

Johnathon Kelly C4587-019
FCI Williamsburg
P.O. BOX 340
SALTERS, SC. 29590

To the Honorable Scott S. Harris, Clerk
Office of the Clerk
United States Supreme Court
Washington, DC 20543

RE: Kelly V. United States
USCA11 No. 18-13708

Dear Mr. Harris:

The petitioner has enclosed a motion for an Extraordinary Writ asking that the petition for Certiorari be placed on the docket. The petitioner has also included the petition for Certiorari. Please acknowledge the motion for an Extraordinary writ as a motion directing the court clerk to place the petition for Certiorari on the courts docket as out of time. Please also acknowledge that the petition for Certiorari is also included inside this package.

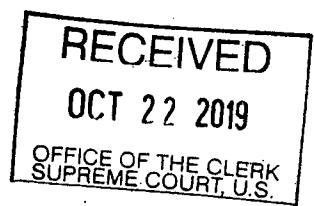
Thank you for your assistance!

	RECEIVED
Sincerely,	NOV - 4 2019
	OFFICE OF THE CLERK SUPREME COURT, U.S.

Johnathon Kelly C4587-019

QUESTION(S) PRESENTED

1. Does the petitioner adequately explain that his request for an extraordinary writ is within this Court's Jurisdiction because it is in compliance with the three prongs described in rule 20.1 of the Supreme Court Rules?
2. Does The petitioner demonstrate that his status as an Actually innocent citizen of the United States justifies applying the miscarriage of justice exception to procedural defaults which is defined in McQuiggins V. Perkins?
3. Does the petitioner demonstrate that his status as an actually innocent Citizen of the United States justifies extending the petitioner's time to file his petition for Certiorari for a period not exceeding sixty days pursuant to Title 28 U.S.C §1201(c) in order to ensure that federal constitutional error does not continue to result in the incarceration of an actually innocent person which would cause the public to loose confidence in the justice system?



No. USCA11 18-13708

IN THE
SUPREME COURT OF THE UNITED STATES

In re Johnathon Kelly — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)
ON PETITION FOR AN EXTRAORDINARY WRIT

On Appeal from the United States Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

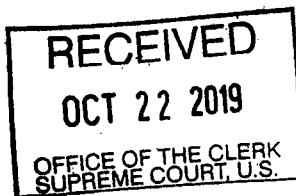
PETITION FOR AN EXTRAORDINARY WRIT

Johnathon Kelly
(Your Name)

FCI Williamsburg, P.O. Box 340
(Address)

Salters, SC. 29590
(City, State, Zip Code)

(Phone Number)



LIST OF PARTIES

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:

Anand, Justin S., United States Magistrate Judge

Coppedge, Susan Former Assistant United States Attorney

Horn John A., former United States Attorney

Krupe, Mary E., Assistant United States Attorney

McReynolds, Jule Jr. former attorney for defendant appellant

Moultrie, Richard Assistant United States Attorney

Pak, Byung J., United States Attorney

Ross, Eleanor L., United States District Judge

Sam-Buchanan, Yonette, Assistant United States Attorney

Sommerfield, Lawrence R., former Assistant United States Attorney

United States of America, Appellee

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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

For cases from federal courts:

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

reported at 18-13708-A; 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 Civil Action Number 1:17-CV-995-FIR ; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

[] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

JURISDICTION

For cases from federal courts:

The date on which the United States Court of Appeals decided my case was January 24, 2019.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 11, 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).

For cases from state courts:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

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. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C § 1201(c)

Title 18 U.S.C § 2423(a)

Title 28 U.S.C § 2255

Title 28 U.S.C § 2253

Fourth Amendment of the United States Constitution

Fifth Amendment of The United States Constitution

Fourteenth Amendment of The United States Constitution

Sixth Amendment Of the United States Constitution

First Amendment of The United Sates Constitution

STATEMENT OF THE CASE

I. FACTS AND CIRCUMSTANCES THAT WARRANTS GRANTING THIS WRIT

On August 16, 2019 the petitioner filed an untimely petition for Certiorari. The petitioner is a pro se litigant with new evidence of Actual innocence. The petitioner has made a substantial showing that several constitutional errors has caused his conviction to be illegal. The petitioner has shown that in light of all of the evidence no jurist acting reasonably would vote to convict him. The petition is untimely due to a misunderstanding of the court rules.

The petitioner relied on information contained in a memorandum from the Supreme Court Clerk's office in order to understand all of the rules and procedures for filing a proper petition for Certiorari. The Memorandum from the Supreme Court Clerk was careful to provide each relevant rule for properly filing a petition for certiorari but was vague and misleading in regards to the computation of the time to file a petition for certiorari because the memorandum did not include the court rule that would explain the way that the ninety day time period is computed.

It was necessary for the Memorandum to include the proper rule because the Memorandum was vague in explaining that "You have ninety days to file not three months". Appendix D is a copy of the Supreme Court Clerks memorandum and on page six of the memorandum the Supreme Court Clerk offers no rule or method for a pro se petitioner to decipher the difference between the ninety day reference and the three month reference. Due to the Supreme Court Clerk failing to include the proper rule that would aid in understanding this vague and misleading clause the petitioner was

forced to consult with the prison law library clerks in order to gain an understanding of what could be the difference between ninety days and three months.

The prison law library clerk lead the petitioner to rule 30.1 of the Supreme Court Rules and the petitioner and the Law library clerks were persuaded that Saturday, Sunday and Federal Holiday's were excluded from the ninety day computation period based on the reading of rule 30.1

The petitioner reasonably relied on this vague and misleading reading of the Supreme Court Clerks memorandum. The petitioner was diligent in using all of his available resources to come to understand this vague and misleading information. However the Supreme Court Clerk's memorandum should have been as careful to provide the specific methods for computing the ninety day time period by including the specific rule that defines the proper procedure.

The petitioner is asking this Court to enforce the actual innocence exception to procedural defaulted claims in order to allow the petition for Certiorari to be reviewed by this honorable Court. This petition is necessary to ensure that the Ends of Justice are met which would protect our societies confidence in the Justice system. This writ is necessary because the records and files of this case could persuade fact finders that Constitutional errors did prevent the petitioner from presenting evidence on his behalf that would have likely freed him from this illegal conviction.

