No. 25A

IN THE

Supreme Court of the United States

SIMON HESSLER,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

ON APPLICATION FOR CERTIFICATE OF APPEALABILITY TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPLICATION FOR CERTIFICATE OF APPEALABILITY

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QUESTIONS PRESENTED

1. Whether reasonable jurists could debate whether the circumstances present in this case present an extraordinary circumstances sufficient to extend the limitations period for the filing of a petition for a writ of habeas corpus.

2. Whether reasonable jurists could debate whether Simon Hessler is actually innocent of the crime of production of child pornography, justifying grant of a certificate of appealability.

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HONORABLE SONIA SOTOMOAYOR, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE OF THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

Pursuant to Supreme Court Rule 22.1, Applicant Simon Hessler respectfully requests a Certificate of Appealability. The United States District Court for the District of Connecticut issued an opinion denying habeas relief on November 12, 204. A copy of that decision and order is attached as Exhibit A. The United States Court of Appeals for the Second Circuit denied a certificate of appealability and dismissed the appeal on May 14, 2025. A copy of that order is attached as Exhibit B.

A certificate of appealability should issue if "reasonable jurists could debate whether (or, for that matter, agree that) the [habeas] 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, 483-84 (2000) (internal quotation marks omitted); see *Autry v. Estelle*, 464 U.S. 1301, 1302 (1983) (White, J., in chambers) (concluding that a habeas Hessler had raised a "substantial question" that did not "lack[] substance," and thus "I am compelled to issue a certificate of probable cause to appeal, as I am authorized to do under § 2253."); *Davis v. Jacobs*, 454 U.S. 911, 918 (1981) (Rehnquist, J., dissenting) (certificate should issue if "any Member of this Court believes [the case] to be deserving of a certificate of probable cause").

INTRODUCTION

Applicant seeks a certificate of appealability (COA) on two questions: (1). Whether reasonable jurists could debate whether the circumstances present in this case present an extraordinary circumstances sufficient to extend the limitations

period for the filing of a petition for a writ of habeas corpus; and (2) Whether reasonable jurists could debate that Simon Hessler is actually innocent of the crime of production of child pornography, justifying grant of a certificate of appealability.

Both are questions that reasonable jurists could debate—indeed, the Seventh Circuit has adopted Applicant's position on the second question. A COA should thus issue to permit the Second Circuit to consider in the first instance these issues of broad importance.

STATEMENT

Simon Hessler, was charged with one count of production of child pornography in violation of 28 U.S.C. sec. 2251(a). On December 11, 2019, Hessler took a plea to this court and on August 13, 2020, he was sentenced to 30 years in federal prison. Hessler did not take a direct appeal of his conviction or sentence. Rather, on September 27, 2023, invoking 28 U.S.C. § 2255(a), appellant challenged his conviction and sentence. *See* Exhibit 1 for the Petition and the exhibits submitted in support in *Hessler v. United States*, 23 cv 01270 (SRU)(District of Connecticut).

Appellant submitted that equitable tolling should extend his limitations period and/or that the limitations period should be reset to one year following his discovery of new evidence, 28 U.S.C. § 2255(f)(4), *Wims v. United States*, 225 F.3d 186, 190 (2d Cir. 2000), allowing him to demonstrate the substantial prejudice caused by the ineffective assistance of counsel. Finally, he submitted that if the district court rejected these arguments, he still merited relief because he was actually innocent. The government opposed the petition.

On November 1, 2024, the district court rejected the petition, holding that appellant had not established by a preponderance of evidence, *Triana v. United States*, 205 F.3d 36, 40 (2d Cir. 2000), that equitable tolling applied or that he presented newly discovered evidence or established that he was actually innocent. The district court also declined to issue a certificate of appealability.

The district court's decision avoided directly resolving appellant's claim that the law firm which represented him below through sentencing, Butler, Norris and Gold of Hartford, Connecticut, rendered constitutionally ineffective counsel.

On May 14, 2025, the Court of Appeals for the second Circuit declined to issue a certificate of appealability and, citing inter-Circuit conflict, Hessler/movant requests that Your Honor grant him such a certificate and allow this Honorable Court to entertain his appeal. The principal issues for review are [1] whether the Hessler/movant presented sufficiently extraordinary circumstance to extend the limitations period for the initiation of the habeas corpus action and [2] if not, whether movant can demonstrate actual innocence because the photographs the government has produced and claims represent prohibited child pornography do not do so as a matter of law. This second issue implicates a notable circuit split on the interpretation of "sexually explicit conduct" under 18 U.S.C. § 2251(a), particularly regarding whether a minor must actively engage in such conduct or if passive involvement (e.g., while sleeping) suffices when the depiction involves the adult's actions. For instance, the Seventh Circuit in *United States v. Howard*, 968 F.3d 717 (7th Cir. 2020) has adopted narrower interpretations requiring the minor to engage

in the conduct, contrasting with broader views in cases like *United States v. Osuba*, 67 F.4th 56 (2d Cir. 2023), *United States v. McCloud*, 590 F.3d 560 (8th Cir. 2009), *United States v. Laursen*, 847 F.3d 1026 (9th Cir. 2017), and *United States v. Finley*, 726 F.3d 483 (3d Cir. 2013), where passive roles by sleeping minors were deemed sufficient under certain circumstances.

Respectfully, there is reasonable basis to conclude that the material conclusions reached below are erroneous and that appellant has presented a substantial claim that his continued imprisonment violates his constitutional rights, warranting issuance of a Certificate of Appealability pursuant to 28 U.S.C. § 2253(c)(2).

First, as to equitable tolling, appellant and his father did exercise due diligence, retaining counsel Kent Mawhinney who represented that he had the capacity to review the record and prepare the required habeas corpus petition only to later learn that this attorney faced significant legal issues of his own [he was later charged with murder and eventually incarcerated with appellant] and could not deliver. The fact that the attorney they hired was himself later charged with a serious felony is an extraordinary circumstance in itself. Hessler also explained below that delays in mail and the incapacity to have contact with his father during COVID [the year between September 2020 and September 2021 was the peak year of COVID restricting such access] conjoined to make impossible early filing of a competent petition. Appellant's father, a former high-ranking IBM executive in Europe, unsuccessfully sought to identify new counsel, before eventually retaining the

undersigned in March 2022. However, by then, the one-year period for filing under 28 U.S.C. § 2255 had expired.

The district court held that ignorance of the law did not excuse Hessler's late filing and that he should have timely filed *pro se* a skeletal habeas corpus petition and later amended it. By so concluding, the district court ignored significant record evidence of Hessler's depressed and impaired mental status, made more acute by the isolation imposed by COVID. In short, the conjunction of factors presents extraordinary circumstances sufficient to trigger equitable tolling.

The further delay is also understandable and forgivable. Upon retention, new counsel had to obtain and review trial counsel's legal file to ascertain the nature and quality of representation, ran into delays outlined in the papers submitted below, including the disorganized nature of prior counsel's files and the time it then took to access the allegedly incriminating photographs secured in the Connecticut State Crime Lab as well as critical information that lab had concerning access by prior counsel to those photos. New counsel office exercised due diligence in these regards and discovered that Hessler's prior counsel never reviewed the relevant photographs nor discussed their provenance or authenticity with the client. New counsel also reviewed the photographs with experts in the area of child pornography in light of the evolving legal standards defining child pornography.

The district court rejected the extensive "new evidence" presented below. Specifically, Hessler showed that his attorney, Bethany Phillips, never viewed the photos which allegedly constituted the child pornography at issue [as attested to by

the crime lab's own record and its staff] and, therefore, could not have meaningfully considered or determined whether they did, or did not, qualify as child pornography. In this context, counsel could not have properly advised her client with regard to appropriate resolution of the criminal charges she was retained to defend. In response, the government offered an Affidavit from attorney Phillips contradicting the evidence supplied by the crime lab and raising a material issue of fact which should have been the subject of an evidentiary hearing. The district court also ignored the letters from both Mr. Gold and Ms. Phillips, which pointed the finger at the other as the lawyer responsible for the matter. *See* Exhibits 32-34 to the Petition.

