N.D.N.Y.
18-cv-120
Hurd, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of October, two thousand eighteen.

Present:

Rosemary S. Pooler,
Raymond J. Lohier, Jr.,
Susan L. Carney,
Circuit Judges.

John C. Killingbeck,

Petitioner-Appellant,

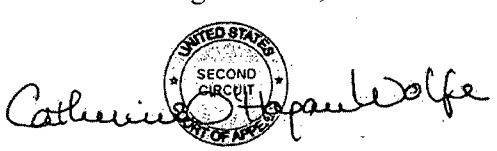
v. 18-1611

United States of America,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



Appendix A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOHN C. KILLINGBECK,

Petitioner-Defendant,

-v- 5:12-CR-63-DNH-1
5:18-CV-120-DNH

UNITED STATES OF AMERICA,

Respondent.

APPEARANCES: OF COUNSEL:

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DAVID N. HURD
United States District Judge

MEMORANDUM–DECISION and ORDER

I. INTRODUCTION

On January 29, 2018, petitioner–defendant John C. Killingbeck ("Killingbeck" or "petitioner"), proceeding pro se, moved pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct the sentence imposed on him after a jury found him guilty of two counts of receiving,

Appendix B

and three counts of possessing, child pornography. Respondent United States of America (the "Government") filed a response in opposition on April 26, 2018. The motion is fully briefed and will be considered on the basis of the submissions without oral argument.

II. BACKGROUND

In late 2010, the Oneida County Sheriff's Department received information suggesting that Killingbeck's home computer contained child pornography. On December 28 of that year, Investigators Patrick O'Connor and Jeremy Van Horne confronted Killingbeck outside of his house in Utica, New York, and questioned him about it.

In a conversation recorded by the investigators, Killingbeck initially denied having any pictures of child abuse on his computer, but upon continued interrogation petitioner eventually conceded that he had searched for pornographic images of children on his home computer through Usenet, an electronic bulletin board system where users may post their own messages and view messages posted by others. Thereafter, investigators executed a search warrant at petitioner's residence, where they recovered several computers later found to contain video and still images of child pornography.

On February 16, 2011, after the Government filed a criminal complaint against Killingbeck, U.S. Magistrate Judge David E. Peebles appointed Assistant Federal Public Defender James F. Greenwald ("Attorney Greenwald") to represent petitioner on the child pornography charges. A grand jury returned a six-count indictment against petitioner on February 8, 2012.

On July 6, 2012, Killingbeck, through his counsel, moved to suppress the evidence seized from his residence and to dismiss the indictment. According to petitioner, (1) the search warrant was procured using false statements by law enforcement and (2) in any

event, the federal criminal statute he had been charged with violating unconstitutionally infringed his right to free speech under the First Amendment. Petitioner's motion was denied in its entirety on November 26, 2012.

On April 18, 2013, Attorney Greenwald advised the Court that Killingbeck was dissatisfied with his representation and had filed "criminal complaints" against him. The Court conducted a hearing on the issue on April 24, 2013, and questioned petitioner regarding his desire to proceed to trial pro se on the criminal charges against him. On the basis of petitioner's consent and in light of other relevant considerations, the Court ordered a mental competency evaluation pursuant to 18 U.S.C. § 4241.

On August 16, 2013, the Court held an evidentiary hearing to evaluate the results of the mental competency evaluation. As relevant here, the Court found Killingbeck competent to stand trial, determined petitioner could proceed pro se in his own defense, and relieved Attorney Greenwald as counsel of record. At petitioner's request, the Court also appointed Attorney Richard Cohen ("Attorney Cohen") as standby counsel to assist petitioner.

On September 3, 2013, Killingbeck, proceeding pro se, moved for reconsideration of the earlier denial of his motion to suppress and to dismiss the indictment. That motion was denied as untimely on October 28, 2013.

On November 15, 2013, Killingbeck filed his own motion to suppress the physical evidence against him and to request dismissal of the indictment on First Amendment grounds. The Government opposed and cross-moved seeking to preclude petitioner from arguing at trial that his actions in receiving and possessing child pornography were protected by the First Amendment. Petitioner's motion was denied and the Government's cross-motion was granted on November 25, 2013.

