No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID WILLIAMS III,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI APPENDIX

Prepared and submitted by,

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Pro se petitioner

APPENDIX TABLE OF CONTENTS

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ON PETITION FOR WRIT OF CERTIORARI TO

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APPENDIX A1

ORDER OF UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT DENYING PETITIONER'S COA

(dated February 8, 2022)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-13078-G

DAVID WILLIAMS, III,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

David Williams moves for a certificate of appealability ("COA") in order to appeal the district court's dismissal of his *pro se* 28 U.S.C. § 2255 motion as untimely. To obtain a COA, Williams 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 Williams has failed to make the requisite showing, his motion for a COA is DENIED.

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-13078-G

DAVID WILLIAMS, III,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: JILL PRYOR and LAGOA, Circuit Judges.

BY THE COURT:

David Williams, III, has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's February 8, 2022, order denying him a certificate of appealability. Upon review, Williams's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DAVID WILLIAMS, III,

Petitioner,

v.

Case No. 6:19-cv-1800-CEM-GJK
Criminal Case No. 6:07-cr-75-CEM-GJK

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS CAUSE is before the Court on Petitioner David Williams, III's Motion to Vacate, Set Aside, or Correct Sentence ("Motion to Vacate," Doc. 1) filed under 28 U.S.C. § 2255. The Government filed a response to the Motion to Vacate (Doc. 8) in compliance with this Court's instruction. Petitioner filed a reply to the response. (Docs. 14, 15). Upon further instruction from the Court (Docs. 16, 23), the Government filed a supplemental response, and Petitioner filed a supplemental reply.

Petitioner asserts two grounds for relief. For the reasons that follow, the Motion to Vacate is denied.

I. PROCEDURAL HISTORY

Petitioner was indicted on May 23, 2007, with nine counts of mail fraud, in violation of 18 U.S.C. §§ 2, 1341 (counts one through nine); obstruction of justice, in violation of 18 U.S.C. §§ 2, 1503(a) (count ten); conspiracy to obstruct justice, in violation of 18 U.S.C. § 372, (count eleven); and filing false claims, in violation of 18 U.S.C. §§ 2, 287 (count twelve). (Criminal Case No. 6:07-cr-75-CEM-GJK, Doc. 1).[1] Following a trial held in September 2007, the Court granted judgment of acquittal to Petitioner's co-defendant. (Crim. Case Doc. 63). The Government moved to dismiss count eleven against Petitioner, which the Court granted, and a jury convicted Petitioner of counts one through ten and twelve. (Crim. Case Docs. 62, 64, 65, 67). The Court sentenced Petitioner to 235 months imprisonment, to be served consecutively to Petitioner's term of imprisonment in Case No. 6:01-cr-58-Orl-28DAB. (Crim. Case Doc. 84 at 2). Petitioner did not appeal.

In June 2008, Petitioner moved for post-conviction relief in a pleading entitled "Verified Petition for Writ of Habeas Corpus Filed Pursuant to the 1940th Edition of 28 U.S.C. § 451 et seq." (*Williams v. Middlebrook*, Case No. 6:08-cv-952-Orl-UWC-KRS (M.D. Fla. June 11, 2008), Doc. 1). Petitioner subsequently sought and was granted leave to supplement and amend the pleading. *Williams v. Middlebrook*,

[1] Criminal Case No. 6:07-cr-75-CEM-GJK will referred be to as "Criminal Case" or "Crim. Case."

Case No. 6:08-cv-952-Orl-UWC-KRS (M.D. Fla. June 11, 2008) (Docs. 12, 13). In the pleadings, Petitioner alleged that 28 U.S.C. §§ 2241 and 2255, as well as 18 U.S.C. § 3231, were unconstitutional and void, and asserted allegations of governmental fraud, unclean hands, bad faith, and unfair dealing, along with separation of powers violations and judicial fraud. The Court construed the Petition as one filed under 28 U.S.C. § 2255 and determined Petitioner was not entitled to relief. (*Williams v. Middlebrook*, Case No. 6:08-cv-952-Orl-UWC-KRS (M.D. Fla. June 11, 2008), Docs. 14, 15). The Eleventh Circuit denied Petitioner a certificate of appealability. (*Williams v. Middlebrook*, Case No. 6:08-cv-952-Orl-UWC-KRS (M.D. Fla. June 11, 2008), Doc. 20).

Petitioner then filed the present Motion to Vacate on September 16, 2019.

II. LEGAL STANDARD

Section 2255 provides that

> [a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a).

> [C]ollateral review is not a substitute for a direct appeal, [therefore,] the general rules have developed that: (1) a

> defendant must assert all available claims on direct appeal, and (2) "[r]elief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice."

Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004) (quoting *Richards v. United States*, 837 F.2d 965, 966 (11th Cir. 1988) (internal quotation marks and citation omitted)) (citing *Mills v. United States*, 36 F.3d 1052, 1055 (11th Cir. 1994)).

III. ANALYSIS

Petitioner asserts two claims for relief. In ground one, Petitioner contends that "[t]he [G]overnment stealthily submitted a defective redacted indictment to the petit jury during deliberation." (Doc. 1 at 4). Petitioner claims that his conviction, therefore, "violates the 5th and 6th Amendments[and] U.S. laws, . . . and was entered in excess of the [C]ourt's jurisdiction." (*Id.*). He also claims his conviction resulted in a fundamental miscarriage of justice. (*Id.*). In ground two, Petitioner contends that "[t]he [G]overnment's stealthy submission of a defective redacted indictment constitutes prosecutorial misconduct." (*Id.*).

A. Second or Successive

The Government argues that Petitioner's Motion to Vacate must be denied because it is a second or successive Section 2255 motion for which he has not received authorization from the Eleventh Circuit. *See* 28 U.S.C. § 2255(h). In

response, Petitioner claims that his Verified Petition for Writ of Habeas Corpus was not properly recharacterized as a first Motion to Vacate under Section 2255 because the Court did not provide him with the notice and warnings required by the Supreme Court in *Castro v. United States*, 540 U.S. 375 (2003).

In *Castro*, the Supreme Court held that

> when a district court recharacterizes a *pro se* motion as a § 2255 habeas petition, it must: 1) notify the litigant of the pending recharacterization; 2) warn the litigant that the recharacterization will subject any subsequent § 2255 motion to restrictions; and 3) provide the litigant an opportunity to withdraw the motion or amend it to include all available § 2255 claims. If a district court fails to issue these warnings, it cannot later consider the recharacterized motion as a previously filed § 2255 motion.

Figuereo-Sanchez v. United States, 678 F.3d 1203, 1206 (11th Cir. 2012) (citing *Castro*, 540 U.S. at 383).

The Government argues that Petitioner was "well-aware that his first motion could be characterized as a [§ 2255 motion], having asked the Court not to do so (despite calling it a habeas motion) and having cited and discussed *Castro* . . . in his first motion." (Doc. 8 at 5 n.6 (docket citations omitted)). But, the Eleventh Circuit has "interpreted the rule in Castro to be 'categorical and mandatory,' and therefore not subject to exception." *Id.* (citing *Gooden v. United States*, 627 F.3d 846, 848–49 (11th Cir. 2010)).

Review of the case file for Petitioner's Verified Petition for Writ of Habeas Corpus reveals that the Court did not comply with *Castro* before it recharacterized the Petition. Therefore, the impediment to filing the present Motion to Vacate is removed, and the Motion to Vacate may not be dismissed merely on grounds that it is second or successive.

B. Timeliness

The Government alternatively argues, however, that the Motion to Vacate is untimely. The Court agrees.

Pursuant to 28 U.S.C. § 2255, the time for filing a motion to vacate, set aside, or correct a sentence is restricted as follows:

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

> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f).

Judgment was entered against Petitioner in his criminal case on January 7, 2008. (Crim. Case Doc. 84). The judgment became final fourteen days later (*i.e.*, January 21, 2008) when Petitioner's time to file a notice of appeal expired. Fed. R. App. P. 4(b)(1)(A)(i); *Ramirez v. United States*, 146 F. App'x 325, 326 (11th Cir. 2005) ("In most cases, a judgment of conviction becomes final when the time for filing a direct appeal expires."). Therefore, Petitioner had through January 22, 2009 to file a 28 U.S.C. § 2255 motion. *See San Martin v. McNeil*, 633 F.3d 1257, 1266 (11th Cir. 2011) (applying Fed. R. Civ. P. 6(a)(1) in computing the AEDPA's one-year limitation period to run from the day after the day of the event that triggers the period); *Downs v. McNeil*, 520 F.3d 1311, 1318 (11th Cir. 2008) (AEDPA's one year "limitations period should be calculated according to the 'anniversary method,' under which the limitations period expires on the anniversary of the date it began to run.") (citing *Ferreira v. Sec'y Dep't of Corr.*, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007)). Petitioner did not file the Motion to Vacate until September 16, 2019, more than *ten years* after the expiration of the limitations period. Therefore, Petitioner's Motion to Vacate is untimely.

In attempt to explain the delay, Petitioner claims that, in March 2016, he made a Freedom of Information Act ("FOIA") request to the Executive Office for the United States Attorneys seeking five categories of documents related to his criminal case. (Doc. 1-1 at 1–2). He waited for more than a year, with no response, causing him to file a FOIA complaint in January 2018 with the United States District Court for the District of Columbia. (Doc. 1-1 at 2 (citing Civil Action No. 1:18-CV-00019-UNA (D.D.C.)). On or about September 14, 2018, Petitioner received 558 pages of documents in response to his FOIA request, at which time he discovered the existence of the redacted indictment that was given to the jury during deliberations. (Doc. 1-1 at 2). He "then researched, prepared and filed a § 2255 motion within one year from the date of discovery." (Doc. 15 at 8).

