UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-3602

Jason August Eisenach

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the District of Minnesota
(0:20-cv-00678-DSD)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

April 12, 2021

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

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-3602

Jason August Eisenach

Appellant

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Appeal from U.S. District Court for the District of Minnesota
(0:20-cv-00678-DSD)

MANDATE

In accordance with the judgment of 02/12/2021, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

April 19, 2021

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-3602

Jason August Eisenach

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the District of Minnesota
(0:20-cv-00678-DSD)

JUDGMENT

Before COLLOTON, STRAS, and KOBES, 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.

February 12, 2021

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

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
District of Minnesota

United States of America,

Plaintiff

v.

Jason August Eisenach,

Defendant.

Case No. CR 16-267 DSD/LIB

JUDGMENT IN A CRIMINAL CASE

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED THAT:

1. The motion to expand the record [ECF No. 88] is granted;
2. The motion to vacate pursuant to § 2255 [ECF No. 89] is denied; and
3. Pursuant to 28 U.S.C. § 2253, the court denies a certificate of appealability.

Date: October 26, 2020

KATE M. FOGARTY, CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 16-267(DSD/LIB)

United States of America,

Plaintiff,

v. **ORDER**

Jason August Eisenach,

Defendant.

This matter is before the court upon pro se defendant Jason August Eisenach's motions to expand the record and to vacate under 28 U.S.C. § 2255. Based on a review of the record, file, and proceedings herein, and for the following reasons, the motion to expand the record is granted and the motion to vacate is denied.

BACKGROUND

On October 4, 2016, Eisenach was indicted on one count of distribution of child pornography and one count of possession of child pornography. The government filed a superseding indictment on June 22, 2017, charging Eisenach with one count of receipt of child pornography and one count of possession of child pornography. Eisenach pleaded guilty to both counts on September 1, 2017, and was sentenced to 96 months' imprisonment and 15 years of supervised release in December of that year. It is what happened between the

October 2016 indictment and the September 2017 guilty plea that forms the basis of Eisenach's request for relief under § 2255.

After being indicted, Eisenach's asserted defense was that he did not know that the images at issue were child pornography until after he looked at them — at which point he claimed he deleted the photos — and thus he did not knowingly receive or possess child pornography. See ECF No. 95 Ex. 3, at 15–16.[1] Eisenach states that sometime before December 12, 2016, his defense counsel told him that "no reasonable jury would find [Eisenach] guilty beyond a reasonable doubt." Eisenach Decl. ¶ 3, ECF No. 90. Nevertheless, on December 12, 2016, Eisenach's defense counsel moved for a continuance on the grounds "that the forensic computer discovery and the alleged use of electronic devices involved in this case" required analysis and that he was exploring retaining an expert to analyze the evidence. ECF No. 22. In the statement of facts in support of the motion signed by Eisenach, he stated that he had discussed the matter with his defense counsel and agreed with the need for additional time to "analyze and prepare the defense to the forensic computer issues involved, including the retention and preparation of any expert witness." ECF No. 23.

[1] For the sake of clarity, the court cites to the page numbers assigned by CM/ECF.

On February 7, 2017, defense counsel again moved for a continuance due to the need to further analyze the forensic computer discovery and alleged use of electronic devices in the crime. ECF No. 25. Eisenach again acknowledged that he had discussed the matter with his defense counsel and agreed that more time was needed. ECF No. 26. After the government filed a superseding indictment in June of 2017, defense counsel moved for a third and final continuance on June 26, 2017. ECF No. 35. Defense counsel's motion was based on the need to analyze and prepare a defense against the new charge of receipt of child pornography. Id. As with the first two motions, Eisenach acknowledged that he had discussed the matter with his defense counsel and agreed with the need for more time. ECF No. 36.

After the third motion for continuance was granted, Eisenach's trial was set for September 6, 2017. See ECF No. 37. Sometime in August, Eisenach, following his counsel's advice, signed a stipulation stating that the individuals depicted in the images at issue were real people, that those people were under the age of 18, and that the images were produced outside of Minnesota. See ECF No. 95 Ex. 1. That stipulation was then included in the government's proposed exhibit list submitted shortly before trial. See ECF No. 43.

