

APPENDIX A,B,C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

SEP 13 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

EFRAIN J. ROSA,

Petitioner-Appellant,

v.

R. L. RHODES,

Respondent-Appellee.

No. 19-15637

D.C. No. 4:18-cv-00438-CKJ-DTF
District of Arizona,
Tucson

ORDER

Before: M. SMITH and HURWITZ, Circuit Judges.

The request for a certificate of appealability (Docket Entry Nos. 2, 3, 4, and 5) is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Porter v. Adams*, 244 F.3d 1006, 1007 (9th Cir. 2001) (order) (holding that a successive 28 U.S.C. § 2255 motion disguised as a 28 U.S.C. § 2241 petition requires a certificate of appealability).

Any pending motions are denied as moot.

DENIED.

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Efrain J. Rosa,

10 Petitioner,

11 v.

12 Juan Baltazar,

13 Respondent.
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No. CV 18-00438-TUC-CKJ (DTF)

ORDER

15 Petitioner Efrain J. Rosa, who is confined in the United States Penitentiary in
16 Tucson, Arizona, filed a pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C.
17 § 2241 (Doc. 1) and paid the filing fee. Petitioner then filed a motion to amend or correct
18 the Petition (Doc. 3) to substitute R.L. Rhodes as the Respondent. The Court will grant the
19 motion and substitute Mr. Rhodes as the Respondent. Petitioner has also filed a motion to
20 incorporate to which he attached two copies of Second Circuit rulings denying him leave
21 to file a successive § 2255 motion based on actual innocence (Doc. 4), and in which
22 Petitioner otherwise contests the Second Circuit's rulings. The Court will deny the motion
23 because the Second Circuit's rulings are not properly before this Court. The Court will
24 dismiss the Petition and this action.

25 **I. Background**

26 In the United States District Court for the Northern District of New York, Petitioner
27 was convicted, pursuant to a conditional plea agreement, of three counts of production of
28 child pornography in violation of 18 U.S.C. § 2251(a) and one count of intimidating a

1 witness in violation of 18 U.S.C. § 1512(b)(1). *United States v. Rosa*, No. 5:07cr00443
 2 (N.D.N.Y. Feb. 12, 2009), Docs. 54, 68. On February 12, 2009, Petitioner was sentenced
 3 to 120 years in prison followed by lifetime supervised release. *Id.*, Doc. 68. On March 8,
 4 2011, the Second Circuit Court of Appeals denied Petitioner's direct appeal. *United States*
 5 *v. Rosa*, 626 F.3d 56 (2d Cir. 2011). On February 27, 2012, the Supreme Court denied
 6 Petitioner's petition for writ of certiorari. *Rosa*, 132 S.Ct. 1632 (2012). On May 14, 2012,
 7 the Supreme Court denied Petitioner's motion for rehearing.

8 On May 13, 2013, Petitioner filed a motion to vacate under 18 U.S.C. § 2255. *Rosa*,
 9 No. 5:07cr00443 (N.D.N.Y. May 13, 2013), Doc. 83. The trial court ordered a response
 10 and granted an extension of time to file a response. *Id.*, Docs. 84, 90. Petitioner filed a
 11 motion for recusal of the trial court and prosecutor. *Id.*, Doc. 93. On March 6, 2014, the
 12 trial court denied Petitioner's motion for recusal and denied his § 2255 motion as untimely.
 13 *Id.*, Docs. 101, 102. On May 13, 2015, the Second Circuit affirmed. *Rosa v. United States*,
 14 785 F.3d 856 (2d Cir. 2015). On November 23, 2015, the Second Circuit denied Petitioner
 15 leave to file a second or successive § 2255 motion finding that he had not met the standard
 16 under 28 U.S.C. § 2255(h)(1). *Rosa v. United States*, No. 15-3408 (2d Cir. Nov. 23, 2015).
 17 On October 15, 2018, the Second Circuit again denied Petitioner leave to file a second or
 18 successive § 2255 motion. *Rosa v. United States*, No. 18-2553 (2d Cir. Oct. 15, 2018). On
 19 November 6, 2018, the Second Circuit denied another motion for leave to file a second or
 20 successive § 2255 motion. *Rosa v. United States*, No. 18-2742 (2d Cir. Nov. 6, 2018).

