No. 25-

IN THE

Supreme Court of the United States

SIMON HESSLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the petitioner presented sufficiently extraordinary circumstances to extend the limitations period for the initiation of the habeas corpus action under 28 U.S.C. § 2255(f), where initial post-conviction counsel retained to file the petition was subsequently charged with conspiracy to commit murder and incarcerated, compounded by COVID-19 restrictions on communication, mental health impairments due to isolation, and diligence in retaining new counsel.

2. If not, whether petitioner can demonstrate actual innocence because the photographs the government claims represent prohibited child pornography do not do so as a matter of law under 18 U.S.C. § 2251(a), implicating a circuit split on whether a minor's passive involvement (*e.g.*, while sleeping) constitutes "sexually explicit conduct" when the depiction involves only the adult's actions.

PARTIES TO THE PROCEEDING AND RELATED CASES

Hessler v. United States of America, 23-cv-1270, United States District Court for the District of Connecticut, Judgment entered November 1, 2024.

Hessler v. United States of America, No. 24-2986, the United States Court of Appeals for the Second Circuit. Judgment entered May 14, 2025.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner states that he has no parent corporations and no publicly held company owns 10% or more of his stock, as Petitioner is an individual.

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JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on May 14, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The habeas proceedings implicate the Due Process Clause of the Fifth Amendment to the United States Constitution (ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), and actual innocence as a gateway under *McQuiggin v. Perkins*, 569 U.S. 383 (2013)), as well as the following provisions:

> 28 U.S.C. § 2253(c)(1)(B): "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. § 2255(f)(4): A one-year period of limitation shall apply to a motion under this

> section . . . [running from] the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.
>
> 18 U.S.C. § 2251(a): Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with the intent that such minor engage in 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, shall be punished as provided under subsection (e). . . .

STATEMENT OF THE CASE

On December 11, 2019, Simon Hessler pled guilty in the United States District Court for the District of Connecticut to a single charge of production of child pornography in violation of 18 U.S.C. § 2251(a). On August 13, 2020, the district court sentenced Hessler to approximately thirty years of incarceration. Petitioner did not take a direct appeal of his conviction or sentence. Rather, on September 27, 2023, invoking 28 U.S.C. § 2255(a), Petitioner challenged his conviction by plea and the sentence imposed, asserting claims of ineffective assistance of counsel by his trial counsel from the firm Butler, Norris & Gold of Hartford, Connecticut. *See Hessler v. United States*, No. 3:23-cv-01270-SRU, Dkt. No. 1 (D. Conn.)

Petitioner argued that equitable tolling should extend the one-year limitations period under 28 U.S.C. § 2255(f), or alternatively, that the period should be reset to one year following his discovery of new evidence under § 2255(f)(4), *see Wims v. United States*, 225 F.3d 186, 190 (2d Cir. 2000). This would allow demonstration of substantial prejudice from counsel's ineffectiveness. Petitioner further submitted that, even if the timeliness arguments failed, he merited relief on grounds of actual innocence. The government opposed the petition. *See Hessler v. United States*, No. 3:23-cv-01270-SRU, Dkt. No. 22 (D. Conn). Petitioner filed a reply brief in support. *See Hessler v. United States*, No. 3:23-cv-01270-SRU, Dkt. No. 29 (D. Conn.)

On November 1, 2024, the district court (Hon. Stefan R. Underhill) denied the § 2255 motion, holding that Petitioner had not established by a preponderance of the evidence, *Triana v. United States*, 205 F.3d 36, 40 (2d Cir. 2000,) or that equitable tolling applied or that he presented newly discovered evidence, or that he was actually innocent. *See App. 3a-26a.*

The district court also declined to issue a certificate of appealability. *Id.* The district court's decision notably avoided directly resolving Petitioner's core claim of constitutionally ineffective assistance of counsel by the Butler, Norris & Gold firm through sentencing. Instead, it focused on timeliness and actual innocence, rejecting the former and finding the latter precluded by Petitioner's plea admissions and the nature of the images. *See App. 3a-26a.*

