No. 22A924

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES D. SULLIVAN, PETITIONER

vs

UNITED STATES OF AMERICA, RESPONDENT

ON APPLICATION FOR CERTIFICATE OF APPEALABILITY

TO THE

SIXTH CIRCUIT APPELLATE JUSTICE OF THE COURT

APPLICATION FOR CERTIFICATE OF APPEALABILITY

United States District Court, Northern District of Ohio, Eastern Division, Case No. 1:16-CR-00155

United States Court of Appeals, Sixth Circuit, Case No. 22-3108

James D. Sullivan, #63990-060
F.C.I. Otisville
P.O. Box 1000
Otisville, NY 10963

Petitioner, pro se

APPENDICIES

TABLE OF AUTHORITIES CITED

I. ISSUE

Applicant applies to the Honorable Justice, in his/her role as an adjunct member of the Sixth Circuit Court of Appeals, for issuance of a Certificate of Appealability in order to correct a clear case of plain error and manifest injustice, apparent from the record and unrefuted by the Government, that the district court denied Applicant his right to withdraw his unaccepted guilty plea and proceed to trial.

II. RULE

Fed.R.Crim.P. 11(d) mandates that a district court allow a defendant to freely withdraw an unaccepted guilty plea "for any or no reason". Stat. Appendix A. The Sixth Circuit and others have held that "[t]he plain text of Rule 11(d)(1) grants a defendant the absolute right to withdraw an unaccepted guilty plea, and the district court lacks discretion to deny such a motion." United States v. Mendez-Santana, 645 F.3d 822, 827 (6th Cir. 2011)(citing cases). The denial of a motion to withdraw an unaccepted guilty plea constitutes plain error effecting the defendant's right to take his case before a jury. United States v. Arami, 536 F.3d 479, 483 (5th Cir. 2008). The failure of a district court to comply with the mandates of Crim.R. 11 constitutes plain error. United States v. McCreary-Redd, 475 F.3d 718, 724-26 (6th Cir. 2007).

Pursuant to the Prison Mailbox Rule espoused in Houston v. Lack, a pleading is filed by a pro se litigant when it is given to prison officials for mailing. 487 U.S. 266 (1988). Documents so filed are not limited to the habeas context. Richard v. Ray, 290

F.3d 810, 813 (6th Cir. 2001). Such documents are deemed filed when they are signed. Cohen v. CCA, 439 Fed. Appx. 489 (6th Cir. 2011).

Regarding any ambiguities in criminal proceedings, the law requires that favor fall on the defendant and that "the tie must go to the defendant." United States v. Santos, 553 U.S. 550, 513-14 (2008). Where there is doubt, under the rule of lenity, it should be resolved in favor of the defendant. United States v. Bass, 404 U.S. 336, 348 (1971).

III. ARGUMENT

The plain error in this instance is clear from the record: Applicant was denied his due process right to trial when the district court refused to allow him to withdraw the guilty plea, entered before a magistrate, that had not yet been accepted by the district court judge. The record shows that the Applicant moved to withdraw his guilty plea pro se (Appx. A) under the prison mailbox rule the same day that the district court judge accepted the plea. Appx. B, Order.

The law is crystal clear that under Crim.R. 11(d) and the Rule of Lenity, the Applicant won the tie and was entitled to withdraw his guilty plea for any or no reason. Despite being advised of the law, the judge simply refused. Appx. C, Transcript of Plea Withdrawal Hearing, PID 1476-78.

Applicant has diligently tried to get the lower courts to hear him out on this obvious error but has only encountered more error that has resulted in a faulty, and binding, law of the case originating in the appellate court on direct appeal that denied this issue when it erroneously conflated the approval of the plea agreement

(Appx. D) with the acceptance of the guilty plea (Appx. B) two days later, to wit:

> "After holding a hearing, the district court denied Sullivan's motion to withdraw his guilty plea. Sullivan first argues that he filed his motion to withdraw on the same day that the district court accepted his plea. He asserts that because his motion is dated July 5, the prison mailbox rule applies to permit his withdrawal 'for any or no reason'. Fed.R.Crim.P 11(d)(1). But even accepting that Sullivan mailed his motion on July 5, he submitted it two days after the district court approved and filed the **plea agreement** on July 3. As a result, the 'any reason' standard does not come into play."