21 In 2016, Petitioner sought relief under § 2241. *Rosa v. United States*, No.
 22 4:16cv00003-TUC-CKJ (JR) (D. Ariz. Apr. 11, 2016), Doc. 9. In an Order filed on April
 23 11, 2016, the Court summarily denied the First Amended Petition, dismissed the action,
 24 and declined to issue a Certificate of Appealability (COA) (Doc. 9).¹ The Ninth Circuit
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 27 ¹ On May 26, 2016, this Court denied Petitioner's motion for reconsideration (Doc.
 28 13). In an Order filed on November 14, 2016 (Doc. 16), the Court construed a letter filed
 by Petitioner as a motion seeking to modify the May 26 Order. The Court granted the
 motion to the extent that it amended the May 26 Order to more accurately describe
 Petitioner's contentions in his motion for reconsideration, but otherwise denied relief.

1 denied Petitioner a COA and denied his motion for rehearing. *Rosa v. United States*, No.
 2 16-15880 (9th Cir. Aug. 24, 2016). The Supreme Court denied Petitioner's petition for
 3 writ of certiorari. *Rosa*, No. 16-7462 (June 1, 2017).

4 **II. Petition**

5 Petitioner asserts six grounds for relief. (Doc. 1.) In Ground One, he alleges that
 6 he is factually and actually innocent of his convictions. In Ground Two, he alleges that he
 7 was subjected to an unconstitutional search and seizure. In Ground Three, he alleges that
 8 his trial counsel had an undisclosed conflict of interest. In Ground Four, he alleges that he
 9 was denied trial by an unbiased and impartial fact-finder. In Ground Five, Petitioner
 10 alleges that his convictions were obtained absent evidence in violation of due process. In
 11 Ground Six, he alleges that the prosecutor failed to disclose evidence favorable to
 12 Petitioner in bad faith.

13 **III. Discussion**

14 A motion to vacate sentence pursuant to 28 U.S.C. § 2255 is generally the
 15 appropriate method for challenging a federally imposed conviction or sentence, including
 16 a challenge that "the sentence was imposed in violation of the Constitution or laws of the
 17 United States, or that the court was without jurisdiction to impose such sentence, or that
 18 the sentence was in excess of the maximum authorized by law." 28 U.S.C. § 2255(a);
 19 *Tripathi v. Henman*, 843 F.2d 1160, 1162 (9th Cir.1988). A § 2241 petition for writ of
 20 habeas corpus is not a substitute for a motion under § 2255. *McGhee v. Hanberry*, 604
 21 F.2d 9, 10 (5th Cir. 1979).

22 The Court will not consider a § 2241 petition by a prisoner authorized to apply for
 23 § 2255 relief "if it appears that the applicant has failed to apply for relief, by motion, to the
 24 court which sentenced him, or that such court has denied him relief, unless it also appears
 25 that the remedy by motion is inadequate or ineffective to test the legality of his detention."
 26 28 U.S.C. § 2255(e); *United States v. Pirro*, 104 F.3d 297, 299 (9th Cir. 1997). This
 27 exception is narrow. *Ivy v. Pontesso*, 328 F.3d 1057, 1059 (9th Cir. 2003). Further, a court
 28 will not consider a § 2241 petition by a prisoner authorized to apply for § 2255 relief "if it

1 appears that the applicant has failed to apply for relief, by motion, to the court which
 2 sentenced him, or that such court has denied him relief, unless it also appears that the
 3 remedy by motion is inadequate or ineffective to test the legality of his detention.” 28
 4 U.S.C. § 2255(e); *United States v. Pirro*, 104 F.3d 297, 299 (9th Cir. 1997).² This
 5 exception is sometimes referred to as the “savings clause” or “escape hatch.” *See Alaimalo*
 6 *v. United States*, 645 F.3d 1042, 1047 (9th Cir. 2011).

