sentence of death has a right to the assistance of counsel and should request the appointment of counsel.[1]

Although the form and instructions do not prohibit a non-death penalty prisoner from adding a request for counsel, they do not specifically advise a non-death penalty prisoner of the right to request appointment of counsel. Advising a death penalty prisoner that he has the right to counsel, while simultaneously failing to advise a non-death penalty prisoner that he has the right to request counsel, incorrectly and improperly implies that the non-death penalty prisoner does not have the right to request the assistance of counsel. Unfortunately, the form and instructions are specifically designed to discourage federal prisoners from requesting counsel in non-death penalty cases.

Reynolds ultimately requested appointment of counsel in his amended pro se motion, filed January 13, 2015. [ECF 4]. However, even then counsel was not appointed until March 23, 2015. [ECF 6].

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the

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[1] "CAPITAL CASES: If you are under a sentence of death, you are entitled to the assistance of counsel and should request the appointment of counsel." *See* Instructions ¶ 10, 2255 Forms.

Assistance of Counsel for his defence." U.S. Const. 6th Amend. A defendant has a constitutional right to the effective assistance of trial counsel under the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

"[A]n ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal." *Massaro v. United States*, 538 U.S. 500, 504 (2003).

> In light of the way our system has developed, in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance. When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose.

Massaro, 538 U.S. at 504–505.

> "Claims of ineffective assistance of counsel are properly raised in a post-conviction motion under 28 U.S.C. § 2255 and not on direct appeal." *United States v. Pherigo*, 327 F.3d 690, 696 (8th Cir.2003). Therefore, we do not, absent the rarest of circumstances, address the merits of a defendant-appellant's ineffective assistance of counsel claim on direct review. *Id.* We have characterized this rule as an "oft repeated refrain." *Id.* The rationale is that claims of ineffective assistance are "more appropriately raised in a collateral proceeding under 28 U.S.C. § 2255, where a better factual record can be developed." *Id.*

United States v. Lopez, 431 F.3d 313, 318 (8th Cir. 2005).

> If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a moving party who qualifies to have counsel appointed under 18 U.S.C. § 3006A. The judge must conduct the hearing as soon as practicable after giving the attorneys adequate time to investigate and prepare. These rules do not limit the appointment of counsel under § 3006A at any stage of the proceeding.

28 U.S.C. § 2255 Rule 8(c).

Although a federal prisoner has the right to the effective assistance of counsel at trial, any claims of ineffective assistance must (absent the rarest of circumstances) be raised in

a collateral proceeding pursuant to a 2255 motion and not on direct appeal. Although Rule 8(c) does not require appointment of counsel unless an evidentiary hearing is warranted, it specifically authorizes appointment counsel "at any stage." Despite this discretionary authority, the form and instructions fail to advise a non-death penalty prisoner of the critical right to at least request the assistance of counsel in the preparation of a 2255 motion. As a result of this obvious omission and misdirection, the form and instructions effectively deny non-death penalty prisoners the right to request appointment of counsel to assist them in identifying, preparing and presenting ineffective assistance of trial claims in their 2255 motions.

In the present case, Reynolds (just like virtually every other indigent non-death penalty federal prisoner) was forced to proceed pro se in the preparation and filing of both his initial and his amended 2255 motions. Counsel was not appointed until months after the one year statute of limitations had run.

In contrast, when a State prisoner pursues an ineffective assistance of trial counsel claim, this Court has recognized an exception to procedural default under 28 U.S.C. § 2254.

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Martinez v. Ryan, 566 U.S. 1, 17 (2012). *Martinez* applies when the "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Trevino v. Thaler*, 569 U.S. 413, 429 (2013).

"Defendants have a right to effective assistance of counsel on appeal." *Lafler v.*

Cooper, 566 U.S. 156, 165 (2012). However, appellate counsel is told in the Eighth Circuit that ineffective assistance of trial counsel claims should not be raised on direct appeal except in the "rarest of circumstances." As a result, appellate counsel is under no obligation to investigate, assess or raise ineffective assistance of trial counsel claims, even if the record is sufficient to raise the claim on direct appeal. In-fact, the stated preference is that all ineffective assistance of trial counsel claims be raised in a 2255 motion. In essence, a federal defendant has the constitutional right to the effective assistance of appellate counsel with respect to all matters - except matters related to the defendant's constitutional right to the effective assistance of trial counsel.

A federal prisoner should not be entitled to less protection than a state prisoner. If a federal prisoner's constitutional right to the effective assistance of trial counsel cannot effectively be protected on direct appeal, then that protection must be provided in the only proceeding where such claims can effectively be raised and considered – a proceeding pursuant to 28 U.S.C. § 2255. Unfortunately, the federal system has been specifically designed to deprive prisoners of a "meaningful opportunity" to raise ineffective assistance of trial counsel claims on direct appeal and specifically designed to force federal prisoners, like Reynolds, to pursue ineffective assistance of trial counsel claims without the assistance of counsel.

The current federal system creates a trap for the unwary. A federal prisoner has a constitutional right to the effective assistance of trial counsel. A federal prisoner has a constitutional right to the effective assistance of appellate counsel. But, appellate counsel is under no duty to protect the prisoner's constitutional right to the effective assistance of trial counsel. In-fact, this Court has told appellate counsel that it is not necessary to raise

ineffective assistance of trial counsel claims on appeal and the Eighth Circuit has told appellate counsel that such claims will be considered only in "the rarest of circumstances." As a result, a federal prisoner is left on his own to try to vindicate his constitutional right to the effective assistance of trial counsel. In essence, the federal system has been designed and operates to deny federal prisoners their constitutional right to the assistance of counsel in identifying, preparing and presenting ineffective assistance of trial counsel claims.

The failure of the federal system to protect a prisoner's constitutional right to the effective assistance of trial counsel is clearly evident in this case. Reynolds appealed his conviction and had the assistance of appellate counsel, but appellate counsel did not raise any claims of ineffective assistance of trial counsel. *See United States v. Reynolds*, 720 F.3d 665 (8th Cir. 2013) *reh'g denied* July 30, 2013. If the form and instructions had reasonably advised Reynolds of his right to request the assistance of counsel in the preparation of his 2255 motion and emphasized the need to do so as soon as his direct appeal was complete, then the District Court could have been reasonably assured that Reynolds' motion would be both timely and comprehensive.

The federal system has, thus far, failed to recognize that protection of a prisoner's constitutional right to the effective assistance of trial counsel is inextricably tied to his right to the assistance of counsel in preparing and prosecuting a 2255 motion. The right to counsel in preparing a 2255 motion is nothing less than an extension of the constitutional right to the effective assistance of appellate counsel, who are now by design effectively precluded from raising ineffective assistance of trial counsel claims on direct appeal. The failure to recognize the right to the assistance of counsel in preparing a 2255 motion immediately following completion of the direct appeal virtually guarantees that an

unrepresented federal prisoner will fail to identify an issue or miss a deadline with no opportunity to remedy if counsel is appointed *after the statute of limitations has run.*

This Court should at long last recognize a constitutional right to the assistance of counsel in the preparation of a 2255 motion. If not, then this Court should at least excuse Reynolds' failure to file his pro se amended motion within the one year statute of limitations due to the failure of a federal system that, by reason of its design and operation, makes it highly unlikely in a typical case that a federal prisoner will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal. *See Trevino*, 569 U.S. at 429.

