IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-12919-G

JIMMY COBB,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Jimmy Cobb, who is serving a term of supervised release, seeks a certificate of appealability ("COA") in order to appeal the district court's denial of his *pro se* 28 U.S.C. § 2255 motion.[1] In order to obtain a COA, Mr. Cobb must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation marks omitted). Mr. Cobb has failed to make the requisite showing.

[1] Mr. Cobb was released from prison on January 28, 2020. However, this Court retains jurisdiction to review the denial of his § 2255 motion. *See United States v. Brown*, 117 F.3d 471, 475 (11th Cir. 1997) (stating that a defendant serving a term of supervised release is "in custody" within the meaning of § 2255).

In Claim 1, Mr. Cobb argued that counsel failed to fully explain the applicable law of the charged offense before he pled guilty. According to Mr. Cobb, counsel erroneously informed him that 18 U.S.C. § 2422(b) and O.C.G.A. § 16-6-5 were lesser-included offenses of 18 U.S.C. § 2425. Mr. Cobb further argued that he suffered prejudice because he unknowingly pled guilty to violating all three statutes based on counsel's erroneous interpretation of them. Reasonable jurists would not debate the denial of this claim, as Mr. Cobb failed to show prejudice. It appears that Mr. Cobb mistakenly believes that he pled guilty to all three statutes, but the record reveals that he pled guilty to the sole charge in the superseding information—18 U.S.C. § 2425.

Moreover, both § 2422(b) and O.C.G.A. § 16-6-5 carried mandatory minimum sentences of ten years' imprisonment, while § 2425 did not. Because he pled guilty to § 2425, and not § 2422(b) or O.C.G.A. § 16-6-5, he was not subject to a ten-year minimum sentence. Additionally, Mr. Cobb received the benefit of a downward variance to 24 months' imprisonment from his guideline range of 46 to 57 months' imprisonment. Accordingly, even if counsel had informed Mr. Cobb that § 2422(b) and O.C.G.A. § 16-6-5 were lesser-included offenses of § 2425 and that he was pleading guilty to all three, Mr. Cobb failed to show prejudice because he received a lesser sentence.

In Claim 2, Mr. Cobb argued that counsel wrongfully advised him to plead guilty to § 2425 because that statute did not criminalize his conduct, and he was actually innocent. Reasonable jurists would not debate the denial of this claim because: (1) there was a sufficient factual basis for his guilty plea; (2) the decision to go to trial on the original indictment would have been unreasonable; (3) the undercover agent ("UC") could have been charged with prostitution under

the version of O.C.G.A. § 16-6-9 in effect at that time;[2] (4) Mr. Cobb could have been charged with attempted enticement of a minor, in violation of § 2422(b); (5) the factual basis for his guilty plea showed that he believed that the UC was a minor when he offered to have sex with her in exchange for money; and (6) he initiated the transmission of the UC's information.

In Claim 3, Mr. Cobb argued that the district court lacked jurisdiction to convict him because §§ 2422(b) and 2425 require that a defendant use the Internet to violate these statutes, and he did not use the Internet to contact the UC. Reasonable jurists would not debate the denial of this claim, as both statutes require only that a defendant "us[e] the mail or any facility or means of interstate or foreign commerce," not exclusively the Internet. *See* 18 U.S.C. §§ 2422(b) and 2425. Mr. Cobb admitted that he used his cell phone to both text message and call the UC using the number listed on a Backpage ad. We previously have held that cellular phones are instrumentalities of interstate commerce. *See United States v. Evans*, 476 F.3d 1176, 1180-81 (11th Cir. 2007). Therefore, even if he did not use the Internet to communicate with the UC, the district court had jurisdiction to convict and sentence him.

Accordingly, Mr. Cobb's COA motion is DENIED.

/s/ Jill Pryor
UNITED STATES CIRCUIT JUDGE

[2] For (3) and (4) here, the government had to prove that Mr. Cobb initiated the transmission of the minor's information with the intent to entice, encourage, offer, and solicit the minor to engage in a sexual activity "for which any person could be charged with a criminal offense." *See* 18 U.S.C. § 2425. To satisfy this element, the government alleged that the UC could have been charged with prostitution under Georgia law, and Mr. Cobb could have been charged with attempted online enticement of a minor, in violation of 18 U.S.C. § 2422(b).

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-12919-G

JIMMY COBB,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeals from the United States District Court
for the Middle District of Georgia

Before: JILL PRYOR and BRASHER, Circuit Judges.

BY THE COURT:

Jimmy Cobb has filed a motion for reconsideration of this Court's April 2, 2021, order denying a certificate of appealability in his appeal from the denial of his underlying 28 U.S.C. § 2255 motion to vacate. Upon review, Cobb's motion for reconsideration is DENIED because he has failed to offer new evidence or arguments of merit to warrant relief.

5a

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

JIMMY COBB,	*	
Petitioner,	*	
vs.	*	CASE NO. 4:17-CR-51 (CDL)
UNITED STATES OF AMERICA,	*	
Respondent.	*	

O R D E R

After a de novo review of the record in this case, the Report and Recommendation filed by the United States Magistrate Judge on April 30, 2020 is hereby approved, adopted, and made the Order of the Court, including the denial of a certificate of appealability.

The Court considered Petitioner's objections to the Report and Recommendation and finds that they lack merit.

IT IS SO ORDERED, this 15th day of July, 2020.

S/Clay D. Land
CLAY D. LAND
U.S. DISTRICT COURT JUDGE
MIDDLE DISTRICT OF GEORGIA

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

JIMMY COBB,	:	
	:	
Petitioner,	:	
	:	CASE NO. 4:17-CR-51-CDL-MSH
v.	:	CASE NO. 4:18-CV-231-CDL-MSH
	:	28 U.S.C. § 2255
UNITED STATES OF AMERICA,	:	
	:	
Respondent.	:	

ORDER AND RECOMMENDATION

Pending before the Court are Petitioner Jimmy Cobb's motion to vacate under 28 U.S.C. § 2255 (ECF No. 59), motion to supplement (ECF No. 61), motions for summary judgment (ECF Nos. 62, 99), motion for default judgment (ECF No. 64), motion to correct registration error (ECF No. 75), motion for bail review (ECF No. 81), motions for return of property (ECF Nos. 83, 86), motion for recusal (ECF No. 87), motion to amend (ECF No. 88), motion for review of motions for return of property (ECF No. 93), motion as to breach of plea agreement (ECF No. 96), motion for review of Order denying motion for bond (ECF No. 97), emergency motion for home confinement (ECF No. 102), and motion to modify conditions of release (ECF No. 103). For the hereinbelow reasons, it is recommended that Petitioner's motion to vacate (ECF No. 59), motions for summary judgment (ECF Nos. 62, 99), motion for recusal (ECF No. 87), and motion to modify conditions of release (ECF No. 103) be denied. Petitioner's motion to supplement (ECF

No. 61) is granted, his motion to amend (ECF No. 88) is granted in part and denied in part, and his remaining motions are denied or denied as moot.

BACKGROUND

On November 16, 2017, a grand jury indicted Petitioner for the attempted online enticement of a minor in violation of O.C.G.A. § 16-6-5 and 18 U.S.C. § 2422(b). Indictment 1-3, ECF No. 1. Petitioner was arrested as part of an undercover operation conducted by the Georgia Bureau of Investigation ("GBI") and the Georgia Internet Crimes Against Children Task Force in Columbus, Georgia on November 11, 2017. Plea Agreement 8, ECF No. 34. On March 5, 2018, Petitioner pled guilty to a superseding count of the use of facilities in interstate and foreign commerce to transmit information about a minor in violation of 18 U.S.C. § 2425. Superseding Information 1, ECF No. 33; Plea Agreement 2; Plea Sheet 1, ECF No. 35; Plea Tr. 7:10-8:24, 18:24-19:20, 22:24-23:08, ECF No. 57; Judgment 1, ECF No. 54.