By rejecting these arguments, the district court rendered without consequence very significant evidence of ineffective assistance of counsel and left for resolution only the matter of actual innocence. This was an error of constitutional magnitude because it assured that there could be no remedy for that ineffectiveness.

In fact as noted above, the evidence established that two attorneys in the firm Hessler's father retained to represent his son pointed fingers at the other as directing Simon's defense. When asked specific questions about the strategic decisions which informed that defense, each directed the undersigned to the other and abdicated responsibility. As significantly, the record reveals that neither counsel reviewed the photographs which formed the heart of the government's case nor discussed the provenance or content of the photographs with defendant Hessler. Nor did either raise any argument that the photographs did not qualify as child pornography under the applicable federal statute and case law interpreting it.

After whitewashing the ineffective assistance of trial counsel by finding that Hessler could have timely submitted a petition by himself, the district court held that Hessler created and distributed the photos in question and that they do constitute child pornography, rejecting any actual innocence argument.[1] In fact, the photos were not found by members of law enforcement who conducted an authorized search of appellant's premises. Rather, allegedly, after this authorized search, a friend of appellant's estranged wife claims to have found the images in a phone traced to Hessler. The defense never challenged the provenance or origin of the photographs or contested that they depicted appellant's body parts.

The images do not depict the Hessler engaging in sexual activity, i.e., masturbation, fornication, or oral sex. Below, Hessler submitted that he was actually innocent of the child pornography possession charge and had not produced child pornography. The district court rejected the former argument, finding the photos depicted Hessler engaging in sufficiently explicit sexual activity to fall within the statute's reach. As discussed in greater detail below, this finding is erroneous as the photos do not depict an identifiable victim, allow any determination of the victim's age, any certainty as to whose penis is shown or depict sexual activity.

In reaching its conclusions, the district court made erroneous factual findings. On page 8 of its opinion, the district court found that, on June 4, 2019, Phillips visited

[1] Hessler cannot produce the photographs for this Court's review because, upon pains of contempt, the district court ordered me to ensure the return of all the photographs, including those the Connecticut State Lab released to my investigator, sex crimes expert Michael Archer.

the crime lab for one hour, suggesting without ever concluding that she reviewed the relevant photos. But there is no dispute that during this hour, Ms. Phillips met with attorneys representing the U.S. Attorney's Office and State of Connecticut prosecutors and none of those attending this meeting confirmed that they reviewed any images. Nor do the contemporaneous meeting notes indicate that those attending reviewed any photos. And, as noted above, the Connecticut Police Lab staff deny that any counsel for defendant ever reviewed the relevant photos.

The district court noted that the visitor registry and the images underlying the federal charges were already in existence when Hessler took his plea; however true this may be, it does not undercut the claim that only through our investigation could Hessler have learned that his lawyer NEVER reviewed those images and that the visitor registry does not establish that she ever did so. Certainly, Ms. Phillips did not tell Hessler or his father this.

Acknowledging that Hessler never was shown the photos for which he took responsibility, the district court concluded that he was aware of the images' existence and quantity. But respectfully, this elides the issue: he was not aware of their content and had never seen them. The district court concluded that had Hessler wanted to go to trial on the ground that the images "did not meet the legal definition of child sexual abuse images, [he] should have raised that argument with Attorney Phillips before pleading guilty." District Court Opinion at 8-9.

However, this ignores several critical issues: first, the district court knew why appellant plead guilty – he desperately wanted to be removed from brutal conditions

of confinement in the State of Connecticut, which included repeated threats on his life which were made known to the sentencing court when His Honor took the plea. Second, how could Hessler be expected to have known whether images he had never seen met or did not meet the evolving definition of child pornography? This was his attorney's function and, absent review of the photographs, no attorney would be able to make an informed judgment or properly advise her client regarding the issue of whether they met the statutory definition of child pornography. Finally, the district court's conclusion that Hessler should have known that his attorney did not provide effective assistance and could himself have investigated the records of the Connecticut Police lab is far-fetched. Appellant needed competent counsel to explore whether his prior attorney effectively performed her role and unraveling what actually occurred took time, effort, and access which an incarcerated individual cannot reasonably be expected to have.

Having determined that equitable tolling does not apply and that appellant failed to produce new evidence thereby extending the commencement of the limitations period, the district court addressed the issue of actual innocence. This Court has held that "actual innocence, if proved, serves as a gateway through which a Hessler may pass whether the impediment is a procedural bar . . . or, as in this case, expiration of the statute of limitations." *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013).

A guilty plea is not a bar to an actual innocence claim. *Cosey v. Lilley*, 62 F.4th 74, 85 (2d Cir. 2023) ("We disagree that Cosey's guilty plea is categorically

incompatible with his claim of innocence . . .petitioner is essentially claiming that the criminal justice process has reached the wrong factual result, whether after a trial or a guilty plea. A gateway claim of innocence is thus not barred per se by a Hessler's guilty plea") (internal quotations omitted). Instead, a guilty plea raises a rebuttable presumption of factual guilt. *Id*.

In this case, the factual record rebuts any such presumption. First, Mr. Hessler maintained his innocence throughout the pendency of his cases. Dr. Leslie Lothstein noted that Mr. Hessler "tried to convince me" that he was "rescuing children," that Mr. Hessler's prosecution has "led him to feel inescapably wronged by the legal system that was charging him with fantasy crimes and wishes and intentions, and not acts," that Mr. Hessler "understood his story so differently than the police," and that Mr. Hessler's account was "more associated with pseudo-logical fantastica than a real plan to be a sex trafficker." *See* Exhibit 41 to Petition for Dr. Lothstein Report, at 1309-1311.

In addition, as noted above, there is ample evidence in the record that Mr. Hessler ultimately pled guilty because of the imperative to have his custody transferred from a state to a federal facility, where he believed he would be safer from abuse. As previously noted, mere weeks before Mr. Hessler entered his pleas, by letter addressed to Attorney Bethany Phillips, Dr. Lothstein wrote: "It is my opinion after having talked with Mr. Hessler on three separate occasions, that he is so frightened to remain in a Connecticut prison for any length of time that he signed the agreement for 30 years to get into a federal detention center," and further that Mr. Hessler

"stated that the main reason he accepted the 30-year plea agreement was to get out of Connecticut State prisons as he fears for his safety from the corrections officers." Exhibit 23 to the Petition for Letter from Leslie Lothstein to Bethany Phillips. In light of this, and in response to Mr. Hessler's own statements at his federal sentencing hearing regarding his abuse, AUSA Gifford took pains to assert that Mr. Hessler's desire to get out of Connecticut state custody was not the motivation for his plea, stating, "I don't want the Court left with the consideration that the defendant, because he may have been treated poorly, was coerced into taking the plea, was coerced into coming – you know, to say, oh, I'd rather be in federal custody." Exhibit 28 to Petition for Federal Sentencing Minutes at 37:5-9. In addition, in Hartford County on the date of Mr. Hessler's plea, ADA Hodge took similar pains to make a record in regards to this issue, stating that a "psychologist hired by the defense . . . noted in the report that perhaps the defendant was entering a plea out of a desire to be removed from State Department of Corrections Custody based on some reports of harassment . . . if the court would just review that section and have the Defendant answer in the affirmative that he's not pleading under duress or out of any ulterior motive simply to be removed or released from state custody."

When the State Court Judge put this issue to Attorney Phillips, she replied that "I did have conversations with all counsel of record in all three matters. And your honor, he's pleading guilty for one reason and one reasons only: that he is guilty." Exhibit 26 to Petition for Hartford Superior Court Plea Minutes, at 26-28.

Attorney Phillips' assurance that Mr. Hessler's desire to escape his abuse did not motivate his guilty plea is undercut by her own statement at the federal sentencing hearing that "one of the benefits afforded to Mr. Hessler is that he will be a federal prisoner." Exhibit 28 to Petition for Federal Sentencing Minutes at 31:23-25.

