

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BCO-051

No. 19-3426

UNITED STATES OF AMERICA

v.

DAVID JAMES WARD,  
Appellant

(D.N.J. No. 2-96-cr-00061-001)

Present: AMBRO, GREENAWAY, Jr., and BIBAS, Circuit Judges

1. Clerk's Submission for Possible Dismissal Pursuant to Jurisdictional Defect.
2. Response by Appellee to Clerk's Submission for Possible Dismissal Pursuant to Jurisdictional Defect.
3. Response by Appellant to Clerk's Submission for Possible Dismissal Pursuant to Jurisdictional Defect.
4. Motion by Appellant for Expedited Decision.

Respectfully,  
Clerk/clw

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ORDER

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Appellant seeks review of a final judgment entered by the District Court on January 9, 1997. Appellant, however, previously filed an appeal of this judgment and this Court affirmed the District Court's decision on November 13, 1997. Appellant cannot take a second appeal from the same judgment of the District Court after the first appeal has been determined. See United States v. Mendez, 912 F.2d 434, 437-38 (10th Cir. 1990).

Moreover, Appellant's second notice of appeal is egregiously untimely, having been filed more than twenty-two years beyond the fourteen-day deadline contained in Federal Rule of Appellate Procedure 4(b). That deadline is rigid and must be enforced

"Appendix A"

where, as here, the government objects to an appeal's timeliness. See United States v. Muhammad, 701 F.3d 109, 111 (3d Cir. 2012). Accordingly, this appeal is hereby dismissed. Appellant's motion for an expedited decision is dismissed as moot.

By the Court,

s/Joseph A. Greenaway, Jr.  
Circuit Judge

Dated: April 6, 2020  
Lmr/cc: Mark E. Coyne  
John F. Romano  
David James Ward



A True Copy:

*Patricia S. Dodszeit*

Patricia S. Dodszeit, Clerk  
Certified Order Issued in Lieu of Mandate

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

David James Ward, :  
Petitioner, :  
v. : CRIMINAL CASE 96-61(WHW)  
UNITED STATES OF AMERICA, :  
Respondent. :

NOTICE OF APPEAL  
APPEALING TO THE U.S. THIRD CIRCUIT APPEALS COURT  
APPELLING THE MISCALCULATION OF THE  
U.S. SENTENCING GUIDELINES RANGE  
ROSALES-MIRELES v. U.S., 138 S. CT. 1897, 201 LED 2d 376 (2018)  
AND FEDERAL RULES OF CRIMINAL PROCEDURE RULE 52(b)

Comes Now, David James Ward, in pro se with this appeal:

The Supreme Court in Rosales-Mireles'(supra) in the slip opinion on page(s) 2, 4, 9, and 11, the Supreme Court mentions the U.S. Probation Office. The Supreme Court calls the Federal Probation Office "an arm of the court," and "the Probation Office which works on behalf of the District Court." The Supreme Court mentions the Federal Probation Office on page 9, of the slip opinion writing, ("That was especially so here where the District Court's error in imposing Rosales-Mireles' sentence was based on a mistake made in the presentence investigation report by the Probation Office which works on the behalf of the District Court.")

"Appendix B"

PLAIN ERROR CONTAINED WITHIN THE  
PRESENTENCE INVESTIGATION REPORT

The Federal Probation Office in the PSI recommended in paragraph #53, that Mr. Ward receive a sentence enhancement for the offense 18 USC 2241, applying sentencing guideline enhancement 2A3.1, adding 4 levels;

The PSI in paragraph #177, recommended that Mr. Ward's sentence be enhanced by applying Application Note 7, adding 2 levels;

An incorrect base offense level of 27, was applied as the starting point, increasing by 3 levels.

In the instant case, Mr. ward was indicted by a grand jury for the offense of kidnapping in violation of 18 USC 1201(a), only the elements of kidnapping were charged in the indictment.

Guideline enhancements 2A3.1 and Application Note 7, are not applicable to the offense kidnapping 18 USC 1201(a), and can not be legally applied to enhance his sentence range and were invalid factors.

