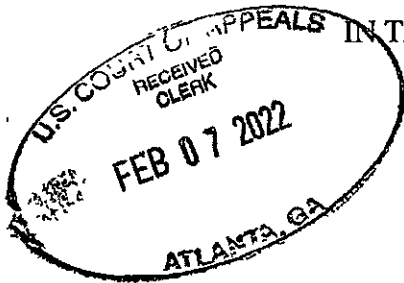


APPENDIX - A



IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-13328-C

NEIL TIMOTHY AHO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

To merit a certificate of appealability, a movant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Because appellant has failed to make the requisite showing, his motion for a certificate of appealability is DENIED.

/s/ Britt C. Grant
UNITED STATES CIRCUIT JUDGE

~~EXHIBIT - II~~

A P P E N D I X - B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 0:20-CIV-62517-MARRA
(0:15-CR-60225-MARRA)

NEIL TIMOTHY AHO,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

FINAL JUDGMENT DENYING MOVANT'S MOTION TO VACATE

This Cause is before the Court upon Movant's Amended Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 and accompanying Memorandum [DE 28; DE 29]. Movant entered a guilty plea to one count of distributing child pornography in violation of 18 U.S.C. § 2252(a)(2) and (b)(1) and was sentenced to 204 months (17 years) imprisonment. DE 28 at 1. In Movant's written plea agreement, he acknowledged that he was aware that the sentence will be imposed by the Court after consideration of the federal sentencing guidelines. DE-CR 30 at 1-2.¹ Movant also acknowledged that the Court could impose a statutory maximum term of up to twenty years imprisonment. DE-CR 30 at 2.

Movant appealed his conviction and sentence to the Eleventh Circuit Court of Appeals where he argued that the district court erred in denying his motion to withdraw the guilty plea and in applying a two-level enhancement for obstruction of justice. DE 28 at 2. The Eleventh Circuit denied Movant's appeal on June 27, 2019. *Aho v. United States*, 779 F. App'x. 613 (11th Cir.

¹ References to Movant's Criminal Docket will be referred to by DE-CR.

EXHIBIT IV

2019). Movant filed a Motion to Vacate Sentence on November 30, 2020. DE 1. Movant was required to amend his Motion multiple times and finally filed an Amended Motion [DE 28] and supporting memorandum [DE 29]. Movant raises the following claims:

1. The Court lacks subject matter jurisdiction because Congress lacked authority to enact 18 U.S.C. § 2252. DE 28 at 4.
2. Counsel was ineffective for failing to raise any constitutional challenge to Section 2252 for vagueness and overbreadth in contravention of the First Amendment. DE 28 at 5.
3. Counsel was ineffective for failing to challenge the issuance of a search warrant obtained through fraud and for failure to file a suppression motion. DE 28 at 7.
4. Counsel was ineffective for failing to raise the FUSED defense, the defense of lack of mens rea, actual innocence, and the failure to call a technology forensics expert. DE 29 at 31.
5. The sentence is substantively unreasonable and must be vacated. DE 29 at 36.

Under Rules Governing Section 2255 Cases, Rule 4(b), a district court faced with a § 2255 motion may enter an order for its summary dismissal “[i]f it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief....” *Broadwater v. United States*, 292 F.3d 1302, 1303 (11th Cir. 2002) (internal citation omitted). After a review of the Amended Motion and Supplemental Memorandum, as well as the record in Movant’s criminal case, it is evident that Movant is not entitled to relief and the Motion is summarily denied.

1. Claim 1—The Court lacks subject matter jurisdiction because Congress lacked authority to enact 18 U.S.C. § 2252.

Movant contends that the Court does not have subject matter jurisdiction to prosecute him because 18 U.S.C. § 2252, the statute to which Movant pled guilty, is unconstitutional. DE 29 at 10. Movant includes a lengthy argument for why he believes “Section 2252 exemplifies an utter disregard for the purpose, scope and operation of the Commerce Clause.” DE 29 at 21. Movant

admits he did not raise this issue on direct appeal. DE 28 at 4. Therefore, he is barred from asserting it on motion for collateral relief unless he can show cause excusing his failure to raise the issue previously, and actual prejudice resulting from the alleged error. *United States v. Nyhuis*, 211 F.3d 1340, 1344 (11th Cir. 2000); *Mills v. United States*, 36 F.3d 1052, 1055 (11th Cir. 1994); *Cross v. United States*, 893 F.2d 1287, 1289 (11th Cir.1990).