In addition, by letter to Mr. Hessler dated June 12, 2020, attorney Phillips wrote "first, regarding your question of whether the State of Connecticut has signed off agreeing that your primary custody shall be with the federal system, the answer is yes. That was a major part of the plea agreement . . . Second, you asked in your letter whether or not I can send you a draft of the State of Connecticut Plea Agreement with the language indicated that the State has agreed that your primary custody shall be with the federal system." Exhibit 27 to Petition for Letter from Bethany Phillips dated June 12, 2020.

What is not reflected in the record, though it was known to Attorney Phillips, is the fact that Mr. Hessler was directly threatened and coerced into accepting a plea by a guard at the Connecticut facility where he was housed. Exhibit 6 to the Petition for Affidavit of Simon Hessler, at ¶ 8. Plainly, the matter of where Mr. Hessler would serve his sentence was at the forefront of his mind throughout this matter and this, not his guilt, motivated his decision to accept the plea offer. Scant as it was, the record below is replete with evidence of Mr. Hessler's fear and duress, as well as evidence of his protests and assertions of innocence, all tending to rebut any presumption of guilt that may be raised by his guilty pleas and allocutions. This

strongly refutes the import of his guilty plea and cautions against over-reliance on it in resolving the actual innocence issue.

Further, though, and entirely independent of that, any presumption raised by Mr. Hessler's guilty plea is easily rebutted by the evidence uncovered by Michael Archer as part of his investigation as is discussed below

"[T]he actual innocence exception is 'severely confined' and applies only if the new evidence shows that it would have been 'more likely than not that no reasonable juror would have convicted'" the petitioner. *United States v. Torres*, 2017 U.S. Dist. LEXIS 2886, *6 (S.D.N.Y. 2017) (quoting *McQuiggin v. Perkins*, 569 U.S. 383 (2013)). "Where the defendant pleaded guilty (as in the instant case) and therefore did not have the evidence in his case evaluated by a jury, the standard nevertheless remains the same--i.e., the Hessler still must show that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Lucidore v. New York State Div. of Parole,* 209 F.3d 107, 114 (2d Cir. 2000) (internal quotations omitted).

This high bar is met in this case. No reasonable jurist could have convicted the Hessler of production of child pornography because the images Mr. Hessler allegedly produced did not constitute child pornography. Michael Archer confirmed this; movant's prior counsel did not disclose this to Mr. Hessler and this provides a fact clearly establishing his actual innocence which was not available to him at the time of his plea and sentence. Indeed, had a jury voted to convict Mr. Hessler of the

production of child pornography based on these images, such conviction would be subject to reversal on appeal as having been based on legally insufficient evidence.

Prior counsel's representation before the sentencing court regarding the legal definition of the images was inaccurate and was not based upon her review or inspection of the images themselves. Mr. Hessler was not, and could not have been aware of, the inaccuracy of prior counsel's representation and the absence of any factual foundation for them.

At Hessler's federal sentencing, the following colloquy took place between Attorney Bethany Philips and the Court:

> MS. PHILLIPS: I would also be remiss, your honor, I appreciate the Court—I wanted to put this on the record. As Your Honor knows, Mr. Hessler was scheduled to be sentenced last Wednesday. On August 3, the Seventh Circuit decided a case, United States v. Howard, which had a differing opinion concerning the charges compared to the Eighth Circuit and other circuits concerning was constitutes production of child pornography. For the record, your honor, I can tell you that I had a lengthy call with Mr. Hessler the night before the sentencing was postponed. I then travelled to the Cheshire correctional facility to explain the case, go over the ramifications and his options at that point. Knowing the decision of the case, Mr. Hessler wanted to move forward. Again, he's prepared to, he wants to place this behind him, and he was advised of the case. I wanted to place that on the record.
>
> The Court: What's the case?
>
> Ms. Phillips: Your Honor, it's U.S. v. Howard, 2020 U.S. at Lexis 24360. And what it stood for was the proposition that certain conduct did not arise to production of child pornography, which are similar to the facts here. However, there's a split in the circuits. There's a similar case on point in the Eighth Circuit which says, yes, this is production of child pornography. Bu, nevertheless, the fact that it was decided so close in time, I wanted to make sure Mr. Hessler was explained about the opinion in that case.

Exhibit 28 to Petition for Minutes of Federal Sentencing Proceeding before Judge Stefan Underhill, August 13, 2020.

Had attorney Phillips actually viewed the images in question, she would have understood that the images did not represent a close case implicating a circuit split but, in fact, were not child pornography under any Circuit's precedent, and that Mr. Hessler was therefore actually innocent of the crime charged. Instead, the fact of actual innocence was concealed by her ineffectiveness, and the information she conveyed to Mr. Hessler led to his false belief that he could have been found guilty of the production of child pornography. Without reviewing the images and confirming that what the government charged met the legal standards for child pornography under the precedent of multiple U.S. Circuit Courts. Phillips advised Hessler. In reality, those images were so far from meeting any legal definition of child pornography that they were cleared by the Connecticut crime lab for release to Mr. Archer. Having never been advised by anyone who actually viewed the images, and having no access to the images himself, Mr. Hessler remained unaware of this evidence establishing his actual innocence until Mr. Archer successfully initiated contact with the Connecticut crime lab.

REASONS FOR GRANT OF THE APPLICATION

18 U.S.C. § 2251(a) applies to any person who "employs, uses, persuades, induces, entices or coerces any minor to engage in…any sexually explicit conduct for the purpose of producing any visual depiction of such conduct." Here, if the photographic images do not depict a minor engaged in any sexually explicit conduct,

they fall without the statute and Hessler is actually innocent of its violation. And this raises an issue of significance meriting issuance of a certificate of appealability.

The district court's contrary analysis is circular: because Hessler admitted, without proper legal counsel, that he committed the requisite predicate acts, he must be held to his admissions and, therefore, cannot establish actual innocence. However, the district court knew that Hessler was prepared to say anything to escape the claws of his confinement in Connecticut. Exhibit 25 to the Petition for report of Dr. Leslie M. Lothstein, who wrote, "It is my opinion after having talked with Mr. Hessler on three separate occasions, that he is so frightened to remain in a Connecticut prison for any length of time that he signed the agreement for 30 years to get into a federal detention center." *Id*. at 2.

Phillips denied below that the horrendous conditions of appellant's confinement substantially motivated his plea, but her claim is hollow and contradicts the developed record. *See* Exhibit 28 to the Petition in which Phillips responds to Hessler's inquiry as to whether Connecticut had agreed to allow him to serve his time in federal prison and her response [in part], "that was a major part of the plea agreement." She repeated the same at sentencing. Exhibit 30 to the Petition at pp. 31-32 (explaining the advantages to her client of being placed in federal custody). The compulsion which predicated the plea could not be more obvious and during the plea allocution and sentencing, the district court judge certainly learned of this principal motivation for the plea and Hessler's serious claims about the horrendous terms and conditions of his state confinement.

Further, appellant's admissions do not explicate the nature of any sexually explicit conduct in which any child victim engaged. The government speculates that in one photo, a child is asleep but its limbs also could be "limp" because it is a doll and it is well established that Hessler and his adult partners used dolls in their fantasy sex play. Exhibit 25 to Petition. The undercover agent seeking to inculpate Hessler pressured him for images demonstrating his credibility in this black market. The metadata establishes that at least one of the images provided is a "known image" to Dropbox, meaning that it is derived from an online source circulating the internet. Additionally, multiple people had access to the studio apartment and the dolls therein. There is no full face depicted in the photos in question and it is not possible to know whose penis is depicted. In fact, there is good cause to doubt, due to certain anatomical variants depicted, that the penis depicted belongs to Hessler.

Nor did Hessler allocute as to what sexually explicit conduct he engaged in, as 18 U.S.C. § 2251(a) requires for a conviction. Likewise, Hessler's allocution does not state with specificity what image or images he admitted producing.

In this light and her further representation that he faced far more time than thirty years, appellant's understanding that his trial lawyer was not undertaking steps required for a vigorous defense and the abhorrent conditions of his confinement in Connecticut, assenting to the plea was the consequence of ineffectiveness, not proof of the contrary. As Dr. Lothstein also noted, when he pled, Hessler was also in the midst of withdrawal from substance abuse and PTSD from abuse he suffered while incarcerated in Connecticut.