Appx. E, Sixth Circuit Opinion, pg. 11 (emphasis added).

As indicated above, the Sixth Circuit Panel obviously erred by conflating the approval of the plea agreement with the acceptance of the guilty plea. Applicant sought rehearing based on this error but was denied. This Court denied Applicant certiorari.

Applicant's § 2255 Petition

Applicant presented this issue in his § 2255 motion as as claim that his due process rights were violated. Appx. F. This claim was never refuted by the Government in its response, prompting Applicant to demand summary judgment on this and other unrefuted claims. Appx. G. The Government elected not to oppose the motion.

After 15 months (and a Mandamus action) the district court denied the § 2255 motion in its entirety without an evidentiary hearing, and denied a certificate of appealability as to all its 43 claims, including the instant due process claim which it found meritless because the issue had been "sufficiently addressed on direct appeal." Appx. H, Order, PID 2108-09. (The court never ruled on the unopposed summary judgment motion).

The erroneous law of the case was further perpetuated when the Applicant requested a certificate of appealability from the

Sixth Circuit Court of Appeals on this claims when that court denied the certificate based on its prior rejection of it on direct appeal of Applicant's "assertions concerning the timing of his [plea withdrawal] motion." Appx. I, Sixth Circuit Order, pg. 5.

In closing, Applicant submits that this case presents one of first impression as he is unable to locate any similar cases involving the issue of a virtual tie between the filing of a document under the prison mailbox rule and an opposing or related filing by a court or other party. However, a compelling case can be made that, under the Rule of Lenity, "the tie must go to the defendant", a maxim Applicant obviously ascribes to. Without the ability to provide a time-stamp to a mailbox rule filing on a particular day, the Applicant submits that the maxim should apply.

IV CONCLUSION

Applicant's ability to obtain a fair hearing is currently mired in a Catch-22 where an erroneous law of the case prevents his obtaining any meaningful review of this plain error. Applicant's request is being made seperately on its own merit and not as part of his Petition for Writ of Certiorari that is being filed concurrently with this application.

Applicant has established the criteria necessary under Slack v. McDaniel that reasonable jurists could disagree with the lower courts' resolution of this claim and prays this Justice, and the Court, issue a Certificate of Appealability and thereby allow Applicant an opportunity to be fairly heard on this clear and and obvious plain error.

Respectfully submitted,

J. Sullivan

James D. Sullivan, pro se
Reg. #63990-060
F.C.I. Otisville
P.O. Box 1000
Otisville, NY 10963

PROOF OF SERVICE

I, James Sullivan, declare that a copy of this document has been served on the Solicitor General of the United States, Room 5614, 950 Pennsylvania Avenue, N.W., Washington, DC 20530-0001 by regular first class postage prepaid U.S. Mail this 11th day of April, 2023.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 4-11-23

J. Sullivan

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

James Sullivan
P.O. Box 5600
Cleveland, OH 44101

Hon. Judge Benita Pearson
United States Courthouse
125 Market Street
Youngstown, OH 44503

July 5, 2017

Re: U.S. v. James D. Sullivan, Case no. 1:16CR155

Your Honor:

I am hereby withdrawing my plea of guilty in this case and declare I am not guilty. I want to proceed to trial.

I have repeatedly tried to contact my attorney to direct him to withdraw my plea since June 29th, 2017, but have been unable to do so.

