APPENDIX A

No. 22-1736

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH MARK WILLIAMS, JR.,)
)
Petitioner-Appellant,)
)
v.) ORDER
)
UNITED STATES OF AMERICA,)
)
Respondent-Appellee.)

Before: NORRIS, Circuit Judge.

Joseph Mark Williams, Jr., a pro se federal prisoner, appeals a district court judgment denying his motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. He seeks a certificate of appealability ("COA"). *See* 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b)(1)-(2).

Williams and his girlfriend produced child pornography involving the two of them and her 11-year-old daughter, three-year-old granddaughter, and six-month-old grandniece. Williams pleaded guilty to three sexual-exploitation counts: two of sexual exploitation of a child, and one of distribution of child pornography. The trial court sentenced him to prison for 80 years. Williams appealed but voluntarily dismissed that appeal on December 7, 2018. On February 3, 2020, Williams filed the § 2255 motion. Although it raised 11 claims, Williams seeks a COA on only two (as numbered in the § 2255 motion), both alleging that trial counsel was ineffective: for (2) improperly inducing Williams to plead guilty and (7) failing to argue that Williams's conduct did not constitute the offenses charged in the three counts. The district court denied the § 2255 motion as untimely and denied a COA. The district court also, in the alternative, rejected the individual claims for various reasons, Claims 2 and 7 because they were meritless. Williams timely appealed.

A COA shall issue "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If the district court denied the § 2255 motion on the merits, the applicant must show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). If the district court denied the § 2255 motion on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the applicant shows that jurists of reason would find debatable (a) whether the motion states a valid claim of the denial of a constitutional right and (b) whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). A COA is improper "if *any* outcome-determinative issue is not reasonably debatable." *Moody v. United States*, 958 F.3d 485, 488 (6th Cir. 2020). Williams fails to meet this standard.

Williams seeks a COA on at least three issues: whether the § 2255 motion was untimely and whether Claims 2 and 7 are meritorious. He also requests a COA on another issue but is unclear on what it is. He may be requesting a COA on another claim that trial counsel was ineffective: for failing to object when the trial court did not sua sponte determine if Williams's conduct constituted the offenses charged in the three counts. If so, that is just Claim 7 again.

Or Williams may be seeking a COA on a claim that it was *the trial court* that erred in failing to sua sponte determine if Williams's conduct constituted the offenses charged in the three counts. But a trial-court-error claim could have been raised on direct appeal. Excepting claims of ineffective assistance of counsel, "claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice." *Massaro v. United States*, 538 U.S. 500, 504 (2003). Williams has not argued cause and prejudice. In short, if this is the claim Williams seeks to have certified, it is procedurally barred. Jurists of reason would not debate it.

As for the other claims raised in the § 2255 motion, any not raised in the COA application are forfeited. *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)

Williams argues that the district court erred in holding his § 2255 motion untimely. But even assuming that procedural ruling debatable, it is not enough to warrant granting a COA. Williams must also show that jurists of reason would find debatable whether his motion states a valid claim of the denial of a constitutional right. In short, his two ineffective-assistance-of-counsel claims must be examined.

To establish ineffective assistance, Williams must show that (1) counsel's performance was deficient—objectively unreasonable under prevailing professional norms—and (2) it prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Prejudice exists if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Id.* at 694. "Because the petitioner must satisfy *both* prongs, the inability to prove either one of the prongs—regardless of which one—relieves the reviewing court of any duty to consider the other." *Nichols v. United States*, 563 F.3d 240, 249 (6th Cir. 2009) (citing *Strickland*, 466 U.S. at 697).

To understand Claim 2 to the extent raised (and that far preserved, *see Jackson*, 45 F. App'x at 385) in the COA application, the reader must understand Claim 7. There, Williams argues that trial counsel was ineffective for failing to argue that Williams's conduct did not constitute the offenses charged in the three counts. In Claim 2, then, Williams argues that trial counsel was ineffective for improperly inducing Williams to plead guilty to offenses that his conduct had not constituted. Williams argues that this rendered his guilty plea unintelligent and involuntary. The district court held that, in both Claims 2 and 7, Williams had failed to meet his burden under *Strickland*. The claims will be considered together.