Apart from Hessler's admissions, the district court found that the disputed images represent child pornography since the photos at issue here show a penis near or touching certain body parts of a sleeping child. However, the photos do not depict either the male actor or the sleeping child engaged in any sexual conduct. One cannot tell from the photos who is depicted. There is no "sexual activity" occurring in the photos. There is no exposed sexualized body part of the minor pictured in any of the photos. There is certainly no image of Hessler masturbating and the photos do not depict anyone engaging in any sexually explicit [or implicit] conduct, the standard set out in *United States v. Osuba*, 67 F.4h 56 (2d Cir. 2023), for defining the threshold element of criminally culpable conduct. Simply stated, the photos do not cross the line from "a simple display of adult genitalia around a sleeping minor" to showing his victim as "an inanimate body" upon which he was "acting sexually." *Id*.

Unlike *Osuba*, where an adult filmed himself masturbating close to a sleeping fully clothed minor, standing over her and ejaculating toward her, nothing in the photographs comes close to such active sexual conduct. Indeed, Hessler engaged in no such "sexual act" and certainly did not photograph or video any sexualized conduct. The photos do not show that Hessler ejaculated on his daughter and there is no such behavior charged. And it is noteworthy that the images used to insinuate such conduct is a "known image" to dropbox and therefore a product of the internet and not Hessler.

Only by distorting and exaggerating what the photos show could the district court bring them within the scope of the *Osuba* holding. Nor do the photos show a

sleeping child "manipulated "in such a manner as to make it appear that she is engaging in sexually explicit conduct." *United States v. Levy*, 594 F. Supp. 2d 427, 443 (S.D.N.Y. 2009).

In short, Hessler did not cross the line from a simple display of adult genitals around a sleeping minor to showing his victim as an inanimate body upon which he was acting sexually. *Osuba*, 67 F.4th at 63. Unlike the conduct held sufficient to violate the statute in *Osuba*, Hessler was not engaged in any sexually explicit activity in the photos. An honest description of the images shows they are much closer to those considered in *Howard* and provide the basis for the finding of actual innocence and dismissal of the charges. In *Howard*, the Seventh Circuit vacated the defendant's conviction for production of child pornography under § 2251(a), where the evidence consisted of videos depicting the defendant masturbating next to a fully clothed, sleeping six-year-old girl. *United States v. Howard*, 968 F.3d 717, 719-20 (7th Cir. 2020). The court held that the statute requires the minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of "such conduct," emphasizing that the sleeping child did nothing more than lie passively in bed, which did not constitute sexually explicit conduct such as masturbation, sexual intercourse, or lascivious exhibition of genitals. *Id.* at 721-22. The *Howard* court rejected the government's argument that the defendant's own conduct sufficed, clarifying that the statute focuses on the minor's engagement, not the adult's independent actions. *Id.* at 722. This holding conflicts with the decision below, as the district court relied on *Osuba* to find the images sufficient, despite their static nature showing no active

sexual conduct by anyone and no lascivious exhibition by the minor—facts even closer to *Howard* than to *Osuba*, where active masturbation and ejaculation directed at the minor were depicted. The images here depict mere proximity of adult genitalia to a sleeping, clothed figure (potentially a doll), without any depicted sexual activity, ejaculation, or manipulation, rendering them insufficient under *Howard's* narrower interpretation.

In contrast, broader interpretations in other circuits, such as the Eighth Circuit in *United States v. McCloud*, 590 F.3d 560 (8th Cir. 2009) (upholding conviction for filming masturbation next to a sleeping child while touching her over clothes, finding the minor's passive role sufficient), the Ninth Circuit in *United States v. Laursen*, 847 F.3d 1026 (9th Cir. 2017) (upholding for rubbing penis on sleeping child's hand during masturbation), and the Third Circuit in *United States v. Finley*, 726 F.3d 483 (3d Cir. 2013) (upholding for touching sleeping child's genitals during adult's sexual conduct), allow convictions where the minor is passively used as a prop in the adult's explicit activity. The decision below aligns with this broader view but conflicts with *Howard* warranting Supreme Court review to resolve the split on whether passive sleeping minors must be deemed "engaged" in sexually explicit conduct under § 2251(a).

Below, the government again attempted to buttress its argument with the claim that Phillips was not ineffective by arguing that she discussed the *Howard* decision with Hessler and he agreed to proceed with the plea. But, again, at the time of this conversation, itself prompted by the Assistant United States' Attorney

informing her of the *Howard* case, Phillips had never seen the images in question and was, by definition, unable to offer effective assistance of counsel. And while the district court utilized other extraneous evidence to reject appellant's claim of actual innocence, *see* Exhibit 4 at 17, these do not independently or collectively establish the elements of the charged offense.

In short, correct application of precedent, including the Second Circuit's own precedent, Osuba, inexorably leads to the conclusion that defendant's counsel was actually innocent and could not have predicated entry of a guilty pleas were competent counsel engaged below.

Accordingly, A certificate of appealability should be issued because appellant makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The certificate of appealability analysis is not coextensive with a merits analysis. The central issue is whether the claims appellant raises are "debatable." *Buck v. Davis*, 580 U.S. 100, 110 (2017). Jurists could both disagree with the decision reached below and conclude that the issues presented "are adequate to deserve encouragement to proceed." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Appellant's trial counsel was ineffective in developing a defense strategy and his trial counsel failed to engage in basic investigative functions which would have allowed her to properly assess the evidence against her client and then applicable precedent. Instead, she failed to investigate either the provenance or legal significance of the government's evidence.

WHEREFORE, appellant makes out sufficiently serious constitutional issues to warrant issuance of a certificate of appealability, this Court should issue one and allow perfection of the appeal on the merits.

Respectfully submitted,

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Dated: August 12, 2025

APPENDIX

TABLE OF APPENDICES

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23-cv-1270
Underhill, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of May, two thousand twenty-five.

Present:

Richard J. Sullivan,
Joseph F. Bianco,
Steven J. Menashi,
Circuit Judges.

Simon Hessler,

Petitioner-Appellant,

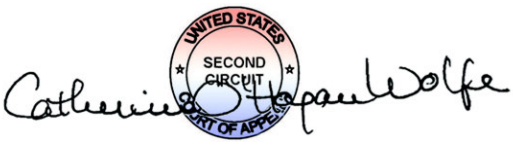
v. 24-2986

United States of America,

Respondent-Appellee.

Appellant moves for a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has not shown that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling" as to the untimeliness of the Appellant's motion filed pursuant to 28 U.S.C. § 2255. *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SIMON HESSLER,
Petitioner,

v.

UNITED STATES,
Respondent.

No. 3:23-cv-1270 (SRU)

ORDER ON PETITION TO VACATE GUILTY PLEA AND SENTENCE UNDER 28 U.S.C. § 2255

Petitioner Simon Hessler ("Hessler") has filed a motion to vacate, set aside, or correct his conviction and sentence pursuant to 28 U.S.C. § 2255. For the reasons that follow, I **deny** the motion.

I. Procedural History

On December 11, 2019, Hessler pled guilty to production of child pornography[1] in violation of 18 U.S.C. § 2251(a) before Magistrate Judge William I. Garfinkel. *United States v. Hessler*, No. 3:19-cr-303 (SRU) ("Criminal Case"), Doc. No. 4. I approved and adopted the guilty plea on January 10, 2020 and sentenced Hessler to approximately twenty-nine years in prison on August 13, 2020.[2] Criminal Case, Docs. No. 12, 43. Judgment entered on September 2, 2020. Doc. No. 45. Attorney Bethany Phillips, then an associate at Butler, Norris, and Gold, represented Hessler during the pendency of his state and federal criminal cases. Hessler now

[1] "The term 'child pornography' is currently used in federal statutes . . . . While this phrase still appears in federal law, 'child sexual abuse material' is preferred, as it better reflects the abuse that is depicted in the images and videos and the resulting trauma to the child." *Child Sexual Abuse Material*, U.S. DEP'T OF JUST. 1 (June 13, 2023), https://www.justice.gov/d9/2023-06/child_sexual_abuse_material_2.pdf.