Equitable Tolling

As relevant to equitable tolling, Petitioner, who was incarcerated following sentencing in August 2020, and his father, residing in France, exercised due diligence in seeking to file a timely § 2255 motion. They retained initial post-conviction counsel Kent Mawhinney, who represented that he had the capacity to review the record and prepare the required habeas petition. However, Mawhinney later faced significant legal issues of his own—he was charged with conspiracy to commit murder and eventually incarcerated, rendering him unable to provide promised legal services. The fact that the retained attorney was himself charged with conspiracy to commit murder in itself constitutes an extraordinary circumstance. Petitioner also explained that delays in mail and the incapacity to communicate effectively with his father during the peak of the COVID-19 pandemic (September 2020 to September 2021) conjoined to make early filing of a competent petition impossible. Restrictions on visitation and correspondence during this period exacerbated the challenges. Petitioner's father, a former high-ranking IBM executive in Europe, unsuccessfully sought alternative counsel before retaining undersigned counsel in March 2022. By then, however, the one-year limitations period under 28 U.S.C. § 2255(f) had expired. The district court held that ignorance of the law did not excuse the late filing and that Petitioner should have filed a *pro se* skeletal habeas petition timely and amended it later. *See App. 9a-11a.* In so concluding, the district court ignored significant record evidence of Petitioner's depressed and impaired mental status, worsened by COVID-19 isolation and the conditions of confinement. Petitioner submitted medical and psychological evidence, including reports

from Dr. Leslie M. Lothstein, attesting to Petitioner's PTSD, substance withdrawal, and mental fragility during the relevant period. *See*, *Hessler v. United States*, No. 3:23-cv-01270-SRU, Dkt. No. 1 at 475 (D. Conn.)

The conjunction of these factors—extraordinary attorney misconduct, pandemic restrictions, and mental health impairments—presents extraordinary circumstances sufficient to trigger equitable tolling under *Holland v. Florida*, 560 U.S. 631, 649 (2010) (equitable tolling requires extraordinary circumstances beyond petitioner's control and diligence). The further delay after retention of new counsel is also understandable. Upon retention in March 2022, undersigned counsel had to obtain and review trial counsel's disorganized legal file to assess the quality of representation. This process encountered delays, including time to access the allegedly incriminating photographs held in the Connecticut State Crime Lab and the records of prior counsel's access thereto.

Counsel exercised due diligence and discovered that Petitioner's prior counsel, Bethany Phillips, had never reviewed the relevant photographs nor discussed their provenance or authenticity with Petitioner. Counsel also consulted experts in child pornography law in light of evolving standards defining "sexually explicit conduct" under 18 U.S.C. § 2251(a).

The district court rejected the extensive "new evidence" presented regarding ineffectiveness. Specifically, Petitioner demonstrated that Attorney Phillips never viewed the photos, as attested by the crime lab's records and staff affidavits. *See Hessler v. United States, No.*

3:23-cv-01270-SRU, Dkt. No. 48-1 at 178 (D. Conn). Thus, Ms. Phillips could not have meaningfully assessed whether the images qualified as child pornography or advised Petitioner appropriately on resolving the charges. The government countered with an affidavit from counsel Phillips contradicting the lab evidence, raising a material factual dispute that warranted an evidentiary hearing under 28 U.S.C. § 2255(b). *See Hessler v. United States*, No. 3:23-cv-01270-SRU, Dkt. No. 22-1 (D. Conn).

The district court ignored this conflict and also disregarded letters from Attorneys Gold and Phillips, each blaming the other for responsibility in the representation. *See Hessler v. United States*, No. 3:23-cv-01270-SRU, Dkt. No. 48-1 at 374 to 384 (D. Conn). By rejecting these arguments without an evidentiary hearing, the district court rendered significant evidence of ineffective assistance inconsequential, leaving only actual innocence for resolution. This was an error of constitutional magnitude, as it foreclosed any remedy for counsel's deficiencies under *Strickland v. Washington*, 466 U.S. 668 (1984). In fact, as noted above, the evidence established that two attorneys in the firm Petitioner's father retained to represent his son pointed fingers at each other as being responsible for petitioner's defense. When asked specific questions about strategic decisions informing that defense, each directed undersigned counsel to the other and abdicated responsibility. *See Hessler v. United States*, No. 3:23-cv-01270-SRU, Dkt. No. 48-1 at 374 to 384 (D. Conn). Significantly, the record reveals that neither counsel reviewed the photographs in question, consulted experts, or investigated their metadata or provenance, which would have revealed potential defenses based on the images' legal insufficiency under § 2251(a).

