APPENDIX A

Portion of the 28 U.S.C. §2255 submitted to the

United States District Court

for the Eastern District of Virginia

Docket: 4:19-cv-00112-AWA

ARGUMENT 1: INEFFECTIVE ASSISTANCE OF COUNCEL THE PROSECUTION BEYOND THE STATUTE OF LIMITATIONS FOR A NON-CAPITAL OFFENSE.

The singular charge of 18 U.S.C. § 2252A(a)(2) is governed under the protections of stale prosecution under 18 U.S.C. § 3282. It holds that a Non-Capital offense must be prosecuted within five years from the time the commission of the crime occurred and not nearly meerly from the detection of the offense.

This protection of a defendant's Due Process Rights is the final border of protection against a stale prosecution. A stale case may be deemed stale prior to any expiration of a Statute of Limitations. A reasonable attorney has the obligation to their client to address the issue of stale prosecution and/or violations of a Statute of Limitations against their client.

The fact that this was not addressed in motions from the Federal Public Defender's Office is Plain Error (Federal Rules of Criminal Procedures 52(b)).

The indictment stipulates the crime occured on or about April 13, 2008. The criminal act of Receipt of Child Pornography is a singular event on a particular time and date. Receipt is not construded as a continuous crime.

Receipt is further distinguishable from Possession because Possession is is a continuation of owning the contraband whereas Receipt does not have a possessionary aspect to the crime.

The City of Suffolk Police Department raided my residence on August 18, 2011. The seizure of computer equipment removed any possessionary aspect to the continuation of Possessing of contraband attributed to me.

The government filed the indictment on September 22, 2016. This is eight (8) years beyond the time the crime was committed [April 13, 2008]. It is also 61-months beyond the time of the warrant's execution. This exceeds the five (5) year limitation from the stale prosecution of a Non-Capital offense.

The fact that Defense counsel did not raise this objection to the Court to allow this Honorable Court to determine the Due Process Rights of the Defendnat is Ineffective Assistance of Counsel.

The fact a preindictment delay is not limited to just the Statute of limitations. The prejudicial preaccusation delay in this case is a violation against the Federal Rules of Criminal Procedures, Rule 48(b) which protects defendants from undue postaccusation delay.

Special Agent John Moughan from the FBI returned the vast majority of the computer equipment on or about October 1, 2013 [See Appendix I]. Mr. Moughan informed me that I should be expected to be arrested in time for Thanksgiving of that same year [within two (2) to three (3) months].

The arrest did not occur in 2013 but rather lingered three (3) years later. This exceeds the safeguards against preaccusation delay. The Statute of Limitations set forth to stop presecutions from the time of the actual occurrance of the crime [April 13, 2008]. This preaccusational delay burdens the Defendant to not be prepared with an attorney for an effective defense.

The delay burends the Defendant with prejudicial disadvantage by not being able to verify the digital evidence to substantiate a defense. The delay also burdens a defense by draining the

financial requirements to keep an attorney on retainer and the lack of funds makes it difficult to be able to hire expert witness forensics to verify the Government's case. Data is difficult to fully delete, however system failures and operating systems do fail. Not being able to have an adiquite post-accusational timeframe to be able to recover data that could have been presented for the Defendant's trial.

A week or a month delay after deleting a file can be 'undeleted'. After three (3) years, this ability to recover digital fragments of deleted information is virtually impossible. This burdens a defendant's ability to establish an affirmative defense in regards of presenting exculpitory evidence.

A defendant is also hindered by the post-accusational delay because of witnesses may not be presented to give testimony for the Defendant. In conjunction with the Defendant's brother, whom is now deceased, the Defendant's friend whom could have given testimony of Mr. Burton's conduct has also deceased. Her name was Venessa Rickerson. Other individuals in the Defendant's circle have moved without any forwarding address including his neighbor, Lizz Palmer, whom Mr. Burton repaired her computer on occasion and Mr. Burton's roommate in 2008 whose last known address is somewhere in Puerto Rico.

This delay violates my Due Process Rights on preaccusational delay. This delay was an intentional delay and allows for the tactical advantage of harrassment of the Defendant at his doorstep and the FBI office with substantial prejudice. See United States vs. Marion, 404 U.S. 307, 324, 30 L. Ed. 2d 468, 92 S. Ct. 455 (1971); Betterman vs. Montana, 578 U.S. ___, 194

L. Ed 2d 723, 136 S. Ct. 1613, No. 14-1457 (2016); United_State vs._Hall, 551 F.3d 257, 271 (4th Cir., 2009); United_States_vs. Inadi, 475 U.S. 387, 89 L. Ed. 2d 390, 106 S. Ct. 1121 (1986); Mathies_vs._United_States, 374 F.2d 312, 314-15 (D.C. Cir., 1967).

A Statute of Limitations is only the final step for a case to be dismissed for being stale. "The statute of limitations is 'the primary guarantee against bringing overly stale criminal charges';" United_States_vs._Cornielle, 171 F.3d 748, 751 (2nd Cir., 1999) (quoting United_States_vs._Marion, 404 U.S. 307, 322, 30 L. Ed. 2d 468, 92 S. Ct. 455 (1971)), "actions brought within the limitations period will rarely be dismissed." This does not mean that a claim of stale prosecution would be dismissed prior to the expiration of the Statute of Limitations.

The Court may attempt to conclude that this offense [18 U.S.C. § 2252A(a)(2)] which falls within Chapter 110 of Title 18 is not governed under 18 U.S.C. § 3282 but rather the limitless exception of statute 18 U.S.C. § 3299.

There is no binding case law in the Fourth Circuit nor any published opinion raised in the Eastern District of Virginia on the applicability of § 3299 in Chapter 110 crimes only.

As an example, in a production case of child pornogoraphy [18 U.S.C. § 2251], which falls within Chapter 110, is not governed under § 3299 either but rather the exemption of 18 U.S.C. § 3283. The offense of producing child pornography involves the "Sexual Abuse" of a child as that term is defined in 18 U.S.C. § 3283, United_States_vs._Carpenter, 680 F.3d 1101 (9th Cir., 2012).

In reference to 18 U.S.C. § 3299, the only circuit that mentions it is United States vs. Coutentios, 651 F.3d 809 (8th Cir., 2011). This case is not binding ~~to~~ on the Fourth Circuit and within the case, the charge of Possession of Child Pornography was vacated. This ruling alludes to the assertion that § 3299 is not applicable to pornography cases alone.

In a pornography case, 18 U.S.C. § 3282 is the applicable Statute of Limitations. In United States vs. Richards, 301 Fed AppX 480 (6th Cir., 2008) discusses that the Statute of Limitations is an affirmative defense for § 2252A cases. Mr. Richards case differs from the Defendant's because Mr. Richard kept physical contraband images in a storage locker that allowed him the ability to recover said contraband within that pivotal five (5) years of the applicable 18 U.S.C. § 3282 Statute of Limitations stop date.

The Defendant's case differs on the account the government took all contraband over five years and one month (61-months) before they indicted me. All of the computer equipment was seized on August 18, 2011 and it eliminated any possessionary access to the contraband.

In conjunction with the constitutional argument of the basic Due Process error in the law, the statute is grammatically incorrect in its application to pornography cases alone. The statute must be ready very carefully to realize that the language utilized means that a combination of an element of Abduction of a Minor **AND** any Sex Offense are required to have § 3299 to be applicable in a case.

The word **AND** is an important word and its meaning grammatically means that 18 U.S.C. § 1201 (Abduction involving a minor victim)

is a required element to make § 3299 applicable. I never kidnapped nor abducted another individual, especially a child.

The exception of a person's Due Process Rights envoked by 18 U.S.C. § 3299 is both unconstitutional at its core and the grammatical wording incorrectly does not allow it to be applicable. The language of the law illustrates that Congress intent did not mean that cases similar to mine falls under the provision of § 3299.

> **18 U.S.C. § 3299 - Child Abduction and Sex Offenses:** Notwithstanding any other law, an indictment may be found or an information instituted at any time without limitation for any offense under section **1201** [18 USCS § 1201] involving a minor victim, **and** for any felony under chapter 109A [18 USCS §§2241 et seq.], **110** [18 USCS §§2251 et seq.] (except for section [sections] 2257 and 2257A [18 USCS §2257 and 2257A]), **or** 117 [18 USCS §§2421 et seq.], **or** section 1591 [18 USCS §1591]. **(emphasis added)**

The grammar of the statute from the Adam Walsh Child Protection and Safety Act of 2006 was written in contemporary Englsih. If Congress would have wanted individual crimes applicable to Chapter 110 items like § 2252A that the Defendant is arguing, then Congress would have utilized either an '**and/or**' or just an '**or**' when they drafted the law. The fact that they utilized the word '**and**' between §1201 and 109A, 110, 117 **or** §1591 is significant and means that §1201 is a required element to make a provision under Chapter 110 [like § 2252A] to be allow § 3299 to be applicable.

Multiple courses for the meaning of the word '**and**' is attached [See Appendix A]. This reference is provided to assist this Honorable Court evaluate the grammatical nuances of this basic verbage.

These three different sources for the meaning of 'and' is sufficient to allow this Honorable Court to interpret the grammatical meaning of the context of § 3299 with an act of abduction / kidnapping of a minor victim during a defendant's criminal history as being required in addition to any of the other crimes cited after the word 'and' to be applicable.

