

AMENDED APPENDIX

- 1) August 3, 2023, Fifth Circuit Dismissal
- 2) August 3, 2021, U.S.D.C. Final Order

APPENDIX 1

August 3, 2023, Fifth Circuit Dismissal

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

August 3, 2023

Lyle W. Cayce
Clerk

No. 23-40100

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

RICHARD WAYNE BARTON,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 3:20-CV-107

CLERK'S OFFICE:

Under 5TH CIR. R. 42.3, the appeal is dismissed as of August 3, 2023, for want of prosecution. The appellant failed to timely comply with the certificate of appealability requirements.

No. 23-40100

LYLE W. CAYCE
Clerk of the United States Court
of Appeals for the Fifth Circuit
Christina Rachal

By: Christina C. Rachal, Deputy Clerk

ENTERED AT THE DIRECTION OF THE COURT

ENTERED

August 03, 2021

Nathan Ochsner, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

RICHARD BARTON,	§	
	§	
<i>Petitioner,</i>	§	
VS.	§	3:15-cr-20/3:20-CV-107
	§	
UNITED STATES OF AMERICA,	§	
	§	
<i>Respondent.</i>	§	

ORDER

JEFFREY VINCENT BROWN, UNITED STATES DISTRICT JUDGE.

Richard Barton pleaded guilty to distributing, receiving, and possessing child pornography¹ and was sentenced to 235 months in prison and ten years of supervised release.² The court also ordered him to pay a special assessment of \$300 and forfeit all property used or intended to be used in committing his offenses.³

Barton appealed his sentence, and he was appointed counsel.⁴ On appeal, he contested whether his conviction was tethered to sufficient facts and argued that his counsel's assistance was ineffective. The court of appeals affirmed.⁵ Barton

¹ See Dkt. 25.

² Dkt. 49.

³ See Dkts. 29, 47.

⁴ Dkts. 51, 60.

⁵ Dkt. 70; *United States v. Barton*, 879 F.3d 595 (5th Cir. 2018).

petitioned for a writ of certiorari, which the Supreme Court denied on October 10, 2018.⁶

Over one year later, Barton moved under 28 U.S.C. § 2255 to vacate his sentence and filed a memorandum in support.⁷ He also moved for appointment of counsel and an evidentiary hearing.⁸

Section 2255 motions are subject to a one-year statute of limitations that runs from the latest of—

- (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.⁹

⁶ Dkt. 72; see *Barton v. United States*, 139 S. Ct. 167 (2018).

⁷ Dkts. 75–76.

⁸ Dkts. 77–78.

⁹ 28 U.S.C. § 2255(f).

Under § 2255(f)(1), a judgment of conviction becomes final when the Supreme Court “affirms [the] conviction on the merits on direct review or denies a petition for writ of certiorari.”¹⁰ Because the Supreme Court denied Barton’s writ on October 10, 2018, the deadline for his motion under § 2255(f)(1) was October 10, 2019. That makes Barton’s motion—filed on March 31, 2020—over four months late.

Conceding this point,¹¹ Barton retorts that he did not timely receive the necessary records to prepare his motion, as requests for those records were ignored by counsel or denied by this court.¹² He also contends that the date his writ was denied is not the proper measure. Instead, he relies on § 2255(f)(4), which provides that the one-year limitations period begins on “the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.”¹³

Barton insists that “newly discovered proof” shows that none of the software or programs that he used to administer his pornography-distribution website, Fuzion.Com, had peer-to-peer distribution capability. Without peer-to-peer

¹⁰ *Clay v. United States*, 537 U.S. 522, 527 (2003).

¹¹ Dkt. 76 at 4–5.

¹² *See* Dkt. 73–74.

¹³ 28 U.S.C. § 2255(f)(4); *see Dodd v. United States*, 545 U.S. 353, 356 (2005).

capability, Barton contends, he could not have distributed pornography. He alleges he discovered this new evidence on January 31, 2020, which means his § 2255 motion was timely filed.