Newly Discovered Evidence and Ineffective Assistance

Petitioner also presented newly discovered evidence under § 2255(f)(4), including the crime lab records showing no access by prior counsel and metadata indicating at least one image was a "known image" to Dropbox (*i.e.*, derived from an online source circulating the internet). *See Hessler v. United States*, No. 3:23-cv-01270-SRU, Dkt. No. 1. The undercover agent pressured Petitioner for images to prove credibility in a black-market sting. Multiple individuals had access to Petitioner's studio apartment and the dolls used in fantasy play, and no full face is depicted in the photos, making their identification impossible. Anatomical variants in the images cast doubt that the depicted penis belongs to Petitioner. Moreover, Petitioner's plea allocution did not specify the sexually explicit conduct engaged in by any minor, as required for conviction under § 2251(a), nor did it identify particular images produced. *See Hessler v. United States*, No. 3:23-cv-01270-SRU, Dkt. No. 22-8 (D. Conn) (Plea Transcript).

Given counsel's representations that Petitioner faced far more than thirty years if convicted at trial, the lack of vigorous defense investigation, and the abhorrent conditions of confinement in Connecticut (including abuse leading to PTSD), assent to the plea was a consequence of ineffective assistance of counsel, not voluntariness. As Dr. Lothstein noted, Petitioner was in substance withdrawal and terrified of remaining in state custody, prompting the plea to transfer to federal prison. *See Hessler v. United States*, No. 3:23-cv-01270-SRU, Dkt. No. 48-1 at 284 (Lothstein Report Nov. 23, 2019). ("[H]e is so frightened to remain in a Connecticut prison . . . that

he signed the agreement for 30 years to get into a federal detention center."). At sentencing, counsel Phillips denied that the conditions of petitioner's confinement motivated his plea, but this contradicts the record, including her own statements confirming that a material condition of the plea was petitioner's transfer to federal custody. *See United States v. Hessler*, No. 3:19-cr-00303-SRU, Dkt. No. 48 (Sentencing Transcript). The district court erred by crediting these contradictions without hearing.

Actual Innocence

Apart from Petitioner's admissions (obtained amid ineffective counsel and duress), the district court found the disputed images constituted child pornography because they showed a penis near or touching body parts of a sleeping child. *See* App. 16a-25a. However, the photos depict neither the male actor nor the sleeping child (potentially a doll) engaged in any sexual conduct. No "sexual activity" is depicted; no sexualized body parts of the minor are exposed; no masturbation or ejaculation is shown. *See Hessler v. United States*, No. 3:23-cv-01270-SRU, Dkt. No. 48-1 at 174-193 (Archer Affidavit). The images fall short of the standard in *United States v. Osuba*, 67 F.4th 56 (2d Cir. 2023), which requires depictions crossing from "a simple display of adult genitalia around a sleeping minor" to showing the victim as "an inanimate body" upon which the adult acts sexually. *Id.* at 63. Unlike *Osuba*—involving filming masturbation and ejaculation toward a sleeping minor—these static photos show mere proximity without active conduct, ejaculation, or manipulation. The district court distorted the images to fit *Osuba*, ignoring *United States v. Levy*, 594 F. Supp. 2d 427, 443 (S.D.N.Y. 2009) (no violation absent manipulation