The petitioner is asking this Court to apply the Actual Innocence exception to this petition. The petitioner's request

for this extraordinary writ is in compliance with the three prong standard of Rule 20.1 that deals with extraordinary writs. The petitioner's request for an extraordinary writ is within this Court's Jurisdiction because the petitioner is asking this Court to apply the excusable neglect standard described in Rule 6 (b)(B) regarding the computation and extending of time to file petition's. The petitioner is asking that this Court invoke the powers to extend the period for filing a petition for Certiorari for a period not surpassing sixty days according to title 28 U.S.C §1201(c) in order to ensure that a miscarriage of Justice does not continue to cause an actually innocent citizen from remaining in prison in violation of the United States Constitution.

This is an extraordinary situation because the evidence shows that the accuser is acknowledging and admitting that the petitioner never had a desire to promote criminal conduct. In the accuser's own words the petitioner did not commit a crime. The accuser's own words confirms through her text messages that if any sex act did take place it took place as a mere incident of the accuser deliberately ignoring the petitioner's urges for her to avoid commercial sex acts. The petitioner should be freed in respect to this evidence because title 18 U.S.C §2423 prohibits convictions that are based on conduct that occurred as a mere incident of any trip. The evidence in this case proves that the petitioner never held the motivation to promote commercial sex and is actually innocent. The petitioner asked the District Court for an evidentiary hearing to develop the Courts records regarding his appointed counsel's failure to file an appeal as requested by the petitioner. The petitioner asked the District

Court to grant an evidentiary hearing to develop the facts surrounding the actual innocence evidence. The District Court refused to conduct an evidence hearing on either of the petitioner's claims. The United States Court Of Appeals have concluded that the petitioner was barred from review of his claims due to his failure to show reasonable diligence and due to the petitioner's failure to make a meritorious claim.

II. THE PETITIONER'S ACTUAL INNOCENCE CLAIM HAS MERITS

The petitioner has provided the District Court and the Court of Appeals with New Evidence of text message transcripts involving seven conversations between the petitioner and his accuser which shows the accuser admitting in her own words that the petitioner never offered her for commercial sex. The new evidence of the seven text messages undeniably shows the accuser acknowledging that the petitioner repeatedly urged the accuser to avoid commercial sex acts. The new evidence of text message transcripts undeniably shows the accuser admitting that the petitioner repeatedly spoke to her outside of text message transcripts urging her to avoid commercial sex acts. One of the seven text message conversations between the petitioner and his accuser clearly shows that the accuser informed the petitioner that she had been offered money for sex in which the petitioner urged the accuser to turn down the money and "Let's Go". The New evidence of text message transcripts clearly proves that the accuser specifically elected to ignore the petitioner's advice to turn down the money and "Let's Go" because the accuser replied, "I didn't want to loose the money. I'm handling it". In several

other new text messages the accuser is seen performing her own choices to engage in conduct that the petitioner is seen clearly urging her to avoid. In light of these statements from the accuser the question of whether or not the petitioner held a criminal "intent" is resolved by this evidence, and in light of the petitioner's "intent" being the required element to prove the crime he is convicted of the petitioner should be freed due to the accuser's own words confirming that the petitioner did not have the requisite "intent".

The petitioner has shown that in light of all of the evidence no jurist acting reasonably would vote to convict him because the required element to convict him is "intent" and the jurist would see that the accuser has confirmed in her own words that the petitioner never had the required "intent" to commit a crime under any statue detailed in his indictment. Most importantly a reasonable jurist would weigh the fact that the accuser has confessed inside her recantation letter that she did in fact lie about the nature of the offense and that the reason she lied was to avoid being charged with drugs that were found on the day the petitioner was arrested (See Recantation Letter Page 1).

It should be noted that On March 19, 2013 the accuser provided a recantation letter to Agents in which she admits that She was not Kidnapped, she was not assaulted, and she was not forced to participate in prostitution (See Government's Exhibit 10 [Recantation Letter]). The conflict surrounding the recantation letter is the fact that the accuser has now claimed that she did engage in acts of prostitution willingly and that the petitioner did not force her to do so.

The petitioner now has seven text messages along with statements the accuser made in her recantation letter that proves the petitioner urged the accuser to avoid commercial sex acts that proves his "intent" for using the internet to place advertisements was not criminal.

A. NEW EVIDENCE THAT WAS NOT PRESENTED AT TRIAL

The First New Text message that demonstrates the petitioner urging the accuser to avoid commercial sex is a message where the accuser asks the petitioner, "Why do I need professional pictures?" (See JK Phone page 00155 message 530, 537). The accuser affirms that the petitioner urged her to use professional pictures instead of using the provocative photos that the accuser sent to the petitioner's cell phone via ~~picture message~~ suggesting that the provocative photos be used on the website. The following text messages include the provocative photos that the accuser sent to the petitioner requesting that they be used on the website but the petitioner declined: (See JK Phone page 00127 message 22);(See JK Phone page 00135 messages 62-66);(JK Phone page 00136 messages 67-70). The accuser formally impeaches her claims with this text.

This evidence provides an understanding that had the petitioner possessed the motivation to offer the accuser for commercial sex it would be unreasonable for him to urge the accuser to avoid using photos that would heighten the possibility of promoting commercial sex because such an encouragement would hinder the goal of promoting commercial sex. The accuser's own words confirm that the petitioner did urge the accuser to avoid using provocative photos. The accuser's own words formally impeaches her claims.

The next text message that demonstrates the petitioner urging the accuser to avoid conduct that promotes commercial sex is a message where the accuser states; "I want to be the 'Lady' that you 'keep' asking for." (See JK Phone page 00155 message 376). The accuser's use of the phrase "keep asking for" affirms that the petitioner asked the accuser on several occasions outside of text messages to conduct herself like a lady and not a prostitute. It is understood that a person with the motivation to offer someone for commercial sex would not repeatedly urge a person to be a lady because that advice is not consistent with the intent to promote commercial sex.

The next text message sequence that demonstrates the petitioner urging the accuser to avoid conduct that promotes commercial sex involves a series of text messages in which the accuser expresses her discontent with the petitioner's legal business intent by stating; "I have been asking you to go to Macon this whole week maybe if you sent me where I know I can get 'my money' then maybe you wouldn't be in a bad mood...let me do [wtf] you brought me here to do and stop wasting both our time...put me where you know [IMA] do fine like I said quit wasting both our time and my potential...I just don't want anybody wasting my time, you know I can get this money but you are not putting me in the situation I need to be in to get where I need to be (See JK Phone 00160 messages 696-704).

The accuser's statements proves that it was her specific intent to disregard the petitioner's repeated advice to conduct herself like a lady and a professional by requesting to use her

own methods which expressly involved engaging in conduct that the petitioner repeatedly urged her to avoid. It is understood that a person with the motivation to offer someone for commercial sex would not prevent a person from participating in conduct that could heighten the possibility of promoting a sex act.