CONCLUSION

For the reasons set forth above, this Court should grant this Petition for a Writ of Certiorari, vacate the judgment of the Eighth Circuit Court of Appeals denying a certificate appealability and remand for consideration of the petitioner's claims of ineffective assistance of trial counsel.

Dated this the 7th day of August, 2018.

Respectfully submitted:

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-1348

Brian Edward Reynolds

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Southern District of Iowa - Des Moines
(4:14-cv-00422-RP)

JUDGMENT

Before LOKEN, BOWMAN and ERICKSON, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

June 18, 2018

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

/s/ Michael E. Gans

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIAN EDWARD REYNOLDS, Movant/Petitioner	:	**No. 18-1348**
vs.	:	**APPLICATION FOR CERTIFICATE OF APPEALABILITY PURSUANT TO 28 U.S.C. § 2253**
UNITED STATES OF AMERICA, Respondent.	:	**AND FEDERAL RULE OF APPELLATE PROCEDURE 22(b)**

COMES NOW the Movant/Petitioner, Brian Edward Reynolds, by counsel and requests that a certificate of appealability be granted in Reynolds v. United States of America, 4:14-cv-00422.

A. ISSUES

I. **Whether Reynolds' failure to file a timely amended 2255 motion is excused, where counsel was not appointed until after the statute of limitations had run and where the federal procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal.**

II. **Whether Reynolds is entitled to an evidentiary hearing on his claim that Trial Counsel prevented him from testifying on his own behalf at trial.**

B. BACKGROUND

Reynolds was sentenced August 15, 2012, to 120 months for Receiving Child Pornography, to 384 months for Enticing a Minor to Engage in Illicit Sexual Activities, and to 180 months for Production of Child Pornography, with all sentences running concurrently. Crim. No. 3:11-cr-00042 [ECF 148].

His conviction and sentences were affirmed July 11, 2013. *United States v. Reynolds*, 720 F.3d 665 (8th Cir. 2013) *reh'g denied* July 30, 2013.

Appendix B

On October 20, 2014, Reynolds filed a pro se 2255 motion and brief in support. [ECF 1 & 2]. On January 13, 2015, he filed a pro se amended motion, which included a request for appointment of counsel. [ECF 4]. On March 23, 2015, the District Court entered an initial review order and appointed counsel. [ECF 6].

C. ARGUMENT

I. Reynolds' failure to file a timely amended 2255 motion is excused, where counsel was not appointed until after the statute of limitations had run and where the federal procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal.

The District Court determined that, with the exception of only his Rule 48 claim, the remaining claims in Reynolds' amended motion were not timely. Order pp. 3-4 [ECF 36]. With respect to those remaining claims, the District Court determined that the exception recognized by the United States Supreme Court in *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013) in regard to ineffective assistance of counsel claims challenging state court convictions pursuant to 28 U.S.C. § 2254 could not be applied to a motion challenging a federal conviction pursuant to 28 U.S.C. § 2255. Order pp. 5-8 [ECF 36].

Reynolds' deadline for filing his 2255 motion was October 28, 2014. Order p. 5 [ECF 36]. His initial pro se motion was filed October 15, 2014. [ECF 1]. That initial motion substantially conformed to the form prescribed by the Rules Governing Section 2255 Proceedings. *See* Appendix of Forms. However, neither the form that he used nor the form prescribed by the rules specifically advised him of his right to request counsel or included a provision for requesting the appointment of counsel. By way of comparison, the

instructions specifically state that a person under a sentence of death has a right to the assistance of counsel and should request the appointment of counsel.[1] Although the form and instructions do not prohibit a non-death penalty prisoner from adding a request for counsel, they do not advise a non-death penalty prisoner of the right to request appointment of counsel or make it convenient to do so. Advising a death penalty prisoner that he has the right to counsel, while simultaneously failing to advise a non-death penalty prisoner that he has the right to request counsel, incorrectly and improperly implies that the non-death penalty prisoner does not have the right to request the assistance of counsel. Unfortunately, the form and instructions appear to be specifically designed to discourage federal prisoners from requesting counsel in non-death penalty cases.

Reynolds ultimately requested appointment of counsel in his amended pro se motion, filed January 13, 2015. [ECF 4]. However, even then counsel was not appointed until March 24, 2015. [ECF 6].

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. 6th Amend. A defendant has a constitutional right to the effective assistance of trial counsel under the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

"[A]n ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal." *Massaro v. United States*, 538 U.S. 500, 504 (2003).

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[1] "CAPITAL CASES: If you are under a sentence of death, you are entitled to the assistance of counsel and should request the appointment of counsel." *See* Instructions ¶ 10, 2255 Forms.

> **In light of the way our system has developed, in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance.** When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose.

Massaro, 538 U.S. at 504–505 (emphasis added).

> **"Claims of ineffective assistance of counsel are properly raised in a post-conviction motion under 28 U.S.C. § 2255 and not on direct appeal."** *United States v. Pherigo*, 327 F.3d 690, 696 (8th Cir.2003). **Therefore, we do not, absent the rarest of circumstances, address the merits of a defendant-appellant's ineffective assistance of counsel claim on direct review.** *Id.* We have characterized this rule as an "oft repeated refrain." *Id.* The rationale is that claims of ineffective assistance are "more appropriately raised in a collateral proceeding under 28 U.S.C. § 2255, where a better factual record can be developed." *Id.*

United States v. Lopez, 431 F.3d 313, 318 (8th Cir. 2005) (emphasis added).

> **If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a moving party who qualifies to have counsel appointed under 18 U.S.C. § 3006A.** The judge must conduct the hearing as soon as practicable after giving the attorneys adequate time to investigate and prepare. **These rules do not limit the appointment of counsel under § 3006A at any stage of the proceeding.**

28 U.S.C. § 2255 Rule 8(c) (emphasis added).

Although a federal prisoner has the right to the effective assistance of counsel at trial, any claims of ineffective assistance must (absent the rarest of circumstances) be raised in a collateral proceeding pursuant to a 2255 motion and not on direct appeal. Although Rule 8(c) does not require appointment of counsel unless an evidentiary hearing is warranted, it specifically authorizes appointment counsel "at any stage." Despite this discretionary authority, the form and instructions fail to advise a non-death penalty prisoner of the critical right to at least request the assistance of counsel in the preparation of a 2255

motion. As a result of this obvious omission and possibly misdirection, the form and instructions effectively deny non-death penalty prisoners the right to request appointment of counsel to assist them in identifying, preparing and presenting ineffective assistance of trial claims in their 2255 motions.

In the present case, Reynolds (just like virtually every other indigent non-death penalty federal prisoner) was forced to proceed pro se in the preparation and filing of both his initial and his amended 2255 motions. Counsel was not appointed until months after the one year statute of limitations had run.

However, the United States Supreme Court has recognized an exception to procedural default in the context of ineffective assistance claims under 28 U.S.C. § 2254.

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Martinez v. Ryan, 566 U.S. 1, 17 (2012). *Martinez* applies when the "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Trevino v. Thaler*, 569 U.S. 413, 429 (2013).