Respectfully,

James Sullivan

Copies to: Charles Fleming, Esquire
Michael Sullivan, Esquire

APPENDIX A

PEARSON, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	CASE NO. 1:16-CR-155
Plaintiff,	)	
	)	
v.	)	JUDGE BENITA Y. PEARSON
	)	
JAMES D. SULLIVAN,	)	
	)	
Defendant.	)	**ORDER**

This matter is before the Court upon Magistrate Judge George J. Limbert's Report and Recommendation ("R&R") that the Court accept Defendant James D. Sullivan's ("Defendant") plea of guilty and enter a finding of guilty against Defendant. ECF No. 66.

On May 17, 2016, the Government filed an Indictment against Defendant alleging violations of 18 U.S.C. § 2252A(a)(5)(B) and 18 U.S.C. § 2251(a), access with intent to view child pornography and attempted production of child pornography, respectively. ECF No. 14. Thereafter, Defendant notified the Court of Defendant's intent to enter a plea of guilty. ECF No. 63. The Court issued an order referring the matter to Magistrate Judge Limbert for the purpose of receiving Defendant's guilty plea. ECF No. 64.

On May 3, 2017, Magistrate Judge Limbert held a hearing during which Defendant consented to the order of referral (ECF No. 65) and entered a plea of guilty as to Count 1of the Indictment. Magistrate Judge Limbert received Defendant's guilty plea and issued a Report recommending that this Court accept Defendant James D. Sullivan's plea and enter a finding of

guilty. ECF No. 66.

The time limitation to file objections to the Magistrate Judge's Report and Recommendation has expired and neither party has filed objections or requested an extension of time.

Fed. R. Crim. P. 11(b) states:

> Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following: (A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath; (B) the right to plead not guilty, or having already so pleaded, to persist in that plea; (C) the right to a jury trial; (D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding; (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses; (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere; (G) the nature of each charge to which the defendant is pleading; (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release; (I) any mandatory minimum penalty; (J) any applicable forfeiture; (K) the court's authority to order restitution; (L) the court's obligation to impose a special assessment; (M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. §3553(a); and (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

The undersigned has reviewed the transcript and the Magistrate Judge's R&R and finds, that in his careful and thorough proceeding, Magistrate Judge Limbert satisfied the requirements of Fed. R. Crim. P. 11 and the United States Constitution. Defendant was placed under oath and determined to be competent to enter a plea of guilty. Defendant was made aware of the charges

and consequences of conviction and his rights and waiver thereof. Magistrate Judge Limbert also correctly determined that Defendant had consented to proceed before the magistrate judge and tendered his plea of guilty knowingly, intelligently and voluntarily. Furthermore, the magistrate judge also correctly found that there was an adequate factual basis for the plea.

Upon *de novo* review of the record, the Report and Recommendation is adopted. Therefore, Defendant James D. Sullivan is adjudged guilty of Count 1 of the Indictment, access with intent to view child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B).

IT IS SO ORDERED.

July 5, 2017
Date

/s/ Benita Y. Pearson
Benita Y. Pearson
United States District Judge

of the offense, I am not eligible for the RDAP program or for that one-year reduction.

I think that, you know, Your Honor, I am going to state unequivocally, had I known these collateral

10:35:08 consequences, I would not have pled guilty.

Your Honor, I have another argument, and that argument would be that the week prior to the court's acceptance of the plea, which I believe is filed -- your acceptance was filed on July 5th, I had lengthy discussions

10:35:27 with counsel regarding my withdrawal of the plea. After those discussions, I made numerous unsuccessful attempts to contact my counsel on June 29th, June 30th and July 3rd, to direct my counsel to withdraw the plea. On July 5th, I wrote the court personally to try and effect that.

10:35:52 Your Honor, I submit that had I not been incarcerated, the plea would have been effectively withdrawn prior to your acceptance of the plea.

THE COURT: You know, I can't let that go by unanswered. Absolutely not. Absolutely not. When Judge

10:36:14 Limbert made his recommendation, what was going to happen happened, that I'd review the record and I'd decide, based on that record, whether or not there was a fair and just reason for withdrawal.