Movant simply cites “ineffective assistance” as the cause for why he did not raise the issue on direct appeal and does not assert resulting prejudice. Ineffective assistance of counsel may satisfy the cause exception to a procedural bar. *Greene v. United States*, 880 F.2d 1299, 1305(11th Cir.1989). In order to do so, however, the claim of ineffective assistance must have merit. *Id.* To determine whether it does, the Court must decide whether the arguments the defendant alleges his counsel failed to raise were significant enough to have affected the outcome of his appeal. *Miller v. Dugger*, 858 F.2d 1536, 1538 (11th Cir. 1988). Appellate counsel is not ineffective for failing to raise claims “reasonably considered to be without merit.” *Nyhuis*, 211 F.3d at 1344.

The Court finds no merit in Movant’s present claim. The Eleventh Circuit has found “Congress clearly has the power to regulate the internet, as it does other instrumentalities and channels of interstate commerce, and to prohibit its use for harmful or immoral purposes regardless of whether those purposes would have a primarily intrastate impact.” *United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004), *cert. denied*, 125 S.Ct. 2951 (2005). Moreover, in order to effectuate a comprehensive scheme to eliminate the market for child pornography, it is within Congress’s authority to regulate interstate “and all *intrastate* possession of child pornography, not just that which has traveled in interstate commerce or has been produced using materials that have traveled in interstate commerce.” *United States v. Maxwell*, 446 F.3d 1210, 1217-18 (11th Cir.2006) (emphasis added) (applying *Gonzalez v. Raich*, 545 U.S. 1 (2005)).

Pursuant to controlling precedent on the subject, "Congress possessed the power to proscribe Movant's distribution of child pornography over the internet." *United States v. Lane*, No. 06-11886, 2006 WL 2711939, at *2 (11th Cir. Sept. 22, 2006) (unpublished)²; *United States v. Smith*, 459 F.3d 1276, 1285 (11th Cir. 2006). Therefore, the Claim Movant attempts to raise is meritless and counsel cannot be found ineffective for failing to raise a meritless argument. *Nyhuis*, 211 F.3d at 1344. **Claim 1** is accordingly denied.

2. Claim 2—Counsel was ineffective for failing to raise a First Amendment challenge to Section 2252.

Movant argues that counsel was ineffective for failing to challenge the constitutionality of Section 2252 on the grounds that it violates the First and Fifth Amendments to the United States Constitution. The United States Supreme Court has determined that 18 U.S.C. § 2252 is constitutional. *See United States v. Williams*, 553 U.S. 285, 306-07 (2008) (determining that § 2252 was not impermissibly overbroad or void for vagueness). Therefore, appellate counsel was not ineffective for failing to raise a meritless constitutional challenge to the statute on appeal. *See, e.g., Diaz v. United States*, No. 18-10605-A, 2018 WL 11336780, at *1 (11th Cir. Apr. 19, 2018). Accordingly **Claim 2** is denied.

3. Claims 3 and 4—Counsel was ineffective for failing to file a motion to suppress; and, for failing to raise the fused defense of lack of mens rea, actual innocence, and failure to call and expert.

In **Claim 3**, Movant argues his trial counsel was ineffective for failing to seek a *Franks* hearing "and or file a motion to suppress or exclude items obtained as a direct result of an illegal search and seizure in violation of the Fourth Amendment." DE 29 at 22. In **Claim 4**, Movant argues counsel was ineffective for failing to "adequately interview Petitioner concerning the facts," for

² Movant in this case raised a nearly identical claim to the claim Plaintiff has raised here.

failing to adequately explain “the mens rea requirement” to Movant, for failing to “investigate facts relating to technology forensics exonerating Movant, for failing to obtain a technology forensics expert, and for “advising Petitioner to sign the Plea and Stipulation” even though “he should have known testimony from a technology forensics expert would provide the foundation for a complete defense to a distribution charge.” DE 29 at 22.