Instead of proceeding to trial, Eisenach pleaded guilty on September 1, 2017. At his change of plea hearing, Eisenach stated that he was there voluntarily and understood what was happening at the hearing. ECF No. 69, at 4, 25. He was asked twice whether he was satisfied with his defense counsel's performance, and both times he stated that he was. Id. at 5, 27. Eisenach stated that he had had enough time to speak to his defense counsel, and that defense counsel had answered all of his questions and told him what he thought would happen if he proceeded to trial. Id. Further, when asked if he had discussed whether to plead guilty with his defense counsel, he agreed that he had done so many times. Id. at 25. He also agreed that he had always been told that it was his decision whether to plead guilty, and that he had to make that decision knowingly and voluntarily. Id. Although he expressed some apprehension to pleading guilty, after a long colloquy in which the court explained to Eisenach that he was not required to plead guilty and he had a right to proceed to trial if he believed he was not guilty, Eisenach agreed that he was guilty. Id. at 27-32.

Eisenach appealed his sentence, and the Eighth Circuit Court of Appeals affirmed. Eisenach timely filed this motion to vacate on March 5, 2020, on the grounds of ineffective assistance of counsel. Eisenach first argues that his defense counsel was

ineffective because he moved for the three continuances, which Eisenach asserts gave the government time to strengthen its case against him. ECF No. 91, at 7-10. Eisenach contends that his defense counsel sought the continuances because he was not prepared and was not diligent in his investigation. Id. Second, Eisenach argues that his defense counsel was ineffective because he advised him to sign the stipulation mentioned above. Id. Eisenach asserts that this stipulation "contained substantially all of the elements of the offenses charged," and was therefore not a reasonable strategic decision designed to benefit him. See ECF No. 91, at 8-9. The government opposes Eisenach's motion.

DISCUSSION

I. Expanding the Record on a § 2255 Motion

Eisenach has moved to expand the record to include his submitted declaration and exhibits. See ECF No. 88. In addition, the government has filed a declaration and exhibits from Eisenach's defense counsel. Under Rule 7 of the rules governing § 2255 cases, the court may accept and consider such documents when ruling on a motion to vacate. See Thomas v. United States, 737 F.3d 1202, 1207 (8th Cir. 2013). The court therefore grants Eisenach's motion and will consider the documents filed by both sides in support of their positions.

II. Section 2255 Standard

Section 2255 provides a federal inmate with a limited opportunity to challenge the constitutionality, legality, or jurisdictional basis of an imposed sentence. This collateral relief is an extraordinary remedy, reserved for violations of constitutional rights that could not have been raised on direct appeal. United States v. Apfel, 97 F.3d 1074, 1076 (8th Cir. 1996). When considering a § 2255 motion, a court may hold an evidentiary hearing. See 28 U.S.C. § 2255(b). A hearing is not required, however, when "(1) the petitioner's allegations, accepted as true, would not entitle the petitioner to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." Sanders v. United States, 341 F.3d 720, 722 (8th Cir. 2003) (citation and internal quotation marks omitted). As discussed below, no hearing is required because Eisenach's claims are either contradicted by the record or facially meritless.

III. Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, Eisenach must meet both prongs of the test set forth in Strickland v. Washington, 466 U.S. 668 (1984). First, Eisenach must show that his counsel's performance was so deficient that it fell below

the level of representation guaranteed by the Sixth Amendment. Id. at 687. "There is a strong presumption that counsel's conduct falls within the wide range of professionally reasonable assistance and sound trial strategy." Jackson v. United States, 956 F.3d 1001, 1006 (8th Cir. 2020) (quoting Toledo v. United States, 581 F.3d 678, 680 (8th Cir. 1990)).

Second, he must establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland, 466 U.S. at 694. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Id. at 691. In the context of a guilty plea such as Eisenach's, he can establish prejudice by showing "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985).