Petitioner agreed that Respondent could prove at trial that on November 11, 2017, a GBI undercover agent ("UC") posted an ad on "Backpage.com" which read "Petite little BAD girl! Ready to please," and "Ready for a night you'll never forget? Call me[.]" Plea Agreement 8; Plea Tr. 20:05-20:16. The UC also posted a phone number and photos of herself posing as a young girl in a hotel room. Plea Agreement 8; Plea Tr. 20:16-20:24. The ad listed the UC's age as "69," and "[i]n the training and experience of law enforcement, a posting age of '69' is code for the fact that a child is being advertised for prostitution." Plea Agreement 8; Plea Tr. 20:24-21:02. Petitioner contacted the UC by text message and stated he saw the UC's ad on Backpage. Plea Agreement 8; Plea Tr.

21:03-21:06. The UC told Petitioner she was 14 years old, Petitioner "stated that he wished to engage in sexual intercourse with the UC at the rate of $20.00 for five minutes of the UC's time," and Petitioner stated he would bring a condom so the UC would not get pregnant. Plea Agreement 8-9; Plea Tr. 21:06-21:19. Petitioner then called the UC, the UC stated she was 14 years old, and Petitioner repeated that he wanted to have sex with her. Plea Agreement 9; Plea Tr. 21:20-21:24. During the conversation, the GBI used information from the text messages and phone call to identify the caller as Petitioner, who lived in Columbus, Georgia. Plea Agreement 9; Plea Tr. 21:25-22:04. The UC provided an address for the meeting, Petitioner traveled to that address, and Columbus Police Department officers arrested him upon arrival. Plea Agreement 9; Plea Tr. 22:04-22:06. A Federal Bureau of Investigation ("FBI") agent interviewed Petitioner the same day. Plea Agreement 9; Plea Tr. 22:07-22:09. During that interview, Petitioner stated it was "a bad decision" to answer the Backpage ad, indicated he did not visit the website seeking to have sex with an underage girl, but admitted he did not terminate the conversation with the UC. Plea Agreement 9; Plea Tr. 22:09-22:13.

Petitioner was sentenced to 24 months imprisonment, 5 years supervised release, and a $100 mandatory court assessment. Judgment 2-3, 6. Petitioner was also required to provide a DNA sample and comply with the requirements of the Sex Offender Registration and Notification Act under 34 U.S.C. § 10901, *et seq.* *Id.* at 3. Judgment was entered against him on July 17, 2018. *Id.* at 1. Petitioner did not appeal. Mot. to Vacate 2, ECF No. 59. On November 26, 2018, the Court received Petitioner's motion to vacate his sentence under 28 U.S.C. § 2255 (ECF No. 59), alleging ineffective assistance of counsel.

Mot. to Vacate 4-6. On December 28, 2018, the Court received Petitioner's motion to supplement (ECF No. 61), alleging actual innocence and lack of jurisdiction. Mot. to Suppl. 3-6. The Court received his first motion for summary judgment (ECF No. 62) on January 3, 2019, and his motion for default judgment (ECF No. 64) on February 1, 2019. The Court extended Respondent's time to respond (ECF No. 63) to Petitioner's motion to vacate on January 30, 2019, and Respondent responded (ECF No. 38) on February 4, 2019. The Court received Petitioner's first reply (ECF No. 67) on February 25, 2019, and his identical second reply (ECF No. 68) on March 7, 2019. Petitioner has filed his twelve other pending motions since that time. Petitioner's motions are ripe for review.

DISCUSSION

I. Petitioner's Motion to Vacate

In his motion to vacate, Petitioner raises ineffective assistance of trial counsel as a ground for relief. Mot. to Vacate 4-6. In his motion to supplement, he also raises two new grounds: actual innocence and lack of jurisdiction. Mot. to Suppl. 3-6. Petitioner's motion to supplement (ECF No. 61) is **GRANTED**. The Court has considered these new grounds for relief as part of his motion to vacate. The Court recommends that his motion to vacate be denied on all grounds.

A. Ineffective Assistance of Trial Counsel

Petitioner raises two claims of ineffective assistance of trial counsel: (1) he did not knowingly plead guilty because counsel failed to fully explain the applicable law, and (2) counsel wrongfully advised Petitioner to plead guilty to violating 18 U.S.C. § 2425 because

that statute does not prohibit his conduct. Mot. to Vacate 4-5; Mem. in Supp. of Mot. to Vacate 2, 4-14, ECF No. 59-1. Petitioner fails to show trial counsel was ineffective.

1. Standard

To prevail on a claim of ineffective assistance of counsel, a petitioner must establish, by a preponderance of the evidence, that his attorney's performance was deficient and that he was prejudiced by the inadequate performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000). However, "[a] court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter,* 562 U.S. 86, 104 (2011) (quoting *Strickland,* 466 U.S. at 689 (1984)).

To establish deficient performance, a petitioner must prove their counsel's performance was unreasonable under prevailing professional norms and that the challenged action was not sound strategy. There is a strong presumption that the challenged action constituted sound trial strategy. *Chateloin v. Singletary*, 89 F.3d 749, 752 (11th Cir. 1996). To show that counsel's performance was unreasonable, a petitioner must establish that no competent counsel would have taken the action in question. *Van Poyck v. Florida Dep't of Corr.*, 290 F.3d 1318, 1322 (11th Cir. 2002) (per curiam).

To satisfy the prejudice prong, a petitioner must show there is a reasonable probability that, but for counsel's inadequate representation, "the result of the proceedings would have been different." *Meeks v. Moore*, 216 F.3d 951, 960 (11th Cir. 2000). If a petitioner fails to establish that he was prejudiced by the alleged ineffective assistance, a

court need not address the performance prong of the *Strickland* test. *Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000). A petitioner's burden when bringing an ineffective assistance claim "is not insurmountable" but "is a heavy one." *Chandler*, 218 F.3d at 1314.

2. Explanation of Applicable Law

Petitioner claims "counsel failed to assure the Petitioner had a full and complete understanding of the law and the facts of the case before advising the Petitioner to enter into the plea." Mot. to Vacate 4. He states that

> counsel had him plead guilty to violating the laws of Georgia, violating 18 U.S.C. § 2422(b) and then agreeing that all were in violation of 18 U.S.C. § 2425. Petitioner will disclose that from a legal and statutory provision aspect, [O.C.G.A. §] 16-6-5, as alleged in the original indictment, and § 2422(b) are greater offenses which carries [sic] higher penalties and different elements, and all cannot be contained in § 2425 since it is a lesser charge. The fact that there are elements in the other statutes that require proof different from each other will not allow the statutes to be conflated in that manner. Therefore, Petitioner entered into the plea agreement on the advice of counsel unknowing, unintelligently and involuntarily.

Mem. in Supp. of Mot. to Vacate 5. He also states that

> [c]ounsel knew or should have known that each of the aforementioned statutes noted in the Superseding Notice required proof of a fact which the other does not. This is especially so with the State statute and § 2422(b). In the instant case Counsel advised the Petitioner to plead guilty to 18 U.S.C. § 2425 stating that the other two statutes were included in it. [O.C.G.A. §] 16-6-5 is punishable by 10 years in prison. § 2422(b) contains a penalty of a minimum of 10 years to life imprisonment. Section 2425 penalty is 0-5 years imprisonment for its violation. In this regard, conflated 16-6-5 and 2422(b) to be included in 2425 is illogical. The greater cannot be included in the lesser. Counsel knew or should have known that the presentation as such in a plea agreement would cause the Petitioner to be convicted of the greater statutes whether or not the elements required proof by different facts.

