No. 18-8729

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

ALAN KENNETH THOMPSON, JR. — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ALAN KENNETH THOMPSON, JR.
(Your Name)

FEDERAL MEDICAL CENTER, P.O. BOX 1600
(Address)

BUTNER, NC 27509
(City, State, Zip Code)

919-575-5000
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QUESTION(S) PRESENTED

1. In light of United States v Peter, 310 F.3d 709 (11th Cir 2002), does the ambiguousness of the nature of the term "material" within Title 18 USC 2252A(a)(2)(B), give the unintended breadth by: (A) authorizing District Courts to accept pleas of guilt without subject-matter jurisdiction, wherefore caprical use of elastic language is construed as a computer file, rather than disk, so long as the file "contains" an unlawful depiction; thereby, (B) substituting factual conduct in violation of United States v Edmond, 780 F.3d 1126 (11th Cir 2015); by modifying statutory elements in order to convict innocent persons of a crime for which they are not indicted?

2. When a prisoner alleges thorny constitutional issues, states facts and cites the law, in relation to and in support of such claims: (A) does a district court's catch-all denial, or failure to adjudicate all claims alleged, violate habeas procedure, when its decision runs contrary to the procedural rule established under Clisby v Jones, 960 F.2d 925 (4th Cir 1992), thereby, serving to render habeas review futile, as applied to that case; Likewise, (B) does a Court of Appeal's failure to clarify its blanket denial, of meritorious issues, violate a claimant's due process right to a meaningful opportunity to present such claims on habeas review, and/or place too significant of a burden at this mere propositional stage, during a COA's threshold inquiry, as re-established in Buck v Davis, 132 S.Ct. 759 (2017)?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at Thompson v U.S. M.D. Fla, LEXIS 29509, 18-12124-6 (Oct 2018); or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was Oct 18, 2018.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: Jan 2, 2019, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, Section 8, 9

United States Constitution, Article III, Section 2

Fifth Amendment to the Constitution

Sixth Amendment to the Constitution

(SEE APPENDIX E)

STATEMENT OF THE CASE

Unveiled, herein, this Petition for Writ of Certiorari, highlights grave injustice occuring to a detestable class of offenders. This group, unfortunately, is of the type that few are willing to stand or defend. Indeed, there is no subject which elicits a more passionate response than the sexual exploitation of children. Society arbors, and rightfully so, the victimization of the defenseless child. Wherefore, it must be the task of the court to review the case as dispassionately as possible to ensure justice. United States v Villard, 200 F.Supp. 803, 809 (3rd Cir 1988).

As this Court is aware, misinterpreted statutes, ambiguity and vague terminology, have a general tendency to permit interpreters to govern conduct, whimsically, beyond a statute's scope. Mass confusion, erupts here due to Congressional use of loose language when drafting statutes that involve child pornography, or material that contains child pornography. Such language, as: "item", "matter", "material", all denote an unlimited array of subject-metter, because the terms can be used to describe virtually any subject within purview of the expounder.

Left undefined by Congress, the phrase "material that contains", of Title 18 U.S.C. 2252A(a)(2)(B), has left courts baffled for over two decades and thus, its definitive meaning is long over due. In fact, other circuits to have interpreted this issue only "reveal the confusion surrounding such language", and remain divided as to whether the meaning of "material", encompasses a "computer disk" or the "computer files" thereon. See United States v Thompson, 281 F.3d 1088,1096 (10th Cir 2002)(J. Seymour, dissenting); Compare United States v Lacy, 119 F.3d 742,748 (9th Cir 1997)(holding "matter" referred to physical media), cert denied 523 U.S. 1101, 118 S.Ct. 1571, 140 L.Ed.2d 804 (1998) with United States v Vig, 167 F.3d 443,448 (8th Cir 1999)(holding "matter" referred to images, regardless of physical

media), cert denied, - U.S. -, 145 L.Ed.2d 125, 120 S.Ct. 146 (1999) and cert denied, - U.S. -, 120 S.Ct. 314 (1999); see also, United States v Reedy, 304 F.3d 358,366 Ftn. 10 (5th Cir 2002)(noting a circuit split); United States v McKelvey, 203 F.3d 66,71-72, Ftn 4 (1st Cir 2000)(same).

Significance of the phrase, "material that contains", calls into question the district court's statutory power to adjudicate the case before it, which is determined by subject-matter jurisdiction. Steele Co. v Citizens for Better Environment, 523 U.S. 83,89 (1998). A court has subject-matter jurisdiction when the acts alleged in the indictment constitutes the offense, under the charged statute. Whereas, a defect in subject-matter jurisdiction occurs where the conduct alleged "falls outside the scope of the charging statute". United States v Brown, 753 F.3d 1344, 1354 (11th Cir 2014). Consequently, any defect in subject-matter jurisdiction requires correction, regardless. United States v Cotton, 535 U.S. 625, 630 (2002).

Frequently, through utilization of vague multisense words, courts apply the elastic language of "material" to be construed as a "file", so long as this computer file "contains" an image of child pornography, under 2252A(a)(2)(B). What is more, the Eleventh Circuit, among others, often concludes that this conduct also violates 2252A(a)(2)(A). E.g., see United States v Gourdin, 591 Fed. Appx. 893,893-94(11th Cir 2015)(stating that section 2252A(a)(2) criminalizes knowing receipt or distribution of child pornography and citing, both 18 USC 2252A(a)(2)(A) and 2252A(a)(2)(B)). However, section (B), requires more than simply showing the receipt or distribution of child pornographic files. This section, proscribes receipt or distribution of "material", but only when such "material [] contains" child pornographic files.

In every case, "the function of the judiciary is to apply the law, not rewrite it" to conform to the policy position of the parties. See Mort

Ranta v Gorman, 721 F.3d 241,253 (4th Cir 2013). Hence the conglomerated use of this criminal statute, paired with vacillated opinions, permit judges, prosecutors, and policemen, to pursue personal predilections, thereby giving unintended breadth to an Act of Congress. Legislative use of ambiguous terms, however, is not a license for courts to use a vacuum to construe "files" of child pornography as a "material" that is capable of containing files of child pornography. Sturgeon v Frost, 194 L.Ed.2d 108,121 (2016).

To do so, would not only be an absurd way to say the statute governs "distribution of any child pornography that contains files of child pornography". But also, many, if not all, judicial opinions would not only violate more principles of statutory construction than can be string-cited on the remainder of this page, but also render other subsections of the same statute redundant; alter statutory elements of the charged offense; extend subject-matter jurisdiction; and substitute the factual basis, in support of a conviction, for a crime to which is not specified in the indictment; and would, thus, encourage convictions of innocent people.

The obscure nature of "material", along with discursive judicial opinions, further facilitates courts when showing reasoned analogies, i.e., in order to gain factual conduct behind the elements of the charged offense. In essence, broadening the factual basis to obtain a conviction in violation of the right to indictment by a Grand Jury. Thus, making cases such as this, imperative to public importance.

For reasons hereto, this case involves the widespread infringement of multiple rights, on such a large, albeit sordid, class of people who are, or soon will be chastized, which if left unattended, these issues would continue to punish the innocent; leave doubtful words subject to further misapplication; and has potential, once granted, to exonerate thousands of individuals indicted under 2252A(a)(2)(B), for the distribution of "files",

whereby, the district court had no statutory power to adjudicate their case.

Accepted as true, Petitioner's factual assertions, establishes that since the inception of 2252A(a)(2)(B), any previous, current, or yet to be indicted persons of the United States, that face or faced indictment, under 2252A(a)(2)(B), would be held under an improper definition of the term "material" and thus convicted for conduct that is not criminal under this statute. Which serves to render any court's judgment thereon void, for want of jurisdiction.