So what then you should not labor under is the

10:36:28 misapprehension that the timing made a difference. It made

no difference. No difference at all. The only difference that can be made is now, while we're talking.

Do you see my point?

So you shouldn't think that before I adopted that recommendation, that I would have allowed you to withdraw the plea because you'd made it before another judicial officer and not me. No. I would have considered that, along with the record made by that other judicial officer, as I am doing now. So the timing made absolutely no difference, except whether or not, as the government has pointed out, when I consider the Bashara factors, how long it was, whether it was something like 71 days or 63 days.

So don't labor under the belief that had I known sooner because I've already told you, your attorney was the first to give me an indication you wanted to withdraw a plea. That didn't motivate me to schedule the hearing. It was only when your letter indicating you were withdrawing motivated.

Do you see the point I make?

THE DEFENDANT: Yes, Your Honor. But my point is this, Your Honor: You had not accepted the plea until July 5th, and the law --

THE COURT: I get your point and I'm telling you you're wrong.

THE DEFENDANT: The law says if you have not

accepted the plea, that I can withdraw it freely and not have to even give you a reason.

THE COURT: You're wrong. You're wrong.

MR. FLEMING: Your Honor, may I have a moment to address a few of the things that he said?

10:37:52

THE COURT: Let him finish and keep a list.

MR. FLEMING: Okay.

THE COURT: I'm keeping a list. And I hope we're coming to an end. Go back to wherever you were and press on, Mr. Sullivan.

10:38:02

THE DEFENDANT: That's it, Your Honor. I would ask that I just be given an opportunity to go to trial. I know what I'm facing. I know I'm facing 35 to life, Your Honor. And I -- and everyone knows you're not a soft judge. I'm taking my life in my hands. But I'm just asking you, please let me go to trial.

10:38:23

THE COURT: Let me tell you this: You said it a couple of times and you seem to be reiterating it now. Judge Limbert said this to you explicitly. He -- and let me find the language.

10:38:37

You know, if you -- here it is. "Do you understand you have a right to a jury trial? This is your right to have 12 people from the community decide your case. However, to return a verdict against you, all 12 jurors would have to agree upon their verdict and the verdicts

10:38:50

SIGNATURES

Defendant: I have read (or have had read to me) this entire plea agreement and have discussed it with my attorney. I have initialed each page of the agreement to signify that I understand and approve the provisions on that page. I am entering this agreement voluntarily and of my own free will. No threats have been made to me, nor am I under the influence of anything that could impair my ability to understand this agreement.

James D. Sullivan
Defendant

May 3, 2017
Date

Defense Counsel: I have read this plea agreement and concur in Defendant pleading in accordance with terms of the agreement. I have explained this plea agreement to Defendant, and to the best of my knowledge and belief, Defendant understands the agreement.

Charls E. Fleming (OH: 0082335)
Counsel for Defendant

5/3/17
Date

United States Attorney's Office: I accept and agree to this plea agreement on behalf of the United States Attorney for the Northern District of Ohio.

Michael A. Sullivan (NY: 2249993)
Assistant United States Attorney
United States Court House
801 West Superior Avenue, Suite 400
Cleveland, OH 44113
(216) 622-3977
(216) 522-8355 (facsimile)
Michael.A.Sullivan@usdoj.gov

05/03/2017
Date

APPROVED:

BENITA Y. PEARSON
United States District Court Judge

7/3/2017
Date

Defendant's Initials

APPENDIX D

C. Motion to withdraw guilty plea

We review a district court's denial of a motion to withdraw a guilty plea for abuse of discretion. *United States v. Haygood*, 549 F.3d 1049, 1052 (6th Cir. 2008). "A district court abuses its discretion where 'it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard.'" *Id.* (quoting *United States v. Spikes*, 158 F.3d 913, 927 (6th Cir. 1998)).