Movant argues that his computer had sophisticated technology that prevented third-party access to the computer. DE 29 at 31–32. But at no point does Movant allege he did not distribute child pornography, nor does he argue that but for counsel’s ineffectiveness no reasonable juror could convict Movant of the alleged crime. Most importantly, in neither **Claim 3** nor **Claim 4** does Movant allege that counsel’s ineffectiveness rendered his plea involuntary.

A “defendant’s plea of guilty, made knowingly, voluntarily, and with the benefit of competent counsel, waives all nonjurisdictional defects in that defendant’s court proceedings.” *United States v. Yunis*, 723 F.2d 795, 796 (11th Cir. 1984). This includes any claim of ineffective assistance of counsel unless the deficient performance relates to the voluntariness of the plea itself. *See, e.g., McMillin v. Beto*, 447 F.2d 453, 454 (5th Cir. 1971); *Smith v. Estelle*, 711 F.2d 677, 682 (5th Cir. 1983). Here, Movant does not contend that his plea was involuntary due to his counsel’s alleged ineffectiveness. *See Baird v. United States*, 445 F. App’x 252, 254 (11th Cir. 2011) (finding “a § 2255 movant who entered a valid guilty plea waives any pre-plea ineffective assistance claims that do not concern his decision to enter the plea;” *accord Wilson v. United States*, 962 F.2d 996, 997 (11th Cir. 1992)).

Even if Movant was able to raise this ineffective assistance of counsel claim on collateral review, the claim is still without merit. Per the facts to which Movant stipulated, a crimes task force was searching a law enforcement database that logs IP addresses that advertise child

pornography files for download via Peer-to-Peer technology. DE-CR 31 at 1. From this investigation it was determined that one AT&T IP address was advertising over 150 images of child pornography. *Id.* Based on this a subpoena was sent to AT&T. *Id.* The subpoena identified the IT address belonging to a subscriber living in Coral Springs, Florida. A state search warrant was then executed at Movant's residence. *Id.* at 2. During the execution of the search warrant, the Movant's mother told law enforcement that she had seen Movant watching child pornography and discovered it on a computer she had received from him. *Id.* Per the terms of the warrant, law enforcement seized multiple devices which contained a partial file download that depicted child pornography and search terms associated with child pornography. *Id.* at 2-3. Subsequently, Homeland Security Investigations coordinated a search of Movant at the border upon his reentry from Japan and searched another device of Movant that contained child pornography search terms. *Id.* at 3-4. Twice more prior to Movant's arrest law, enforcement was able to identify Movant's residence with a subpoena to a wireless internet company and then search his home pursuant to a search warrant. *Id.* at 4. Then, in August of 2015, a federal search warrant was executed at Defendant's home where law enforcement uncovered a drive with images and videos of child pornography. *Id.* at 6.

Per the facts to which Movant stipulated, Movant's counsel did not have a good faith basis to suppress the search of his home given that it was pursuant to a search warrant supported by probable cause (*i.e.*, connection to investigation of child pornography on the internet, multiple lawfully executed search warrants that revealed child pornography search terms and a large quantity of encrypted data, a witness telling law enforcement she had seen Movant view child pornography). *See Treffinger v. United States*, 798 F. App'x 428 (11th Cir.), *cert. denied*, 141 S. Ct. 317 (2020) (finding defense counsel's failure to file motion to suppress evidence seized from

search of defendant's home was not ineffective assistance of counsel if the motion would have been meritless).

Movant has waived his pre-plea constitutional claim that counsel was ineffective for failing to file a motion to suppress, or failure to explain "the mens rea requirement" to Movant, for failing to "investigate facts relating to technology forensics exonerating Petitioner, for failing to obtain a technology forensics expert." *See, e.g., Bullard v. Warden, Jenkins Corr. Ctr.*, 610 F. App'x. 821, 824 (11th Cir. 2015) (holding claim that counsel failed to file a motion to suppress is waived by guilty plea because he did not claim that his plea was involuntary). Therefore, **Claims 3 and 4** are denied.

