No. 21-1147

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 5, 2023
DEBORAH S. HUNT, Clerk

HERBERT BERNARD JOHNSON,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

BEFORE: McKEAGUE, STRANCH, and DONALD, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*Judge Davis recused herself from participation in this ruling.

NOT RECOMMENDED FOR PUBLICATION

No. 21-1147

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HERBERT BERNARD JOHNSON,	)	
	)	
Petitioner-Appellant,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE EASTERN DISTRICT OF
UNITED STATES OF AMERICA,	)	MICHIGAN
	)	
Respondent-Appellee.	)	

ORDER

Before: McKEAGUE, STRANCH, and DONALD, Circuit Judges.

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. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. 34(a).

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 we affirmed. *United States v. Johnson*, 775 F. App'x 794, 801 (6th Cir. 2019).

In August 2020, Johnson filed a motion to vacate, raising 17 grounds for relief. He later moved to amend his motion to include three additional claims. The district court denied Johnson's motion to amend and found that his remaining claims were either procedurally defaulted or meritless. This court granted a certificate of appealability on one issue: "Whether

the district court erred in dismissing on procedural-default grounds Johnson's claim that the district court's jury instructions on Count Four constructively amended the indictment." *Johnson v. United States*, No. 21-1147, slip op. at 7 (6th Cir. Oct. 7, 2021).

On appeal, Johnson argues that the district court erred by failing to acknowledge and address his argument that his attorneys' ineffectiveness at trial and on direct appeal constituted cause to overcome the procedural default of his constructive-amendment claim. He argues that his attorneys were aware of the issue and unreasonably failed to raise it, and he contends that his defense was prejudiced because, if the jury were properly instructed, he would have been acquitted of Count Four.

When reviewing a district court's denial of a § 2255 motion, we review factual findings for clear error and legal conclusions de novo. *Braden v. United States*, 817 F.3d 926, 929 (6th Cir. 2016). A federal prisoner procedurally defaults any claim that he could have raised on direct appeal. *Elzy v. United States*, 205 F.3d 882, 884 (6th Cir. 2000). A district court may nevertheless address the merits of a procedurally defaulted claim if a movant shows cause to excuse the default and actual prejudice. *See Vanwinkle v. United States*, 645 F.3d 365, 369 (6th Cir. 2011).

Johnson does not dispute the district court's finding that he procedurally defaulted his constructive-amendment argument by failing to raise it on direct appeal. The only issue in dispute is whether Johnson overcame the procedural default by showing cause and prejudice. Procedural default is an affirmative defense, so Johnson was not required to address it in his initial § 2255 motion. *Gray v. Netherland*, 518 U.S. 152, 165-66 (1996); *Vanwinkle*, 645 F.3d at 370. Once the government raised the procedural-default defense in its responsive pleading, Johnson filed a reply that specifically cited his attorneys' alleged ineffectiveness as cause to excuse the procedural default of his substantive claims. Despite this, the district court found that Johnson raised no such argument.

In the final section of its opinion, however, the district court addressed Johnson's freestanding ineffective-assistance-of-counsel claims. In concluding that these claims were meritless, the district court found that counsel did not perform deficiently by failing to raise the

constructive-amendment argument, which Johnson raised as "Claim Four" of his habeas petition, because that argument involved "entirely proper conduct by plaintiff and/or the Court." Thus, although the district court does appear to have overlooked the fact that Johnson raised his attorneys' alleged ineffectiveness as cause to overcome the procedural default of Claim Four, it did find that counsel was not ineffective for failing to raise the constructive-amendment argument because that argument was meritless.

To establish ineffective assistance of counsel, a movant must show that his attorney performed deficiently and that his defense was prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The performance inquiry requires the movant to "show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The prejudice inquiry requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "[I]neffective assistance of appellate counsel claims are governed by the same *Strickland* standard as claims of ineffective assistance of trial counsel." *Shaneberger v. Jones*, 615 F.3d 448, 452 (6th Cir. 2010). But where appellate counsel "presents one argument on appeal rather than another . . . the petitioner must demonstrate that the issue not presented 'was clearly stronger than issues that counsel did present'" to establish ineffective assistance. *Caver v. Straub*, 349 F.3d 340, 348 (6th Cir. 2003) (quoting *Smith v. Robbins*, 528 U.S. 259, 288 (2000)).

Section 2252A(a)(5)(B) applies to any individual who

> knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, *or* that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer.

18 U.S.C. § 2252A(a)(5)(B) (emphasis added). The statute's jurisdictional hook has two separate prongs. The first grants the district court jurisdiction if the image of child pornography itself traveled in interstate commerce. Johnson refers to this as the "travels-in-commerce" prong.

The second grants the district court jurisdiction if the materials that were used to produce the child pornography traveled in interstate commerce. Johnson refers to this as the "material-in-commerce" prong.