Id. at 14. Thus, Petitioner appears to contend that (1) counsel's performance was deficient because counsel erroneously informed him that 18 U.S.C. § 2422(b) and O.C.G.A. § 16-6-

5 were lesser-included offenses of 18 U.S.C. § 2425, and (2) he suffered prejudice because he unknowingly pled guilty to violating all three statutes based on counsel's erroneous interpretation of the statutes. *See* Reply 3-5, ECF No. 67.

Even assuming both that counsel erroneously informed Petitioner that 18 U.S.C. § 2422(b) and O.C.G.A. § 16-6-5 were lesser-included offenses of 18 U.S.C. § 2425 and that this constitutes deficient performance, Petitioner fails to show resulting prejudice. A defendant convicted under 18 U.S.C. § 2422(b) "shall be fined . . . and imprisoned not less than 10 years or for life." In Georgia, a defendant convicted under O.C.G.A. § 16-6-5 "shall be punished by imprisonment for not less than ten nor more than 30 years." Thus, a conviction under either statute results in a statutory minimum sentence of ten years imprisonment. Petitioner, however, was convicted of violating 18 U.S.C. § 2425 and sentenced under that statute. *See* Judgment 1. A defendant convicted of violating 18 U.S.C. § 2425 "shall be fined under this title, imprisoned not more than 5 years, or both." Unlike 18 U.S.C. § 2422(b) and O.C.G.A. § 16-6-5, this statute has no statutory minimum sentence. Because Petitioner pled guilty to violating 18 U.S.C. § 2425—instead of 18 U.S.C. § 2422(b) or O.C.G.A. § 16-6-5—he was not subject to a ten-year minimum sentence.

Additionally, Petitioner's sentencing guideline range was 46-57 months based on an offense level of 23 and his criminal history category of I. Revised Final Presentence Investigation Report 10, ECF No. 48; Sentencing Tr. 27:21-23, ECF No. 58. Petitioner, however, received a downward variance from the guideline range and was sentenced to 24 months imprisonment, 5 years supervised release, and a $100 mandatory court

assessment—far less than the ten-year mandatory minimum for both 18 U.S.C. § 2422(b) and O.C.G.A. § 16-6-5. Judgment 2-3, 6; Sentencing Tr. 28:14-29:09. Accordingly, even if counsel informed Petitioner that 18 U.S.C. § 2422(b) and O.C.G.A. § 16-6-5 were lesser-included offenses of 18 U.S.C. § 2425 and that he was pleading guilty to violating all three, he fails to show prejudice because he received a lesser sentence. Because Petitioner fails to show that but for counsel's inadequate representation, "the result of the proceedings would have been different," he has not shown prejudice resulting from counsel's allegedly deficient performance. *Meeks*, 216 F.3d at 960. Therefore, counsel was not ineffective by allegedly informing him that 18 U.S.C. § 2422(b) and O.C.G.A. § 16-6-5 were lesser-included offenses of 18 U.S.C. § 2425.

Although Petitioner frames this claim as one of ineffective assistance of counsel, he also argues his guilty plea was unknowing and, therefore, invalid as a result of counsel's alleged erroneous interpretation of 18 U.S.C. § 2425. Mem. in Supp. of Mot. to Vacate 5-8, 14-15. To the extent Petitioner raises an independent claim that his guilty plea was unknowing and invalid, his claim should be denied. "A defendant's guilty plea must be knowing and voluntary in order to be constitutionally valid." *United States v. Munguia-Ramirez*, 267 F. App'x 894, 897 (11th Cir. 2008). "Rule 11 [of the Federal Rules of Criminal Procedure] imposes upon a district court the obligation and responsibility to conduct an inquiry into whether the defendant makes a knowing and voluntary guilty plea." *United States v. Hernadez-Fraire*, 208 F.3d 945, 949 (11th Cir. 2000). In order for a plea to be knowing and voluntary: "(1) the guilty plea must be free from coercion; (2) the defendant must understand the nature of the charges; and (3) the defendant must know and

understand the consequences of his guilty plea." *United States v. Mosley*, 173 F.3d 1318, 1322 (11th Cir. 1999).

In evaluating a petitioner's guilty plea, "the representations of the defendant, his lawyer, and the prosecutor at [a plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings." *Winthrop-Redin v. United States*, 767 F.3d 1210, 1216 (11th Cir. 2014) (alteration in original). Each plea colloquy is assessed "individually based on various factors, such as the simplicity or complexity of the charges and the defendant's sophistication and intelligence." *Mosley*, 173 F.3d at 1322-23. "The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

Here, Petitioner argues his plea was unknowing because he did not understand the nature of the charge in the superseding information due to counsel's alleged erroneous interpretation of 18 U.S.C. § 2425. Mem. in Supp. of Mot. to Vacate 5-8, 14-15. A defendant must receive "real notice of the true nature of the charged crime." *United States v. Brown*, 117 F.3d 471, 476 (11th Cir. 1997). In other words, a defendant should be "informed of the elements of the charged offense." *Id.* However, "there is no one mechanical way . . . that a district court is required to inform the defendant of the nature of [his] charges[.]" *United States v. Puentes-Hurtado*, 794 F.3d 1278, 1286 (11th Cir. 2015) (alterations and omission in original). "Whether the court has adequately informed the defendant of the offense's nature turns on a variety of factors, including the complexity of

the offense and the defendant's intelligence and education." *United States v. Telemaque*, 244 F. 3d 1247, 1249 (11th Cir. 2001) (citations omitted).

During Petitioner's plea colloquy, which occurred *after* counsel allegedly informed Petitioner that 18 U.S.C. § 2422(b) and O.C.G.A. § 16-6-5 were lesser-included offenses of 18 U.S.C. § 2425, the Court first asked Petitioner about his age and educational background. Plea Tr. 4:16-4:22. Petitioner indicated that he was 35 years old at that time, he had graduated from college with a degree in psychology, and he could read and write. *Id.* The Court also asked Petitioner about his present mental state, and Petitioner indicated that he had never been treated for mental illness, he was not under the influence of drugs or alcohol, and he understood what he was doing. *Id.* at 4:23-5:12. The Court told Petitioner that he needed to understand the charge against him in the superseding information before he entered a plea. *Id.* at 7:10-13. In order to ensure Petitioner's understanding, the Court asked the prosecuting Assistant United States Attorney ("AUSA") to read both the charge and the elements thereof. *Id.* at 7:13-7:18. The AUSA read the superseding information to Petitioner, which stated that Petitioner had been charged with the use of facilities in interstate and foreign commerce to transmit information about a minor in violation of 18 U.S.C. § 2425. *Id.* at 8:05-8:21; *see also* Superseding Information 1. The Court asked Petitioner if he understood the charge, and he stated that he did. Plea Tr. 8:22-8:24.

The Court then told Petitioner that he needed to "understand what the government would have to prove at trial to convict [him] on this charge" and asked the AUSA to read the essential elements of 18 U.S.C. § 2425. *Id.* at 8:25-9:04. The AUSA read the five

elements of the charge to Petitioner. *Id.* at 9:06-9:22. Afterwards, the Court asked Petitioner if he understood these elements, and Petitioner stated that he did. *Id.* at 9:23-10:01. The Court later asked Petitioner if he read the plea agreement, discussed it with his attorney, and understood it, and Petitioner answered each question in the affirmative. *Id.* at 13:04-24; *see also* Plea Agreement 2 (stating, *inter alia*, that Petitioner "is guilty and will knowingly and voluntarily enter a plea of guilty to Count One of the Superseding Information, which charges [Petitioner] with Use of Facilities in Interstate and Foreign Commerce to Transmit Information about a Minor, in violation of [18 U.S.C. § 2425]"). The Court noted that Petitioner had "indicated that [he understood] the charge," and asked him how he wished to plead to that charge. Plea Tr. 18:24-19:02. Petitioner stated "guilty." Plea Tr. 19:03. The Court found that Petitioner understood the charges and had entered a knowing and voluntary plea. *Id.* at 22:24-23:14.