The words in a statute have meanings. These meanings are important to clarify as illustrated in Atlantic Cleaners & Dryers vs. United States, 286 U.S. 427, 76 L. Ed. 1204 (1932).

In addition to the grammatical verbage of § 3299, the intent of Congress with the enactment of Adam Walsh Child Protection and Safety Act, Public Law 109-248, Title II, §211(1), 120 Stat. 616 (July 27, 2006) is clear. The law was a tribute to the abduction of John Walsh's son, Adam Walsh. In the same bill, Title I, §102, 120 Stat. 590 states a list of minors who were also victims of abduction [under 34 U.S.C. § 20901]. These unfortunate lost souls include: Jacob Wetterling, Megan Nicole Kanka, Jetseta Gage, Jessica Lansofrd, Christy Ann Fornoff, Polly Klass, Jimmy Ryce, Amanda Brown, Elizabeth Smart, Molly Bish, Charlie Brucia, Sarah Lunde, and Samantha Runnion. These innocent minors were abducted in conjunction with the other offenses that was committed against them and illustrates the intention of Congress.

The tragic nature of these crimes prompted Congress to specify abduction as a required element to make § 3299 applicable to a Sexual Offense. For these reasons, the Prosecution should never have brought these charges against the Defendnat and it was Ineffective Assistance of Counsel for not Motioning for a dismissal.

APPENDIX B

Motion submitted to the Court of Appeals for the Fourth Circuit No. 21-7284

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
OF THE NEWPORT NEWS DIVISION

UNITED STATES OF AMERICA Plantiff,	)	
vs.	)	DOCKET No: 4:16-cr-0071-AWA
JOHN MOSES BURTON IV Defendant/Movant.	)	

NOTICE TO APPEAL THE COURTS DECISION TO DENY
THE CERTIFICATE OF APPEALIBILITY .

COMES NOW John Moses Burton IV, the Defendant, brings forth this Notice of Intent to Appeal the district courts decision to deny the Certificate of Appealibility concerning the first argument concerning the language of the Statute of Limitations governed by 18 U.S.C. §3299 never adjudicated by this circuit or any other circuit beyond its Ex Post Facto application towards a case but not the actual language of the statute itself.

I hereby give this notice.

Respectfully Submitted

John Moses BurtonIV
90387-083
Federal Satellite Low Elkton
P.O. Box 10
Lisbon, Ohio 44432-0010

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT OF APPEALS

UNITED STATES OF AMERICA Plantiff, vs. JOHN MOSES BURTON IV Defendant/Movant.	)	E.D. VA DOCKET: 4:16-cr-00071 CASE No 21-7284

MOTION FOR FIRST IMPRESSION REGARDING THE CONJUNCTIVE VERSUS THE DISJUNCTIVE INTERPRETATION WITHIN TITLE 18, UNITED STATES CODE §3299 IN RESPECT HOW IT APPLIES TO OFFENDERS LIKE MYSELF.

HERE COMES John Moses Burton IV, Defendant, respectfully requesting the Fourth Circuit of Appeals to grant this Certificate of Appealability regarding the adjudication and applicablility of the conjunctive interpretation concerning 18 U.S.C. §3299 aa it applies to my case. To the best of my knowledge, no circuit has addressed this particular issue concering the conjunctive nature of the §3299 language.

Being the first appellate court to address this particular concern of the language contained within the Adam Walsh Child Protection and Safety Act of 2006, Public Law 109-248, July 27, 2006, 120 Stat.616. The actual verbage of the law is as the following:

> Notwithstanding any other law, an indictment may be found or an information instituted at any time without limitation for any offense under section 1201 involving a minor victim, and for any felony under chapter 109A, 110 (except for section 2257 and 2257A), or 117, or section 1591.

I emphasized the conjunctions that are in controversy in this section. I conceed that the crime that I was convicted, Receipt of Child Pornography, 18 U.S.C. 2252A(a)(2), is an offense listed under chapter 110 which is expressly indicated within this section. I contend that the conjunction "and" has a conjunctive meaning which means that a person would be required to ahve been involved in a form of kidnapping of a minor victim that was not of their own offspring along with one or more of these other listed provisions cited (under chapters 109A, 110, or 117, or §1591).

This law was inspired by the kidnapping of Adam Walsh and unfortunately other minor victims which created the "Stranger Danger" campaign in the 1990s. This law does not, by any means, imply any sort of reduction of a statute of limitations nor if its passage did not occur, the statute of limitations would not have decreased. This law merely extended the federal government to pursue an abduction decades after the discovery of a crime that was committed.

An example of why similar laws were in place was from the henious acts attributed to Danny Heinrich, who abducted Jacob Wetterling, sexually assaulted him and ultimately murdered that innocent life. Decades later, he was caught presumably because of a child pornography detection but subsequently confessed of this brutal act.

I believe that a majority of persons who have acted on these herendious and eggregious acts have also been involved with the sharing of inappropriate materials (child pornography). This

is not to say people who have child pornography is likely to physically assault a minor but rather the correlation is a one way street of people who have assaulted a child sexually would most likely have been involved with the transmission of child pornography.

§3299 language "Notwishstanding any other law..." illustrates that its passage or if it never would have passed, would not interfer with other Statute of Limitations previously imposed. Another statute, 18 U.S.C. 3283, which deals with sexual assault, still allows a victim to confront the perpetrator for 10 years or until their 25th birthday, whichever is longer. §3299, with an addition to an abduction, would extend this sexual assault to nearly 80 years. But without §3299, the original limitation would still be in place.

But in fact, neither 3299 nor 3283 applies in my case but rather 3282 is a more appropriate limitation of 5 years because the crime was non-capital in nature, did not involve in the phsyical sexual assault by a defendant. Sexual assault is a serious crime that needs to be dealt with tough but fair policies and laws. Demostration that any sexual assault, including that of a minor does not fall into the capital punishment aspect, the Supreme Court ensured that sexual assaults of a minor who did not intend the victim to be murdered. This aspect is summed up under Kennedy v. Louisiana, 554 U.S. 407 (2008).

§3299 has an unconstitutional aspect that deprives a person of due process rights. The intent of having a statute of limitations

is designed to "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by a loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise" United States v. Kubrick, 444 U.S. 111 at 117 (1979).

I have at least three witnesses that are now deceased that could have colloberated a rejection of the government's claims. This includes images of conscenting women found on my cellular phone that were legal in nature. As stated earlier, this provision, §3299, could allow prosecution decades (80 years later) for the offense that I was convicted. Besides witnesses and fading memories, electronic devices have a limited lifespan with its own serious impairment for the loss of evidence for both the prosecution and defense of an individual.

The depraving of a defendant is a grave situation of a criminal justice system that the foundation was not built upon. Former Attorney General Eric Holder once said that the great promise of our nation's federal sentencing laws is to ensure that their administration is "tough but fair". Remarks Prepared for Delivery by Attorney General Eric Holder to the D.C. Court of Appeals Judicial Conference, June 19, 2009.

I expalined most of these views in my 28 U.S.C §2255 motion that I am appealing here (section I am referring is enclsoed for your convience) is submitted to the district court's ECF No. 55 at 18. The more you look through the Adam Walsh Act, I see no other provisions of adding the conjunction 'and' within a serious of statutes and/or chapters that are referenced (e.g

sections within the act, 111, 216 and 305 (referring to 18 U.S.C. §§3142 & 1467). This illustrates that the conjunction 'and' was purposeful and meant in addition to unlike these other sections that only utilized the conjunction 'or' to be disjunctive.

With the fact that no other circuit has adjudicaated this meaning and I stipulate that §3299 does not extend to civil cases as indicated by Hardden v. St. Clair Cty, No 2:16-cv-13904 (E.D. Mich., Dec 4, 2017). But more importantly, in criminal matter against Harold Randolph Martin, Count 11, Mr. Martin's argument is persuasive and this count was dismissed despite of §3299, United States v. Pittman, No. 13-cr-4510-JAH (S.D. Cal, Aug 11, 2015) This indicates that even though majority of judges have utilized §3299 retroactively in their cases. The language itself has not been addresssed.

This still goes back to the Fifth Amendment's Due Process Clause that requires dismissal of an indictment if delay prior to the indictment "caused substantial prejudice to [the defendant's] rights to a fair trail" and "was intentional device to gain tactical advantage over the accused" United States v. Harris, 551 Fed App'x 699 (4th Cir., Jan 15, 2015) (citing United v. Marion, 404 U.S. 307 at 324 (1971). I would have had my late brother who would have been able to testify that the computer equipment were from his collection, and that testimony would have exaunerated me.

Also, because no other circuit had adjudicated the conjunctive or disjunctive nature of this particular statute, I draw this courts attention to other statutes that deals with the conflicting

meanings of 'and'. Recently, under United States v. Lopez, 998 F.3d 431 (9th Cir., May 23, 2021), it found that the word 'and' meant 'and', when dealing with the Safety Valve of of §3553(f)(1). I would be remiss if I didn't mention that United States v. Garcon, No. 19-14650 (11th Cir., May 18, 2021) disagreed and actually inferred the meaning of 'and' to represent 'or'.

This conjunctive versus disjunctive nature of these conjunctions have been adjudicated previously in this circuit for §3663A(c)(1). In this case, the meaning does actually mean the conjuctive 'and'. United States v. Diaz, 865 F.3d 168, 174 (2017) for the Mandatory Victims Restitution Act meaning of the conjunction 'and'.