As an issue of national importance, Petitioner brings the instant Motion for Writ of Certiorari, because to permit a conviction to stand where not a whit of evidence supports an element of the crime charged, would do great damage to the considerations of due process that serves as a fundamental bulward of the criminal justice system. United States v Fries, 727 F.3d 1286, 1294 (11th Cir 2013). Not to mention, the substantial rights, as well as the fairness and integrity of the courts, are seriously affected when someone is sent to prison for a crime that, as a matter of law, he did not commit. United States v Cruz, 554 F.3d 840,845 (9th Cir 2009).

Misinterpretation of 2252A(a)(2)(B), paired with highly passionate responses to this subject and procedures, utilized, to carry the case this far, viz., to warrant review by this Court, statistically affects the Constitutional rights of every individual to have ever fell or fallen under this statute. Therefore, it is emphatically the province and duty of the judicial department to say what the law is; and those that apply law to particular cases must of necessity expound and interpret that law. Marbury v Madison, 5 U.S. 137,177 (1803).

In addition, because a court cannot waive jurisdiction, nor ignore jurisdictional defects, rather the court noticing, or put on notice, to the defect must raise the matter on its own. Insurance Corp of Ireland v

Compaignie de Bauxites de Guinee, 456 U.S. 694,704 (1982).

In light of such perplex questions of law and multitude of rights at stake, Petitioner, respectfully, has done his part to contest the language. Because, the very nature of statutory interpretation requires that someone present the argument before courts can define the law, or change it. Prost v Anderson and the Enigmatic Savings Clause of 2255: When is A Remedy By Motion "Inadequate or Ineffective?", 89 Denv U. L. Rev. 435,454 (2012). Having fully articulated his claims, through various motions, all, more or less, contesting these issues; and appropriately challenging the court's interpretation, Petitioner can do no more.

The opportunity to present an issue, in a post-conviction proceeding, has little reality or worth if debatably meritorious claims, and subsequent wails for help, simply fall on blind eyes and deaf ears. Thus rendering the entire habeas proceeding null, as there would be no remedial vehicle for redress. See Triestman v United States, 124 F.3d 361,378-79 (2nd Cir 1997) (Permitting a Bailey claim, on 2241, because of the constitutional issue that would arise from refusing to hear an actual innocence claim).

Whereby, Petitioner is unable to show how Title 28 USC 2255 was inadequate or ineffective, aside from proving the Eleventh Circuit, Clisby violation, for the district court's failure to address all claims on 2255, see Clisby v Jones, 960 F.2d 925, 935-36 (11th Cir 1992); and unable to satisfy the gatekeeping functions of Second and Successive savings clause. A thorny Constitutional issue would result, as there is no other avenue for judicial review available for a party who claims factual or legal innocence as result of a previously unavailable stautory interpretation. United States v Surratt, 797 F.3d 240,253 (4th Cir 2015); see also Davis v United States, 417 U.S. 333, 346-47 (1974).

In the appearances of fairness, such procedures, no matter the offense charged, simply cannot be tolerated. Hereunder, respectfully, summons the

Supreme power of this Court to resolve such widespread manifest injustice, by granting Certiorari in the above entitled case, to clear up these irregularities once and for all.

Reasons for Granting the Petition

I. Cause of Jurisdiction

Federal courts are of limited jurisdiction, and the law presumes that "a cause lies outside this limited jurisdiction". Kokkonen v Guardian Life Ins. Co. of Am., 511 U.S. 375,377 (1994). As a court of limited jurisdiction, Federal courts begin and end with an examination of their jurisdiction. Gen. Motors Corp v E.P.A., 363 F.3d 442,448, 361 U.S. App. D.C. 6 (D.C. CIR 2004).

A Federal court's general subject-matter jurisdiction comes from 18 USC 3231, which states that "district courts ....shall have original jurisdiction over all offenses against the United States". Musacchio v United States, 577 U.S. -, 193 L.Ed.2d 639,650 (2016). That is to say, subject-matter jurisdiction defines a court's power to hear a case. LIght foot v Cendent Morg. Corp., 580 U.S. -, 196 L.Ed.2d 493,502 (2017). However, a defect in subject-matter jurisdiction occurs where the conduct alleged "falls outside the scope of the charging statute". Brown, 753 F.3d at 1354; See also United States v Peter, 310 F.3d 709 (11th Cir 2002).

In other words, if it appears that the acts alleged in the indictment for which an individual was convicted did not constitute the offense then it appears upon the face of proceedings, that judgment was void. Mackey v Miller, 126 F. 161 (9th Cir 1903); see also Thor v United States, 554 F.2d 759,762 (5th Cir 1977). Consequently any defects in subject-matter jurisdiction requires correction regardless, Cotton, 535 U.S. at 630, and because jurisdiction cannot be waived or forfeited, Id, this Court has an independant obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from a party. Arbaugh v Y & H Corp., 546 U.S. 500,

514 (2016)[1].

A. Equivocal Language

A determination of whether the district court had subject-matter jurisdiction, and relevant contentions herewith, hinge upon the meaning of the term "material that contains" prong of Title 18 2252A. Which, runs analogous with the enumerated list of "any books, magazines, periodicals, films, video tapes, or other matter which contains a visual depiction", as governed under 18 USC 2252(a)(4)(B)[2]. Due to such similarities in language, the particular "material that contains" clause of 2252A, is held to be irretreivably ambiguous. See Dauray v United States, 215 F.3d 252 (2nd Cir 2002)(after employing canons of construction, the court applied the rule of lenity, after concluding that the meaning of "matter which contains" is irretreivably ambiguous)[3]. Discomfiture among the courts, are led by this equivocal language. That is, courts have determined that a computer file is "material", so long as it "contains" an image of child pornography. Because, under the Eleventh Circuit's view, the act of "distribution" occurs where a person distributes child pornography within the meaning of 2252A(a)(2) when he either transfers it to another person or makes it available to others through a file-sharing website or peer-to-peer network. United States v Grzybowicz, 747 F.3d 1296,1308 (11th Cir 2014). Likely, because a vast majority of circuit decisions, rest on the fact that "when an individual consciously makes files available for others to take, and those files are in fact taken, distribution has occured". United States v Chiarado, 684 F.3d 265,282 (1st Cir 2012).

Indeed, these actions establish how the act of distribution occurs. In other words, the adoption above applies to "those files", of which are images, and establishes what act or deed completes the object of the distribution, that is, for the distribution of "any child pornography", in violation of 2252A(a)(2)(A). See United States v Stitz, 877 F.3d 533,538 (4th Cir 2017)

(holding that where files have been downloaded from a defendant's share folder, use of a peer-to-peer file sharing program constitutes distribution pursuant to 2252A(a)(2)(A).

No matter how hardened this decision may be, however, it disregards the fact that Congress enacted 2252A(a)(2) to govern more than just the distribution of files. Because, under 2252A(a)(2)(B), distribution can also occur when a person distributes any "book, magazine, periodical, film, video tape, computer disk or any other material", when such material "contains child pornography" See United States v Albert, 195 F.Supp.2d, 167,171 (1st Cir 2002).

Courts seem to stagger discursively between sections 2252A(a)(2)(A) and (B), as many, if not all, circuits digress from the decision in Stintz, to waver that "downloading images and videos containing child pornography and storing them in a shared folder accessible to others "also "amounts to distribution under 2252A(a)(2)(B)". United States v Richardson, 713 F.3d 232,236 (5th Cir 2013).