[2] I sentenced Hessler to 347 months of incarceration in order to account for the thirteen months he was detained before sentencing. *See* Sentencing Hr'g Tr., Doc. No. 48 at 40:3-40:13.

claims he received ineffective assistance of counsel from Attorney Phillips in federal plea negotiations.

Hessler did not directly appeal the federal criminal conviction. He also pled guilty to multiple state charges, *e.g.*, Risk of Injury to a Child, Sexual Assault in the Fourth Degree, and Attempt to Commit Commercial Sexual Abuse to a Minor. Conn. Conviction Case Detail, Nos. HHD-CR18-0265633-T, HHD-CR19-0181174-0.[3] Hessler's federal term of imprisonment runs concurrently with his state sentence. *See* Criminal Case, Doc. No. 45 at 1. He is currently in federal custody.[4]

II. Standard of Review

A section 2255 petition provides those in federal custody with an opportunity to challenge the legality of their sentences. It is the "proper vehicle when the federal prisoner seeks to challenge the legality of the imposition of a sentence by a court." *Poindexter v. Nash*, 333 F.3d 372, 377 (2d Cir. 2003) (cleaned up). To obtain relief, a petitioner must show that his sentence was invalid because (1) "the sentence was imposed in violation of the Constitution or the laws of the United States"; (2) the court lacked jurisdiction to impose the sentence; (3) the sentence exceeded the maximum detention authorized by law; or (4) the sentence "is otherwise subject to collateral attack." 28 U.S.C. § 2255(a).

The standard is stringent; even constitutional errors will not be redressed through a section 2255 petition unless they have had a "substantial and injurious effect" that results in "actual prejudice" to the petitioner. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (internal citations omitted); *see also Underwood v. United States*, 166 F.3d 84, 87 (2d Cir. 1999)

[3] Hessler pled guilty to the state charges on August 18, 2020. *Id.*
[4] Inmate Locator, No. 26624-014, https://www.bop.gov/inmateloc// (last visited Oct. 28, 2024).

(applying *Brecht*'s standard to section 2255 petitions). The petitioner bears the burden of proving that he or she is entitled to relief by a preponderance of the evidence. *Blackmon v. United States*, 2019 WL 3767511, at *4 (D. Conn. Aug. 9, 2019) (citing *Triana v. United States*, 205 F.3d 36, 40 (2d Cir. 2000)).

If a petitioner fails to raise an issue upon direct appeal, that issue will be deemed procedurally defaulted and unreviewable absent a demonstration of ineffective assistance of counsel, an "intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *United States v. Becker*, 502 F.3d 122, 127 (2d Cir. 2007) (quoting *United States v. Tenzer*, 213 F.3d 34, 39 (2d Cir. 2000)).

A petitioner is entitled to a hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). "Mere generalities or hearsay statements will not normally entitle the applicant to a hearing . . . . The petitioner must set forth specific facts which he is in a position to establish by competent evidence." *Dalli v. United States*, 491 F.2d 758, 760-61 (2d Cir. 1974) (citations omitted). In the absence of supporting facts, the court may resolve a petitioner's claims without a hearing. *See id.* at 760-62.

III. Discussion

A. Timeliness

Section 2255 habeas corpus petitions must be filed within one year of the conviction becoming final—that is, when the petitioner has exhausted avenues for relief through direct appeal. 28 U.S.C. § 2255(f)(4); *Superville v. United States*, 771 F. App'x 28, 31 (2d Cir. 2019) (quoting *Moshier v. United States*, 402 F.3d 116, 118 (2d Cir. 2005) (per curiam)) ("For the purposes of § 2255(f)(1), 'an unappealed federal criminal judgment becomes final when the time

for filing a direct appeal expires.'"). "[T]he date on which the" section 2255 "limitations clock beg[ins] to tick is a fact-specific issue." *Wims v. United States*, 225 F.3d 186, 190 (2d Cir. 2000)) (cleaned up); *see Rivas v. Fischer*, 294 F. App'x 677, 679 (2d Cir. 2008) (remanding to the district court to make factual findings regarding "whether a duly diligent person in petitioner's circumstances would have discovered the evidence . . .") (cleaned up). A habeas petitioner bears the burden of "of persuading the court that he exercised due diligence in discovering the factual predicate of his habeas claim." *Shabazz v. Filion*, 2006 WL 2792741, at *5 (N.D.N.Y. Sept. 26, 2006), *aff'd*, 402 F. App'x 629 (2d Cir. 2010) (cleaned up).

Hessler's deadline to appeal expired on September 16, 2020. *See* Criminal Case, Doc. No. 45 (judgment entered on September 2, 2020); *see United States v. Wright*, 945 F.3d 677, 683 (2d Cir. 2019) (citing 28 U.S.C. § 2255(f)(1) and Fed. R. App. P. 4(b)(1)(A)(i)) (when no notice of appeal is filed, the deadline to file a section 2255 habeas petition runs one year and fourteen days after judgment enters). Hessler did not file his habeas petition until September 27, 2023. Doc. No. 1. He should have filed the instant petition on or before September 16, 2021, one year after his deadline to appeal expired. Hessler nonetheless argues the petition is timely because (a) he uncovered "new evidence," (b) equitable tolling principles apply, and (c) he is actually innocent of the crime to which he pled guilty. Doc. No. 1 at 54-70.

1. *Equitable Tolling*

"To equitably toll the one-year limitations period, a petitioner must show that extraordinary circumstances prevented him from filing his petition on time, and he must have acted with reasonable diligence throughout the period he seeks to toll." *Hizbullahankhamon v. Walker*, 255 F.3d 65, 75 (2d Cir. 2001) (quoting *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000)) (internal quotation marks omitted).

Hessler states in his petition—but not in his affidavit—Pierre Hessler retained Kent Mawhinney to represent Hessler in his postconviction proceedings on November 9, 2020. Petition, Doc. No. 1 at 25; Hessler Aff., Doc. No. 1 at 302 ¶ 29 ("My father, . . . and I were advised by Kent Mawhinney, . . . that Mr. Mawhinney was researching and developing a collateral attack on my plea and sentence."); *but see* Mawhinney Email, Doc. No. 1 at 562 (Mawhinney emails Pierre Hessler that he "need[s] to tighten up my work before meeting with counsel who specializes in post-judgment motions," suggesting that Mawhinney was not prepared to represent Hessler for post-conviction proceedings). Mawhinney was purportedly Hessler's cellmate, doc. no. 1 at 24, while Mawhinney faced criminal charges for conspiracy to commit murder.[5] His law license was suspended at the time. *See id.*

After Hessler and his father were "[n]ot seeing any indication that Mawhinney was performing as promised," they "sought assistance from other counsel." Petition, Doc. No. 1 at 26; *see also* Hessler Aff., Doc. No. 1 at 302 ¶¶ 29-30. Hessler does not specify when he terminated Mawhinney's representation, although the record suggests it was sometime after January 12, 2021. *See* Mawhinney Email, Doc. No. 1 at 561 (Mawhinney sent an email update to Pierre Hessler on January 12, 2021). Hessler appears to have retained current counsel in March 2022, about six months after the deadline to file his habeas petition. Petition, Doc. No. 1 at 26.

Attorney Mawhinney apparently never advised Hessler of section 2255's one-year statute of limitations, *id.* at 25-26, but Hessler's ignorance of the limitations period is insufficient to warrant equitable tolling. *See United States v. Valdez*, 2023 WL 2596911, at *3 (S.D.N.Y. Mar.

[5] *See* Alana Seldon, *Judge Suspends Kent Mawhinney's Law License, Appoints Clients New Attorney*, FOX61.COM, Jan. 28, 2020, https://www.fox61.com/article/news/judge-suspends-kent-mawhinneys-law-license-appoints-clients-new-attorney/520-cf4b96b5-319b-4e15-869b-ae8019ffb100 (last visited Oct 29, 2024).

