No. 21-1147

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 07, 2021
DEBORAH S. HUNT, Clerk

HERBERT BERNARD JOHNSON, )
)
Petitioner-Appellant, )
)
v. ) ORDER
)
UNITED STATES OF AMERICA, )
)
Respondent-Appellee. )

Before: ROGERS, Circuit Judge.

Herbert Bernard Johnson, a federal prisoner proceeding pro se, appeals the district court's judgment denying his motion to vacate his sentence, filed pursuant to 28 U.S.C. § 2255, and his motion to amend the motion to vacate. Johnson has filed an application for a certificate of appealability ("COA"), a motion to take judicial notice, a motion to compel production of grand jury material, and a motion to supplement the certified record.

In 2018, a jury convicted Johnson of attempted coercion and enticement of a minor, in violation of 18 U.S.C. § 2422(b) ("Count One"); travel with intent to engage in illicit sexual activity, in violation of 18 U.S.C. § 2423(b) ("Count Two"); and possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(2) ("Count Four"). The district court sentenced him to 121 months of imprisonment on each count, to run concurrently, and this court affirmed. *United States v. Johnson*, 775 F. App'x 794, 801 (6th Cir. 2019).

In August 2020, Johnson filed a motion to vacate, raising seventeen grounds for relief. He later moved to amend his motion to include three additional claims. The district court denied Johnson's motion to amend, finding that his proposed additional claims were untimely because they did not relate back to the filing date of his initial § 2255 motion and that Johnson was not entitled to equitable tolling. The district court alternatively found that, even if it granted Johnson's

motion to amend, all three claims raised therein, as well as Johnson's fifteen other claims that did not challenge counsel's effectiveness, were procedurally defaulted because Johnson did not raise them on direct appeal. It found that Johnson failed to present any argument showing cause and prejudice or actual innocence to overcome the procedural default. Finally, the district court found that Johnson's independent ineffective-assistance-of-trial-counsel claims were meritless.

In his COA application, Johnson argues that the district court should have construed claim five of his § 2255 motion, as well as arguments in his reply brief, as alleging actual innocence. He also argues that reasonable jurists could debate the district court's conclusion that claim eighteen did not relate back to the filing of his initial § 2255 motion. Finally, Johnson argues that reasonable jurists could debate the merits of claims three through five, ten, and eighteen, and he contends that his defense attorneys performed ineffectively by failing to preserve these arguments, both in the district court and on appeal. By failing to request a COA as to his other grounds for relief, Johnson has abandoned them on appeal. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam); *Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000).

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner may meet this standard by showing that reasonable jurists could debate whether the petition should have been determined in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). If the petition was denied on procedural grounds, the petitioner must show "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

*I.* <u>*Actual Innocence*</u>

Johnson first challenges the district court's finding that he did not raise a claim of actual innocence to overcome the procedural default of his claims. Specifically, he cites claim five of his habeas petition, in which he argued that he could not be convicted of sexually abusing a minor, in

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Criminal No. 15-CR-20577
Civil Action No. 20-CV-12328

vs.

HON. BERNARD A. FRIEDMAN

HERBERT BERNARD JOHNSON,

Defendant.
_____/

**OPINION AND ORDER DENYING DEFENDANT'S § 2255 MOTION AND DENYING DEFENDANT'S MOTION TO AMEND HIS § 2255 MOTION**

This matter is presently before the Court on defendant's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence [docket entry 109] and defendant's motion to amend his § 2255 motion [docket entry 114]. Plaintiff has filed a response opposing both motions and defendant has filed a reply. Pursuant to E.D. Mich. LR 7.1(f)(2), the Court shall decide both motions without a hearing.

On March 27, 2018, this Court sentenced defendant to a 121-month prison term following a jury trial in which defendant was found guilty on three counts: Count 1: attempted coercion and enticement of a minor, in violation of 18 U.S.C. § 2422(b); Count 2: travel with intent to engage in illicit sexual activity, in violation of 18 U.S.C. § 2423(b); and Count 4: possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(2). *See United States v. Johnson*, 775 F. App'x 794, 796-97 (6th Cir. 2019). The jury acquitted defendant of transportation of child pornography, in violation of 18 U.S.C. § 2252A(a)(1). *Id.* at 797. At the close of trial, defendant moved for a judgment of acquittal under Fed. R. Crim. P. 29, which the Court denied. *Id.*

Defendant subsequently filed a timely appeal challenging the Court's denial of his motion for acquittal and claiming insufficient evidence as to all three of his convictions. *Id.* As to

the first two counts – attempted coercion and enticement of a minor, and travel with intent to engage in illicit sexual activity – the Sixth Circuit held that, "[a]fter a careful review of the entire record, we conclude that there was substantial and competent evidence of defendant's guilt and that evidence was more than sufficient for a rational juror to reach a guilty verdict on both counts." *Id.* at 799. Regarding the third count, possession of child pornography, the Sixth Circuit held that "defendant offers no alternative explanation for his possession of the pornographic images of children, and the evidence supporting defendant's guilt is copious. A rational juror could conclude from the evidence that defendant was guilty of possession of child pornography." *Id.* at 800. The court of appeals thus affirmed this Court's judgment of conviction as to all three counts.