As glossed above, this latter scenario, could not have been the intent of legislature. Section 2252A(a)(2)(B), requires more than just a showing that files or images of child pornography had been transported through commerce, distributed to another person or even, made accessible to another through a file-sharing network.

Section B, of 2252A(a)(2), specifically requires a showing that a person distributed "material", not the child pornography itself. As, this is the language Congress drafted, and most likely meant, viz., "material" in the form of computer disks because the framers of 2252A specifically chose the term "computer disks" containing child pornography, rather than "computer files". Thus, when Congress gave its most recent conception of what would constitute "material that contains" an image of child pornography, it settled on "computer disks" as the item intended to be distributed. Thompson, 281 F.3d

at 1097-98. (J. Seymour dissenting).

Further support on this conclusion, comes from looking to different sections of 2252A, as each subpart applies to conduct beyond the distribution of the image itself. Indeed, it would be an odd result, if Congress drafted seven subsections governing criminal conduct under statute 2252A, all, to prohibit one action, viz., for the distribution of child pornographic images when only one section would have been practical.

Whimsical Application.

As demonstrated in Stintz, 877 F.3d at 538 and Richardson, 713 F.3d at 236, inter alia, this issue is, by far not an isolated issue. As courts across the country, have been caprically misinterpreting the use of files to be the object that must be distributed, to constitute the factual conduct, which establishes distribution pursuant to and for the purposes of obtaining convictions under both 2252A(a)(2)(A) and 2252A(a)(2)(B)[4].

Of significance, as alleged in the indictment, the specific act of distributing files, is the fact used to support elements of statute 2252A(a)(2)(A), however, Petitioner is not indicted under section A, rather he is indicted for 2252A(a)(2)(B), which tends to raise serious Constitutional brows. See Constitutional validity, infra, pg 15-17.

Therefore, highlighting that to hold placement of child pornographic "files in a share folder, accessible to others on a file sharing program", as the act that "constitutes distribution for the purpose of 2252A(a)(2)(B)"[5], would otherwise, in the same breath, hold 2252A(a)(2)(A) to be superfluous. An anomoly that goes against the grains of many cardinal principles of statutory interpretation, and like the doubtful nature of the terms involved, begs of canons of construction.

Circuit Conflict. As glossed earlier, the phrase "material that contains" has left courts baffled for over two decades. Of the handful of cases to have addressed the issue, two have produced only confusion and disarry in

the lower courts[6]. It would seen that in the area of federal subject-matter jurisdiction, vagueness and ambiguity are grounds enough to revisit an unworkable prior decision and resolve the conflict amongst the Circuits. See Grabart Inc. v Grent L.D. & C. Co., 513 U.S. 527,555 (1995).

Amendment. Once the subject of much debate, this argument, seens to have fell off to the wayside. As, this latent anomoly, regarding Courts who are divided as to whether computer disks or computer files, has remained dormant since Congress amended section 2252(a)(4)(B), back in 1998, to change "3 or more" units governed to "1 or more" units. Pub. L. 105-314, §203(a)(1)(1998).

In this light, the amendment rightly served to close the loophole in the statue, and provided certainty behind the circuit's flucuating interpretations. As, courts now have the benefit of Congress' express words to clear up whether "1" or "3 or more" computer disks or computer files, violate that statute. Appearances can be deceiving, however, as this resolve still leaves open the question as to whether in fact "matter", or in this case "material", encompasses a computer disk or a computer file, itself, to have been the item distributed.

Significantly, Petitioner's contentions herewith, do not directly concern statute 2252(a)(4)(B); the quantities involved; or any relevant unit of prosecution; nor whether child pornography had been transported in commerce; but rather, controversy occurs as to which act triggers a violation of the charged statute, in this case, under 2252A(a)(2)(B).

Statutory Interpretation. Having established, at minimum, that one critical word of the statute lends itself to at least two meanings, opens the door to canons of statutory interpretation to resolve the ambiguity. United States v Turkette, 452 U.S. 576,581 (1981); see also United States v R.L.C., 503 U.S. 291,298 (1992).

Advent of the internet, and its use as a means of distributing child pornography, has forced many courts to parse the ambiguous meanings of statutes written prior to the technology boom of the past two decades. Statutes written and amended in the early 1990s were, by the end of that decade, no longer as clear. As result, two decades later, the meaning of "material" is not plain and requires application of the canons of construction because (as Napolean observed) everything is more or less organized as "matter". Thompson, 281 F.3d at 1094[7].

Statutory Definition. Chapter 110 of the United States Code addresses relevant statutes that deal with child pornography. This chapter does not define "material", the term, however, is generally taken to mean any substance of which an object is composed and as determined earlier, defies obvious unitary usage, which incites statutory interpretation.

Fortunately, Congress defined "child pornography", under 2256(5) and (8). Thus, "child pornography" is understood to include "data stored or [data] capable of conversion" into any image, because it is expressly defined to include "any visual depiction". Id.

Notably, Petitioner asserts that the term "file" is not drafted under Chapter 110, relating to child pornography, nor is the term defined in or appear on the face of, any relevant amendments. Nevertheless, this term is perceived to mean "a collection of data ... that is stored as a unit on the computer". American Heritage Dictionary of Computer Words, 293 (1998). Consequently, a court must use caution, here, as it must ordinarily resist reading words or elements into a statute that do not appear on its face. Bates v United States, 522 U.S. 23,29 (1997).

With blindfolds off, it is easy to see, that if a "file" is composed of stored data and "child pornography" is defined as data, whether stored or converted, heedful eyes would logically conclude that they are inclusive to each other and unified as one. Thus, a computer file depicting child

pornography falls, clearly and unambiguously, within the ambit of the broad "any child pornography" clause of 2252A(a)(2)(A), as opposed to being stretched into the more limited "material that contains" phrase of 2252A(a)(2)(B).

Lists and Other Associated Terms. As previously explored, there is no plain meaning for the "material that contains" language of 2252A(a)(2)(B), consequently, courts resort to canons of statutory interpretation to help resolve the ambiguity. Turkette, 452 U.S. at 581. Two related canons, further solidify Petitioner's position and should inform the expounder, what the meaning of "material" is, for the purpose of criminal liability under 2252A(a)(2)(B), these canons are:

> First, when "legislative intent or meaning of a statute is not clear, the meaning of doubtful words may be determined by reference to their relationship with other associated words or phrases". (noscitur a sociis). **2A Norman J. Singer, Sutherland Statutory Construction, 46.16** (5th ed. 1992); see also Dole v United Steelworkers of America, 494 U.S. 26,36 (1990). Second, is "where general words follow a specific enumeration of persons or things, the general words should be limited to persons or thins similar to those specifically enumerated". (ejusdem generis). Turkette, 452 U.S. at 581; see also Reading Law, The Interpretation of Legal Texts, Antonin Scalia, Bryan A. Garner, 199-213 (2012).

Under this approach, uncertainty of the phrase "material that contains", paves the way for nosictur a sociis and thus, is clarified by gaining meaning from associated words in its comparison to "any book, magazine, periodical, film, video tape, or any other matter which contains" language of 2252(a)(4)(B). Therefore, although similar, section 2252A(a)(5)(B) is viewed as a supplement[8] which criminalizes the knowing possession of "any book, magazine, periodical, film, video tape, computer disk, or any other material that contains an image of child pornography". See 18 USC 2252A(a)(5)(B). On the other hand section 2252(a)(4)(B), does not include "computer disk" in its cross section, which intimates that 2252A was, in fact, enacted due to technological advances... particularly through the use of computers, Thompson, 281 F.3d at 1097 (quoting Pub. L. 105-314, §203(a)(1)(1998)).