"Defendants have a right to effective assistance of counsel on appeal." *Lafler v. Cooper*, 566 U.S. 156, 165 (2012). However, the United States Supreme Court and this Court have repeatedly told appellate counsel that ineffective assistance of trial counsel claims should not be raised on direct appeal except in the "rarest of circumstances." *See Lopez*, 431 F.3d at 318. As a result, appellate counsel are under no obligation to investigate, assess or raise ineffective assistance of trial counsel claims, even if the record is sufficient

to raise the claim on direct appeal. In-fact, the stated preference is that all ineffective assistance of trial counsel claims be raised in a 2255 motion. In essence, a federal defendant has the constitutional right to the effective assistance of appellate counsel with respect to all matters - except matters related to the defendant's constitutional right to the effective assistance of trial counsel.

If a federal prisoner's constitutional right to the effective assistance of trial counsel cannot effectively be protected on direct appeal, then that protection must be provided in the only proceeding where such claims can effectively be raised and considered – a proceeding pursuant to 28 U.S.C. § 2255. A federal prisoner should not be entitled to less protection than a state prisoner, particularly when the federal system has been specifically designed to deprive prisoners of a "meaningful opportunity" to raise ineffective assistance of trial counsel claims on direct appeal and specifically designed to force federal prisoners, like Reynolds, to pursue ineffective assistance of trial counsel claims without the assistance of counsel.

The current federal system creates a trap for the unwary. A federal prisoner has a constitutional right to the effective assistance of trial counsel. A federal prisoner has a constitutional right to the effective assistance of appellate counsel. But, appellate counsel is under no duty to protect the prisoner's constitutional right to the effective assistance of trial counsel. In-fact, the United States Supreme Court has told appellate counsel that it is not necessary to raise ineffective assistance of trial counsel claims on appeal and this Court has told appellate counsel that such claims will be considered only in "the rarest of circumstances." As a result, a federal prisoner is left on his own to try to vindicate his constitutional right to the effective assistance of trial counsel. In essence, the federal

system has been designed and operates to deny federal prisoners their constitutional right to the assistance of counsel in identifying, preparing and presenting ineffective assistance of trial counsel claims.

The failure of the federal system to protect a prisoner's constitutional right to the effective assistance of trial counsel is clearly evident in this case. Reynolds appealed his conviction and had the assistance of appellate counsel, but appellate counsel did not raise any claims of ineffective assistance of trial counsel. *See United States v. Reynolds*, 720 F.3d 665 (8th Cir. 2013) *reh'g denied* July 30, 2013. If the form and instructions had reasonably advised Reynolds of his right to request the assistance of counsel in the preparation of his 2255 motion and emphasized the need to do so as soon as his direct appeal was complete, then the District Court could have been reasonably assured that Reynolds' motion would be both timely and comprehensive.

The federal system has, thus far, failed to recognize that protection of a prisoner's constitutional right to the effective assistance of trial counsel is inextricably tied to his right to the assistance of counsel in preparing and prosecuting a 2255 motion. The right to counsel in preparing a 2255 motion is nothing less than an extension of the constitutional right to the effective assistance of appellate counsel, who are now by design effectively precluded from raising ineffective assistance of trial counsel claims on direct appeal. The failure to recognize the right to the assistance of counsel in preparing a 2255 motion immediately following completion of the direct appeal virtually guarantees that an unrepresented federal prisoner will fail to identify an issue or miss a deadline with no opportunity to remedy if counsel is appointed *after the statute of limitations has run.*

However, it is not necessary for this Court to recognize a constitutional right to the

assistance of counsel in the preparation of a 2255 motion. It is sufficient if this Court will simply recognize that Reynolds' failure to file his pro se amended motion within the one year statute of limitations is excused by the failure of a federal system that, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal. *See Trevino*, 569 U.S. at 429.

II. Reynolds is entitled to an evidentiary hearing on his claim that Trial Counsel prevented him from testifying on his own behalf at trial.

The District Court denied Reynolds' request for an evidentiary hearing and determined that trial counsel did not prevent Reynolds from testifying. Order pp. 16-17, 22 [ECF 36]. Contrary to the District Court's findings, the trial record actually indicates Reynolds was hesitant when asked whether he had decided to testify or not.

> MS. HELPHREY: First, Your Honor, I would indicate that I have conferenced with Mr. Reynolds and I conferenced with him yesterday evening after the state of the evidence that far and now again since we have had testimony today. Based on that record and our conversations, he has made a decision not to testify. I have explained to him obviously that this is his decision, not my decision, but also counseled him on my advice and that's the state of where we are at this point.
>
> Mr. Reynolds, do you agree with how I characterized things to this point?
>
> THE DEFENDANT: **Somewhat. . . .**
>
> THE COURT: Mr. Reynolds, you understand that the lawyer can give you advice and help about whether or not you want to exercise your right not to testify or your right to testify; but ultimately the decision to do one or the other is up to you, don't you?
>
> THE DEFENDANT: Yes.
>
> THE COURT: After consultation with your lawyer have you decided to exercise your Constitutional right not to be a witness in this case?

THE DEFENDANT: That's correct.

Crim. Case, Trial Tr. 784-85. (emphasis added).

By denying the request for an evidentiary hearing, the Court failed to give Reynolds the opportunity to explain why he was hesitant when asked if he was giving up his right to testify at trial and the opportunity to explain what his testimony would have been at trial. Dismissing the claim, the Court relied solely on trial counsel's affidavit and failed to consider whether Reynolds' testimony would have been relevant to the issues at trial and whether trial counsel's advice was in-fact competent.

Reynolds was facing the possibility of life imprisonment, if convicted of each of the three offenses. Trial counsel did not call any witnesses.

A. Count 1 - Receipt.[2] Reynolds was charged with Receiving Child Pornography in violation of 18 U.S.C. §§ 2252(a)(2) and 2252(b)(1). Crim. Case, Redacted Indictment [ECF 16]. The jury was instructed that, in order to convict, the government had to prove he "knowingly received photographs that contained visual depictions of child pornography" and that he "knew that the visual depictions were of a minor engaging in sexually explicit conduct." Crim. Case, Jury Inst. 10 [ECF 108]. It is clear from Reynolds' claims that he would have testified that he believed A.G. was nineteen years old, that he did not "knowingly" receive the photographs found on his computer, and that he did not "know" that A.G. was a minor.

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[2] Count 1 was re-numbered for trial and appears as Count 2 in the indictment. Crim. Case, Redacted Indictment [ECF 16].

B. Count 2 - Enticement.[3] Reynolds was charged with Enticement of a Minor to Engage in Illicit Sexual Activities in violation of 18 U.S.C. 2422(b). The jury was instructed that, in order to convict, the government had to prove Reynolds enticed a person under the "age of eighteen years to engage in sexual activity," that he "believed that the person was under the age of eighteen" and that "sexual activity occurred." Crim. Case, Jury Inst. 11 [[ECF ____], 108].[4] It is clear from Reynolds' claims he would have testified that he believed A.G. was nineteen years old and that he would deny engaging her in sexual activity.

C. Count 3 - Production. Reynolds was charged with Production of Child Pornography in violation of 18 U.S.C. §§ 2251(a), 2251(e) and 2. The jury was instructed that, in order to convict, the government had to prove Reynolds "knowingly persuaded, induced, enticed, or coerced" C.K. to produce photographs of her engaged in "sexually explicit conduct." Crim. Case, Jury Inst. 10 [ECF 108]. It is clear from Reynolds' claims that he would have testified that he did not ask her to take or send him sexually explicit photographs.

WHEREFORE, the Movant/Petitioner prays that the Court issue a certificate of appealability for the issues stated above.