On December 2, 2013, Killingbeck proceeded to trial with Attorney Cohen participating as standby counsel. Petitioner represented himself at trial, made opening and closing statements, and cross-examined the Government's witnesses. After the Government voluntarily dismissed Count Six of the indictment, the jury returned a verdict of guilty on the five remaining counts of receipt and possession of child pornography.

On May 29, 2014, the Court conducted a sentencing hearing. As at trial, Killingbeck represented himself—he filed his own sentencing submissions and objections to the pre-sentence investigation report, and cross-examined witnesses during the hearing. Ultimately, petitioner was sentenced to serve 240 months' imprisonment followed by a twenty-year term of supervised release. Petitioner timely appealed, filing his own notice of appeal and pro se brief.

On October 5, 2015, the U.S. Court of Appeals for the Second Circuit rejected Killingbeck's arguments and affirmed the judgment of conviction. United States v. Killingbeck, 616 F. App'x 14 (2d Cir. 2015) (summary order). Petitioner moved pro se for rehearing and rehearing en banc. Those requests were denied by the Court of Appeals on February 17, 2017. Thereafter, the U.S. Supreme Court denied his petition for a writ of certiorari on May 23, 2016, 136 S. Ct. 2457, and denied petitioner's request for rehearing on August 8, 2016, 137 S. Ct. 19.

On October 6, 2016, Killingbeck requested from this Court a docket sheet and "a packet of forms for filing a motion for a writ of habeas corpus." Petitioner also requested the appointment of standby counsel. A docket entry reflects that the Syracuse Clerk's Office mailed petitioner a docket sheet, a 2241 form packet, and a 2255 form packet. Petitioner's request for the appointment of standby counsel was denied on November 14, 2016.

On November 28, 2016, Killingbeck appealed the denial of counsel. While the appeal remained pending, petitioner filed in this Court another motion for the appointment of counsel and a motion for leave to proceed in forma pauperis. The Court of Appeals dismissed petitioner's appeal on May 3, 2017.

On December 27, 2017, Killingbeck filed a letter motion requesting information about the status of his case and about the various motions he had filed. In a December 29 text order, this Court explained that the Second Circuit had affirmed petitioner's conviction, that his request for the appointment of counsel had been denied, that he had appealed that motion, and that the Second Circuit had then dismissed that appeal.

The December 29 text order further advised Killingbeck that to the extent his additional requests for appointment of counsel—filed in this Court subsequent to his taking of an appeal of the denial of the same issue to the Second Circuit for review—were considered to still be pending, those additional requests would be denied in light of the Second Circuit's mandate dismissing his appeal from this Court's previous denial of the same request.

On January 29, 2018, Killingbeck filed this § 2255 motion along with a request for permission to proceed in forma pauperis.

III. LEGAL STANDARDS

A. Section 2255

Section 2255 permits a court to "vacate, set aside or correct" a conviction or sentence "imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). This section limits claims to those that allege "the sentence was imposed in violation of the Constitution or the laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence is in excess of the maximum authorized by law,

or is otherwise subject to collateral attack." Id. Accordingly, collateral relief under § 2255 is available "only for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that constitutes 'a fundamental defect which inherently results in a complete miscarriage of justice.'" United States v. Jackson, 41 F. Supp. 3d 156, 161 (N.D.N.Y. 2014) (quoting United States v. Bokun, 73 F.3d 8, 12 (2d Cir. 1995)).

B. Killingbeck's Pro Se Status

Because Killingbeck is proceeding pro se, his submissions will be "liberally construed in his favor," and will be read "to raise the strongest arguments that they suggest." Jackson, 41 F. Supp. 3d at 161 (internal citation and citation omitted). However, a § 2255 petitioner still bears the burden of proving his claim by a preponderance of the evidence, Triana v. United States, 205 F.3d 36, 40 (2d Cir. 2000), and "[a]iry generalities, conclusory assertions[,] and hearsay statements will not suffice" to meet this standard. United States v. Aiello, 814 F.2d 109, 113 (2d Cir. 1987). Nor is a reviewing court required to credit factual assertions that are "contradicted by the record in the underlying proceeding." Puglisi v. United States, 586 F.3d 209, 214 (2d Cir. 2009).