4. Claim 5—Counsel was ineffective for failing to argue that the sentence is substantively unreasonable and must be vacated

Although Movant's claim is titled that the sentence he received is "substantively unreasonable," the Memorandum in support of his claim styles the claim as an ineffective assistance of counsel issue rather than a trial court error. Movant claims that "former counsel rendered ineffective assistance based on the failure to challenge the reasonableness of the sentence imposed on Petitioner." DE 29 at 36. Review of a sentence for reasonableness requires courts to consider: (1) whether the district court committed a significant procedural error, and (2) whether the sentence is substantively reasonable, under an abuse of discretion standard. *See United States v. Livesay*, 525 F.3d 1081, 1091 (11th Cir. 2008) (citing *Gall v. United States*, 552 U.S. 38, 51 (2007)). A sentence is procedurally unreasonable if the district court erred in calculating the guideline range, treated the Sentencing Guidelines as mandatory, failed to consider the 18 U.S.C. § 3553 factors, selected a sentence based on clearly erroneous facts, or failed to adequately explain the sentence, including any deviation from the guideline range. *See Gall*, 552 U.S. at 51. *See also United States v. Rodriguez*, 628 F.3d 1258, 1264 (11th Cir. 2010). "In considering the §3553(a)

factors, the district court does not have to discuss each one explicitly.” *United States v. Gonzalez*, 550 F.3d 1319, 1324 (11th Cir. 2008) (citing *United States v. Scott*, 426 F.3d 1324, 1329 (11th Cir. 2005)). An acknowledgment that the court “has considered the defendant’s arguments and the §3553(a) factors will suffice.” *Id.* (citing *Scott*, 426 F.3d at 1330).

A. Procedural Reasonableness of Sentence

Movant has not demonstrated that the trial court miscalculated the advisory guidelines, treated the guidelines as mandatory, or failed to adequately explain the sentence imposed. In fact, the trial court considered the stipulations and statements of the parties, the Presentence Investigation Report (“PSI”), and the statutory factors in fashioning the sentence imposed, which was three years below the statutory maximum term of imprisonment of twenty years Movant potentially faced upon conviction and varied below the advisory guideline range. On this record, Movant has not demonstrated that the sentence was procedurally unreasonable.

B. Substantive Reasonableness of Sentence

“The review for substantive unreasonableness involves examining the totality of the circumstances, including an inquiry into whether the statutory factors in § 3553(a) support the sentence in question.” *Gonzalez*, 550 F.3d at 1324 (citing *Gall*, 552 U.S. at 51). The district court is required to impose a sentence “sufficient, but not greater than necessary, to comply with the purposes” listed in §3553(a)(2), including the need to reflect the seriousness of the offense, promote respect for the law, provide just punishment, deter criminal conduct, and protect the public from the defendant’s future criminal conduct. *Id.* (quoting 18 U.S.C. §3553(a)(2)). The court is also required to consider “the nature and circumstances of the offense and the history and characteristics of the defendant.” *Id.* (quoting 18 U.S.C. § 3553(a)(1)).

The record reveals that the trial court considered the PSI, which contained information about Movant's history and characteristics. The trial court further indicated it had considered the § 3553(a) factors, and the statement of the parties prior to imposing sentence. The Government asked for a 240-month sentence followed by a lifetime of supervised release. DE 126 at 52. The Court found Movant could not be given a reduction for acceptance of responsibility given his attempt to withdraw his plea and obstruction during that hearing. DE 126 at 53. The sentence imposed was below the twenty-year statutory maximum. The Court varied the sentence downward to 204 months because the Court found the "guidelines are overly harsh in this case." DE 126 at 54. Movant has not demonstrated trial court error, much less ineffectiveness arising from counsel's failure to pursue this issue. A challenge to the reasonableness of the sentence would have been meritless. Relief is therefore not warranted.

CERTIFICATE OF APPEALABILITY

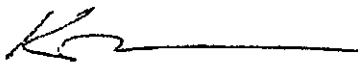
A prisoner seeking to appeal a district court's final order denying his § 2255 motion to vacate has no absolute entitlement to appeal but must obtain a certificate of appealability ("COA"). See 28 U.S.C. §2253(c)(1); *Harbison v. Bell*, 556 U.S. 180, 183 (2009). This Court should issue a certificate of appealability only if the movant makes "a substantial showing of the denial of a constitutional right." See 28 U.S.C. §2253(c)(2). Where a district court has rejected Movant's constitutional claims on the merits, the movant must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. See *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Upon consideration of the record, a certificate of appealability shall not issue.

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. Movant's Amended Motion to Vacate [DE 28] is **DENIED**.