A. Continuances

Eisenach first contends that his counsel was ineffective in requesting three separate continuances that, according to Eisenach, allowed the government time to strengthen its case against him. Eisenach states that the reason for each continuance was that his defense counsel was not prepared. Because Eisenach's

counsel submitted a declaration contesting this assertion, Eisenach argues that an evidentiary hearing is required to resolve any credibility and factual disputes. The court disagrees, as the record makes clear that Eisenach's assertions lack merit.

Each motion for continuance was accompanied by an explanation from Eisenach's counsel and a statement of facts signed by Eisenach regarding the reason for the request. See ECF Nos. 22, 23, 25, 26. Eisenach agreed that the first two continuances were needed to investigate, analyze, and prepare a defense regarding the forensic computer issues involved. Further, Eisenach agreed that the third continuance was necessary to analyze and prepare defenses to the superseding indictment. These statements of fact belie Eisenach's current assertion that his counsel requested continuances simply because he was unprepared, and thus an evidentiary hearing on the matter is not required.

The question then becomes whether the requested continuances constitute a performance so deficient as to rise to the level of ineffective assistance of counsel. Defense counsel is provided broad leeway in planning and executing a defense strategy, including whether to request a continuance or acquiesce to a request for a continuance. See Strickland, 466 U.S. at 689; Nazarenus v. United States, 69 F.3d 1391, 1394 (8th Cir. 1995); United States v. Antwine, 873 F.2d 1144, 1149 n.8 (8th Cir. 1989).

In Antwine, the court rejected defendant's claim of ineffective assistance of counsel based on counsel's request for a continuance, finding that the request "represented his effort to provide the most effective assistance possible by allowing adequate time to prepare a defense." 873 F.2d at 1149 n.8. And in Nazarenus, the court held that counsel was not ineffective even after acquiescing to a government-requested continuance that allowed the government to strengthen its case against the defendant. See 69 F.3d at 1394.

Similarly here, the record illustrates that defense counsel's decision to request three continuances, and Eisenach's acquiescence to each, represents a ~~reasonable effort~~ to investigate, analyze, and prepare the best defense possible. As such, defense counsel's performance was not deficient, and the court need not analyze whether Eisenach was prejudiced by these decisions.

B. Stipulation

Eisenach next argues that defense counsel was ineffective in advising him to sign a stipulation regarding certain facts before trial. Eisenach now contends that this stipulation "contained substantially all of the elements of the offenses charged," and his counsel was therefore deficient in advising him to sign it and he was prejudiced by its existence. No evidentiary hearing is

required before disposing of this claim because it is facially meritless.

The following facts were in the stipulation: the individuals depicted in the images at issue were real people, they were people under the age of 18, and the images were produced outside of Minnesota. To be convicted of receipt or possession of child pornography, the government needed to prove that Eisenach knowingly received or possessed the images, "using a means and facility of interstate and foreign commerce and that had been mailed, shipped and transported in and affecting interstate and foreign commerce, by any means including a computer," and that those images contained visual depictions of a minor engaging in sexually explicit conduct. See 28 U.S.C. § 2252(a)(2), (a)(4)(B). A comparison of the stipulation against what is required to convict someone of receipt or possession of child pornography clearly shows that Eisenach was not advised to stipulate to "substantially all" of the elements required.

Further, like his claim above, this argument fails because the decision to enter a stipulation of this kind can be part of a reasonable strategy, especially where the stipulation does not in any way impede defendant's chosen line of defense. See Lemon v. United States, 335 F.3d 1095, 1096 (8th Cir. 2003). And even if counsel's advice to enter the stipulation could be deemed

deficient, Eisenach has not shown how he was prejudiced by this decision. Stipulating to the above facts in no way hindered Eisenach's chosen defense that, as evidenced by his claim that he deleted the images immediately on realizing what they depicted, he did not knowingly or intentionally receive or possess child pornography. Eisenach has failed to establish that he was prejudiced by this decision because he has not shown that there is a reasonable probability that he would not have pleaded guilty but for the existence of this stipulation. As such, his claim of ineffective assistance of counsel relating to the stipulation fails.