The next text message sequence that demonstrates the petitioner urging the accuser to avoid commercial sex acts is the most significant of all because the text message sequence shows that the accuser was inside of the home of an individual when the accuser advised the petitioner that the individual refused to pay the accuser for her time without receiving sex in exchange for money. The petitioner advised the accuser to, "Tell him that you are not trying to get played and to put your money in your hand...If he can't do that then 'Lets GO.'" (See JK Phone page 00218 messages 690-693). The petitioner's statement in this text message sequence definitively proves that he did not have the intent to offer the accuser for commercial sex because under no circumstances does anyone with the intent to offer someone for commercial sex urge a person to turn down money for sex.

In regards to the petitioner telling the accuser "Let's Go" the accuser replied; "I didn't want to loose the money...I'm handling it" (See JK Phone page 00175 messages 1264-1267). Based on the petitioner giving the accuser the option to leave when he said to her "Let's Go" in combination with the accuser expressing her choice to ignore the

petitioner's advice by engaging in conduct of her own choice it is proven that if the accuser did engage in a sex act that it did not happen as any motivation of the petitioner because the petitioner's state of mind and his intent was clearly expressed in his advice for the accuser to leave the home of the individual when he said "Let's Go."

The next text message that demonstrates the petitioner urging the accuser to avoid commercial sex is a text where the petitioner is seen showing his disappointment in the accuser for wanting to sleep with multiple men by stating; "I'd rather have a ho that snitch than to have a ho that got 100 boyfriends" (See JK Phone page 00228 message 1057). It is understood that a person with the intentions to offer a person for commercial sex would not urge a person to avoid being involved with multiple men.

The next text message that demonstrates the petitioner urging the accuser to avoid commercial sex is a text message where the petitioner expresses his disappointment in the accuser for allowing men to entice her into commercial sex and other unprofessional acts by stating; "All you [wana] do is have sex with guys that sound sexy" (See JK Phone 00228 message 1058). Although the petitioner was upset with the accuser and quite disrespectful the petitioner shows that his intent was to urge the accuser to avoid being enticed by men who were seeking to destroy her reputation as an up and coming Entertainer by participating in commercial sex acts which would tarnish her brand name.

The final text message sequence that demonstrates the petitioner urging the accuser to avoid commercial sex is also very significant because this sequence took place the day before the petitioner was arrested in this case which will prove that the petitioner had his legal business intent up until the day of his arrest. After the accuser caused the petitioner to be arrested on January 3, 2013 the petitioner asked the accuser if she would allow him to market and promote her in the same way that famous Model/Reality television star Coco Chenile marketed her career. (See JK Phone 00234 message 1314). The accuser agreed to the petitioner's professional business intent. (See JK Phone 00195 message 2093).

In light of the accuser stating in her recantation letter that from her very first day of traveling with the petitioner that she knew the petitioner had a legal business intent in combination with the seven text messages revealing the accuser confirming that the petitioner maintained his intent to conduct a legal and professional Entertainment Company until the day he was arrested the petitioner's appointed counsel should have presented the text message transcripts to the court in an effort to prove the accuser has formally impeached her claims.

The petitioner used the Courts records to show that his Sixth amendment right to have competent counsel was taken from him because the records of the courts transcripts shows that the petitioner told the District Judge during an Ex Parte hearing that he asked his counsel for evidence of text message transcripts to be brought to the Court's attention and None of the Lawyers for the petitioner presented the evidence that the petitioner asked for his lawyers to present which rendered both lawyers to be ineffective.

B. SUMMARY OF THE FACTS OF THE CONSTITUTIONAL CLAIMS

1. THE PETITIONER'S APPOINTED COUNSEL WAS INEFFECTIVE
FOR FAILING TO INVESTIGATE THE EVIDENCE

On May 6, 2014 The United States Magistrate Judge appointed Federal defense Counsel to represent the petitioner. On June 30, 2014 appointed counsel represented the petitioner during a plea hearing and was asked by the District Judge, "Have you reviewed the evidence and evaluated the legality of any statements, confessions, or any other evidence that the Government has obtained?" (See Docket Entry 91 page 19). The record proved he did not. Had appointed counsel investigated the evidence appointed counsel would have discovered: (1) The seven text messages that the accuser made in which she acknowledges the fact that the petitioner repeatedly urged her to avoid participating in conduct that promotes commercial sex acts; (2) Statements the accuser made that proves the petitioner told the accuser to turn down money that was offered to her in exchange for sex; (3) Impeaching statements that Government witnesses made under oath; (4) Misrepresented evidence that the Prosecutors allowed to exist in their case files; and (5) Text message transcripts refutes all of the evidence and testimonies that the Government has used to obtain a conviction.

2. THE PETITIONER'S APPOINTED COUNSEL WAS INEFFECTIVE
FOR FAILING TO FILE FOR A SUPPRESSION HEARING
AS THE PETITIONER REQUESTED

The petitioner told his appointed counsel that his first suppression hearing was unconstitutional due to known false evidence and known false testimonies being located in the Court's records and due to the petitioner's retained counsel failing to

provide the petitioner with any of the discovery evidence that was needed to refute the false findings of the suppression hearing. The petitioner explained exactly what evidence he was seeking to present and where it was located. Appointed counsel failed to present the impeaching evidence. Had appointed counsel pursued a suppression hearing the following evidence would have been used to suppress the false evidence and impeach false testimonies:

a. THE ACCUSER'S RECANTATION LETTER IMPEACHES HER CLAIMS

The accuser's own recantation would have been used to disavow her claim that the petitioner caused her to engage in commercial sex because the accuser wrote, "When I left Birmingham the first time 'I knew' he had his own business." (See Government's Exhibit 10 page 1). In this phrase the accuser acknowledges that she and the petitioner agreed for her to participate in a legal business because the accuser would not have known to mention a legal business endeavor had she not discussed participating in a legal business with the petitioner. The appointed counsel should have used the accuser's own words to impeach her claims.

The accuser states inside her recantation letter that her motives for telling lies were because, "I didn't want weed on my record." (See Government's exhibit 10 page 1). The accuser admits that her second motive for telling lies was because, "I knew after we got pulled [up] and I snitched I had to 'make sure' he stayed in jail." (See Government's Exhibit 10 page 1). These two statements by the accuser should have been used to impeach the accuser's claims because the accuser admits that the circumstances

of her possibly being arrested for the drugs found during the highway traffic stop that began this case caused her to deliberately lie to authorities in an effort to fulfill her two confessed motives of escaping the possibility of being arrested.