2. Final judgment is entered in favor of Respondent.
3. No Certificate of Appealability shall issue.
4. Any pending motions are **DENIED** as moot.
5. The Clerk of Court shall **CLOSE** this case.

DONE AND ORDERED Chambers at West Palm Beach, Florida, this 13th day of September, 2021.


KENNETH A. MARRA
United States District Judge

Copies furnished to: Movant, counsel of record.

~~EXHIBIT V~~

APPENDIX - C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-13328-C

NEIL TIMOTHY AHO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Before: ROSENBAUM and GRANT, Circuit Judges.

BY THE COURT:

Neil Aho filed a “Brief in Support of Petition for Panel Rehearing and En Banc Review” of this Court’s order dated January 21, 2022, denying a certificate of appealability in his appeal from the district court’s denial of his 28 U.S.C. § 2255 motion to vacate. As this Court’s rules do not permit panel rehearing or *en banc* review in this circumstance, Aho’s filing is instead construed as a motion for reconsideration under 11th Cir. R. 22-1(c) and 27-2. Because Aho has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motion, his motion for reconsideration is DENIED. His “Motion for Leave to File [an] Oversized Brief” is GRANTED to the extent that all of his arguments were considered.

APPENDIX - D

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 20-62517-CIV-MARRA
(Case No. 15-60225-CR-MARRA)**

Neil Timothy Aho,

Movant,

v.

United States of America,

Respondent.

**ORDER GRANTING CONTINUANCE AND DENYING REQUEST TO FILE A
MOTION TO DISMISS**

This cause is before the Court on pro se Movant's Motion for Reconsideration and Proposal [ECF No. 17], Petition Requesting Continuance [ECF No. 18], Motion to File Excess Pages, etc. [ECF No. 21] and Motion to Amend/Correct Complaint [ECF No. 26].

Movant was ordered to amend his 28 U.S.C. §2255 Motion to Vacate sentence and was given a page limit of 30 pages [ECF No. 13]. Movant filed an amended §2255 Motion [ECF No. 20] within the page limit but proposed filing a separate motion on this issue of subject matter jurisdiction to be styled as a Motion to Dismiss [ECF No. 17; ECF No. 21; ECF No. 26]. Movant filed a separate motion to exceed the page limit for the Motion to Dismiss [ECF No. 21].

A final judgment in Movant's criminal case has been entered meaning the Movant cannot file a Motion to Dismiss. Fed. R. Crim. P. 12 ("A motion that the court lacks jurisdiction may be made at any time while the case is pending.").

Movant may only challenge the constitutionality of his confinement pursuant to a §2255 Motion. Therefore, all possible grounds for relief must be raised within Movant's §2255.

Movant shall have one final opportunity to amend his §2255 Motion. All grounds for relief must be specified within this Motion. Movant may have 45 pages to state the relief requested and the facts supporting each ground. Movant will not be granted an additional extension of the page limit or an additional continuance.

Movant has until May 10, 2021 to file a **FINAL** amended §2255 to not exceed 45 pages. If Movant fails to file an amended Motion by this deadline, [ECF No. 20] will be the operative Motion for review.

Accordingly, it is **ORDERED AND ADJUDGED**:

1. The Motion for Continuance [ECF No. 18] is **GRANTED**. Movant shall have until May 10, 2021 to file an Amended Motion. Movant shall be advised that he cannot incorporate any prior Motions by reference.
2. Movant shall submit his final §2255 Motion in the form prescribed under Rule 2(c) of the Rules Governing 2255 Proceedings, a copy of which was previously supplied as an attachment to the Court's December 8, 2020 Order [ECF No. 6-1].
3. Movant's Motion for Reconsideration and Memorandum in Support and Modification Proposal [ECF No. 17] is **DENIED**.
4. Movant's Motion to Exceed Page Limit [ECF No. 21] is **GRANTED** in part and **DENIED** in part. Movant may have 45 (forty-five) pages to file an Amended Petition but shall not file a separate Motion to Dismiss.
5. Movants Motion to Amend/Correct Amended Complaint [ECF No. 26] is **DENIED** as

MOOT. Any amendments may be included in the final §2255 Motion.

DONE AND ORDERED at West Palm Beach, Florida this 16th day of April, 2021.


KENNETH A. MARRA
United States District Judge

Cc:

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APPENDIX - E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

FILED BY PG D.C.