In Counts 3-4, Williams pleaded guilty to sexual exploitation of a child, 18 U.S.C. § 2251(a), (e), and, in Count 7, to distribution of child pornography, 18 U.S.C. § 2252A(a)(2)(A), (b)(1). (Counts 1-2 and 5-6 were dismissed.) He now argues that those statutes do not apply to his alleged conduct, because the allegedly pornographic images he was involved in making "do not contain content that fits within the definition of any of the federal statutes at issue."

"Any person who . . . .uses . . . any minor to engage in, or who has a minor assist any other person to engage in, . . . any sexually explicit conduct for the purpose of producing any visual

depiction of such conduct" is guilty of sexual exploitation of children. 18 U.S.C. § 2251(a). Distribution of child pornography, meanwhile, is committed by

> [a]ny person who . . . knowingly receives or distributes . . . any child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer.

18 U.S.C. § 2252A(a)(2)(A).

Williams argues that the images used in Counts 3-4 and 7 fall outside the statutes because the minors depicted are not engaged in sexually explicit conduct. But "the 'use' element is satisfied if a minor is photographed in order to create pornography." *United States v. Wright*, 774 F.3d 1085, 1089 (6th Cir. 2014).

That brings one to Williams's argument that the images created were not pornography. According to Williams, the image used for Count 3 is that of a "sleeping, clothed minor . . . who happens to be in an image" where is also visible Williams's erect penis, the image used for Count 4 "can . . . be viewed as a natural-scene image of a child in diaper-changing position in which the image could be for medical purposes, for example, such as a rash or genital bumps," and the image in Count 7 is "of a girl in underwear, standing by a wall, not looking at the camera, in a bathroom (natural) setting, and no sexual conduct is occurring."

There were actually three images supporting Count 3. They "depict the 11-year-old's legs across the defendant. He's nude and he's masturbating." The trial judge reviewed the images and confirmed that that was what was depicted. "Sexually explicit conduct" includes actual or simulated masturbation. 18 U.S.C. § 2256(2)(A)(iii).

The images supporting Count 4 were of "an infant female six months old or thereabouts." The pictures "focused on her pubic area" and depicted oral and hand contact with the child's genitals. "Sexually explicit conduct" includes "lascivious exhibition of the anus, genitals, or pubic area of any person." 18 U.S.C. § 2256(2)(A)(v).

Finally, the images supporting Count 7 included the images supporting Counts 3-4. If the conduct depicted was sexually explicit when it supported Counts 3-4, it was sexually explicit when it supported Count 7.

It was professionally reasonable of counsel not to argue that Williams's conduct did not constitute the offenses charged in the three counts. Hence it was professionally reasonable of counsel not to tell Williams that such an argument constituted a reason not to plead guilty. Jurists of reason would not debate it.

Jurists of reason would not debate that Williams has failed to make a substantial showing of the denial of a constitutional right. Accordingly, his application for a certificate of appealability is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOSEPH MARK WILLIAMS, JR.,

Movant,

CASE No. 1:20-cv-92

v.

HON. ROBERT J. JONKER

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

INTRODUCTION

The matter is before the Court on Movant Williams' motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. (ECF No. 1). The Court has determined that an evidentiary hearing is unnecessary to the resolution of this case. *See* Rule 8, RULES GOVERNING 2255 CASES; *see also Arredondo v. United States*, 178 F.3d 778, 782 (6th Cir. 1999) (holding that an evidentiary hearing is not required when the record conclusively shows that the petitioner is not entitled to relief). For the following reasons, the Court denies the motion.

BACKGROUND

Movant and his girlfriend, Sherri Smith—a self-described "satanic taboo couple"—produced child pornography involving Movant, Ms. Smith, and Ms. Smith's eleven-year-old daughter, three-year-old granddaughter, and six-month-old grandniece. At the culmination of an

investigation during which Movant sent an undercover FBI officer dozens of such images,[1] officers raided Movant's residence. Inside an outbuilding, agents found what one FBI agent called a "child pornography house of horrors." They discovered a room containing children's toys and movies and a box filled with vibrators, sex toys, and lubricants. Officers also located a molded model of a pre-school-aged size vagina and buttocks, and a birth control prescription for a minor victim. On Movant's devices, agents found additional images of child pornography.