After holding a hearing, the district court denied Sullivan's motion to withdraw his guilty plea. Sullivan first argues that he filed his motion to withdraw on the same day that the district court accepted his plea. He asserts that because his motion is dated July 5, the prison mailbox rule applies to permit his withdrawal "for any reason or no reason." Fed. R. Crim. P. 11(d)(1). But even accepting that Sullivan mailed his motion on July 5, he submitted it two days after the district court approved and filed the plea agreement on July 3. As a result, the "any reason" standard does not come into play.

Sullivan next disputes the district court's conclusion that no "fair and just reason" existed to withdraw the plea. *See* Fed. R. Crim. P. 11(d)(2)(B). Withdrawal "is not an absolute right but is a matter within the broad discretion of the district court." *United States v. Kirkland*, 578 F.2d 170, 172 (6th Cir. 1978) (per curiam); *see also United States v. Spencer*, 836 F.2d 236, 238 (6th Cir. 1987). To prevail, the defendant must show "a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). A district court consults several factors to make this determination:

> (1) the amount of time that elapsed between the plea and the motion to withdraw it; (2) the presence (or absence) of a valid reason for the failure to move for withdrawal earlier in the proceedings; (3) whether the defendant has asserted or maintained his innocence; (4) the circumstances underlying the entry of the guilty plea; (5) the defendant's nature and background; (6) the degree to which the defendant has had

invalid as it failed to state an offense. Both Counts One and Two failed to particularize the material that was accessed and the identity of the victim allegedly exploited, thereby making it entirely possible for the Movant to be subject to a subsequent prosecution for the same offense(s) based on the same facts.

CLAIM 3 - THE GOVERNMENT ABUSED THE GRAND JURY PROCESS WHEN HE CALLED THEM FOR THE PURPOSE OF OBTAINING ADDITIONAL EVIDENCE IN A PENDING CASE

On September 27, 2016, AUSA Gullo called a grand jury and subpoenaed Movant's sister to testify regarding matters currently pending in the case. Exhibit A, Sullivan Affdavit, ¶25; Exhibit D, Cogan Affidavit.

Movant submits that the government was alread aware of this witness who was available at the original grand jury. The witness testified to the matter of venue and of the Movant's actual use of the Dell computer. Id.. Movant submits that this calling a grand jury to bolster evidence is unlawful.

CLAIM 4 - THE COURT FAILED TO CONDUCT AN EVID.R. 104 INQUIRY TO QUALIFY THE EMPLOYMENT OF EVID.R. 414

On May 2, 2017, the Court held a hearing on the defendant's Motion in Limine *doc. #55) that was filed in responce to the government's Notice of Intent to Admit Evid.R. 414 Evidence. The Court ruled to allow the evidence by virtue of the defendant having been charged and indicted with an offense falling within Title 18 Chapter 110; ergo R. 414 qualified. Doc. #105, Final Pre-trial Tr., pg. 65; Doc. #67, Order, PID 596.

Movant submits truncated analysis did not conform to Rules 104 and 414 in two significant ways. First, the COurt ignored the requirement that it, not the prosecutor of grand jury (part of the Executive Branch), make the requisite finding that it was charged to perform under R. 104. Second, by charging and indicting the Movant with an offense under Chapter 110, only probable cause was established that the defendant engaged in that conduct, not a preponderance of evidence as required. Such truncated analysis violates Due Process, Equal Protection, and the Separation of Powers Doctrine.

CLAIM 5 - THE COURT PLAINLY ERRED AND CREATED A MANIFEST INJUSTICE WHEN IT DENIED MOVANT'S MOTION TO WITHDRAW GUILTY PLEA

Movant's handwritten Motion to Withdraw Guilty Plea was signed and mailed on July 5, 2017. Exhibit A, Sullivan

APPENDIX F

Affidavit, ¶64; Doc. #76, Motion to Withdraw Guilty Plea. The Magistrate's Report and Recommendation that the guilty plea be accepted was adopted by the Court that same day. Doc. #73, Order.