To this end, any lingering doubt about the limiting principles applicable

to the residual phrase "material that contains", is quickly satisfied by, yet another, intrinsic statutory aid. Conclusively, the wording of the statute invites application of the canon ejudem generis.

Further determination of the phrase "material that contains", of 2252A(a)(2)(B), requires looking to statute 2252A as a whole. Applied to 2252A(a)(5)(B), ejusdem generis advises that, the general phrase "any other material that contains" an image, should be so construed as like in kind to, and no more expansive than, a "book, magazine, periodical, film, video tape, [or] computer disk". These terms denote specific concrete forms of media that are used to capture, store, or deliver information as a means of communication. They are tangible illustrations of physical media, rather than mediums, themselves. Brune, 767 F.3d at 1023, Thompson, 281 F.3d 1094-96, Lacy, 119 F.3d at 748. Therefore, although both disks and files could be viewed as "containing" the visual depiction, it is safe to conclude that "material" is the physical media "that contains child pornography"; and that, files, themselves, do not rank as "material" for the purposes of criminal liability under 2252A(a)(2)(B). Id.

Constitutional Validity. Resolution between multiple reasonable interpretations of a statute, courts will alwyas prefer one that sustains constitutionality to one that does not, under the presumption of constitutional validity. NLRB v Jones & Laughlin Steel Corp., 301 U.S. 1,30 (1937).

As hinted earlier, here, reading the definition of "material" expansively as courts and the government would have it, to include "files" of child pornography, implicitly eviscerates the statute's element of scienter - a reading that smacks of overbreadth. Brune, 767 F.3d at 1024 (citing United States v X-Citement Video Inc., 513 U.S. 64, 115 S.Ct. 464,469 (1994).

Under settled law, a scienter requirement is presumed to apply "to each of the statutory elements which criminalize otherwise innocent conduct". X-Citement Video Inc., 513 U.S. at 469. This application is necessary,

because the elements at issue are crucial to establishing liability. The same is true of 2252A's requirement that material "contains" an unlawful depiction. Distribution of computer disks, like the distribution of books, is ordinarily lawful. The presence of illegal images on the disks or in the books, is a crucial element separating legal innocence from wrongful conduct". See Id. Accordingly, a person may only be convicted upon a showing that he knew the matter in question contained an unlawful visual depiction. Lacy, 119 F.3d at 747.

The interpretation of inferior courts, to the contrary, fails to meet such demands. As glossed earlier, a computer file is defined as data stored and child pornography is further defined as data stored, which, taken together, can be easily concluded that a file containing an illegal depiction is, in fact, child pornography. See United States v Wilson, 182 F.3d 737,743 (10th Cir 1999).

This finding, to be frank, is all that is required as an element of 2252A(a)(2)(A). See Appendix F, Fifth Circuit's Pattern Jury Instructions, 2.85D(requiring the third element to establish that when the person "[distributed]" the item, that the person believed the item "[was]" child pornography[9].

Therefore, when files are broadly construed as a "material", or vice versa, for the purposes of criminal liability under 2252A(a)(2)(B), such interpretation eviscerates the statutory element of scienter that requires a showing that one knew the matter "contained" an unlawful depiction because, instead, like section A, all that would be required is merely showing that one knew the matter was an unlawful depiction.

Ergo, violating an individual's Fifth Amendment right to be tried on an indictment charged by a Grand Jury's allegations, as occurred here. Bedoy v United States, 827 F.3d 495,513 (5th Cir 2016); see also Statutory Elements, infra, Pg. 20-21. Such applications, violate this Court's mandate

to interpret a statute where fairly possible so as to avoid substantial Constitutional questions. X-Citement Video, 513 U.S. at 69; See also Clark v Martinez, 543 U.S. 371,381 (2005).

Thus, to avoid unconstitutionality and to not conflict with mandates of law in this Court, or any other cardinal principles of statutory construction, it is safe to conclude that "files" are not "material" for the purposes of 2252A(a)(2)(B).

Statutory Summation. Utilization of canons of construction, above, puts an end to both Petitioner's and the court's confusion, viz., the doubtfulness of "material" had been clarified by its comparison to books, magazines, or computer disks, and is thus constrained to alike objects.

In other words, where Section 2252 is ambiguous as to whether "matter" means computer disks or computer files, section 2252A is crystal clear, making it a crime to knowingly possess or distribute "any ... computer, disk, or any other material that contains an image of child pornography". 18 USC 2252A(a)(5)(B) and (2)(B). This statute deals with much the same subject-matter as 2252(a)(4)(B), but was written in the internet age and its language provides assistance in unterstanding the intended meaning of ambiguous terms, such as "matter" and "material" in similar statutes[10].

Unlike 2252, section 2252A includes computer analog in the list of "books, magazines, periodicals ..." as "computer disks". In 1996, when computer software and hardware technology had advanced to a point much closer to that of today. This concludes, that the framers of 2252A(a)(2)(B) specifically chose to punish people for distributing computer disks containing child pornography, rather than for computer files.[11]

Any other interpretation would violate not only many interpretative canons herein, but also renders some words redundant and facilitates convictions for a crime to which is not indicted. All, by ascribing to

one word a meaning so broad that it is inconsistent with its accompanying words and thus, gives unintended breadth to an Act of Congress. Gustafson v Alleyd, 513 U.S. 561, 574-75 (1995)[12].

As done here, by stretching elastic language to encompass distribution of computer files, conduct outside the reach of this provision. Whereby, the act alleged is preceeded by a separate statute expressly proscribing such conduct. Thus, in light of the above, and avoid unconstitutionality, it is clear Congress intended to target computer disks rather than computer files, when drafting the general term "material" into statute 2252A(a)(2)(B).

B. Want of Jurisdiction. Having diligently concluded, that the act of distributing child pornographic files does not fall within the gamut of "material", under 2252A(a)(2)(B), simultaneously, establishes that any statement, within an indictment, alleging distribution of files that contain child pornography, in violation of 2252A(a)(2)(B), strips the court of its statutory and constitutional power to hear that case. See, Peter, 310 F.3d at 715. Likewise, where an indictment does not allege the distribution of any book, magazine, or computer disk, containing child pornography, in violation of 2252A(a)(2)(B), it has failed to allege conduct to evoke the court's power to enter judgment because the act specified in the indictment fails to state a violation of the charged statute. See Id.

Hence, the district court, in this case, is without subject-matter jurisdiction, because the indictment failed to allege distribution of any book, magazine, or computer disk. But, instead, it affirmatively alleged the distribution of files; and those files, are outside the scope of section 2252A(a)2)(B). Thus, any judgment entered thereon is void. See, Brown, 753 F.3d at 1354[13]. Here, under the statute charged, 2252A(a)(2)(B), the instant indictment specified the act of distributing three child pornographic files, D.E. 12, Pg 1, See also Appendix F, and did not allege the distribution of books, magazines, computer disks, or any other material that contains

those files, it has thus failed to allege an "offense against the laws of the United States". 18 USC 3231.

In other words, no matter how much concrete evidence the government provides, showing the distribution of child pornographic files, it is no closer to proving the distribution of any book, magazine, or computer disk than it would have no proof whatsoever. Thus, "it is clear under the circumstances, that the government's proof of the alleged conduct, no matter how overwhelming, would have brought it no closer to showing a the crime charged than it would no proof at all". Peter, 310 F.3d 715.

Innocence. In every criminal case, the government must be put to its burden of proof, because permitting a conviction to stand where not a whit of evidence supports an element of the crime charged, would do great damage to the considerations of due process that serves as a fundamental bulwork of the justice system. Fries, 725 F.3d at 1294. The substantial rights, as well as the fairness and integrity of the courts, are seriously affected when someone is sent to prison for a crime that, as a matter of law, he did not commit. Cruz, 554 F.3d at 845.