I hope this case is fairly straight forward issue of the grammatical use of the conjunction 'and' in this manner with the Congressional intent to neither increase nor decrease the statute of limitations of just those charged with child pornography cases but rather extend that liability for those who were kidnapped for years if not decades before the person, or unfortunately a body, is located along with these other horrendious crimes stated. The Constitutional aspect of waiting decades until being charged and arrested does disparage a defendant's chance in bringing a fair challenge. I impore you to take all of these considerations and GRANT this certificate of Appealability from the District Court of Eastern Virginia for a full adjudication and clarification. In doing so, I also hope if oral arguments are needed, counsel would be provided to articulate the position.

Respectfully Submitted,

11 August 2021

John Moses Burton
90387-083
Federal Satellite Low Elkton
P.O. Box 10
Lisbon, OHIO 44432-0010

CERTIFICATE OF SERVICE

I certify on this 12th day of August, 2021, I delivered using postage pre-paid first class mail to staff mail room utilizing the Bureau of Prisons legal mail policy this and a true and exact copy for all the foregoing persons listed below to ensure timeliness. I further respectfully request that the clerk of the court to electronically disseminate teh foregoing to all relevant parties attached to this case concerning this Notice of Appeal of the Eastern District of Virginia's denial of my §2255 motion.

Copies sent to:

Clerk of the Court, Patricia Conner
Court of Appeals for hte Fourth Circuit
1100 East Main Street, Suite 501
Richmond, VA 23219-3517

United States Assistant Attorney
Lisa K. Man, esq.
G Zachery Terwilliger, esq
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Foundation Plaza Three
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Clerk of the Court
For the Eastern District of Virginia
600 Granby Street
Room 193
Norfolk, VA 23510-1915

This document was signed and verified on this 11th day of August, 2021

Respectfully Submitted,

John Moses Burton IV
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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
INFORMAL BRIEF FOR HABEAS AND SECTION 2255 CASES

No. 21-7284, US v. John Burton, IV
4:16-cr-00071-AWA-RJK-1, 4:19-cv-00112-AWA

1. **Declaration of Inmate Filing**

An inmate's notice of appeal is timely if it was deposited in the institution's internal mail system, with postage prepaid, on or before the last day for filing. Timely filing may be shown by:

- a postmark or date stamp showing that the notice of appeal was timely deposited in the institution's internal mail system, with postage prepaid, or
- a declaration of the inmate, under penalty of perjury, of the date on which the notice of appeal was deposited in the institution's internal mail system with postage prepaid. To include a declaration of inmate filing as part of your informal brief, complete and sign the declaration below:

Declaration of Inmate Filing

Date NOTICE OF APPEAL deposited in institution's mail system: 12th August 2021

I am an inmate confined in an institution and deposited my notice of appeal in the institution's internal mail system. First-class postage was prepaid either by me or by the institution on my behalf.

I declare under penalty of perjury that the foregoing is true and correct (see 28 U.S.C. § 1746; 18 U.S.C. § 1621).

Signature: [signature] Date: 15 Sept 2021

[***Note to inmate filers***: *If your institution has a system designed for legal mail, you must use that system in order to receive the timing benefit of Fed. R. App. P. 4(c)(1) or Fed. R. App. P. 25(a)(2)(A)(iii).*]

2. **Jurisdiction**

Name of court from which you are appealing:

Eastern District of Virginia

Date(s) of order or orders you are appealing:

August 5th, 2021

3. **Certificate of Appealability**

Did the district court grant a certificate of appealability? Yes [ ]No[X]

If Yes, do you want the Court of Appeals to review additional issues that were not certified for review by the district court? Yes [ ]No[ ]

If Yes, **you must** list below the issues you wish to add to the certificate of appealability issued by the district court. If you do not list additional issues, the Court will limit its review to those issues on which the district court granted the certificate.

4. **Issues on Appeal**

Use the following spaces to set forth the facts and argument in support of the issues you wish the Court of Appeals to consider on appeal. You must include any issue you wish the Court to consider, regardless of whether the district court granted a certificate of appealability as to that issue. You may cite case law, but citations are not required.

Issue 1. In light of Toussie v. United States, 397 U.S. 112 (1970), isn't 18 U.S.C. §3299 unconstitutional of basic due process rights.

Supporting Facts and Argument.

The offense (18 U.S.C. 2252A) was conducted in Apr 2008, with a search warrant for an unrelated incident conducted on August 18, 2011, but the indictment did not occure until September 22, 2016 which is eight and half years after the offense and five years, 1 month from the gathering of the evidence. Lifespan of a typical electronics for it being outdated is three years. The delay in this case allows ferment endlessly by passage of time to obscure and minimize danger of defendant to provide protection because of the sheer lapse of time and witnesses (including electronics) from memory loss.

Issue 2.

The grammatical language of 18 U.S.C. 3299 with its congressional intent indicates the conjuctive 'AND' is important to the statute.

Supporting Facts and Argument.

The Adam Walsh Act, Public Law 109-248 was dedicated to several victims of kidnapping and the intent of the law was not to reduce any statute of limitations for any sex offense including child pornography but rather expand the limitations when conducted along side of an offense of abduction also. The law indicates briefly:

> ... and indictment may be found... at any time without limitation for any offense under section 1201 involving a minor victim, **and** any felony under chapter 109A, 110 ..., **or** 117, **or** section 1591.

These conjunctions grammatically indicate the word and is conjunctive.

Issue 3.

Supporting Facts and Argument.

Issue 4.

Supporting Facts and Argument

5. **Relief Requested**

Identify the precise action you want the Court of Appeals to take:

Vacate the sentence and Remand the case to the District Court to Dismiss the charges

6. **Prior appeals (for appellants/petitioners only)**

A. Have you filed other cases in this Court? Yes [x] No [ ]

B. If you checked YES, what are the case names and docket numbers for those appeals and what was the ultimate disposition of each?

United States v. John Moses Burton IV, No. 17-4524

Affirmed the District Court

No. 21-6967: Still pending

Signature

[Notarization Not Required]

John Moses Burton

[Please Print Your Name Here]

CERTIFICATE OF SERVICE

****

I certify that on 16 Sept 2021 I served a copy of this Informal Brief on all parties, addressed as shown below:

Signature

NO STAPLES, TAPE OR BINDING PLEASE

IN THE UNITED STATE COURT OF APPEALS

FOR THE FOURTH CIRCUIT OF APPEALS

UNITED STATES OF AMERICA Plaintiff, vs. JOHN MOSES BURTON IV Defendant/Movant.	No. 21-7284 E.D. VA Docket: 4:16-cr-00071-AWA-RJK-1, 4:19-cv-00112-AWA

INFORMAL BRIEF FOR HABEAS AND SECTION 2255 CASES WITH RESPECT TO THE CONSTITUTIONALITY OF 18 U.S.C. §3299 ALONG WITH THE GRAMMATICAL INTERPRETATION OF THE STATUTE.

HERE COMES John Moses Burton IV, Defendant, respectfully requesting the Fourth Circuit of Appeals to Grant this Certificate of Appealability regarding the questions of the constitutionality of having a limitless Statute of Limitations for a non-capital offense where the defendant had zero interaction with a victim nor caused any bodily harm to an individal. The second question broken into two segments regarding the concern of the grammatical language used for the limitless aspect of title 18, United States Code, section 3299.

ARGUMENT ONE

A Statute of Limitations is designed to protect individuals from having to defend themselves against charges when basic facts have become obscured by passage of time and to minimize danger of official punishment because of facts in far-distant past, and such time limit may also have salutary effect of encouraging law enforcement officials to promptly investigate suspected

criminal activity. Toussie vs. United States, 397 U.S. 112 (1970).

In criminal statutes of limitations are to be liberally interpreted in favor of repose. United States vs. Marico, 404 U.S. 307 (1971). With the Statute of Limitations were founded upon liberal theory that prosecutions should not be allowed to ferment endlessly in files of government to explode after witnesses and proofs necessary to protection of accused had by sheer lapse of time passed beyond availability. United States vs. Elipoulos, 45 F.Supp 777 (Dist NJ, 1942).

Along with persons being subject to loss of memory, computer hardware have a limited life expenctancy. For instance, hard drive reliability has a projected industry standard life of approxiamtely five years according to IN RE Seagate Technology LLC Litigation Consolidated Action, 326 F.R.D. 223 @ 226 (N.D. Cal., July 5, 2018). Seagate experienced issues with their drives with premature failure with a survival rate of only 43 percent in April 2011 which increased to 70 percent in April 2012 despite the fact the industry hard drive standard should be 90 to 99 percent reliability.

Another computer failure are motherboards including the issue with failed capacitors experienced with Dell Inc. OptiPlex systems. A significant number of Dell OptiPlex PCs had a premature failure rate as indicated by Advanced Internet Technology Inc. vs. Dell Inc., No: 5:07-cr-00426-H (N.D. NC, 2009) with additional documents unsealed on May 21, 2010.

Included in the items seized at my residence included both Seagate hard drives and a Dell OptiPlex PC.

The premature hardware failutre being an expose in a New York Times article in June 2021 referenced in the Statler vs. Dell Inc., 775 F.Supp 2d 474 (E.D. NY., March 30, 2011) case. The premature failures demostrate a defendant's inability for evidenciary defense which allows the government an unlimited amount of time to prosecute. Hardware industry standards show the physical deficiency for a person to provide a proper defense beyond five years.