Petitioner argues "[i]t is obvious that [during the plea colloquy] Petitioner did not understand the statute but was counseled by counsels to say yes to what ever the court asked." Mem. in Supp. of Mot. to Vacate 8. Petitioner's conclusory allegation that he did not understand the charges in spite of his statements to the contrary in response to the Court's persistent questioning fails to show that his plea was unknowing. *See Blackledge*, 431 U.S. at 74. Based on Petitioner's education level, his review of the charge in the superseding information and plea agreement, the AUSA's explanation of the charge and its elements during the plea colloquy, and the Court's questioning thereabout, it is clear Petitioner understood the nature and elements of 18 U.S.C. § 2425 when he pled guilty. *See* Superseding Information 1; Plea Agreement 2; Plea Tr. 7:10-10:01, 13:04-13:24,

18:24-19:03, 22:24-23:14. Because he knowingly and voluntarily pled guilty, he fails to show that his plea was invalid.

3. Advice to Plead Guilty and Actual Innocence

Petitioner argues counsel was ineffective "by advising the Petitioner to enter a Plea Agreement to a Statute that his conduct does not prohibit."[1] Mem. in Supp. of Mot. to Vacate 2. He contends he suffered prejudice because "he would have opted to go to trial if Counsels would have presented him with the understanding of the prohibited conduct set forth in § 2425." *Id.* at 5. In a portion of his motion to amend (ECF No. 88), Petitioner again argues counsel was ineffective in recommending that he plead guilty to the superseding information. *See* Mot. to Amend 6-7, ECF No. 88. He restates the same arguments in support. *Id.* For the hereinbelow reasons, the Court has granted in part Petitioner's motion to amend (ECF No. 88) to the extent he again raises this claim. His claims are discussed in this section.

Rule 11(b)(3) of the Federal Rules of Criminal Procedure provides that the Court must determine whether there is a factual basis for a plea before accepting that plea. "The standard for evaluating challenges to the factual basis for a guilty plea is whether the trial court was presented with evidence from which it could reasonably find that the defendant was guilty." *United States v. Frye*, 402 F.3d 1123, 1128 (11th Cir. 2005) (internal

[1] To the extent Petitioner claims he did not violate 18 U.S.C. § 2425, his claim is really one of actual innocence. In his motion to supplement, Petitioner raises the same arguments and states that his claim is one for actual innocence. Mot. to Supplement 3-4, ECF No. 61. Because Petitioner raises identical arguments in the ineffective assistance of counsel ground of his original motion to vacate and in the actual innocence ground of his motion to supplement, the Court analyzes both claims in this subsection, and recommends that both be denied.

quotations and citations omitted). "The representations of the defendant, his lawyer, and the prosecutor at [a plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings." *Winthrop-Redin*, 767 F.3d at 1216 (11th Cir. 2014). "[W]hen a defendant makes statements under oath at a plea colloquy, he bears a heavy burden to show his statements were false." *United States v. Rogers*, 848 F.2d 166, 168 (11th Cir. 1988) (citation omitted).

Here, the trial court was presented with a sufficient factual basis to support Petitioner's guilty plea, and Petitioner fails to meet his burden to show that this finding was incorrect. The superseding information provided that Petitioner

> knowingly used facilities in interstate and foreign commerce, to wit: a cellular telephone and the Internet, to initiate the transmission of the name, address, telephone number, and electronic mail address of another individual, knowing that said individual had not attained the age of sixteen (16) years, with the intent to entice, encourage, offer, and solicit that individual to engage in a sexual activity for which any person could be charged with a criminal offense, to wit: Prostitution, in violation of the laws of the State of Georgia, and the Attempted Online Enticement of a Minor, in violation of Title 18, United States Code, Section 2422(b); all in violation of Title 18, United States Code, Section 2425.

Superseding Information 1. In his plea agreement, Petitioner unequivocally agreed that "[Petitioner] is guilty and will knowingly and voluntarily enter a plea of guilty to Count One of the Superseding Information, which charges Defendant with Use of Facilities in Interstate and Foreign Commerce to Transmit Information about a Minor, in violation of Title 18, United States Code, Section 2425." Plea Agreement 2. Petitioner agreed that he read the entire plea agreement, understood it, initialed each page, and signed at the end. Plea Tr. 13:08-13:24.

During his plea colloquy, after the AUSA read the superseding information and the elements of 18 U.S.C. § 2425, Petitioner stated under oath that he understood the charge and elements thereof. *Id.* at 7:10-10:01. Petitioner then pled guilty to violating 18 U.S.C. § 2425, stated he was pleading guilty because he was, in fact, guilty, and agreed that committed the acts described in the superseding information. *Id.* at 18:24-19:20. He also agreed the Government could prove that he initiated contact with the UC by texting the UC's phone number after seeing the ad on Backpage, the UC advised him that she was 14, Petitioner called the UC on the same phone number, she again advised him she was 14 during the call, Petitioner stated he wanted to have sex with the UC in exchange for money, Petitioner requested that the UC send him her address so they could meet, the UC texted Petitioner an address, and Petitioner traveled to that address with the intention of having sex with the UC in exchange for money. Plea Agreement 8-9; Plea Tr. 19:21-22:16; *see also* Pet'r's Sent'g Mem. Ex. 2, at 3-4, ECF No. 50-2.

The Court found that these facts established a factual basis for each element of 18 U.S.C. § 2425 and accepted Petitioner's guilty plea. Plea Tr. 22:24-23:08. Thus, Petitioner agreed he specifically violated 18 U.S.C. § 2425, he stipulated to facts as part of his plea agreement, and the Court found that there was a sufficient factual basis for Petitioner's guilty plea. Plea Agreement 2, 8-9; Plea Tr. 18:24-23:08. He fails to show that there was insufficient factual basis for his guilty plea to the superseding information. Consequently, Petitioner has not established that counsels' performance was deficient in advising him to plead guilty to the superseding information or that he is actually innocent of violating 18 U.S.C. § 2425.

In spite of his plea to specifically violating 18 U.S.C. § 2425, Petitioner still contends he is innocent of that charge, and counsel should not have advised him to plead guilty. First, he argues counsel should not have advised him to plead guilty under the superseding information because he did not solicit an individual to engage in a sexual activity for which any person could be charged with prostitution, in violation of the laws of the State of Georgia.[2] Mem. in Supp. of Mot. to Vacate 9-11. At the time Petitioner pled guilty to the superseding information on March 5, 2018, O.C.G.A. § 16-6-9 provided that "[a] person commits the offense of prostitution when he or she performs or offers or consents to perform a sexual act, including but not limited to sexual intercourse or sodomy, for money or other items of value."[3] Petitioner agreed the Government could show that Petitioner "stated that he wished to engage in sexual intercourse with the UC at the rate of $20.00 for five minutes of the UC's time." Plea Agreement 8-9; Plea Tr. 21:06-21:19. Because Petitioner asked the UC to engage in sexual intercourse with him in exchange for money, the UC could have been charged with prostitution under O.C.G.A. § 16-6-9 had

[2] Petitioner also appears to contend the Government had to show he violated O.C.G.A. § 16-6-5 because he was initially charged with violating that that statute in original indictment. Mem. in Supp. of Mot. to Vacate 9-10; *see also* Indictment 1. However, in the superseding information—to which Petitioner pled guilty—the Government alleged he satisfied one element of 18 U.S.C. § 2425 because he "solicit[ed] [an] individual to engage in a sexual activity for which any person could be charged with a criminal offense, to wit: Prostitution, in violation of the laws of the State of Georgia[.]" Superseding Information 1. Thus, the superseding information does not allege Petitioner violated O.C.G.A. § 16-6-5, and the Government would not have been required to prove a violation of that statute at trial.