7 The savings clause or escape hatch under § 2255(e) is narrow. *Ivy v. Pontesso*, 328
 8 F.3d 1057, 1059 (9th Cir. 2003). The § 2255 remedy is not inadequate or ineffective to
 9 test the legality of a petitioner’s detention merely because the statute of limitations bars the
 10 petitioner from filing a motion under § 2255, the sentencing court has denied relief on the
 11 merits, or § 2255 prevents the petitioner from filing a second or successive petition. *See*
 12 *id.*; *Moore v. Reno*, 185 F.3d 1054, 1055 (9th Cir. 1999); *Charles v. Chandler*, 180 F.3d
 13 753, 758 (6th Cir. 1999); *Tripati*, 843 F.2d at 1162. The § 2255 remedy is only inadequate
 14 or ineffective “when a petitioner (1) makes a claim of actual innocence, and (2) has not had
 15 an unobstructed procedural shot at presenting that claim.” *Harrison v. Ollison*, 519 F.3d
 16 952, 959 (9th Cir. 2008) (quoting *Stephens v. Herrera*, 464 F.3d 895, 898 (9th Cir. 2006));
 17 *see Alaimalo*, 645 F.3d at 1047 (“A petitioner is actually innocent when he was convicted
 18 for conduct not prohibited by law.”).

19 In the Ninth Circuit, a § 2241 petitioner asserting a claim of actual innocence for
 20 purposes of the escape hatch of § 2255 is tested under the standard articulated by the
 21 Supreme Court in *Bousley v. United States*, 523 U.S. 614, 623 (1998). *Stephens*, 464 F.3d
 22 at 898. In *Bousley*, the Supreme Court held that “[t]o establish actual innocence, petitioner
 23 must demonstrate that, in light of all the evidence, it is more likely than not that no
 24 reasonable juror would have convicted him.” *Id.* (quoting *Bousley, supra.*); *accord*
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26 ² Section 2255(e) provides that: An application for a writ of habeas corpus in behalf
 27 of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall
 28 not be entertained if it appears that applicant has failed to apply for relief, by motion, to
 the district court which sentenced him, or that such court has denied him relief, unless it
 also appears that the remedy by motion is inadequate or ineffective to test the legality of
 his detention.

1 *Talbott v. Holencik*, No. 08-619, 2009 WL 322107, at *6-7 (C.D. Cal. Feb. 5, 2009); *see*
 2 *Gilbert v. United States*, 640 F.3d 1293, 1314-15 (11th Cir. 2011); *United States v. Poole*,
 3 531 F.3d 263, 267 n. 7 (4th Cir. 2008); *Wyatt v. United States*, 574 F.3d 455, 460 (7th Cir.
 4 2009); *United States v. Peterman*, 249 F.3d 458, 462 (6th Cir. 2001).³

5 In determining whether a petitioner has had an unobstructed procedural shot to
 6 pursue his claim, the court considers “(1) whether the legal basis for petitioner’s claim ‘did
 7 not arise until after he had exhausted his direct appeal and first § 2255 motion;’ and (2)
 8 whether the law changed ‘in any way relevant’ to petitioner’s claim after that first § 2255
 9 motion.” *Harrison*, 519 F.3d at 960 (quoting *Ivy*, 328 F.3d at 1060-61). The burden of
 10 coming forward with evidence affirmatively showing the inadequacy or ineffectiveness of
 11 the § 2255 remedy rests with the petitioner. *McGhee*, 604 F.2d at 10; *Redfield v. United*
 12 *States*, 315 F.2d 76, 83 (9th Cir. 1963). Unless a petitioner satisfies both criteria, he must
 13 seek relief under § 2255 in the sentencing court, or seek certification to file a successive
 14 § 2255 motion in the relevant federal appellate court rather than in a § 2241 petition.