IV. Certificate of Appealability

To warrant a certificate of appealability, a defendant must make a "substantial showing of the denial of a constitutional right" as required by 28 U.S.C. § 2253(c)(2). A "substantial showing" requires a petitioner to establish that "reasonable jurists" would find the court's assessment of the constitutional claims "debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). The court is firmly convinced that Eisenach's motion is baseless, and that reasonable jurists could not differ on the results. A certificate of appealability is not warranted.

CONCLUSION

Accordingly, **IT IS HEREBY ORDERED** that:

1. The motion to expand the record [ECF No. 88] is granted;

2. The motion to vacate pursuant to § 2255 [ECF No. 89] is denied; and

3. Pursuant to 28 U.S.C. § 2253, the court denies a certificate of appealability.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: October 23, 2020

s/David S. Doty
David S. Doty, Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
AT MINNEAPOLIS

JASON AUGUST EISENACH,	)	
	)	
Movant,	)	USDC Case No. 0:20-cv-____
	)	
v.	)	
	)	USDC Case No. 0:16-cr-267
UNITED STATES OF AMERICA,	)	
	)	Hon. David S. Doty
Respondent.	)	Senior U.S. District Judge

PRO SE MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE, SET ASIDE OR CORRECT A FEDERAL SENTENCE OR CONVICTION PURSUANT TO 28 U.S.C. §2255

[Return Date to be Fixed by the Court]

COMES NOW JASON AUGUST EISENACH, Movant *pro se*, in the above styled and numbered cause, and respectfully submits this Memorandum of Law in support of the Motion to Vacate pursuant to 28 U.S.C. §2255, and would show the Court the following facts, circumstances, and points of law:

I. Introduction

Mr. Eisenach asks this Honorable Court to vacate his convictions and sentence on the basis that they were the result of ineffective assistance of counsel. Specifically, former counsel was constitutionally deficient for unnecessarily delaying Mr. Eisenach's original trial setting – including repeatedly waiving Mr. Eisenach's constitutional and statutory right to a speedy trial – from the original January 17, 2017 setting, immediately prior to which point counsel assessed that "no reasonable jury would find [Mr. Eisenach] guilty beyond a reasonable doubt," until September 2017, when by August 2017, counsel assessed that "there was no way he could win [Mr. Eisenach's] case." Counsel was also constitutionally deficient for advising Mr. Eisenach to stipulate to elements of the charged offenses. Absent counsel's deficiencies there is a reasonable probability that Mr. Eisenach would have proceeded to trial as he originally intended.

Mr. Eisenach's plea was unknowing, unintelligent, and involuntary based on counsel's ineffective assistance. The convictions and sentence

resulting from the plea should be vacated and Mr. Eisenach returned to the pre-plea stage of proceedings in the criminal case.

II. Jurisdiction

Pursuant to 28 U.S.C. §2255, "[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 is otherwise subject to collateral attack, may move the court which imposed sentence to vacate, set aside, or correct sentence." Mr. Eisenach so moves this Court on grounds that his sentence was imposed and his conviction obtained as a result of proceedings wherein he was denied the effective assistance of counsel.

III. Review Standards

A motion for relief under §2255 follows the procedures established by the "Rules Governing Section 2255 Cases in the United States District Courts" ("Rules"). The text of §2255 states that "[u]nless the motion and the files and records of the case **conclusively** show that the prisoner is entitled to no relief,

the court shall cause notice thereof to be served on the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto."[1] Similarly, the Rules dictate that, upon initial consideration by the assigned District Judge, a §2255 motion should be dismissed only "if it **plainly** appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief."[2] In all other cases, "the judge must order the United States attorney to file an answer, motion, or other response within a fixed time, or to take action the judge may order."[3] The Rules authorize, where appropriate and by order of the Court, discovery proceedings, an expansion of the record, and an evidentiary hearing.

Subsequent to the "Preliminary Review" stage set out in Rule 4, the ultimate legal standard for motions brought pursuant to §2255 is prescribed by statute:

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1 *28 U.S.C. §2255* (emphasis added).

2 *Rule 4(b)* (emphasis added).