[3] O.C.G.A. § 16-6-9 was amended in 2019 and now provides "[a] person, *18 years of age or older*, commits the offense of prostitution when he or she performs or offers or consents to perform a sexual act, including, but not limited to, sexual intercourse or sodomy, for money or other items of value." 2019 Ga. Laws 30, § 1-6 (effective date July 1, 2019) (emphasis added).

she agreed and performed the act. Therefore, Petitioner fails to show that the Government could not have proven this element of the superseding information.

Second, Petitioner argues counsel should not have advised him to plead guilty to the superseding information because he did not solicit an individual to engage in a sexual activity for which any person could be charged with attempted online enticement of a minor in violation of 18 U.S.C. § 2422(b). Mem. in Supp. of Mot. to Vacate 11-13. 18 U.S.C. § 2422(b) provides that

> whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

Petitioner contends that he did not use the Internet to communicate with the UC. *Id.* at 11-12. He agreed that he used a cell phone to text and call the UC, but he states this "cannot in and of itself warrant a conviction." *Id.* at 11; *see also* Plea Agreement 8; Plea Tr. 21:03-21:19. However, the Eleventh Circuit has held that "[t]elephones and cellular telephones are instrumentalities of interstate commerce," and their use, alone, can satisfy this element of 18 U.S.C. § 2422(b). *United States v. Evans*, 476 F.3d 1176, 1180-81 (11th Cir. 2007) (citations omitted). Thus, had Petitioner could have been charged with violating 18 U.S.C. § 2422(b). Furthermore, Petitioner contends the UC could not have violated both 18 U.S.C. § 2422(b) and O.C.G.A. § 16-6-9 because they criminalize different conduct. Mem. in Supp. of Mot. to Vacate 12-13. Even if the UC could not be charged with violating 18 U.S.C. § 2422(b), Petitioner could be charged with violating this statute because he agreed

the Government could prove that he used his cell phone to attempt to induce, entice, or coerce a person he believed to be under the age of 18 to engage in prostitution by offering to have sex with her in exchange for money. *See* Plea Agreement 8-9; Plea Tr. 21:03-21:24.

Petitioner also contends he did not intend to contact a minor. Mem. in Supp. of Mot. to Vacate 13. In support, he asserts (1) that an ad which lists an age of "69" refers to a sex act and is not an indication that the ad offers sex with minors, and (2) that Backpage's disclaimer disallows minors from accessing or posting ads with sexual content. *Id.* However, Petitioner agreed that the Government could prove that (1) the UC told Petitioner that she was fourteen by text message after Petitioner contacted her, and (2) the UC again informed Petitioner she was fourteen when he called her, (3) Petitioner offered to have sex with the UC after she told him she was fourteen. Plea Agreement 8-9; Plea Tr. 21:06-21:24. "[A] defendant's mere belief that a minor was involved is sufficient to sustain an attempt conviction under 18 U.S.C. § 2422(b), even if the defendant's offense conduct did not involve an actual minor." *United States v. Slaughter*, 708 F.3d 1208, 1215 (11th Cir. 2013) (internal quotations omitted) (upholding conviction where defendant contacted a minor online who "was actually [an] FBI Special Agent . . . pretending to be an underage girl as part of an undercover task force to prevent and prosecute sex crimes against children"). Even if Petitioner did not intend to contact a minor on Backpage, he believed the UC was a minor when he offered to have sex with her in exchange for money. Because Petitioner enticed, encouraged, offered, and solicited the UC to engage in a sexual activity for which he could have been charged under 18 U.S.C.§ 2422(b), he fails to show that the

Government could not have proven that he violated this element of the superseding information.

Third, Petitioner argues he did not violate 18 U.S.C. § 2425 because he did not initiate the transmission of the name, address, telephone number, and electronic mail address of another. Mem. in Supp. of Mot. to Vacate 14-15. He argues that the UC created the ad and that he merely contacted the UC without transmitting information. *Id.* at 14. Petitioner admits, however, that the Government could prove that he initially messaged the UC using her telephone number. Plea Agreement 8; Plea Tr. 21:03-21:06. He also initiated the transmission of the UC's address by requesting a location to meet her. Pet'r's Sent'g Mem. Ex. 2, at 3-4.. Petitioner fails to show that the Government could not have proven that he violated this element of 18 U.S.C. § 2425. Because he does not show that the Government could not prove an element of the superseding information, he is not actually innocent and counsel's performance was not deficient in urging him to plead guilty to the superseding information.

Finally, even if counsels' performance was deficient in advising him to plead guilty, Petitioner fails to show prejudice. Petitioner's original indictment charged him with violating 18 U.S.C. § 2422(b). Indictment 1. His trial on this charge was set to begin on March 5, 2018. *See* Notice of Resetting Hearing, Feb. 15, 2018. Petitioner entered into his plea agreement and pled guilty to the superseding information on March 5, 2018, before jury selection began. Minute Entry, Mar. 5, 2018, ECF No. 31; *see also* Plea Tr. 3:04-3:11. Thus, had Petitioner rejected the plea agreement and the superseding information, he would have proceeded to trial upon the charge in the original indictment. 18 U.S.C. § 2422(b)

provides that

> whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

A jury likely would have convicted Petitioner of violating 18 U.S.C. § 2422(b). Petitioner used a facility or means of interstate commerce to communicate with the UC by texting and calling her with his cellular telephone. Plea Agreement 8-9; Plea Tr. 21:03-21:24; *see Evans*, 476 F.3d at 1180-81 (holding that "[t]elephones and cellular telephones are instrumentalities of interstate commerce," and their use, alone, can satisfy this element of 18 U.S.C. § 2422(b) (citations omitted)). He attempted to persuade, induce, entice, or coerce the UC to engage in prostitution by asking to have sex with her at a rate of $20.00 for five minutes of her time. Plea Agreement 8-9; Plea Tr. 21:06-21:19. The UC stated she was 14 years old before and after he offered to have sex with her. Plea Agreement 8-9; Plea Tr. 21:06-21:24. Even though the UC was over 18 years old, "a defendant's mere belief that a minor was involved is sufficient to sustain an attempt conviction under 18 U.S.C. § 2422(b), even if the defendant's offense conduct did not involve an actual minor." *Slaughter*, 708 F.3d at 1215 (internal quotations omitted) (upholding conviction where defendant contacted a minor online who "was actually [an] FBI Special Agent . . . pretending to be an underage girl as part of an undercover task force to prevent and prosecute sex crimes against children"). Petitioner fails to show that a jury would not have convicted him for violating 18 U.S.C. § 2422(b) had he proceeded to trial on the original

indictment.

If a jury convicted Petitioner of violating 18 U.S.C. § 2422(b), he would have faced a ten-year minimum mandatory sentence. A defendant convicted of violating 18 U.S.C. § 2425 "shall be fined under this title, imprisoned not more than 5 years, or both." Thus, because Petitioner pled guilty to violating 18 U.S.C. § 2425—instead of being convicted by a jury of violating18 U.S.C. § 2422(b)—he was not subject to a ten-year minimum sentence. Because Petitioner fails to show a reasonable probability that, but for counsel's inadequate representation, "the result of the proceedings would have been different," he fails to show prejudice resulting from counsels' allegedly deficient performance in advising him to plead guilty to the superseding information. *Meeks*, 216 F.3d at 960. The Court **RECOMMENDS** that Petitioner's motion to vacate be **DENIED** on his ineffective assistance of counsel ground. The Court **RECOMMENDS** that Petitioner's supplement to his motion to vacate be **DENIED** on his actual innocence ground.