15 Petitioner asserts that he is actually innocent of his convictions. Even if true,
 16 Petitioner has not shown that he lacked an unobstructed procedural shot to pursue his
 17 claims. Plaintiff does not allege, and has not shown, that the legal basis for his claims did
 18 not arise until after he had exhausted his first § 2255 motion. Nor has Petitioner shown
 19 that the law changed in any way relevant to any of his claims *after* his first § 2255 motion.
 20 Accordingly, the Court will dismiss the Petition and this action for lack of jurisdiction.

21 **IT IS ORDERED:**

22 (1) Petitioner’s motion to amend or correct Petition to substitute R.L. Rhodes as
 23 the Respondent (Doc. 3) is **granted**.

24 (2) Petitioner’s motion to incorporate (Doc. 4) is **denied**.

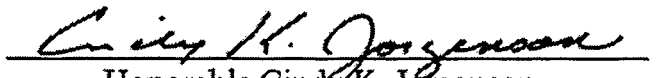
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 26 ³ The Ninth Circuit has further stated that “a petitioner generally cannot assert a
 27 cognizable claim of actual innocence of a noncapital sentencing enhancement[.]” but it left
 28 open “the question whether a petitioner may ever be actually innocent of a noncapital
 sentence for the purpose of qualifying for the escape hatch.” *Marrero v. Ives*, 682 F.3d
 1190, 1193 (9th Cir. 2012); *see also Ezell v. United States*, 778 F.3d 762, 765 n. 3 (9th Cir.
 2012).

1 (3) Petitioner's Petition Under 28 U.S.C. § 2241 (Doc. 1) and this case are
2 **dismissed.**

3 (4) The Clerk of Court must **enter judgment accordingly and close this case.**

4 (5) Although Petitioner has brought his claims in a § 2241 petition, a certificate
5 of appealability is required where a § 2241 petition attacks the petitioner's conviction or
6 sentence. *See Porter v. Adams*, 244 F.3d 1006, 1007 (9th. Cir. 2001). Pursuant to Rule
7 11(a) of the Rules Governing Section 2255 Cases, in the event Movant files an appeal, the
8 Court declines to issue a certificate of appealability because reasonable jurists would not
9 find the Court's procedural ruling debatable. *See Slack v. McDaniel*, 529 U.S. 473,
10 484 (2000).

11 Dated this 14th day of February, 2019.

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14 Honorable Cindy K. Jorgenson
15 United States District Judge
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Efrain J. Rosa,

Petitioner,

v.

Juan Baltazar,

Respondent.

No. CV 18-00438-TUC-CKJ (DTF)

ORDER

Petitioner Efrain J. Rosa, who is confined in the United States Penitentiary in Tucson, Arizona, filed a pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 (Doc. 1) and paid the filing fee. Petitioner also filed a motion to incorporate to which he attached two copies of Second Circuit rulings denying him leave to file a successive § 2255 motion based on actual innocence (Doc. 4) and in which he otherwise contested the Second Circuit's rulings. In an Order filed on February 14, 2019, the Court denied the motion because the Second Circuit's rulings were not properly before this Court and dismissed the Petition and this action (Doc. 5). Judgment was entered the same day (Doc. 6).

Petitioner has filed a motion for reconsideration (Doc. 7). That motion will be denied.

Motions for reconsideration should be granted only in rare circumstances. *Defenders of Wildlife v. Browner*, 909 F. Supp. 1342, 1351 (D. Ariz. 1995). A motion for reconsideration is appropriate where the district court "(1) is presented with newly

1 discovered evidence, (2) committed clear error or the initial decision was manifestly unjust,
2 or (3) if there is an intervening change in controlling law.” *School Dist. No. 1J, Multnomah*
3 *County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Such motions should not be
4 used for the purpose of asking a court “to rethink what the court had already thought
5 through – rightly or wrongly.” *Defenders of Wildlife*, 909 F. Supp. at 1351 (*quoting Above*
6 *the Belt, Inc. v. Mel Bohannon Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)). A motion
7 for reconsideration “may not be used to raise arguments or present evidence for the first
8 time when they could reasonably have been raised earlier in the litigation.” *Kona Enters.,*
9 *Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). Nor may a motion for
10 reconsideration repeat any argument previously made in support of or in opposition to a
11 motion. *Motorola, Inc. v. J.B. Rodgers Mech. Contractors, Inc.*, 215 F.R.D. 581, 586 (D.
12 Ariz. 2003). Mere disagreement with a previous order is an insufficient basis for
13 reconsideration. *See Leong v. Hilton Hotels Corp.*, 689 F. Supp. 1572, 1573 (D. Haw.
14 1988).