On December 7, 2017, Movant pleaded guilty to two counts of sexual exploitation of a child, and to one count of distribution of child pornography in violation of 18 U.S.C. §§ 2251(a), (e) and 2252A(a)(2)(A) and (b)(1). On April 18, 2018, the Court sentenced Movant to a total term of 960 months imprisonment.[2] Judgment entered on April 19, 2018, with restitution reserved for further consideration. An Amended Judgment including restitution entered on July 16, 2018. (Crim ECF No. 101).[3]

A Notice of Appeal was filed on August 13, 2018, and the matter proceeded to the Sixth Circuit Court of Appeals.[4] But on November 13, 2018, counsel for Movant filed a motion to hold briefing in abeyance. *United States v. Williams*, No. 18-1914 (6th Cir. Nov. 13, 2018) (Dkt. #15). In the motion, counsel indicated that Movant was considering whether he wished to proceed or whether to withdraw his appeal. Then, on December 7, 2018, counsel for Movant filed a motion

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[1] Movant's communications with the undercover officer also included various admissions about who was depicted in the photos. In one message, Movant told the officer that he and his girlfriend, were into "older/younger (very younger) and incest."

[2] Movants' guidelines were literally off the charts. His offense level of 53 was 10 levels above the highest on the chart. (PSR ¶ 106).

[3] References to "Crim ECF" are to the record in the underlying criminal case, *United States v. Williams*, Case No. 1:17-cr-147 (W.D. Mich.).

[4] Movant sought and obtained permission for extension of time to file a notice of appeal. (Crim ECF No. 105).

to withdraw the appeal. *Id.* at Dkt. #17. The motion included a notice of withdrawal of appeal signed by Movant and dated November 25, 2018. *Id.* at Dkt. #17-2. An Order granting the motion for voluntary dismissal was entered by the Clerk the same day, December 7, 2018. *Id.* at Dkt. #18.

More than a year later, on February 3, 2020, Movant filed the instant motion to vacate, set aside, or correct sentence under Section 2255. (ECF No. 1). The Government responded in opposition on the merits (ECF No. 13) and Movant replied. (ECF No. 21). But after reviewing the motion and the parties' briefs, the Court noted that the motion had not been filed within a year after Movant had voluntarily dismissed his appeal. If Movant's judgment of conviction became "final" for statute of limitations purposes on that date, then the Section 2255 motion was untimely filed. The Court alerted the parties to the issue and expressly noted it was considering dismissing the motion as untimely. Before doing so, however, the Court gave both sides an opportunity to file briefing and to raise any arguments that equitable tolling ought to apply (ECF No. 22). *See Day v. McDonough*, 547 U.S. 198, 210 (2006) (concluding a court "must accord the parties fair notice and an opportunity to present their positions" before a petition is dismissed sua sponte on statute of limitations grounds). Both sides have responded.

DISCUSSION

A. Timeliness

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), state and federal prisoners have a one-year limitations period in which to file a habeas corpus petition. That period runs from one of four specified dates:

(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).

The parties agree that the date Movant's conviction became "final" under 28 U.S.C. § 2255(f)(1) is the applicable date for purposes of applying the statute of limitations. But the parties disagree that December 7, 2018—the date the order entered granting Movant's motion to withdraw his appeal—is the date Movant's conviction became "final." Rather, the government argues the 90-day period normally available for a petitioner for a writ of certiorari from the United States Supreme Court must be added, which would make Movant's motion timely. The government acknowledges that this position is against the majority of district court decisions within the circuit that have considered the issue. (ECF No. 26, PageID.400) (collecting cases).[5]

[5] The cases cited by government that have declined to extend a ninety-day period to the statute of limitations following a voluntary withdrawal of an appeal are *United States v. Goward*, 719 F. Supp. 2d 792 (E.D. Mich. 2010); *Dean v. United States*, No. 1:17-CR-93, 2021 WL 1909705, at *1 (S.D. Ohio May 12, 2021); *Wright v. United States*, No. 1:16-CV-01080-JDB-JAY, 2020 WL 718237, at *3 (W.D. Tenn. Feb. 12, 2020); *Sermon v. United States*, Case No. 13-cv-02808, 2017 WL 980626, at *7 (W.D. Tenn. Mar. 13, 2017); *Christian v. Klee*, No. 14-13982, 2015 WL 6605433, at *2 (E.D. Mich. Oct. 30, 2015); *United States v. May*, No. CR 09-20482, 2015 WL 5692736, at *2 (E.D. Mich. Sept. 25, 2015); *Wilson v. United States*, No. 1:06-CR-338, 2012 WL 2328007, at *1 (N.D. Ohio June 19, 2012); *Gomez v. United States*, No. 1:06-CR-30, 2010 WL 1609412, at *2 (E.D. Tenn. Apr. 20, 2010); *Robinson v. United States*, No. 1:04-CR-23, 2009 WL 3048459, at *2 (E.D. Tenn. Sept. 17, 2009); *Kelly v. United States*, No. CIV A 1:09CV-P27-R, 2009 WL 2747838, at *1 (W.D. Ky. Aug. 26, 2009); *Blewett v. United States*, No. 1:01 CR 00014-M, 2006 WL 2375605, at *2 (W.D. Ky. Aug. 14; 2006); *Martin v. United States*, No. 05-CV-74032, 2006 WL 1494966, at *3 n.1 (E.D. Mich. May 25, 2006); *Stern v. United States*, No. 2:02-