3 *Id.*

> If the court finds that . . . the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant him a new trial or correct the sentence as may appear appropriate.[4]

IV. Ground for Relief

A. Ground One:
Mr. Eisenach's Plea was not Knowingly, Intelligently and Voluntarily Entered as a Result of Ineffective Assistance of Counsel

[1]. The Applicable Standard

Mr. Eisenach may challenge the entry of his plea of guilty on the basis that counsel's ineffectiveness prevented the plea from being knowing and voluntary. *Tollett v. Henderson,* 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). In *Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), the Supreme Court held that the two-part test set forth in *Strickland v. Washington,*

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[4] *28 U.S.C. §2255.*

466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), applies to cases involving guilty pleas. *United States v. Regenos*, 405 F.3d 691, 693 (8th Cir. 2005). To prevail on a claim of ineffective assistance of counsel, Mr. Eisenach must show that his counsel's actions fell below an objective standard of reasonableness and that he suffered prejudice as a result. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *United States v. Thompson*, 872 F.3d 560, 566 (8th Cir. 2017). In the context of this claim, the prejudice showing requires that Mr. Eisenach "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and instead would have insisted on going to trial." *Hill*, 474 U.S. at 59 (1985); *Thompson*, 872 F.3d at 566. The Supreme Court recently clarified that this requirement is not contingent on the defendant having a reasonable defense, or any objective likelihood of acquittal, because the error which is being remedied is the "denial of the entire judicial proceeding . . . to which he had a right." *Lee v. United States*, 137 S.Ct. 1958, 1965 (2017).

[2]. Deficient Performance

Counsel was constitutionally deficient for unnecessarily delaying Mr. Eisenach's trial – including repeatedly waiving Mr. Eisenach's constitutional and statutory right to a speedy trial – from the original January 17, 2017 setting, immediately prior to which point counsel assessed that "no reasonable jury would find [Mr. Eisenach] guilty beyond a reasonable doubt,"[5] until September 2017, when by August 2017, counsel assessed that "there was no way he could win [Mr. Eisenach's] case."[6] The basis for counsel's deteriorating appraisal of Mr. Eisenach's chances at trial are directly attributable to counsel's deficiency in failing to be prepared and failing to move the case forward to a timely trial in January 2017. Specifically, between January and September of 2017, due to former counsel's lack of diligence, the

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[5] *See EX #1, Declaration of Jason August Eisenach, in Support of Motion to Vacate, Set Aside or Correct a Federal Sentence or Conviction Pursuant to 28 U.S.C. §2255, ¶3* [attached to the contemporaneously submitted Motion to Expand the Record].

[6] *See EX #1, ¶8.*

United States obtained a superseding indictment,[7] altering the count one offense from distribution of child pornography – an offense for which there was clearly insufficient evidence[8] – to receipt of child pornography,[9] and gathered substantially more inculpatory evidence against Mr. Eisenach.[10]

Counsel was also constitutionally deficient for advising Mr. Eisenach to stipulate to elements of the charged offenses.[11] *See, e.g., United States v. McCoy,* 410 F.3d 124, 130-135 (3d Cir. 2005) (trial counsel's decision to stipulate to elements of knowledge and intent may constitute ineffective assistance of counsel). This is true, because: 1) the rationale provided by counsel makes no sense as it advances none of a trial defendant's interests[12] and therefore cannot be considered a reasonable strategic decision; 2) Mr. Eisenach received

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7 *DE #31.*

8 *See EX #1, ¶3.*

9 *Compare DE #1 with DE #31; See also, EX #1, ¶6.*

10 *See EX #1, ¶7.*

11 *Id., ¶4.*

12 *See EX #1, ¶4.*

absolutely no benefit from his stipulation, made at a time when they remained in the posture of proceeding to trial; and 3) that stipulation contained substantially all of the elements of the offenses charged, i.e., that Mr. Eisenach knew that he was receiving child pornography containing images of real children and that those images had moved in interstate commerce.