Respectfully submitted,

/s/ Unes J. Booth
Unes J. Booth AT0001015
BOOTH LAW FIRM

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[3] Count 2 was re-numbered for trial and appears as Count 3 in the indictment. Crim. Case, Redacted Indictment [ECF 16].

[4] This jury instruction actually imposed a higher burden on the government than required by the statute. 18 U.S.C. § 2422(b) prohibits both the sex act and the attempt. In this case, the jury had to find that the act was committed.

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ATTORNEY FOR MOVANT/PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on February ____, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the parties of record.

/s/ Jackie Smith
Legal Assistant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

NOTICE OF APPEAL

Brian Edward Reynolds	*	4:14-cv-00422
Plaintiff	*	District Court Docket Number
United States of America	*	Robert W. Pratt
Defendant	*	District Court Judge

Notice is hereby given that Brian Edward Reynolds appeals to the United States Court of Appeals for the Eighth Circuit from the ☑ Judgment ☐ Order entered in this action on January 8, 2018.

Signature of Appellant/Cnsl	122 W. Jefferson Street
	Street Address
2/16/2018	Osceola, Iowa 50213
Date	City State Zip
Unes J. Booth	641-342-2619
Typed/printed Name	Telephone Number

Transcript Order Form: **(To be completed by attorney for appellant)**

Please prepare a transcript of: Not applicable
(Specify)

I am not ordering a transcript because: No Reported Hearings
(Specify)

CERTIFICATE OF COMPLIANCE

Appellant hereby certifies that copies of this notice of appeal/transcript order form have been filed/served upon the US District Court, court reporter, and all counsel of record and that satisfactory arrangement for payment of cost of transcripts ordered have been made with the court reporter (FRAP 10(b))

Attorney's Signature _____ Date: 2/16/2018

NOTE: COMPLETE APPROPRIATE APPEAL SUPPLEMENT FORM

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF IOWA
OFFICE OF THE CLERK
P. O. BOX 9344
DES MOINES, IA. 50306-9344
515-284-6248

Civil Case Notice of Appeal Supplement

COUNSEL FOR APPELLANT PLEASE COMPLETE AND SUBMIT WITH NOTICE OF APPEAL

Case Name: Brian Edward Reynolds **vs.** United States of America

District Court Case # 4 : 14 - cv - 00422

Appeal Fee ($505.oo) Status Pd ☐ IFP ☑ Pending ☐ Govt. Appeal ☐

Counsel Appointed ☑ **CJA** ☑ **Retained** ☐ **Pro Se** ☐

Appeal filed by Counsel ☑ **Pro Se** ☐

Any reason why counsel should not be appointed No

Pending post Judgment motions: Yes ☐ **No** ☑

Type of Motion(s) 2255

High Public Interest Case Yes ☐ **No** ☑

Simultaneous Opinion Release Requested Yes ☐ **No** ☑

Trial Held Yes ☐ **No** ☑

Jury Trial Held Yes ☐ **No** ☑

Court Reporter Yes ☐ **No** ☑ **Length of Trial** _____

Reporter's Name _____

Address _____

_____

Phone _____

Transcript Ordered Yes ☐ **No** ☑

Appealing: Order prior to final judgment ☐ **Final Judgment** ☑

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

BRIAN REYNOLDS, Movant/Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	4:14-cv-00422-RP **ORDER**

Brian Reynolds moves to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Mot., ECF No. 1. Reynolds challenges the conviction and sentence imposed against him in *United States v. Reynolds*, 3:11-cr-00042-RP (S.D. Iowa) (Crim. Case), and the Court takes judicial notice of the proceedings in that case. Reynolds also raises several additional claims to his § 2255 motion, and he seeks transport for an evidentiary hearing on his claims. ECF Nos. 4, 35. The Court appointed counsel to assist Reynolds. ECF No. 6. Reynolds' former counsel filed an affidavit responding to the § 2255 claims. ECF No. 20; *see* Rule 7 of the Rules Governing Section 2255 Proceedings. The Government resists the motion to amend as untimely except for one claim; it resists the remaining claims as without merit. ECF No. 23. Reynolds, through counsel, replied to the Government's resistance. ECF No. 34. The matters are ready for ruling.

The Court concludes all of the claims Reynolds seeks to add to his § 2255 motion must be dismissed as untimely except for the amendment related to the dismissal of Count 1. The Court further concludes Reynolds has not shown he is entitled to any relief under § 2255 regarding his other claims on the merits. His motion must be dismissed without an evidentiary hearing, and no certificate of appealability will issue.

I. BACKGROUND

Reynolds was charged with conspiracy to produce child pornography (Count 1); receiving pornography (Count 2); enticement of a minor to engage in illicit sexual activities (Count 3); and production of child pornography (Count 4). Crim. Case, Redacted Indict., ECF No. 16. Before trial and outside the presence of the jury, the Government dismissed Count 1. Crim. Case, Minutes Apr. 3, 2012, ECF No. 98. Reynolds went to trial on the other counts, which were renumbered Count 1 through Count 3, and the jury found him guilty of the charges. Crim. Case, Jury Verdict, ECF No. 104. The Court sentenced him to 120 months on the receipt count, 384 months on the enticement count, and 190 months on the production count, to be served concurrently, followed by 15 years of supervised release. Crim. Case, J., ECF No. 148.

Reynolds appealed, and the Court of Appeals affirmed. *United States v. Reynolds*, 720 F.3d 665 (8th Cir.), *reh'g denied*, July 30, 2013)). Reynolds submitted his § 2255 motion for mailing on October 15, 2014. ECF No. 1, at 13.

II. SECTION 2255 CLAIMS

The Court summarized Reynolds' initial § 2255 claims as follows:

- Trial counsel failed to show Reynolds at least two plea offers;
- Trial counsel failed to advise Reynolds regarding his sentencing exposure;
- Trial counsel failed to investigate properly, particularly by obtaining a qualified computer expert to review the evidence, which would have helped the defense;
- Trial counsel failed to raise the Government's violation of Federal Rule of Criminal Procedure 48 when the Government dismissed a count after the jury heard about it, and which prevented Reynolds from presenting impeachment evidence regarding a witness for the prosecution, and trial counsel should have cross-examined the accuser in the dismissed count;
- Trial counsel failed to allow Reynolds to testify;
- Trial counsel failed to prepare Reynolds for the allocution portion of sentencing or address the Federal Rule of Criminal Procedure 32 allocution errors by the Court at sentencing;
- Appellate counsel failed to raise the alleged violation of Rule 48;

- Appellate counsel failed to argue there should have been expert testimony to investigate the case properly, and that Reynolds was unaware of plea offers; and
- Appellate counsel failed to argue the Court violated Federal Rule of Criminal Procedure 32 during the allocution at sentencing.

Order Mar. 23, 2016, ECF No. 6, at 2-3 (citing ECF Nos. 1, 2, 2-1).

The Court allowed Reynolds to amend his motion to raise the following additional claims, but the Court did not rule on the timeliness of them:

- The Court and prosecutor violated Rule 48 by allowing the jury to hear about the dismissed count in an attempt to inflame the jury, and Reynolds' counsel either was unaware of the situation or failed to consult with Reynolds about it.
- The prosecution engaged in misconduct by withholding exculpatory evidence regarding one of the victim's ages.
- Trial counsel was ineffective in failing to resist trial continuances. Reynolds asserts his lawyer allowed Reynolds to sit in jail, hoping he would agree to a plea agreement.
- Trial counsel was ineffective in failing to challenge the admission of statements by Reynolds' daughter that previously were ruled inadmissible.