But it says that it has previously taken this position in *United States v. Parker*, 416 F. App'x 132 (3d Cir. 2011), and it further says the approach is consistent with the only published circuit court decision to have examined this issue, *Latham v. United States*, 527 F.3d 651 (7th Cir. 2008). Movant agrees with the government's analysis. He further states that to the extent the Court discerns any ambiguity in the statute of limitations, the rule of lenity should be applied to resolve the ambiguity in his favor. The Court respectfully disagrees with Movant and the government and chooses to follow the majority of district courts that do not add the ninety-day period when the Court of Appeals grants a petitioner's own request for dismissal of an appeal.

Even assuming without deciding that the rule of lenity applies to Section 2255's statute of limitations, the Court sees no ambiguity to resolve here or any other basis to toll the statute of limitations.[6] A plain language analysis is all that is needed to see why a voluntary dismissal is different than a merits decision for purposes of the ninety-day period. Both Section 1254 and Supreme Court Rule 13.1 focus on a "judgment or decree" (Section 1254) or a "judgment" (S. Ct. R. 13.1) for purposes of seeking a writ of certiorari. That was the emphasis of the government's brief in *Parker* as well, *See* Br. for U.S., *United States v. Parker*, 2010 WL 8546110, at *13 (filed Aug. 17, 2010) ("The plain language [of Section 1254] allows a party to seek certiorari *after judgment* is entered in the Court of Appeals[.]") (emphasis added). The whole point of a Rule

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CR-021, 2005 WL 2922457, at *2 (S.D. Ohio Nov. 3, 2005), *report and recommendation adopted*, No. CRIM. 2:02-CR-021, 2005 WL 3338704 (S.D. Ohio Dec. 8, 2005); *Bird v. United States*, No. 3:17-CR-013, 2022 WL 738543, at *4 (E.D. Tenn. Mar. 10, 2022); and *Russell v. United States*, 2014 WL 3400973, *1 (E.D. Tenn. July 10, 2014).

[6] *C.f. Lay v. United States*, 623 F. App'x 790, 794 n.4 (6th Cir. 2015) ("find[ing] no error" in the district court's decision to apply the rule of lenity to § 2255's limitations period"). *Lay* itself, however, referenced equitable tolling when discussing the reasons for the untimely filing, including the fact the movant's counsel had been suspended from the practice of law during the relevant timeframe. *Id.*

42(b) dismissal Order, in contrast, is to avoid any kind of judgment, decree, mandate, or other *judicial* act. So the rule provides that the dismissal is entered by the "circuit clerk." FED. R. APP. P 42(b). This plain language means that "when a notice of appeal is voluntarily dismissed, further direct review is not possible." *United States v. Goward*, 719 F. Supp. 2d 792, 794 (E.D. Mich. 2010) (citing *Futernick v. Sumpter Twmp.*, 207 F.3d 305, 312 (6th Cir. 2000)). "Direct review cannot be prolonged if the defendant voluntarily abandons the effort." *Id.* And as noted, several district courts within this circuit have similarly agreed that a decision becomes "final" for statute of limitations purposes under Section 2255, on the date that the motion to voluntarily dismiss the appeal is granted. *See, e.g.*, *Bird v. United States*, No. 3:20-cv-114, 2022 WL 738543, at *3 (E.D. Tenn. Mar. 10, 2022); *Dean v. United States*, No. 1:17-cr-93, 2021 WL 190975, at *1 (S.D. Ohio May 12, 2021); *Wright v. United States*, No. 1:16-cv-01080-JDB-jay, 2020 WL 718237 (W.D. Tenn. Feb. 12, 2020).