B. Lack of Jurisdiction

In his supplement to his motion to vacate, Petitioner also argues that the Court lacked subject matter jurisdiction. Mot. to Supplement 5-6. Specifically, he argues that 18 U.S.C. §§ 2422(b) and 2425 both require that a defendant use the internet to violate those statutes, and he did not use the internet to contact the UC. *Id.* at 5-6. He contends that only the UC used the internet to post the ad on Backpage, but he did not communicate with the UC on Backpage. *Id.* Both statutes, however, require only that a defendant "us[e] the mail or any facility or means of interstate or foreign commerce"—not exclusively the internet. 18 U.S.C. §§ 2422(b), 2425. Petitioner admits he used his cell phone to both text

message and call the UC using the number included in the Backpage ad. Plea Agreement 8-9; Plea Tr. 21:03-21:24. The Eleventh Circuit has held that "[t]elephones and cellular telephones are instrumentalities of interstate commerce," and their use, alone, can satisfy this requirement. *Evans*, 476 F.3d at 1180-81 (citations omitted). Therefore, even if Petitioner did not use the internet to communicate with the UC, the Court retained jurisdiction to sentence him for violating 18 U.S.C. §§ 2422(b) and 2425. The Court recommends that Petitioners supplement to his motion to vacate be denied on this ground.

II. Motions for Summary Judgment

The Court received Petitioner's first motion for summary judgment (ECF No. 62) on January 3, 2019. Summary judgment may be granted only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In determining whether a *genuine* dispute of *material* fact exists to defeat a motion for summary judgment, the evidence is viewed in the light most favorable to the party opposing summary judgment, drawing all justifiable inferences in the opposing party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A fact is *material* if it is relevant or necessary to the outcome of the suit. *Id.* at 248. A factual dispute is *genuine* if the evidence would allow a reasonable jury to return a verdict for the nonmoving party. *Id.*

Petitioner filed his motion before Respondents filed a response to his motion to vacate (ECF No. 59), and pursuant to the Court's November 26, 2018, Order, Respondents had until January 25, 2019, to file their response. Order 1, ECF No. 60. In his motion for summary judgment, Petitioner contends "[f]irst, summary judgment is warranted because

the [Petitioner] did not violate [18 U.S.C.] § 2425 and second, [Petitioner] did not violate [18 U.S.C.] § 2422b." 1st Mot. for Summ. J. 3, ECF No. 62. In support, he restates the factual allegations and legal arguments he raised in support of his motion to vacate (ECF No. 59) and motion to supplement (ECF No. 61). *See id.* at 3-5. For the hereinabove reasons, however, the Court recommends that Petitioner's motion to vacate and motion to supplement be denied on these same grounds. Thus, Petitioner fails to show that he is entitled to judgment as a matter of law on these claims, and the Court **RECOMMMENDS** that Petitioner's first motion for summary judgment (ECF No. 61) be **DENED**.

The Court received Petitioner's second motion for summary judgment (ECF No. 99) on November 8, 2019. Therein, he states that Respondents have "not made any showing sufficient to establish the existence of every element essential to defeat [Petitioner's] request for relief to vacate, set aside, and correct conviction and sentence." 2d Mot. for Summ. J. 2, ECF No. 99. In support, Petitioner again restates several of his arguments he raised in support of his motion to vacate and motion to supplement. *See id.* at 2-3. Because the Court recommends that Petitioner's motion to vacate and motion to supplement be denied on these same grounds, Petitioner fails to show that he is entitled to judgment as a matter of law on these claims, and the Court also **RECOMMMENDS** that Petitioner's second motion for summary judgment (ECF No. 99) be **DENED**.

III. Motion for Recusal

The Court received Petitioner's motion for recusal (ECF No. 87) on August 26, 2019. Therein, he seeks to recuse the undersigned pursuant to 28 U.S.C. § 455. Mot. for Recusal 1-3, ECF No. 87. Under 28 U.S.C. § 455, a magistrate judge "shall disqualify

himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The statute also enumerates certain other circumstances requiring a judge to disqualify himself. *Id.* at § 455(b)(1)-(5). Petitioner does not specify which statutory circumstances apply to this case. It appears, however, that Petitioner's primary complaint is that the undersigned is biased against him. Thus, he may rely on either subsection (a) or subsection (b)(1).

The standard under subsection (a) is objective and requires the Court to ask "whether an objective, disinterested lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain significant doubt about the judge's impartiality." *United States v. Patti*, 337 F.3d 1317, 1321 (11th Cir. 2003) (internal quotation marks omitted). In the Eleventh Circuit, "it is well settled that the allegation of bias must show that the bias is personal as distinguished from judicial in nature." *Bolin v. Story*, 225 F.3d 1234, 1239 (11th Cir. 2000) (internal quotation marks and citation omitted) (per curiam). As a result, "a judge's rulings in the same or a related case are not a sufficient basis for recusal," except in rare circumstances where the previous proceedings demonstrate pervasive bias and prejudice. *Id.*; *see also Liteky v. United States*, 510 U.S. 540, 555 (1994) ("[J]udicial rulings alone almost never constitute [a] valid basis for a bias or partiality recusal motion."); *McWhorter v. City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990) ("[The bias] must derive from something other than that which the judge learned by participating in the case.").

In support of his motion, Petitioner appears to argue that the undersigned should be recused because he has denied Petitioner's motions and has not granted Petitioner relief

even though Petitioner is innocent of the charges for which he was convicted. Mot. for Recusal 2-3. Petitioner has not pointed to any specific facts showing that any sort of extrajudicial bias existed, nor has Petitioner demonstrated that the undersigned's rulings exhibit "such a high degree of . . . antagonism as to make fair judgment impossible" or a bias toward Petitioner "so extreme as to display clear inability to render fair judgment." *See Liteky*, 510 U.S. at 551, 555. Although Petitioner claims the undersigned is biased because he denied Petitioner's motions, it is clear that "[r]epeated rulings against a litigant, no matter how erroneous and how vigorously and consistently expressed, are not a basis for disqualification of a judge on the grounds of bias and prejudice." *See Maret v. United States*, 332 F. Supp. 324, 326 (E.D. Mo. 1971). Additionally, Petitioner contends the undersigned has failed to rule in his favor, even though "this case is simple and there is no factual basis to support the conviction." Mot. for Recusal 3. Even assuming this is true, under 28 U.S.C. § 455(a), the bias required for a judge to recuse himself "must derive from something other than that which the judge learned by participating in the case." *McWhorter*, 906 F.2d at 678. Petitioner fails to show bias under 28 U.S.C. § 455(a).

28 U.S.C. § 455(b)(1) requires disqualification where the judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding[.]" "Recusal under this subsection is mandatory, because 'the potential for conflicts of interest are readily apparent.'" *Patti*, 337 F.3d at 1321 (quoting *Murray v. Scott*, 253 F.3d 1308, 1312 (11th Cir. 2001)). Again, Petitioner fails to allege any personal bias on the part of the undersigned. Any knowledge gained through the course of a judicial proceeding is not a "disputed evidentiary fact" that requires recusal. *United*

States v. Bailey, 175 F.3d 966, 969 (11th Cir. 1999). Instead, knowledge of disputed evidentiary facts must be gained through an extrajudicial source to warrant recusal. No such knowledge exists here. Because Petitioner has failed to allege facts requiring the undersigned to recuse himself, the Court **RECOMMENDS** that his motion for recusal be **DENIED**.