**b. THE ACCUSER ADMITTING TO USING MANIPULATION
WAS GROUNDS TO IMPEACH HER CLAIMS**

The petitioner explained to appointed counsel that the accuser's expressed motives are significant to impeaching her claims because the petitioner told Agents On January 9, 2013 that while the petitioner was in Louisiana with the accuser on January 3, 2013 that the accuser called the Bossier City Police to make ~~false complaints against the petitioner in which the accuser is~~ seen demonstrating her willful ability to plan false accusations for the specific purpose of manipulating authorities. Once the police arrived on the scene the accuser admitted that she had lied to them. However when the Agents from this case asked the accuser why she lied to them the accuser stated that she was aware that by saying the exact details that she relayed to police on January 3, 2013 that the police would respond faster (See Docket Entry 38 [Suppression hearing Transcript] page 135).

The context of the details the accuser planned to use were impeaching because the accuser maliciously uses her age as a weapon and follows up her manipulation with claims of being assaulted and forced into prostitution. During the 911 phone call that the accuser made in Louisiana the accuser states; "Hello I am 17, and my pimp hit me in the stomach (See 911 Call). Due to

the accuser admitting to knowing that the element of her being 17; being allegedly assaulted; and being allegedly caused to prostitute herself would manipulate authorities to respond faster the petitioner's appointed counsel should have used the accuser's prior premeditated manipulation of authorities to suppress the accuser's accusations in this Federal case because the record proves the accuser has admitted to using the same false allegations in this Federal case in an effort to fulfill her two confessed motives.

Text message evidence shows the accuser texting the petitioner after the Louisiana incident boasting about her strategic decision to make false complaints against the petitioner. The accuser states; "I thought about everything I did and how I would do it. You going to jail was not apart of the plan...but [aye] you can play mind games 'so can I'" (See JK Phone 00188 messages 1769-1773). The accuser has expressed her ability of knowing what to say to manipulate authorities and she is seen bragging about manipulating authorities and for this reason the appointed counsel was deficient for failing to seek a suppression hearing to use the accuser's taunting statements to impeach her accusations.

c. INTERNET ADVERTISEMENTS SHOULD HAVE BEEN SUPPRESSED

The petitioner asked his appointed counsel to file a motion for a suppression hearing because the records and files of

this case proves that the petitioner told Agents on January 9, 2013 that the accuser agreed to upload her photos onto the internet website in order to participate in the petitioner's Entertainment Company. The petitioner told Agents that the Entertainment company legally offered to host Events such as Bachelor parties; Private parties; Birthday Parties; and Music events. The petitioner also explained to authorities that the women of the Entertainment Company would accompany individuals on dinner dates; trips; and frequently women would entertain individuals at their residence (See Pre-Sentencing Report, paragraph 13);(See Government's Exhibit 6).

In regards to the services the petitioner's Entertainment Company legally offered a suppression hearing would have allowed the petitioner's appointed counsel to demonstrate that text message transcripts of the accuser's cell phone records proves that internet users did request legitimate services such as dinner dates because the accuser's phone contains a message from an internet user in which he says, "Hello I'm going to be in town this weekend are you available for 'dinner'" (See RW Phone). This text message from the accuser eliminates the Government's theory that the reputation of the website does automatically prove that the petitioner had the intent to promote commercial sex acts because it is clear that not all internet users of this website are seeking commercial sex which makes it reasonable to believe that the petitioner was catering to the internet user that were seeking legitimate services.

Text messages show that the petitioner encouraged the accuser to focus on the internet user that were seeking legitimate services because the petitioner advised the accuser to, "...answer the phone and ignore all of the other stuff" (See JK Phone 00228 message 1056). In view of this evidence appointed counsel should have moved for a suppression hearing to suppress the usage of internet advertisements as evidence to allege that the petitioner had a criminal intent for using the legally authorized website.

Regarding the petitioner's intent for using the internet the petitioner informed appointed counsel that he was using the internet to promote his Entertainment Company. The petitioner informed appointed Counsel that his Entertainment company focused on showing men and women how to use the internet to build a brand name for themselves through the act of marketing and promoting themselves as on the verge artist and Entertainers. The petitioner explained that he was using his talents as a Screen Writer; Song Writer; and on the verge Music Producer to create opportunities for men and women to pursue long term careers as actors or actresses; hip hop artist; Rhythm and Blues artist; Background dancers for concerts and music videos; Models; Fashion designers; make up artist; and any other field involving the Entertainment industry all in an effort to help people legally promote their

It should be noted that the petitioner has New evidence of Movie Scripts that he has written which are copy written and registered with the Screen Writers Guild of America. (See Screen Writers Guild of America Website). New Evidence proves that the petitioner is a Screen Writer for One Accord Media which is the name of the Movie Production Company that he and his brother formed in an effort to help men and women find acting roles. The petitioner is licensed to the SAG and AFTRA as a Producer of film

family owned Entertainment Company.

3. PROSECUTORIAL MISCONDUCT AFFECTED THE JUDGE'S JUDGEMENT

On March 26, 2013 United States Prosecutors relied on the original investigative reports of Trooper Grier; Agent Green; and Agent Whiteman to present sex trafficking allegations to the Grand Jury in an effort to secure an indictment (See Docket Entry 1). Prosecutors knew or should have known that the information they presented to the Grand Jury was false because on March 19, 2013 the Prosecutors received a recantation letter from the accuser that placed the accusations that United States Attorney's planned to present to the Grand Jury into controversy. The accuser recanted all of her original criminal details and the remaining portions of the recantation letter was in conflict with the evidence. Prosecutors had no right to present the accuser's original accusations to the Grand Jury in light of the recantation letter refuting those claims. Prosecutors committed a due process violation by presenting the original investigative reports to the Grand Jury knowing that the recantation letter that was received a week prior to filing for an indictment proves the investigative reports were false. Prosecutor's should have ordered a follow up investigation prior to seeking an indictment.

After Prosecutor's secured the indictment using known false information Prosecutors proceeded to persuade the United states Magistrate Judge; The District Judge; and potential jurors that despite the accuser providing false information to Authorities the accusations were still credible because the accuser was 17 years old and expressing signs of fear.

In an effort to prove the accusations were still credible Prosecutors used known false evidence of volumes of internet advertisements that they knew were created by an individual not involved in this case; misrepresented the evidence of lingerie items; and misrepresented the purpose of condoms found in the vehicle to support their accusations.