Id. at 3 (citing ECF No. 4-2). Reynolds did not swear or indicate what date he submitted the amended claims for filing. The Court cannot discern a postmark date from the envelope. The Court received the request on January 12, 2015, and that is the date the Court will use as the filing date for the amended claims. Clerk's No. 4.

III. ONLY ONE AMENDED CLAIM MAY BE REVIEWED

The Government argues all but one of the amended claims is late. ECF No. 23, at 4-5. The Government asserts the only timely claim is the claim related to the dismissal of Count 1, a claim Reynolds raised in his original § 2255 motion. *Id.* The Court therefore considers whether the other amended claims are late. *See Mandacina v. United States*, 328 F.3d 995, 999-1000 (8th Cir.) (amendment filed beyond the statute of limitations is permitted if the claim "asserted in the original pleading and the claim asserted in the amended pleading arose out of the same conduct,

transaction, or occurrence") (quotation marks and citations omitted); *see also Day v. McDonough*, 547 U.S. 198, 205, 209, 211 n.11 (2006) (statute of limitations defense not jurisdictional; courts are not obligated to consider time bar sua sponte; court may raise the issue, but should state "intelligently choose to waive a statute of limitations defense, a district court would not be at liberty to disregard that choice").

A. The Remaining Amendments Are Untimely

Reynolds must file his § 2255 motion within a one-year statute of limitations that runs 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;
>
> (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). Reynolds' conviction became final when the time to seek certiorari expired, that is, ninety days after the Court of Appeals denied rehearing on July 30, 2013. *See Clay v. United States*, 537 U.S. 522, 532 (2003) ("for federal criminal defendants who do not file a petition for certiorari with this Court on direct review, § 2255's one-year limitation period starts to run when the time for seeking such review expires when the time for seeking such review expires"); Sup. Ct. R. 13(1), (3) (providing ninety days to petition for writ of certiorari, running from the date a timely motion for rehearing is denied). Reynolds therefore had one year from

October 28, 2013, to file his § 2255 motion. Any claim Reynolds raised after October 28, 2014, is barred by the one-year statute of limitations unless it relates back to a ground that was timely raised. *See Mandacina*, 328 F.3d at 999-1000.

Reynolds' initial § 2255 motion, filed on October 15, 2014, ECF No. 1, and the additional arguments received by the Court on October 20, 2014, ECF No. 2, were timely filed because they were filed within one year of October 28, 2013. *See* 28 U.S.C. § 2255(f); Rule 3(d) of Rules Governing Section 2255 Proceedings for the U.S. District Courts ("timely if deposited in the institution's internal mailing system on or before the last day for filing"). Reynolds' amendment, however, was filed in January 2015, more than one year after October 28, 2013. His claims in the amendment are therefore beyond the one-year statute of limitations set out in § 2255(f). Reynolds does not argue the remaining new claims relate back to his original claims, ECF No. 34, and the Court also concludes they do not. Consequently, the Court may not review the late claims unless Reynolds shows he is excused from the deadline.

B. There Are No Grounds to Avoid the Time Bar

Reynolds argues his late filing is excused because he did not have counsel, and his first opportunity to raise ineffective assistance of counsel is in a § 2255 motion. Contrary to Reynolds' argument, he does not have a right to counsel's assistance in preparing a § 2255 motion. *See* 28 U.S.C. § 2255(g) ("the court may appoint counsel" except in certain situations not applicable to Reynolds' case). Reynolds attempts to excuse his failure to comply with the one-year deadline by relying on cases that create a narrow exception to the procedural default rules governing habeas corpus petitions challenging state-court convictions. ECF No. 34, at 4-5. The cases are inapposite. In *Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012), the Court held that

where state law *requires* ineffective assistance of trial counsel claims be raised for the first time in a collateral proceeding, then "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id.* In *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), the Court extended the *Martinez* exception to provide that ineffectiveness of postconviction counsel may be used to show cause and prejudice to excuse the procedural default of another ground for habeas relief where state law by "matter of course" precludes the opportunity to raise ineffective assistance of counsel claim on direct appeal. *Trevino*, 133 S. Ct. at 1921. It is true that challenges to counsel's performance in federal criminal proceedings generally are raised in a § 2255 motion. *Barajas v. United States*, No. 16-1680, 2017 WL 6001563, at *4 (8th Cir. Dec. 5, 2017) ("Petitioners may, and in many cases must, wait to raise ineffective assistance claims for the first time on collateral review.") (citing *Massaro v. United States*, 538 U.S. 500, 508-09 (2003)). But it is not *required* that movants wait until a § 2255 proceeding to raise ineffective assistance of counsel claims. *E.g.*, *United States v. Rice*, 449 F.3d 887, 897 (8th Cir. 2006) ("[T]his Court may decide an ineffective assistance issue on direct appeal if the ineffectiveness is readily apparent or [the representation is] obviously deficient, if resolution on direct appeal will avoid a plain miscarriage of justice, or if the record has been fully developed." (quotation marks and citation omitted) (second alteration in original). Moreover, the rules in *Martinez* and *Trevino* governing exceptions to bars of federal review of state postconviction actions simply have not been applied to the very different legal posture of initial federal postconviction actions and the question whether a statute of limitations deadline should be excused.

Instead, to avoid the statute of limitations bar in § 2255(f), a movant must show either that he is entitled to equitable tolling of the statute of limitations or that he is actually innocent. "[A] petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) ((internal quotation marks omitted). Equitable tolling is "an exceedingly narrow window of relief" available "'only when extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time [or] when conduct of the defendant has lulled the plaintiff into inaction.'" *Jihad v. Hvass*, 267 F.3d 803, 805 (8th Cir. 2001) (quoting *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000)). Reynolds argues only that he should have had counsel help him prepare a § 2255 motion, but as previously discussed, he does not have a right to counsel in a § 2255 proceeding. Furthermore, it is not enough to be unschooled in the law to avoid the statute of limitations. A movant's own ignorance of the law and procedures, lack of counsel, limited access to a law library, and delays in getting a transcript do not warrant equitable tolling. *See Riddle v. Kemna*, 523 F.3d 850, 858 (8th Cir. 2008) (citing cases), *abrogated on other grounds in Gonzalez*, 565 U.S. at 134, 140 n.2 (2012).

As for the actual innocence exception, the Supreme Court has recognized it in the context of the statute of limitations applicable to habeas petitions challenging state convictions. *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1933-35 (2013). The statute of limitations applicable to state habeas petitioners is substantially the same as that applicable to § 2255 movants. *Compare* 28 U.S.C. § 2244(d)(1) *and* 28 U.S.C. § 2255(f)(1). The actual innocence exception, however, is also a narrow passageway to consideration of a claim, requiring a petitioner to "'show that it is

more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'" *McQuiggin*, 133 S. Ct. at 1935 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). Reynolds provides no "new evidence" for the Court to consider, and he does not meet the exacting standard for the exception. The Court therefore cannot consider the claims added in January 2015 except for the claim related to dismissed Count 1. The Court now turns to the merits of the claims properly before the Court.

IV. DISCUSSION

A federal inmate may file a motion under 28 U.S.C. § 2255 for release "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).