making it appear the child engages in explicit conduct). Correctly applied, the images align with those considered in *United States v. Howar*d, 968 F.3d 717 (7th Cir. 2020), where the Seventh Circuit vacated a conviction for videos of a defendant masturbating next to a sleeping, clothed child. The *Howard* court held § 2251(a) requires the minor to "engage in" sexually explicit conduct (*e.g.*, masturbation, intercourse, or lascivious exhibition of genitals); passive sleeping does not suffice, as the statute focuses on the minor's engagement, not the adult's independent actions. *Id*. at 721-22. This creates a clear circuit split. The Second Circuit's broader view in *Osuba* aligns with the Eighth Circuit in *United States v. McCloud*, 590 F.3d 560 (8th Cir. 2009) (upholding for filming masturbation next to sleeping child while touching over clothes, deeming 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); 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 conduct). But *Howard's* narrower interpretation—requiring active minor engagement—conflicts, warranting this Court's resolution to ensure uniform application of federal criminal law. Below, the government argued that attorney Phillips discussed *Howard* with Petitioner, who agreed to plead, but, by that time, Phillips had never seen the images, rendering her advice inherently ineffective. Extraneous evidence cited by the district court (*e.g.*, plea admissions) does not independently prove the elements, as the allocution was nonspecific and coerced. Correct application of precedent leads inexorably to actual innocence: Petitioner could not have been convicted had competent counsel engaged. On May 14, 2025, the Second Circuit denied a certificate of

appealability, finding no substantial showing of a denial of constitutional rights under 28 U.S.C. § 2253(c)(2). *See App. 1a-2a.* Petitioner's application to Justice Sotomayor for a certificate was denied on August 21, 2025. *See Hessler v. United States*, No. 25A187 (U.S. Aug. 21, 2025) (Sotomayor, J., in chambers).

REASONS FOR GRANTING THE PETITION

This Court should grant *certiorari* because the questions presented are substantial, involving the uniform interpretation of a critical federal criminal statute and core habeas protections. Reasonable jurists could debate the district court's rulings on timeliness and actual innocence, warranting a certificate of appealability under *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (COA issues if claims are "debatable" or deserve encouragement to proceed). *See also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *Buck v. Davis*, 580 U.S. 100, 110 (2017) (COA analysis focuses on debatability, not merits).

I. The Equitable Tolling Claim Is Debatable and Warrants Review.

Equitable tolling applies where a petitioner shows (1) extraordinary circumstances prevented timely filing and (2) diligence. *Holland*, 560 U.S. at 649. Here, the district court erred by overlooking the extraordinary confluence of events: initial post-conviction counsel Kent Mawhinney's charge of conspiracy to commit murder and incarceration (an unforeseeable felony rendering representation impossible); COVID-19 restrictions peaking in 2020-2021, delaying communication and access; and Petitioner's documented mental impairments from

isolation and abuse. *See Cosey v. Lilley*, 62 F.4th 74, 80 (2d Cir. 2023) (equitable tolling for external obstacles beyond control); cf. *United States v. Torres*, 2017 U.S. Dist. LEXIS 2886, at *15 (S.D.N.Y. 2017) (mental health as factor). The district court mechanically applied a "*pro se* skeletal filing" rule, ignoring diligence evidence: Petitioner's father sought counsel extensively, and new counsel promptly investigated upon retention despite file disorganization. *See* App. 9a-10a. This is debatable, as Second Circuit precedent allows tolling for attorney misconduct and pandemics. *See Lucidore v. New York State Div. of Parole*, 209 F.3d 107, 113 (2d Cir. 2000). Review is needed to clarify tolling in post-COVID habeas cases. Moreover, the "new evidence" of counsel's failure to review images resets the clock under § 2255(f)(4), as this was undiscoverable earlier with diligence. *Wims*, 225 F.3d at 190. The Phillips affidavit created a *fact* issue requiring a hearing, which the district court denied in error. *See* App. 12a-13a.

II. The Actual Innocence Claim Presents a Clear Circuit Split Requiring Resolution.

Actual innocence serves as a gateway to review defaulted claims. *McQuiggin*, 569 U.S. at 386. Here, the images do not depict a minor "engag[ing] in . . . sexually explicit conduct" under § 2251(a). The district court relied on *Osuba*, but the facts of this case are far closer to *Howard*: no active sexual act by the adult toward the minor, no lascivious exhibition by the child, and possible doll use. *See* App. 19a-20a. The circuit split is stark and recurring. In *Howard*, the Seventh Circuit reversed, holding § 2251(a) demands the minor's active engagement; the adult's proximity or masturbation alone,