As the government argues *Latham* is the only published circuit authority and it came to a different conclusion. But *Latham* reached that conclusion in *dicta* and on facts distinguishable from this one. In *Latham* the defendant filed a notice of appeal from his conviction on November 14, 2002. Thereafter the defendant, through counsel, filed a motion under FED. R. APP. P. 42(b) to dismiss the appeal. *Latham*, 527 F.3d at 652. The motion was granted on May 1, 2003. Less than two weeks later, the defendant filed a motion to reinstate the appeal—asserting that his counsel had misled him about the consequences of dismissing his appeal. *Id.* The court of appeals denied the motion and a motion to reconsider on June 9 and 25, 2003, respectively. The defendant then filed a Section 2255 motion on May 7, 2004. The district court dismissed the motion as untimely because it concluded the statute of limitations had been running since May 1, 2003, when

the court of appeals granted the motion to withdraw the appeal, and so more than a year had elapsed between the date the defendant's conviction became final under Section 2255(f)(1) and the date the defendant filed his Section 2255 motion. The Seventh Circuit Court of Appeals, however, concluded the motion was timely because the defendant had filed a motion to reinstate the appeal within the time to seek rehearing under FED. R. APP. P. 40(a)(1). This was enough to "put off 'finality' until [the] court had acted" on the motion to reinstate. *Latham*, 527 F.3d at 652. Movant did no such thing in the Court of Appeals in this case.

After declaring this holding, the Seventh Circuit went on to observe that the motion would have been timely even if the defendant had not sought the reinstatement of the appeal. The court observed that notwithstanding the voluntary dismissal the defendant could still have sought a writ of certiorari from the United States Supreme Court under 28 U.S.C. § 1254. *Id.* at 652-653. And under *Clay v. United States*, 537 U.S. 522 (2003), a federal conviction does not become final until after the expiration of time to file a petition for a writ of certiorari (or on the date of denial). So, the court reasoned, the defendant's conviction did not become "final" until ninety days after the withdrawal motion was granted, when the period for seeking a writ of certiorari expired. These observations were not necessary to the decision in *Latham* and were therefore dicta. This Court also respectfully disagrees with *Latham's* dicta based on the textual analysis previously provided.

Movant also cites to *Short v. United States*, No. 2:12-cr-97-JRG-MCLC-1, 2017 WL 1310975 (E.D. Tenn. Apr. 5, 2017). But the unpublished district court decision is not binding on this Court, nor is it persuasive. In *Short* the district court observed in a single sentence that the movant's conviction became final ninety days after the court of appeals granted the earlier motion to dismiss direct appeal. *Id.* at *2. The Court did not deal with the plain language of FED. R. APP.

P 42(b) and the Supreme Court Rule, nor did the *Short* court need to do so because the movant's motion was untimely even with the ninety-days added.

For these reasons, the Court believes the correct date for purposes of applying Section 2255(f)(1) to cases in which the defendant has voluntarily withdrawn a direct appeal is the date the order enters granting the withdrawal motion, as the majority of the decisions within this circuit have held. Accordingly, Movant's judgment became final on December 7, 2018, the date the motion to voluntarily dismiss the appeal was granted. The statute expired, one year later on December 9, 2019 (following an intervening weekend). The motion, either on January 30, 2020, when it was signed or February 3, 2020, when it was filed, is beyond the one-year limitations period and is therefore untimely.

Section 2255(f)'s statute of limitations is not jurisdictional, and accordingly the statute is subject to equitable tolling. A review of the motion and the briefs filed by Movant does not reveal a basis to toll the statute of limitations. Indeed, Movant does not argue for equitable tolling at all. Under a liberal reading, Movant might be read as arguing the statute should be tolled because he did not know why his attorney filed the motion to withdraw the appeal. But the record demonstrates that Movant himself signed off on the withdrawal motion. Movant, furthermore, never sought reinstatement of the appeal. And he still had an entire year from the date the Court of Appeals granted his motion to withdraw to argue ineffective assistance of counsel in a Section 2255 motion. The Court finds no basis for tolling.