Reynolds focuses on counsel's performance. Generally, to show that counsel failed to provide constitutionally effective assistance under the Sixth Amendment, a movant must show (1) counsel's representation was deficient, and (2) the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985) (*Strickland* applies to assistance of counsel in the context of a guilty plea). A court need not address both components of the test if a movant makes an insufficient showing on one of the prongs. *Strickland*, 466 U.S. at 697. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91. Prejudice is

demonstrated with "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. A movant cannot be prejudiced by counsel who fails to raise a meritless claim. *See id.*; *Rodriguez v. United States*, 17 F.3d 225, 226 (8th Cir. 1994) (per curiam) (counsel not ineffective for failing to raise meritless challenge). The Court addresses the various argument in turn.

A. Plea Offers

Reynolds claims his former counsel did not discuss with him at least two plea offers. ECF No. 2-1, at 8. He states that had he known about the offers, "he would never have gone to trial and faced a potential "life in prison' sentence." *Id.* He states he did not see the offers until he received his case file from counsel. *Id.*

Former counsel for Reynolds disputes his version of the facts. Helphrey Aff. ¶ 8, ECF No. 20, at 3-4. Her records document meetings with Reynolds on January 19, 2012, and March 30, 2012, to discuss the plea, but Reynolds rejected both of them. *Id.* Former counsel avers that according to her notes, Reynolds would consider a plea to "time served" only, which counsel advised was not feasible, given the mandatory minimum sentences he faced. *Id.* Counsel encouraged Reynolds to make a counteroffer, but Reynolds was uninterested. *Id.* Counsel advised Reynolds of her opinion that it was in his best interest to continue negotiations, and she reviewed with him what she "perceived to be damaging evidence and trial risks," but Reynolds "maintained his position that he wanted to proceed to trial." *Id.*

Counsel's notes support her statement. ECF No. 2-3 at 1. In addition, the record supports counsel's statements. At trial, before jury selection and outside the presence of the jury, the

Government stated that plea negotiations had occurred:

> . . . I think our last offer, all previous offers having been declined, was to have the defendant plead–offer to allow the defendant to plead guilty to Counts–what were Counts 3 and 4 of the Indictment.
>
> We had last discussed–we had tendered a written Plea Agreement that allowed for a specific sentence of 25 years, but most recently we had discussed a range of 20 to 30 years, where the defense could argue for as low as 20 and the government would argue for as much as 30, but that would be the parameters of the agreement and would still be Counts 3 and 4. Those offers were made to, discussed, and they haven't been accepted. The 25 years was specifically rejected. The 20 to 30 was never responded to really.

Crim. Case, Trial Tr. 6, ECF No. 158. Counsel for Reynolds then stated, "I would just indicate that Mr. Reynolds is not interested in those offers that have been made and I don't think any further record is needed." *Id.*

The United States Supreme has held that, "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) (addressing formal plea offers and explaining it was not addressing exceptions, if any, to the general rule regarding formal offers). To show prejudice resulting from a lapsed or rejected plea offer, defendants must, among other things, "demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." *Id.* at 1409. Reynolds swears he never knew about the plea offers and would have pleaded guilty if he had known them. But Reynolds' self-serving statement is belied by the record. Consequently, Reynolds' claim is meritless and no hearing is required on it because "the record affirmatively refutes the factual assertions upon which it is based." *Franco v. United States*, 762 F.3d 761, 763 (8th Cir. 2014).

B. Advice Regarding Sentencing Exposure

Reynolds asserts counsel was ineffective by failing to inform him of his sentencing exposure. ECF No. 2-1, at 10. Reynolds states that counsel instead focused on the defense for trial. *Id.* Reynolds further states the Indictment did not mention the sentencing ranges for the charges. *Id.*

The record demonstrates that Reynolds was informed of the penalties at his arraignment, and he indicated he understood them. Crim. Case, Minutes Apr. 25, 2011, ECF No. 18. In her affidavit, former counsel states that she discussed the Indictment with Reynolds. ECF No. 20 ¶ 9. She states she reminded Reynolds of the penalties during plea negotiations and he was fully apprised of his sentencing exposure. *Id.* At sentencing, Reynolds continued to maintain his innocence and said, "I ask the Court to consider the fact that conviction does not mean guilt. This is supported by law as to Alford and nolo contendere please and proven by over 2000 wrongful convictions since the 1980's." Crim. Case, Sent. Tr. 42, ECF No. 156.

"A defendant who maintains his innocence at all the stages of his criminal prosecution and shows no indication that he would be willing to admit his guilt undermines his later § 2255 claim that he would have pleaded guilty if only he had received better advice from his lawyer." *See Sanders v. United States*, 341 F.3d 720, 723 (8th Cir. 2003). Here the record belies Reynolds' more recent statements that he would have pleaded guilty but for counsel's failure to advise him of the potential penalties he faced. "'[T]he movant must present some credible, non-conclusory evidence that he would have pled guilty had he been properly advised.'" *Id.* at 722 (quoting *Engelen v. United States*, 68 F.3d 238, 241 (8th Cir.1995)). Because the record demonstrates Reynolds knew of the potential maximum penalty and did not want to admit his guilt, he fails to show a reasonable probability that he would have accepted a plea offered to him.

See Engelen, 68 F.3d at 241 (to show prejudice, movant "must show that, but for his counsel's advice, he would have accepted the plea"). This claim must be dismissed as without merit. Reynolds' related claim that appellate counsel should have raised the argument on appeal also fails. *Dyer v. United States*, 23 F.3d 1424, 1426 (8th Cir. 1994) (counsel not ineffective in failing to raise a meritless claim).

C. Expert Witness

Reynolds asserts counsel failed to investigate the charges properly and therefore could not advise him whether to take the Government's plea offer. ECF No. 2-1, at 11. In particular, Reynolds asserts, counsel unreasonably "abandoned" her investigation without finding out for herself whether the inculpatory evidence against Reynolds was strong, thus she did not advise Reynolds that he would face a lengthy sentence if the jury found him guilty at trial. *Id.* In a different vein, Reynolds asserts that his former counsel used an unqualified computer expert from the Federal Defender's own office to evaluate the evidence against Reynolds. *Id.* at 20. He asserts that a qualified expert in "networked computers, various cell phones, and potential DNA evidence . . . could have refuted or impeached the government's evidence and witnesses." *Id.* For example, Reynolds argues, an expert could have resolved whether the content of an archived online "chat" with one of the victims could be retrieved; whether the extent of the child pornography was, as the Federal Defender's expert said, only one image of child pornography on Reynolds' computer; whether the victim's phone truly had evidence of text messages and photo exchanges with Reynolds; and whether the victim portrayed herself online as a nineteen year old. *Id.* at 20-21, 24-25.

Reynolds' former counsel avers that their office routinely relies on the Federal Defender

Assistant Computer Systems Administrator to conduct forensic examinations of computer hard drives. ECF No. 20 ¶ 10. It was the administrator's evaluation that revealed the exculpatory images resulting in dismissal of Count 1. *Id.* Counsel also consulted with another expert on the way to find online chat archives or Facebook remnants. *Id.* The Federal Defender Assistant Computer Systems Administrator did not find such data. *Id.* Counsel also retained an expert to conduct an independent analysis of the DNA evidence, and an investigator interviewed witnesses. *Id.* The experts and the investigator were available at trial. *Id.* Counsel did not independently review the phone data because there was no indication from Reynolds or otherwise that the data was incorrect. *Id.*

The Supreme Court has held "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. Here, counsel performed sufficient research and investigation to determine that no further expert investigation was warranted. "The selection of an expert witness is a paradigmatic example of the type of 'strategic choic[e]' that, when made 'after thorough investigation of [the] law and facts,' is 'virtually unchallengeable.'" *Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014) (quoting *Strickland*, 466 U.S. at 690). Furthermore, even assuming competent counsel would have selected another expert, Reynolds does now show "'there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" *Id.* (quoting *Strickland*, 466 U.S. at 694). Thus, even though counsel did not pursue additional expert review, Reynolds was not prejudiced by counsel's failure to do so, and this claim must be dismissed.