The U.S. Sentencing Guidelines Manual, in Chapter Two states ("When the district court decided which U.S. Sentencing Guideline to apply, it must determine the guideline section in Chapter Two ( Offense Conduct ) applicable to the offense of conviction ( i.e., the offense conduct charged in the indictment

or information of which the defendant was convicted. ) U.S. Sentencing Guideline Manual 1B1.2(a). To do this, the court is to refer to the Statutory Index, Appendix A of the Guidelines to find the offense of conviction.").

It was clearly plain error by the sentencing court to enhance Mr. Ward's mandatory guidelines sentence range by applying 2A3.1 and Application Note 7, substantially increasing the sentence beyond the plea agreement made with the government.

MR. WARD WAS NOT INDICTED BY A GRAND JURY  
FOR THE OFFENSE 18 USC 2241.  
THE ENHANCEMENTS 2A3.1 and APPLICATION NOTE 7  
APPLY TO THE OFFENSE 18 USC 2241

PLAIN ERROR AS A RESULT OF INSUFFICIENT INDICTMENT

In *Rosales-Mireles* (supra), in the slip opinion on page 7, paragraph 2 wrote (...The Court repeatedly has reversed judgments for plain error on the basis of inadvertent or unintentional errors of the court or parties below. See e.g., Silber v. United States, 370 U.S. 717, at 717-718 (1962) (per curiam)(reversing judgment for plain error as a result of insufficient indictment.)

The Supreme Court in Class v. United States, 138 S. Ct. 798, at 804, 200 LED 2d 37, at 44 (2018) citing Hocking Valley R. Co. v. United States, 210 F 735 (CA 6 1914)(holding that a defendant

may raise the claim that, because the indictment did not charge an offense no crime has been committed, for it is "the settled rule that" despite a guilty plea a defendant "may urge" such a contention "in the reviewing court.")

In Ex Parte Bain, 121 U.S. 1., at 12-13, 30 LED 2d 849, 7 S. Ct. 781 (1887) held (The declaration of article V of the Amendments to the Constitution, that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, is jurisdictional; and no court of the United States has authority to try a prisoner without indictment or presentment in such cases.")

In Stirone v. United States, 4 LED 2d 252, 361 U.S. 212, at 216-217 (1960) Headnote(s) [6] and [9], the Court held (A federal court cannot permit a defendant to be tried on charges that are not made in the indictment against him)(The purpose of the requirement of the Fifth Amendment that a man be indicted by a grand jury is to limit his jeopardy to offense charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge; this purpose is defeated by a device or method which subjects the defendant to prosecution for an act which the grand jury did not charge.)

The Presentence Investigation Report at paragraph #53, was both the device and method the sentencing court utilized when it incorrectly applied the invalid enhancement 2A3.1, adding

4 levels; The sentencing court also used the device and method of paragraph #177, in said PSR, that incorrectly applied the enhancement Application Note 7; The sentencing court also used the device and method of applying an incorrect base offenses level of 27, adding 3 levels.

BOTH THE FEDERAL PROBATION OFFICE  
AS WELL AS THE SENTENCING COURT  
APPLIED INCORRECT ENHANCEMENTS  
SUBJECTING MR. WARD TO PROSECUTION  
FOR AN ACT WHICH THE GRAND JURY  
DID NOT CHARGE.  
THIS WAS CLEARLY PLAIN ERROR

The above cited Supreme Court cases Ex Parte Bain (supra), and Stirone (supra), are very clear that it is plain error to impose a sentence or sentence enhancement for an unindicted offense. The Federal Probation Office, operating as an arm of the District Court, working on behalf of the District Court, has violated Mr. Ward's Constitutionally secured right of Due Process of Law; the U.S. Probation Office in said PSR, as well as the District Court, have violated the Grand Jury Clause of the of the fifth Amendment of the United States Constitution, by denying Mr. Ward the right to have the grand jury make the charge on its own judgment, charging a violation of 18 USC 2241. This is a substantial right which cannot be taken away. This caused Mr. Ward to be convicted [sentenced] on a charge the grand jury never made against him.