15 The Court has reviewed Petitioner’s motion. Petitioner maintains that he is actually
16 innocent of certain counts of conviction, citing purported recently discovered new
17 evidence, which he contends the police and/or prosecutor failed to disclose in violation of
18 *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Petitioner appears to refer to Grounds One,
19 Five, and Six of the Petition.¹ He further alleges that he showed violations of other
20 constitutional rights in connection with his convictions.

21 As the Court previously explained, a district court may not consider a § 2241
22 petition by a prisoner authorized to apply for § 2255 relief “if it appears that the applicant
23 has failed to apply for relief, by motion, to the court which sentenced him, or that such
24 court has denied him relief, unless it also appears that the remedy by motion is inadequate
25 or ineffective to test the legality of his detention.” 28 U.S.C. § 2255(e); *United States v.*
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28 ¹ It appears clear that the issues raised in Grounds Two, Three, and Four either were
raised, or could have been raised, on direct appeal or in a timely filed § 2255 motion.

1 *Pirro*, 104 F.3d 297, 299 (9th Cir. 1997).² A remedy under § 2255 is only inadequate or
2 ineffective “when a petitioner (1) makes a claim of actual innocence, and (2) has not had
3 an unobstructed procedural shot at presenting that claim.” *Harrison v. Ollison*, 519 F.3d
4 952, 959 (9th Cir. 2008) (quoting *Stephens v. Herrera*, 464 F.3d 895, 898 (9th Cir. 2006));
5 *see Alaimalo*, 645 F.3d at 1047 (“A petitioner is actually innocent when he was convicted
6 for conduct not prohibited by law.”). In determining whether a petitioner has had an
7 unobstructed procedural shot to pursue his claim, the court considers “(1) whether the legal
8 basis for petitioner’s claim ‘did not arise until after he had exhausted his direct appeal and
9 first § 2255 motion;’ and (2) whether the law changed ‘in any way relevant’ to petitioner’s
10 claim after that first § 2255 motion.” *Harrison*, 519 F.3d at 960 (quoting *Ivy*, 328 F.3d at
11 1060-61).

12 Even assuming that Petitioner had met his burden of showing actual innocence, and
13 the Court does not so find, Petitioner has not shown that he lacked an unobstructed
14 procedural shot to pursue his claims for purposes of § 2255’s escape hatch. Petitioner
15 seems to contend that the Second Circuit’s denial of leave to file a second or successive
16 § 2255 motion denied him an unobstructed procedural shot to present his claims.

17 A court of appeals may only authorize a second or successive § 2255 motion if (1)
18 “the claim relies on a new rule of *constitutional* law, made retroactive to cases on collateral
19 review by the Supreme Court, that was previously unavailable,” or (2) “the factual
20 predicate for the claim could not have been discovered previously through the exercise of
21 due diligence,” and “the facts underlying the claim . . . would be sufficient to establish by
22 clear and convincing evidence that, but for *constitutional* error, no reasonable factfinder
23 would have found the applicant guilty of the underlying offense.” *Id.*, 464 F.3d at 897-98
24 (quoting 28 U.S.C. § 2244(b)(2)) (Emphasis added).

25
26 ² The § 2255 remedy is not inadequate or ineffective to test the legality of a
27 petitioner’s detention merely because the statute of limitations bars the petitioner from
28 filing a motion under § 2255, the sentencing court has denied relief on the merits, or § 2255
prevents the petitioner from filing a second or successive petition. See id.; Moore v. Reno,
185 F.3d 1054, 1055 (9th Cir. 1999); *Charles v. Chandler*, 180 F.3d 753, 758 (6th Cir.
1999); *Tripati*, 843 F.2d at 1162.