As just unmasked, computer files, in general, are not within the scope of "material" for the purposes of 2252A(a)(2)(B), hence, establishing actual innocence, meaning factual innocence, not mere legal insufficiency. Actual innocence means that the person did not commit the crime charged. Rodriguez v Johnson, 104 F.3d 694,697 (5th Cir 1997).

Accepted as true, Petitioner's factual assertion establishes that since the statute's inception, any previous, current, or yet to be indicted, persons of the United States, that face or faced indictment, under 2252A(a)(2)(B), would be held under an improper definition of the term "material" and thus, convicted for conduct that is not criminal under this section. Further demonstrating, that in light of all the evidence, it is more likely than not that no reasonable factfinder would have convicted him. Bousley v

United States, 523 U.S. 614,623 (1998).

Statutory Elements. The view of actual innocence focuses on the elements of the crime of conviction. See United States v Mikalajunas, F.3d 490,494 (4th Cir 1999). Elements, are the constituent parts of a crime's legal definition - the things the prosecution must prove to sustain conviction. Mathis v United States, 579 U.S. -, 195 L.Ed.2d 604,610 (2016); see also Black's Law Dictionary, 634 (10th ed. 2014).

As held in United States v X-Citement Video Inc., 513 U.S. at 73, to sustain conviction, there must be a showing of knowledge - or belief - that the matter in question contained an unlawful depiction. Lacy, 119 F.3d at 747. Significant here, in Petitioner's case, there is no such showing.

As noted previously, the plea agreement states that the elements to be proven were, inter alia, that when Petitioner distributed child pornography, he believed the "item was" child pornography, D.E. 22, Pg 2; D.E. 52, Pg 9, line 1-8, not that the equivocal item "contained" child pornography, as required by law. See Id; See also Appendix F.

Since a guilty plea admits all elements of a formal criminal charge it must accurately state all elements to which the government must prove beyond a reasonable doubt. Brown, 753 F.3d at 1347. However, Petitioner's plea was not drafted with such precision, that is to say, the record is devoid of any proof that he believed the material "contained" child pornography because the third element, omits this crucial word from a constituent part of the statute's elements. See D.E. 22, Pg. 2; D.E. 52, Pg 9, line 1-8, Pg 19, line 7-22.

While visiting the subject, here the indictment charges 2252A(a)(2)(B), for distribution of "material that contains" child pornography, but without presentment to the Grand Jury, or notice, the plea agreement and resulting colloquy alleges a plea of guilt to mere distribution of "child pornography",

as if charged under 2252A(a)(2)(A). D.E. 22, Pg 1, A.1; D.E. 52, Pg 8, line 14-16; see also Appendix F. The plea agreement, because it does not reference "materials" that "contain" child pornography, not only neglects to fully state all elements of the criminal charge, but also fails to reflect that Petitioner received real notice of the nature of the charge against him, to satisfy his requisite understanding of the charge. See Federal Rules of Criminal Procedure 11(b)(1)(G), See also United States v Broce, 488 U.S. 563,569 (1989); Smith v O'Grady, 312 U.S. 329 (1941); Bousley, 523 U.S. at 618-19.

No matter how it is read, at no point in the plea agreement, plea colloquy, transcripts or otherwise, does the record reflect a crucial element of the offense, viz., a showing that Petitioner had knowledge that the material contained an unlawful depiction. In other words:

> the Third Element does not state, nor can it prove, the matter in question "contained" an image of child pornography, as required by law. See Lacy, 119 F.3d at 747. Thus, the Third Element was modified to support statute 2252A(a)(2)(A), for the distribution of "any child pornography", because it proves that an "item of child pornography" when distributed, "was" child pornography. That is to say, proving that when Petitioner distributed the questionable "item" that he believed the "item was" - or constituted - child pornography. See D.E. 22, Pg 2, Elements of Offense. Clearly, on the record, this falls short of proving an essential element of the offense.

Factual Basis. Since the conduct specifically alleged, is not within the statute's scope, neither can the facts support the statutory element. Accordingly, the requirement of the statute, under which Petitioner was prosecuted - that is distribution of "material", e.g., in the form of computer disks - is not satisfied in this case. Lacking a factual basis for acceptance of Petitioner's plea, the district court erred in accepting this plea, which constitutes a fundamental defect in the plea proceeding. See Federal Rule of Criminal Procedure 11(b)(3); See also United States v McKelvey, 203 F.3d at 72; Dominguez Benitez, 542 U.S. 74 (2004).

In other words, left without a factual basis to support the conviction,

the district court had no authority to modify the Third Element; under agreement of the parties, Rule 11, or otherwise. Thus, violating the Fifth Amendment to the Constitution, which provides that "[n]o man shall be held to answer for a ... crime, unless on a presentment or indictment of a Grand Jury", U.S. Const. Amend. V, which slashes due process rights. Id.

Amendment of Indictment. An implicit or constructive amendment of the indictment, constituting reversible error, occurs when it permits a person to be convicted upon a factual basis that effectively modifies an essential element of the offense charged. United States v Reasor, 418 F.3d 466,475 (5th Cir 2005). The constructive amendment doctrine is not about factual theories, it's about elements, an element of a crime is one whose specification, with precise accuracy, is necessary to establish the very legality of the behavior and thus, the Court's jurisdiction. United States v Shultz, N.D. Ill., LEXIS 73318, Case No: 14-cr-467-3 (May 2017). Simply put, a person can be convicted only on a crime charged in the indictment. United States v Madden, 733 F.3d 1314,1318 (11th Cir 2013).

Plea Proceeding. In Petitioner's case, as with nearly every instance where courts accept pleas of guilt to statute 2252A(a)(2)(B), both the plea agreement and plea colloquy assume that Count One of the indictment charged Petitioner with distribution of "child pornography" under 2252A(a)(2)(A). As belabored herein, the indictment actually charged Petitioner with distributing "material that contains child pornography" under 2252A(a)(2)(B), D.E. 12 , Pg 1. Thus, the court could not accept a plea agreement to an offense not contained in the indictment. United States v Edmond, 780 F.3d 1126,1130 (11th Cir 2015).

When presented with the plea agreement, Petitioner signed a factual proffer, designated as the "Factual Basis", D.E. 22, Pg 21; see also Appendix F. This proffer alleges:

that Petitioner admitted to using a "Kik mobile application ... to

post and receive multiple images of child pornography over the internet". Id. These statements, do not track the language of the indictment, nor section 2252A(a)(2)(B); rather the factual proffer tracks the language of 2252A(a)(2)(A), for the knowing distribution and receipt of child pornography.

Like Edmond, here, "[n]either the prosecution nor defense ... noted the glaring inconsistancy between the offenses" described in the plea agreement and those in the indictment. Edmond, 780 F.3d at 1128; see also D.E. 52, Pg. 11, line 1-6; Appendix F. Unfortunately, for Petitioner, "the District Court did not notice the problem either", Id. Edmond at 1128[14].

During Petitioner's plea colloquy, the district court first confirmed that Petitioner had full opportunity to review both the indictment and plea agreement with his attorney. After accepting Petitioner's answer, that he understood the contents of both documents - an answer which demonstrated that he understood neither, given that the documents referred to different crimes - the court explained, as directed to Petitioner:

> that "[y]ou are charged in Count One, the count to which, according to your plea agreement, you will plead guilty, with distribution of child pornography, in violation of Title 18, United States Code, Section 2252(a)". D.E. 52, Pg 8, line 14-16.