D. Dismissal of Count 1 and Related Claims

Reynolds argues that counsel performed ineffectively by failing to object when the Government dismissed without prejudice Count 1 of the Indictment. ECF No. 2-1, at 14. Count 1 of the Indictment charged that in and around December 2008 and January 2009, Reynolds enticed a thirteen-year-old girl to engage in sexually explicit conduct for the purpose of producing pornography. Crim. Case, Redacted Indictment, ECF No. 16. Reynolds criticizes the dismissal because, he argues, the Government acted in bad faith, knowing it could refile Count 1 if Reynolds were found not guilty at trial. *Id.* at 15. Reynolds further criticizes the action because counsel failed to ask Reynolds if he agreed with the dismissal, which was pursuant to Rule 48 of the Federal Rules of Criminal Procedure and required the defendant's consent. *Id.* Reynolds asserts that when he told counsel of the Rule 48 violation, she said Rule 48 did not exist. *Id.* at 14. Reynolds argues the dismissal inflamed the prejudice of the jury, which had already heard about the charge. *Id.* at 17. Reynolds asserts that if Count 1 had not been dismissed, counsel could have impeached the credibility of witness A.G., who is the girl identified in Count 1 and who testified for the Government regarding the separate enticement charge. *Id.* at 18-19; Crim. Case, Trial Tr. 285-365. For example, the defense could have impeached A.G.'s credibility with her sexual history and online presence, which Reynolds argues show she misled him about her age. *Id.* at 19. Reynolds further states the Federal Defender's in-house computer expert determined the prosecution relied on images for Count 1 that were created more than a year before the time the Indictment indicated that they were created. *Id.* at 18. Similarly, Reynolds claims his former counsel should have cross-examined Heather Dunn as a witness to impeach A.G.'s prior statement that Reynolds induced A.G. to take illegal pictures of herself. ECF No. 2-

1 at 31-32. Reynolds asserts that Dunn, not Reynolds, induced A.G. to take the photos of herself. *Id.*

Former counsel for Reynolds states that Count 1, the conspiracy count, was dismissed before trial began, and the jury never heard about it. ECF No. 20 ¶ 11. The record bears this out. Crim. Case, Trial Tr. 7. The charges were renumbered to omit the conspiracy count. Crim. Case, Preliminary Ins. 2, ECF No. 91, at 3. Former counsel further avers she believed the key witness regarding Count 1, A.G., was compelling, and the charge feasibly could have led to a conviction with a fifteen-year mandatory minimum sentence. ECF No. 20 ¶ 11. Counsel states she did not need Reynolds' permission to agree to the dismissal of Count 1. *Id.* Counsel tried to impeach A.G.'s credibility by asking her when she created a photo sent to Reynolds, but the Court limited the cross-examination under Federal Rule of Evidence 412. *Id.*; Crim. Case, Trial Tr. 7-8, 343-44. Former counsel is of the opinion that dismissal of Count 1 was, nevertheless, in Reynolds' best interest. ECF No. 20 ¶ 11. Former counsel made the strategic decision not to call Dunn as a witness "because she was a friend of the victim and had refused the request by defense to be interviewed." *Id.* ¶ 13. Counsel avers, "I determined it was too risky to put her on the stand not knowing what she would say and considering her unwillingness to speak with the defense." *Id.*

Reynolds' claim regarding the Government's bad faith is wholly conclusory and therefore without merit. Furthermore, counsel was not required to obtain Reynolds' express consent to dismiss Count 1 because it was not one of the fundamental decisions reserved for only defendants to make. *See Thomas v. United States*, 737 F.3d 1202, 1208 (8th Cir. 2013) ("Those fundamental choices remaining with the defendant are the decision 'whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.'") (quoting *Jones v. Barnes*, 463

U.S. 745 751 (1983)); *see also id.* (choice not to file motion to dismiss based on speedy trial violation was counsel's tactical choice). The record demonstrates conclusively that counsel adequately investigated the charges and arrived at an informed decision to permit dismissal of Count 1. Counsel's decision was a tactical choice in trial strategy, made after reasonable investigation of the law and facts of Reynolds' case. It was within counsel's expertise and is entitled to deference. *See Thomas*, 737 F.3d at 1209; *see also Strickland*, 466 U.S. at 690 ("strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable"). Similarly, counsel's decision not to call as a trial witness a person who was friends with the victim and who had been unwilling to speak with the defense was within the range of reasonable trial strategies that this Court will not second-guess. *See Strickland*, 466 U.S. at 690; *Rice*, 449 F.3d at 898 ("Trial counsel enjoys a strong presumption that his decisions regarding which witnesses to call were reasonable."). Moreover, Reynolds fails to show there is a reasonable probability the outcome of trial would have been different if the jury had heard the additional impeachment evidence regarding A.G.'s credibility. Reynolds fails to show counsel's performance regarding the dismissal of Count 1 and related claims denied him his Sixth Amendment right to effective assistance of counsel.

E. Reynolds Testimony

Reynolds claims he wanted to testify at trial, but his trial counsel told him, "You're not going to testify and don't argue with me." ECF No. 2-1 at 30. The record does not support Reynolds' claim that counsel refused to allow him to testify. At trial, Reynolds acknowledged that he did not want to testify in his own behalf:

> MS. HELPHREY: First, Your Honor, I would indicate that I have conferenced with Mr. Reynolds and I conferenced with him yesterday evening

> after the state of the evidence that far and now again since we have had testimony today. Based on that record and our conversations, he has made a decision not to testify. I have explained to him obviously that this is his decision, not my decision, but also counseled him on my advice and that's the state of where we are at this point.
>
> Mr. Reynolds, do you agree with how I characterized things to this point?
>
> THE DEFENDANT: Somewhat. . . .
>
> THE COURT: Mr. Reynolds, you understand that the lawyer can give you advice and help about whether or not you want to exercise your right not to testify or your right to testify; but ultimately the decision to do one or the other is up to you, don't you?
>
> THE DEFENDANT: Yes.
>
> THE COURT: After consultation with your lawyer have you decided to exercise your Constitutional right not to be a witness in this case?
>
> THE DEFENDANT: That's correct.

Crim. Case, Trial Tr. 784-85. Reynolds' counsel states it was "after both sides rested, during a jury instruction conference. Mr. Reynolds made the remark that he should have testified. I informed him we had already rested our case." ECF No. 20 ¶ 12. Consequently, Reynolds' claim that counsel prevented him from testifying must be dismissed.