THE DISTRICT COURT  
DID NOT HAVE THE REQUIRED  
SUBJECT MATTER JURISDICTION  
TO PUNISH MR. WARD FOR THE  
OFFENSE 18 USC 2241  
WHEN THE SENTENCING COURT  
APPLIED 2A3.1 AND APPLICATION NOTE 7  
CAUSING A MISCALCULATION  
OF THE U.S. SENTENCING GUIDELINES RANGE

The Federal Probation Office in said PSR, as well as the district court, have violated Mr. Ward's Sixth Amendment right to a Jury Trial, when the PSR recommended the district court apply 2A3.1 and Application Note 7, as enhancements, causing a miscalculation of the U.S. Sentencing Guidelines Sentence range. Thereby increasing Mr. Ward's mandatory U.S. Sentencing Guidelines range sentence, far beyond the plea agreement made with the government when Mr. Ward plead guilty.

The Federal Probation Office knew, or should have known, that it was responsible for causing the sentencing court to impose an unlawful mandatory guidelines sentence, in violation of Due Process of Law.

PLAIN ERROR EX POST FACTO  
SENTENCING VIOLATION DUE TO  
THE MISCALCULATION OF THE  
U.S. SENTENCING GUIDELINES SENTENCE RANGE

The sentencing court has violated Mr. Ward's rights under the United States Constitution Article I, Section 9, Clause 3, when it retrospectively applied 5K2.21, before its enactment, thereby altering the definition of criminal conduct, and also,



increasing the penalty by which a crime is punishable under the mandatory guidelines, making more onerous the quantum of punishment attached to the crime, in violation of the ex post facto prohibition.

The sentence enhancement guideline 5K2.21, took effect on November 1, 2000. Mr. Ward was sentenced January 7, 1997. 5K2.21 allows the sentencing court to increase the sentence above the guideline range, based on conduct underlying a charge dismissed as part of a plea agreement, or underlying a potential charge not pursued in the case as part of a plea agreement that did not enter into the determination of the applicable guideline range.

The year 2000, Guideline enhancement 5K2.21 satisfied squarely the first element, "the law must be retrospective, that is, it must apply to events occurring before its enactment." Secondly, 5K2.21 has caused Mr. ward's sentence to be enhanced substantially. The guideline enhancement has been applied to a crime that occurred December 7, 1995, over four years before its enactment. See Peugh v. United States, 186 LED 2d 82 (2013) Headnotes 1 - 21.

#### MANDATORY U.S. SENTENCING GUIDELINES

The sentence in the instant case was imposed under the mandatory U.S. Sentencing Guidelines. Please see United States v. Booker, 543 U.S. 220, at 234, 125 S. Ct. 738, 160 LED 2d 621

(2005) Headnote [6] (The Guidelines as written, however, are not advisory; they are mandatory and binding on all judges..." at 234 (Because they are binding on judges, we have consistently held that the Guidelines have the force and effects of laws."); also see Burns v. United States, 501 U.S. 129, at 147 (1991), according to Burns, Mr. Ward had a due process of law expectation that he would receive a sentence within the applicable guidelines range; In Beckles v. United States, 197 LED 2d 145 at F.N. 4 (2017) the Court wrote that the mandatory guidelines "fix sentences"; According to Gall v. United States, 552 U.S. 38, at 49-51 (2007) Decision (Federal Courts of Appeals required to review all federal criminal sentences-whether inside, just outside, or significantly outside Federal Sentencing Guidelines (18 USCS APPX) range under abuse of discretion standard.).

In Rosales-Mireles (supra), on page 1, of the slip opinion (Justice Sotomayor delivered the opinion of the Court. Federal Rules of Criminal Procedure 52(b) provides that a court of appeals may consider errors that are plain and affect substantial rights, even though they are raised for the first time on appeal. This case concerns the bounds of that discretion, and whether a miscalculation of the U.S. Sentencing Guidelines range, that has been determined to be plain and to affect a defendant's substantial rights, calls for a court of appeals to exercise its discretion under rule 52(b) to vacate the defendant's sentence. The Court holds that such an error will in the ordinary case, as here, seriously affect the fairness, integrity, or public

reputation of judicial proceedings, and thus will warrant relief.")

PLAIN ERROR BY THIS COURT IN ITS DECISION IN  
USA V. WARD, 131 F 3d 335 (CA 3 1997)

This Court committed plain error when it affirmed the decision by the district court, when the sentencing court incorrectly applied the sentencing enhancements 2A3.1 and Application Note 7. This plain error was raised by the Federal Public Defender at the sentencing proceedings, when he objected to the miscalculation of the U.S. Sentencing Guidelines range sentence the district court imposed.