In an effort to prove that the accusations were still credible the Prosecutors elicited known false testimonies from Corporal Paquette, Trooper Grier, Agent Green, and Agent Whiteman. The false testimonies that were presented were not harmless because the Magistrate Judge and the District Judge and the Pre-Sentencing investigators relied on the false evidence contained in the Prosecutors case file to determine the petitioner's alleged conduct in this case. (See Pre-Sentencing Report paragraphs 6-12).

The United States Attorney admitted that prior to placing her witnesses on the stand to testify for the suppression hearing that she interviewed each witness to prepare them for the questions that they would be asked during the suppression hearing (See Docket Entry 38 page 5). Prosecutor's had the Duty to review the evidence to determine if what the witnesses were testifying to during their interviews was accurate prior to introducing the testimonies to the Court. After each witness testified during the suppression hearing the Prosecutor's had the duty to make sure that the evidence and the testimonies were not in conflict with the files and the Court's records.

Prosecutors did not perform their duty because the record proves that they were informed about inconsistencies during the

suppression hearing but failed to correct the record causing the Judges to rely on the following false facts:

First, during sentencing the District judge relied on the Prosecutor's presentation of a statement from the accuser's recantation letter in which the accuser wrote, "I wanted to leave I wanted to quit but in his eyes I was his now." Text messages show that the petitioner often told the accuser and other women that they could leave and in some text messages the petitioner threatened to send the accuser and other women where ever they wanted to go if they did not want to be apart of his Entertainment Company. (See JK Phone 00117 message 22);(See JK Phone 00116 message 14);(JK Phone 00184 message 1613);(JK Phone 00225 messages 937-939);(JK Phone 00179 messages 1396,1397,1400);(JK Phone 00183 messages 1561,1562). A proper investigation of the text message transcripts would have revealed that the accuser was never held against her will. Sentencing Judge was affected by this false statement (See Docket Entry 92 page 5).

Second, during sentencing the District Judge relied on the Prosecutor's contention that the petitioner kept the accuser's earnings (See Docket Entry 92 page 6). The District Judge showed he was affected by the false information because he stated, "Why turn over the money?" (See Docket Entry 92 page 14). The District Judge also stated, "And this was during the time when he would not give her the money she was earning." (See Docket Entry 92 page 8). Text message Transcripts had they been investigated would have proved that the accuser was not being made to hand over her money. The accuser specifically states," Maybe if you sent me where I can get 'my money' . . ." (See JK Phone 00160 message 596). The accuser

lets it be known that she was getting her own money. The accuser also states, "I'm just trying to get this money and get the hell on." The accuser makes it understood that she was planning on making her some money and leave. The accuser also states, "I'm going to get some change so I can get something to snack on." The accuser did not ask permission she showed she controlled her own money by stating exactly what she planned on doing with the money she earned. Text messages proves that the Prosecutors were wrong for presenting this false information to the Court.

Third in regards to the facts already developed throughout this petition the District Judge stated, "With respects to the facts of this case, I'm going to adopt the facts that are set forth in the pre-sentencing report as my finding of facts." (See Docket Entry 92 page 16). The petitioner's due process rights to a fair trial were affected by the Prosecutors allowing their files to contain known false information. The Prosecutor's conduct was not harmless because the record of the Court shows the District Judge's Judgement was affected by the presentation of the known false evidence and known false testimonies. In view of the petitioner knowing that the false evidence and false testimonies would have a negative affect on the potential readers of the files and records the petitioner knew a trial would not be fair.

The records of this Court shows that the Prosecutors: (1) Sought an illegal indictment using known false information; (2) Sought an illegal conviction using the same known false evidence that they used to obtain the indictment; and (3) elicited known false testimonies in order to bolster the credibility of a known false accuser.

REASONS FOR GRANTING THE PETITION

III. SUMMARY OF THE ARGUMENT AND JURISDICTION

This petition should be granted because the new evidence will prove that if any alleged sex act took place that it was not a motivation of the petitioner. The evidence will prove that the petitioner has urged the accuser to avoid participating in conduct that promotes commercial sex on more than seven occasions. The evidence will prove that the petitioner was advised by the accuser that an individual offered her money for sex and the petitioner is seen urging the accuser to turn down the money and "Let's Go." The evidence proves that the accuser deliberately ignored the petitioner's advice and made her own choice to engage in conduct that the petitioner advised her to flee from.

The petitioner cannot reasonably be held accountable for any conduct that any individual chooses to participate in after he urges them to "Let's Go." The conduct that allegedly took place seems to have taken place as a mere incident of the accuser's own conduct because the accuser is seen ignoring the petitioner's specific urges to "Let's Go." Under Title 18 U.S.C § 2423 it is an insufficient basis to convict a person for conduct that occurred as a mere incident of a trip or trips. Through text messages the accuser has admitted that the petitioner urged her to avoid commercial sex.

A: THE PETITIONER HAS MET THE ACTUAL INNOCENCE STANDARD

Even if the limitations period has expired, however, "actual innocence, if proved, serves as a gateway through which the petitioner may pass," although "the gateway should open only when

a petitioner presents 'evidence of innocence so strong that a cannot have confidence in the outcome of the trial unless the court is satisfied that the trial was free of nonharmless constitutional error.'" McQuiggin V. Perkins, 133 S.Ct. 1924, 1928, 1936 (2013)(Quoting Schlup V. Delo, 513 U.S. 298, 316 (1995)). "To be credible," a claim that constitutional error has caused the conviction of an actually innocent person must be supported with New reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that was not presented at trial. Schlup V. Delo, 513 U.S. at 324. To prevail on such a claim, "The petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the New evidence. House V. Bell, 547 U.S. 536, 126 S.Ct. (2006)(Quoting Schlup V. Delo, 513 U.S. 327, 115 S.Ct. 851)). To apply the Schlup standard in the context of a guilty plea: "Petitioner's procedurally barred claim may still be reviewed in this collateral proceeding if he can establish that the constitutional error in his plea colloquy has "probably resulted" in the conviction of one who is actually innocent. Schlup V. Delo, 513 U.S.

The petitioner has new evidence that was not presented to the Court at all which satisfies the first requirement of the Actual Innocence Standard. The petitioner has made a substantial showing that his appointed counsel and United States Attorneys caused him to enter a unconstitutional plea of guilty which satisfies the second requirement of the Actual innocence standard. The petitioner has presented rulings from similar circumstanced cases in which the jurist of those case voted in favor of the accused which in light of

- those ruling from similar circumstanced case it is reasonable to conclude that a reasonable Jurist would rule in favor of the petitioner and vote not to convict him thus satisfying the third requirement of the Actual innocence standard.