IV. DISCUSSION

At the outset, the Government correctly argues Killingbeck's § 2255 petition is time-barred. Section 2255 imposes a one-year statute of limitations, which 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 prevent 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)(1)-(4).

As relevant here, "finality attaches for purpose of [§ 2255's] limitations period when the Supreme Court denies a § 2255 petitioner's certiorari petition on direct review." Rosa v. United States, 785 F.3d 856, 860 (2d Cir. 2015); see also id. ("The filing of a motion for rehearing of such a . . . denial of certiorari does not affect [ ] finality . . . .").

In other words, the limitations period in this case began to run on May 23, 2016, the date on which Killingbeck's petition for certiorari was denied, and expired on May 23, 2017, one year later. Accordingly, petitioner's January 29, 2018 § 2255 motion is clearly untimely.

Killingbeck has failed to demonstrate any reason why the untimely nature of his § 2255 petition should be excused. See, e.g., United States v. Osmanson, 2014 WL 5587009 at *9 (D. Vt. Oct. 31, 2014) ("To equitably toll the one-year limitations period, a petitioner must show that extraordinary circumstances prevented him from filing his petition on time, and he must have acted with reasonable diligence throughout the period he seeks to toll.").

Importantly, a petitioner's "pro se status does not in itself constitute an extraordinary circumstance meriting tolling." Reid v. United States, 2014 WL 4101507 at *5 (E.D.N.Y. Aug. 15, 2014) (citation omitted). And "a prisoner has no constitutional right to counsel on a § 2255 petition." Id. at *4. Accordingly, Killingbeck's seriatim filings seeking the

assignment of counsel demonstrate neither diligence nor the kind of extraordinary circumstances that might warrant equitable tolling. See, e.g., Csanadi v. United states, 2016 WL 2588162 at *6 (D. Conn. May 4, 2016) (rejecting pro se petitioner's assertion that a motion for the appointment of counsel provided an equitable basis for tolling § 2255's limitations period); Sanchez-Butriago v. United States, 2003 WL 354977 at *3 (S.D.N.Y. Feb. 14, 2003) ("The limitation period is not tolled whenever a petitioner files any sort of motion. Were it tolled so easily, a petitioner could repeatedly file motions . . . and effectively eviscerate [the] statute of limitations.").

To be sure, some district courts to have grappled with this question have concluded otherwise. United States v. Flores, 2007 WL 4326733 at *2 (S.D.N.Y. Dec. 4, 2007) (observing petitioner chose to "engage in a time-consuming appeal of the denial" of his motion for appointment of counsel that was filed *before* he submitted his § 2255 motion and suggesting the better course would have been to first file the petition in a timely manner and *then* move for the appointment of counsel).

But even if one were to reach the merits here, Killingbeck's § 2255 petition would fail. A review of his submissions confirm that he continues to raise substantially the same kind of constitutional arguments he has repeatedly raised before this Court and on appeal. In sum and substance, petitioner believes he has a First Amendment right to view child pornography, at least when it arrives through "Usenet."

More particularly, Killingbeck contends that child pornography is *not* child pornography when it is delivered through this kind of newsgroup platform. But the law is settled that child pornography is not protected under the First Amendment, and "[t]he fact that Killingbeck obtained the pornographic material through 'Usenet' . . . *does not affect the*

analysis." Killingbeck, 616 F. App'x at 15 (emphasis added).

V. CONCLUSION

Killingbeck's § 2255 petition is untimely and meritless.

Therefore, it is

ORDERED that

1. John C. Killingbeck's § 2255 petition is DENIED; and

2. A certificate of appealability will not be issued.

The Clerk of the Court is directed to terminate the pending motions and to close the associated civil case openings.

IT IS SO ORDERED.

Dated: May 3, 2018
Utica, New York.

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of December, two thousand and eighteen,

Present: Rosemary S. Pooler
Raymond J. Lohier, Jr.,
Susan L. Carney

Circuit Judges,

John C. Killingbeck,

Petitioner - Appellant,

v.

United States of America,

Respondent - Appellee.

ORDER
Docket No. 18-1611

Appellant John C. Killingbeck filed a motion for reconsideration and the panel that determined the motion has considered the request.

IT IS HEREBY ORDERED, that the motion is denied.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court

Catherine O'Hagan Wolfe

Appendix C

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