Defendant now raises seventeen issues in his § 2255 motion and three additional issues in his motion to amend his § 2255 motion, for a total of twenty claims. Plaintiff has accurately and succinctly summarized the issues raised in defendant's motions as follows:

1. The jury trial voir dire was conducted in a manner that did not ensure protection against bias.
2. The district court failed to investigate juror misconduct when a juror fell asleep.
3. The indictment was defective as to count one and two or the trial suffered a fatal variance.
4. Johnson's indictment was constructively amended as to count four.
5. The jury instructions for count one did not instruct the jury that Johnson could not have been charged with sexual abuse of a minor under the government's theory.
6. There was no federal jurisdiction for conviction on count four.
7. The use of Craigslist Ad No. 5187810747 as context to Johnson's conversation with Jason was a violation of Fed. R. Evid. 901.
8. Admission of children's panties violated Fed. R. Evid. 404(b).
9. Defendant's attorney was ineffective for failing to properly use a defense expert witness to provide

mitigation evidence and testimony.

10. Johnson's statutory enhancement under 18 U.S.C. § 2252A(b)(2) and his resulting sentence on count four were *Apprendi* violations.
11. Agent Nichols' testimony about NCIS database information was inadmissible hearsay.
12. Johnson's attorney was ineffective in cross-examination of Agent Nichols and Christensen.
13. The restitution order was improper.
14. The district court does not have the authority to direct the Bureau of Prisons to evaluate Johnson.
15. The district court delegated imposition of Johnson's punishment to a non-article III judge.
16. Special conditions 4 and 7 act as occupational restrictions.
17. Special conditions 2 and 4 are unconstitutionally vague.

In his motion to amend the [motion], Johnson [seeks to add]:

18. Key terms in the jury instructions for counts one and two were never defined for the jury.
19. It was error for the district court to sentence Johnson to lifetime supervised release.
20. Cumulative errors infected Johnson's trial.

Pl.'s Resp. at 10-11 (footnote omitted). Johnson also alleges ineffective assistance of counsel as to all of the above claims. Def.'s Reply at 2. Upon review of the facts and relevant case law, the Court shall deny defendant's motions for the following reasons.

*I. Section 2255's Statute of Limitations*

Defendant's motion to amend his § 2255 motion is untimely. "The Antiterrorism and Effective Death Penalty Act of 1996 ('AEDPA') established a one-year statute of limitations for filing federal habeas petitions." *Cleveland v. Bradshaw*, 693 F.3d 626 (6th Cir. 2012). Section 2255(f)(1) provides, in relevant part, that "[a] 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of [four possible dates, including]

the date on which the judgment of conviction becomes final."[1] The Supreme Court has held that "[f]or the purposes of starting the clock on § 2255's one year limitation period . . . a judgment of conviction becomes final when the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction." *Clay v. United States*, 537 U.S. 522, 525 (2003). This expiration date falls "90 days after entry of the Court of Appeals' judgment and 69 days after the issuance of the appellate court's mandate." *Id.* (citation omitted). "AEDPA's one-year statute of limitations also applies whenever a party attempts to raise a new claim for relief in a motion to amend pleadings pursuant to Federal Rule of Civil Procedure 15." *Crawford v. United States*, No. 10-20269, 2016 WL 3213403, at *3 (E. D. Mich. June 10, 2016) (citation omitted). In the present case, the Sixth Circuit issued its judgment on May 23, 2019 [docket entry 104], and its mandate on June 14, 2019 [docket entry 105]. One year and ninety days after the former date was August 21, 2020, and one year and sixty-nine days after the latter date was August 22, 2020. Defendant signed

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[1] Section 2255(f)(1)-(4) provides the following four possible dates on which the statute of limitations begins to run:

> (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.

Based on the facts alleged and arguments raised in the instant motion, the only relevant statute of limitations date is that which is contained in § 2255(f)(1).

his motion to amend his § 2255 motion on August 30, 2020, and certified that he placed the motion in his prison's legal mail system on September 1, 2020. *See* Mot. Am. at 4-5. Thus, defendant missed the deadline to file a motion to amend his § 2255 motion.