IV. Motion to Modify Conditions of Release

The Court received Petitioner's motion to modify conditions of release (ECF No. 103) on April 1, 2020. Therein, he argues "his constitutional rights are being violated due to mandatory involuntary civil commitment for sex offender treatment." Mot. to Modify Conditions of Release 3, ECF No. 103. In entering judgment against Petitioner, the Court issued the following special condition of supervised release:

> You shall participate in a mental health program to include any available sexual offender treatment as recommended by a psychiatrist or psychologist. Such treatment may include mental health counseling, residential treatment, outpatient treatment, and/or the prescription of psychotropic medications by a medical doctor. The U.S. Probation Office shall administratively supervise your participation in the program by approving the program and monitoring your participation in the program. You shall contribute to the costs of such treatment not to exceed an amount determined reasonable by the court approved 'U.S. Probation Office's Sliding Scale for Service,' and shall cooperate in securing any applicable third-party payment, such as insurance or Medicaid.

Judgment 5. Petitioner appears to interpret this language as a direction to the U.S. Probation Office to *recommend* that Petitioner participate in a mental health program. *See* Mot. to Modify Conditions of Release 2 (quoting this language and emphasizing "recommended"). He states that the U.S. Probation Office has erroneously "ordered that it is *mandatory* to take part in this treatment." *Id.* at 3 (emphasis added). To the extent

Petitioner argues this condition of supervised release is merely a recommendation, the Court **RECOMMENDS** that his motion be **DENIED**. This condition is mandatory. Judgment 5 ("You *shall* participate in a mental health program. . . ." (emphasis added)).

To the extent Petitioner seeks to modify this condition of release, his motion is properly construed as a motion pursuant to 18 U.S.C. § 3582.[4] A district court may "modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration of the term of supervised release." 18 U.S.C. § 3583(e)(2). In deciding whether to modify the conditions of supervised release, a court must consider the factors set forth in 18 U.S.C. § 3553(a). *Id.* As it pertains to the modification of the conditions of supervised release, the pertinent factors are:

> (1) the nature and circumstances of the offense; (2) the defendant's history and characteristics; (3) the need for deterrence; (4) the need to protect the public; (5) the need to provide the defendant with educational and vocational training, medical care, or correctional treatment; (6) the applicable guideline range; (7) any pertinent policy statements set forth by the Sentencing Commission; (8) the need to avoid unwarranted sentencing disparities; and (9) the need to provide restitution.

United States v. Aldrich, 785 F. App'x 688, 690 (11th Cir. 2019). "It is not necessary for a special condition to be supported by each § 3553(a) factor; rather, each factor is an independent consideration to be weighed." *Id.* (quoting *United States v. Tome*, 611 F.3d

[4] The Court declines to characterize Petitioner's motion as a new motion pursuant to 28 U.S.C. § 2255. Petitioner specifically attacks a particular condition of his release; not the validity of his conviction. *See United States v. Mosley*, 796 F. App'x. 1014, 1015-16 (11th Cir. 2020) (per curiam) (holding that the district court properly declined to characterize petitioner's motion attacking a condition of his supervised release as a motion pursuant to 28 U.S.C. § 2255). Additionally, if the Court construed Petitioner's motion as a motion pursuant to 28 U.S.C. § 2255, it would constitute either an unauthorized second successive petition or an untimely amendment to his pending motion to vacate.

1371, 1376 (11th Cir. 2010)). The decision to grant or deny a motion for modification rests in the discretion of the Court. *Id.* Based on the Court's review of the record, and after taking into account the factors set forth in 18 U.S.C. § 3553(a), the Court **RECOMMENDS** that Petitioner's motion be **DENIED**.[5]

V. Petitioner's Remaining Motions

A. Motion for Default Judgment

On February 1, 2019, the Court received Petitioner's motion for default judgment (ECF No. 64), which the Clerk docketed as a motion for ruling on his first motion for summary judgment (ECF No. 62). Therein, Petitioner "moves for Demand/Default Judgment on all claims." Mot. for Default J. 1, ECF No. 64. Petitioner, however, failed to move for the Clerk to enter default under Rule 55(a) of the Federal Rules of Civil Procedure before filing his motion for default judgment pursuant to Rule 55(b) of the Federal Rules of Civil Procedure. Additionally, Petitioner filed his motion on January 22, 2019.[6] *Id.* Pursuant to the Court's November 26, 2018, Order, Respondents had until January 25, 2019, to file their response. Order 1, ECF No. 60. Consequently, his motion is premature

[5] Petitioner also contends the challenged conditions of supervised release are unconstitutional. Mot. to Modify Conditions of Release 3-4. The Court, however, lacks jurisdiction to consider this argument. A motion under 18 U.S.C. § 3583(e)(2) "may not be used to challenge the legality or constitutionality of a supervised release condition." *United States v. McClamma*, 676 F. App'x 944, 948 (11th Cir. 2017).

[6] Although the Court did not receive Plaintiff's motion until February 1, 2019, Plaintiff signed the motion on January 22, 2019. "Under the prison mailbox rule, a *pro se* prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." *United States v. Glover*, 686 F.3d 1203, 1205 (11th Cir. 2012) (internal quotation marks omitted). "Unless there is evidence to the contrary, like prison logs or other records, we assume that a prisoner's motion was delivered to prison authorities on the day he signed it." *Id.*

for these two reasons. His motion is **DENIED**.

B. Motion to Correct Registration Error

On July 8, 2019, the Court received Petitioner's motion to correct registration error (ECF No. 75), which the Clerk docketed as a motion to alter judgment. Therein, Petitioner states that the U.S. Probation Office wrongfully instructed him to register as a sex offender prior to his incarceration, and he timely complied with the instruction. Mot. to Correct Registration Error 1, ECF No. 75. He contends this instruction was erroneous and that he should only have to register as a sex offender upon release from incarceration. *Id.* He requests that he be removed from the sex offender registry "until post conviction proceedings are finalized." *Id.* Because the Court recommends that his motion to vacate be denied, his post-conviction proceedings are now finalized, and his motion to correct registration error is now moot. In the alternative, Petitioner has been released from custody, so his motion is also moot for this reason. *See* Mot. to Modify Conditions of Release 1, ECF No. 103 ("Movant served time and was released on the January 28, 2020."). For these two reasons, Petitioner's motion is **DENIED AS MOOT**.

C. Motion for Bail Review

The Court received Petitioner's motion for bail review (ECF No. 81) on July 26, 2019. Therein, he requests bail pending review of his motion to vacate (ECF No. 59). Mot. for Bail Review 1-2, ECF No. 81. The Court received Petitioner's motion for review of Order denying motion for bond (ECF No. 97) on October 7, 2019. Therein, Petitioner again seeks bail pending habeas review. A habeas petitioner seeking bail during the pendency of a habeas application must show (1) a likelihood of success on the merits of a

substantial constitutional claim, and (2) extraordinary and exceptional circumstances rendering bail necessary to preserve the effectiveness of petitioner's habeas claims. *Gomez v. United States*, 899 F.2d 1124, 1125 (11th Cir. 1990) (citation omitted).

Petitioner states he is likely to succeed on the merits of his claims, and his case presents extraordinary and exceptional circumstances because he is innocent. Mot. for Bail Review 2; Mot. for Review of Order Denying Mot. for Bond 2-3, ECF No. 97. For the hereinabove reasons, however, the Court has recommended that Petitioner's motion to vacate be denied on all grounds. For those same reasons, Petitioner cannot show that he is likely to succeed on the merits of his claims. Therefore, he fails to satisfy his burden on his motion for bail. Additionally, Petitioner has been released from custody. *See* Mot. to Modify Conditions of Release 1, ECF No. 103 ("Movant served time and was released on the January 28, 2020."). Thus, in the alternative, his motions are now moot. Petitioner's motions are **DENIED**.