The district court then set out to confirm that Petitioner had actually committed the crime to which he was to plead. It accomplished this feat by:

> first, reciting the elements from the plea agreement. D.E. 52, Pg 8, line 20 - Pg 9, line 10; see also D.E. 22,2; Appendix F. Second, by confirming that Petitioner's "plea agreement set forth facts related to the offense to which [Petitioner] plead[] guilty", and then, ensuring that he had "read the factual basis that is set forth" in the plea agreement, D.E. 52, Pg 11, line 18.

After establishing there were no objections to the facts, the district court, again, asked directly about the elements of the offense, while defense read along:

> Court: Do you admit, Mr. Thompson, that you knowlingly distributed... an item of child pornography?
>
> Petitioner: Yes, your honor.
>
> Court: Do you admit the specific items you distributed consisted of the file names that are set forth in the indictment and in the

plea agreement on page 20, namely, the three file names listed here on page 20 of your plea agreement?

Petitioner: Yes, your honor.

Court: Do you admit that when you distributed these items - that is, those three files - by your computer, that you believed that they were child pornography?

Petitioner: Yes, your honor.

Court: I do find based on the facts in the plea agreement and the discussion here with the [Petitioner] regarding the personalization of the elements do state sufficient facts for a plea of guilty. D.E. 52, Pg 19, line 3 - Pg 20, line 2.

This stunt was finally accomplished by confirming Petitioner had reviewed the factual proffer with his attorney and that he understood and agreed to its contents and was satisfied by his attorney's representation. Unfortunately, the district court did not refer to any facts that might have been made manifest the offense to which Petitioner was pleading. Following this exchange, the court accepted his guilty plea as to Count One with the obvious understanding that Count One involved distribution of child pornography rather than, distribution of materialthat contain files of child pornography. Accordingly, judgment entered, also noting a conviction for distributing child pornography. D.E. 44.

Therefore, it is apparent on the record's face, that both the plea agreement and plea colloquy assume Count One of the indictment charged Petitioner with distribution of child pornography. A fallacy, that even his own counsel had failed to acknowledge. See D.E. 38, Pg 1 (stating that Petitioner had "plead guilty to distribution of child pornography"). Therefore, as unfortunate as this may be for the district court, its integrity has been compromised by accepting a guilty plea to an offense not contained in the indictment. Edmond, 780 F.3d at 1130. Because, such defilement constittues a fundamental defect in the plea proceeding. Id. McKelvey, 203 F.3d at 72.

It is "self evident" that a defendant's conviction for a crime not

charged in the indictment seriously affects the fairness, integrity and public reputation of judicial proceeding. Madden, 733 F.3d at 1323; see also United States v Floresca, 38 F.3d 706,714 (4th Cir 1994) (acknowledging that "convicting a defendant for an unindicted crime affects the fairness, integrity and public reputation of Federal judicial proceedings in a manner most serious").

As conceded above, although Petitioner's conduct may well have been criminal under 2252A(a)(2)(A), for actions that constituted distribution of child pornography; the fact remains, that on the face of the indictment, he was not indicted under subsection A. As charged, under section B, Petitioner's conduct is not a crime. Mackey v Miller, 126 F.161 supra. Therefore, he was certainly entitled to relief on habeas corpus, because if court's are permitted to flat ignore jurisdictional arguments on collateral review, infra, then a prisoner's right to access the court and due process rights of Fifth Amendment to the Constitution, would be in vain.

II. Habeas Procedure Violation

Under Title 28, Section 2255, of the United States Code, Congress offers: "a prisoner in custody" to claim the "right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence". This allows a prisoner to move the court which imposed such sentence to set aside or correct the sentence. See 28 USC 2255(a).

Section 2255 was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus. See Davis, 417 U.S. at 343. Thus, a federal prisoner generally collaterally attacks the validity of his federal conviction and sentence by filing a motion to vacate, under 2255. Sawyer v Holder, 326 F.3d 1363,1365 (11th Cir 2003).

The framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a

vital instrument to secure that freedom. Boumediene v Bush, 553 U.S. 723,739 (2008). No where in the history of section 2255, can there be found any purpose to impinge upon prisoners' rights of collateral attack upon their conviction. United States v Hayman, 342 U.S. 205,212-14 (1952); see also Const. Article I, Section 9 (The privilege of the writ of Habeas Corpus shall not be suspended ...).

In cases evaluating whether other "substitute" habeas remedies are adequate and effective, the decision hinges on whether the party seeking relief "has an adequate remedy at law". Trainer, 431 U.S. at 440. Assessment does not go to 2255's effectiveness, instead, the question is only whether the procedures in 2255 provided a genuine opportunity for Petitioner to raise his present claim. Surratt, 797 F.3d at 254. Here, that did not happen.

A. Clisby Violation. Pertinent here, district judges must resolve all claims for relief, regardless of whether relief is granted or denied. Clisby, 960 F.2d at 936. A "claim for relief" is defined as "any allegation of a constitutional violation". Id at 935-36. Allegations of distinct constitutional violations constitute seperate claims for relief, even if both allegations arise from the same operative facts. Id.

Under well settled law, ineffective assistance of counsel ("IAC") constitutes a violation of a defendant's Sixth Amendment rights and is, a claim of a constitutional violation. See Strickland v Washington, 466 U.S. 684-86 (1984). Likewise, an allegation of a jurisdictional violation, under Article III, Section 2 of the Constitution, cuts through the due process clause of the Fifth Amendment right to not "be deprived of life, liberty, or property, without due process of law", which also constitutes a claim of a constitutional magnitude.

Here, subsequent to Petitioner's botched appeal, he sought to set aside of correct his conviction or sentence under 2255: alleging in short

two grounds for relief, (1) ineffective assistance of trial counsel; and (2) ineffective assistance of appellate counsel. See D.E. 1, civil, Pg 7, 19; see also D.E. 9, civil, Pg 1. The district court then entered final judgment and denied Petitioner's MOtion to Vacate. Id.

Perplexed, the district court found Petitioner's first claim of IAC derived from trial counsel's deficient performance, merely "because counsel did not challenge the sufficiency of the indictment", by arguing that (1) there was "a variance between the statute and the allegations of the indictment" and/or (2) because of "a variance between the indictment (or perhaps the statute) and the elements of the offense as enumerated in the Plea Agreement", D.E. 4, civil, Pg 3.

Here, Judge Hodges attempted to use the record to refute this claim, however, recital of terms that track the language as charged in the indictment, replicating statute 2252A(a)(2)(B), and renumerating elements of the plea, instead of conducting a factual analysis to determine how the specific act alleged - for the distribution of three child pornographic files - violates this particular statute, does little to reach the full merit behind Petitioner's claims. That is to say, the district court failed to establish the specific act, or conduct, that calls forth Federal jurisdiction under the statute charged.

Of significance, under Peter, 310 F.3d 709, an allegation of a "variance between the statute and the allegation of the indictment", as perceived by Judge Hodges, invalidates the conviction and thus, voids the court's judgment entered thereon, for want of jurisdiction. Here, the court did not administer a jurisdictional analysis or any other retort, rather Judge Hodges simply passed over this argument and other relevant discrepancies thereof, by proffering a mere narration of events in return. In essence, waiving Petitioner's jurisdictional arguments in contrast to this Court's holding in Cotton.