Movant submits that the denial of his motion to withdraw his unaccepted guilty plea constitutes a violation of Due Process, a denial of Movant's right to trial, a plain error, and a miscarriage of justice.

CLAIM 6 - THE COURT CREATED A MANIFEST INJUSTICE WHEN IT ACCEPTED AN INVALID GUILTY PLEA

On July 5, 2017, after reviewing the transcript of the Change of Plea proceedings, the Court adopted the Magistrate's Report and Recommendation that the guilty plea be accepted. Doc. #73, Order. A review of the plea transcript of the colloquy reveals that the Movant was not notified of all the essential elements of the charge to which he was pleading, and that it did not establish a factual basis for the offense. Doc. #68, Change of Plea Tr., pgs. 7, 23.

Movant submits that the R. 11 hearing transcript plainly shows that the plea was invalid, yet the Court accepted it. This error was plain, affected the Movant's substantial rights, and affected the fairness, integrity, and public reputation of the proceedings.

GROUND IV - THE GUILTY PLEA WAS NOT KNOWING, VOLUNTARY, AND INTELLIGENT

CLAIM 1 - NEITHER THE MOVANT, HIS COUNSEL, OR THE COURT CORRECTLY CORRECTLY UNDERSTOOD THE ESSENTIAL ELEMENTS OF THE OFFENSE

During the change of plea colloquy the Magistrate read the statute word for word in explaining the elements to the Movant. Doc. #68, Change of Plea Tr., pg. 7. This explanation did not advise the Movant that the government must prove that the defendant knew the nature of the image contained on the material. Neither did the Plea Agreement. Doc. #72.

Movant submits that neither counsel, the government, or the Court was aware of the existence of this required element. Since the Movant never made any admissions and has maintained his innocense, the error by the Court is not harmless. It is ipso facto that the omission of this element means that Movant was not properly advised of the nature of the offense to which he pled guilty, that his plea was not knowing and voluntary, and that he can plead anew.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA Respondent v. JAMES D. SULLIVAN Movant	CASE NO. 16-CR-155 (BYP) MOTION FOR SUMMARY JUDGMENT

Now comes the Movant. pro se, pursuant to Fed.R.Civ.P. 56 and moves this Court grant summary judgment. Movant shows herein that there is no genuine dispute as to any material fact and that he is entitled to judgment as a matter of law on the following claims:

GROUND II - DENIAL OF SIXTH AMENDMENT RIGHT TO COUNSEL AT THE MOTION TO WITHDRAW GUILTY PLEA HEARING

Claim #1 - It cannot be disputed that prior to its written ruling to deny the motion to withdraw guilty plea that:

1) the Court was made aware of the
   a) the Movant's dissatisfaction with his counsel
   b) counsel's misfeasance and conflict of interest, and
   c) Movant's request for appointment of new counsel to represent him at that hearing.
2) the Court failed to address these issues, and
3) the Court was derelict in its duty to rehear the the motion with new counsel.

Claim #2 - It cannot be disputed that at that hearing:

1) counsel stood by silently as the Court misstated the facts, the record, and the law as the Movant involuntarily argued his motion pro se.
2) counsel, when asked to argue the motion, refused by saying, "It's your motion. You argue it."

APPENDIX G

3) counsel opposed Movant's claims, testified against Movant, and at one point called Movant a liar.

Claim #3 - It cannot be disputed that at that hearing:

1) Movant was compelled by the Court to argue his motion pro se

2) Movant never expressed any desire to do so, and

3) counsel was present.

Claim #4 - It cannot be disputed that at that hearing the Court failed to:

1) advise Movant of his right to have his counsel argue the motion

2) provide Movant a Faretta warning, and

3) obtain a waiver of the Movant's right to have counsel argue the motion.

Claim #5 - It cannot be disputed that at that hearing the Court:

1) excluded counsel from the motion to withdraw guilty plea hearing, and

2) effectively recruited counsel as an adversary to the Movant's cause.