SEP 28 2021

ANGELA E. NOBLE
CLERK U.S. DIST. CT.
S. D. OF FLA. - MIAMI

FILING FEE	
PAID <u>NO</u>	Civil Case No.: 20-62517-CV-Marra/Brannon
In Forma Pauperis	Criminal Case No.: 15-60225-CR-Marra/Matthewman
Angela E. Noble, Clerk	

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

NEIL TIMOTHY AHO,
Defendant-Appellant.

Appeal No. _____

NOTICE OF APPEAL AND MEMORANDUM
IN SUPPORT OF FILING THE NOTICE

Defendant-Appellant Neil Timothy Aho, appearing pro se and proceeding in forma pauperis ("Aho"), respectfully files this Appeal to the United States Court of Appeals for the Eleventh Circuit from discrete portions of the Final Order of the United States District Court for the Southern District of Florida entered on September 14, 2021 (DE 31) (the "September 14 Order") denying his Motion to vacate, set aside and dismiss with prejudice the Sentence and Judgment of Conviction entered against him on June 1, 2018 (the "Judgment"). The gravamen of the Appeal is based on the following: (i) The District Court lacks subject-matter jurisdiction to adjudicate any aspect of this criminal proceeding other than entry of an Order dismissing the Judgment with prejudice and (ii) The District Court failed to fulfill its independent, mandatory and inimitable duty to confirm the existence of subject-matter jurisdiction to hear this case prior to adjudicating any aspect of the case.

The lack of subject-matter jurisdiction is an issue separate and distinct from the other issues raised in the Motion Aho filed pursuant to Section 2255 of Title 28 of the United States Code ("Section 2255 Motion"). The subject-matter jurisdiction challenge based on a void Statute does not require Section 2255 as a procedural vehicle to question the original jurisdiction of the District Court or of this Honorable Court to render any decisions on the merits or to do anything other than to dismiss the Indictment and concomitant Prosecution with prejudice. See, e.g., United States v. Shkambi, 993 F.3d 388, 384 (5th Cir. Apr. 7, 2021) ("Article III Jurisdiction is always first.") (citation omitted); City of New York v. Mickalis Pawn Shop, LLC., 645 F.3d 114, 125-26 (2nd Cir. 2011) ("Our inquiry to ascertain whether we have subject-matter jurisdiction ordinarily precedes our analysis on the merits."). As the United States Supreme Court has specifically held: "Federal Courts have an independent obligation to inquire into the existence of subject matter

jurisdiction." (Arbaugh v. Y & H Corp., 546 U.S. 500, 514) (2006) (Ginsburg, J.)).

In an earlier Order entered on April 19, 2021 (DE 27) (the "April 19 Order"), the District Court erroneously rejected the lack of subject-matter jurisdiction argument; refused to acknowledge its failure to confirm sua sponte the existence of subject-matter jurisdiction to adjudicate this case and improperly required Aho to raise this challenge as part of his Section 2255 Motion. In this context, District Judge Marra denied Aho the right to present full and comprehensive arguments demonstrating the District Court has no jurisdiction whatsoever to decide the merits or any procedural issue. Although the District Court did increase the Section 2255 page-limit under applicable Local Rules from 20- to 45-pages, the Court refused to accept the complete and comprehensive arguments Aho sought to present and only grudgingly accepted a truncated subject-matter jurisdiction argument as part of the Section 2255 Motion challenging the Judgment. Aho reserved his right to contest this violation of due process on Appeal and accordingly incorporates the wrongful denial of his right to present a full and comprehensive argument to the District Court as part of this Appeal. Abbreviated advocacy should not determine the outcome of a subject-matter jurisdiction issue arising out of the flagrant misuse of the power to punish conferred upon Congress and fundamental violations of the Tenth Amendment and principles of federalism and dual sovereignty. Aho has an unequivocal right to present arguments "at a meaningful time and in a meaningful manner" (Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (Powell, J.) quoting Armstrong v. Manzo, 380 U.S. 545, 532 (1965) (Stewart, J.); See Kaley v. United States, 199 L.Ed.2d 46, 74 (2014) (Kagan, J.) (same)).