UNLAWFUL CONFINEMENT  
IN VIOLATION OF THE EIGHTH AMENDMENT'S  
CRUEL AND UNUSUAL PUNISHMENT CLAUSE

For over seven (7) years Mr. Ward has been in federal prison lingering longer than the law demands. His mandatory U.S. Sentencing Guidelines sentence should have been 135 - 168 months. Mr. Ward's sentence was served completely years ago.

The correct calculation of the guidelines sentence in the instant case should be: Kidnapping base level offense 24, Prior Criminal History 9. Pleading guilty subtracting 3. Resulting in an Offense Level of 30, Criminal History Category IV, for a mandatory guidelines sentence of 135 - 168 months.

PRIOR APPEAL DISMISSED  
FOR LACK OF JURISDICTION

On May 15, 2018, Mr. Ward appealed to this Court, incorrectly pursuant to 18 USC 3742(F)(1). On September 25, 2019, appeals court case number 18 - 2053, was dismissed for lack of jurisdiction. The issues and grounds in the instant appeal are the same. The jurisdictional basis of this appeal is pursuant to Rosales-Mireles v. United States, 138 S. Ct. 1897, 201 LED 2d 376 (2018) and Federal Rules of Criminal Procedure Rule 52(b). According to the Supreme Court in Rosales-Mireles (supra), this Court does have discretion, under rule 52(b) to vacate Mr. Ward's sentence, if this Court determines whether a miscalculation of the U.S. Sentencing Guidelines range has occurred during sentencing, and determines it to be plain error that affects Mr. Ward's substantial rights, that seriously affects the fairness, integrity, or public reputation of judicial proceedings, and thus will warrant relief.

Mr. Ward believes that he has demonstrated that his right to the relief requested in the instant appeal is clear and indisputable. The instant appeal is thus ripe for disposition.

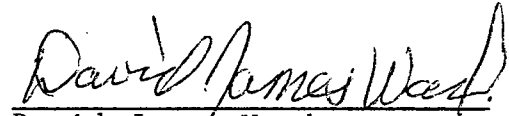
RELIEF SOUGHT

Respectfully request this Honorable Court vacate the sentence, remand to the district court for further proceedings consistent with Rosales-Mireles v. United States, 138 S. Ct. 1897, 201 LED 2d 376 (2018).

This appeal is true and correct under penalty of perjury as provided for under Title 28 USC 1746.

Respectfully submitted,

October 4, 2019



David James Ward  
Reg. No. 10694-026  
FCI FAIRTON  
P.O. BOX 420  
Fairton, New Jersey

cc: DJW

08320

CERTIFICATE OF SERVICE  
BY U.S. MAIL  
CERTIFIED MAIL # 7019 1120 0000 5453 0291

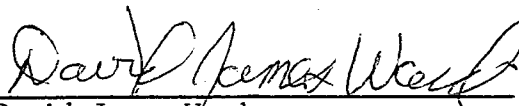
I, David James Ward, do hereby certify that I placed an original and one copy of the document: "NOTICE OF APPEAL APPEALLING TO THE U.S. THIRD CIRCUIT APPEALS COURT APPEALLING THE MISCALCULATION OF THE U.S. SENTENCING GUIDELINES RANGE PURSUANT TO ROSALES-MIRELES v. UNITED STATES, 138 S. Ct. 1897, 201 LED 2d 376 (2018) AND FEDERAL RULES OF CRIMINAL PROCEDURE RULE 52(b)," also inclosed is an APPLICATION TO PROCEED IN FORMA PAUPERIS, WITH A INSTITUTIONAL SIX MONTH ACCOUNT STATEMENT. Place in the U.S. Mail with the correct first class postage affixed thereto and addressed as follows:

CLERK, U.S. DISTRICT COURT  
U.S. COURTHOUSE  
50 WALNUT STREET  
NEWARK, NEW JERSEY 07102

This document is true and correct under penalty of perjury, 28 USC 1746.