Claim #6 - It cannot be disputed that at that hearing the Court:

1) recruited counsel to testify against his client, and

2) suborned a conflict of interest.

GROUND III - MISCARRIAGE OF JUSTICE, VIOLATIONS OF DUE PROCESS, LACK OF JURISDICTION, AND PLAIN ERROR

Claim #2 - It cannot be disputed that the indictment:

1) was invalid

2) was insufficient

3) failed to state an offense, and

4) failed to confer jurisdiction to the Court.

Claim #4 - It cannot be disputed that the Court:

1) failed to qualify the employment of Evid.R. 414 by finding that the Movant had engaged in child molestation conduct by a preponderance of of evidence.

Claim #5 - It cannot be disputed that:

1) the Movant had an absolute right to withdraw his guilty plea for any or no reason

2) it was plain error for the Court to deny the motion to withdraw guilty plea, and

3) the Law of The Case Doctrine does not apply to the Sixth Circuit's affirmance of the denial.

Claim #6 - It cannot be disputed that:

1) it was a manifest injustice for the Court to accept the invalid guilty plea.

GROUND IV - THE PLEA WAS NOT KNOWING, VOLUNTARY, AND INTELLIGENT

Claim #1 and #2 - It cannot be disputed that at the plea hearing:

1) nobody knew of the scienter element of Accessing

2) the Court failed to notify the Movant, and determine his understanding, of the scienter element of Accessing, and

3) the Court failed to establish a factual basis for the charge of Accessing.

GROUND V - ACTUAL INNOCENSE

It cannot be disputed that the following relevant conduct is not a violation of Accessing under 18 U.S.C § 2252A(a)(5)(B):

"... Defendant used the Dell Computer to access with intent to view numerous digital files containing child pornography." (R. 139, PID 2045).

It also cannot be disputed that the government claimed that the Movant viewed the images, the actus reus of which is outside the ambit of Accessing. (R. 52, Notice to Admit Evidence, PID 510).

CONCLUSION

Movant has shown that there is no genuine dispute as to any material fact presented above and that he is entitled to judgment as a matter of law on those claims.

Respectfully submitted,

J. Sullivan

James D. Sullivan, pro se
Reg. #63990-060
FMC Butner
P.O. Box 1600
Butner, NC 27509

Claims 31-36 argue that Petitioner was not given his Sixth Amendment right to counsel in part because counsel withdrew at the same hearing in which the motion for withdrawal of the guilty plea was heard. Petitioner has not met his burden by the preponderance of the evidence to show a constitutional error for any of these claims. Claim 31 argues that the Court failed to inquire into the nature of the movant's dissatisfaction with counsel. Claim 32 argues that movant was abandoned by counsel at the withdrawal of plea hearing. Claim 33 argues that the Court compelled the movant to argue for withdrawal of his guilty plea *pro se*. Claim 34 argues that the Court failed to advise the movant of his right to counsel. Claim 35 argues that the Court excluded defense counsel from the motion to withdraw guilty plea hearing. Claim 36 argues that the Court suborned a conflict of interest.

Claims 31-36 were already addressed by the Court in the ineffective assistance of counsel section of this ruling. These claims are covered by the Court's *Strickland* analysis (above) because it is not the case that Petitioner did not have counsel, but that he is dissatisfied with counsel's performance. Petitioner had counsel because the Court did not grant counsel's motion to withdraw until after denying Petitioner's motion to withdraw his plea of guilty. Importantly, the method the Court used to address those two motions did not result in any error related to Petitioner's right to counsel.[6]

Claims 41-44 make multiple arguments related to Petitioner's attempt to withdraw his guilty plea and Petitioners' displeasure with the ruling of the Sixth Circuit on the matter. Claim 41 argues that the Court created a manifest injustice when it denied movant's motion to withdraw his guilty plea. Claim 42 argues that the Court created a manifest injustice when it

[6] *See supra* note 5.

accepted an invalid guilty plea. Claim 43 argues that Petitioner and counsel did not understand the elements of the crime. Claim 44 argues that the movant did not understand the nature of the crime to which he pleaded guilty.