In addition, witnesses, such as my late brother who could have testified the computer hardware were given to me with any number of items already downlaoded to their memory. Without being able to provide testimony of these individual(s) along with my personal counsel telling my mother to "get rid" of the rest of my computer systems, compromised my defense capabilities. It was ineffective assistance of counsel **not** to challenge the Statute of Limitations during pretrial.

ARGUMENT TWO

The grammatical pretense of the statute in question is a concerning linguistic evaluation. The two part portion about the meaning of the conjunctive usage of '**AND**'. In a normal usage, the conjunctive relationship within the phrase like the one written in 18 U.S.C. §3299 indicates an offense of an abduction of a minor (§1201) as a requirement to any of the following chargest — Chapter 109A (sexual assault), 110 (Child Pornography),

or 117 (Enticement and/or cohortion), **or** section 1591 (child prostitution / sex trafficking).

I concede that the offense, 18 U.S.C. § 2252A is an offense that falls within chapter 110 as cited above. However, the inclusion of that offense is predicated on the commission of an offense of kidnapping also. This case has no instance of any abductions or kidnapping.

As the Court may be aware, the word '**AND**' recently been found to have a conjunctive meaning within the statute 18 U.S.C. § 3553(f)(1) when dealing with the Safety Valve. And plainly means and. United States vs. Lopez, 998 F.3d (9th Cir., May 23, 2021).

The Eleventh Circuit disagreed with the same statute and decided that the 'and' were to be interpretated disjunctively. United States vs. Garcon, 997 F.3d 1301 (11th Cir., May 18, 2021).

This creats a circuit split based on the same singular word. The Fourth already found the '**AND**' conjunction in regards to the Mandatory Victims Restitution Act found in 18 U.S.C. § 3663A(c)(1) also has the plain meaning of '**and**'. United States vs. Diaz, 865 F.3d 168 at 174 (4th Cir., 2017).

The second part of the grammitical aspect is the intention of the Adam Walsh Child Protection and Safety Act of 2006, Public Law 109-248, 120 Stat. 616, July 27, 2006. As previously stated in the § 2255, 18 U.S.C. §3299 was written in the Adam Walsh Act with the Act written in response of a dozen children for whom

were victims of an abduction. The law never reduced or rolled back any sort of statute oflimitations for any offense. The beginning of §3299 starts with "Notwithstanding of any other law" meaning if other laws are in effect, it will not interfere. The law only increases the statute of limitations of these non-capital offenses to require an incident of a kidnapping of a minor too. By no means would it reduced the previous establishment of another statute of limitations (18 U.S.C. §3282) or imply that in anyway as the government has illuded to in its response to the § 2255.

Any crime against a child is a tragic ordeal. The appropriate laws should deal with such offenders appropriately but not by interpreting a law that is both unconstitutional and written in such a manner that does not actually apply to a defendant but apply it anyways. No circuit has considered the constitutionality of the limitless prosecution of these crimes but rather, referenced if the statute may be applied retroactively or not. This would be the first time a circuit tackled thsi particular statute directly (and not in passing).

IN CONCLUSION

The issue affects defendants against overzealous prosecution without consideration of a person's Due Process Rights. This would allow to restore a defense preparation against both memory lost of alibi witnesses and of lost electronic evidence.

This Court should GRANT this Cirtificate of Appealability

in regards to this segment of this §2255 appeal. Please keep in mind that the offense was suppose to have occured in 2008. This was eight years before the indictment and an excess of five years from when the search warrant was executed that gathered the evidence. What should limit the governemnt to come after a person with similar circumstances 20 or even 50 years later? The technology today is not compatible with technology available 50 years ago and standards have changed within the last 10 years of society let alone 50 years.

The crime is tragic with the portrayed events within the images. The governemnt should take steps to remove the content rather than just prosecute the people for self promotions and advancements similar to the Senate hearing held on 15th of September 2015 with sexual survivors of Nassar assaults.

The government during its investigation subpeanaed the Internet Service Provider (ISP) for my Internet Protocol (IP) address. With that information, its easy to diduce they were investigating my network activity. The government proclaims I "hide" my location with stealth technology. That is quite impossible with them surveying the actual connection to the world. If you look at similar to a stake out in front of a house, law enforcement can view the coming and goings to a house and which car is leaving the garage. It would not matter if I walked, used a bicycle or drove any number of vehicles, each method would be detected despite any "privacy software" the government may claim that was being utilized at my residence.

Notwithstanding of everything presented hereforth, I appreciate this honorable Court to make the difficult decision to issue a Certificate of Appealability and ultimately Vacate the sentence with a Remand back to the District Court for a Dismissal.

Respectfully Submitted,

John Moses Burton IV
90387-083
Federal Satelltie Low Elkton
P.O. Box 10
Lisbon, OH 44432-0010

C E R T I F I C A T E O F S E R V I C E

I certifity on this 16th day of September, 2021, that I delivered this foregoing motion to the Bureau of Prisons mailroom with the proper postage to be timely and compliant with the rules of this Court concerning the Appeal of my 2255.

I copied a true and exact copy and mailed a copy to the foregoing opposition:

Jared A. Hernandez
Office Of the United States Attorney
Fountain Plaza 3
721 Lakefront Commons
Suite 300
Newport News, VA 23606

Signed on this 15th day of September, 2021.

Respectfully,

John Moses Burton IV

APPENDIX C

UNITED STATES DISTRICT COURT OF THE EASTERN VIRGINIA (opinion)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

FILED
AUG - 5 2021
CLERK, U.S. DISTRICT COURT
NORFOLK, VA

JOHN MOSES BURTON, IV,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Case No. 4:16cr71

ORDER

Pending before the Court is a Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by Petitioner John Moses Burton, IV (ECF No. 94), and related Motions for Discovery (ECF No. 97) and Motion to Unseal Case Documents (ECF No. 99). For the following reasons, Petitioner's Motion to Vacate (ECF No. 94) is **DENIED**. Because his Motion to Vacate is denied, his accompanying Motion for Discovery (ECF No. 97) and Motion to Unseal Case Documents (ECF No. 99) are **DENIED as moot.**

I. BACKGROUND

A. Facts

On July 22, 2011, a woman reported suspecting that John Moses Burton, IV, ("Petitioner") had taken a photograph up her skirt using a cell phone. Statement of Facts at 1, ECF No. 54. On August 18, 2011, officers from the Suffolk Police Department executed a warrant at Petitioner's residence to search for evidence of unlawful photographing of others. *Id.* The officers recovered electronic devices that contained

explicit images and videos, including child pornography. *Id.* Petitioner also had file-sharing programs located on his computer's hard drive. *Id.* at 2.

On January 28, 2013, law enforcement obtained a warrant for the search of Petitioner's seized electronic storage devices. *Id.* at 1. Between May 17, 2013, and April 20, 2016, Virginia State Police completed a forensic analysis on the media seized from Petitioner's residence, discovering over 600 images of child pornography as defined under 18 U.S.C. § 2256 (2)(A)–(B) and (8). *Id.* at 2.

On September 26, 2016, agents of the Federal Bureau of Investigation arrested Petitioner on a federal warrant. *Id.*; *see* Temp. Det. Order, ECF No. 6. Petitioner admitted that he received an image that depicted child pornography as detailed in Count One of the Indictment. *See* Indictment, ECF No. 1. Petitioner further admitted that the image had been transported in interstate and foreign commerce via the internet, an interconnected network that crosses state and national borders. Statement of Facts at 2, ECF No. 54.

B. Procedural History

On November 8, 2016, Petitioner raised a claim in a Motion to Suppress arising from the Fourth Amendment to the United States Constitution. *See* Mot. to Suppress, ECF No. 17. The Court denied Petitioner's Motion on April 7, 2017. *See* Order on Mot. to Suppress, ECF No. 48.

On April 21, 2017, Petitioner pleaded guilty to Count One of the Indictment, which charged him with Receipt of Child Pornography pursuant to 18 U.S.C. § 2252A(a)(2). *See* Plea Agreement at 1, ECF No. 53. As part of the Plea Agreement,

Petitioner preserved his right to appeal this Court's denial of his Motion to Suppress. *Id.* at 4. On July 21, 2017, this Court sentenced Petitioner to 120 months' imprisonment and a life term of supervised release on Count One. Judgment at 2–3, ECF No. 72.

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit on August 9, 2017. Notice of Appeal, ECF No. 76. The Fourth Circuit affirmed the judgment on December 19, 2018. Fourth Cir. Judgment, ECF No. 89. On January 2, 2019, Petitioner filed for a stay of mandate pending a petition for certiorari pursuant to Federal Rule of Appellate Procedure 41(d)(1). Pet. Stay Mandate, ECF No. 90. The Fourth Circuit denied Petitioner's request for rehearing *en banc* on January 29, 2019. Fourth Cir. Den. Reh'g, ECF No. 91. On February 6, 2019, the Fourth Circuit issued its mandate for final judgment. Fourth Cir. Mandate, ECF No. 92. Petitioner then filed a petition for a writ of certiorari to the United States Supreme Court on February 27, 2019. *United States v. Burton*, No. 17-4524, 756 F. App'x 295 (4th Cir. 2019), Pet. Cert., ECF No. 64. The Supreme Court denied certiorari on April 29, 2019. *Id.*, Den. Pet. Cert., ECF No. 65.

Petitioner filed the instant Motion pursuant to 28 U.S.C. § 2255 on November 8, 2019, requesting a dismissal of Count One and a full resentencing.[1] *See generally* Mot. to Vacate, ECF No. 94.