Sincerely,

October 4, 2019

  
David James Ward  
Reg. No. 10694-026  
FCI FAIRTON  
P.O. BOX 420  
Fairton, New Jersey 08320

cc: DJW

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA, :  
Appellee-Respondent, :  
vs. : CASE NO. 19 - 3426  
David James Ward, : (D.N.J. No. 2-96-cr-00061-001)  
Appellant-Petitioner. :

MOTION ADDRESSING THIS COURT'S  
AUTHORITY OVER THE APPEAL

This Court has authority and discretion over this appeal.

In Rosales-Mireles v. United States, 138 S. Ct. 1897, 201 LED 2d 376 (2018), see the SYLLABUS, page - 2, in the slip opinion the Court wrote: HELD: ("A miscalculation of a Guidelines sentencing range that has been determined to be plain and to affect a defendant's substantial rights calls for a court of appeals to exercise its discretion under Rule 52(b) to vacate the defendant's sentence in the ordinary case. Pp. 6 - 15.")

In Rosales-Mireles (supra), in the slip opinion, at page 6, II A, the first paragraph, the Court wrote:(Although "Rule 52(b) is permissive, not mandatory," Olano, 507 U.S., at 735, it is well established that courts "should" correct a forfeited

"Appendix C"

plain error that affects substantial rights "if the error 'seriously affects the fairness, integrity or public reputation of judicial proceedings.'" Id., at 736 (quoting U.S. v. Atkinson, 297 U.S. 157, at 160 (1936); alteration omitted); see also Molina-Martinez, 578 U.S., at \_\_\_-\_\_\_ (slip opinion, at 4 - 5).

The instant appeal has the jurisdictional basis of the case Rosales-Mireles (supra) and Federal Rules of Criminal Procedure Rule 52(b), appealing the miscalculation of the U.S. Sentencing Guidelines Range. Mr. Ward has outlined and explained in the instant appeal the various plain errors that are contained within the Presentence Investigation Report, that the district court followed when it imposed an incorrect range sentence, of the mandatory U.S. Sentencing Guidelines. This has violated Mr. Ward's substantial rights, and affects the fairness, integrity or public reputation of judicial proceedings.

This Honorable Court "should" correct the plain error in the range of the sentence imposed in the instant case. The error was objected to by the Federal Public Defender at the sentence proceedings when he objected to the miscalculation of the U.S. Sentencing Guidelines Range sentence, that was imposed by the sentencing court.

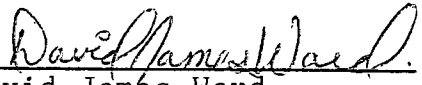


For all of the above stated reasons, it calls for this Court to exercise its discretion under Rule 52(b) to vacate Mr. Ward's sentence and remand for resentencing. This is fully supported by the case Rosales-Mireles (supra).

This motion is true and correct under penalty of perjury, under 28 U.S.C. 1746.

Respectfully submitted,

October 29, 2019

  
David James Ward  
Reg. No. 10694-026  
F.C.I. FAIRTON  
P.O. BOX 420  
Fairton, New Jersey

cc: DJW

08320

CERTIFICATE OF SERVICE

BY U.S. MAIL

APPEALS COURT NUMBER 19 - 3426  
(D.N.J. No. 2-96-cr-00061-001)

I, David James Ward, do hereby certify that I placed a copy of the following: "MOTION ADDRESSING THIS COURT'S AUTHORITY OVER THE APPEAL," placed in the U.S. Mail with the correct first class postage affixed thereto and addressed to the following:

CLERK, U.S. THIRD CIRCUIT COURT OF APPEALS  
21400 U.S. COURTHOUSE  
601 MARKET STREET  
PHILADELPHIA, PENNSYLVANIA  
19106 - 1790

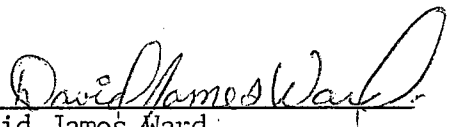
and

ASSISTANT U.S. ATTORNEY(S)  
Mark E. Coyne and MARK J. McCARREN  
970 BROAD STREET  
SUITE 700  
NEWARK, NEW JERSEY 07102

This certificate of service is true and correct under penalty of perjury, under 28 U.S.C. 1746.