with a passive sleeping child, does not produce a depiction of "such conduct" by the minor. 968 F.3d at 722 ("The statute focuses on the minor's engagement, not the adult's independent actions."). Videos of masturbation next to a sleeping child were insufficient. *Id.* at 719-20. Conversely, *Osuba* (Second Circuit) upheld a conviction where an adult filmed ejaculation toward a sleeping minor, deeming the minor "used" as a prop in explicit conduct. 67 F.4th at 63. Similarly, *McCloud* (Eighth) found passive touching over clothes sufficient; *Laursen* (Ninth) allowed rubbing on a hand; *Finley* (Third) permitted genital touching. These broader views treat passive minors as "engaged" if they are central to the adult's explicit activity, conflicting with *Howard's* requirement for activity or engagement by the minor. This split undermines uniform enforcement of § 2251(a), a key tool against child exploitation, and affects sentencing (mandatory minimums turn on "production"). *See* 18 U.S.C. § 2251(e). The district court's alignment with the broader view despite facts favoring *Howard* makes the innocence claim debatable. Jurists could disagree, as the images show "mere proximity" without manipulation or activity. Review is essential to resolve the conflict, ensure fair application, and address whether passive depictions suffice—especially given evolving technology and defenses like metadata showing internet-sourced images. The ineffectiveness claim ties in: competent counsel would have certainly reviewed the photos and determine whether *Howard* applied, informing any plea decision. The district court's circular reliance on admissions (obtained under duress) ignores this. Granting *certiorari* will clarify habeas gateways and statutory interpretation, promoting justice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New Paltz, New York
September 29, 2025

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED MAY 14, 2025

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

24-2986
D. Conn.
23-cv-1270
Underhill, J.

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.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appendix A

Filed May 14, 2025

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

/s/ Catherine O'Hagan Wolf

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT, FILED NOVEMBER 1, 2024

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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

SIMON HESSLER,

Petitioner,

v.

UNITED STATES,

Respondent.

Filed November 1, 2024

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.

1. "The term 'child pornography' is currently used in federal statutes . . . . While this phrase still appears in federal law, 'child

§ 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 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

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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.

3. Hessler pled guilty to the state charges on August 18, 2020. *Id.*

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, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) (internal citations omitted); *see also Underwood v. United States*, 166 F.3d 84, 87 (2d Cir. 1999) (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

4. Inmate Locator, No. 26624-014, https://www.bop.gov/inmateloc// (last visited Oct. 28, 2024).

the evidence. *Blackmon v. United States*, 2019 U.S. Dist. LEXIS 134299, 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 U.S. Dist. LEXIS 73355, 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 U.S. Dist. LEXIS 49009, 2023 WL 2596911, at *3 (S.D.N.Y. Mar. 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

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).

insufficient to toll the limitations period. *See Holland v. Florida*, 560 U.S. 631, 651-52, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (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 U.S. Dist. LEXIS 112900, 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.

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

No. 1 at 26. I decline to equitably toll the period Hessler searched for counsel. *See Geritano v. United States*, 2023 U.S. Dist. LEXIS 86644, 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 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 U.S. Dist. LEXIS 59652, 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, 127 S. Ct. 1079, 166 L. Ed. 2d 924 (2007) (incarcerated individuals have no constitutional right to counsel in post-conviction proceedings).

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

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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.*

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, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (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, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (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, 115 S. Ct. 851, 130 L. Ed. 2d 808 (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, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (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, 132 S. Ct. 2060, 182 L. Ed. 2d 978 (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 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

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.*

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

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.

> 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.

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."

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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.

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 U.S. App. LEXIS 32016, 2022 WL 17086495, at *2 (2d Cir. Nov. 21, 2022), *cert. denied*, 143 S. Ct. 1043, 215 L. Ed. 2d 201 (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, 217 L. Ed. 2d 307 (2024). "[P]hysical contact is not a necessary component of passive engagement[,]" nor must the minor 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).

Appendix B

> 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

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.")

(*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 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).

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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).

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).

It is Hessler's burden to prove otherwise. *Dwyer v. United States*, 2016 U.S. Dist. LEXIS 157532, 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

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).

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 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, 129 S. Ct. 1481, 173 L. Ed. 2d 347 (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