[1] Petitioner requested that all nine Counts be dismissed; Counts Two through Nine had been dismissed already as part of the Plea Agreement. Mot. to Vacate at 16, ECF No. 94; Judgment at 6, ECF No. 72.

This Court appointed counsel, who filed supplemental briefing on April 14, 2020. Suppl. Mem. Mot. to Vacate, ECF No. 110. The Government filed its response on July 10, 2020. Gov't Resp. Mot. to Vacate, ECF No. 115. The matter is now fully briefed and ripe for resolution.

II. TIMELINESS

Petitioner's Motion is timely. The judgment of conviction under § 2255 becomes final when the United States Supreme Court denies a petition for a writ of certiorari. *See* § 2255(f)(1); *Clay v. United States*, 537 U.S. 522, 527 (2003) (finality under § 2255 attaches when a court "affirms a conviction on the merits on direct review *or denies a petition for a writ of certiorari*, or when the time for filing a certiorari petition expires") (emphasis added). Petitioner's § 2255 Motion was filed in November 2019, within one year of the Court's denial of certiorari in April 2019. *See* Mot. to Vacate, ECF No. 94; Den. Pet. Cert., ECF No. 65.

III. SECTION 2255 STANDARD GENERALLY

A federal prisoner may move to vacate, set aside, or correct a sentence on four grounds: (1) the sentence was imposed in violation of the Constitution or laws of the United States, (2) the sentencing court lacked jurisdiction, (3) the sentence imposed was in excess of the maximum amount authorized by law, or (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a). The sentencing court must "grant a prompt hearing" to "determine the issues and make findings of fact and conclusions of law with respect thereto" unless the record conclusively shows that the

prisoner is entitled to no relief.[2] 28 U.S.C. § 2255(b). A petitioner "bears the burden of proving his grounds for collateral attack by a preponderance of the evidence." *Siers-Hill v. United States*, 467 F. Supp. 3d 406, 414 (E.D. Va. 2020) (quoting *Hall v. United States*, 30 F. Supp. 2d 883, 889 (E.D. Va. 1998)).

The Sixth Amendment to the Constitution of the United States guarantees a defendant the right "to have the Assistance of Counsel." U.S. Const. amend. VI. "[T]he right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). A Sixth Amendment ineffective assistance of counsel claim within a § 2255 motion is an "attack on the fundamental fairness of the proceeding whose result is challenged." *Id.* at 697.

The decision in *Strickland* established a two-prong inquiry to determine whether an attorney's deficient performance has deprived a defendant of effective counsel. *Id.* at 669. To succeed, a petitioner must show (1) that "counsel's representation fell below an objective standard of reasonableness," and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

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[2] *See* R. Governing § 2255 Procs. 8(a) ("If the motion is not dismissed, the judge must review the answer, any transcripts and records of prior proceedings . . . to determine whether an evidentiary hearing is warranted."). Here, the record conclusively demonstrates that Petitioner is entitled to no relief. Therefore, an evidentiary hearing is unnecessary. *See Sanders v. United States*, 373 U.S. 1, 21 (1963) (holding that the sentencing court has discretion to ascertain whether a § 2255 claim is substantial before granting full evidentiary hearing).

proceeding would have been different."[3] *Id.* at 688, 694. A fair assessment of attorney performance requires that "every effort be made to . . . evaluate the conduct from counsel's perspective at the time." *Id.* at 689. Similarly, a petitioner must also overcome the presumption that the challenged action "might be considered sound trial strategy." *Id.* Accordingly, a court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" under the circumstances.[4] *Id.*

When a petitioner has previously entered a guilty plea, the standard for the second prong of the *Strickland* test is modified. *See Hooper v. Garraghty*, 845 F.2d 471, 475 (4th Cir. 1988). In this scenario, a petitioner "must show that there is a reasonably probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Moreover, the determination of whether counsel's error prejudiced a petitioner by causing him to plead guilty depends on "the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea." *Id.*

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[3] Here, "reasonable probability" means "a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland*, 466 U.S. at 694; *see also id.* at 686 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.").

[4] An attorney's representation that is "merely below-average performance" is not deficient; deficiency requires a showing that counsel's representation fell "below the wide range of professionally competent performance." *Griffin v. Warden, Md. Corr. Adjustment Ctr.*, 970 F.2d 1355, 1357 (4th Cir. 1992).

The relief contemplated under § 2255 "does not encompass all claimed errors in conviction and sentencing." *United States v. Addonizio*, 442 U.S. 178, 185 (1979). Habeas review is "an extraordinary remedy and will not be allowed to do service for an appeal." *Bousley v. United States*, 523 U.S. 614, 621 (1998) (internal quotation marks omitted); *see also Gao v. United States*, 375 F. Supp. 2d 456, 465 (E.D. Va. 2005) (holding that a claim raised in a § 2255 motion for the first time is procedurally defaulted because of the petitioner's failure to raise it on direct review). If a petitioner has procedurally defaulted on a claim by failing to raise it on direct review, the claim may be raised in habeas "only if the defendant can first demonstrate either cause and actual prejudice, or actual innocence." *Bousley*, 523 U.S. at 622 (internal quotation marks omitted).[5]

IV. PETITIONER'S CLAIMS

Each of the seven claims within Petitioner's § 2255 motion is without merit and none warrants an evidentiary hearing by the Court.

A. Claim One: Ineffective Assistance of Counsel for Failure to Raise a Statute of Limitations Defense

Petitioner's first claim of ineffective assistance of counsel for failure to raise a statute of limitations defense lacks merit. Because Petitioner's interpretation of 18 U.S.C. § 3299—the relevant statute governing timeliness for § 2252A and related

[5] *See also Siers-Hill*, 467 F. Supp. 3d. at 414 ("Any matter that could have been asserted either at trial or on appeal but was not so asserted is not appropriate for review on motion under § 2255—thereby subjecting it to procedural default—unless there is a showing of 'cause' sufficient to excuse the procedural default and of 'actual prejudice' resulting from the error.").

crimes—is novel and inconsistent with the legislative history, Petitioner's counsel did not act unreasonably when declining to advance this argument in pretrial motions. *See Strickland*, 466 U.S. at 688.

Specifically, Petitioner contends that he was sentenced inappropriately under § 3299 and instead should have been sentenced under a related statute for non-capital offenses, 18 U.S.C. § 3282. Because § 3282 carries a five-year statute of limitations, Petitioner asserts that his defense counsel should have raised a statute of limitations defense following this theory.

Petitioner's interpretation of § 3299 places significant emphasis on the conjunctive use of the word "and" to assert that an additional kidnapping violation (18 U.S.C. § 1201) is required to avoid the application of the statute of limitations.[6] *See* Mem. Supp. Mot. to Vacate at 18, ECF No. 95. Under Petitioner's interpretation of the statute, a charge of a violation under § 2252A without the accompanying kidnapping violation is governed by the five-year statute of limitations for non-capital offenses provided under § 3282. *See id.*

Given the lack of established precedent supporting Petitioner's interpretation of § 3299, there is no likelihood that advancing this interpretation would have impacted the "result of the proceeding" in Petitioner's favor. *See Strickland*, 466 U.S. at

[6] *See* 28 U.S.C. § 3299 ("Notwithstanding any other law, an indictment may be found or an information instituted at any time without limitation for any offense under section 1201 . . . involving a minor victim, *and* for any felony under chapter 109A, 110 (except for section [1] 2257 and 2257A), or 117, or section 1591.") (emphasis added). Petitioner was charged with violating 18 U.S.C. § 2252A, which falls under chapter 110.

694. The Supreme Court has ruled that absent "exceptional circumstances," a defendant is "bound by the tactical decisions of competent counsel." *Reed v. Ross*, 468 U.S. 1, 13 (1984). The circumstances in this case are not exceptional.[7] Counsel's failure to raise a novel statutory interpretation challenge to § 3299 does not fall below the "objective standard of reasonableness" for effective assistance of counsel. *See Strickland*, 466 U.S. at 688.

Moreover, this Court concludes that Petitioner's statutory interpretation is unpersuasive. No case law or legislative history supports Petitioner's interpretation that the statute's use of "and" requires a kidnapping violation under § 1201 *in addition to* any of the listed crimes in § 3299. The relevant statutory history demonstrates that "the congressional intent is to expand the statute of limitations, not diminish it." *See* Gov't Resp. Mot. to Vacate at 3–4, ECF No. 115. This assertion is supported in related statutes in which Congress has eliminated time limits governing the statute of limitations for certain offenses involving minors[8]—including § 3299, under which Petitioner's § 2252A(a)(2) charge falls. Petitioner's interpretation is inconsistent with strong legislative intent.

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[7] Petitioner cannot show that "actual prejudice" would result if this Court refuses to entertain his novel statutory interpretation claim in habeas, as he must do because he failed to raise the issue on direct review. *See Bousley*, 523 U.S. at 622. Similarly, Petitioner fails to demonstrate that a "miscarriage of justice would result from the refusal of the court to entertain" his novel statutory interpretation claim. *United States v. Mikalajunas*, 186 F.3d 490, 493 (4th Cir. 1999); *see also White v. United States*, No. 4:11cr11, 2014 WL 2002249, at *7 (E.D. Va. May 13, 2014).

[8] *See, e.g.*, 18 U.S.C. § 3283 ("No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse, or kidnaping, of a child under the age of 18 years shall preclude such prosecution during the life of the child, or for ten years after the offense, whichever is longer.").

