APPENDIX

United States Court of Appeals for the Fifth Circuit

No. 23-50878

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

GARRY DAVID GALLARDO,

Defendant—Appellant.

Application for Certificate of Appealability
the United States District Court
for the Western District of Texas
USDC No. 5:06-CR-133-1
USDC No. 5:87-CR-98-1

ORDER:

Garry David Gallardo, federal inmate # 41571-080, is in custody pursuant to his 1987 and 2006 child pornography convictions. Gallardo filed identical motions under Federal Rule of Civil Procedure 60(b) in each of his criminal proceedings, attacking his underlying criminal convictions and contending that the trial courts respectively lacked jurisdiction over his criminal proceedings and to enter his criminal judgments. The district court construed the motions as seeking relief under 28 U.S.C. § 2255 and dismissed them without prejudice for lack of jurisdiction for failure to obtain

Appendix A

authorization from this court to file a successive § 2255 motion. The district court also denied Gallardo's motions to proceed in forma pauperis (IFP) on appeal, finding that any appeal would "fail to present a good faith non-frivolous issue." Gallardo's notices of appeal are construed as motions for a certificate of appealability (COA) to appeal the district court's dismissal of his Rule 60(b) motions. *See* FED. R. APP. P. 22(b)(2). Gallardo also moves for leave to proceed IFP on appeal, to expedite his appeal, and for this court to protect his constitutional rights.

As a preliminary matter, because Gallardo did not raise in his Rule 60(b) motions his argument that he received ineffective assistance when his counsel abandoned him with respect to the direct appeal of his 1987 conviction, this court lacks jurisdiction to consider it. *See Black v. Davis*, 902 F.3d 541, 545 (5th Cir. 2018). Otherwise, to obtain a COA to appeal the denial of his Rule 60(b) motions, Gallardo must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), by showing "at least, that jurists of reason would find it debatable whether the [motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Gallardo fails to make the requisite showing, and, accordingly, his motion for a COA is DENIED. His motion to proceed IFP on appeal, his motion to expedite his appeal, and his motion seeking protection of his constitutional rights are likewise DENIED.

Gallardo has ignored this court's previous warnings and has remained undeterred by the sanctions previously imposed by continuing to file frivolous, repetitive, or otherwise abusive motions in this court and the district court challenging his 1987 and 2006 child pornography convictions. Accordingly, Gallardo is ORDERED to pay a sanction of $500 to the clerk of this court, and he is BARRED from filing, in this court or in any court

subject to this court's jurisdiction, any pleading based, in whole or in part, on his child pornography convictions until the sanction is satisfied. In the event that Gallardo satisfies the $500 sanction, he shall remain BARRED from filing, in this court or in any court subject to this court's jurisdiction, any pleading based, in whole or in part, on his child pornography convictions, unless he first obtains leave of the court in which he seeks to file such challenge.

Gallardo is further WARNED that he should review any pending complaints, motions, and appeals and withdraw any that are frivolous or repetitive, and that failure to withdraw any frivolous or repetitive proceedings could result in the imposition of monetary sanctions. Finally, Gallardo is WARNED that filing any frivolous or repetitive pleading or challenge to his child pornography convictions, in this court or any court subject to this court's jurisdiction, will subject him to additional and progressively more severe sanctions.

CORY T. WILSON
United States Circuit Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA	§	
	§	
V.	§	**SA-06-CR-133-OLG-1**
	§	**SA-87-CR-098-OLG-1**
GARRY GALLARDO	§	
#41571-080	§	

ORDER

Pending before the Court are Movant Garry Gallardo's "Motion[s] to Reopen the 28 U.S.C. § 2255 Proceedings" pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. (ECF No. 306 in 5:87-CR-098-OLG-1; ECF No. 171 in 5:06-CR-133-OLG-1). Gallardo was originally convicted of four counts of Mailing Explicit Sexual Matter Concerning Minors in Cause No. 5:87-CR-098-OLG-1. While serving a term of probation for that conviction, Gallardo was caught viewing child pornography on a computer at the St. Mary's University library and downloading it onto a diskette labeled Vol. 45. A search of Gallardo's shed uncovered more diskettes labeled Vol. 1-33.