Reynolds also claims his trial counsel failed to allow Reynolds to testify at his suppression hearing, "when the court determined whether to admit his statements made to law enforcement after he said he was done and wanted a lawyer." ECF No. 2-1 at 30. Again, the record refutes Reynolds' claim. At the suppression hearing, counsel stated, "I've discussed the interview with my client. I don't anticipate my client to testify." Crim. Case, Hr'g Mar. 2, 2012, Tr. 6, ECF No. 70. Moreover, the Supreme Court has not held a defendant's right to testify extends to pretrial hearings. *Cf. Rock v. Arkansas*, 483 U.S. 44, 52-53 (1987) (describing a defendant's constitutional right to testify at trial in the defendant's own defense); *see also Johnson v. Norris*, 537 F.3d 840, 848 (8th Cir. 2008) (concluding counsel made reasonable strategic decision to advise defendant not to testify, and defendant decided not to testify).

Finally, Reynolds' conclusory statement that he wanted to testify at the suppression hearing does not indicate the outcome would have been different if he had testified. Consequently, he does not show he was prejudiced by counsel's performance. *See Strickland*, 466 U.S. at 690. This claim must be dismissed.

F. Allocution at Sentencing

Reynolds claims his counsel never advised him about the purposes of presenting mitigating evidence during allocution at sentencing or what "mitigation" meant. ECF No. 2-1 at 26-29. Reynolds further claims counsel failed to challenge what Reynolds sees as a violation of Federal Rule of Criminal Procedure 32 at sentencing. *Id.*

Reynolds' former counsel avers that she explained the right of allocution to Reynolds before the sentencing hearing as a chance to provide mitigating information to the Court, but that he was not required to make any statement. ECF No. 20 ¶ 14. She states she advised Reynolds against raising trial issues, and that such errors are raised on appeal, not during allocution. *Id.* Counsel states "[t]he allocution presented at sentencing was not consistent with my advice." *Id.*

When offered the opportunity to exercise his right of allocution at sentencing, Reynolds began criticizing the evidence at trial, stating no one had claimed he used force against the victim until at trial, and it was unlikely he could have used force. Crim. Case, Sent. Tr. 38, ECF No. 156. The Court interrupted Reynolds, informing him it did not want to stop him from speaking, but it was bound by the jury's findings, and he could appeal any mistakes made at trial. *Id.* at 39. The Court added that if the case were reversed for a new trial, "some of what you say may come back to haunt you, so you might want to consider that before you continue with your statement." *Id.* The Court, however, allowed Reynolds to continue and told him, "I'm going to

listen very patiently. You go ahead." *Id.* at 40. Reynolds now asserts his allocution was worthless because the Court "simply continued on as planned when Mr. Reynolds was done." ECF No. 2-1 at 29.

The right of allocution is an important one, yet its source is not the Constitution but rather Federal Rule of Criminal Procedure 32. *United States v. Hoffman*, 707 F.3d 929, 937 (8th Cir. 2013). There is no Rule 32 error where, as here, the defendant receives an opportunity to speak before sentence is imposed. *See id.* at 937-38 ("We have found no error as long as the court gives the defendant an opportunity to speak prior to the imposition of sentence."). Counsel therefore did not perform ineffectively in failing to raise a Rule 32 error on appeal. *Dyer*, 23 F.3d at 1426. Moreover, Reynolds cannot show he was prejudiced by counsel's advice regarding allocution because the sentence was based on an individual assessment of Reynolds and the factors in 18 U.S.C. § 3553(a). Crim. Case, Sent. Tr. 42. At sentencing the Court explained:

> Sexual exploitation of any kind, but particularly of minors, is the most serious crime this Court has dealt with in the fifteen years they've been on the district court. The circumstances of this offense are particularly aggravating. The defendant used the facilities, the computer of his minor daughter, to engage a minor in a conversation online that eventually resulted in a sexual attack on the minor in which force was used by the defendant that the jury found existed. The history and characteristics of the defendant are to a large extent unknown. There's not much social history. The defendant did not cooperate with the presentence writer in this case. No doubt Ms. Helphrey's characterization of his background is correct, that he had a very difficult socioeconomic circumstance. At least that's the default position that this Court tends to accept given the beginning of his criminal history, which as the Presentence Report reflects, is substantial and long-standing. . . . The Court makes a specific finding of this record that the defendant is dangerous to others given the criminal history and the evidence produced at trial.

Id. at 43-44. Reynolds does not demonstrate his sentence would have been different had he presented additional mitigating evidence during allocution or not spoken at all. *See Strickland,*

466 U.S. at 690. Consequently, his claim of ineffective assistance regarding allocution, like all of his other claims, must be denied.

G. No Evidentiary Hearing Is Needed

Reynolds asks for an evidentiary hearing, ECF No. 34, and an order to transport him for an evidentiary hearing, if one is ordered, ECF No. 35. "[T]he judge must review [the record] and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted." Rule 8 of the Rules Governing Section 2255 Proceedings. "The district court is not permitted to make a credibility determination on the affidavits alone; thus if the decision turns on credibility, the district court must conduct a hearing." *Thomas*, 737 F.3d at 1206. A "movant is entitled to an evidentiary hearing on a Section 2255 motion unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." *Voytik v. United States*, 778 F.2d 1306, 1308 (8th Cir. 1985) (citing 28 U.S.C. § 2255(b)); *see also Franco*, 762 F.3d at 763 ("No hearing is required, however, where the claim is inadequate on its face or if the record affirmatively refutes the factual assertions upon which it is based.") (quoting *Anjulo-Lopez v. United States*, 541 F.3d 814, 817 (8th Cir. 2008)). Here, the files and records conclusively show that Reynolds is not entitled to § 2255 relief. Consequently, no hearing is needed. The request for a hearing and transport to it must be denied.

VI. CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11(a) of the Rules Governing Section 2255 Proceedings in the United States Courts, the Court must issue or deny a Certificate of Appealability when it enters a final order adverse to the Movant. District Courts have the authority to issue certificates of appealability under 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b). A certificate of appealability

may issue only if Movant "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A substantial showing is a showing "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotation marks and citations omitted). Movant has not made a substantial showing of the denial of a constitutional right for any of his claims. Consequently, no Certificate of Appealability will issue in this case. He may request issuance of a Certificate of Appealability by a judge on the Eighth Circuit Court of Appeals. *See* Fed. R. App. P. 22(b).

VII. SUMMARY AND RULINGS

The Court **denies and dismisses** as untimely Reynolds' amended claims except for the claim related to the dismissal of Count 1.

The Court has carefully reviewed the motion brought under 28 U.S.C. § 2255, the pleadings in this § 2255 action, and the record of the prior proceedings in the criminal case. Based on its review, the Court concludes that Brian Reynolds has not shown that counsel provided constitutionally ineffective assistance in any respect; and he has not shown that he is in custody under a judgment that violates the Constitution or any law of the United States, that the Court lacked jurisdiction to enter the judgment against him, that the sentence exceeded the maximum authorized by law, or that the judgment and sentence are otherwise subject to collateral review. *See* 28 U.S.C. § 2255(a), (b).

Accordingly, the Court **denies** the motion to vacate, set aside, or correct sentence, brought under 28 U.S.C. § 2255. ECF No. 1. The motion for transport is **denied**. ECF No. 35.

The case is **dismissed**. A Certificate of Appealability is **denied.** Movant may request issuance of a Certificate of Appealability by a judge on the Eighth Circuit Court of Appeals. *See* Fed. R. App. P. 22(b).

IT IS SO ORDERED.

Dated this 8th day of January, 2018.

Robert W. Pratt

ROBERT W. PRATT
U.S. DISTRICT JUDGE