Neither, had Judge Hodges addressed his own notation of an alternative

claim that allegedly challenged a "variance between the indictment" and the "elements of the offense as enumerated in the Plea Agreement", D.E. 4, civil, Pg 4. For sake of argument, regardless of what the interpretation of "material" was intended to signify. It is clear, from the record, the Plea Agreement does not list all elements of the offense, because it only recounts the elements of the offense intended to be charged. Therefore, by omitting the fact that Petitioner knew the matter in question "contained" an illegal image, Judge Hodges' opinion, simply passed over this discrepency. Id. Compare also Appendix F.

As perceived, the district court, along with disregarding Petitioner's other challenges, then concluded the second claim to be "even weaker" in comparison to the Appellate Court's "independent review of the record". D.E. 4, civil, Pg 5. Petitioner's claim, however, did not allege that "the Court of Appeals was [] deficient", or claim Ineffective Assistance of Appellate Court, nor did he challenge - as Judge Hodges "understood" - that it "is the business of [the district] court to review the decisions of the Court of Appeals", or any relevant jobskills of either tribunal. Id.

Rather notably, in its confusion, the reason this claim is "weaker", is because the court committed an error of law by applying the wrong legal standard to Petitioner's IAC claim. In other words, Petitioner challenged the effectiveness of counsel's representation on appeal, Judge Hodges, however, puzzled, was some how under the impression that "any finding by [the district] court that [Petitioner's] appellate counsel was deficient in some way would be ... a finding that the Court of Appeals was equally deficient". D.E. 4, civil, Pg 5.

This determination, does little to initiate any standard of review under the requisite Strickland test, established by this Court. Nor did this inquiry analyze, whether other grounds alleged therein showed cause or prejudice, e.g. as to whether counsel's absolute failure to consult his

client prior to filing a "no-merit" brief on his behalf, D.E. amounts to deficient performance, when counsel completely overlook[ed] meritorious grounds for an appeal". United States v Lopez, 100 F.3d 113,119 (10th Cir 1996); see also Lombard v Lynaugh, 868 F.2d 1475 (5th Cir 1989).

Judge Hodges, then, concluded his ruling with a catch-all denial that "[a]ny claims or contentions made by [Petitioner] that are not expressly identified in this order have been considered and rejected". D.E. 4, civil, Pg. 5. This is not enough for the Appellate Court to have known if the district court considered whether Petitioner's claims had merit[15].

All along, Petitioner has alleged facts, that, if true, would entitle him to relief, the district court was therefore obligated to issue an evidentiary hearing, to enter conclusions of law or least, rule on his merits. Aron v United States, 291 F.3d 708,713 (11th Cir 2002). Likewise because neither the 2255 motion, the files, nor the records of the case conclusively shows that Petitioner is entitled to no relief, the district court was compelled to conduct a hearing to enter conclusion of law to resolve these claims. Anderson v United States, 948 F.2d 704,706 (11th Cir 1991). More specifically, and contrary to Judge Hodges' confused assumptions, Petitioner's motion, record and file thereof could not have shown, conclusively, that the claims were entitled to no relief, because the record was not yet established on some facts or points of law and directly refuted by others.

This includes, but not limited to only arguments herein, but also those listed in Petitioner's Application for COA. D.E. 16, civil, Pg 9-14 (amended); see also D.E. 9, Pg 8-11. Where, for example, it is crystal clear from the record's face that a "Jones violation" had occurred. D.E. 55, criminal, Pg 35, line 4; see also United States v Jones, 899 F.2d 1097,1102 (11th Cir 1990). A "Jones Violation" impacts whether and how the Eleventh Circuit reviews grounds on appeal. That is, the failure to offer an

opportunity to object, affects the standard of review on appeal and subsequently, all issues brought under the Court of Appeals "independant review of the record". Id; D.E. 4, Pg 5. Jones, 899 F.2d at 1102; see also United States v Pyles, 862 F.3d 82,87-88 (D.C. Cir 2017).

In appearances of fairness, this procedural violation should have been dealt with first. United States v Campbell, 473 F.3d 1345,1347-48 (11th Cir 2007). Worse yet, when this procedural irregularity occurs in the Eleventh Circuit, those cases are "routinely" remanded[16]. Unfortunately for Petitioner, however, his case was not remanded. Mostly, due to counsel's failure to raise such claim, even though he dutifully articulated this argument, both, in the district court and in the Court of Appeals. D.E. 1, civil, Pg 12-13; see also D.E. 16, civil, Pg 35-37,38,41-42,47,50,74-75,76,77,88-89(amended).

Here, with no opportunity to object to facts or conclusions of law, in violation of Jones; stacked on top of the district court's failure to address all claims of relief, in violation of Clisby; followed by, complete disregard for developing a sufficient habeas record to facilitate the Court of Appeals review, thus serves as a retardant, by creating a nonexistant record, with which to impede Petitioner's "right to collaterally attack his conviction or sentence. Hayman, 342 U.S. at 212-14.

In other words, Judge Hodges failed to reach and adjudicate, fundamental procedural issues. And, put simply, a sound analysis of all Petitioner's issues is essential to properly resolve his 2255 proceeding, because a ruling inPetitioner's favor would allow previously alleged claims to be addressed on their merits and potentially serve to invalidate the conviction or least, reduce his sentence.

Here, Petitioner's central argument was IAC, however, each of his two claims housed individual subsections, albeit, grouped for ease of argument. While he may not have presented these claims, each, in a seperate section or under a distinct heading in his 2255 motion, Petitioner did nevertheless

articulate his unadressed claims in his motion. All the while, citing sufficient case law for his propositions and quoting accurate Rule, or excerpts from the record, when necessary. See Heffeild, Lexis 1561 at 3. (remanding, where the district court failed to liberally construe defendant's pro se 2255 claim of ineffective assistance of counsel, in a child pornography case, violating Clisby).

Not to be cheeky. Here, Petitioner's motions are not transcribed in gobbledygook, nor is the language unintelligible, and unless one reads his motions with blinders, his claims are thoroughly raised[17]. Thus, as articulated in previous motions, his allegations conclusively show Petitioner alleged only substantial constitutional violations, fully supported by the record, and hold at least some arguable merit. To which, he is entitled to relief, albeit, by the district court's obligation to "grant a prompt hearing thereon, to determine the issues and make findings of fact and conclusions of law thereto", 28 U.S.C. 2255(b), rather than merely passing them off as inconsequential. This Court has the power to remand or correct these errors of law.

B. COA Procedural Violation. Before Petitioner may appeal a district court's denial of his habeas petition, he must first obtain a Certificate of Appealability ("COA"). See Title 28 USC 2253(c)(1). A court may issue a COA, "only if the applicant has made a substantial showing of the denial of a constitutional right". See 28 USC 2253(c)(2). In other words, the "required substantial showing ...must have some footing in the law". Ruiz v Davis, 850 F.3d 225,228 (5th Cir 2017).

This Court recently cautioned that the COA inquiry is "limited" and "not coextensive with a merit analysis". Buck v Davis, 132 S.Ct. 759,773-74 (2017). Here, because Petitioner only sought COA at this stage his burden was lighter. Thus, Petitioner was merely required to demonstrate that his claims of constitutional violations were such that jurists of reason

could debate with the district court's disposition of the issues. Id. (quoting Miller-El v Cockrell, 537 U.S. 322,327 (2007)). Whereupon, the inferior courts were charged with reviewing the case only through this prism and must make only a general assessment of the merits. Buck, 132 S.Ct. at 773.

To this end, a COA does not require a showing that the appeal will succeed. Accordingly, a court should not decline the application for COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in Slack would mean very little if review were denied because the prisoner did not convince a judge, or, for that matter, three jusges, that he would prevail. Id at 337. After all, when COA is sought, the whole premise is that the prisoner "has already failed in that endeavor". Id.(quoting Barefoot v Estelle, 463 U.S. 880,893 n.4 (1983)).