Of course, Barton's alleged new proof conflicts with his allocution at his rearraignment. As recounted in the Fifth Circuit's opinion:

At the rearraignment, the government recounted its evidence against Barton and asked the district court to elicit during allocution whether Barton understood that, by uploading the images back to the internet, he distributed child pornography. So the court asked, "Do you understand, sir, that you distributed child pornography?" "Yes, sir," Barton answered.¹⁴

Barton continues that if the time for him to file his petition does not run from January 31, 2020, the one-year statute of limitations may also be equitably tolled when its strict application would be inequitable,¹⁵ such as for claims of "actual innocence" or a "fundamental miscarriage of justice."

Section 2255(f)(4)

To invoke the deadline provided in § 2255(f)(4), the petitioner must show that he exercised "due diligence." In February 2019, Barton moved to compel his former counsel to produce case files and discovery materials for preparation for federal

¹⁴ *Barton*, 879 F.3d at 597.

¹⁵ *See United States v. Patterson*, 211 F.3d 927, 930–31 (5th Cir. 2000) (per curiam).

habeas proceedings.¹⁶ But just one month later, Judge Hanks denied that motion, explaining that Barton's request was premature because "[f]ederal district courts do not have the authority to order prepetition discovery in habeas cases."¹⁷ Judge Hanks also signaled to Barton that he first needed to file a motion under § 2255.¹⁸ Even so, more than a year passed before Barton filed his motion. He does not explain why, after being instructed that he needed to file his § 2255 motion before the court could compel discovery, he waited so long. Barton has not shown due diligence.

Equitable Tolling

Barton also argues that limitations should be equitably tolled. The Supreme Court has explained that "actual innocence" claims, like the one Barton tentatively raises, can override the statute of limitations. But tenable actual-innocence claims are rare: "[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt."¹⁹

¹⁶ Dkt. 73.

¹⁷ Dkt. 74 at 1 (quoting FEDERAL HABEAS MANUAL § 6:10 (2017)).

¹⁸ *See id.* (stating that "because he has not yet filed a motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255, there is no case or controversy before this Court").

¹⁹ *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)).

The new proof that Barton alludes misses this mark. As the Fifth Circuit has explained, “[d]istribution convictions have passed muster in this circuit even without direct evidence that someone downloaded an image the defendant uploaded.”²⁰ The need for peer-to-peer capability is simply not necessary to support a distribution charge.

What’s more, even if Barton could prove that peer-to-peer sharing was impossible on his website, a reasonable jury would still likely convict him on other evidence. After all, Barton signed an admission and stated orally in court that he distributed child pornography by hosting a child-porn website. He also confessed that some of his website’s users gave him “donations” to help him run pornography-trading sites, where users viewed, downloaded, and exchanged pornographic images that Barton uploaded.

And Barton does not adequately explain how his new evidence undermines his conviction for the two other charges he pleaded guilty to: receipt and possession of child pornography.

Despite Barton’s supposed newly discovered evidence, a reasonable jury would have still convicted him based on the other facts proffered by the government

²⁰ *Barton*, 879 F.3d at 597 (citing *e.g.*, *United States v. Russell*, 668 F. App’x 104, 105 (5th Cir.) (per curiam)).

at his arraignment. As much as Barton asserts an actual-innocence claim, he has not established that claim should override the statute of limitations.


Ineffective Assistance of Counsel

Because the court holds that Barton's § 2255 motion is time-barred, it does not consider his ineffective-assistance-of-counsel arguments.

* * *

For all these reasons, the court denies Barton's motion to vacate (Dkt. 75), his motion for an evidentiary hearing (Dkt. 77), and his motion for appointment of counsel (Dkt. 78).

Signed on Galveston Island on this 3rd day of August, 2021.


JEFFREY VINCENT BROWN
UNITED STATES DISTRICT JUDGE