Furthermore, Petitioner's guilty plea and subsequent failure to raise the issue on appeal precludes any claim that he suffered "actual prejudice" from his counsel's decision not to raise the issue. *See Siers-Hill*, 467 F. Supp. 3d at 414 ("When a movant has knowingly and voluntarily pled guilty and waived his right to appeal, he cannot demonstrate cause sufficient to warrant habeas review"); *see also United States v. Wiggins*, 905 F.2d 51, 53 (4th Cir. 1990) (holding that a knowing and voluntary plea agreement in which the petitioner expressly waives a right to appeal is valid and enforceable). Consequently, Petitioner's first claim is rejected.

B. Claim Two: Petitioner Re-Raises a Fourth Amendment Claim That Has Already Been Fully and Fairly Litigated

Petitioner's second claim attempts to relitigate his Fourth Amendment claim that has been denied by this Court and also on appeal by the United States Court of Appeals for the Fourth Circuit. Because Petitioner has fully and fairly litigated this issue in a suppression hearing[9] and on subsequent appeals,[10] Petitioner is barred from seeking relief in this Court through the instant motion. *See Sanders v. United States*, 373 U.S. 1, 9 (1963) (holding that "nothing in § 2255 requires that a sentencing court grant a hearing on a successive motion alleging a ground for relief already

[9] *See* Tr. Suppression Hr'g, ECF No. 84.

[10] *See* Notice of Appeal, ECF No. 76; *United States v. Burton*, No. 17-4524, 756 F. App'x 295 (4th Cir. 2019), Pet. Cert., ECF No. 64.

fully considered on a prior motion and decided against the prisoner"); *see also Bousley*, 523 U.S. at 621.

Petitioner initially raised his Fourth Amendment complaint in a Motion to Suppress. *See* Mot. to Suppress, ECF No. 17. In that Motion, Petitioner contended that his Fourth Amendment rights were violated because law enforcement unlawfully searched and seized his work cell phone. *Id.* Although the Court determined that the search warrants at issue were "constitutionally overbroad," the warrants were nevertheless valid under the "good faith" exception to the exclusionary rule.[11] *See* Order on Mot. to Suppress at 1, ECF No. 48.

In the Plea Agreement, Petitioner preserved his right to appeal the Court's ruling on his Motion to Suppress and the alleged Fourth Amendment violation. *See* Plea Agreement at 4, ECF No. 53. Upon review, the Fourth Circuit affirmed this Court's judgment, finding that the "extreme sanction of exclusion" would be inappropriate because the officers conducted the searches in good faith reliance on two warrants. *See* Fourth Cir. Order Aff'g Judgment at 3, ECF No. 88 (quoting *United States v. Leon*, 468 U.S. 897, 926 (1984)). Petitioner then sought certiorari before the Supreme Court on the issue, and it was denied. *See United States v. Burton*, No. 17-4524, 756 F. App'x 295 (4th Cir. 2019), Den. Pet. Cert., ECF No. 65.

[11] The "sole purpose" of the exclusionary rule "is to deter future Fourth Amendment violations." *Davis v. United States*, 564 U.S. 229, 236–37 (2011). However, exclusion is considered a "last resort" regarding Fourth Amendment violations. *United States v. Stephens*, 764 F.3d 327, 335 (4th Cir. 2014).

Petitioner again raises the issue in the instant § 2255 motion. Although § 2255 provides relief for alleged constitutional violations,[12] it does not provide an opportunity to relitigate Fourth Amendment claims that have been adjudicated previously at a suppression hearing. *See Kaufman v. United States*, 394 U.S. 217, 227 (1969) (noting that "when a request for relief under § 2255 asserts a claim of unconstitutional search and seizure which was tested by a motion to suppress at or before trial . . . the § 2255 court need not stop to review the adequacy of the procedure"). Appointed counsel for Petitioner concedes that Petitioner is barred from relitigating his Fourth Amendment claim under the guise of the instant motion. *See* Suppl. Mem. Mot. to Vacate at 5, ECF No. 110.

Moreover, Petitioner is barred from raising the issue via collateral attack because there has been no change in the relevant law since his suppression hearing. *See United States v. Roane*, 378 F.3d 382, 396 n.7 (4th Cir. 2004) (noting that defendants cannot relitigate issues via collateral attack if they are unable to point to "any change in the law that warrants [a court's] reconsideration" of their claims); *see also Boeckenhaupt v. United States*, 537 F.2d 1182, 1183 (4th Cir. 1976) (holding that petitioners cannot be "allowed to recast, under the guise of collateral attack, questions fully considered by this court"). Accordingly, Petitioner's second claim lacks merit.

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[12] *See Sanders*, 373 U.S. at 8 (noting that, in the context of § 2255 motions, "[c]onventional notions of finality of litigation have no place where . . . infringement of constitutional rights is alleged.").

C. Claim Three: Ineffective Assistance of Counsel for Failure to File a Rule 35 Motion and Various Additional Reasons

Petitioner also claims that his trial counsel was ineffective for failing to file a "Rule 35 motion," among other alleged shortcomings. *See* Mot. to Vacate at 7, ECF No. 94. Because each claim fails to satisfy both prongs of the *Strickland* standard, the Court rejects each claim individually and in the aggregate. *See* 466 U.S. at 688, 694.

i. Rule 35 Motion

Rule 35 of the Federal Rules of Criminal Procedure provides courts with a procedural mechanism to correct or reduce a sentence because of clear error. It cannot, however, be used in place of an appeal or a collateral attack. *See United States v. Lewis*, 392 F.2d 440, 443 (4th Cir. 1968) (holding that a § 2255 motion to vacate, rather than a Rule 35 motion, is the appropriate remedy for collaterally attacking an improper sentence). Further, the Supreme Court affirmed in *Hill v. United States* that "the narrow function of Rule 35 is to permit correction at any time of an illegal sentence, not to reexamine errors occurring at the trial." 368 U.S. 424, 430 (1962).

There is no evidence that Petitioner's sentence is illegal or otherwise a result of clear error. Moreover, a Rule 35 motion is filed by the Government—*not* defense counsel—when the defendant has cooperated with the Government in some fashion. *See* Fed. R. Crim. P. 35(b)(1) ("Upon the *government's motion* . . . the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.") (emphasis added). Counsel for Petitioner concedes that "there is nothing in discovery that would indicate that [Petitioner] cooperated with the [G]overnment in any event to receive any type of substantial

assistance review." *See* Suppl. Mem. Mot. to Vacate at 6, ECF No. 110. Therefore, this claim is rejected.

ii. Dr. Katherine Snably's Psychology Report

Petitioner contends that trial counsel was ineffective by failing to present Dr. Katherine Snably during sentencing to address her psychology report. Petitioner concedes that trial counsel submitted the report to the Court under seal and referenced it frequently in counsel's Position on Sentencing. *See* Suppl. Mem. Mot. to Vacate at 6, ECF No. 110; Position on Sent'g, ECF No. 62. Counsel's performance was sufficient under *Strickland*. *See* 466 U.S. at 688, 694.

iii. Objections to PSR

Petitioner contends that trial counsel should have objected to certain portions of the Pre-sentence Investigation Report ("PSR"). As Petitioner acknowledges, however, his admission of guilt, acceptance of the jointly stipulated Statement of Facts, and acceptance of responsibility all "present difficult hurdles for Petitioner to overcome in asserting that trial counsel was ineffective." *See* Suppl. Mem. Mot. to Vacate at 7, ECF No. 110.

Petitioner's guilty plea conveys an implicit acceptance of the PSR and the stipulated facts in the record. The result of the proceeding would have likely remained unchanged even if Petitioner's trial counsel argued otherwise. *See Wiggins*, 905 F.2d at 53; *Strickland*, 466 U.S. at 694.

iv. Sentencing Guidelines

Petitioner argues that the Court should have followed the factors delineated in the 2007 sentencing guidelines manual rather than the updated 2016 version used at sentencing. Mem. Supp. Mot. to Vacate at 70, ECF No. 95; *see* U.S. Sentencing Guidelines Manual § 1B1.11(b)(1) ("If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.") (emphasis removed).[13] There is nothing in the record to indicate that the Court violated the ex post facto clause by using the 2016 guidelines.

Regardless of whether the Court erred in using the 2007 guidelines, Petitioner admits that "there is no difference in the advisory sentencing range between 2007 and 2016." Suppl. Mem. Mot. to Vacate at 7, ECF No. 110. Petitioner has failed to show that the result of the proceeding would have been different had trial counsel objected to the Court's use of the 2007 guidelines at sentencing.[14] *See Strickland* 466 U.S. at 694.

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[13] *But see* U.S. Sentencing Guidelines Manual § 1B1.11(a) ("The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced."). This is what the Court did.