As stated in Slack, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy 2253(c) is straightforward: The Petitioner must demonstrate that reasonable jurists would find the district court's assessment of the Constitutional claims debatable or wrong". Slack v McDaniel, 529 U.S. 473,484 (2000). Put otherwise, at this stage, the court must only make "an initial determination whether a claim is reasonably debatable" and nothing more. Buck, 137 S.Ct. at 774.

Applying these rules to just a few claims within Petitioner's application, there is no difficulty concluding that a COA should have issued. Putting aside, even, the misinterpretation argued at length above, here, the district court does not explain nor does the Court of Appeals acknowledge, nonetheless, why it limits itself to the two issues reviewed or why it used an erroneous standard of law, when other claims clearly existed. See D.E. 9, civil, Pg 8-11. The court's self-imposed limitation is inexcusable given that it committed, not one but at least two, procedural violations under both Jones

and Clisby, when Petitioner challenged these prima facie claims, along with other challenges to jurisdiction, and to his conviction and sentence.

The district court's failure to consider Petitioner's alternative grounds, halts his review on habeas corpus. Petitioner's other claims were adequately raised, as briefed, many of which were obviously correct. In fact, the procedural claims identified herein were offered, not to prove, but to establish Petitioner has, as required, "shown that jurists of reason would find it debatable whether the district court was correct in its procedural ruling". Miller-El, 537 U.S. at 338 (quoting Slack, 529 U.S. at 484).

For example: The fact that other circuit's, too, require district courts to consider all issues presented in a 2255 motion, see United States v Espinoza-Aguilar, 469 Fed. Appx. 663,670(10th Cir 2012)(citing Clisby), establishes that Petitioner's claims have a secure "footing in the Law". Ruiz, 850 F.3d at 228. Likewise, Justice Seymour's dissent, in United States v Thompson, 281 F.3d at 1093-99, emphasizes the existance of a debatable claim, one Petitioner raised involving the "act" alleged, and which determines a court's jurisdiction. Demonstrating that reasonable jurors might well have valued this opinion concerning the central question before them, had Petitioner's argument not been passed off as insignificant.

It is apparent the court's adjudication is unreasonable, here, in light of the evidence and facts presented, and which, runs contrary to clearly established law. Thus, proving "something more than the absence of frivolity" or the existance of mere "good faith" on his part. Barefoot, 463 U.S. at 893. Because, had just one juror dissented on a single one of these findings, no conviction or length of sentence, could have been imposed.

This Court, however, does not require Petitioner to prove, before an issuance of a COA, that some jurists would grant to petition. The question is the debatability of the underlying constitutional claim, not the resolution

of that debate. Miller-El, 537 U.S. at 338. Put otherwise, the inquiry is not whether the claim can be proven, rather at this propositional stage, the focus is on the potential merit of the claims.

> Hence, why Petitioner articulated: That the decision to deny COA disregards or conflicts with several laws of this Court, the Eleventh Circuit's precedent case law, or both. Surely, incarcerating innocent people under a false pretense, without jurisdiction, through deficient counsel, by altering statutory elements and slamming the Habeas gate shut to accomplish this stunt, would fit into this criteria, would it not?
>
> Here, the Eleventh Circuit's refusal to acknowledge or least, grant COA, subsequently, "confirms the district court's assessment of Petitioner's habeas motion, which, like a boondoggle, serves to conclude the conviction and sentence in violation of the Constitution or other laws of the United States". See D.E. Petitioner's rehearing Pg 1-2.

As explained, this is so because a great many of Petitioner's claims were not addressed and thereby, defaulted by the district court, in violation of Clisby. This is precisely "the failure to allow for collateral review" that "raise[s] serious constitutional questions", Triestman, 124 F.3d at 377 which tends to taint public perception of judicial economy and begs the question: Quis custodict ipos custodies? Who will guard the guards themselves?

Precedent case law has little value, when a court is permitted to vaguely side-step substantial claims through bigotry or blanketed denials. Constitutional claims of this magnitude, cannot be swept aside and shrouded amongst the pile of "no meritorious arguments", D.E. 18, civil; see Appendix C, simply, due to revultion to the offense, lack of interest, or because the movant appears in Pro Se capacity. The fundamentals of due process require more. Due process mandates that Petitioner be provided an opportunity to be heard at a meaningful time and in a meangingful manner. Mathews v Eldridge, 424 U.S. 319,333 (1976).

Here, Petitioner made a gateway showing of actual innocence, inter alia, which establishes sufficient doubt about Petitioner's guilt to justify the conclusion that his further detention would be a miscarriage of justice[18], since his conviction and procedures therefrom, were, the product of unfair

practice. Thus, leaving Petitioner intolerant by the court's refusal to acknowledge remonstrant claims for relief.

It is "uncontroversial ... that the priviledge of habeas entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law". Boumediene, 553 U.S. at 779.

Courts are thus "entrusted with ensuring Petitioner has a meaningful opportunity to demonstrate that he is entitled to relief from his allegedly erroneous conviction and sentence". United States v Wheeler, 886 F.3d 415, 426 (4th Cir 2016). Because, the very nature of statutory interpretation requires that someone present the argument before the courts can define the law, or change it. Prost v Anerson, 89 Denv. U.L. Rev. at 454. Having thoroughly articulated his argument through various motions and appropriately challenged the law or judicial interpretations thereof, Petitioner can do no more.

The habeas procedure or collateral attack, if you will, utilized here has little reality or worth if its meaningful opportunity is cloaked by vague coverings, when colorable claims are apethetically disregarded as if they had not been raised at all.

The above, demonstrates constitutional violations that have resulted in a conviction of a person who is actually innocent. Schlup v Delo, 513 U.S. 298,327 (1995). Petitioner, thereby, asserts that a denial here would continue to allow Congressional power to determine the scope of statute 2252A(a)(2)(B), Lonchar v Thomas, 517 U.S. 314,322, to be trampled by inferior courts, and raise serious questions to principles of law.

In its wake, such rejection would leave a thorny Constitutional issue or issues, in the aftermath, if no other avenue of judicial relief were available for a party who claims to be factually or actually innocent as result of a court's erroneous statutory interpretation. See Surratt,

797 F.3d at 253; see also Triestman, 124 F.3d at 379.

Petitioner's claim is the "change in law" or least, the challenge to it, however, ignored, his claim cannot rise to the occasion or meet the "change in law" section of 2255(h) for second or successive, nor meet the requirements of 2241, showing that his 2255(a) Motion to vacate was "inadequate or ineffective". Accordingly, the focus here, is on the more fundamental defect presented by a situation in which an individual is incarcerated for conduct that, by statute, is not criminal, but through no fault of his own, has no course for redress. In re Jones, 226 F.3d 328,333 Ftn. 4 (4th Cir 2000). The procedure utilized, here, offends habeas relief, in violation of U.S. Constitution, Article I, Section 9, Clause 2, and requires remand.

CONCLUSION

Where a legal issue appears to warrant review, this Court grants Certiorari in the expectation of being able to decide that issue, Schiro v Farley, 510 U.S. 228,229 (1994). In light of the split between circuits, and in stride with perplex questions of law, affecting the multitude of rights at stake, Petitioner, respectfully, asks in the interest of justice, that this Court grant his petition to resolve such widespread manifest errors of law, once and for all.

By powers vested by the Constitution, this Court has authority to remand or vacate inferior court's decisions and correct fundamental errors presented in the above entitled case. The petition for a writ of certiorar should be granted.

Respectfully submitted,

March 27, 2019
Date

Alan Kenneth Thompson, Jr.