Gallardo was subsequently convicted of possession of child pornography and receipt of child pornography in Cause No. 5:06-CR-133-OLG-1. On October 12, 2006, the Court sentenced Gallardo to 240 months for possession of child pornography and 480 months for receipt of child pornography and ordered the sentences to run concurrently. The Court also revoked Gallardo's probation in Cause No. 5:87-CR-098-OLG-1 and sentenced Gallardo to ten years to run consecutively to his sentence in Cause No. 5:06-CR-133-OLG-1.

In the pending Rule 60(b) Motions, the Court understands Gallardo to attack his underlying criminal convictions on jurisdictional grounds. Section 2255 provides the primary means of collateral attack on a federal sentence. *Tolliver v. Dobre*, 211 F.3d 876, 877 (5th Cir. 2000). Accordingly, the pending motions are construed as motions pursuant to 28 U.S.C. § 2255. Section 2255 further provides that before a second or successive motion to vacate, set aside, or correct

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sentence is filed in the district court, a movant must move in the appropriate court of appeals for an order authorizing the district court to consider the motion. *See* 28 U.S.C. §§ 2255, 2244(b)(3).

Gallardo has previously challenged his conviction in 5:87-CR-098-OLG-1 in a § 2255 motion, which the Court denied on the merits. (ECF No. 145 in 5:87-CR-098-OLG-1). He also challenged his conviction in 5:06-CR-133-OLG-1 in a § 2255 motion, which the Court granted in part and denied in part on the merits. (ECF No. 124 in 5:06-cr-133-OLG-1). Gallardo then filed a Motion to Alter or Amend Judgment pursuant to Fed. R. Civ. P. 59(e) in both criminal cases, which the Court construed in part as § 2255 motions and dismissed without prejudice for want of jurisdiction. (ECF Nos. 300 & 301 in 5:87-cr-098-OLG-1; ECF Nos. 161 & 162 in 5:06-cr-133-OLG-1). On appeal from the dismissal, the Fifth Circuit denied Gallardo's request for a Certificate of Appealability. *United States v. Gallardo*, No. 21-50604 (5th Cir. 2022).

Pursuant to the amendments to §§ 2255 and 2244(b), the Court finds Gallardo's successive motions should be dismissed because Gallardo has not obtained prior approval to file a successive motion. *See United States v. Fulton*, 780 F.3d 683 (5th Cir. 2015) (holding the district court does not have jurisdiction to consider a successive § 2255 motion and remanding to the district court with instructions to dismiss the successive motion for want of jurisdiction). Gallardo failed to present an order to this Court from the Fifth Circuit Court of Appeals authorizing the filing of a successive § 2255 motion; therefore, this Court lacks jurisdiction to proceed with the § 2255 motions.

Accordingly,

IT IS ORDERED that the pending motions (ECF No. 306 in 5:87-cr-098-OLG-1 and ECF No. 171 in 5:06-cr-133-OLG-1) are construed as Motions to Vacate pursuant to 28 U.S.C. § 2255.

IT IS FURTHER ORDERED that the Clerk of the Court shall open companion civil causes for these respective matters, in keeping with its practices for docketing new motions to vacate pursuant to 28 U.S.C. § 2255 and shall file a copy of this Order in the new causes.

Finally, **IT IS ORDERED** that, to the extent Movant seeks to set aside his sentences and convictions, in whole or in part, his motions to vacate pursuant to 28 U.S.C. § 2255 are **DISMISSED WITHOUT PREJUDICE** for want of jurisdiction and a certificate of appealability is **DENIED**.

IT IS FURTHER ORDERED that all pending motions related to this motion, if any, are **DENIED AS MOOT.**

SIGNED this the 8 day of November, 2023.

ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GARRY GALLARDO,
#41571-080
Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

~~SA-06-CR-133-OLG-1~~

FINAL JUDGMENT

The Court considered the Judgment to be issued in the above styled and numbered cause. Pursuant to the Order dismissing Movant Garry Gallardo's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 of even date herewith without prejudice for want of jurisdiction,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that Movant's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (ECF No. 171) is **DISMISSED WITHOUT PREJUDICE. IT IS FURTHER ORDERED** that all pending motions related to this motion, if any, are **DENIED AS MOOT.**

FINALLY, IT IS ORDERED that a **CERTIFICATE OF APPEALABILITY WILL NOT ISSUE**, and this case is **DISMISSED** and **CLOSED.**

It is so **ORDERED.**

SIGNED on this 8 day of November, 2023.

ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

FILED

JUN 3 2 13 PM '87

CLERK

BY

DEPUTY

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

UNITED STATES OF AMERICA, Plaintiff, V. GARRY DAVID GALLARDO, Defendant.	CRIMINAL NO. SA-87-CR-098(1) S U P E R S E D I N G I N D I C T M E N T [Vio: 18 U.S.C. § 2252(a)(1): Mailing Explicit Sexual Matter Concerning Minors.]

THE GRAND JURY CHARGES:

COUNT ONE
[18 U.S.C. § 2252(a)(1)]

That on or about March 2, 1987, at San Antonio, Texas, in the Western District of Texas, Defendant,

GARRY DAVID GALLARDO,

did knowingly mail visual depictions, the producing of which involved the use of minors engaging in sexually explicit conduct, and which visual depictions are of such conduct, to wit: a certain envelope bearing a return address of Garry Gallardo, P.O. Box 14306, San Antonio, Texas 78214, which envelope contained, along with other matter, seven (7) black and white photographs depicting lascivious exhibition of the genitals and pubic area, in violation of Title 18, United States Code, Section 2252(a)(1).

COUNT TWO

[18 U.S.C. § 2252(a)(1)]

That on or about March 2, 1987, at San Antonio, Texas, in the Western District of Texas, Defendant,

GARRY DAVID GALLARDO,

did knowingly mail visual depictions, the producing of which involved the use of minors engaging in sexually explicit conduct, and which visual depictions are of such conduct, to wit: a certain envelope bearing a return address of Garry Gallardo, P.O. Box 14306, San Antonio, Texas 78214, which envelope contained, along with other matter, four (4) black and white photographs depicting lascivious exhibition of the genitals and pubic area, in violation of Title 18, United States Code, Section 2252(a)(1).

COUNT THREE

[18 U.S.C. § 2252(a)(1)]

That on or about March 2, 1987, at San Antonio, Texas, in the Western District of Texas, Defendant,

GARRY DAVID GALLARDO,

did knowingly mail a visual depiction, the producing of which involved the use of a minor engaging in sexually explicit conduct, and which visual depiction is of such conduct, to wit: a certain envelope bearing a return address of Garry Gallardo, P.O. Box 14306, San Antonio, Texas 78214, which envelope contained, along with other matter, one (1) color photograph depicting lascivious exhibition of the genitals and pubic area, in violation of Title 18, United States Code, Section 2252(a)(1).

COUNT FOUR

[18 U.S.C. § 2252(a)(1)]

That on or about January 26, 1987, at San Antonio, Texas, in the Western District of Texas, Defendant,

GARRY DAVID GALLARDO,

did knowingly mail a visual depiction, the producing of which involved the use of a minor engaging in sexually explicit conduct, and which visual depiction is of such conduct, to wit: a certain envelope bearing a return address of Garry Gallardo, P.O. Box 14306, San Antonio, Texas 78214, which envelope contained, along with other matter, one (1) black and white photograph depicting lascivious exhibition of the genitals and pubic area, in violation of Title 18, United States Code, Section 2252(a)(1).

A TRUE BILL.

George Dumont
FOREMAN

HELEN MILBURN EVERSBERG
United States Attorney

By: Steven Snyder
STEVEN L. SNYDER
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

UNITED STATES OF AMERICA, PLAINTIFF, VS. GARRY DAVID GALLARDO, DEFENDANT.	CRIMINAL ACTION SA-87-CR-98 SAN ANTONIO, TEXAS JULY 31, 1987 3:28 P.M.

SENTENCING

BEFORE THE HONORABLE EDWARD C. PRADO, JUDGE,
UNITED STATES DISTRICT COURT,
WESTERN DISTRICT.