Sincerely,

October 29, 2019

  
David James Ward  
Reg. No. 10694-026  
F.C.I. FAIRTON  
P.O. BOX 420  
Fairton, New Jersey

cc:DJW

08320

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA, :  
APPELLE-RESPONDENT, : CASE NO. 19 - 3426  
V. : (D.N.J. 2-96-cr-00061-001)  
David James Ward, :  
APPELLANT-PETITIONER. :

MOTION FOR EXPEDITED DECISION  
PETITIONER'S SENTENCE IS COMPLETELY SERVED  
A FAVORABLE DECISION BY THIS COURT  
WOULD RESULT IN PETITIONER'S  
IMMEDIATE RELEASE FROM CUSTODY

In Rosales-Mireles v. United States, 201 LED 2d 376, 138 S. Ct. 1897 (2018), in the slip opinion, on page 9, the first paragraph states: ("The possibility of additional jail time thus warrents serious consideration in a determination whether to exercise discretion under Rule 52(b).")

The instant appeal, on page 9, Petitioner wrote:

UNLAWFUL CONFINEMENT  
IN VIOLATION OF THE EIGHTH AMENDMENT'S  
CRUEL AND UNUSUAL PUNISHMENT CLAUSE

("For over seven (7) years Mr. Ward has been in federal prison lingering longer than the law demands. His mandatory U.S. Sentencing Guidelines sentence should have been 135 - 168

"Appendix D"

months. Mr. Ward's sentence was served completely years ago.

The correct calculation of the guidelines sentence in the instant case should be: Kidnapping base offense level 24, Prior Criminal History 9. Pleading guilty subtracting 3. Resulting in an Offense Level of 30, Criminal History Category IV, for a mandatory guidelines sentence of 135 - 168 months.")

TO DATE: MR. WARD HAS SERVED 288 MONTHS.

Mr. Ward has served 120 months, additional jail time, beyond his lawful mandatory guidelines plea agreement sentence. A miscalculation of the U.S. Sentencing Guidelines Range, caused by the district court's incorrect application of the Guidelines, utilizing incorrect base offense level and enhancements that do not apply to the offense of conviction, charged in the single count indictment returned by the grand jury.

RELIEF REQUESTED

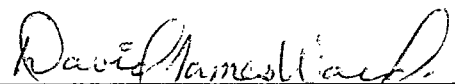
For all of the above stated reasons and facts, Mr. Ward requests this Honorable Court use its authority and discretion, reverse the sentence and remand for resentencing.

This motion is true and correct under penalty of perjury under Title 28 U.S.C. 1746.

Respectfully submitted,

December 18, 2019

cc: DJW

  
David James Ward #10694-026  
F.C.I. FAIRTON  
P.O. BOX 420  
Fairton, New Jersey 08320

CERTIFICATE OF SERVICE  
BY U.S. MAIL  
APPELLATE NO. 19 - 3426  
(D.N.J. 2-96-cr-00061-001)

I, David James Ward, do hereby certify that I placed a true and correct copy of the following: "MOTION REQUESTING EXPEDITED DECISION PETITIONER'S SENTENCE IS COMPLETELY SERVED A FAVORABLE DECISION BY THIS COURT WOULD RESULT IN PETITIONER'S IMMEDIATE RELEASE FROM CUSTODY," placed in the U.S. Mail with the correct first class postage affixed thereto and addressed as follows:

CLERK, U.S. THIRD CIRCUIT COURT OF APPEALS  
21400 U.S. COURTHOUSE  
601 MARKET STREET  
PHILADELPHIA, PENNSYLVANIA 19106 - 1790

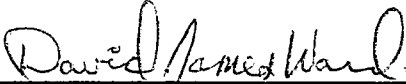
and

Assistant U.S. Attorney  
MR. MARK E. COYNE  
970 BROAD STREET, SUITE 700  
NEWARK, NEW JERSEY 07102

This certificate of service is true and correct under penalty of perjury as provided for under Title 28 U.S.C. 1746.

Sincerely,

December: 18, 2019

  
David James Ward #10694-026  
F.C.I. FAIRTON  
P. O. BOX 420  
Fairton, New Jersey 08320

cc: DJW