Johnson correctly points out that the second superseding indictment charged him under the material-in-commerce prong, while the district court instructed the jury on the travels-in-commerce prong. The government, while acknowledging the difference, nevertheless argues that the indictment was not constructively amended because Johnson was not convicted of a different crime than the crime charged by the second superseding indictment.

A constructive amendment occurs if "the offense described by the indictment and the one described by the jury instructions are 'two alternative crimes,'" but a mere "variance" occurs if the indictment and the jury instructions present "two alternative methods by which the one crime . . . could have been committed." *United States v. Budd*, 496 F.3d 517, 522 (6th Cir. 2007) (ellipsis in original) (quoting *United States v. Prince*, 214 F.3d 740, 758 (6th Cir. 2000)). As the government points out, both the second superseding indictment and the jury instructions correctly recited the elements of a § 2252A(a)(5)(B) offense. The only difference is that they cited alternative means of committing that offense. Under these circumstances, a variance occurred, rather than a constructive amendment. While a constructive amendment is "per se prejudicial and . . . reversible error," *Budd*, 496 F.3d at 521, a variance warrants relief only if it affected a substantial right, *United States v. Davis*, 970 F.3d 650, 659 (6th Cir. 2020) (quoting *United States v. Mize*, 814 F.3d 401, 409 (6th Cir. 2016)), *cert. denied*, 141 S. Ct. 1108 (2021).

The district court properly concluded that Johnson could not rely on his attorneys' failure to raise his variance argument as cause to excuse the procedural default. On direct appeal, we found that the evidence was sufficient to support Johnson's conviction. *Johnson*, 775 F. App'x at 800-01. And, as the government points out, the evidence would have been sufficient to convict Johnson under the "material-in-commerce prong" as well. At trial, the government produced evidence showing that Johnson had transported his work computer in interstate commerce when he brought it with him on a trip from Colorado to Michigan. There was also evidence from which a juror could infer that, once Johnson arrived in Michigan, he copied

images of child pornography onto his work computer. The definition of "producing" that applies to § 2252A "encompasses copying images onto a hard drive or other digital storage device." *United States v. Lively*, 852 F.3d 549, 560 (6th Cir. 2017). Appellate counsel therefore did not unreasonably conclude that this argument was weaker than other arguments that he raised on direct appeal, and Johnson also has not shown prejudice.

Finally, Johnson argues in his appellate brief that the district court also constructively amended the indictment by instructing the jury that it could convict him under § 2252A if the images that he possessed depicted an individual who appeared to be a minor, rather than requiring the depiction of an actual minor, and by instructing the jury that the child pornography merely had to affect commerce. Because Johnson did not present these arguments to the district court or raise them in his application for a certificate of appealability, they are not properly before us, and we decline to address them, *see United States v. Ellison*, 462 F.3d 557, 560 (6th Cir. 2006); *Elzy*, 205 F.3d at 886.

For the foregoing reasons, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES OF AMERICA, Plaintiff, vs. HERBERT BERNARD JOHNSON, Defendant.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION
2020 U.S. Dist. LEXIS 264226
Criminal No. 15-CR-20577,Civil Action No. 20-CV-12328
December 29, 2020, Decided
December 29, 2020, Filed

Counsel {2020 U.S. Dist. LEXIS 1}For United States of America, Plaintiff (2:15-cr-20577-BAF-APP-1): Margaret M Smith, LEAD ATTORNEY, Mitra Jafary-Hariri, United States Attorney's Office, Detroit, MI.

Herbert Bernard Johnson, Petitioner (2:20-cv-12328-BAF), Pro se, Littleton, CO.

Judges: HON. Bernard A. Friedman, Senior United States District Judge.

Opinion

Opinion by: Bernard A. Friedman

Opinion

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{2020 U.S. Dist. LEXIS 2} 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**{2020 U.S. Dist. LEXIS 3}** 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**{2020 U.S. Dist. LEXIS 4}*** 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'){**2020 U.S. Dist. LEXIS 5**} 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, 123 S. Ct. 1072, 155 L. Ed. 2d 88 (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{**2020 U.S. Dist. LEXIS 6**} and sixty-nine days after the latter date was August 22, 2020. Defendant signed 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{**2020 U.S. Dist. LEXIS 7**} 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, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (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{**2020 U.S. Dist. LEXIS 8**} 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{2020 U.S. Dist. LEXIS 9} 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 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, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010). "The doctrine of equitable tolling allows courts to toll a statute{2020 U.S. Dist. LEXIS 10} 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{2020 U.S. Dist. LEXIS 11} 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, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998). "Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim{2020 U.S. Dist. LEXIS 12} 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).

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**{2020 U.S. Dist. LEXIS 16}** 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.

Dated: December 29, 2020

Detroit, Michigan

/s/ Bernard A. Friedman

Bernard A. Friedman

Senior United States District Judge

Footnotes

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).

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.
4

The Court addresses the issue of ineffective assistance of counsel below.

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