B. IN LIGHT OF NEW EVIDENCE NO REASONABLE JURIST WOULD CONVICT

The evidence that the petitioner has presented proves that the petitioner urged the accuser to avoid commercial sex acts by telling her to turn down money that was offered to her for commercial sex and "Let's Go." The petitioner can not be convicted for decisions that an individual made on their own concious after being urged over seven times to avoid the conduct. A person cannot be convicted for conduct that happened as a mere incident of the trip or trips. (See title 18 U.S.C § 2423(a)). Because she has demonstrated that the conduct she allegedly engaged in was not a motivation of the petitioner no reasonable Jurist would vote to convict because a Jurist functioning under the proper instructions would adhere to the fact that conduct that occured as a mere incident of a trip is an insufficient basis to convict.

A jurist of reason would consider the facts of this petition and determine that If the court can rely on what the accuser said while she was facing the possibility of possibly being arrested for drugs to be credible then it reasonably follows that what the accuser said during a time when she was under no duress should be credible as well. A jury would determine that the claims that were made by the accuser while she was facing the possibility of being arrested were abstract while the statement that she made freely through text message transcripts were concrete and held more weight.

A Reasonably minded jurist would look to the Supreme Court ruling of Schlup V. Delo and learn that the constitutional violation in that case was found to be an ineffective assistance of counsel claim where counsel failed to conduct interviews of witnesses and compare those constitutional violations to the Constitutional violation of this petition and determine that the petitioner is entitled to the same relief as Schlup was entitled to. The Supreme Court stated that, "If a petitioner 'Such As Schlup' presents evidence of innocence so strong that a court cannot have confidence in the outcome...the petitioner should be allowed to pass through the gateway and argue the merits of his underlying constitutional claims. (See Schlup V. Delo 513 U.S. 316, 115 S.Ct 851 (1995)).

A reasonably minded Jurist would be introduced to a similar case from the Sixth Circuit which is a prima facies case because it involve a sex trafficking claim where the accuser made many misrepresentation and the lead investigator in that case was found to have lied to the courts. The Court determined that the accused should be aquitted because the evidence was indisputable. (SEE United States V. Fahra, 2016 US App LEXIS 4174; FED App: 012 N (6th Cir 2016)). A Jurist of reason would compare the case of the petitioner to the prima facies case of United States V. Fahra and discover that Fahra's case had only one investigator that displayed misconduct and in the case of the petitioner two investigators and prosecutors were involved in misconduct as well as the petitioner's counsel. Therefore the ruling of those similar circumstanced cases shows that the reasonable minded jurist that came to those conclusion would also come to the same conclusion for the petitioner.

A Jurist of reason would consider the petitioner concrete evidence of his established role in his Established Family owned Entertainment Company and reason that the Petitioner actually has proven that he set up a legal business that was designed to show women how to use their Brains and their Beauty to make a living without selling sex. A Jurist of reason would conclude that although the petitioner made a controversial decision to Use a legal Escort Company to Promote Events and to allow women to establish themselves as entertainers that the petitioner's aspirations were within the law.

A Jurist of reason would determine that the accuser expressed in her own words that the petitioner did have a legal business intent. A Jurist Of reason would determine that in light of the accuser acknowledging through seven text messages that she understood that the petitioner was urging her to avoid commercial sex that the petitioner cannot be held accountable for any action that the accuser took after heeding the petitioner's encouragements. No reasonable Jurist would vote to convict in light of the evidence or in light of the extreme prejudice the petitioner endured in trying to invoke his constitutional right to have a fair judicial proceeding.

C. SUBSTANTIAL ERROR THAT CONSTITUTIONAL ERROR IN THE PLEA COLLOQUY CAUSED THE PETITIONER'S CONVICTION

1. APPOINTED COUNSEL'S ERRONEOUS ADVICE CAUSED THE PETITIONER TO PLEA

Appointed Counsel advised the petitioner that the fact that the website that was used to place advertisements had a reputation for containing advertisements that involved sex trafficking that a jury would automatically find him guilty if he went to trial. The

appointed counsel was wrong to advise the petitioner that his defense would not be considered based on the reputation of the legal website he used because counsel had cases available to him that would have refuted his theory. The Ninth Circuit Court stated the following:

In contrast, numerous states license, tax and otherwise regulate escort services. "Plaintiff is simply wrong when he insist that the Adult services category and related categories are all synonyms for illegal sexual services." The "Court finds it unlikely that the defendant would be able to prove that all online advertisements for 'Escort Services' are for prostitution. (See Backpage.Com LLC V. McKenna, 881 F.Supp 2d 1282 (9th cir. 2012)).

Appointed Counsel had acces to this case which would have supported the petitioner's day one defense instead appointed counsel offered erroneous advice. The Seventh Circuit agrees that appointed counsel's advice was erroneous because in a similar case the seventh circuit stated the following:

"A majority of the advertisements in Backpage's Adult section are for sex but a majority is not all, and not all advertisements for sex are advertisements for illegal sex." (See Backpage.com LLC V. Dart, 807 F.3d 234 (7th cir. 2015))

In view of other Courts confirming that not all adverisements are illegal appointed counsel's advice prejudice the petitioner into entering an undesired plea. However the fact that a guilty plea must be intelligently made is not a requirement that all advice by the defendant's lawyer withstand retrospective examination in a post conviction hearing. (See McMann V. Richards, 397 U.S. 759, 770, 90 S.Ct 1441, 1448 (1970). "If a petitioner pleads guilty on the advice of counsel, he must demonstrate that the advice was not within the range of competence demanded of attorney's in criminal cases, Counsel's failure to evaluate properly to inform himself of the facts that would have shown the existence of a constitutional claim

might in particular fact situations meet the standard of proof. (See McMann v. Richards, 397 U.S. 771. The petitioner's counsel's advice meets the exception described in McMann and entitles the petitioner to a habeas proceeding.

2. APPOINTED COUNSEL'S FAILURE TO INVESTIGATE
THE PETITIONER'S DEFENSE EVIDENCE
CAUSED THE PLEA

The record before this Court shows that the petitioner has been attempting to present a defense from day one of this case ironically the petitioner's appointed counsel has failed to present any of the petitioner's defense evidence because appointed counsel declined to review the evidence to determine if the evidence had any merits. The evidence involved in this petition was presented to appointed counsel and appointed counsel ignored the probative force of the evidence. The Supreme Court has concluded that, "Where the alleged error is a failure to investigate or discover potential exculpatory evidence, the determination whether the error prejudiced the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that the discovery of the evidence likely would have changed the outcome of trial. (See Hill v. Lockhart, 474 U.S. 59, 106 S.Ct 366 (1985). The evidence developed throughout this petition shows that had appointed counsel investigated and presented the facts the petitioner would have cast enough doubt regarding his guilt that the Government would not have been able to find him guilty beyond a reasonable doubt and the outcome of the case would have likely favored the petitioner.