The September 14, 2021 Order completely misses all of these crucial points. See September 14 Order at 2-3. Although the failure of former counsel to raise the lack of subject-matter jurisdiction constitutes ineffective assistance prejudicial to the defense, this is not the linchpin of the subject-matter jurisdiction challenge. Nor is the failure to raise the issue on Appeal of any legal significance because lack of subject-matter jurisdiction based on a void statute can never be waived. The September 14 Order fails to come to grips with this determinative point. The unsupported assertion the argument "is reasonably considered to be without merit" (DE 31 at 3) is bereft of substantive support and does not address in any way the comprehensive- yet partially truncated- analysis demonstrating the District Court acted without authority based on a void statute. (See "Memorandum in Support of Section 2255 Motion" (DE 29 at 11-21)). The citations to United States v. Hornaday, 392 F.3d 1306, 1311 (11th Cir. 2004), cert. denied, 125 S.Ct. 2951 (2005) and United States v. Maxwell, 446 F.3d 1210 1217-18 (11th Cir. 2006) are completely misplaced

and do not address the essential legal argument advanced in the lower court. Both cases lack comprehensive substantial analysis. (See DE 29 at 11-21).

Pursuant to this Notice of Appeal, Aho most respectfully states the Final September 14 Order must be vacated and set aside because the District Court: (i) Misconstrued Fed. R. Crim. P. 12 ("Rule 12") as outlined infra; (ii) Failed sua sponte to confirm the existence of subject-matter jurisdiction; (iii) Ignored comprehensive arguments and provided no substantive analysis regarding constitutional issues raised in the Section 2255 Motion: (a) Congress lacks authority (direct or implied) to enact the Statute in question (Section 2252 of Title 18 of the United States Code ("Section 2252")); (b) ~~Failed to address~~ Commerce Clause issues of constitutional dimension that override stare decisis concerns including the Law of the Circuit (see DE 29 at Section I); (iv) Though claiming to have reviewed Aho's Supplemental Memorandum in support of the 2255 Motion (DE 30), completely sidesteps its primary points of attack, namely, the Law of this Circuit has not addressed the following: (a) Section 2252 exceeds the enumerated powers to punish conferred upon Congress under Articles I and III of the United States Constitution; (b) Section 2252 transgresses the sovereign police power reserved to the States under the Tenth Amendment when they Ratified the Constitution and formed the Union and (c) Promulgation of Section 2252 contravenes fundamental principles of federalism and dual sovereignty designed to preserve individual liberty and (v) Failed to recognize Section 2252 is void ab initio for the foregoing reasons yielding no amount of subject-matter jurisdiction to proceed with the criminal action.

Aho also respectfully states this Honorable Court should adjudicate this Appeal prior to determining the Application for Issuance of a Certificate of Appealability and hold the COA determination in abeyance until final resolution on appeal of whether subject-matter jurisdiction exists to decide this case. to consider whether a COA should issue in a given case, the original case must be cognizable in a Federal Court in the first place. In other words, the District Court must have subject-matter jurisdiction to adjudicate the case. An action based upon a void Statute is not cognizable and can not and should not be heard Accordingly, Aho respectfully states, this Court should as a threshold consideration confirm whether subject-matter jurisdiction exists and decide this Appeal distinct from- and before determining- whether a COA should issue.

The United States Supreme Court has unequivocally declared, "[S]ubject-matter jurisdiction can never waived or forfeited at any point in the litigation."

separately from the other arguments in to the Section 2255 Motion. Indeed, if the Court lacks subject-matter jurisdiction, then the Court lacks authority to decide any issue relating to this action. The District Court inexplicably and erroneously rejected this position and insisted Aho raise the lack of subject-matter jurisdiction as part of his post-collateral Section 2255 attack. In this respect, the District Court relies upon Rule 12 (See the April 19 Order (DE27)). The Court misinterprets the scope and operation of the Rule. District Judge Marra hides behind a Rule listing pre-trial motions a defendant is required to file while a case is pending to obscure the failure to confirm sua sponte the existence of subject-matter jurisdiction. That decision stands Rule 12 on its head and contravenes the statutory canon of construction eiusdem generis. Under this canon, specific words govern the interpretation of general phrases. Rule 12 simply does not apply to the challenge to subject-matter jurisdiction raised in this Appeal based on a Statute void ab initio. Rule 12(c)(3) lists no fewer than 15 motions a defendant must file prior to trial. Lack of subject-matter jurisdiction is not listed. In this respect, the challenge transcends "a defect in instituting the prosecution." The challenge rests upon the lack of any power of the District Court to hear the case, Rule 12(b)(2) refers to a party filing a motion. This subsection of the Rule has nothing to do with the independent and unwaivable duty of a federal district court to confirm the existence of subject-matter jurisdiction.