B. ***Actual Innocence***

Movant also claims that he is actually innocent of his crimes of conviction because the images underlying his convictions in Count 3 and Count 4 may not qualify as depictions of sexually

explicit conduct. A plea of actual innocence can overcome the one-year statute of limitations. *McQuiggin v. Perkins*, 569 U.S. 383, 394-97 (applying the actual innocence standard in *Schlup v. Delo*, 513 U.S. 298 (1995), and *House v. Bell*, 547 U.S. 518 (2006), to the expiration of the statute of limitations). In *McQuiggin*, the Supreme Court held that a habeas petitioner who can show actual innocence under *Schlup's* rigorous standard is excused from the statute of limitations under the miscarriage-of-justice exception. In order to make a showing of actual innocence under *Schlup*, a petitioner must present new evidence showing that "'it is more likely than not that no reasonable juror would have convicted [the petitioner].'" *McQuiggin*, 569 U.S. at 395 (quoting *Schlup*, 513 U.S. at 329). "Actual innocence means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998).

In arguing for actual innocence, Movant likens his case to that of *United States v. Howard*, 968 F.3d 717, 721-22 (7th Cir. 2020), which held that the "sexually explicit conduct" at issue under Section 2251(a) must be that of the minor, not some other person. The court went on to explain the evidence of that case was insufficient to sustain the defendant's conviction because it included a sexual act of an adult engaged in sexual conduct lying next to a sleeping minor. Movant says the depictions in this case include sexual conduct by the exploiter, not the child victim, and are insufficient under *Howard*. Movant does not cite any newly discovered evidence but simply argues that the evidence was insufficient to meet the government's burden of proof. Accordingly, these claims cannot satisfy the *McQuiggin* test of actual innocence; they merely address legal sufficiency. The claims are therefore untimely.

The claims fail for other reasons too. They are, first of all, procedurally defaulted because they are arguments that could have been, but were not, raised on direct appeal. Moreover, Movant

admitted as part of his plea colloquy that, with respect to Count 3, he had "sexual contact with [CJ] and took photos." (Crim. ECF No. 97, PageID.570).[7] The government articulated its theory that the photograph shows a sexual act, namely an adult male in the context of a minor who was a part of the visual depiction. With respect the image in Count 4, Movant testified that the sexual poses and sexual contact by Movant and Ms. Smith with the six-month old minor and her body made the images sexually explicit. (Crim. ECF No. 97, PageID.583-584). Movant went on to testify that he distributed sexually explicit images of child pornography for sexual gratification. (Crim. ECF No. 97, PageID.585). This is enough to sustain a conviction. The "use" element of the statute is "fully satisfied for the purposes of the child pornography statute if a child is photographed to create pornography." *United States v. Laursen*, 847 F.3d 1026, 1033 (9th Cir. 2017) (quoting *United States v. Wright*, 774 F.3d 1085, 1090 (6th Cir. 2014)); *see also United States v. Mendez*, ___ F.4th ___, 2022 WL 2036295 (9th Cir. 2022) (observing that *Laursen* forecloses applying the Seventh Circuit's interpretation of Section 2251(a) in *Howard*). *Laursen* which adopted the Sixth Circuit's reading in *Wright* forecloses Movant's challenges to his convictions as well.

C. Merits of Other Claims

Movant's remaining claims, even if they were timely, would fail for other reasons as well. Movant first raises a litany of ineffective assistance of counsel arguments: failure to perform an adequate investigation (Ground 1); improperly inducing Movant to plead guilty (Ground 2); failing to advise movant of the penalty he faced by pleading guilty (Ground 3); failing to preserve an objection to Congress' authority to regulate Movant's conduct (Ground 4); failing to object to his consecutive sentence (Ground 5); failing to present an adequate mitigation argument at sentencing

[7] At the time, "CJ" was an eleven-year old female.

(Ground 6); and failing to challenge the applicability of the statutes charged to Movant's conduct (Ground 7). In Grounds 8 through 11, Movant goes on to raise various due process challenges to his sentence. As the government sets out in its brief (ECF No. 13), the latter four due process claims are all barred because they are non-constitutional sentencing claims that are non-cognizable in this habeas action, barred by the waiver in his plea agreement, procedurally defaulted, contradicted by the record, or by some combination of the above.