3. APPOINTED COUNSEL FAILED TO FILE A MOTION TO
SUPPRESS WHICH CAUSED THE PLEA

The records and files of this case contained known false evidence and false testimonies that the petitioner explained to his appointed counsel caused prejudice to his right to have a fair trial

because the false information would cause the petitioner to be judged based on events that did not take place. The petitioner described the location of evidence that would refute the false evidence and false testimonies and those locations have been developed inside this petition. Appointed Counsel failed to suppress evidence and for his deficient conduct the records and files of this case still reflect known false information. The Law has concluded that "Trial Counsel's delay in filing a meritorious suppression hearing in order to later obtain a more favorable habeas review was objectively unreasonable and required a remand for an evidentiary hearing. (See Huynh V. King, 95 F.3d 1052 (11th cir. 1996)). The eleventh circuit found in the cited case that Huynh's Fourth amendment claim was dispositive to a finding of prejudice and the Court of Appeals remanded the case back to the District Court for an Evidentiary Hearing. Due to the petitioner asking his appointed counsel to Raise a Fourth Amendment claim during the suppression hearing he was seeking, the Huynh case proves the petitioner's appointed counsel was deficient for not seeking the suppression hearing which would have possibly yielded the same relief that Huynh received. However Supreme Court law states that "If Counsel's Conduct at trial viewed in the context of the totality of circumstances falls below the range of competency generally demanded of attorneys in criminal cases a criminal conviction obtained through such a trial unconstitutionally deprives the defendant of liberty. (See McMann V. Richards, 397 U.S. 759, 771, 90 S.Ct (1970). Counsels conduct fell bellow the objective standard of review and caused prejudice to the petitioner by causing him to enter a plea which made appointed Counsel deficient under the two prong test described in Strickland V. Washington, 466 U.S. 668, 684, 689 S.Ct. 660, 684)

4. PROSECUTORIAL MISCONDUCT CAUSED A GUILTY PLEA

The Prosecutor's adduced evidence tending to establish that the accuser was still credible despite her volumes of misrepresentations. The Law has concluded that "False testimony qualifies as material if there is any reasonable likelihood that the false testimony could have affected the judgement of the Jury. Giglio V. United States, 405 U.S. 154 92 S.Ct (1972). The prosecutors knew that their case files contained false information that had been recanted or that they knew was in conflict with the evidence. The law states that, "If it is established that the Government Knowingly permitted the introduction of false testimony reversal is automatic. (See United States V. Agurs, 427 U.S. 97, 103, 96 S.Ct 2392 (1976)).

The prosecutors not only allowed misrepresentations to go uncorrected but the prosecutors bolstered the credibility of the accuser by placing four Government officials on the stand knowing that each of the Government officials had testified falsely. There being no question that false testimony was introduced to bolster the credibility of the accuser's misrepresentations and there being no reasonable application of the law under which it could be said that the prejudice suffered by the the petitioner fell short of legal standards established by the Supreme Court by law this conviction should be vacated.

IV. MORE JURISDICTION THAT JUSTIFIES GRANTING THIS WRIT

Along with the petitioner's status as an actually innocent Prisoner the petitioner is asking this Court to apply the three

prong test of Rule 20.1 to the circumstances and facts that are outlined in this petition. Regarding prong one the petitioner is contending that this writ will be in aid of the Courts appellate jurisdiction because this Court can ensure that the ends of Justice are met by assessing the factual basis of the newly discovered evidence while also assessing the debatability of the petitioner's underlying constitutional claims in order to compel the lower Court's to perform the action that the cited Supreme Court Case laws require for Courts to perform in situations where actual innocence has been proven.

Regarding the second prong of rule 20.1 The exceptional circumstances that warrant granting this writ is: (a) the lower Courts have consistently declined to hold an evidence hearing despite the petitioner's presentation of new evidence being supplemented with substantial constitutional violations that are proven by court transcripts and court files; (b) The record proves the petitioner has used the Court's files and records to prove that not only is he actually innocent but the files show that the petitioner has been vocally trying to explain to Authorities from the day of his arrest how to find the evidence that will prove his actual innocence in which he was recklessly disregarded. This is an extraordinary circumstance.

Regarding the third prong of rule 20.1 Adequate relief to this constitutional error can not be obtained from any other court because the lower Courts have refused to entertain the claims of the petitioner's actual innocence and by sending this case back to the lower courts without any other instruction the

lower Court's will adhere to their original decision which would cause an actually innocent citizen to remain in prison.

Other jurisdiction that the petitioner prays this court to invoke is Rule 6(b)(B) excusable neglect clause to extending the time for computing filing periods. The petitioner has filed at least six timely petitions to the District Court and two timely petitions to the United States Court Of Appeals which proves that the petitioner does comply with the time frames that are specified to file each motion and in the case of the petition for Certiorari due to the petitioner being mislead by vague instructions from the Supreme Court Clerk's memorandum the excusable neglect exception should aid this Court in allowing the actual innocence claims to be heard in this Court.

Other Jurisdiction that the petitioner prays deeply for this court to invoke is available in title 28 U.S.C § 1201(c) which allows a justice of the Supreme Court to find that a good cause was shown that justifies extending the period to file a petition for Certiorari for a time period not exceeding sixty days in order to allow petitions of Certiorari to be heard. For this cause the petitioner asks that the Justices of this Court excuse the procedural default in consideration to the Actual innocence miscarriage of justice exception to procedural default that is outlined in McQuiggin V. Perkins; Rule 20.1; Rule 6. (b)(B); and title 28 U.S.C §1201 c).

Well Established Supreme Court Law has established that Actual innocence if proved serves as a Gateway through which a petitioner may pass a procedural bar, McQuiggin V. Perkins, 569 U.S. 383, 386, 133 S.Ct 1924 (2013).