Petitioner's argument implicates 28 U.S.C. § 2255(f)(4), which permits the one-year limitations period to begin on "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." If the limitations period began to run on September 15, 2018, the day after Petitioner received the documents in response to the FOIA request and purportedly discovered the redacted indictment for the first time, then Petitioner had

through September 16, 2019,[2] to file his Motion to Vacate. As Petitioner filed the Motion to Vacate on that day, it would be timely.

"The statutory language, 'the date on which the facts . . . could have been discovered,' indicates that the one-year period begins on the first day the evidence becomes reasonably available." *Trucchio v. United States*, 553 F. App'x 862, 864 (11th Cir. 2014) (per curiam). Petitioner's subjective belief about the date the new evidence became available to him does not control the analysis, *id.* (citing *Aron v. United States*, 291 F.3d 708, 711 (11th Cir. 2002)), and Petitioner bears the burden to adequately allege due diligence under Section 2255(f)(4). *Id.*

Review of Petitioner's criminal case record reveals that the redacted indictment was filed on the publicly available docket on September 5, 2007 — the same day it was submitted to the jury. (Crim. Case Doc. 68). Therefore, the redacted indictment was almost immediately available to Petitioner, and he does not receive the benefit of the later limitations period start date under Section 2255(f)(4).

Petitioner also argues that he has established prosecutorial misconduct, cause and prejudice, actual innocence, and a fundamental miscarriage of justice warranting the application of equitable tolling through his September 14, 2018 receipt of the FOIA documents. (Doc. 1-1 at 10; Doc. 15 at 18).

[2] September 15, 2019, fell on a Sunday. Thus, the deadline was extended to Monday, September 16, 2019, by operation of Rule 6(a)(1)(c), Federal Rules of Civil Procedure.

In certain circumstances, the doctrine of "equitable tolling" may apply to excuse a party's failure to comply with the strict requirements of a statute of limitations. *Holland v. Florida*, 560 U.S. 631, 645 (2010). The Section 2255 limitations period may be subject to equitable tolling where a movant's untimely filing is due to "extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Jones v. United States*, 304 F.3d 1035, 1039 (11th Cir. 2002). The Supreme Court has established a two-part test for equitable tolling. Petitioner "must show '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' . . . prevent[ing] timely filing." *Lawrence v. Fla.*, 549 U.S. 327, 336 (2007). Petitioner bears the burden of establishing the applicability of equitable tolling by making specific allegations. *See Cole v. Warden, Ga. State Prison*, 768 F.3d 1150, 1158 (11th Cir. 2014) (citing *Hutchinson v. Fla.*, 677 F.3d 1097, 1099 (11th Cir. 2012)).

Petitioner has not satisfied either part of the test. Although he explains the steps he took once he initiated the FOIA request in 2016, Petitioner does not explain why he waited until 2016 to make such request. Petitioner claims prosecutorial misconduct warrants equitable tolling, based on the prosecution's failure to give Petitioner a copy of the redacted indictment before giving it to the jury. However, Petitioner does not explain why he did not review his criminal case docket at any

time after the trial. Thus, he has failed to demonstrate that he diligently pursued his rights or that some extraordinary circumstance stood in his way.

The Court may also consider an untimely petition for federal habeas corpus upon a showing that a fundamental miscarriage of justice has occurred, whereby a constitutional violation has probably resulted in the conviction of one who is actually innocent. *See McQuiggin v. Perkins*, 569 U.S. 383, 391–99 (2013); *see also Wyzykowski v. Dep't of Corr.*, 226 F.3d 1213, 1218-19 (11th Cir. 2000). "Actual innocence is not itself a substantive claim, but rather serves only to lift the procedural bar caused by [a movant's] failure timely to file [a] § 2255 motion." *United States v. Montano*, 398 F.3d 1276, 1284 (11th Cir. 2005) (per curiam). To demonstrate actual innocence, a petitioner must "support his allegations of constitutional error with new reliable evidence . . . that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). The movant "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* at 327.

Petitioner asserts that, in counts one through nine, he was charged with aiding and abetting mail fraud. Yet, the redacted indictment, which Petitioner claims generally removed references to the other co-defendant and references to the existence of any other defendant (Doc. 1-1 at 4–6), "didn't allege the existence of a principal actor besides [himself] who supposedly committed the crimes charged."