Because defendant's motion to amend is time-barred by AEDPA's statute of limitations, the claims therein may be raised only if they "relate back to the date of the original pleading within the meaning of Rule 15(c)." *Crawford*, 2016 WL 3213403, at *3. While Rule 15(c) provides three possible ways in which an amendment can relate back to the original pleading, only subsection 15(c)(1)(B) is relevant to the facts and arguments raised in the instant motion. Rule 15(c)(1)(B) provides that "[a]n amendment to a pleading relates back to the date of the original pleading when: the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading." The Supreme Court has emphasized that Rule 15(c) "relaxes, but does not obliterate, the statute of limitations; hence relation back depends on the existence of a common core of operative facts uniting the original and newly asserted claims." *Mayle v. Felix*, 545 U.S. 644, 659 (2005) (internal quotation marks omitted). In *Mayle*, the Supreme Court resolved a circuit split as to the proper approach to determining when claims relate back. The more lenient of the two approaches allowed "relation back of a claim first asserted in an amended petition, so long as the new claim stems from the habeas petitioner's trial, conviction, or sentence." *Id.* at 656. The Supreme Court observed that under this first approach, "virtually any new claim introduced by an amended petition will relate back, for federal habeas claims, by their very nature, challenge the constitutionality of a conviction or sentence, and commonly attack proceedings anterior thereto." *Id.* at 657. The Court favored the narrower of the two approaches to relation back, which allows review of untimely claims "only when the claims

added by amendment arise from the same core facts as the timely filed claims, and not when the new claims depend upon events separate in both time and type from the originally raised episodes." *Id.* (internal quotation marks omitted). In adopting the latter approach, the Supreme Court noted that "[i]f claims asserted after the one-year period could be revived simply because they relate to the same trial, conviction, or sentence as a timely filed claim, AEDPA's limitation period would have slim significance." *Id.* at 662 (citation omitted).

Defendant's motion to amend his § 2255 motion contains three claims. First, defendant argues that "key terms in the jury instructions for counts one and two were never defined for the jury." Def.'s Mot. Am. at 2. While defendant's original motion raised a distinct jury-instruction-related issue,[2] none of the original claims therein addressed the definitions in the jury instructions, or lack thereof. Second, defendant claims that "it was error for the district court to sentence Johnson to lifetime supervised release." *Id.* at 3. Again, while defendant originally raised distinct supervised release-related issues,[3] none of the original claims address the condition of lifetime supervised release. These first two claims do not fall within the narrower approach to relation back that the Supreme Court embraced in *Mayle*. They relate to the same "trial, conviction, or sentence," but do not share a "common core of operative facts" with the claims originally raised. The third and final claim defendant raises in his motion to amend is that "cumulative errors infected Johnson's trial." Def.'s Mot. Am. at 4. Given the cumulative nature of this third claim, it does arguably overlap with claims raised in the original § 2255 motion. However, "[u]nder AEDPA, we

[2] Claim 5 takes issue with allegedly unproved elements of Count I, attempted coercion and enticement of a minor. Def.'s Mot. at 12-14.

[3] Claims 16 and 17 take issue with other conditions of defendant's supervised release, including computer monitoring, employment preapproval, and sex offender diagnostic evaluations, treatment, or counseling. Def.'s Mot. at 31-32.

do not recognize claims of cumulative error." *Hill v. Mitchell*, 842 F.3d 910, 948 (6th Cir. 2016).

In his reply brief, defendant argues that "[e]ven if Johnson's claims were not sufficiently related to his initial claims, equitable tolling should apply." Def.'s Reply at 4. The Supreme Court has held that under AEDPA, habeas petitions are subject to equitable tolling. *See Holland v. Florida*, 560 U.S. 631, 649 (2010). "The doctrine of equitable tolling allows courts to toll a statute of limitations when 'a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control." *Ordway v. Jordan*, No. 20-5425, 2020 WL 6197929, at *4 (6th Cir. Sept. 29, 2020) (internal quotation marks and citations omitted). "A petitioner is entitled to equitable tolling only if he shows that (1) he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland*, 560 U.S. at 649 (internal quotation marks and citations omitted). "[T]he doctrine of equitable tolling is used sparingly by federal courts. The party seeking equitable tolling bears the burden of proving he is entitled to it." *Roberts v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010) (citation omitted).

In this case, the "extraordinary circumstances" at issue involved the closures and disruptions, both within prison facilities and the federal courts, caused by the Covid-19 pandemic. Def.'s Reply at 4-7. Though in many ways the pandemic is extraordinary, defendant's "failure to meet the filing deadline did not unavoidably ar[i]se from circumstances beyond [his] control." *Jaqua v. Winn*, No. 19-2321, 2020 WL 6703198, at *2 (6th Cir. Sept. 1, 2020). In his reply brief, defendant outlines the various steps he has taken over the past year to litigate his case. Def.'s Reply at 4-6. However, defendant ultimately waited until the last minute to file his original § 2255 motion, leaving only three days to research, write, and file the motion to amend. *Id.* at 6. A lack of diligence

is further indicated by defendant's admission that upon filing the original motion, he already intended to file the motion to amend presently at issue. *Id.* With or without a global pandemic, defendant did not leave adequate time for a timely filing, particularly given the limited law library access and similar features that generally characterize prison life. *See Jaqua*, 2020 WL 6703198, at *2. For these reasons, the Court concludes that defendant is not entitled to equitable tolling of the limitations period. As the proposed amendment does not relate back and its untimeliness may not be excused, defendant's motion to amend his § 2255 motion is denied.