[14] Petitioner's trial counsel would have erred in urging the Court to follow the 2007 guidelines. The Court follows the most recent version (here, the 2016 version.) *See* U.S. Sentencing Guidelines Manual § 1B1.11(a).

v. Failure to Contest Additional Charges

Petitioner asserts that his counsel failed to contest any of the "multiplicitous charges," and that as a result he was placed in a worse negotiating position with the Government. *See* Mem. Supp. Mot. to Vacate at 53, ECF No. 95. Eight of the original nine counts were dismissed as part of the Plea Agreement. *See* Judgment at 6, ECF No. 72. A broad objection to the subsequently dismissed counts is unlikely to have had a significant bearing on the outcome of the case to satisfy the second prong of the *Strickland* standard. *See* 466 U.S. at 694. Petitioner's trial counsel was not deficient for failing to contest the dismissed additional charges. *See id.*

vi. Plea Agreement

Petitioner contends that his plea was not voluntary because he was given inadequate time in light of his purported learning disability to review the Plea Agreement. Mot. to Vacate at 7, ECF No. 94. Petitioner also contends that his trial counsel assured him that he would receive between sixty and seventy-two months maximum if he pleaded guilty.[15] *Id.* The Plea Agreement states that "the penalty for the offense is a mandatory minimum term of imprisonment of five (5) years [sixty months], a

[15] *But see* Mem. Supp. Mot. to Vacate at 13, ECF No. 95 ("My attorney repeatedly stated *she believed* (*but could not promise*) that the sentence of incarceration would have been on the low end of the spectrum of 60 to 72 months.") (emphasis added).

maximum possible term of imprisonment of twenty years." Plea Agreement at 1, ECF No. 53.

At Petitioner's plea hearing, the Magistrate Judge asked Petitioner if he understood the terms of the agreement; Petitioner answered affirmatively. *See* Tr. Plea Hr'g at 23, ECF No. 83. The Magistrate Judge also asked if Petitioner entered into the Plea Agreement "freely and voluntarily;" Petitioner answered affirmatively. *Id.* at 29. Petitioner's contention that he entered the plea involuntarily is contradicted by his freely made statements to the Court. *See id.*; *see also Brady v. United States*, 397 U.S. 742, 756 (1970) (holding that a defendant enters a guilty plea intelligently when the defendant is "made aware of the nature of the charge against him, and there was nothing to indicate that he was incompetent or otherwise not in control of his mental faculties"); *Appleby v. Warden, N. Reg'l Corr. Facility*, 595 F.3d 532, 537 (4th Cir. 2010) ("[A] guilty plea is voluntary if entered by one fully aware of the direct consequences of the plea.") (internal quotation marks removed).

Petitioner has failed to demonstrate his incompetency or inability to understand the charges against him by a preponderance of evidence.[16] *See Beck v. Angelone*, 261 F.3d 377, 388 (4th Cir. 2001) (holding that "a petitioner raising a substantive claim of incompetency is entitled to no presumption of incompetency and must

[16] The PSR does not contain any evidence of a learning disability. The Report references that Petitioner claimed a speech impediment and saw a tutor twice a week beginning in third grade, and also states that he graduated high school and more recently earned an "A+ Information Technology" certificate at CompTIA. *See* PSR at 20, ECF No. 74. There is no evidence that a speech impediment impacted his ability to understand the charges before him.

demonstrate his incompetency by a preponderance of the evidence"). Even if Petitioner submitted proof of a prior learning disability, "[n]ot every manifestation of mental illness demonstrates incompetence to stand trial; rather, the evidence must indicate a present inability to assist counsel or understand the charges." *Id.* (quoting *Burket v. Angelone,* 208 F.3d 172, 192 (4th Cir.), *cert. denied,* 530 U.S. 1283, (2000)).

Petitioner's claim that he had an insufficient time to review the Plea Agreement (and could not fully consent to its terms) is negated by his own statements at the plea hearing. *See* Tr. Plea Hr'g at 3, ECF No. 83 (the Magistrate Judge asked Petitioner if he had consented to and reviewed the terms of the Plea Agreement, and Petitioner answered affirmatively that he had).

Petitioner has proffered no evidence of incompetent performance by his counsel in directing him to sign the Plea Agreement. Because Petitioner signed the agreement—and responded affirmatively to the Court that he consented to and understood its terms—he fails to demonstrate ineffective assistance of counsel under either prong of the *Strickland* standard. *See* 466 U.S. at 688, 694.

In sum, each of the grounds in Petitioner's third claim is without merit. The Court rejects each claim individually and in the aggregate.

D. Claim Four: Violation of Due Process Under Fed. R. Crim. P. 11(c)(1)

Petitioner's claim that his Fifth Amendment Due Process rights were violated during the Plea Agreement is without merit. *See Siers-Hill,* 467 F. Supp. 3d at 414. A United States Magistrate Judge is authorized, with the consent of the defendant, to conduct plea proceedings pursuant to Federal Rule of Criminal Procedure 11. *See*

28 U.S.C. §636 (b)(1)–(3); *United States v. Dees*, 125 F.3d 261, 266 (5th Cir. 1997) (holding that the taking of a guilty plea is a permissible "additional duty" for federal magistrate judges under § 636(b)(3)).

Nevertheless, Petitioner contends that the Magistrate Judge impermissibly participated in plea negotiations in violation of Federal Rule of Criminal Procedure 11(c)(1). *See* Mem. Supp. Mot. to Vacate at 49, ECF No. 95. Under this Rule, the court "must not participate in . . . discussions" surrounding plea agreements. Fed. R. Crim. P. 11(c)(1). According to Petitioner, the Magistrate Judge discussed the possibility of restitution amounting to $5,000 with defense counsel in closed chambers before the plea hearing. *See* Mem. Supp. Mot. to Vacate at 49, ECF No. 95. As Petitioner concedes, this amount was not reflected on the actual Plea Agreement. *See id.*; Plea Agreement, ECF No. 53.

Instead, Petitioner was charged a $100 special assessment at sentencing. *See* Judgment at 6, ECF No. 72. Even if this Court accepts Petitioner's allegation that the Magistrate Judge was somehow involved in plea negotiations in violation of Rule 11(c)(1), any harm rendered by an alleged discussion regarding restitution is effectively moot because this Court declined to order restitution at sentencing. *See United States v. Davila*, 569 U.S. 597, 608–10 (2013) (holding that improper participation by the court in plea discussions does not in itself demand an automatic vacatur of plea).

Petitioner also claims that defense counsel was ineffective for permitting the Court to participate in plea negotiations. *See* Mem. Supp. Mot. to Vacate at 49, ECF No. 95. Petitioner stated that he "take[s] umbrage to think that my counsel would

have allowed this error despite being the Defense Attorney" and that this constitutes a "violation of Effectiveness [sic] Assistance of Counsel." *See id.* The alleged "error," even if it occurred, had no impact on the Plea Agreement or the resulting sentence. *See generally* Plea Agreement, ECF No. 53.

Petitioner concedes that there is "no indication that this event would have changed Petitioner's intent to plead guilty." Petitioner's claim fails to satisfy the second prong under *Strickland*. *See* Suppl. Mem. Mot. to Vacate at 8, ECF No. 110; 466 U.S. at 694. There is no indication that the "result of the proceeding" would have been different if the alleged $5,000 restitution amount had been included or if the alleged Rule 11(c)(1) violation had occurred. *See Strickland*, 466 U.S. at 694. Petitioner's signing of the Plea Agreement and the omission of a restitution penalty at sentencing rendered any alleged violation harmless and moot. *See Siers-Hill*, 467 F. Supp. 3d at 414.

E. Miscellaneous Claims

Petitioner brings three additional claims that challenge his sentence on jurisdictional and other constitutional grounds. Each of these claims is without merit, as Petitioner's counsel concedes.[17] *See* Suppl. Mem. Mot. to Vacate at 8–9, ECF No. 110.

[17] Petitioner's counsel acknowledges that Claims Six and Seven—the equal protection and separation of powers claims, respectively—fail "to take into account his guilty plea," and appear to lack merit. *See* Suppl. Mem. Mot. to Vacate at 9, ECF No. 110.

i. Claim Five: Jurisdictional Challenge on Commerce Clause Grounds

Petitioner levies a jurisdictional challenge to his conviction, asserting that the Government could not show that the images used to convict him under § 2252A satisfy the "Commerce Clause" and that a federal court consequently lacks jurisdiction to try his case. *See* Mot. to Vacate at 10, ECF No. 94. This is an incorrect application of the law. Petitioner conflates the interstate commerce element of § 2252A with Congress's Article I powers,[18] the Tenth Amendment of the United States Constitution,[19] and federal court subject-matter jurisdiction generally.[20]

The nexus between interstate commerce and the use of the internet to obtain child pornography is well established. *See* Suppl. Mem. Mot. to Vacate at 8, ECF No. 110; *see, e.g.*, *United States v. Ellyson*, 326 F.3d 522, 533 (4th Cir. 2003) (holding that circumstantial evidence that child pornography obtained through the internet satisfies the interstate commerce element under § 2252A); *United States v. Hilton*, 257 F.3d 50, 54 (1st Cir. 2001) ("[P]roof of transmission of pornography over the Internet . . . satisfies the interstate commerce element of the offense."). Petitioner admitted that the seized images of child pornography had been transported in interstate and foreign commerce via the internet to his computer. *See* Statement of Facts at 2, ECF

[18] *See* U.S. Const. art. I, § 8, cl. 3.
[19] *See* U.S. Const. amend. 10.
[20] *See* Mem. Supp. Mot. to Vacate at 54, ECF No. 95 (asserting "both [malicious] prosecution and Ineffective Assistance of Counsel for not Motioning to Dismiss the charges on the grounds that this article had been amended by the Tenth Amendment of the[ ] United States Constitution").

No. 54. Petitioner's argument implicating the Commerce Clause and the Tenth Amendment is without merit.