(Doc. 15 at 10; *see also* Doc. 1-1 at 3). He claims the "redacted indictment can be read as [he] aided and abetted himself," or that he "aid[ed] or abett[ed] someone else who committed the principal offenses," but that it "doesn't specify what the principal offenses are and on [sic] the existence of a principal actor." (Doc. 1-1 at 3–4, 6; *see also* Doc. 15 at 9–11). He argues that the redacted indictment, therefore, "failed to charge lawful crimes" and that the jury instructions given did not correct the error. (Doc. 15 at 10; *see also* Doc. 1-1 at 3). Thus, Petitioner contends that because he cannot be convicted of a crime that does not exist, his convictions were entered in excess of the Court's jurisdiction and constitute a miscarriage of justice. (Doc. 1-1 at 6–7; Doc. 15 at 15).

However, Petitioner's arguments are entirely baseless. As Petitioner points out, he was charged in counts one through nine of the indictment and redacted indictment with violations of 18 U.S.C. §§ 1341 and 2. (Crim. Case Doc. 1 at 1–8; Doc. 68 at 1–8). Section 1341 sets forth the prohibition against mail fraud — *i.e.*, the statute prohibits using the United States Postal Service or a private or commercial carrier to further a "scheme or artifice to defraud;" to "obtain[] money or property by means of false or fraudulent pretenses, representations, or promises;" or "to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit

or spurious article." Section 2(a) provides that, "[w]hoever commits an offense against the United States ***or*** aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." (emphasis added).

Petitioner focuses entirely on the "aids [and] abets" language of § 2. But he fails to acknowledge that the first part of § 2(a) also provides for punishment as a "principal" for "commit[ting] an offense against the United States."[3]

Moreover, the jury was instructed that Petitioner was charged with mail fraud. (Crim. Case Doc. 97 at 106–110, 114). Although the Court further instructed the jury on aiding and abetting at the very end of the jury charge, that instruction was not given in error. "Aiding and abetting 'is an alternative charge in every [federal criminal indictment], whether explicit or implicit, and the rule is well-established, both in this circuit and others, that one who has been indicted as a principal may be convicted on evidence showing that he merely aided and abetted the commission of the offense.' " *Bourtzakis v. United States Att'y Gen.*, 940 F.3d 616, 622 (11th Cir. 2019) (quoting *United States v. Walker*, 621 F.2d 163, 166 (5th Cir. 1980)), *cert. denied sub nom. Bourtzakis v. Barr*, 141 S. Ct. 245 (2020).

The record, therefore, demonstrates that Petitioner was charged with and convicted of mail fraud and his arguments regarding being charged and convicted of

[3] *Accord* Principal, *Black's Law Dictionary* (11th ed. 2019) ("Principal" means, among other things, "[s]omeone who commits or participates in a crime.").

aiding and abetting mail fraud are irrelevant and fail to establish a miscarriage of justice. Consequently, the Motion to Vacate is denied as time-barred.

Any of Petitioner's allegations not specifically addressed herein have been found to be without merit.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for certificate of appealability only if the Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec'y, Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). However, the petitioner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Petitioner has failed to make a substantial showing of the denial of a constitutional right.[4]

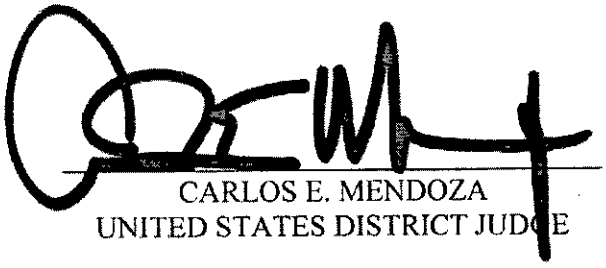
V. CONCLUSION

It is hereby **ORDERED** and **ADJUDGED** as follows:

[4] "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." *Rules Governing Section 2255 Proceedings for the United States District Courts*, Rule 11(a).

1. Petitioner's Motion to Vacate, Set Aside, or Correct Sentence (Doc. 1) is **DENIED** as time-barred, and this case is **DISMISSED with prejudice**.
2. The Clerk of the Court shall enter judgment accordingly and is directed to close this case.
3. The Clerk of the Court is further directed to file a copy of this Order in criminal case number 6:7-cr-75-CEM-GJK and to terminate any motions pending in that case. (Crim. Case Doc. 94).

DONE and **ORDERED** in Orlando, Florida on August 23, 2021.



CARLOS E. MENDOZA
UNITED STATES DISTRICT JUDGE

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID WILLIAMS III,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PROOF OF SERVICE

I, David Williams III, do swear or declare that on this date, ~~October~~ November 3rd, 2022, as required by Supreme Court Rule 29, I provided true and correct copies of the foregoing MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, PETITION FOR WRIT OF CERTIORARI, and Appendix, by United States Mail to the Solicitor General of the United States, whose address is: Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W.; Washington, DC 20530-0001.

I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted by,

David Williams III

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Post Office Box 1031
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Pro se petitioner