Claims 41-44 are meritless. Petitioner ignores the well settled law that a withdrawal of a guilty plea is not designed to "allow a defendant to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes he made a bad choice in pleading guilty." *United States v. Benton*, 639 F.3d 723, 727 (6th Cir. 2011). Moreover, the issues raised in claims 41-44 have been sufficiently addressed on direct appeal. *See Sullivan*, 751 F. App'x at 799, 807-09 (6th Cir. 2018).

Absent exceptional circumstances, or an intervening change in the law, Petitioner may not use a § 2255 petition to relitigate issues brought on direct appeal. *Wright*, 182 F.3d at 467. Petitioner has not pleaded any such circumstance, or any such intervening change in the law permitting him to relitigate these matters. Therefore, Petitioner's claims related to the withdrawal of the guilty plea (31-36 and 41-44) are denied.

B. Grand Jury Due Process Claims

Claims 37-40 are related to issues Petitioner had with the grand jury that indicted him. Claim 37 argues that the grand jury indicted him without probable cause. Claim 38 argues that the grand jury issued an insufficient indictment, and that the grand jury's indictment was invalid. Claim 39 argues that the government abused the grand jury process. Claim 40 argues that the grand jury should not have heard certain evidence.

None of the Claims stated in Claims 37-40 properly state a cause of action on a § 2255 petition. None of them show a "(1) an error of constitutional magnitude; (2) a sentence imposed

In Claim (16), Sullivan alleged that trial counsel performed ineffectively by failing to advise him that the government had to prove that he knew that the images he accessed contained child pornography, but Sullivan was informed of the elements of the crime on the record and admitted that he knowingly accessed the files with the intent to view child pornography. In Claim (17), Sullivan asserted that trial counsel did not give him an adequate opportunity to review the plea agreement, but this assertion is contradicted by the plea transcript, where he expressed his satisfaction with trial counsel, affirmed that he had discussed the plea agreement with his attorney, and went over the agreement paragraph by paragraph with the magistrate judge. He further argued, in Claims (18) and (19), that trial counsel failed to inform him that the plea colloquy was invalid and object to the invalid proceeding, but he does not show any irregularities with the plea proceeding. Reasonable jurists could not debate the district court's rejection of Claims (16) through (19).

Sullivan next challenged the district court's rejection of his motion to withdraw his guilty plea. In Claims (29) and (41), Sullivan disputed the date on which his guilty plea was accepted and asserted that the timing of his motion allowed him to withdraw his plea for any or no reason; in Claim (42), he asserted that the district court accepted an invalid guilty plea; and in Claim (28), he claimed that appellate counsel failed to cite a specific case concerning whether digital files are "material." On direct appeal, this court affirmed the district court's denial of Sullivan's motion to withdraw his plea. *See Sullivan*, 751 F. App'x at 807-08. This court rejected Sullivan's assertions concerning the timing of his motion; approved of the district court's analysis of the factors under *United States v. Bashara*, 27 F.3d 1174, 1181 (6th Cir. 1994) (superseded on other grounds, as stated in *United States v. Caseslorente*, 220 F.3d 727, 734 (6th Cir. 2000)), and Federal Rule of Criminal Procedure 11(d)(2)(B); and rejected his arguments concerning judicial bias and inadequacies in the factual basis of the plea. *See Sullivan*, 751 F. App'x at 808. This included rejecting his argument that digital files are not "material" sufficient to violate § 2252A(a)(5)(B). *See, e.g., United States v. Gray*, 641 F. App'x 462, 467-68 (6th Cir. 2016). Sullivan provides no reason for this court to reconsider these issues on collateral review. He does not show that counsel