Additionally, there is neither evidence of malicious prosecution nor ineffective assistance of counsel for failing to pursue Petitioner's argument. Trial counsel's assistance was not deficient for failing to raise a jurisdictional challenge.[21] *See Strickland*, 466 U.S. at 688, 694.

ii. Claim Six: Equal Protection Violation

Petitioner's Fourteenth Amendment Equal Protection claim fails. He contends that the Government is "primarily prosecuting males" for § 2252A and related crimes, that "females are participating in the illegal activity" too, and that males are a "protected group" that somehow warrant specialized treatment. *See* Mot. to Vacate at 11, ECF No. 94.

Neither § 2252A or § 3299 makes any reference or gives any special consideration to the gender of potential offenders or victims. Petitioner puts forth numerous articles and statistics to support his contention, but these are generalized complaints about the impact of the statute on his own sentence.

Males as a class lack any of the traditional indicia of previously established suspect classes: white males, in particular, are "not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the

[21] Petitioner's counsel and the Government agree. *See* Suppl. Mem. Mot. to Vacate at 8, ECF No. 110; Gov't Resp. Mot. to Vacate at 7, ECF No. 115.

majoritarian political process." *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 357 (1978) (Brennan, J., concurring) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)). In fact, courts have consistently refused to grant white males suspect class status because they are "not a 'discrete and insular' minority" requiring such extraordinary protection in the first place. *Id.* at 290 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4, (1938)). Moreover, it is unclear how an application of strict scrutiny to § 2252A would impact Petitioner's guilty plea or the terms of his sentencing.

Counsel for Petitioner acknowledges that the claim is without merit. *See* Suppl. Mem. Mot. to Vacate at 9, ECF No. 110. Consequently, this claim also fails.

iii. Claim Seven: Separation of Powers Violation

Petitioner contends that the United States Probation and Pretrial Service Department conducted an investigation that was unfairly prejudicial because its mere existence raises constitutional separation of powers concerns.[22] Petitioner asserts that because the Department is a component of the Judiciary Branch, it should be precluded from conducting investigations or otherwise enforcing the Court's orders. *See* Mot. to Vacate at 12, ECF No. 94. According to Petitioner, this investigative authority should rest purely within the Executive Branch. *Id.* Petitioner argues that the

[22] *See* Mem. Supp. Mot. to Vacate at 80, ECF No. 95 ("The Court is NOT to be conducting their [sic] own investigations. This duty falls to the Executive Branch and it shows bias towards this and every defendant.") (emphasis in original).

current organization of the federal Probation and Pretrial Services Department is facially unconstitutional.

Congress has given district courts broad discretion for officers of the United States Probation and Pretrial Service Department to administer pretrial and post-sentence duties throughout the course of criminal proceedings. *See* 18 U.S.C. §§ 3152, 3153 (codifying the establishment and organization of pretrial services for federal courts via the Pretrial Services Act of 1982); *see also* 18 U.S.C. § 3603 (codifying the authority and related duties of probation officers generally). Petitioner provides no evidence that statutes "directly tarnish[] a defendants [sic] chance of having a fair trial." *See* Mem. Supp. Mot. to Vacate at 79, ECF No. 95.

Furthermore, Petitioner entered a guilty plea, which implicitly acknowledges the validity of the Department's pretrial investigation and otherwise precludes the issue from being raised on collateral attack. *See* Suppl. Mem. Mot. to Vacate at 9, ECF No. 110; *Bousley*, 523 U.S. at 621–22; *Siers-Hill*, 467 F. Supp. 3d at 414. Petitioner's final claim is without merit and is rejected.

V. CERTIFICATE OF APPEALABILITY

Because this Court **DENIES** Petitioner's Motion to Vacate, Petitioner may seek to obtain a certificate of appealability. A district court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." R. Governing § 2255 Procs. 11(a).

Typically, a petitioner may only appeal a district court's denial of a motion to vacate after first obtaining a certificate of appealability from either the district court

or the court of appeals.[23] *See* Fed. R. App. P. 22(b)(1) ("[T]he applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). . . . If the district judge has denied the certificate, the applicant may request a circuit judge to issue it."); *see also* 28 U.S.C. § 2253(a) ("In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.").

This Court may "direct the parties to submit arguments on whether a certificate should issue." *See* R. Governing § 2255 Procs. 11(a). If the Court decides to issue a certificate, it "must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." *See id.*; *see also Hohn v. United States*, 524 U.S. 236, 240 (1998) (holding that "[c]ertificates of appealability may issue 'only if the applicant has made a substantial showing of the denial of a constitutional right.'") (quoting 28 U.S.C. § 2253(c)(2)). If the Court denies a certificate, a petitioner "may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22." *See* R. Governing § 2255 Procs. 11(a).

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[23] Since the enactment of the Antiterrorism and Effective Death Penalty Act, three circuits have held that both district and circuit judges, as well as the circuit justice, may issue a certificate of appealability. *See Else v. Johnson*, 104 F.3d 82 (5th Cir. 1997); *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063 (6th Cir. 1997); and *Hunter v. United States*, 101 F.3d 1565 (11th Cir. 1996). The approach taken by Federal Rule of Appellate Procedure 22 accords with these circuits' decisions.

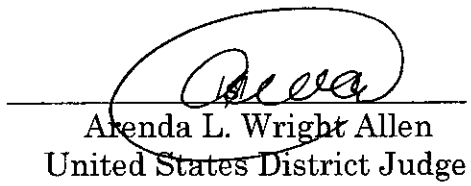
Petitioner has not shown that the denial of the instant Motion would deny him any constitutional right. *See* 28 U.S.C. § 2253(c)(2). Accordingly, this Court **DENIES** granting a certificate of appealability.

VI. CONCLUSION

For the foregoing reasons, Petitioner's Motion to Vacate (ECF No. 94) is **DENIED**. Because his Motion to Vacate is denied, his accompanying Motion for Discovery (ECF No. 97) and Motion to Unseal Case Documents (ECF No. 99) are **DENIED as moot.** The Court **DENIES** a certificate of appealability pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure.

The Clerk is **REQUESTED** to forward a copy of this Order to Petitioner John Moses Burton, IV, his appointed counsel, and the Assistant United States Attorney.

IT IS SO ORDERED.



Arenda L. Wright Allen
United States District Judge

August 4, 2021
Norfolk, Virginia

APPENDIX D

UNITED STATEES COURT OF APPEALS FOR THE FOURTH CIRCUIT (decision)

FILED: February 22, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-7284
(4:16-cr-00071-AWA-RJK-1)
(4:19-cv-00112-AWA)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JOHN MOSES BURTON, IV

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-7284

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOHN MOSES BURTON, IV,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Arenda L. Wright Allen, District Judge. (4:16-cr-00071-AWA-RJK-1; 4:19-cv-00112-AWA)

Submitted: February 17, 2022 Decided: February 22, 2022

Before AGEE and RUSHING, Circuit Judges, and SHEDD, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

John Moses Burton, IV, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

John Moses Burton, IV, seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2255 motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the motion states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Burton has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

APPENDIX E

DICTIONARY ENTRY INFORMATION FOR THE CONJUNCTION 'AND'

Appendix A from the original briefing in the

United States District Court of the Eastern Virginia

APPENDIX

A

Definition of the conjunction 'AND' from multiple dictionaries

The American Heritage Diction of the English Language, Fourth Edition ©2006:

AND n. A logical operator that returns a true value only if both operands are true [from and]

And conj. 1. Together with or along with; in addition to; as well as. Used to connect words, phrases or clauses that have the same grammatical function in a construction.

2. Added to; plus: *two and two makes four.*

3. Used to indicate result: *Give the boy a chance, and he might surprise you.*

4. informal to. Used between.

Merriam Webster's Collegiate Dictionary, Tenth Edition ©1996:

AND n.(1949) a logical operator that requires both of two inputs to be present or two conditions to be met for an output to be met for an output to be made or a statement to be execute.

And conj. 1. used as a function word to indicate connection or addition esp. of items within the same class or type; used to join sentence elements of the same grammatical rank or function.

2a. used as a function word to express logical modification, consequence, antithesis, or supplementary explanation

b. used as a function word to join one finite verb (as go, come, try) to another so that together they are logically equivalent to an infinitive of purpose (come - see me)

3. used in logic to form a conjunction

Oxford College Dictionary: Second Edition ©2007:

And conj. 1. used to connect words of the same part of speech, clauses, or sentences that are to be taken jointly: *bread and butter | a hundred and fifty.*

- used to connect two clauses when the second happens after the first: *he turned around and walked out.*
- used to connect two clauses, the second of which results from the first: *do that once more, and I'll skin you alive.*

- connecting two identical comparatives, to emphasize a progressive change: *getting better and better.*
- connecting two identical words, implying great duration or great extent: *I cried and cried.*
- used to connect two identical words to indicate that things of the same name or class have different qualities: *all human conduct is determined or caused-- but there are causes and causes.*
- used to connect two numbers to indicate that they are being added together: *six and four make ten.*
- archaic used to connect two numbers, implying secession: *a line of men marching two and two.*

2. used to introduce an additional comment or interjection: *they believe they are descended from him, and quite right, too.*
   - used to introduce a question in connection with what someone else has just said: *"I found the letter." "And did you steam it open?"*
   - used to introduce a statement about a new topic: *and now to the dessert.*
3. informal used after some verbs and before another verb to indicate intention, instead of "to": *come and see me.*

noun (usu. AND) electron. a Boolean operator that gives the value one if and only if all the operands are one and otherwise has a value of zero.