*II. Failure to Raise Claims on Appeal*

Even if the Court granted defendant's motion to amend, each of defendant's twenty claims, with the exception of those pertaining to ineffective assistance of counsel, is procedurally defaulted. By failing to raise any of them on direct appeal, defendant procedurally waived these claims. *See Bousley v. United States*, 523 U.S. 614, 621 (1998). "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either cause and actual prejudice, or that he is actually innocent." *Id.* at 622 (internal quotation marks and citations omitted).

The Supreme Court has explained what is required to demonstrate both "cause and actual prejudice" and "actual innocence." "[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded" counsel's ability to raise the claim earlier. *Coleman v. Thomas*, 501 U.S. 722, 753 (1991) (internal quotation marks and citation omitted). The Supreme Court further explained that "[a]ttorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must bear the risk

of attorney error." *Id.* at 752-53 (internal quotation marks omitted). However, attorney error that rises to the level of incompetence can constitute cause.[4] *Id.* at 754. To prove the "actual prejudice" component of "cause and actual prejudice," defendant "must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original). Finally, "[t]o establish actual innocence, petitioner must demonstrate that, in light of the evidence, it is more likely than not that no reasonable juror would have convicted him," but for the allegedly ineffective assistance of counsel. *Bousley*, 523 U.S. at 623 (internal quotation marks omitted). On appeal, defendant only challenged this Court's denial of his motion to acquit. In his instant motion, defendant does not explain why he failed to raise on appeal any of the twenty issues he is raising now. Nor does defendant suggest that he is actually innocent of the three charges of which he was convicted. Thus, defendant has established neither "cause and actual prejudice" nor "actual innocence" and cannot overcome his failure to raise these issues on appeal.

*III. Ineffective Assistance of Counsel*

Finally, defendant's claims of ineffective assistance of counsel fail on the merits. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court held that

> [a] convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious

[4] The Court addresses the issue of ineffective assistance of counsel below.

> as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

*Id.* at 687. The Supreme Court further clarified that

> [j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable .... Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance ....

*Id.* at 688. Consequently, to prove ineffective assistance of counsel, defendant bears a heavy evidentiary burden.

Defendant has not met his burden in the instant motion. In not one of the alleged instances of ineffective assistance did his counsel's performance fall below the "wide range" of reasonable conduct. The claims either involve entirely proper conduct by plaintiff and/or the Court, requiring no objection on the part of defense counsel (Claims 3, 4, 5, 6, 7, 8, 10, 11, 13, 14, 15, 16, 17, 18, and 19), or reasonable trial strategy (Claims 1, 2, 9, and 12). *See, e.g.*, *Miller v. Webb*, 385 F.3d 666, 672-73 (6th Cir. 2004) ("A strategic decision cannot be the basis for a claim of ineffective assistance unless counsel's decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness."). Further, had any of the claims fallen below the "wide range of reasonable professional assistance," defendant has failed to present any evidence as to prejudice, particularly in light of the strong factual record presented at trial.

For these reasons, the Court concludes that defendant's § 2255 motion fails both procedurally and substantively. Procedurally, the motion fails because defendant waived all but the

ineffective assistance of counsel claims by neglecting to raise them on direct appeal. Substantively, the ineffective assistance of counsel claims fail because defendant has not met his burden under *Strickland*. Accordingly,

IT IS ORDERED that defendant's § 2255 motion is denied.

IT IS FURTHER ORDERED that defendant's motion to amend his § 2255 motion is denied.

IT IS FURTHER ORDERED that plaintiff's motion to strike defendant's reply is denied.

s/Bernard A. Friedman
Bernard A. Friedman
Senior United States District Judge

Dated: December 29, 2020
Detroit, Michigan

**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on December 29, 2020.

Herbert Bernard Johnson, #51407039
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Littleton, CO 80123

s/Johnetta M. Curry-Williams
Case Manager

No. 21-1147

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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HERBERT BERNARD JOHNSON,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

**BEFORE:** WHITE, THAPAR, and READLER, Circuit Judges.

Herbert Bernard Johnson petitions for rehearing en banc of this court's order entered on October 7, 2021, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

**ENTERED BY ORDER OF THE COURT**

**Deborah S. Hunt, Clerk**

Appendix C.