22, 2023) ("[T]o the extent [the petitioner] may be asserting that he was unaware of the specific statutory deadline for his [§ 2255] filing, courts have held that ignorance of the law . . . is not sufficient to toll the statute of limitations.") (cleaned up). Negligence on part of Attorney Mawhinney is also insufficient to toll the limitations period. *See Holland v. Florida*, 560 U.S. 631, 651-52 (2010) (equitable tolling is not warranted for missed deadlines resulting from "a garden variety claim of attorney negligence") (cleaned up). Even if Hessler could demonstrate that the period Mawhinney purportedly represented him should be equitably tolled, his habeas petition—filed on September 27, 2023—was still filed 1 year, 7 months, and 20 days too late.

Second, Hessler makes generalized assertions that the COVID-19 restrictions at his prison and disruptions in court operations slowed his habeas efforts. Petition, Doc. No. 1 at 69. The COVID-19 pandemic is not in itself an "extraordinary circumstance[]" that warrants equitable tolling. *Hines v. United States*, 2021 WL 2456679, at *2-*3 (S.D.N.Y. June 16, 2021) (collecting cases).

Third, Hessler unsuccessfully solicited attorneys to represent him in postconviction proceedings from sometime in March 2021 to June 2022. [6] *See* Petition, Doc. No. 1 at 26. I decline to equitably toll the period Hessler searched for counsel. *See Geritano v. United States*, 2023 WL 3499511, at *6 (E.D.N.Y. May 17, 2023) ("Courts in this Circuit have routinely denied equitable tolling based on an inmate's *pro se* status.") (collecting cases). Although Hessler could not find an attorney, he could have filed his habeas corpus petition pro se within the limitations

[6] After Hessler retained Sussman & Goldman, he claims that further delays were due to missing outgoing mail in his prison and his counselor's willful failure to accommodate his legal team's visitation. Hessler Aff., Doc. No. 1 at 302-03 ¶¶ 32-37. Hessler's complaint of missing outgoing mail from prison is insufficient. *See Rivera v. United States*, 719 F. Supp. 2d 230, 234 (D. Conn. 2010), *aff'd*, 448 F. App'x 145 (2d Cir. 2011) (declining to toll the habeas deadline because the petitioner's complaints regarding "delays caused by the prison mail system were consistent with the ordinary inconveniences experienced by all prisoners") (cleaned up). "This is not to say that such inconveniences could never amount to extraordinary circumstances, but to do so they would have to impose a significant obstacle preventing petitioner from filing in a timely manner." *Id.*

period and later amended or supplemented it with the assistance of counsel. *See United States v. Wright*, 945 F.3d 677, 685 (2d Cir. 2019) (quoting *Doe v. Menefee*, 391 F.3d 147, 175 (2d Cir. 2004)) (when evaluating "reasonable diligence," courts "expect even *pro se* petitioners to know when the limitations period expires and to understand the need to file a habeas motion within that limitations period") (cleaned up); *cf. Csanadi v. United States*, 2016 WL 2588162, at *6 (D. Conn. May 4, 2016) (quoting *Nelson v. Quarterman*, 215 F. App'x 396, 398 (5th Cir. 2007)) (declining to equitably toll the limitations period because the petitioner "could have and should have filed a pro se skeletal petition rather than only the motion for appointment of counsel") (internal quotation marks omitted); *see also Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007) (incarcerated individuals have no constitutional right to counsel in post-conviction proceedings).

I therefore decline to equitably toll the one-year limitations period.

2. *New Evidence*

Section 2255(f)(4) prescribes when the limitations period begins to run:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> * * *
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f)(4). "Section 2255[(f)](4) is not a tolling provision . . . . Rather, it resets the limitations period's beginning date[.]" *Wims v. United States*, 225 F.3d 186, 190 (2d Cir. 2000). Hessler argues that the limitations period runs from the date he discovered "new evidence" of Phillips's ineffective assistance of counsel. Petition, Doc. No. 1 at 61.

Hessler claims Attorney Phillips was ineffective because she never viewed the images underlying the federal charge, nor hired an expert to review the images or their metadata. Hessler Aff., Doc. No. 1 at 301-02 ¶ 23; *but see* Phillips Aff., Doc. No. 22-1 ¶ 10 ("I . . . traveled

to the State Forensic Lab on June 4, 2019, to review the images of the child pornography . . . I recall observing many images of child pornography."). Phillips advised Hessler that under the prevailing case law, Hessler had no reasonable defense. Hessler Aff., Doc. No. 1 at 302 ¶ 24. A postconviction forensic investigator retained by Hessler viewed the images in February 2023 and June 2023. Archer Aff., Doc. No. 1 at 367 ¶ 9. Investigator Michael Archer formed an opinion that the images did not meet the legal definition of child sexual abuse material. *Id.* at 369 ¶ 11; *id.* at 379-80 ¶ 27.

Attorney Phillips's alleged failure to view the images is, according to Hessler, "new evidence that . . . could not have been discovered earlier through any additional exercise of diligence[.]" Petition, Doc. No. 1 at 61.

Hessler's argument is unavailing. The Connecticut Forensics Laboratory's visitor register indicates that Attorney Phillips visited the forensics laboratory for one hour on June 4, 2019. Doc. No. 22-4 at 2. The visitor register and the images underlying the federal charge were already in existence at the time of Hessler's federal guilty plea—December 11, 2019—over three years before he filed the habeas petition. Hessler knew of the images' content via secondary descriptions in the plea agreement's stipulation of offense conduct. Redacted Plea Agreement, Criminal Case, Doc. No. 10 at 13-14. Hessler was aware of those images' existence and quantity. *See id.* Hessler admitted, in open court, that he had reviewed the plea agreement's stipulation of offense conduct. Waiver & Plea Hr'g Tr., Doc. No. 22-8 at 43:15-48:17 ("The Court: . . . the stipulation of offense conduct, which is pretty detailed in this case. Have you gone over those as well? The Defendant: Yes, your Honor."); *id.* at 50-51 (Judge Garfinkel asked Hessler if he admits to committing some of the specific offense conduct outlined in the plea agreement, and Hessler answers in the affirmative). If Hessler wanted to proceed to trial on

the argument that the images of Minor Victim One ("MV1") did not meet the legal definition of child sexual abuse images, Hessler should have raised that argument with Attorney Phillips before pleading guilty. If Hessler wanted to investigate whether Phillips had viewed the images—or for how long she viewed the images—nothing prevented him from doing so well within the limitations period. Section 2255's limitations period runs from the date "the facts supporting the claim . . . could have been discovered," not when new legal arguments can be drawn from previously known or previously knowable evidence. 28 U.S.C. § 2255(f)(4). The argument that the petition was timely because the discovery of new evidence reset the start date of the limitations period fails.

3. *Actual Innocence*

In the context of a habeas petition, "actual innocence" refers to factual innocence, not the alleged legal insufficiency of the evidence presented in the underlying criminal proceeding. *Bousley*, 523 U.S. at 623 (citing *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)). "[A] claim of actual innocence could provide a basis for excusing a late filing even though petitioner pled guilty." *Cosey v. Lilley*, 62 F.4th 74, 85 (2d Cir. 2023) (quoting *Friedman v. Rehal*, 618 F.3d 142, 152 (2d Cir. 2010)) (cleaned up). "To make a threshold showing of actual innocence . . . a petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Dhinsa v. Krueger*, 917 F.3d 70, 81 (2d Cir. 2019) (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)) (cleaned up). A petitioner's claim that he is actually innocent "is not itself a constitutional claim. It serves instead as a gateway through which a habeas petitioner must pass to have his otherwise time-barred constitutional claim heard on the merits." *Cosey v. Lilley*, 62 F.4th 74, 77 (2d Cir. 2023) (citing *Schlup v. Delo*, 513 U.S. 298 (1995)).

"The petitioner's burden in making a gateway showing of actual innocence is deliberately 'demanding.'" *Hyman v. Brown*, 927 F.3d 639, 656 (2d Cir. 2019) (quoting *House v. Bell*, 547 U.S. 518, 538 (2006)). "It requires, first, that petitioner adduce new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Id.* (quoting *Schlup*, 513 U.S. at 324) (internal quotation marks omitted). A habeas court must "view the evidence in the light most favorable to the prosecution" and determine if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Dhinsa*, 917 F.3d at 81 (quoting *Coleman v. Johnson*, 566 U.S. 650, 654 (2012)) (cleaned up). The court must evaluate the evidence's trustworthiness on its own merits and in light of pre-existing evidence in the record. *Schlup*, 513 U.S. at 327-28.