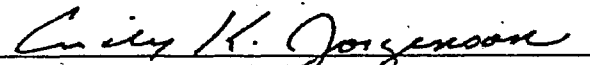
1 As the Court previously found, Petitioner has neither alleged nor shown that the
2 *legal* basis for his claims did not arise until after the time to file a timely first § 2255 motion.
3 Rather, Petitioner asserts that he did not discover the *factual* basis for his claims until after
4 the deadline to file a timely first § 2255 motion. However, that is precisely the type of
5 claim for which § 2255 provides a remedy. In such circumstances, a prisoner may seek
6 leave from the relevant circuit court to file a second or successive § 2255 motion under
7 § 2244(b)(2) and § 2255(h), i.e., circumstances in which “the factual predicate for the claim
8 could not have been discovered previously through the exercise of due diligence” and “the
9 facts underlying the claim . . . would be sufficient to establish by clear and convincing
10 evidence that, but for *constitutional* error, no reasonable factfinder would have found the
11 applicant guilty of the underlying offense.” The Second Circuit found that even if
12 Petitioner’s alleged new evidence was newly discovered within the meaning of
13 § 2255(h)(1), Petitioner had not “made a showing that the evidence, ‘if proven and viewed
14 in light of the evidence as a whole, would be sufficient to establish [constitutional error]
15 by clear and convincing evidence that no reasonable factfinder would have found [him]
16 guilty of the underlying offense[s].’” *Rosa v. United States*, No. 18-2742 (2d Cir. Nov. 6,
17 2018) (quoting 28 U.S.C. § 2255(h)(1); *see also Rosa v. United States*, No. 18-2553 (2d
18 Cir. Oct. 15, 2018). It found for similar reasons, that Petitioner had not made a showing
19 that he was entitled to relief on his actual innocence claim, specifically, “that, in light of
20 new evidence, ‘it is more likely than not that no reasonable juror would have found [him]
21 guilty beyond a reasonable doubt.’” *Id.* (quoting *House v. Bell*, 547 U.S. 518, 536-37
22 (2006), and *Schlup v. Delo*, 513 U.S. 298, 327 (1995)) (citing Petitioner’s guilty plea and
23 inculpatory evidence as a whole.

24 But, the denial by the Second Circuit of leave to file a second or successive § 2255
25 pursuant to §§ 2244(b)(2) and 2255(h) did not render a remedy inadequate or ineffective
26 under § 2255. Rather, it reflected the Second Circuit’s determination that Petitioner had
27 not satisfied the §§ 2244(b)(2) and 2255(h) standard. That determination did not thereby
28 deprive Petitioner of an adequate or effective remedy under § 2255.

1 In short, in his Petition, Petitioner failed to establish that one of the two avenues for
2 relief under § 2255's escape hatch, i.e., that he lacked an unobstructed procedural shot to
3 present his claims. Petitioner has not shown that the Court clearly erred, an intervening
4 change in controlling law, that its previous decision was manifestly unjust, or newly
5 discovered evidence. Accordingly, the Court will deny Petitioner's motion for
6 reconsideration.

7 **IT IS ORDERED** that Petitioner's motion for reconsideration (Doc. 7) is **denied**.

8 Dated this 6th day of March, 2019.

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11 Honorable Cindy K. Jorgenson
12 United States District Judge
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§ 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who--

(1) knowingly transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mails, any visual depiction, if--

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or through the mails, if--

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(5) either--

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151 [18 USCS § 1151]), knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

§ **2251.** Sexual exploitation of children

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor 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, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

(b) Whoever knowingly uses intimidation, threatens or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to--
(1) influence, delay or prevent the testimony of any person in an official proceeding;

**Additional material
from this filing is
available in the
Clerk's Office.**