"Convictions for receipt and possession of child pornography turn on essentially the same requirements and evidence. The elements of receipt under 18 U.S.C. § 2252(a)(2) require the defendant to knowingly receive an item of child pornography, and the item to be transported in interstate or foreign commerce. The elements of possession under 18 U.S.C. § 2252(a)(4)(B) require the defendant to knowingly possess an item of child pornography, and the item to be transported in interstate or foreign commerce by any means." *United States v. Worthey*, 716 F.3d 1107, 1113 (8th Cir. 2013) (internal citations omitted).

After former counsel advised Mr. Eisenach to stipulate to all elements of the offenses by signing a written stipulation that Mr. Eisenach knew that

the material he found was in fact child pornography, that those depicted were in fact children, and that the images moved in interstate commerce, the United States included reference to the written stipulations in its trial brief[13] and listed the written stipulations as potential trial exhibits.[14] There is absolutely no strategic or reasonable basis for an attorney to advise his client to stipulate to all elements of an offense when that client intends to proceed to trial.

Former counsel's delay, at the point he recognized that "no reasonable jury would find [Mr. Eisenach] guilty beyond a reasonable doubt,"[15] fell below the minimal level of competence demanded of criminal defense

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[13] *See DE #41, pp. 11-12* ("**2. Stipulations** The government and the defendant have agreed to stipulate to the interstate commerce element of the charged offenses, as well as to the fact that the children depicted in the child pornography are real people under the age of 18 at the time those files were produced. The parties have also stipulated that the records of Internet service provider CenturyLink are authentic business records covered by Federal Rule of Evidence 803(6). The government will offer the signed stipulations as exhibits during trial.").

[14] *See DE #43, p. 3* ("Plaintiff's Exhibit No. 66 – Stipulation as to children and interstate commerce.").

[15] *See EX #1, ¶3.*

counsel.[16] The same is true of counsel's inexplicable advice that Mr. Eisenach should agree to stipulations which were essentially a confession to the offenses changed in the superseding indictment. *See, e.g., United States v. McCoy,* 410 F.3d 124, 130-135 (3d Cir. 2005). Former counsel's deficiencies left his client with no choice but to plead guilty and constitute a total abdication of counsel's defense function under the Sixth Amendment.

[3]. Prejudice

Absent counsel's lack of diligence, unpreparedness, and inexplicable misadvice that Mr. Eisenach should stipulate to the elements of the offenses

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[16] The factual bases offered to support counsel's request for continuances and for waiving his client's right to a speedy trial were: 1) On December 12, 2016, "the need for additional time to analyze and prepare the defense to the forensic computer issues involved, including the retention and preparation of any expert witnesses." *DE #23;* 2) On February 7, 2017, "the need for additional time to analyze and prepare the defense to the forensic computer issues involved." *DE #26;* and 3) On June 26, 2017, "the need for additional time to analyze and prepare the defense to the superseding indictment for which the first appearance is on 07/10/2017." *DE #36.* The legitimacy of the first two are called into question by counsel's assessment that no reasonable jury could find Mr. Eisenach guilty – *See EX #1,* ¶3 – and the third would have been unnecessary but for the delays occasioned by the two prior illegitimately sought continuances.

charged, there is a reasonable probability that Mr. Eisenach would have persisted in his plea of not guilty and proceeded to exercise his right to a trial by jury.[17] Mr. Eisenach only pleaded guilty because counsel's deficiencies left him with no other option.[18] This reality is supported by the fact that Mr. Eisenach had previously rejected a more favorable plea offer, which capped his sentence exposure at 5 years' imprisonment.[19] Further buttressing the reasonable probability that Mr. Eisenach would have proceeded to trial but for counsel's deficiencies is the record of Mr. Eisenach's change of plea hearing, held September 1, 2017, which demonstrated that he was reluctantly pleading guilty because his former counsel has advised him that he would lose at trial – as a direct result of counsel's deficiencies.

> THE COURT: ***Has [former counsel] told you what he thinks ought to happen in this case or what would happen if you went to trial?***
>
> THE DEFENDANT: ***Yes.***

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17 *See EX#1, ¶¶ 8, 10.*

18 *Id.*

19 *Id., ¶5.*

THE COURT: Has he told you what he thinks will happen here when you are pleading guilty?