Hessler pled guilty to Production of Child Pornography, which mandates a fifteen-year term of imprisonment for "[a]ny person who employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct." 18 U.S.C. § 2251(a).[7] When he pled guilty in both state and federal court, Hessler admitted the essential elements of the felony charge. "[S]elf-inculpatory statements made under oath carry a strong presumption of verity." *United States v. Lam Peralta*, 792 F. App'x 68, 70 (2d Cir. 2019) (quoting *United States v. Maher*, 108 F.3d 1513, 1530 (2d Cir. 1997)) (internal quotation marks omitted).

In his federal case, Hessler admitted under oath that 26 separate images depict his "penis *on and near* MV1's hand, bare feet, and bare stomach as well as Hessler's hand manipulating

[7] The offender must have known, or had reason to know, that the visual depiction would be transmitted in interstate commerce; was actually transmitted in interstate or foreign commerce, affected interstate or foreign commerce; or was produced or transmitted using materials that had been mailed, shipped, or transported in interstate or foreign commerce. *Id.*

MV1's breast." *See* Redacted Plea Agreement, Criminal Case, Doc. No. 10 at 13 (emphasis added); *see also* Plea Hr'g Tr., Doc. No. 22-8 at 47:18-47:23, 49:14-49:17. He admitted that MV1, as depicted in the images, was a human child who "was under twelve years of age at the time." Redacted Plea Agreement, Criminal Case, Doc. No. 10 at 13; *see also* Plea Hr'g Tr., Criminal Case, Doc. No. 22-8 at 47:24-47:25, 49:14-49:17. He admitted that he "employed, used, persuaded, induced, enticed or coerced . . . MV1 to take part in sexually explicit conduct for the purpose of producing a visual depiction of such conduct." Redacted Plea Agreement, Criminal Case, Doc. No. 10 at 13 (cleaned up).

Hessler admitted under oath at the Hartford state plea hearing that "the child in those photos was a real child and not one of these anatomically correct dolls that he had purchased . . . . So the sexual assault, the production charges involve an actual child." Hartford Case Plea Hr'g Tr., Doc. No. 22-9 at 19; *id.* at 24 ("THE COURT: Are the facts that the state's placed on the record . . . essentially correct? THE DEFENDANT: Yes, Your Honor."); *id.* at 28 ("THE COURT: . . . . And I asked you about whether the facts that were placed on the record by the state's attorney, if those were essentially correct, and is your response still yes to that question? THE DEFENDANT: Yes, Your Honor.").[8]

At the Tolland state plea hearing, Hessler admitted to producing:

> [I]mages of the defendant's penis touching a juvenile female's feet. . . . that juvenile to be 12 years of age. . . . In one image, the child's hand is dangling at the wrist as if limp, and there is a penis touching her hand . . . . In another image it depicts an adult hand grabbing the same child's breast. . . . Lastly, . . . there was an image noted with a penis that appeared to be erect on top of the child's stomach and breasts.

[8] At oral argument of the present motion, Hessler suggests that the child dolls found by police in his "dungeon" that could have been the subject in the picture, not MV1. *See also* Petition, Doc. No. 1 at 47 ("the images . . . provided insufficient evidence to conclude that the feet depicted even belonged to a minor child, . . . not to an adult or a lifelike doll"). But Hessler does not present affirmative evidence, in an affidavit or otherwise, to support the suggestion that the subject of the photos was a doll and not a child.

Tolland Case Plea Hr'g Tr., Doc. No. 1 at 486-87; *id.* at 494 ("THE COURT: . . . Mr. Hessler, you heard the facts as stated by the prosecutor. Do you essentially agree with those facts as stated? THE DEFENDANT: Yes, Your Honor."). Hessler admitted that those images depicted his penis. *See id.* at 487.[9]

Despite those self-inculpating statements made under oath, Hessler argues that he is innocent because the images do not meet the statutory definition of child pornography.

4. *Whether the Images Depict Child Pornography*

Section 2251(a) requires that the offender "uses, . . . any minor to engage in, . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct." 18 U.S.C. § 2251(a). "Sexually explicit conduct" includes "actual or simulated . . . lascivious exhibition of . . . genitals . . . of any person." 18 U.S.C. § 2256(2)(A)(v) (internal quotation marks omitted). The *Dost* factors define "lascivious exhibition" by asking a court to consider, *inter alia*, "whether the setting of the visual depiction is sexually suggestive . . . whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity . . . whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *United States v. Close*, 2022 WL 17086495, at *2 (2d Cir. Nov. 21, 2022), *cert. denied*, 143 S. Ct. 1043 (2023) (citing *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986)).

A minor's engagement in the sexually explicit conduct "can be active or passive." *United States v. Osuba*, 67 F.4th 56, 62 (2d Cir. 2023), *cert. denied*, 144 S. Ct. 577 (2024). "[P]hysical contact is not a necessary component of passive engagement[,]" nor must the minor

[9] Furthermore, although not made under oath, Hessler wrote to a state probation officer, "I have not denied any of my actions . . . ." Doc. No. 22-7 at 1.

be unclothed. *Id.* at 64. "[B]ecause § 2256 defines sexually explicit conduct to include 'actual or simulated' activity, if a sleeping child is used or manipulated in such a manner as to make it appear that she is engaging in sexually explicit conduct, then [§ 2251] is violated." *Id.* at 63 (quoting *United States v. Levy*, 594 F. Supp. 2d 427, 443 (S.D.N.Y. 2009)) (internal quotation marks omitted).

In *Osuba*, the offender filmed a video of himself masturbating close to a minor, "standing over the minor and ejaculating toward her, . . . missing her arm only narrowly." *Id.* at 60, 63. The offender did not physically touch the minor. *Id.* at 64. That conduct satisfied section 2251(a).

> By creating a video depicting . . . masturbation, the intended consummation of which was visibly directed toward a minor who was physically present, Osuba crossed the line from "a simple display of adult genitals around a sleeping minor" to showing his victim as "an inanimate body" upon which he was acting sexually.

United States v. Osuba, 67 F.4th 56, 62-63 (2d Cir. 2023) (quoting *United States v. Lohse*, 797 F.3d 515, 520-21 (8th Cir. 2015)) (cleaned up).

Hessler stakes his innocence claim on *United States v. Howard*, 968 F.3d 717 (7th Cir. 2020). In *Howard*, the government's sole argument on appeal was that section 2251(a) criminalized an individual "who made a video of *his own* solo sexually explicit content," regardless of if the minor was engaged in actual or simulated sexually explicit conduct. *Id.* at 721; *id.* at 723 ("The government staked its entire case for conviction on a mistaken interpretation of the statute."). That interpretation, "taken to its logical conclusion, . . . does not require the presence of a child on camera at all. The crime could be committed even if the child who is the object of the offender's sexual interest is in a neighbor's yard or across the street." *Id.* at 721. The *Howard* Court determined that the jury instructions had set forth an erroneous

interpretation of the statute. *Id.* at 719, 723. *Howard* only reached the jury instructions issue. *Id.* at 723.

Both *Lohse* and *Osuba* are more germane to the instant petition. In *Lohse*, the defendant seemed to challenge both the sufficiency of the evidence and the jury instructions. 797 F.3d at 521-22; *see Howard*, 968 F.3d at 723 ("Indeed, the Eighth Circuit [in *Lohse*] could not tell if the defendant was challenging the jury instructions or the sufficiency of the evidence."). The *Lohse* Court reached both issues and upheld both the jury instructions and the evidence's sufficiency. *Lohse*, 797 F.3d at 521-22. *Lohse* analyzed the content of the child sexual abuse images. *See id.* at 520-22. *Osuba* did the same. "[W]e address a question *Howard* did not reach, ... [W]e take a step *Howard* did not, *holding that on the facts of this case*, the minor's passive involvement as the intended recipient of Osuba's actions suffices . . . ." *Osuba*, 67 F.4th at 64. Hessler essentially asks me to ignore *Osuba* in favor of *Howard*. But to ignore applicable and binding circuit precedent in favor of ill-suited, out-of-circuit precedent would belie the duties of a district court.