APPEARANCES FOR:

THE GOVERNMENT:

MR. STEVEN L. SNYDER, AUSA
MR. LARRY MATHEWS, AUSA
MR. MIKE HARDY, AUSA
MR. GREG ANDERSON, AUSA
U.S. ATTORNEY'S OFFICE
727 E. DURANGO BLVD.
SAN ANTONIO, TEXAS 78206

THE DEFENDANT:

MR. EDUARDO SAENZ
1406 W. MAGNOLIA AVENUE
SAN ANTONIO, TEXAS 78201

THE COURT RECORDER:

MS. NANCY HERMER

PROCEEDINGS RECORDED BY ELECTRONIC SOUND RECORDING.

TRANSCRIPT PRODUCED BY TRANSCRIPTION SERVICE:

ACCUWORD PROCESSING
9642 Winsome
Houston, TX 77063
(713) 780-3011

Part of
01 Appendix C

DEFENDANT GALLARDO: YOUR HONOR, IF I MAY? ALL I SAID WAS THAT THE ONES THAT WERE MAILED WERE NO LESS THAN FIVE YEARS OLD.

THE COURT: ANYTHING FURTHER FROM EITHER SIDE?

MR. SNYDER: NOTHING, YOUR HONOR.

THE COURT: MR. SAENZ?

MR. SAENZ: NO, YOUR HONOR.

THE COURT: MR. GALLARDO, AS TO COUNT 1, IT IS THE DECISION OF THIS COURT THAT YOU BE COMMITTED TO THE CUSTODY OF THE ATTORNEY GENERAL OF THE UNITED STATES OR HIS AUTHORIZED REPRESENTATIVE, FOR IMPRISONMENT FOR A TERM OF SIX YEARS, PURSUANT TO 4205(A).

COUNT 2, IT IS THE JUDGMENT OF THIS COURT THAT YOU BE COMMITTED TO THE CUSTODY OF THE ATTORNEY GENERAL OR HIS AUTHORIZED REPRESENTATIVE, FOR IMPRISONMENT FOR A TERM OF SIX YEARS, PURSUANT TO 4205(A).

IT IS RECOMMENDED THAT THE SENTENCE IMPOSED IN COUNT 2 RUN CONSECUTIVE TO THE SENTENCE IMPOSED IN COUNT 1.

AS TO COUNT 3, YOU'RE COMMITTED TO THE CUSTODY OF THE ATTORNEY GENERAL OR HIS AUTHORIZED REPRESENTATIVE, FOR IMPRISONMENT FOR A TERM OF SIX YEARS, PURSUANT TO 4205(A).

IT IS RECOMMENDED THAT THE SENTENCE IN COUNT 3 WILL RUN CONSECUTIVE TO THE SENTENCE IMPOSED IN COUNTS 1 AND 2.

AS TO COUNT 4, YOU'RE COMMITTED TO THE CUSTODY OF THE ATTORNEY GENERAL OF THE UNITED STATES OR HIS AUTHORIZED

REPRESENTATIVE, FOR IMPRISONMENT FOR A TERM OF TEN YEARS, PURSUANT TO 4205(A).

IT IS FURTHER RECOMMENDED THAT THIS SENTENCE IN COUNT 4, THE INCARCERATION IS SUSPENDED. AND YOU BE PLACED ON SUPERVISED PROBATION FOR A PERIOD OF FIVE YEARS.

IT IS RECOMMENDED THAT THE SENTENCE IMPOSED IN COUNT 4 WILL BEGIN TO RUN UPON THE EXPIRATION OF THE SENTENCES WHICH THE COURT HAS IMPOSED IN COUNTS 1, 2, AND 3.

THEREFORE, THE TOTAL SENTENCE IMPOSED, MR. GALLARDO, IS EIGHTEEN YEARS, TO BE FOLLOWED BY A FIVE-YEAR SUPERVISED PROBATION PERIOD, WITH SUPERVISION.

IT IS THE RECOMMENDATION, FURTHER, OF THE COURT THAT YOU BE REQUIRED TO PAY A $200 ASSESSMENT, THAT IS $50 FOR EACH COUNT THAT YOU HAVE BEEN FOUND GUILTY OF.

AND, ALSO, THAT YOU RECEIVE PSYCHIATRIC AND MENTAL HEALTH SERVICES. AND THE PROPER FACILITY FOR THAT WOULD BE EITHER THE MEDICAL CENTER IN ROCHESTER, MINNESOTA, OR THE FEDERAL CORRECTIONAL INSTITUTION AT BUTNER, NORTH CAROLINA.

SO, THE COURT, FURTHER, RECOMMENDS THAT YOUR SENTENCE BE SERVED EITHER AT ROCHESTER, MINNESOTA, OR BUTNER, NORTH CAROLINA.

ANY MOTIONS BY THE GOVERNMENT?

MR. SNYDER: YES. THE UNITED STATES OF AMERICA MOVES TO DISMISS THE ORIGINAL INDICTMENT RETURNED IN THE CASE.

THE COURT: THAT MOTION WILL BE GRANTED.

MR. SNYDER: THANK YOU.

THE COURT: THE COURT WILL BE IN RECESS.

THE DEPUTY COURTROOM CLERK: ALL RISE, PLEASE.

(THE COURT RECESSED AT 3:06 P.M.)

===

I, BARBARA J. DRENNAN, AUTHORIZED ELECTRONIC RECORDING TRANSCRIBER, DO HEREBY CERTIFY THAT I HAVE TRANSCRIBED THE ABOVE PROCEEDINGS FROM CERTIFIED TAPES TAKEN BY THE COURT IN THE ABOVE STYLED AND NUMBERED CAUSE ON JULY 31, 1987; THAT SAID PROCEEDINGS WERE REDUCED TO TYPEWRITING BY ME OR UNDER MY PERSONAL SUPERVISION, AND THE ABOVE AND FOREGOING 15 PAGES OF TYPEWRITING CONSTITUTE A TRUE AND CORRECT TRANSCRIPT THEREOF.

GIVEN UNDER MY AUTHORIZED HAND, THIS THE 11th DAY OF November, A.D., 1988.

Barbara J. Drennan

BARBARA J. DRENNAN

AUTHORIZED ELECTRONIC RECORDING TRANSCRIBER

United States of America vs.

DEFENDANT: GARRY DAVID GALLARDO
420 West Pyron, San Antonio, Texas

United States District Court for WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DOCKET NO. SA-87-CR-98

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH DAY YEAR: July 31, 1987

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

[X] WITH COUNSEL Eduardo Saenz (Name of Counsel)

PLEA

[X] GUILTY, and the court being satisfied that there is a factual basis for the plea, on 6/15/87. [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [ ] GUILTY.

Defendant has been convicted as charged of the offense(s) of knowingly mailing visual depictions on or about 1/26/87 and 3/2/87, the producing of which involved the use of minors engaged in sexually explicit conduct, and which visual depictions are of such conduct, to-wit: certain envelopes bearing a return address of Garry Gallardo, P. O. Box 14306, San Antonio, Texas, 78214, which envelopes contained, along with other matter, photographs depicting lascivious exhibition of the genitals and public area, in violation of 18 U.S.C. 2252(a)(1), as charged in Counts One, Two, Three, and Four of the Superseding Indictment filed 6/3/87.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of SIX (6) YEARS pursuant to 18 USC 4205(a) on Count One; SIX (6) YEARS pursuant to 18 USC 4205(a) on Count Two, said sentence on Count Two to run consecutively to the sentence imposed on Count One; SIX (6) YEARS pursuant to 18 USC 4205(a) on Count Three to run consecutively to the sentences imposed on Counts One and Two; and TEN (10) YEARS on Count Four, the execution of said sentence of imprisonment on Count Four is hereby suspended and defendant is placed on PROBATION for a period of FIVE (5) YEARS, with supervision and under the terms and conditions of the Amended General Rules of Probation issued by this Court on 7/19/85 and filed on 7/22/85, said probationary period to commence upon completion of service of the sentences imposed on Counts One, Two, and Three; for a TOTAL SENTENCE of EIGHTEEN (18) YEARS IMPRISONMENT followed by FIVE (5) YEARS PROBATION, with supervision.

SPECIAL CONDITIONS OF PROBATION

IT IS FURTHER ORDERED that defendant shall immediately pay to the Attorney General a penalty assessment in the amount of $50 on each of Counts 1, 2, 3, and 4, for a TOTAL PENALTY ASSESSMENT of $200, for the purpose of funding a federal crime victims fund, pursuant to the "Victims of Crime Act of 1984," 18 U.S.C. § 3013.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends incarceration at the Federal Medical Center at Rochester, Minnesota, or the Federal Correctional Institution at Butner, North Carolina, where he could receive the psychiatric and mental health services necessary to assist him with his problem.

On motion of the U.S. Attorney, pursuant to plea agreement, the original Indictment filed on 4/15/87 is hereby dismissed.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

EDWARD C. PRADO

Date July 31, 1987

FILED
AUG 3 1987
CHARLES W. VAGNER, Clerk
By [illegible]

Appendix D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS,
SAN ANTONIO DIVISION

GARY DAVID GALLARDO, Movant,	§	
v.	§	CAUSE NO. SA-08-CA-00756-OLG [SA-06-CR-00133-OLG]
UNITED STATES OF AMERICA, Respondent.	§	

ORDER ACCEPTING RECOMMENDATION OF MAGISTRATE JUDGE

On this date came on to be considered the memorandum and recommendation of United States Magistrate Judge John W. Primomo (docket no. 87), and the objections of movant, Gary David Gallardo (docket no. 95). When a party objects to a memorandum and recommendation, the Court is required to make a *de novo* determination of those portions of the report or proposed findings or recommendations to which objection is made. Kreimerman v. Casa Veerkamp, 22 F.3d 634, 646 (5th Cir. 1994); 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b).

On March 15, 2006, Gallardo was charged with possession of child pornography in Count One of the Indictment, as proscribed by 18 U.S.C. § 2252A(a)(5)(B), and with receipt of child pornography in Count Two of the Indictment, as proscribed by 18 U.S.C. § 2252(a)(2). The same images were involved in both counts. Pursuant to a plea agreement, Gallardo pled guilty to both counts. On October 12, 2006, the Court sentenced him to 240 months on Count One and 480 months on Count Two, to run concurrently, and to be followed by a term of supervised release for life. The magistrate judge recommended that Gallardo's § 2255 Motion to Vacate (docket no. 73) be denied on all grounds except one: he found that Gallardo's conviction and sentence for possession of child pornography (Count One) should be vacated on double jeopardy grounds.

Appendix E

The Court has conducted an independent review of the entire record, a *de novo* review of the matters raised by the objections, and has reviewed the applicable law. The Court concludes that Gallardo's objections lack merit, and that they should be overruled. The Court further concludes that the memorandum and recommendation should be accepted.

Accordingly, it is ORDERED that Gallardo's objections are OVERRULED, and that the memorandum and recommendation is ACCEPTED pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b).

It is further ORDERED that Gallardo's § 2255 Motion to Vacate (docket no. 73) is GRANTED IN PART and DENIED IN PART as follows: Gallardo's sentence on Count One (240 months) is VACATED; all other grounds are DENIED. Because the sentence in Count One did not lead the Court to impose a harsher sentence on Count Two or the subsequent term of community supervision, a new sentencing hearing is not warranted. See *United States v. Kennedy*, 9 F.3d 103, 103–04 (5th Cir. 1993).

Additionally, pending in this case are several pro se motions filed by Gallardo seeking to continue discovery, file additional pleadings, hold a hearing, and issue final judgment in this case. It is ORDERED that those motions (docket nos. 94, 101, 102, 103, 106, 110, 112, 116, and 118) are DENIED AS MOOT.

It is further ORDERED that, having resolved all issues, this case is to be CLOSED on this date.

SIGNED this 29 day of September, 2011.

United States District Judge Orlando L. Garcia

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO. SA-06-CR-133-OG
	)	
GARRY GALLARDO	)	

STIPULATION OF FACTS

The United States of America, by and through the United States Attorney for the Western District of Texas and the undersigned Assistant United States Attorney, the Defendant, GARRY GALLARDO, and his attorney, Peter Held, stipulate to the following facts:

I.

If this case had proceeded to trial, the United States would have proven, by legal and competent evidence, that:

On June 29, 2005, Defendant, Garry Gallardo, was in the St Mary's University library in San Antonio, Texas, United States, using a computer which was available to the public. The library has several computers which are connected to the Internet for students and other visitors to use. Gallardo was using one of the computers. Two young girls, ages 14 and 15, who were attending some special classes at the University were looking for an available computer when they observed Gallardo looking at a web page which had a banner stating "Cum Sluts Child Sex Slaves."

The two girls reported what they saw to a librarian. The librarian observed Gallardo

Appendix R

looking at a web page with pornography on it. The librarian called the University Police. The police also observed Gallardo looking at a web page with child pornography on it. Gallardo had a 3.5 inch diskette in the computer. Gallardo and ultimately the computer were removed to the University police station. Gallardo waived his rights and admitted he had been looking at child pornography. Gallardo also admitted he had downloaded child pornography from the Internet to the diskette. Later at the San Antonio Police Department, Gallardo admitted that the diskette that had been in the computer was his and initialed it. The diskette was labeled Vol 45. He also stated he had been downloading images of child porn and that he knew the definition of child porn since he had been previously arrested for child pornography.

Subsequently during a search of a shed at Defendant's home, a tenant of Defendant gave consent to the FBI to search a common area in the laundry room where more diskettes labeled vol one through thirty-three were located.

A forensic analysis of the diskettes located numerous jpeg photo files of child pornography. On the vol 45 diskette that the Defendant had at the library showed that between 12:51 pm and 1:30 pm on June 29, 2005, defendant had received and downloaded to the diskette 22 images and a web page each of which was child pornography. Among those files were four files which are named in the indictment and depict sexual acts with a known identified minor.. More specifically the files named:

R4[12].jpg is a photograph of a little girl between the ages of 7 to 8 years old performing fellatio on an adult male. The victim has been identified by Belgium authorities.

tn03[9].jpg is a photograph of a little girl approximately 5 years old performing fellatio

on an adult male. The victim has been identified by Austrian authorities.

Logo_51[59].jpg is a photograph of a little girl approximately 5 years old performing fellatio on an adult male. The victim has been identified by Austrian authorities.

tn02[13].jpg is a photograph of a little girl approximately 7 years old performing fellatio on an adult male. The victim has been identified by English authorities.

All four of the above images traveled in interstate commerce and were downloaded from the Internet and saved to the diskette labeled vol. 45 on June 29, 2005, by the Defendant using the St Mary's university Library computer.

The following files were found on the diskettes located at the Defendant's residence:

m_p_1[978].jpg is a photograph of a 6 year old girl who is lying on a bed naked with her hands displaying her genitals and the words "slut hurt me" written on her torso in red.. The victim has been identified by the FBI in North Carolina.

M1040001[2084].jpg is a photograph of a seven to nine year old girl having intercourse with an adult male. The victim has been identified by authorities in Washington.

II.

The Defendant and his attorney, having read the foregoing Stipulation of Facts, agree that

these facts are true and correct, as evidenced by their signatures affixed below.

Respectfully submitted,

JOHNNY SUTTON
UNITED STATES ATTORNEY

BY: _____
C. LARRY MATHEWS, JR.
ASSISTANT U.S. ATTORNEY

_____
GARRY GALLARDO
DEFENDANT

_____
PETER HELD
ATTORNEY FOR DEFENDANT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA	§	
	§	
V.	§	**SA-06-CR-133-OLG-1**
	§	**SA-87-CR-098-OLG-1**
GARRY GALLARDO	§	
#41571-080	§	

ORDER

Movant Garry Gallardo was originally convicted of four counts of Mailing Explicit Sexual Matter Concerning Minors in Cause No. 5:87-CR-098-OLG-1. While serving a term of probation for that conviction, Gallardo was caught viewing child pornography on a computer at the St. Mary's University library and downloading it onto a diskette labeled Vol. 45. A search of Gallardo's shed uncovered more diskettes labeled Vol. 1-33.

Gallardo was subsequently convicted of possession of child pornography and receipt of child pornography in Cause No. 5:06-CR-133-OLG-1. On October 12, 2006, the Court sentenced Gallardo to 240 months for possession of child pornography and 480 months for receipt of child pornography and ordered the sentences to run concurrently. The Court also revoked Gallardo's probation in Cause No. 5:87-CR-098-OLG-1 and sentenced Gallardo to ten years to run consecutively to his sentence in Cause No. 5:06-CR-133-OLG-1.

On April 19, 2021, Gallardo filed a *pro se* "Motion for Judicial Notice" and a *pro se* motion for a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(1)(A) in both criminal cases. The Court construed the motions as motions for compassionate release. On April 26, 2021, the Court denied the motions, finding no compelling or extraordinary reasons for a sentence reduction. Alternatively, the Court found that Gallardo failed to demonstrate that he is not a danger to the safety of any other person in the community and the 18 U.S.C. § 3553(a) factors do not support an early release.

Appendix G

Gallardo then filed the pending self-styled Motions to Alter or Amend Judgment pursuant to Fed. R. Civ. P. 59(e) in both criminal cases. (ECF No. 300 in 5:87-cr-098-OLG-1; ECF No. 161 in 5:06-cr-133-OLG-1). In the Motions, he argues that the Court's order denying the compassionate release motions failed to address the "merits . . . that conclusively demonstrate the lack of jurisdiction of this Court over both movant and the subject-matter of the prosecutions in both cases."

At the outset, Gallardo's reliance on Rule 59(e) of the Federal Rules of Civil Procedure is misplaced. The Federal Rules of Civil Procedure do not apply to motions under § 3582 because the motions are criminal in nature. *See United States v. Goodwyn*, 596 F.3d 233, 235 (4th Cir. 2010). Moreover, insofar as Gallardo asks the Court to reconsider its order denying the compassionate release motion, he fails to demonstrate that his jurisdictional challenge amounts to a compelling and extraordinary reason to warrant a sentence reduction under § 3582(c)(1)(A).

To the extent Gallardo seeks to attack his underlying criminal convictions on jurisdictional grounds, the pending motions are construed as motions pursuant to 28 U.S.C. § 2255 and dismissed without prejudice. Section 2255 provides the primary means of collateral attack on a federal sentence. *Tolliver v. Dobre*, 211 F.3d 876, 877 (5th Cir. 2000). Section 2255 further provides that before a second or successive motion to vacate, set aside, or correct sentence is filed in the district court, a movant must move in the appropriate court of appeals for an order authorizing the district court to consider the motion. *See* 28 U.S.C. §§ 2255, 2244(b)(3).

Gallardo has previously challenged his conviction in 5:87-CR-098-OLG-1 in a § 2255 motion, which the Court denied on the merits. (ECF No. 145 in 5:87-CR-098-OLG-1). He also challenged his conviction in 5:06-CR-133-OLG-1 in a § 2255 motion, which the Court granted in part and denied in part on the merits. (ECF No. 124 in 5:06-cr-133-OLG-1).

Pursuant to the amendments to §§ 2255 and 2244(b), the Court finds Gallardo's successive motions should be dismissed because Gallardo has not obtained prior approval to file a successive motion. *See United States v. Fulton*, 780 F.3d 683 (5th Cir. 2015) (holding the district court does not have jurisdiction to consider a successive § 2255 motion and remanding to the district court with instructions to dismiss the successive motion for want of jurisdiction). Gallardo failed to present an order to this Court from the Fifth Circuit Court of Appeals authorizing the filing of a successive § 2255 motion; therefore, this Court lacks jurisdiction to proceed with the § 2255 motions.

Accordingly,

IT IS ORDERED that, to the extent the pending motions seek reconsideration of the Court's order denying Gallardo's motions for compassionate release, Gallardo's request for relief is denied.

IT IS FURTHER ORDERED that, to the extent Gallardo seeks to attack his underlying criminal convictions on jurisdictional grounds in the pending motions (ECF No. 300 in 5:87-cr-098-OLG-1 and ECF No. 161 in 5:06-cr-133-OLG-1) the motions are construed as Motions to Vacate pursuant to 28 U.S.C. § 2255.

IT IS FURTHER ORDERED that the Clerk of the Court shall open companion civil causes for these respective matters, in keeping with its practices for docketing new motions to vacate pursuant to 28 U.S.C. § 2255 and shall file a copy of this Order in the new causes.

Finally, **IT IS ORDERED** that, to the extent Movant seeks to set aside his sentences and convictions, in whole or in part, his motions to vacate pursuant to 28 U.S.C. § 2255 are **DISMISSED WITHOUT PREJUDICE** for want of jurisdiction and a certificate of appealability is **DENIED**.

IT IS FURTHER ORDERED that all pending motions are **DENIED AS MOOT**.

SIGNED this the 2nd day of June, 2021.

ORLANDO L. GARCIA
CHIEF UNITED STATES DISTRICT JUDGE