THE DEFENDANT: Yes.

THE COURT: Okay. And you are still willing to plead guilty?

THE DEFENDANT: Yes.

THE COURT: ***Do you believe you are guilty?***

THE DEFENDANT: ***Yes and no, to be honest.***

THE COURT: Well, what's the no?

THE DEFENDANT: I -- I don't know if you know my history or anything, but I was planning on getting into law enforcement. You know, I found this stuff years ago on a computer with a -- on the old hard drive and I was snooping around on my phone. I found a similar program on -- for my phone and I -- it just went too far, and this is where I am.

THE COURT: But you don't disagree that that's where you are, right?

THE DEFENDANT: I -- I am guilty because I should have left it alone, like the first time.

THE COURT: Okay.

THE DEFENDANT: And that's why I am here.

THE COURT: So I want to make --

THE DEFENDANT: I want to take responsibility and -- you know, I didn't think it was going to be this bad. ***I was planning on going to trial.*** I didn't want to come here and do this, but after hearing everything

against me, this is the only course that makes sense and –

* * * * *

THE COURT: All right. And so I'm going to ask the question again that you had doubts about, but I want to make sure that you don't have doubts about, and that is whether you believe you are guilty of the charges in the indictment.

THE DEFENDANT: You know, the evidence is there against me. It doesn't matter why I did it. The evidence is there, and it can't be erased, and ***I'll lose.***

* * * * *

THE DEFENDANT: . . . ***I have no choice but to plead guilty.***

* * * * *

THE DEFENDANT: . . . ***I don't want to sit there and try to fight a losing war. If I'm going to lose at war, then it's not even worth fighting, is what I am saying.***

* * * * *

THE COURT: ***And, again, I'm going to ask you, do you now wish to plead guilty?***

THE DEFENDANT: ***Well, I wish I didn't have to, but I will, sir.***

THE COURT: Okay. So I'm going to ask you --

THE DEFENDANT: ***I wish I didn't have to, but I will.***

DE # 69, pp. 27-32 (emphasis added).

Had counsel not unnecessarily delayed Mr. Eisenach's trial – allowing the prosecution time to gather additional evidence and correct the count one charging error – and not unreasonably advised Mr. Eisenach to stipulate to the elements of the offenses charged, there is a reasonable probability that he would have persisted in his plea of not guilty and proceeded to trial by jury. After all, just as Mr. Eisenach told the Court at his change of plea hearing "he was planning on going to trial,"[20] until his counsel's deficiencies left him with "no choice but to plead guilty."[21]

V. Prayer for Relief

Mr. Eisenach's plea was entered as a result of ineffective assistance and is therefore neither knowing or voluntary. *See, e.g., Tollett v. Henderson,* 411 U.S. 258, 267 (1973). Moreover, a conviction obtained by such plea must be reversed. *See, e.g., Hill v. Lockhart,* 474 U.S. 52 (1985). The Supreme Court recently clarified that this requirement is not contingent on the defendant

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[20] *DE #69, p. 28.*

[21] *Id., p. 30.*

having a reasonable defense, or any objective likelihood of acquittal, because the error which is being remedied is the "denial of the entire judicial proceeding ... to which he had a right."*Lee v. United States*, 137 S. Ct. 1958, 1965 (2017).

Mr. Eisenach was deprived of rights guaranteed by the Fifth and Sixth Amendments to the United States Constitution in connection with his plea in this case. Mr. Eisenach seeks to vindicate those rights in this Court. Mr. Eisenach has established entitlement to, and respectfully requests vacation of his convictions and sentence.

Respectfully submitted this ____ day of February, 2020.

Jason A. Eisenach, *Pro Se*
Register # 20895-041
FCI Elkton
P.O. Box 10
Lisbon, OH 44432

VI. Verification

I, Jason August Eisenach, verify under penalty of perjury, pursuant to 28 U.S.C. §1746 that the foregoing is true and correct. Executed this ___ day of February, 2020.

_____

Jason A. Eisenach, *Pro Se*
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