Subject-matter jurisdiction is fundamental to the basic authority of the Court to hear a case (Carlisle v. United States, 517 U.S. 416, 435 (1996) (Souter, J., concurring)). The District Court misapprehended this abecedarian jurisdictional precept using the spectre of dismissal as a cudgel to pressure Aho to include the lack of subject-matter jurisdiction argument as part of his Section 2255 Motion. Subject-matter jurisdiction defines the authority of a federal court to hear a particular case (Alikani v. United States, 200 F.3d 732, 734 (11th Cir. 2000)). Congress confers this authority on Article III Courts by statute (Id.). And for federal crimes, Congress bestows such authority pursuant to Section 3231 of Title 18 the United States Code ("Section 3231"). That Section provides federal district courts original jurisdiction over all offenses against the laws of the United States. Here, there is no jurisdiction under Section 3231 because Section 2252 is a nullity and the "indictment failed to charge conduct that amounts to an offense against the laws of the United States" (United States v. Morales, 987 F.3d 966, 978-79 (11th Cir. 2021) citing United States v. Brown, 752 F.3d 1344, 1348 (11th Cir.

2014) (citing Section 3231); United States v. Moore, 954 F.3d 1322, 1333 (11th Cir. 2020); United States v Easley, 2021 U.S. Dist. LEXIS 119796 at 7-8 (N.D. ALA. June 28, 2021).

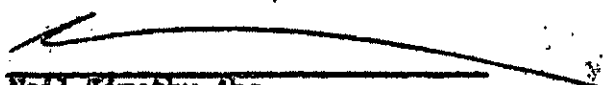
The Eleventh Circuit held in Williams v. Warden, 713 F.3d 1332, 1337 (11th Cir. 2014) if a court at any time determines the lack of subject-matter jurisdiction, then the action must be dismissed. That holding is consistent with the United States Supreme Court directive and ruling in Gonzalez v. Thaler, supra at 648. "When a requirement goes to subject-matter jurisdiction, courts are obligated to consider sua sponte issues that the parties have disclaimed or have not presented." (quoted in Williams, supra at 1338). Subject-matter jurisdiction can never be waived or forfeited (Id.). See United States v. Hartwell, 448 F.3d 707, 721 (4th Cir. 2006) (Williams, Circuit Judge, concurring) ("A conviction and sentence entered without subject-matter jurisdiction is void.") citing United States v. Prigden, 64 F.3d 147, 149 (4th Cir. 1995) ("Authorizing appeal if sentence imposed in violation of law").

This Appeal does not turn upon an argument alleging a defect in an Indictment or Information or Grand Jury proceedings. Nor does Aho allege lack of personal jurisdiction and/or diversity jurisdiction and/or improper venue. Aho argued and demonstrated Congress lacks authority of any kind, nature or description to enact the Statute upon which the Indictment and concomittant prosecution is based. See 'Memorandum of Law in Support of Section 2255 Motion' (DE 29 at 11-21). The whole proceeding is a nullity because Section 2252 was void at the time of enactment. The District Court can not and must not use Fed. R. Crim. Rule 12 as a shield against its failure to confirm the existence of subject-matter jurisdiction, especially where, as here, the Rule has no relevance to a challenge to subject-matter jurisdiction predicated upon a statute void ab initio. The challenge forming the basis for the Appeal is not a matter of hypertechnical "jurisdictional purity." The Appeal arises out of the District Court acting beyond the power of an Article III Court and therefore acting beyond the Rule of Law.

CONCLUSION

Based on the foregoing discussion, Aho most respectfully states this Notice of Appeal is timely filed; the Notice should be docketed and a briefing schedule issued to address the lack of subject-matter jurisdiction challenge and the District Court abdication of its duty to confirm such jurisdiction exists. Any other outcome would violate the Rule of Law. Aho further respectfully states this Honorable Court rule the enactment of Section 2252 is unlawful and the proceeding must be dismissed with prejudice.

Respectfully Submitted,


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