D. Motions for Return of Property

The Court received Petitioner's first motion for return of property (ECF No. 83) on August 5, 2019. Therein, Petitioner states that during his arrest, the arresting officers confiscated $250.00 in cash and a cell phone from Petitioner. 1st Mot. for Return of Property 1, ECF No. 83. Because his superseding information lacked a forfeiture notice, Petitioner claims he is entitled to his cash and cell phone. *Id.* at 1-2. Respondents filed a response (ECF No. 84) to Petitioner's motion on August 15, 2019. Respondents state that the Columbus, Georgia Police Department—whose officers arrested Petitioner and confiscated his property incident to arrest—has preserved these items as evidence in

Petitioner's case. Resp. to 1st Mot. for Return of Property 2, ECF No. 84. Thus, Petitioner is not entitled to these items at this time, and his motion is **DENIED**.

The Court received Petitioner's second motion for return of property (ECF No. 86) on August 26, 2019. He raises the same arguments he raised in his first motion and requests that the district judge review the denial of his first motion. 2d Mot. for Return of Property 1, ECF No. 86. It appears Petitioner's second motion is predicated on the belief that the undersigned denied his first motion. *See id.* ("Petitioner presents this motion upon the court and ask that the denial for the Return of Property Motion by Honorable Magistrate Judge Stephen Hyles ([ECF No.] 85) be reviewed by the District Judge."). However, the Court had not denied Petitioner's motion at that time. Because Petitioner raises no new ground in support of his second motion, that motion is **DENIED AS MOOT**. The Court received Petitioner's third motion for return of property (ECF No. 93) on September 23, 2019. This motion appears to be a duplicate of his second motion for return of property (ECF NO. 86). This motion is **DENIED AS MOOT** for the same reasons as his second motion for return of property.

E. Motion to Amend

The Court received Petitioner's motion to amend (ECF No. 88) his motion to vacate on August 29, 2019. Therein, Petitioner seeks to amend his motion to vacate in two ways: (1) he seeks to raise a new claim of ineffective assistance of trial counsel arising from counsels' alleged failure to withdraw his guilty plea and to proceed to trial on the original indictment, and (2) he seeks to again raise arguments concerning his pending ineffective assistance of trial counsel claim arising from counsels' advice that he plead guilty to the

superseding information. Mot. to Amend 1-7, ECF No. 88.

The Anti-Terrorism and Effective Death Penalty Act (hereinafter "AEDPA") was enacted primarily to put an end to the unacceptable delay in the review of prisoners' habeas petitions. "The purpose of the AEDPA is not obscure. It was to eliminate the interminable delays in the execution of state and federal criminal sentences, and the . . . overloading of our federal criminal justice system, produced by various aspects of this Court's habeas corpus jurisdiction." *Hohn v. United States,* 524 U.S. 236, 264-65 (1998) (Scalia J., dissenting). The AEDPA, which became effective on April 24, 1996, therefore instituted a time bar as follows:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> > (1) the date on which the judgment of conviction becomes final;
> >
> > (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if movant was prevented from making a motion by such governmental action;
> >
> > (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f).

A proposed amended claim to a motion pursuant to 28 U.S.C. § 2255 is subject to this same one-year limitations period. *Davenport v. United States*, 217 F.3d 1341, 1343

(11th Cir. 2000). Thus, a newly proposed amendment is barred unless it is timely filed or unless it relates back to a timely filed claim. *Id.* at 1344. Here, judgment was entered against Petitioner on July 19, 2018. *See* Judgment, ECF No. 54. Petitioner's conviction was final on August 3, 2018—when his time for filing a notice of appeal expired, fourteen days after the judgment was entered. Fed. R. App. P. 4(b)(1)(A). His one-year period of limitation pursuant 28 U.S.C. § 2255(f)(1) began to run on August 3, 2018, and expired on August 5, 2019. Therefore, when Petitioner filed his amendment on August 23, 2019 under the prison mailbox rule, he was over two weeks past the one-year limitations period. *See* Mot. to Amend 7 (showing Petitioner signed his motion on August 23, 2019). This Court is consequently without jurisdiction to review the merits of Petitioner's newly-raised claims unless they relate back to a timely filed claim. To the extent Petitioner seeks to restate arguments raised in his motion to vacate concerning his ineffective assistance claim arising from counsels' advice that he plead guilty to the superseding information, his motion is **GRANTED IN PART** because it relates back to a timely filed claim in his original motion to vacate. Those arguments have been considered above. However, to the extent he seeks to raise a new claim of ineffective assistance of counsel concerning counsels' failure to withdraw his guilty plea and proceed to trial on the original indictment, his motion to amend is **DENIED IN PART** because this is a new claim which does not relate back to a timely filed claim.

F. Motion as to Breach of Plea Agreement

The Court received Petitioner's motion as to breach of plea agreement (ECF No. 96) on October 1, 2019. Therein, Petitioner argues that his plea agreement constitutes an

enforceable contract, which the Government breached by wrongfully convicting him. Mot. as to Breach of Plea Agreement 1-5, ECF No. 96. He raises the same arguments he previously raised in support of his motion to vacate (ECF No. 59) and his first motion for return of property (ECF No. 83). *Id.* 1-4. For the hereinabove reasons, the Court recommends that both motions be denied on all grounds. Because Petitioner's motion as to breach of plea agreement relies on the same grounds, it is also **DENIED**.

G. Emergency Motion for Home Confinement

The Court Received Petitioner's emergency motion for home confinement (ECF No. 102) on December 31, 2019. Therein, he requests that the Court order that he be released to home confinement. Emergency Mot. for Home Confinement 1-2, ECF No. 102. Petitioner has been released from custody. *See* Mot. to Modify Conditions of Release 1, ECF No. 103 ("Movant served time and was released on the January 28, 2020."). Therefore, Petitioner's motion is **DENIED AS MOOT**.

CERTIFICATE OF APPEALABILITY

Rule 11(a) of Rules Governing Section 2255 Cases in the United States District Courts provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A certificate of appealability may issue only if the applicant makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If a court denies a collateral motion on the merits, this standard requires a petitioner to demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a court denies a collateral motion on procedural grounds,

this standard requires a petitioner to demonstrate that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 478 (2000). Petitioner cannot meet either of these standards and, therefore, a certificate of appealability in this case should be denied.

CONCLUSION

For the foregoing reasons, it is recommended that Petitioner's motion to vacate his sentence under 28 U.S.C. § 2255 (ECF No. 59), motions for summary judgment (ECF Nos. 62, 99), motion for recusal (ECF No. 87), and motion to modify conditions of release (ECF No. 103) be denied. Petitioner's motion to supplement (ECF No. 61) is granted, and his motion to amend (ECF No. 88) is granted in part and denied in part. His motion for default judgment (ECF No. 64), motion to correct registration error (ECF No. 75), motion for bail review (ECF No. 81), motions for return of property (ECF Nos. 83, 86), motion for review of motions for return of property (ECF No. 93), motion as to breach of plea agreement (ECF No. 96), motion for review of Order denying motion for bond (ECF No. 97), and emergency motion for home confinement (ECF No. 102) are denied or denied as moot. Additionally, a certificate of appealability should be denied. Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, within fourteen (14) days after being served with a copy hereof. The District Judge shall make a de novo determination of those portions of the Recommendation to which objection is made. All other portions of the Recommendation may be reviewed for clear error.

The parties are hereby notified that, pursuant to Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice."

SO RECOMMENDED, this 30th day of April, 2020.

/s/ STEPHEN HYLES
UNITED STATES MAGISTRATE JUDGE