V. CONSTITUTIONAL PROVISION MUST BE ENFORCED TO PROTECT
THE PUBLIC'S CONFIDENCE IN THE JUSTICE SYSTEM

Although sex trafficking is a very serious crime and our youth must be protected from predators it would be a complete miscarriage of Justice to allow a person to remain in prison when the evidence proves his innocence. Women will become empowered with a false sense that they can vindictively create false accusation to hurt a person they dislike if we allow these type of case to become personal and cloud our sense of justice. Our future sons deserve to be protected from the potential vindictive false claims of women who may harbor spite. For this reason the United States Constitution is in place to mandate that what is Authorized by the Constitution must be Carried out. The Citizens of each state shall be entitled to all privileges and immunities of citizens in the several states regardless of the accusation. (See Article 4 section 2 Of the United States Constitution).

The petitioner is sensitive to the nature of this offense because the petitioner was a victim of sexual assault as a child (See Pre-Sentencing Report);(See Also Georgia Bureau of Investigations Case Files). The petitioner deserves to be exonerated because he has lawfully presented evidence to prove his innocence and because the Statues and the Constitution demand it. This High Court has the responsibility to protect the intrest of our Society and our Constitution by doing in the petitioner's case what has been decided in other case where the evidence has proven "Factual" innocence.

This Constitution and the laws of the United states which shall be made in pursuance there of and all the treaties made, or which shall be made under the Authority of the United States, shall be the supreme law of the Land and Judges in every state shall be bound

there by, anything in the constitution, or laws of any State to the contrary notwithstanding. (See Article 6 of the United States Constitution).

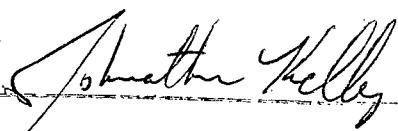
The nature of the accusations should not prevent the petitioner from receiving the relief that the law prescribes because the Court would violate the petitioner's Ninth Amendment Rights by abusing it's discretion to deny the petitioner a Constitutional gauranteed right that other citizens similarly circumstanced have been granted. The enumeration of the Constitution, of certain rights, shall not be construed to deny or disparge other's retained by the people. (See the Ninth Amendment of the United States Constitution).

VI. CONCLUSION

The petitioner has presented a rare situation where the Accuser has admitted the innocence of the petitioner. The petitioner has served nearly his entire sentence that he was illegally forced to serve. And the petitioner is praying that this Court compels the lower court to review the petitioner's new evidence of Factual Innocence and restore his liberty.

The petitioner humbly asks this Court to have compassion for the mistake that he made and the petitioner prays that this Honorable Court have mercy on him and grant this petition in the interest of Justice. The petitioner is a Pro Se petitioner and asks that his petition be reviewed under a less stringent standard than formal pleadings drafted by lawyers pursuant to Haines V. Kerner, 404 U.S. 519, 520, 92 S.Ct (1972).

Respectfully Submitted,



IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-13708-A

JOHNATHON KELLY,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

Before: JORDAN and ROSENBAUM, Circuit Judges.

BY THE COURT:

Johnathon Kelly has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2, of this Court's January 24, 2019, order denying his motions for a certificate of appealability and leave to proceed *in forma pauperis* on appeal. Upon review, his motion for reconsideration is DENIED because he has offered no meritorious arguments to warrant relief.

IN THE UNITED STATES COURT OF APPEALS
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No. 18-13708-A

JOHNATHON KELLY,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

ORDER:

On March 15, 2017, Kelly filed the instant 28 U.S.C. § 2255 motion raising four grounds for relief. Kelly argued that his § 2255 motion was not untimely because, after sentencing, he told counsel that he wanted to appeal. Counsel said that he would not assist him on appeal but told Kelly that, after he filed the notice of appeal, the government would appoint appellate counsel for him. Kelly then stopped contacting counsel and waited to hear from appellate counsel, but when he heard nothing from counsel or the courts, he inquired of the Clerk of Court, who informed him that he had no appeal pending.

The government responded by arguing that Kelly's § 2255 motion was untimely and that there was no basis for equitable tolling. Kelly replied that he was entitled to equitable tolling because his counsel promised to file a notice of appeal but failed to do so.

A magistrate judge issued a report and recommendation (“R&R”), recommending that Kelly’s § 2255 motion be dismissed as time-barred, equitable tolling not apply, and a certificate of appealability (“COA”) be denied. The district court adopted the R&R, denied Kelly’s § 2255 as time-barred, and denied a COA. Kelly filed a notice of appeal from the district court’s order denying his § 2255 motion. Kelly also filed a motion for leave to proceed IFP on appeal, which the district court denied. Kelly now moves this Court for a COA and IFP status.

Timeliness

In order to obtain a COA, a movant must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Where the district court has denied a motion to vacate on procedural grounds, the movant must show that jurists of reason would find debatable (1) whether the motion states a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Antiterrorism and Effective Death Penalty Act (“AEDPA”) imposes a one-year statute of limitations for filing a § 2255 motion that begins to run from the latest of four possible events. Relevant here, the limitations period for filing a § 2255 motion begins to run on the date on which the judgment of conviction becomes final. 28 U.S.C. § 2255(f). Here, the district court correctly determined that Kelly’s § 2255 motion was untimely. Kelly’s judgment became final on September 30, 2014. Kelly did not file the instant § 2255 motion until March 15, 2017, which was more than one year after his conviction and sentence became final. Thus, his § 2255 motion was untimely.

Equitable Tolling

The AEDPA limitations period may be equitably tolled, but the petitioner must show “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quotation omitted). Equitable tolling is “an extraordinary remedy [that] is typically applied sparingly.” *Arthur v. Allen*, 452 F.3d 1234, 1252 (11th Cir. 2006) (quotation omitted). The diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence. *See Holland*, 560 U.S. at 653.

Here, equitable tolling does not apply, even if counsel’s failure to file an appeal could be construed as attorney abandonment, and, thus, qualify as an extraordinary circumstance that stood in the way of Kelly timely filing his § 2255 motion, because Kelly did not act with reasonable diligence. *See Cadet v. Fla. Dep’t of Corrs.*, 853 F.3d 1216, 1236 (11th Cir. 2017) (holding that attorney abandonment meets the extraordinary circumstance element for equitable tolling). By Kelly’s own admission, he waited more than 28 months after his conviction became final to inquire into the status of his appeal. Kelly did not exercise reasonable diligence, particularly because the appeal window ended 14 days after sentencing. A duly diligent person in Kelly’s circumstances could have unearthed the information that his counsel failed to file a direct appeal any time after the 14-day deadline for filing the appeal passed.

In light of the above, this Court DENIES Kelly’s motion for a COA on his § 2255 motion. Consequently, this Court also DENIES his motion for IFP status as moot.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

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