At oral argument, Attorney Sussman argued that the images cannot constitute child pornography because they depict Hessler's flaccid penis. Even assuming that Hessler's penis was flaccid—a claim Hessler's own forensic investigator contradicts[10]—a reasonable jury could conclude that Hessler's conduct meets the legal definition of child pornography. The images depict a "sleeping child used 'as a sexual object.'" *Osuba*, 67 F.4th at 64 (quoting *Lohse*, 797 F.3d at 520-21); *see Lohse*, 797 F.3d at 521-22 (*Dost* factors met for images including a child "wearing pajamas and sleeping on a bed" and the offender's "flaccid penis near the child's cheek

[10] *Compare* Lothstein Report, Doc. No. 1 at 475 (Hessler "denied being erect or ejaculating"), *with* Archer Aff., Doc. No. 1 at 372 ("The image depicts: a semi-erect penis, in proximity to two bottoms of human feet . . . . There are a number of photos showing Mr. Hessler in various states of erection.")

or mouth, and he is pulling or holding her hair . . ." because "the setting of the images was sexually suggestive; the images were intended to elicit a sexual response in the viewer; and K.S. was portrayed as a sexual object.").[11]

The *Dost* factors are "not mandatory, formulaic or exclusive." *United States v. Rivera*, 546 F.3d 245, 253 (2d Cir. 2008). In cases where images only display "the adult defendant's genitals, many of the *Dost* factors simply do not apply." *Lohse*, 797 F.3d at 520. There was no reasonable explanation for Hessler to take photos of his genitals in close proximity to MV1—flaccid or not, touching MV1 or not—except to use MV1 to produce sexually explicit content. Hessler was no stranger to child sexual abuse images. Federal Plea Hr'g Tr., Doc. No. 22-8 at 49:3-49:6 ("[T]here were other child pornography images, unrelated to Minor Victim 1, that appeared to have been downloaded from the internet or the Dark Web by Mr. Hessler, that w[ere] also on the USB drive."); Redacted Plea Agreement, Criminal Case, Doc. No. 10 at 13 (Hessler possessed "eight hundred forty-nine images of suspected child pornography, with six hundred eighty-eight unique hash values. . . . [O]ne hundred thirty-five videos containing child pornography, with one hundred thirty-one being unique hash values[.]") (cleaned up).

The only reasonable description of the child sexual abuse images—from an adult man who possessed hundreds of other images and videos depicting child sexual abuse—is a "lascivious exhibition" of Hessler's genitals. *See* 18 U.S.C. § 2256(2)(A)(v). Like in *Osuba*, Hessler "crossed the line from a simple display of adult genitals around a sleeping minor to showing his victim as an inanimate body upon which he was acting sexually." *Osuba*, 67 F.4th at 63 (quoting *Lohse*, 797 F.3d at 521)) (cleaned up).

[11] *Lohse* was decided before Hessler pled guilty to both the state and federal charges. *See* Federal Plea Hr'g Tr., Doc. No. 22-8 at 1 (December 2019); *see* Hartford Plea Hr'g Tr., Doc. No. 1 at 402 (December 2019); *see* Tolland Plea Hr'g Tr., Doc. No. 1 at 482 (December 2019).

It is Hessler's burden to prove otherwise. *Dwyer v. United States*, 2016 WL 6782739, at *1 (D. Conn. Nov. 14, 2016). He does not.

5. *Hessler's Proffered Evidence of Actual Innocence is Insufficient*

Hessler's innocence claim[12] heavily relies upon Forensic Investigator Michael Archer's factual and legal opinions. Archer claims that he "reviewed a substantial portion of the digital evidence . . . . I have reviewed the images involving [MV1]." Archer Aff., Doc. No. 1 at 365. But Archer only describes, in detail, one image depicting Hessler's penis near MV1's feet and lower legs. "The image depicts: a semi-erect penis, in proximity to two bottoms of human feet. . . . There are a number of photos showing Mr. Hessler in various states of erection." *Id.* at 372. "Only feet and lower extremities are seen in the photo. They are not clearly the feet and lower extremities of a child." *Id.* at 371 (cleaned up). Archer agrees that the penis depicted in that image belongs to Hessler. *Id.* at 372 ("I . . . agree that it is Mr. Hessler's penis. Mr. Hessler has distinct penile anatomy.").

Neither Archer nor Hessler proffer affirmative evidence in their affidavits that approximately 25 other images depict, *inter alia*, "Hessler's penis on and near MV1's hand, bare feet, and bare stomach as well as Hessler's hand manipulating MV1's breast." *See* Redacted Plea Agreement, Criminal Case, Doc. No. 10 at 13; *see also* Plea Hr'g Tr., Doc. No. 22-8 at 47:18-47:23, 49:14-49:17. Archer makes only conclusory remarks about those 25 other images. *E.g.*, Second Archer Aff., Doc. No. 30 at 3 ("I reviewed all the photos and find none of them to raise to the level of the production of child pornography."). Archer's opinion that images cannot

[12] I focus my discussion on Hessler's factual innocence claim regarding the images themselves. Hessler additionally argues that he is factually innocent of Attempt to Commit Commercial Sexual Abuse to a Minor. *See* Doc. No. 1 at 62. I do not address the conduct underlying that state charge. Section 2255 only allows me to evaluate the conduct underlying the federal production charge, not Hessler's state charges. *See* 28 U.S.C. § 2255(a).

legally constitute child pornography is wholly irrelevant to the instant habeas petition, especially when Archer does not factually dispute the content of the 26 images. In any event, nothing in the Archer affidavit proffers "*new* reliable evidence"; it only offers alternative interpretations of old evidence. *Schlup*, 513 U.S. at 324 (emphasis added).

Other evidence in the record buttresses Hessler's actual guilt. Before his guilty plea, Hessler admitted to a clinical and forensic psychologist that he exposed himself to MV1. Lothstein Report, Doc. No. 1 at 475. Hessler "admit[ted] to sexually *touching* [MV1] . . . . He believes she was asleep the whole time." *Id.* (emphasis added). Attorney Phillips's affidavit similarly indicates that Hessler made sexual contact with MV1 in the images. Phillips Aff., Doc. No. 22-1 ¶ 10 ("These included images of . . . Simon's penis on [MV1's] stomach/breast area. There were also photos of his penis near her feet.") (cleaned up); *see also id.* ¶ 14 ("Mr. Hessler indicated to Lee Gold and to me that he was the person in the photos.").

I conclude that Hessler has not overcome the "strong presumption of verity" of his "[s]elf-inculpatory statements made under oath" at the guilty plea proceedings. *Lam Peralta*, 792 F. App'x at 70 (internal quotation marks omitted). Hessler does not meet the demanding standard required to sustain a claim of actual innocence.

B. Certificate of Appealability

"Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a proceeding under section 2255." 28 U.S.C. § 2253(c)(1)(B). A "final order" is an order "that dispose[s] of the merits of a habeas corpus proceeding." *Harbison v. Bell*, 556 U.S. 180, 183 (2009).

Hessler may obtain a certificate of appealability "only if" he "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The motion, files, and

record of this case conclusively show that Hessler is entitled to no relief. Hessler has not demonstrated that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Rhagi v. Artuz*, 309 F.3d 103, 106 (2d Cir. 2002) (cleaned up). I therefore decline to issue a certificate of appealability.

IV. Conclusion

For the reasons set forth above, Simon Hessler's 28 U.S.C. § 2255 motion to vacate, set aside, or correct his conviction and sentence, **doc. no. 1**, is **denied**. The Clerk is instructed to enter judgment for the United States and close the case.

So ordered.

Dated at Bridgeport, Connecticut, this 1st day of November, 2024.

/s/ STEFAN R. UNDERHILL
Stefan R. Underhill
United States District Judge