With respect to the ineffective assistance of counsel claims, Movant fails to meet his burden under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Movant claims in Ground 1 that his attorney should have, *inter alia*, looked into his mental health issues, interviewed witnesses, and contacted experts. But most of what he says his attorney should have done is barred by the waiver in his plea agreement and lacking in support. Beyond that, Movant fails to demonstrate that a more thorough investigation would have resulted in a different outcome, or that his plea was not knowingly, intelligently, and voluntarily made. Counsel avers he and his office spent a collective 30 hours researching the validity of the search warrant and concluded that no challenge would be successful (Kaczor Aff. ¶ 14, ECF No. 15, PageID.339). With respect to Grounds 2, 3 and 5, Movant affirmed under oath that he was pleading guilty of his own free will. His attorney had been available to answer his questions, and Movant did not need any more time to consult with him before engaging in his plea. The Court's Rule 11 colloquy ensured that Movant understood the possible penalties he faced on each count. It is true that the Court did not expressly detail that sentencing could be consecutive, but a "court need not 'explicitly admonish a defendant that a sentence may be imposed consecutively' to ensure that a defendant's plea is knowing and voluntary." *United States v. Green*, 608 F. App'x 383, 385 (6th Cir. 2015) (quoting *United States*

v. Ospina, 18 F.3d 1332, 1334 (6th Cir. 1994). Movant's claim in Ground 4 with respect to the constitutionality of the statute is patently meritless. *United States v. Rose*, 714 F.3d 362 (6th Cir. 2013). Counsel was not ineffective for failing to preserve a meritless objection. *United States v. Martin*, 45 F. App'x 378, 381 (6th Cir. 2002).

Movant's claim in Ground 6 that he would have received a lesser sentence if his counsel had presented a more thorough mitigation defense also fails. Counsel prepared a sentencing memo that discussed the various sentencing factors. (Kaczor Aff. ¶ 20, ECF No. 15, PageID.347). The brief (ECF No. 82) raised several issues, including Movant's lack of criminal history, age, cooperation with authorities, and acceptance of responsibility. (Crim. ECF No. 82). Thus movant's blatant assertion that counsel did "nothing" to mitigate the sentence is patently false. Movant complains, as he did in Count 1, that his counsel should have more diligently pursued a diminished capacity defense or otherwise challenge's Movant's cognition. Movant presents some of his medical records, most of which relate to his physical conditions. None of them reflect anything that would come close to supporting a diminished capacity defense. To the contrary, they reflect ongoing headaches and dizziness, but no psychological effects. For example, at a March 21, 2016, appointment Movant complained of dizziness and headaches, but he was negative for confusion and was not nervous or anxious. (ECF No. 2-37, PageID.136). Counsel states that Movant never gave counsel any cause for concern about competency. Counsel further points out the records attached to Movant's motion wholly fail to support this claim. (Kaczor Aff. ¶¶ 15-16, ECF No. 15, PageID.342-343). Counsel said as much before the plea colloquy as well, and the Court's questioning of movant before accepting the plea fully satisfied the Court that Movant was

competent to plead guilty. Thus, Movant entirely fails to meet his burden. Finally Ground 7 fails for the reasons the Court set out above in addressing Movant's claim of actual innocence.

CONCLUSION

Accordingly, the Court concludes that Movant is not entitled to the relief he seeks because the motion is untimely, and the claims within it are barred by his guilty plea, procedurally defaulted, or fail on the merits.

Before Movant may appeal the Court's dismissal of his Section 2255 petition, a certificate of appealability must issue. 28 U.S.C. § 2253(c)(1)(B); FED. R. APP. P. 22(b)(1). The Federal Rules of Appellate Procedure extend to district judges the authority to issue certificates of appealability. FED. R. APP. P. 22(b); *see also Castro v. United States*, 310 F.3d 900, 901–02 (6th Cir. 2002). Thus, the Court must either issue a certificate of appealability indicating which issues satisfy the required showing or provide reasons why such a certificate should not issue. 28 U.S.C. § 2253(c)(3); FED. R. APP. P. 22(b)(1); *In re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997).

A certificate of appealability 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). To make the required "substantial showing," the petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The Court does not believe that reasonable jurists would find the Court's assessment of the claims Movant raised debatable or wrong.

ACCORDINGLY. IT IS ORDERED:

1. Movant's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence (ECF No. 1) is **DENIED.**

2. Movant's request for a Certificate of Appealability is **DENIED.**

3. Movant's motions for extension (ECF NO. 16, 18, 19, and 20) are **DISMISSED AS MOOT.**

Dated: June 30, 2022

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE