APPENDIX

No. _____

In The Supreme Court of the United States

JONATHON WILLIAM-DURAND NEUHARD,
Petitioner,

v.

UNITED STATES,
Respondent.

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RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 24a0242p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JONATHON WILLIAM-DURAND NEUHARD,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

No. 22-2120

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
Nos. 2:15-cr-20425-1; 2:20-cv-13119—Gershwin A. Drain, District Judge.

Decided and Filed: October 25, 2024

Before: SUTTON, Chief Judge; LARSEN and MURPHY, Circuit Judges.

COUNSEL

ON BRIEF: J. Vincent Aprile II, LYNCH, COX, GILMAN & GOODMAN, P.S.C., Louisville, Kentucky, John R. Minock, CRAMER, MINROCK & SWEENEY, Ann Arbor, Michigan, for Appellant. Jessica Currie, UNITED STATES ATTORNEY'S OFFICE, Detroit, Michigan, for Appellee.

OPINION

LARSEN, Circuit Judge. A jury convicted Jonathon Neuhard of producing, receiving, and possessing child pornography. A panel of this court affirmed his convictions. Neuhard then sought to vacate his sentence under 28 U.S.C. § 2255, arguing ineffective assistance of trial and appellate counsel. The district court denied the motion but granted Neuhard a certificate of appealability. For the reasons outlined below, we AFFIRM.

I.

For years, Neuhard sexually assaulted his two minor nieces while babysitting them at their grandmother's house. The older girl, MV1, who was nine years old when the abuse began, described multiple occasions when Neuhard had shown her pornographic videos, molested her, and photographed her naked in her grandmother's basement.

After MV1's mother reported the abuse, law enforcement obtained a warrant, searched Neuhard's trailer, and seized a laptop and memory card which contained two downloaded videos of child pornography and four deleted images. Metadata revealed that the images had been taken at the grandmother's house using a cell phone of the same make and model as Neuhard's. MV1 identified herself as the naked minor in the deleted images and testified that Neuhard was the photographer.

Neuhard was indicted on counts of producing, receiving, and possessing child pornography in violation of 18 U.S.C. §§ 2251(a), 2252A2, and 2552A(5)(B). The district court appointed Richard Korn as Neuhard's trial counsel after prior counsel withdrew. When meeting with his client, Korn noticed that Neuhard exhibited awkward behaviors when answering questions. Korn also noticed that Neuhard had reacted in a flat, emotionless manner in his recorded police interrogation. So, Korn sought more information. He discussed the issue with prior counsel, Neuhard's parents, and Neuhard himself. Korn also considered the opinions of two expert examiners. One had already concluded that Neuhard had autism, whereas the other found that Neuhard presented an inconclusive case. Korn further reviewed all of Neuhard's school records, including medical records, and read books and articles on autism and sexual crimes. Korn concluded it was a "close call" but decided that introducing evidence of Neuhard's autism at trial would be more harmful than helpful. R. 200, PageID 1969–70. Korn worried that, regardless of what an expert might caution, the jury would view Neuhard as a mentally ill sexual deviant who lacked control over his impulses. So, he decided that he would introduce autism evidence only if "absolutely necessary." R. 200, PageID 1959–60; R. 184-2, PageID 1766.

Korn laid out the defense's theory in his opening statement to the jury: three other individuals who lived at or frequented the grandmother's house had committed the crimes alleged. During the government's case, Agent Lisa Keith testified that she had interviewed Neuhard as well as these three other men. When asked by the prosecution about the other three's demeanor, Keith said that "[t]hey were cooperative, helpful, offered to take lie detector tests . . . ." R. 126, PageID 981. Korn immediately asked for a sidebar and objected to the reference to polygraph tests because it breached a pretrial agreement the parties had negotiated not to introduce such evidence.

During the sidebar, the government admitted error and supported a curative instruction. Korn noted the likely inadvertent nature of the comment and suggested remedying the error by introducing evidence that Neuhard had also offered to take a polygraph. (Neuhard had originally offered to take a polygraph while unrepresented, but Korn had later withdrawn that offer.) The court opted for the government's remedy, struck the remark from the record, and admonished the jury twice not to consider Keith's testimony "about other people offering to go take a polygraph." R. 126, PageID 982–85.

After the government rested, Korn moved for a mistrial, arguing that the instruction was insufficient to remedy the damage done. Keith's comment, Korn argued, completely undermined his theory of the case. If the court disagreed about a mistrial, Korn asked the court to at least permit him to introduce Neuhard's offer to take a polygraph to balance the bias caused by the comment. The court denied both requests but offered to reiterate its jury instruction. Korn declined the offer to avoid further highlighting the polygraph comment for the jury. The jury convicted Neuhard on all three charges.

Neuhard obtained new counsel, who raised six issues on appeal. *See United States v. Neuhard*, 770 F. App'x 251, 252–59 (6th Cir. 2019). This court affirmed, rejecting several arguments relevant to this appeal. Specifically, we held that the district court had not abused its discretion in rejecting Neuhard's polygraph offer and instead giving a limiting instruction, and that the alleged cumulative errors did not "warrant a retrial." *Id.* at 255–56.

Neuhard then pursued habeas relief under § 2255. He argued that Korn had performed deficiently by failing to adequately investigate and present evidence of his autism at trial and failing to immediately request an evidentiary hearing to determine whether Keith had intentionally mentioned a polygraph. Neuhard also argued that his appellate counsel had performed deficiently by failing to appeal the denial of his mistrial motion. After holding an evidentiary hearing, the district court denied habeas relief but granted Neuhard's motion for a certificate of appealability on these three issues.

II.

We review a district court's decision denying habeas relief under § 2255 de novo and its factual findings for clear error. *Greer v. United States*, 938 F.3d 766, 770 (6th Cir. 2019). To prevail on an ineffective assistance claim, "the defendant must show that counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984). This "is a most deferential standard even under *de novo* review." *Kendrick v. Parris*, 989 F.3d 459, 468 (6th Cir. 2021) (cleaned up) (quoting *Harrington v. Richter*, 562 U.S. 86, 105 (2011)). To prove that counsel's "[r]epresentation [was] constitutionally ineffective," a defendant must show that "it so undermined the proper functioning of the adversarial process that [he] was denied a fair trial." *Id.* at 470 (citation and quotation omitted). Courts also "must make 'every effort' to 'eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *Id.* at 468 (quoting *Strickland*, 466 U.S. at 689).

A.

Neuhard first contends that Korn performed deficiently by failing to sufficiently investigate and present expert evidence concerning Neuhard's autism. We disagree.

An attorney making a strategic decision must adequately "investigate his [or her] options and make a reasonable choice between them." *Towns v. Smith*, 395 F.3d 251, 258 (6th Cir. 2005). A strategy is reasonable if it falls "within the range of logical choices an ordinarily

competent attorney . . . would assess as reasonable to achieve a specific goal." *Miller v. Francis*, 269 F.3d 609, 616 (6th Cir. 2001) (quotation omitted). *Strickland* demands "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at 689. And "the range of reasonable applications is substantial" and "wide." *Kendrick*, 989 F.3d at 468 (quoting *Harrington*, 562 U.S. at 105).

The record shows that Korn adequately investigated Neuhard's autism and developed a reasonable strategy not to introduce autism evidence at trial. Neither party argues that producing evidence of autism would have been a defense to liability. Instead, any value from presenting such evidence would have been to explain Neuhard's atypical demeanor. Korn immediately noticed Neuhard's "unusually slow," "rigid," and "awkward" responses to his questions and, after reviewing Neuhard's interrogation recordings several times, became aware of his flat affect. R. 184-2, PageID 1765–66; R. 200, PageID 1957–58, 1966. Korn's concern was that a jury might infer guilt from Neuhard's emotionless response to police questioning.

Korn took reasonable steps to investigate this issue. He consulted with prior counsel and had several discussions with Neuhard's parents. He reached out to prior counsel's expert witness who had diagnosed Neuhard with autism. He also contacted a second psychologist who had previously evaluated Neuhard but found it inconclusive whether Neuhard had autism. Counsel also obtained all Neuhard's school records including his psychological assessments, though they contained "no mention of autism." R. 184-2, PageID 1766, R. 200, PageID 1958. Still, Korn "accepted the fact that [Neuhard] was autistic," and he researched the relationship between "autism and criminal sexual conduct cases" by reviewing relevant books and articles. R. 200, PageID 1964; R. 184-2, PageID 1766.

Based on this evidence, Korn, after several consultations with Neuhard, decided that presenting autism evidence entailed "the risk that the jury would perceive him as a mentally ill 'monster' who could not control his impulses to sexually abuse children." R. 184-2, PageID 1766–67. Korn took into account that "an expert would testify that such a conclusion is not valid," but thought that such caution would "not matter" to a jury. *Id.* at 1767. The risk, counsel concluded, "outweighed" any benefit to be gained. *Id.* at 1766. This strategic decision, based on sufficient investigation, fell well within the range of reasonable representation.

Nothing at trial suggested Korn should have changed course. In Korn's experience, Neuhard's awkwardness displayed itself only during conversation, and Korn knew that Neuhard had elected not to testify. During the proceedings, Neuhard sat at counsel table and "comported himself well, took notes during the testimony, and consulted with trial counsel in an appropriately subdued manner." R. 184-2, PageID 1767. The only negative evidence of Neuhard's comportment consisted of his unemotional demeanor during the six-minute interrogation recordings and the interviewing agent's testimony that he perceived Neuhard as "robotic," "reserved," "unemotional," and "short." R. 125, PageID 840–42. After hearing this testimony, Korn again considered whether he should put on an expert to explain the potential cause of Neuhard's demeanor but determined that calling an expert would only highlight Neuhard's atypical mannerisms for the jury. Drawing attention to the issue, Korn reasoned, would likely do more harm than good. And Korn deployed other tactics to combat the agent's testimony. He carefully cross-examined the agent, attacking his credibility, highlighting Neuhard's cooperativeness, and reiterating all of this in his closing statement. Korn's decision not to introduce autism evidence was thus well within the range of reasonable representation.

Neuhard's arguments to the contrary are unavailing. He argues that Korn should have done more research. For example, he says Korn should have consulted more sources, such as the National Autism Association, to learn how to present autism evidence. But counsel did research this issue and made the professional judgment that it would not be in his client's best interest to present autism evidence. "The test for ineffectiveness is not whether counsel could have done more;" it is merely whether counsel did enough. *Waters v. Thomas*, 46 F.3d 1506, 1518 (11th Cir. 1995).

Neuhard suggests that it should have been obvious to Korn that he needed to perform more research and introduce autism evidence because a new expert report, commissioned in conjunction with habeas proceedings, concluded that Neuhard was more seriously affected by autism than the prior experts had opined. Indeed, the post-trial expert said that Neuhard functioned in many ways like a ten-year-old child without autism. Neuhard does not clearly explain why having a more-severe diagnosis would have mattered. But, in any event, "simply introducing the contrary opinion of another mental health expert during habeas review is not

sufficient to demonstrate the ineffectiveness of trial counsel." *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 758 (6th Cir. 2013); *see also Black v. Bell*, 664 F.3d 81, 105 (6th Cir. 2011). The question is whether record evidence supports the conclusion that Korn "should have been aware at the time of [Neuhard's] trial" that additional investigation would produce more favorable evidence than the previous experts had provided. *Black*, 664 F.3d at 105 (emphasis omitted). No such evidence exists here. Korn interacted with Neuhard personally, consulted with his parents, obtained his school records, which did not mention autism, and consulted two experts. One expert diagnosed him with autism but the other could not confidently conclude, based on "borderline" test results, that Neuhard met the requirements for an autism diagnosis. R. 200, PageID 1964. Counsel still accepted that Neuhard was autistic but had no reason to suspect that yet another expert would provide a more severe diagnosis.[1] *See Mammone v. Jenkins*, 49 F.4th 1026, 1052 (6th Cir. 2022). Korn's investigation was reasonable.

Neuhard next says that counsel should have prepared materials regarding Neuhard's autism in case the need to present them arose at trial. But counsel is not ineffective for failing to prepare for eventualities that do not materialize. This argument, in other words, is just another way of asking whether counsel reasonably assessed the need to introduce expert testimony before and during trial. As explained above, the answer is "yes."

In sum, Neuhard's claim fails on *Strickland*'s first prong because Korn acted reasonably when investigating Neuhard's autism and deciding not to introduce autism evidence at trial.

B.

Neuhard next contends that Korn provided ineffective assistance by not requesting "an immediate evidentiary hearing" to determine whether Agent Keith acted deliberately when she testified concerning polygraphs. We again disagree.

Here, Neuhard fails on the prejudice prong, so we need not consider deficient performance. *Smith v. Mitchell*, 348 F.3d 177, 199–200 (6th Cir. 2003). Under *Strickland*'s prejudice prong, Neuhard must show that "[t]he likelihood of a different result" absent Korn's

[1]Indeed, it bears mentioning that an additional expert, retained before sentencing, described Neuhard's autism as "mild." R. 200, PageID 1882.

error was "substantial, not just conceivable." *Harrington*, 562 U.S. at 112. He doesn't. Instead, as the district court correctly explained, he speculates that, had Korn sought an evidentiary hearing, he would have uncovered malfeasance by the prosecution and the court would have granted a mistrial on that basis. *See United States v. Neuhard*, 2022 WL 10613160, at *5–6 (E.D. Mich. Oct. 18, 2022). The evidence suggests otherwise.

The parties disagree about the legal standard governing a district court's decision to grant a mistrial. The government says that, when the issue is improper reference to a polygraph, a mistrial is proper when an inference about the polygraph result was essential to assessing the credibility of a critical witness. *See United States v. Walton*, 908 F.2d 1289, 1293 (6th Cir. 1990). Neuhard says that *Zuern v. Tate*, 336 F.3d 478, 485 (6th Cir. 2003), applies instead. *Zuern* held that when determining whether an improper reference to inadmissible evidence merits a mistrial, courts should consider "(1) whether the remark was unsolicited, (2) whether the government's line of questioning was reasonable, (3) whether the limiting instruction was immediate, clear, and forceful, (4) whether any bad faith was evidenced by the government, and (5) whether the remark was only a small part of the evidence against the defendant." *Id.* We need not resolve this dispute because Neuhard cannot show a reasonable probability that the district court would have granted a mistrial here, even under Neuhard's preferred test.

To begin, the prosecution did not solicit Agent Keith's polygraph testimony. Neuhard's brief admits as much. After an instruction from the trial court not to discuss hearsay, the prosecution asked Keith about the three other suspects' "attitude, the demeanor, how they presented to you as a federal agent asking them questions?" R. 126, PageID 980–81. In response, Keith testified that the three were "cooperative, helpful, offered to take lie detector tests." *Id.* at 981. Korn immediately asked for a sidebar. He objected to the polygraph testimony; the government admitted error; and Korn asked for permission to introduce evidence that Neuhard had also offered to take a polygraph. The government's question, which asked only about demeanor, cannot be construed as soliciting testimony concerning polygraph offers.

The prosecution's questioning was also reasonable. The defense focused on the other potential perpetrators who had access to Neuhard's phone and laptop. By asking about their demeanor under questioning, the government sought relevant evidence aimed at rebutting the

defense's principal theory. *Cf. Jamison v. Collins*, 291 F.3d 380, 385 (6th Cir. 2002) (holding evidence concerning other suspects was relevant).

The district court also issued an immediate, clear, and forceful jury instruction. As soon as the sidebar ended, the court instructed the jury that:

> the reference here through the witness about other people offering to go take a polygraph is something that should not have come in and so I'm going to order that that be stricken, and so it's something you cannot consider when you discuss the case and deliberate on the case. So that testimony about other people offering to take a polygraph is to be stricken and not considered by you.

R. 126, PageID 984–85. The court issued this instruction before the presentation of further evidence and the directive made clear to jurors they could not consider the polygraph comments. And "[j]urors are presumed to follow instructions." *United States v. Harvey*, 653 F.3d 388, 396 (6th Cir. 2011). *See also Neuhard*, 770 F. App'x at 255 (holding on direct appeal that the district court acted within its discretion by giving this instruction).

The record, furthermore, reveals no grounds on which to upset the district court's determination that the government did not deliberately introduce the polygraph evidence. Neuhard argued in the evidentiary hearing on the § 2255 motion that Keith's mention of the polygraphs could not have been inadvertent. After all, the prosecutor had told her not to mention them and the court had just instructed her not to recount hearsay. *See Neuhard*, 2022 WL 10613160 at *6. But Keith testified that, despite her experience as an agent, Neuhard's trial was her first time testifying, that she mistakenly made the polygraph remark, and that she immediately felt "like an idiot" afterward. R. 197, PageID 1864; R. 200, PageID 1978–79. The court found Keith's explanation credible and we "give great deference to the district court's credibility determinations." *United States v. Prigmore*, 15 F.4th 768, 777 (6th Cir. 2021) (quotations and citation omitted). Neuhard points to no other evidence that the polygraph testimony was intentional. We thus defer to the district court's credibility determination in favor of the government.

Finally, the remark was, at best, "only a small part of the evidence against the defendant." *Zuern*, 336 F.3d at 485. The credibility of the three men who offered to take polygraphs was not vital to the case. As the court explained, these three lived in and had access to the home between

2012 and 2013. Yet, whoever took the child pornography pictures did so in January 2014. *Neuhard*, 2022 WL 10613160, at *6. Moreover, MV1 testified that Neuhard took the pictures while molesting her in her grandmother's basement. *Id.* The pictures' metadata confirmed her testimony, showing that they were taken at the grandmother's house by a Samsung phone identical to Neuhard's. And police found the laptop and memory card containing these images—alongside other downloaded child pornography videos—in Neuhard's trailer.

In sum, Neuhard has not demonstrated a reasonable probability that the district court would have granted a mistrial had Korn immediately requested an evidentiary hearing after the polygraph comments. So, he has not shown prejudice as required by *Strickland*.

C.

Finally, Neuhard contests appellate counsel's performance, arguing that she should have appealed the denial of the mistrial motion based on bias from the polygraph evidence, rather than appealing the court's ruling refusing to introduce Neuhard's polygraph offer. Once more, we disagree.

At the outset, Neuhard's presentation of the issues suggests that his direct appeal had only two possible claims. That's hardly the case. Neuhard's appellate counsel actually raised six sophisticated arguments on appeal, including a Fourth Amendment challenge to the search warrant, a prosecutorial misconduct challenge to closing arguments, a sentencing enhancement challenge concerning Neuhard's state law convictions, a challenge to the causation standards for restitution, and an overall cumulative error challenge. Brief for Appellant at ii–iii, *Neuhard*, 770 F. App'x 251 (Mem.). She is not at fault merely for not raising a seventh. *See* Ruggerio Aldisert, Winning on Appeal 129 (2d ed. 2003) ("The most important decision you make in writing a brief is to limit the issues to about three, no more."). Indeed, appellate counsel "need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Smith v. Robbins*, 528 U.S. 259, 288 (2000); *Hand v. Houk*, 871 F.3d 390, 410 (6th Cir. 2017) (same). So appellate counsel fails the performance prong only when the "ignored issues are clearly stronger than those presented." *Hoffner v. Bradshaw*, 622 F.3d 487, 505 (6th Cir. 2010) (quoting *Robbins*, 528 U.S. at 259).

To meet this standard, "it is not enough that the ignored claim was stronger than one of the claims actually presented; to overcome the presumption of effectiveness, the ignored claim must have been stronger than all of those other claims that were actually presented." *Sullivan v. United States*, 587 F. App'x 935, 944–45 (6th Cir. 2014); *see also Houston v. Phillips*, 2022 WL 3371349, at *4 n.3 (6th Cir. Aug. 16, 2022) ("Houston does not argue that this defaulted claim was 'clearly stronger' than the twelve other ineffective-assistance claims that his postconviction counsel did raise"); *Hutton v. Mitchell*, 839 F.3d 486, 501 (6th Cir. 2016) (comparing two omitted claims to the five claims raised on appeal), *rev'd on other grounds*, 582 U.S. 280 (2017); *Mapes v. Tate*, 388 F.3d 187, 192 (6th Cir. 2004) (comparing the omitted issue to the twelve assignments of error raised on appeal). The government does not raise this argument, however, so we do not reject Neuhard's arguments on this basis.

Focusing just on the two issues Neuhard has selected, we disagree that the mistrial denial provided grounds for appeal that were "clearly stronger" than the polygraph issue. A court can admit evidence that a party offered to take a polygraph if the evidence is relevant and the risk of unfair prejudice or jury confusion does not outweigh its probative value. *United States v. Harris*, 9 F.3d 493, 501–02 (6th Cir. 1993). Neuhard's appellate counsel advanced colorable arguments that his uncounseled offer to take a polygraph showed that he lacked knowledge of the child pornography on his devices, even though counsel later withdrew that offer. Brief for Appellant at 41, *Neuhard*, 770 F. App'x 251 (Mem.). Appellate counsel also argued that, since the government first breached the agreement not to introduce polygraph information, admitting evidence that Neuhard offered to take a polygraph examination would not have resulted in prejudice to either party because the damage was done. *Id.* at 41–42. These were reasonable arguments to make on appeal.

Neuhard's mistrial claim, meanwhile, had little chance of success on appeal. As we explained above, even applying Neuhard's preferred test, *Zuern*, 336 F.3d at 485, Neuhard fails each of its prongs. *See supra* II.2. We can't say that this claim was "clearly stronger" than the one counsel raised.

Neuhard resists this conclusion, pointing to this court's reasoning rejecting his appeal. *See Neuhard*, 770 F. App'x at 255. But Neuhard relies exclusively on information that arose

after his appellate counsel made her strategic decisions to argue that those decisions were unreasonable. As the Supreme Court has explained, "[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). "Once we eliminate the distorting effects of hindsight," Neuhard cannot "overcome the presumption that" his appellate counsel provided adequate representation. *Kendrick*, 989 F.3d at 474.

In sum, Neuhard's appellate counsel did not perform inadequately by failing to raise the mistrial issue on appeal.

* * *

We AFFIRM the district court's denial of Neuhard's § 2255 habeas motion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-2120

JONATHON WILLIAM-DURAND NEUHARD,

Petitioner - Appellant,

v.

UNITED STATES OF AMERICA,

Respondent - Appellee.

FILED
Oct 25, 2024
KELLY L. STEPHENS, Clerk

Before: SUTTON, Chief Judge; LARSEN and MURPHY, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's denial of Jonathon William-Durand Neuhard's § 2255 habeas petition is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

APPENDIX B

No. 22-2120

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JONATHON WILLIAM-DURAND NEUHARD,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: MOORE, Circuit Judge.

Jonathon William-Durand Neuhard, a federal prisoner represented by counsel, appeals the district court's order that granted in part and denied in part his motion to vacate under 28 U.S.C. § 2255. Neuhard moves to expand the certificate of appealability issued by the district court.

A jury found Neuhard guilty of producing, receiving, and possessing child pornography, in violation of 18 U.S.C. §§ 2251(a), 2252A(a)(2), and 2252A(a)(5)(B). The district court sentenced him to concurrent prison terms of 420 months, 240 months, and 120 months, respectively. We affirmed the district court's judgment. *United States v. Neuhard*, 770 F. App'x 251 (6th Cir. 2019).

Neuhard filed a § 2255 motion, raising various claims, including that his trial counsel rendered ineffective assistance by not adequately presenting evidence of his autism as a mitigating factor at sentencing. The district court granted the motion as to Neuhard's claim that his appellate counsel rendered ineffective assistance by failing to appeal a restitution order as directed, but the court otherwise denied relief. The court granted a certificate of appealability as to three of four issues, including on Neuhard's claim that trial counsel was ineffective for failing to present evidence of Neuhard's autism at trial, but denied a certificate of appealability as to Neuhard's claim that trial counsel rendered ineffective assistance at sentencing.

Neuhard now moves to expand the certificate of appealability to include that claim. To obtain a certificate of appealability, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court has rejected a constitutional claim on the merits, a movant must show that jurists of reason would find the district court's assessment of the claim to be debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). To prevail on an ineffective-assistance-of-trial-counsel claim, a movant must establish that trial counsel's performance was deficient, meaning that counsel made errors so serious that he was not functioning as the counsel guaranteed by the Sixth Amendment, and that the deficiency prejudiced the defense, meaning that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Shimel v. Warren*, 838 F.3d 685, 696 (6th Cir. 2016) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

At Neuhard's sentencing in November 2017, counsel relied on the opinions of two psychologists, Jennifer Zoltowski and Dr. Steven Miller, who conducted assessments of Neuhard in 2016 and 2017, respectively. Both Zoltowski and Miller concluded that, based on their review of Neuhard's history, their examinations of him, and the results of psychological testing, Neuhard suffers from autism. Both experts noted that Neuhard's autism results in significant functional deficits, although Miller characterized Neuhard's autism as milder or less severe than other cases of autism. Based on the assessments of Miller and Zoltowski, trial counsel argued that a lesser sentence was warranted.

Neuhard contends that counsel was ineffective by not presenting more evidence about his autism. In his application for a COA before the district court, he argued that counsel failed to perform an adequate investigation into autism and as a result, wrongly relied on psychological evaluations that characterized Neuhard's autism as "mild." Neuhard relies on a 2020 psychological assessment conducted by Dr. Andrew Maltz, who specializes in autism, along with Maltz's related testimony. Maltz conducted additional testing on Neuhard and concluded that he has autism resulting in various impairments, particularly with comprehension, adaptive functioning, and understanding the social aspects of communication. Maltz disputed that a case

of autism can be considered "mild," although he recognized that people with autism have differing levels of cognitive and functional ability. Before the district court, Neuhard argued that this evaluation would have rebutted the government's contentions that Neuhard's autism was not mitigating and that some of his traits were aggravating factors. In his application for a certificate of appealability in the Sixth Circuit, he presents a new argument: trial counsel was ineffective for failing to argue that Neuhard was entitled to a downward departure due to his diminished capacity, pursuant to USSG § 5K2.13. We generally do not review claims not presented to the district court. *United States v. Ellison*, 462 F.3d 557, 560 (6th Cir. 2006)); *see also Charette v. Bell*, 106 F. App'x 327, 331 (6th Cir. 2004).

Reasonable jurists would not debate the district court's rejection of Neuhard's ineffective-assistance claim. Prior to sentencing, Neuhard had been psychologically evaluated by Zoltowski, and counsel referred Neuhard to Dr. Miller for another evaluation. Counsel also argued at sentencing that Neuhard's autism had a profound effect on his life and should be viewed as a mitigating factor. Although counsel could have obtained additional or different expert testimony, he reasonably relied on the opinions of Zoltowski and Miller, given that no evidence suggested that either expert was incapable of providing a valid assessment and nothing in Dr. Miller's report suggested that additional analysis was warranted. *See Morris v. Carpenter*, 802 F.3d 825, 841 (6th Cir. 2015) (explaining that "[a]ttorneys are entitled to rely on the opinions and conclusions of mental-health experts"); *Lundgren v. Mitchell*, 440 F.3d 754, 772 (6th Cir. 2006) (holding that counsel was not ineffective in their investigation when they obtained two mental-health experts who evaluated the petitioner and interviewed immediate family members). The fact that counsel may have been able to obtain a somewhat more detailed or favorable assessment from another expert is insufficient to show that counsel's performance was so deficient that he was not functioning as the counsel guaranteed by the Sixth Amendment. *See Johnson v. Bagley*, 544 F.3d 592, 605 (6th Cir. 2008) (recognizing that a defense attorney need not shop for the best expert who will testify in the most advantageous way possible); *Reynolds v. Bagley*, 498 F.3d 549, 557 (6th Cir. 2007) (same). Because the caselaw in our circuit cuts strongly against the arguments petitioner

set forth before the district court, a reasonable jurist would not debate the district court's rejection of Neuhard's argument that trial counsel provided ineffective assistance at sentencing.

Accordingly, Neuhard's motion to expand the certificate of appealability is **DENIED**. The clerk's office is directed to issue a briefing schedule with respect to the claims certified by the district court.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX C

No. 22-2120

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JONATHON WILLIAM-DURAND NEUHARD,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: BOGGS, BATCHELDER, and GIBBONS, Circuit Judges.

Jonathon William-Durand Neuhard, a federal prisoner, petitions for rehearing of our June 22, 2023, order denying his motion to expand the certificate of appealability issued by the district court. Neuhard also moves for permission to exceed the length limitation for a petition for rehearing. We have reviewed the petition and conclude that this court did not overlook or misapprehend any point of law or fact in denying Neuhard's motion to expand the certificate of appealability. *See* Fed. R. App. P. 40(a)(2).

Accordingly, we **GRANT** Neuhard's motion to file an oversize petition for rehearing and **DENY** the petition.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JONATHAN NEUHARD,

Defendant.

Case No. 15-cr-20425

U.S. District Court Judge
Gershwin A. Drain

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO VACATE SENTENCE (ECF No. 175)

I. INTRODUCTION

On March 17, 2017, Defendant Jonathon Neuhard was convicted, after a jury trial, of production, receipt, and possession of child pornography, in violation of 18 U.S.C. § 2251(a) (Count One), 18 U.S.C. § 2252A(a)(2) (Count Two), and 18 U.S.C. § 2252A(5)(B) (Count Three), respectively. ECF No. 117. He was sentenced to 420 months on Count One, 240 months on Count Two, and 120 months on Count Three, to run concurrently for a total sentence of 35 years. ECF No. 165, PageID.1620. Neuhard's convictions and sentences were affirmed on direct appeal by the Sixth Circuit. *United States v. Neuhard*, 770 Fed. App'x 251 (6th Cir. 2019). His petition

for a writ of certiorari was subsequently denied by the United States Supreme Court on November 25, 2019. *Neuhard v. United States*, 140 S. Ct. 570 (2019).

Presently before the Court is Defendant's Motion to Vacate Pursuant to 28 U.S.C. § 2255. ECF No. 175. The Motion is fully briefed, *see* ECF Nos. 184, 190, and the Court held an evidentiary hearing on the Motion on May 13 and 26, 2022. For the following reasons, the Court will **GRANT IN PART AND DENY IN PART** Neuhard's Motion to Vacate Pursuant to 28 U.S.C. § 2255 (ECF No. 175).

II. BACKGROUND

A. Factual & Procedural Background

In March 2015, Neuhard's nieces, MV-1 (then nine years old) and MV-2 (then seven years old), told their mother that Neuhard had sexually assaulted them at their grandmother's house. ECF No. 34-1, PageID.117-18. Their mother reported the abuse to the police, and an investigation ensued. *See* ECF No. 34-1. A forensics examination of Neuhard's tablet revealed that four photographs of an adult male performing sexual acts on MV-1 had been deleted from the SD card. ECF No. 125, PageID.851-54. Metadata indicated that the photographs had been taken at the victims' grandmother's house in January 2014. *Id.* at PageID.847-54. Neuhard's laptop also contained two child-pornography videos that had been downloaded from

the internet. ECF No. 126, PageID.906-07. Neuhard was ultimately arrested by Homeland Security Investigations Agent Lisa Keith. ECF No. 126, PageID.970.

A grand jury charged Neuhard in a three-count indictment with production of child pornography (the photos of MV-1) and receiving and possessing child pornography (the videos from the internet) in violation of 18 U.S.C. §§ 2251(a), 2252A(a)(2), and 2252A(5)(B). *See* ECF No. 12. A jury trial commenced on March 15, 2017, and testimony lasted two and a half days.

During the trial, Sergeant Marc Zupic, who conducted the search of Neuhard's residence, testified that Nehard was "reserved, unemotional[,] [and] [s]hort with his answers" when Sergeant Zupic interviewed him. ECF No. 125, PageID.841. Sergeant Zupic went on to describe Neuhard's behavior during their second conversation, which occurred at the police station, as "robotic." *Id.* at PageID.842. Recordings of this second interview were also played for the jury. *Id.* at PageID.842-47.

MV-1 testified that Neuhard molested her while showing her pornographic videos on more than one occasion. ECF No. 123, PageID.627-31, PageID.633-35. She also testified that he took pictures of her genitals with his phone and confirmed that the four photographs recovered from the tablet depicted her and Neuhard. *Id.* at PageID.635-38. One of these photographs depicted Neuhard's genitalia as well. *See*

ECF No. 125, PageID.847-854. According to MV-1, the abuse occurred at her grandmother's (Neuhard's mother-in-law's) house, where Neuhard lived at the time. ECF No. 123, PageID.627-36.

The defense theory was that one of the several other men who had lived in the house over time and had access to Neuhard's electronic devices took the photographs and downloaded the videos. ECF No. 125, PageID.822-23. Debra Razzaq, Neuhard's mother-in-law and the victims' grandmother, testified that in addition to Neuhard and his family, Justin Cinquemani, Cody Cinquemani, and Sanchez Fernandez lived in her house during 2012 and 2013. ECF No. 127, PageID.1055-60. Razzaq also testified that she hired Forest McNiff to remodel her basement. *Id.* at PageID.1061. She further testified that the other people living in the house had access to Neuhard's phone and tablet and that Fernandez used Neuhard's phone frequently. *Id.* at PageID.1063-65.

Agent Keith testified that, during her investigation, she had interviewed other men who had a significant presence at Debra Razzaq's residence, including Sanchez Fernandez, Rustam Razzaq (Debra Razzaq's son and the victims' uncle), and Forest McNiff. ECF No. 126, PageID.979-80. When asked about their attitudes and demeanor during questioning, Agent Keith responded that the men were "cooperative, helpful, offered to take lie detector tests, [and] allowed [her] to take

photographs of their hands, their fingers, their thumbs." *Id.* at PageID.981. Trial counsel, Attorney Korn, requested a sidebar and objected to the testimony. *Id.* He asked that the Court cure the error by allowing him to introduce evidence, through Sergeant Zupic, that Neuhard offered to take a government polygraph during his interrogation. *Id.* The prosecutor objected because Neuhard ultimately withdrew the offer; instead, she proposed the Court strike the testimony and give a curative instruction. *Id.* at PageID.982-83. Ultimately, this Court struck the inadmissible testimony regarding the three men offering to take polygraphs and instructed the jury not to consider it. *Id.* at PageID.984-85.

After the Government rested, Neuhard moved for a new trial. Attorney Korn explained that "the import of everything [he had] done during the trial was that there were other people living in this house who could have perpetrated the abuse and they could have taken those pictures." *Id.* at PageID.1019. Thus, Agent Keith's statement about the other men offering take polygraphs was "very damaging" to the defense, and "there's no way that an instruction could make [the jury] forget that they hear[d] that." *Id.* at PageID.1020. Trial counsel therefore asked the Court to grant a new trial "under these circumstances." *Id.*

Attorney Korn went on to request that, if the Court was disinclined to grant his motion, that it allow Neuhard to introduce evidence that he offered to take a

polygraph during his interview with Sergeant Zupic to "balance the equation." *Id.* at PageID.1022-23. The Court denied the motion without prejudice, *id.* at PageID.1023-24, but Neuhard never filed a renewed motion despite being given an extension of time in which to do so, ECF No. 122. The Court also denied trial counsel's request to introduce evidence of Neuhard's offer to take a polygraph so as not to introduce additional errors into the trial. *Id.* at PageID.1025.

The jury convicted Neuhard on all counts, ECF No. 117, and judgment entered on November 22, 2017, ECF No. 145. Neuhard timely appealed that judgment. ECF No. 147. However, after briefing by the parties, the Court later entered an order requiring Neuhard to pay $40,356 in restitution. *See* ECF No. 163. Neuhard did not appeal this order.

On appeal, appellate counsel, Attorney Raben, argued, *inter alia*, that the Court abused its discretion by denying Neuhard's request to admit evidence that he had offered to take a polygraph. ECF No. 175, PageID.1674. The Sixth Circuit affirm this Court's denial, finding that the polygraph evidence "was marginally relevant at best." *Neuhard*, 770 F. App'x at 255. Appellate counsel did not raise the Court's denial of Neuhard's motion for a mistrial.

B. The Instant Motion

Neuhard now seeks to vacate his sentence pursuant to 28 U.S.C. § 2255. ECF No. 175. He raises three arguments in support of his Motion to Vacate. *Id.* First, he contends he was deprived of his Sixth Amendment right to effective assistance of appellate counsel because Attorney Raben failed to raise a meritorious issue on direct appeal. *Id.* at PageID.1672–78. Specifically, Neuhard asserts that appellate counsel was deficient for failing to raise as an issue on appeal the Court's denial of trial counsel's motion for mistrial based on the introduction of inadmissible and allegedly prejudicial polygraph evidence. *Id.* Second, Neuhard argues he was deprived of his Sixth Amendment right to effective assistance of trial counsel because Attorney Korn failed to present evidence of Neuhard's autism, failed to request an evidentiary hearing on whether Agent Keith's polygraph testimony was inadvertent, failed to adequately present evidence of Neuhard's autism as a mitigating factor at sentencing, and failed to investigate by not interviewing the mother of the victims prior to trial. *Id.* at PageID.1690–1700. Third, Neuhard asserts he was deprived of his Sixth Amendment right to effective assistance of appellate counsel because Attorney Raben admitted she inadvertently failed to file a notice of appeal from the restitution order. *Id.* at PageID.1701–03.

The Government concedes that appellate counsel "performed deficiently by failing to file a notice of appeal on the amended judgment, despite Defendant's specific request to do so." ECF No. 184, PageID.1761. The Government thus agrees that Neuhard should be permitted to file a notice of appeal from the amended judgment so that he can appeal the order of restitution in this case. *Id.* Nevertheless, the Government disputes Neuhard's remaining claims of error. *Id.* at PageID.1746–60. For the following reasons, the Court will grant in part and deny in part Neuhard's Motion to Vacate.

III. LAW & ANALYSIS

A. Legal Standard

Under § 2255, a prisoner sentenced by a federal court may "move the court which imposed the sentence to vacate, set aside or correct the sentence" on the grounds that, *inter alia*, "the sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). To establish a claim for ineffective assistance of counsel under the Sixth Amendment, a petitioner must show that (1) "counsel's representation fell below an objective standard of reasonableness," and (2) "any deficiencies in counsel's performance must [have] be[en] prejudicial to the defense." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984), *superseded on other grounds* by Antiterrorism and Effective Death Penalty

Act of 1966, Pub. L. No. 104-132, 110 Stat. 124; *see also Harrington v. Richter*, 562 U.S. 86, 104 (2011).

With respect to the performance prong, the Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead emphasized that the proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (internal quotation marks omitted). The reviewing court must determine "whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688. The court must make "every effort" "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 690. In doing so, defense counsel is entitled to a "strong[] presume[ption]" that he or she made "all significant decisions in the exercise of reasonable professional judgment." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (quoting *Strickland*, 466 U.S. at 690).

To show prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. However, "a defendant

need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. In determining whether defense counsel's errors resulted in the required prejudice, the court presumes the judge and jury acted according to the law. *Id.* at 694-95.

B. Discussion

Generally, claims not raised on direct appeal are procedurally defaulted and may not be raised on collateral review unless the petitioner shows either (1) "cause and actual prejudice" or (2) "actual[] innocen[ce]." *Bousley v. United States*, 523 U.S. 614, 622 (1998) (internal quotation marks omitted). Ineffective assistance of counsel claims, however, are not subject to this rule. *Massaro v. United States*, 538 U.S. 500, 504 (2003). Accordingly, the Court will proceed to address the merits of Neuhard's claims even though they were not raised in his direct appeal to the Sixth Circuit. *See* ECF No. 169.

1. Ineffectiveness of trial counsel

i. Failure to present evidence of autism at trial

Neuhard asserts that trial counsel was ineffective because he did not present evidence of Neuhard's autism at trial despite "notice" that Neuhard's demeanor would be at issue based on Neuhard's interrogation. ECF No. 175, PageID.1693-96.

The Sixth Circuit has held that 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." *Hughes v. United States*, 258 F.3d 453, 457 (6th Cir. 2001) (citing *Nguyen v. Reynolds*, 131 F.3d 1340, 1349 (10th Cir. 1997)). The Supreme Court has noted that the "situations in which the wide latitude counsel must have in making tactical decisions will be limited to any one technique or approach" are "rare." *Harrington*, 562 U.S. at 106 (internal quotation marks omitted). Nevertheless, "[d]espite the strong presumption that defense counsel's decisions are guided by sound trial strategy, it is not sufficient for counsel to merely articulate a reason for an act or omission alleged to constitute ineffective assistance of counsel. The trial strategy itself must be objectively reasonable." *Miller v. Francis*, 269 F.3d 609, 616 (6th Cir. 2001).

As an initial matter, in its brief, the Government contests whether Neuhard even has autism. ECF No. 184, PageID.1748. However, at the evidentiary hearing on the Motion, the Government objected to Neuhard calling his autism expert because, in its position, whether or not Neuhard has autism or the severity of it are not before the Court. Instead, the issues before the Court, according to the Government, are whether trial counsel was deficient for failing to present evidence of Neuhard's autism at trial or consult with an autism specialist for sentencing.

While this Court overruled the Government's objection, it agrees that it need not determine whether Neuhard is autistic, or the severity of his autism, to resolve Neuhard's claims.

The Government also asserts that trial counsel was not ineffective because Neuhard would not have been able to admit evidence of his autism as an affirmative (diminished capacity) defense or to negate the *mens rea* of the charged offenses. ECF No. 184, PageID.1749–53. The Government misunderstands Neuhard's argument. Instead, Neuhard contends that the evidence should have been admitted because the Government put his flat affect at issue via Sergeant Zupic's testimony and the clips of Neuhard's interrogation. ECF No. 190, PageID.1816. However, the Court need not determine whether evidence of Neuhard's autism is admissible for this purpose because it finds trial counsel's performance was not deficient in this regard.

Trial counsel's failure to introduce evidence of Neuhard's autism at trial was clearly a strategic decision. Attorney Korn attested that he "noticed immediately" during their initial meeting that Neuhard "was unusually slow to respond to questions and often responded in a rigid and awkward manner." ECF No. 184-2, PageID.1765. In response, Attorney Korn consulted about Neuhard's affect and autism with Neuhard's first attorney and the psychologist prior counsel had engaged.

Id. at PageID.1765-66. He also reviewed Neuhard's school records as well as books and articles about autism and criminal sexual conduct cases. *Id.* at PageID.1766. Finally, Attorney Korn discussed the matter with Neuhard's parents and Neuhard himself on several occasions.[1] *Id.*

Attorney Korn attested that he was aware of Neuhard's flat affect during Neuhard's interrogation. *Id.* Nevertheless, "after considering all the information" he had obtained, he "made a strategic decision not to introduce evidence of [Neuhard's] autism at trial unless it was absolutely necessary." *Id.* Attorney Korn explained that he was concerned that the marginal benefit to Neuhard of introducing evidence of Neuhard's autism "would be outweighed by the risk that the jury would perceive [Neuhard] as a mentally ill 'monster' who could not control his impulses to sexually abuse children" regardless of whether an expert testified that such conclusions are invalid. *Id.* at PageID.1766-67. Attorney Korn hoped that the jury would ascribe an innocent explanation to Neuhard's unemotional response during the interrogation. *Id.* at PageID.1767. He thus determined that introducing testimony of Neuhard's autism "would increase, not decrease, the odds of conviction." *Id.*

[1] The Court notes that Neuhard's father is the former Director of the State Appellate Defender's Office for the State of Michigan and former President of the National Legal Aid and Defender Association. Fed. R. Evid. 201.

Attorney Korn did not change his mind over the course of the trial because he did not notice anything unusual about Neuhard's demeanor as Neuhard was well-behaved and engaged in the process. *Id.* In both his affidavit and during the evidentiary hearing, Attorney Korn affirmed that, although he wrestled with the decision, he would make the same one if he had to do it over again. *Id.*

Neuhard argues that "leaving it to the jury with no guidance is not a 'strategic decision,'" ECF No. 190, PageID.1815, but Attorney Korn's testimony clearly belies this characterization. Attorney Korn consulted various sources, including Neuhard's father, who happens to be one of the preeminent defense attorneys in Michigan, before deciding the potential benefits of introducing Neuhard's autism at trial were not worth the risks. This decision was clearly well-reasoned, regardless of whether other attorneys might have made a different one. *Miller*, 269 F.3d at 616 (noting counsel's strategic decision "need not be particularly intelligent or even one most lawyers would adopt, but it must be within the range of logical choices an ordinarily competent attorney . . . would assess as reasonable to achieve a 'specific goal'"); *see also Harrington*, 562 U.S. at 108 ("An attorney need not pursue an investigation that would be fruitless, *much less one that might be harmful to the defense*." (emphasis added)). Accordingly, Neuhard cannot satisfy the performance prong of a *Strickland* claim with respect to this claim.

ii. Failure to request an evidentiary hearing regarding Agent Keith's polygraph testimony

Neuhard also maintains that trial counsel was ineffective for not requesting an evidentiary hearing to determine whether Agent Keith was forewarned to not bring up the issue of polygraphs during her testimony. ECF No. 175, PageID.1696. He further asserts that trial counsel had no basis on which to concede that Agent Keith made an inadvertent mistake given her experience and the Court's caution not to introduce hearsay. ECF No. 190, PageID.1818 (citing ECF No. 126, PageID.981-85). The Court need not determine whether trial counsel's failure to request an evidentiary hearing under these circumstances constitutes deficient performance because the failure to request an evidentiary hearing did not prejudice the defense.

As a preliminary matter, the Court notes that Neuhard's claim is largely speculative. Specifically, he hypothesizes that if trial counsel had requested an evidentiary hearing, he would have discovered malfeasance either on the part of the prosecutor or Agent Keith. He further hypothesizes that the Court would have granted a mistrial on that basis, as opposed to relying on another remedy. Neuhard's speculation on both these points is insufficient to support a claim for ineffective assistance of counsel. *See Harrington,* 562 U.S. at 112 ("The likelihood of a different result must be substantial, not just conceivable."); *Cross v. Stovall*, 238 F. App'x 32, 39–40 (6th Cir. 2007) ("Cross's ineffective assistance claim is doomed

by the fact she makes nothing more than conclusory assertions about actual prejudice. Her conclusory assertions fall far short of showing actual prejudice.").

Notably, Neuhard's assumptions about his success if trial counsel had requested an evidentiary hearing have proven incorrect. Agent Keith testified during the evidentiary hearing on the instant Motion that the prosecutor had instructed her not to mention the polygraphs during her testimony, but she did not recall hearing the Court's admonition about hearsay prior to her mistake. Additionally, despite having been in law enforcement for nearly fifteen years, it was her first time testifying in a jury trial and her response was unintentional. She further stated that she immediately "felt like an idiot." Thus, if trial counsel had requested an evidentiary hearing, it would not have shown overwhelming evidence of deliberateness on the part of Agent Keith or the prosecutor.

Even if it had, *United States v. Murray*, on which Neuhard heavily relies to support his claim, does not mandate reversal. 784 F.2d 188, 189 (6th Cir. 1986) ("We do *not* hold that under any and all circumstances in every case where the words 'polygraph examination' are mentioned, a grant of a new trial would be required."). Indeed, the Sixth Circuit has held that "[a] curative instruction or the strength of other evidence may render the remark harmless." *United States v. Little*, 9 F.3d 110, *11 (6th Cir. 1993) (table) (citing *United States v. Walton*, 908 F.2d 1289, 1293-94

(6th Cir. 1990)). As such, reference to a polygraph concerning a testifying witness other than the defendant is reversible "only if (1) an inference about the result of the test may be critical in assessing the witness' credibility, and (2) the witness' credibility is vital to the case." *Id.* Although Sanchez Fernandez, Rustam Razzaq, and Forest McNiff did not testify, Neuhard cannot satisfy this standard because the credibility of these men was not vital to the case. The photos were taken in January 2014, ECF No. 125, PageID.847-54, but witnesses testified that these men lived in the house between 2012 and 2013, ECF No. 127, PageID.1055-60, ECF No. 123, PageID.614, PageID.618. Because other evidence in the record undermined the defense theory that one of these men took the photos, their credibility was not "vital." *See United States v. Winkelman*, 101 F.3d 703, *3 (6th Cir. 1996) (table) ("Not only was [witness'] credibility not vital to the case, his testimony was not vital in light of the other evidence presented.").

Thus, assuming *arguendo* that trial counsel erred by not requesting an evidentiary hearing about Agent Keith's polygraph testimony, Neuhard cannot show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Accordingly, Neuhard cannot satisfy the prejudice prong with respect to this claim, and it fails.

iii. Failure to adequately present autism at sentencing

Neuhard asserts that trial counsel's "presentation of information regarding Defendant's autism at sentencing was inadequate and denied [Neuhard] the effective assistance of counsel." ECF No. 175, PageID.1697. Specifically, Neuhard argues that trial counsel erred by using a report prepared by Dr. Steven Miller, Ph.D., that referred to Neuhard's autism as "mild/less severe" because the Government argued at sentencing that Neuhard's mild autism should not count as a mitigating factor and should instead count as an aggravating factor. *Id.* Dr. Andrew Maltz, who evaluated Neuhard in support of his habeas petition, disputes the description of autism as having varying degrees of severity; he asserts that all individuals with autism are similarly impaired but have different levels of cognition. ECF No. 175, PageID.1698

The Court concludes that Neuhard cannot satisfy the performance prong of the *Strickland* standard for this claim. During the sentencing hearing, trial counsel argued at length that Neuhard's autism had profoundly impacted his life and that the Court should consider it a mitigating factor. ECF No. 154, PageID.1516-58. Nevertheless, Neuhard argues that trial counsel relied on the wrong expert in doing so. ECF No. 190, PageID.1819. He cites several out of circuit opinions for the

proposition that a reasonable attorney would have selected an expert in the precise field at issue. *Id.* at PageID.1820.

However, the Sixth Circuit has held that "[t]he Constitution does not require that an indigent criminal defendant be able to retain the expert of his choosing, only that a competent expert be made available." *Lundgren v. Mitchell*, 440 F.3d 754, 772 (6th Cir. 2006) (citing *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985)). Moreover, "[a] licensed practitioner is generally held to be competent, unless counsel has good reason to believe to the contrary." *Id.* Trial counsel had no reason to doubt Dr. Miller's competency at the time. Moreover, nothing in Dr. Miller's report indicated that further investigation into Neuhard's autism was necessary. *See Clark v. Mitchell*, 425 F.3d 270, 285 (6th Cir. 2005) (finding that "[i]t was not unreasonable for [defense] counsel, untrained in the field of mental health," to not hire a neuropsychologist when the psychologists counsel had retained did not indicate that one was necessary). Indeed, even now, it seems that Dr. Maltz's disagreement with Dr. Miller is more semantic than anything else. Ultimately, both agree that Neuhard has higher cognitive abilities than those with—what Dr. Maltz would say is incorrectly labeled as—"severe" autism. "Absent a showing that trial counsel reasonably believed that Dr. [Miller] was somehow incompetent or that additional testing should have occurred, simply introducing the contrary opinion of another

mental health expert during habeas review is not sufficient to demonstrate the ineffectiveness of trial counsel." *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 758 (6th Cir. 2013). Accordingly, Neuhard is not entitled to habeas relief on this claim.

iv. Failure to investigate

Neuhard also contends that trial counsel was ineffective for failing to interview Sabina Shaoou, the mother of the victims, before trial. Neuhard alleges that when she was interviewed by a defense investigator in July and August 2020, Shaoou shared her belief that Forrest McNiff, who was contracted to remodel Debra Razzaq's basement, joined with Neuhard to molest her children and his own, but she did not share these suspicions with the police. ECF No. 175, PageID.1699. Neuhard argues that if Shaoou had been interviewed prior to trial, trial counsel could have engaged in additional investigation and cross examination regarding the defense theory of third-party culpability for the photos. *Id.* at PageID.1699-1700. In particular, trial counsel could have discovered that McNiff was charged in 2005 with two counts of criminal sexual conduct in the first degree for molesting his daughter. ECF No. 190, PageID.1823.

As to the performance prong of the *Strickland* test, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes

particular investigations unnecessary." *Strickland*, 466 U.S. at 691. In so doing, "Counsel [is] entitled to formulate a strategy that [is] reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." *Harrington*, 562 U.S. at 107. As such, "[a]n attorney need not pursue an investigation that would be fruitless, *much less one that might be harmful to the defense*." *Id.* at 108 (emphasis added).

Here, trial counsel's decision not to interview Shaoou before trial was clearly a reasoned strategic decision. Attorney Korn attested via affidavit and testified at the evidentiary hearing that he worked very closely with Shaoou's sister and mother while preparing the case, and they repeatedly told Attorney Korn that Shaoou and her husband adamantly believed their children's accusations. ECF No. 184-2, PageID.1769. He specifically chose not to further cross examine Shaoou about potential third-party culpability because he did not want to open the door for her to explain why she was so certain Neuhard was the culprit. *Id.* at PageID.1769-70. *See Tinsley v. Million*, 399 F.3d 796, 809–10 (6th Cir. 2005) ("[I]t is far from true that bad testimony beats no testimony at all[,] . . . given the risk that every positive argument by a defendant potentially opens the door to a more-harmful response." (internal quotation marks omitted)). This decision was "within the range of logical choices an ordinarily competent attorney . . . would assess as reasonable to achieve

a 'specific goal.'" Thus, the Court concludes trial counsel's performance was not deficient under these circumstances.

Further Neuhard cannot show that he was prejudiced by trial counsel's decision not to interview Shaoou before trial. As a preliminary matter, Neuhard provides no evidence from Shaoou that she would have testified as he describes. *See Tinsley*, 399 F.3d at 810 (rejecting petitioner's ineffective assistance of counsel claim based on the failure to call witnesses because the petitioner failed to "introduce[] affidavits or any other evidence establishing what they would have said"). Nor does it appear that the defense investigator's testimony at the evidentiary hearing is sufficient. *See United States v. Bass*, 460 F.3d 830, 839 (6th Cir. 2006) ("[I]t was not an abuse of discretion for the district court not to hold a hearing on the issue of the uncalled witnesses when [petitioner] failed to point to any evidence (e.g., affidavits), besides his counsel's bare assertion, of what the witnesses would testify to.").

Regardless, Shaoou testified at the evidentiary hearing that she did not tell the defense investigator that McNiff had sexually assaulted her daughters or taken sexually explicit images using Neuhard's laptop. Moreover, she testified that despite asking MV-1 "hundreds" of times, MV-1 never stated that anyone else had touched her inappropriately. Accordingly, Neuhard cannot show "that there is a reasonable

probability that, but for counsel's [failure to interview Shaoou before the trial], the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694, and he is not entitled to habeas relief on this claim.

v. Cumulative effect

In determining the prejudice from counsel's errors, "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. Here, however, whether trial counsel's alleged errors are viewed collectively or in isolation, Neuhard is unable to show he was "deprive[d] . . . of a fair trial, a trial whose result is reliable." *Id.* at 687. Indeed, the Court did not find trial counsel's performance was deficient in any of the ways Neuhard alleged. Accordingly, Neuhard has not established a claim for ineffective assistance of trial counsel.

2. Ineffectiveness of appellate counsel

Finally, Neuhard asserts that he was denied the effective assistance of appellate counsel because appellate counsel raised the Court's denial of trial counsel's request to introduce evidence that Neuhard had offered to take a polygraph as an issue on appeal and did not raise the Court's denial of trial counsel's motion for a mistrial. ECF No. 175, PageID.1673.

> In *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L.Ed.2d 987 (1983), [the Supreme Court] held that appellate counsel who files a

> merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal. Notwithstanding *Barnes*, it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent. *See, e.g., Gray v. Greer*, 800 F.2d 644, 646 (C.A.7 1986) ("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome").

Smith v. Robbins, 528 U.S. 259, 288 (2000).

For the reasons discussed in Section III.B.1.ii *supra*, it is not clear that the omitted mistrial argument is "clearly stronger" than the evidentiary claim appellate counsel did raise. *See Caver v. Straub*, 349 F.3d 340, 348 (6th Cir. 2003). Neuhard argues that the evidentiary claim was based on "introducing more inadmissible evidence, fraught with the unhelpful fact that Defendant's counsel ultimately withdrew that offer." ECF No. 175, PageID.1677. However, as the Sixth Circuit noted on appeal, "in limited circumstances, evidence of a party's willingness to submit to a polygraph may, within the discretion of the trial court, become admissible." *Neuhard*, 770 F. App'x at 255 (internal quotation marks omitted). In contrast, as stated *supra*, the Sixth Circuit will reverse the denial of a motion for a mistrial based on a reference to a polygraph taken by someone other than the defendant "*only* if (1) an inference about the result of the test may be critical in

assessing the witness' credibility, and (2) the witness' credibility is vital to the case." *Little*, 9 F.3d 110, *11 (emphasis added). The men at issue did not testify, there was evidence that they did not Because the omitted argument is not clearly stronger than the one presented on appeal, Neuhard's ineffective assistance of appellate counsel claim must fail.

IV. CONCLUSION

Accordingly, **IT IS HEREBY ORDERED** that Neuhard's Motion to Vacate Sentence (ECF N0. 175) is **GRANTED IN PART AND DENIED IN PART**. Specifically, the Motion is **GRANTED** with respect to Neuhard's claim that appellate performed deficiently by failing to file a notice of appeal of the Amended Judgment regarding restitution despite Neuhard's specific request to do so; the Motion is **DENIED** in all other respects. Neuhard is permitted to file a notice of appeal from the Amended Judgment (ECF No. 165), limited to appealing the order of restitution in this case, within **fourteen (14) days** of this order. *See* Fed. R. App. P.4(b).

IT IS SO ORDERED.

/s/ Gershwin Drain
GERSHWIN A. DRAIN
UNITED STATES DISTRICT JUDGE

Dated: October 18, 2022

CERTIFICATE OF SERVICE

Copies of this Order were served upon attorneys of record on October 18, 2022, by electronic and/or ordinary mail.
/s/ Teresa McGovern
Case Manager

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JONATHAN NEUHARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Case No. 15-cr-20425

U.S. District Court Judge
Gershwin A. Drain

ORDER GRANTING IN PART AND DENYING IN PART PETITIONER'S APPLICATION FOR A CERTIFICATE OF APPEALABILITY (ECF No. 203)

On October 18, 2022, this Court granted in part and denied in part Petitioner Jonathan Neuhard's Motion to Vacate Pursuant to 28 U.S.C. § 2255. ECF No. 197. Specifically, the Court granted Neuhard's Motion with respect to his claim that appellate counsel provided ineffective assistance by failing to file a notice of appeal from this Court's restitution order. *See id.* at PageID.1873. The Court denied the Motion with respect to his claim that appellate counsel provided infective assistance by failing to appeal the denial trial counsel's oral motion for mistrial as well as his claim that trial counsel provided ineffective assistance by failing to (1) present evidence of Neuhard's autism at trial, (2) request an evidentiary hearing regarding

whether a Government's witness's testimony about third-party's polygraph examinations was inadvertent, (3) adequately present evidence of Neuhard's autism as a mitigating factor at sentencing, and (4) interview the mother of the victims prior to trial. *See id.* Neuhard timely appealed. ECF No. 198.

Presently before the Court is Neuhard's Application for a Certificate of Appealability. *See* ECF No. 203. Neuhard seeks a certificate of appealability

> on the ineffective assistance of trial counsel claim regarding the failure to adequately investigate the options with regard to presenting evidence of Neuhard's autism and either to present or be prepared to present that evidence to the jury and/or the trial judge, including sentencing, and on trial counsel's uninformed immediate assurance to the trial court that the prosecution witness's violation of the pretrial agreement not to mention the polygraph examinations was unintentional and counsel's failure to immediately request an evidentiary hearing to determine whether the blurted polygraph information was an intentional strategic ploy by the witness.

ECF No. 203, PageID.2043. He also seeks a certificate of appealability "on the ineffective assistance of appellate counsel [claim] for failing to raise on appeal the trial court's denial of a mistrial based on the injection of the blurted out testimony that other individuals interviewed by the law enforcement investigators had agreed to take a polygraph exam." *Id.* at PageID.2043–44.

A court may issue a certificate of appealability if the petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

To make this showing, one must demonstrate that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). Thus, "[w]here a district court has rejected the constitutional claims on the merits," the petitioner need only "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* In contrast, "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim," a certificate of appealability "should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition 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." *Id.*

The certificate of appealability inquiry "is not coextensive with a merits analysis." *Buck v. Davis*, 580 U.S. 100, 115 (2017). Indeed, the petitioner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). As such, the question of whether a certificate of appealability should issue "should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck*, 580 U.S. at 115 (quoting *Miller-El*, 537 U.S. at 336).

Here, upon review of the Parties' submissions and the record in this case, the Court finds that reasonable jurists could debate (1) whether trial counsel provided ineffective assistance by failing to present evidence of Neuhard's autism at trial, (2) whether trial counsel provided ineffective assistance by failing to request an evidentiary hearing regarding the Government witness' polygraph testimony, and (3) whether appellate counsel provided ineffective assistance by failing to raise the denial of trial counsel's oral motion for mistrial on appeal. The Court will thus grant Neuhard's Application for a Certificate of Appealability as to those issues. The Court declines to grant a certificate of appealability with respect to any of the other grounds raised in Neuhard's Motion to Vacate Pursuant to 28 U.S.C. § 2255, including his claim that trial counsel was ineffective for failing to adequately present evidence of Neuhard's autism as a mitigating factor at sentencing.

Accordingly, **IT IS HEREBY ORDERED** that Petitioner's Application for a Certificate of Appealability (ECF No. 203) is **GRANTED IN PART AND DENIED IN PART**. Specifically, the Certificate of Appealability is **GRANTED** with respect to Petitioner's ineffective assistance of appellate counsel claim and Petitioner's claim that trial counsel provided ineffective assistance by failing to present evidence of his autism at trial and failing to request an evidentiary hearing regarding the Government's witness' polygraph testimony; it is **DENIED** in all other respects.

IT IS SO ORDERED.

/s/ Gershwin Drain
GERSHWIN A. DRAIN
UNITED STATES DISTRICT JUDGE

Dated: April 3, 2023

CERTIFICATE OF SERVICE

Copies of this Order were served upon attorneys of record on April 3, 2023, by electronic and/or ordinary mail.
/s/ Teresa McGovern
Case Manager

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 0:24-cv-61760-DIMITROULEAS-HUNT

Fidelity Warranty Services, Inc.,

Plaintiff,

vs.

Six M's II, LLC, d/b/a Chrysler of Lawrenceburg, et al.,

Defendants.

_____/

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

Plaintiff Fidelity Warranty Services, Inc. ("FWS"), pursuant to Federal Rule of Civil Procedure 56 and Southern District of Florida Local Rule 56.1, files this Motion for Summary Judgment and Memorandum of Law seeking judgment in its favor against Defendants, Six M's II, LLC, d/b/a Chrysler of Lawrenceburg, and Marcus D. Withers. In support of this Motion, FWS states as follows:

INTRODUCTION

The facts of this case are simple and undisputed. Defendants breached the Advance Agreement and Personal Guarantee between the parties and owe the balance due on the loan amount. In Defendant Marcus Withers' own words, "The company owes it … [and] I personally guaranteed for it." ECF No. 33, Statement of Material Facts (hereinafter, "SMF"), ¶ 35. The Court should hold Defendants to their promises and grant summary judgment in FWS's favor, finding Defendants jointly and severally liable for damages, costs, and attorney's fees.

BACKGROUND

FWS, along with its affiliated entities comprising the JM&A Group (collectively,

"FWS"), is a provider of motor vehicle service contracts and finance and insurance ("F&I") products. SMF ¶¶ 1-2. In November 2023, FWS entered into an agreement with automotive dealership Defendant Six M's II, d/b/a Chrysler of Lawrenceburg ("the Dealer"). SMF ¶¶ 3-4, 8. The Dealer agreed to sell FWS products pursuant to terms laid out in the Administrative Agreement. SMF ¶ 5. In exchange, FWS agreed to advance the Dealer $2.5 million ("Advance"), to be repaid by the Dealer over a period of 30 months as set forth in the Advance Agreement. SMF ¶¶ 9-13. Defendant Marcus Withers ("Withers"), owner and dealer principal of Six M's, executed a Personal Guarantee of full performance under the Advance Agreement. SMF ¶¶ 3, 17-18.[1]

Under the Advance Agreement, the Dealer agreed to pay interest only on the Advance in November and December 2023. SMF ¶ 12. Starting in January 2024, the Dealer agreed to then make monthly minimum payments, including principal and interest, of $97,604 ("Monthly Minimum"). SMF ¶ 13. Commissions from the sale of FWS F&I products would be applied toward the Monthly Minimum. SMF ¶ 10. If commissions did not satisfy the Monthly Minimum, however, the Dealer agreed to pay the difference. SMF ¶ 13.

The Advance Agreement contains two acceleration provisions: If the Dealer (1) failed to make timely monthly payments, or (2) ceased selling FWS F&I products, FWS could call the entire balance of the loan due within ten days. SMF ¶¶ 14-15.

The Dealer blew past re-payment deadlines on the Advance as soon as it pocketed the $2.5 million. Its first interest-only payment was late, as was nearly every subsequent payment until it stopped paying altogether. SMF ¶¶ 27-28. The Dealer also stopped selling any FWS products on or about April 1, 2024. SMF ¶ 22.

[1] This Memorandum refers to the Administrative Agreement, Advance Agreement, and Personal Guarantee collectively as "the November 2023 agreements."

At the end of May 2024, FWS formally notified Defendants that full repayment of the balance of the Advance was due within ten days, pursuant to the Advance Agreement's acceleration clause. SMF ¶¶ 29-30. FWS also noted that under the Personal Guarantee, Withers himself was personally liable for that repayment. SMF ¶ 31. On August 6, FWS sent Defendants a second formal notice demanding repayment of the entire outstanding balance. SMF ¶ 32. Defendants have not paid the balance of the Advance owed, in clear violation of their obligations under the Advance Agreement and Personal Guarantee. SMF ¶¶ 35-36.

LEGAL STANDARD

Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Although the moving party bears the initial burden of demonstrating the absence of any dispute of material fact, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), once satisfied, the burden shifts to the non-moving party to identify material in the record showing a genuine issue of material fact that precludes summary judgment, *Poer v. Jefferson Cnty. Comm'n*, 100 F.4th 1325, 1336 (11th Cir. 2024). A dispute is only genuine and material if it affects the outcome of the case; in other words, the factual dispute must be "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

At summary judgment the court views evidence in the light most favorable to the nonmoving party and draws all reasonable inferences in that party's favor. *Poer*, 100 F.4th at 1335. "[C]onclusory allegations and speculation," however, do not create a genuine dispute of material fact, nor do they support a reasonable inference. *Black v. Wigington*, 811 F.3d 1259, 1265 (11th Cir. 2016); *see also Poer*, 100 F.4th at 1335 ("[I]nferences that are supported by only speculation or conjecture will not defeat a summary judgment motion."). Instead, "[f]or factual

issues to be considered genuine, they must have a real basis in the record." *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1303 (11th Cir. 2009) (citation omitted). Indeed, "a mere scintilla of evidence" is insufficient to create a genuine dispute of material fact. *Poer*, 100 F.4th at 1336 (quoting *Paylor v. Hartford Fire Ins. Co.*, 748 F.3d 1117, 1122 (11th Cir. 2014)).

Under Florida law, "[c]ontract interpretation begins with a review of the plain language of the agreement because the contract language is the best evidence of the parties' intent at the time of the execution of the contract." *Taylor v. Taylor*, 1 So. 3d 348, 350 (Fla. Dist. Ct. App. 2009) (per curiam).[2] If the terms are unambiguous, interpretation also *ends* with the text. *Ungerleider v. Gordon*, 214 F.3d 1279, 1282 (11th Cir. 2000). Then, "it is up to the court to interpret the contract as a matter of law." *Neumann v. Brigman*, 475 So. 2d 1247, 1249 (Fla. Dist. Ct. App. 1985).

ARGUMENT

I. PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT FOR BREACHES OF THE ADVANCE AGREEMENT AND PERSONAL GUARANTEE.

A successful breach-of-contract claim must "establish: (1) the existence of a contract; (2) a material breach of that contract; and (3) damages resulting from the breach." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1272 (11th Cir. 2009) (citing *Friedman v. N.Y. Life Ins. Co.*, 985 So. 2d 56, 58 (Fla. Dist. Ct. App. 2008)).

Here, the parties do not dispute the existence of the November 2023 agreements. Nor are the terms of those agreements in dispute. And the undisputed material facts show that Defendants breached the agreements and are liable for resulting damages.

[2] The Advance Agreement and Personal Guarantee are governed by Florida law. SMF ¶ 20.

A. Summary Judgment Is Warranted Because the Undisputed Facts Demonstrate That the Dealer Breached the Advance Agreement.

The Dealer breached the Advance Agreement in two separate ways: First, it made multiple late payments until it stopped paying altogether. Second, when FWS properly called the entire loan due after the Dealer stopped selling FWS products, it did not pay the balance owed.

1. The Dealer breached the Advance Agreement by making late payments and failing to repay the balance due upon acceleration.

FWS agreed to advance the Dealer $2.5 million. SMF ¶ 9.[3] The Dealer agreed to a repayment schedule, including two months of interest-only payments followed by Monthly Minimum payments of $97,604. SMF ¶¶ 11-13. A late payment would trigger FWS's right, on ten days' notice, to call due the entire balance of the loan. SMF ¶ 14.

The Dealer repeatedly made late payments. Payment was late for the November 2023, February 2024, and March 2024 invoices. SMF ¶ 27. Nor has the Dealer paid the Monthly Minimum in any subsequent months. SMF ¶ 27. In fact, since July 2024, the Dealer has not paid a cent of the Monthly Minimum due under the Advance Agreement. SMF ¶ 28.

On May 31, 2024, FWS invoked the Advance Agreement's acceleration clause by sending notice to Defendants that the balance of the Advance must be paid within ten days. SMF ¶¶ 29-31. FWS sent a second notice calling the entire Advance due on August 6. SMF ¶¶ 32-34. Defendants have never challenged the validity of these notices, and they admit the balance has not been paid. SMF ¶¶ 35-36. FWS is entitled to summary judgment based on these undisputed

[3] Defendants plead affirmative defenses resting on allegations that FWS actually agreed to advance Defendants more than $2.5 million. ECF No. 6, at 6. While this would not be a defense to paying back the amount borrowed (as Withers confirmed when he admitted he owes the money), the record demonstrates that FWS never agreed to loan more money. Defendants do not dispute that the November 2023 Advance Agreement is the only advance agreement between Defendants and FWS. SMF ¶ 21. And the November 2023 agreements are governed by a merger clause requiring any modification to be in writing. SMF ¶ 6-7.

material breaches.

2. The Dealer also breached the Advance Agreement by not repaying the balance due following its termination of FWS product sales.

The Advance Agreement required the Dealer to "do business with [FWS] on a substantially exclusive basis" during the thirty-month repayment period. SMF ¶ 15. The Advance Agreement specified that "substantially exclusive" business means "at least ninety-five percent (95%) of the total F&I products sold by Dealer during each calendar year shall be products provided through [FWS]." SMF ¶ 15. If the Dealer stopped selling FWS products on a substantially exclusive basis, FWS could call the entire outstanding Advance amount due within ten days. SMF ¶ 15.

By April 1, 2024, the Dealer stopped selling FWS products completely. The dealer instead decided to sell the F&I products of a competitor in exchange for a loan from that competitor. SMF ¶¶ 22-26. In light of its decision to stop selling FWS products, FWS sent two notices to Defendants that payment was due in full, but the Dealer has not complied. Summary judgment should be granted against the Dealer on this basis as well.

B. Summary Judgement Is Warranted Against Withers Because He Breached the Personal Guarantee.

Withers "personally and unconditionally guarantee[d] … the payment of any and all indebtedness, damages, costs and expenses (including attorneys' fees and costs of collection)" owed to FWS by the Dealer. SMF ¶ 18. Mr. Withers himself testified: "I personally guaranteed" the Dealer's performance under the Advance Agreement. SMF ¶ 35. In addition, he "expressly waive[d] … all defenses, offsets and counterclaims which the undersigned may at any time have to any claim of [FWS] against the Dealer." SMF ¶ 19. As a result, when FWS properly demanded full repayment of the loan and the Dealer failed to comply, Withers was obligated to step in and pay the monies owed by the Dealer. His failure to do so constituted an independent breach under the Personal Guarantee. *See Reiter Petroleum, Inc. v. Gallant*, No. 11-cv-61254, 2011 WL

4055392, at *2 (S.D. Fla. Sept. 13, 2011) ("A breach of a guaranty agreement is a straightforward state-law breach of contract claim." (cleaned up)).

II. FWS IS ENTITLED TO ENTRY OF JUDGMENT FOR ITS DAMAGES, FEES, AND COSTS.

As of March 11, 2025, the Dealer and Withers jointly and severally owe FWS $2,394,022.52, inclusive of contractually agreed upon interest at a rate of 7.5% (i.e., $474.44 per day). SMF ¶¶ 37-38; *see also Becker Holding Corp. v. Becker*, 78 F.3d 514, 517-18 (11th Cir. 1996) (applying Florida law to order prejudgment interest at the rate set in the breached agreement). Additionally, by contract, both Defendants are responsible for FWS's fees and costs.[4]

CONCLUSION

For the reasons stated above, FWS respectfully requests that the Court grant it summary judgment on its breach-of-contract claims against both Defendants and hold Defendants jointly and severally liable for $2,394,022.52, plus any further interest accrued at the rate of $474.44 per day hereafter, and FWS's attorneys' fees and costs.

[4] In addition to the cost-shifting provision Withers agreed to in the Personal Guarantee, SMF ¶ 18, the Advance Agreement states that "[t]he Dealer unconditionally and on demand shall indemnify fully" FWS for all expenses and costs it might incur "by reason of any breach of this Advance Agreement by Dealer," SMF ¶ 16; *see MVW Mgmt., LLC v. Regalia Beach Devs. LLC*, 230 So. 3d 108, 112 (Fla. Dist. Ct. App. 2017) (explaining that under Florida law, express indemnification language "clearly indicat[ing] that it applies to the acts of the other party to the contract" will be enforced as to first-party claims); *ADF Int'l, Inc. v. Baker Mellon Stuart Constr., Inc.*, No. 98-cv-1310, 2001 WL 34402607, at *1-2 (M.D. Fla. Apr. 6, 2001) (holding that broad indemnification language "encompass[ing] 'any and all claims'" should be interpreted to include first-party claims), aff'd, 01-12454 (11th Cir. Feb. 13, 2002) (unpublished). Under these two provisions, both Withers and the Dealer are jointly and severally liable for FWS's costs and fees in this action.

Dated: March 12, 2025.

Respectfully submitted,

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APPENDIX F

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

JONATHON WILLIAM-DURAND NEUHARD, Defendant-Appellant.

No. 17-2422.

United States Court of Appeals, Sixth Circuit.

May 20, 2019.

On Appeal from the United States District Court for the Eastern District of Michigan.

BEFORE: BOGGS, KETHLEDGE, and STRANCH, Circuit Judges.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

BOGGS, Circuit Judge.

Two of Jonathon Neuhard's nieces told their mother, and eventually the police, that he had sexually assaulted them. Officers obtained a warrant to search his electronic devices. They discovered child pornography, including photos he had taken and videos he had downloaded. A jury convicted Neuhard of producing, receiving, and possessing child pornography. On appeal, he contests the district court's denial of his motion to suppress the photos and videos found on his electronic devices. He also challenges several aspects of his trial and sentence. Finding all of these arguments unpersuasive, we affirm Neuhard's conviction and sentence.

I. Background

The investigation into Neuhard began when his nieces, whom we will call MV1 (then nine years old) and MV2 (then seven), told their mother that Neuhard had sexually assaulted them. Their mother informed the police.

According to MV1, Neuhard molested her at least three times. One time, he showed her a pornographic video, told her, "this is what you have to do to me," and molested her. Another time, Neuhard took pictures of her genitals and bare chest with his cell phone. MV1 was seven or eight years old at the time of these assaults. Her sister, MV2, reported one assault, which happened when she was six.

Based on the girls' and their mother's statements, the local police obtained a search warrant from an Oakland County, Michigan judge. They found a tablet with a memory card, which contained four photos of Neuhard performing sexual acts on MV1. On Neuhard's laptop, they found two child-pornography videos downloaded from the internet.

A grand jury indicted Neuhard on three counts: producing child pornography (the photos of MV1) and receiving and possessing child pornography (the videos from the internet). *See* 18 U.S.C. §§ 2251(a), 2252A(a)(2), 2252A(a)(5)(B). He moved to suppress the videos and photos, arguing that the police lacked probable cause to search his electronic devices and that the warrant violated the Fourth Amendment's particularity requirement. The district court denied his motion.

Neuhard went to trial, and the jury convicted him on all three counts. The district court sentenced him to 35 years in prison and later ordered him to pay $40,356 in restitution. Neuhard timely appealed his conviction and prison sentence, but he did not file an additional notice of appeal from the subsequent restitution order.

II. Motion to Suppress

We begin with the search of Neuhard's electronic devices. The Fourth Amendment requires that search warrants be based "upon probable cause . . . and particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. Neuhard argues that the warrant here violated both requirements: The police lacked probable cause to

search for child pornography and the warrant was overbroad. We disagree on both grounds, and so we affirm the district court's denial of Neuhard's motion to suppress.

"When reviewing the denial of a motion to suppress, we review the district court's findings of fact for clear error and its conclusions of law de novo, considering the evidence in the light most favorable to the government." *United States v. Richards*, 659 F.3d 527, 536 (6th Cir. 2011).

A. Probable Cause

Neuhard first argues that the affidavit supporting the search warrant did not establish probable cause to search for child pornography. "Considering the totality of the circumstances," *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018), his argument is meritless.

Probable cause exists if the facts, circumstances, and "reasonably trustworthy information" would allow a person "of reasonable caution" to believe that a crime has been committed. *Brinegar v. United States*, 338 U.S. 160, 175 (1949). This is "a practical, nontechnical conception," *ibid.*, and it "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 243-44 n.13 (1983). We give "great deference" to the issuing magistrate's probable-cause determination. *Id.* at 236.

Detective Mark Zupic submitted an affidavit in support of the warrant application. In it, Zupic explained that he had observed forensic interviews of MV1 and MV2. Both girls accused Neuhard of sexually assaulting them. MV1 stated that Neuhard "got on his computer and typed `sex video,'" and showed her a video "of a girl sucking a boy's part . . . neither actors were wearing any clothes and then the boy shoved his part into the girl." R. 34-1 at 119. Neuhard "told her `this is what you have to do to me'" and then molested her. *Ibid.* She also stated that "when she was 7 or 8 years old, on Christmas," Neuhard took pictures of her genitals with his cell phone. *Ibid.*

Neuhard contends that this affidavit failed to establish probable cause to search his electronic devices for child pornography. He is right that standing alone, evidence of child molestation does not establish probable cause to search for child pornography. *United States v. Hodson*, 543 F.3d 286, 292 (6th Cir. 2008). But *Hodson* does not help him. In that case, the affidavit contained evidence of molestation but "no information whatsoever" about child pornography. *Id.* at 289. Here, the affidavit stated that Neuhard both showed MV1 child pornography stored on his computer and produced child pornography using his cell phone.

Neuhard also cites *United States v. Doyle*, 650 F.3d 460 (4th Cir. 2011). *Doyle* is even easier to distinguish. The affidavit in *Doyle* claimed that the defendant had shown someone "pictures of nude children." *Id.* at 464. But during the pre-warrant investigation, "none of the alleged child victims made allegations to law enforcement that they were shown pornographic material. Indeed, there is no indication in the record that the children were even *asked* during the interview process about the presence of child pornography." *Id.* at 473. Neuhard does not argue that Detective Zupic's affidavit misrepresented MV1's statements.

Neuhard's final argument is that when MV1 described the video he showed her, she may have used the words "boy" and "girl" to refer to adults. "But probable cause does not require . . . rul[ing] out a suspect's innocent explanation for suspicious facts." *Wesby*, 138 S. Ct. at 588. The question is whether, "considering all of the surrounding circumstances, including the plausibility of the explanation itself . . . there was a substantial chance of criminal activity." *Ibid.* (cleaned up). Zupic's affidavit easily clears this bar.

B. Particularity

Next, Neuhard argues that the search warrant violated the Fourth Amendment's particularity requirement. We disagree.

"The particularity requirement encompasses two separate concerns—whether the warrant supplies adequate information to guide officers in selecting what items to seize, and whether the category of items specified in the warrant is too broad because it includes articles that should not be seized." *United States v. Evers*, 669 F.3d 645, 651-52 (6th Cir. 2012). Neuhard's arguments relate to the second concern. The warrant allowed the police to seize from Neuhard's house:

> Any and all records or evidence of the crime of child sexual assault/abuse, including but not limited to . . . cell phones, smart phones, tablets, or any other handheld/portable electronic devices, computers . . . video game consoles . . . photographs related to child pornography or the victims . . . external hard drives . . . digital cameras . . . any and all information and/or data stored . . . on computer media or media capable of being read by a computer including, but not limited to, floppy diskettes, fixed hard disk drives, flash drives, CD's or DVD's, secure digital (SD) cards, removable hard disk cartridges, and any other device designed to store computer data, with the intent of all the aforementioned electronics and electronic storage devices that are seized will be analyzed by a forensic examiner.

R. 34-1 at 115. According to Neuhard, the warrant was overbroad.

First, Neuhard argues that the warrant should only have allowed the police to search his cell phone and computer, the devices MV1 mentioned in her forensic interview. But a search warrant is "valid if it is as specific as the circumstances and the nature of the activity under investigation permit." *Guest v. Leis*, 255 F.3d 325, 336 (6th Cir. 2001) (cleaned up). This warrant was as specific as the circumstances permitted. The police knew that Neuhard used his computer and cell phone to view videos and take pictures, but they did not know where he *stored* his child-pornography files. *See Evers*, 669 F.3d at 653.

Next, Neuhard contends that the warrant should have included a date restriction. Presumably, he means that it should have allowed the police only to search for files created around the time of MV1's allegations. But even if the warrant should have included a date restriction, suppression is not the right remedy. When a warrant is overbroad, we "sever the infirm portion . . . from the remainder which passes constitutional muster." *United States v. Blakeney*, 942 F.2d 1001, 1027 (6th Cir. 1991). Neuhard makes no argument that the files the police found fail to match the time period MV1 described.

Finally, Neuhard complains that the warrant did not include a search protocol. But our precedent does not require search protocols in all cases. *Richards*, 659 F.3d at 538-39. Instead, we undertake "a reasonableness analysis on a case-by-case basis." *Id.* at 539. "In general, so long as the computer search is limited to a search for evidence explicitly authorized in the warrant, it is reasonable for the executing officers to open the various types of files" stored on the seized devices "in order to determine whether they contain such evidence." *Id.* at 540 (cleaned up). Neuhard has given us no reason to think this general rule leads to unreasonable results in his case.

For these reasons, the search of Neuhard's electronic devices was reasonable. The warrant complied with the Fourth Amendment's particularity and probable-cause requirements, and the district court rightly denied Neuhard's motion to suppress.

III. Trial

Neuhard also claims that three errors require a retrial. First, he argues, the district court erred when it refused to admit evidence that he offered to take a polygraph test. Second, he claims that the prosecutor's closing argument improperly included facts not in evidence and personal opinions with no basis in the record. Finally, he makes a cumulative-error claim. All three arguments are meritless.

A. Polygraph Testimony

After the police searched Neuhard's house and seized his electronics, he agreed to an uncounseled interview with a detective. During this interview, he offered to submit to a polygraph examination. At trial, Neuhard tried to introduce evidence of this offer, but the district court refused to admit it. The district court did not abuse its discretion.

While polygraph results are usually inadmissible, "in limited circumstances, evidence of a party's willingness to submit to a polygraph may, within the discretion of the trial court, become admissible . . . . The trial court must first determine whether the proffered evidence is relevant. If the court finds that the evidence is relevant, it must then balance the probative value of the evidence against the hazard of unfair prejudice and jury confusion. We review the court's conclusion on this matter for an abuse of discretion." *United States v. Harris*, 9 F.3d 493, 501-02 (6th Cir. 1993) (cleaned up).

The polygraph-evidence dispute began with testimony from a government witness. Case agent Lisa Keith interviewed three other men who had lived in the house where the pornographic photos of MV1 were taken. Neuhard's theory was that one of these other men was responsible for the images. On direct examination, the government asked Keith to describe "[t]he attitude, the demeanor, how they presented" during the interviews. R. 126 at 981. Keith responded that the three men "offered to take lie detector tests[.]" *Ibid.* Defense counsel objected, and the government conceded that this testimony was inadmissible. The district court instructed the jury that "the reference . . . about other people offering to go take a polygraph is something that should not have come in and so I'm going to order that that be stricken, and so it's something you cannot consider when you discuss the case and deliberate on the case." *Id.* at 984-85. Later, defense counsel asked for permission to call the detective who interviewed Neuhard "just to ask him . . . if my client offered to take a polygraph." *Id.* at 1022. The district court denied this request.

The district court did not abuse its discretion. The evidence that Neuhard offered to take a polygraph "was marginally relevant at best," *Harris*, 9 F.3d at 502, and it was misleading, because he later withdrew his offer. Moreover, "[t]he waste of time that would result from the inquiry into this collateral issue, both on cross-examination and on redirect, is a sufficient reason to exclude the evidence." *United States v. Stephens*, 148 F. App'x 385, 389 (6th Cir. 2005). Neuhard argues that the evidence should have been admitted "to balance the evidentiary equation" after Keith's testimony, Reply Br. at 9, but the district court was within its discretion to remedy that error by issuing a limiting instruction, which we presume the jury followed. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000).

B. Closing Argument

The prosecutor's closing argument included remarks about "how those with a sexual interest in children groom, condition, and prey on their victims." R. 127 at 1098. The prosecutor argued that "[w]hen a person has a sexual interest in children, like the defendant here, and he has the access and opportunity to sexually exploit those children, like the defendant here, that person . . . will groom their victims into believing that sex between children and adults is okay. And will show them pornographic videos to normalize this, but also to instruct the child how to perform the sex acts that they will then be forced to do." *Id.* at 1098-99. Neuhard argues that these remarks were improper because there was no expert testimony about grooming. In his view, the prosecutor argued facts not in evidence and expressed a personal opinion with no support in the record. Even assuming the prosecutor's remarks were improper, they were not flagrant, and so they do not require a new trial.

"Whether the government's closing argument constitutes prosecutorial misconduct presents a mixed question of law and fact that we review de novo." *United States v. Emuegbunam*, 268 F.3d 377, 403-04 (6th Cir. 2001). A prosecutor's improper argument warrants a new trial if it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). "We employ a two-step process in reviewing claims of prosecutorial misconduct. First, we determine whether the prosecutor's comments were improper. Second, if the comments were improper, we consider whether they were so flagrant as to warrant reversal." *United States v. Lawrence*, 735 F.3d 385, 431 (6th Cir. 2013).

Even if the prosecutor's comments here were improper,[1] they were not so flagrant as to warrant reversal. Flagrancy "is a pretty high standard." *United States v. Francis*, 170 F.3d 546, 552 (6th Cir. 1999). Neuhard cannot meet it. For one thing, it is hard to see how the prosecutor's comments "tended to mislead the jury or prejudice the defendant[.]" *United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001). Grooming was not at issue in this case. It was not an element of any of the three offenses Neuhard was charged with, and it was irrelevant to his defense theory (which blamed his former roommates for the child pornography on his devices). Moreover, "the evidence against the defendant was strong." *Ibid.*[2] Thus, the prosecutor's closing argument does not warrant reversal, even assuming it was improper.

C. Cumulative Error

Neuhard next makes a cumulative-error claim. Neuhard is entitled to a new trial based on errors that are "harmless" when considered "in isolation" if, "[a]fter examining them together . . . we are left with the distinct impression that the due process was not satisfied[.]" *United States v. Parker*, 997 F.2d 219, 221 (6th Cir. 1993). Neuhard points to three errors: the case agent's testimony that his roommates were willing to take polygraphs, the district court's refusal to admit testimony that he offered to take a polygraph, and the government's closing-argument comments about grooming. Neuhard asserts that "the

cumulative effect was toxic," Appellant Br. at 50, but he does not explain why the combined effect was a denial of due process. In particular, he points to no "connection, reliance, or relation" between the polygraph testimony and the grooming comments. *United States v. Daniel*, 932 F.2d 517, 521 (6th Cir. 1991). His conclusory assertion of cumulative error does not warrant a retrial.

IV. Sentencing

Finally, Neuhard challenges two aspects of his sentence: a statutory enhancement based on a prior conviction, and the restitution the district court ordered him to pay. The first argument is meritless, and he forfeited the second.

A. Statutory Enhancement

In 2006, when Neuhard was 17, he pled guilty to third-degree criminal sexual conduct in state court. He successfully completed a diversion program, so the state court dismissed the proceedings without entering a final judgment of conviction. In sentencing Neuhard in this case, the district court held that his 2006 guilty plea is a "prior conviction" that subjects him to a higher statutory sentencing range. 18 U.S.C. § 2251(e). On appeal, Neuhard argues that the sentencing enhancement is improper because his 2006 guilty plea is not a conviction under Michigan law. Our precedent forecloses this argument.

The jury convicted Neuhard of producing child pornography. *See* 18 U.S.C. § 2251(a). This offense usually carries a sentence of "not less than 15 years nor more than 30 years" in prison. 18 U.S.C. § 2251(e). However, the sentencing range rises to "not less than 25 years nor more than 50 years" if the defendant "has one prior conviction . . . under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography." *Ibid.* The district court applied the higher range and sentenced Neuhard to 35 years—above the statutory maximum absent the prior-conviction enhancement.

Neuhard entered his 2006 guilty plea pursuant to Michigan's Holmes Youthful Trainee Act. Under the YTA, "if an individual pleads guilty to a criminal offense, committed on or after the individual's seventeenth birthday but before his or her twenty-fourth birthday," the sentencing court "may, without entering a judgment of conviction and with the consent of that individual, consider and assign that individual to the status of youthful trainee." Mich. Comp. Laws § 762.11(1). If the defendant complies with certain conditions, "upon final release of the individual from the status as youthful trainee, the court shall discharge the individual and dismiss the proceedings." *Id.* § 762.14(1). The statute specifies that "[a]n assignment of an individual to the status of youthful trainee as provided in this chapter is not a conviction for a crime[.]" *Id.* § 762.14(2).

Neuhard completed two years of probation on youthful-trainee status, so the state court apparently dismissed the proceedings against him without entering a judgment of conviction. He now argues that his YTA guilty plea is not a "prior conviction" under Michigan law, so he is not subject to the 25-to-50-year enhanced sentencing range under § 2251(e), and his 35-year sentence exceeds the correct statutory maximum.[3] "We review de novo the district court's legal conclusion that a prior conviction is a qualifying offense" for a sentencing enhancement. *United States v. McGrattan*, 504 F.3d 608, 610 (6th Cir. 2007).

Neuhard's argument cannot overcome two high hurdles. First, as a general rule, federal law controls the question of whether a state adjudication is a "conviction" for purposes of a federal statute. *See Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 111-12 (1983) ("Whether one has been `convicted' within the language of the gun control statutes is necessarily . . . a question of federal, not state, law, despite the fact that the predicate offense and its punishment are defined by the law of the State."). Of course, Congress could override this default rule with "a plain indication to the contrary[.]" *Id.* at 119 (cleaned up).

More to the point, we have already held that a YTA guilty plea "qualifies as a prior conviction for federal sentencing purposes[.]" *Adams v. United States*, 622 F.3d 608, 612 (6th Cir. 2010). *Adams* involved a provision raising the mandatory minimum sentence for certain federal drug offenses from five years to ten if the defendant "commits such a violation after a prior conviction for a felony drug offense has become final[.]" 21 U.S.C. § 841(b)(1)(B). We concluded that a YTA guilty plea is sufficient to trigger the § 841(b)(1)(B) enhancement, even though it does not result in a formal judgment of guilt. *Adams*,

622 F.3d at 612. And we noted that "Michigan's own sentencing scheme supports this view," as the state sentencing guidelines count YTA adjudications in a defendant's criminal-history score. *Id.* (citing Mich. Comp. Laws § 777.50(4)(a)).

Neuhard tries to get around both precedents in one stroke. He relies on § 2251(e)'s text, which refers to prior convictions "under the laws of any State[.]" According to Neuhard, this phrase directs us to use state law to determine whether an adjudication is a conviction, negating *Dickerson*'s default rule and distinguishing this case from *Adams,* where the federal sentencing statute lacked a similar phrase. With these two cases out of the way, he urges, we should look to Michigan law to conclude that a YTA guilty plea is not a conviction.

We disagree. Looking at a longer excerpt of the statutory text reveals the problem with Neuhard's argument. The statute provides that:

> Any individual who violates . . . this section shall be . . . imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be . . . imprisoned for not less than 25 years nor more than 50 years[.]

18 U.S.C. § 2251(e). In plain English, a violation of § 2251 usually carries a sentence of 15 to 30 years. There are two ways to increase the range to 25 to 50 years: if the defendant has a prior conviction under one of the listed federal sex-offense statutes, or if the defendant has a prior conviction under a state statute that criminalizes the same kind of conduct. Section 2251(e) tells the sentencing court to analyze the *subject* of the state law, not (as Neuhard contends) the present status of the prior judgment under state law. If Congress wanted to override *Dickerson*'s default rule and have state law determine what counts as a conviction, it would have said so more explicitly. *See, e.g.,* 18 U.S.C. § 921(a)(20) ("What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held.").

Thus, *Adams* and *Dickerson* control this case. We hold, in accordance with *Adams,* that Neuhard's YTA guilty plea is a "prior conviction" for the purposes of § 2251(e).[4] The district court correctly calculated a statutory sentencing range of 25 to 50 years, and the 35-year sentence does not exceed the statutory maximum.

B. Restitution

Finally, in his opening brief, Neuhard challenged the district court's restitution order, arguing that the court improperly used a tort proximate-cause standard to calculate the amount he owed. As Neuhard concedes in his reply brief, we cannot consider this argument.

After the sentencing hearing, the district court entered an initial judgment imposing terms of imprisonment and supervised release. It subsequently held a second hearing to determine the amount of restitution, after which it entered an amended judgment. Neuhard filed a notice of appeal from the initial judgment, but he did not file a second notice of appeal from the amended judgment. The government objects to appellate review of the restitution award.

In this circumstance, we cannot review the restitution award. *Manrique v. United States*, 137 S. Ct. 1266, 1274 (2017) ("[A] defendant who wishes to appeal an order imposing restitution in a deferred restitution case must file a notice of appeal *from that order.*" (emphasis added)).

V. Conclusion

For these reasons, we AFFIRM the denial of Neuhard's motion to suppress, the judgment of conviction and sentence, and the amended judgment.

[1] We need not decide this issue to resolve Neuhard's claim.

[2] MV1 testified that Neuhard showed her pornographic videos on his red and black computer, and that one of the videos involved "a little girl." R. 123 at 629-30. She also testified that Neuhard used his cell phone to take pictures of himself touching her "private part." *Id.* at 635, 638. She identified herself in the photos found on the memory card in Neuhard's tablet. *Id.* at 637. Neuhard's zebra-striped bed linens were visible in some of the photos. The image files' metadata confirmed that they were taken at Neuhard's house using the same model of cell phone he owned.

[3] The argument heading and a few sentences in Neuhard's opening brief frame this as a due-process claim, but it appears to actually be a statutory-construction argument. He cites only one due-process case, and it is inapposite. In *People v. Temelkoski,* the Michigan Supreme Court held that retroactively requiring a defendant sentenced under the YTA to register as a sex offender deprived him of the benefits of his guilty plea, and therefore violated due process. 905 N.W.2d 593, 594 (Mich. 2018). *Temelkoski* does not support Neuhard's arguments, which are not grounded in retroactivity concerns.

[4] The D.C. Circuit has held that a Michigan YTA guilty plea triggers a similar sentencing enhancement in another federal child-pornography statute, 18 U.S.C. § 2252A(b)(2). *United States v. Bruns*, 641 F.3d 555, 558 (D.C. Cir. 2011). The *Bruns* court conducted its own analysis of Michigan law, but we do not need to reach these issues in light of *Adams*.