No.

IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW LANE DURHAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In *Herrera v. Collins*, 506 U.S. 390 (1993), this Court held that there is no free-standing claim of actual innocence under the Constitution available to a *state* prisoner seeking habeas relief in a *federal* court.

The question presented is whether this is also true for a *federal* prisoner seeking a new trial based on actual innocence in the same *federal* court that convicted him?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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TO: The Honorable Chief Justice and Associate Justices of the United States Supreme Court:

Matthew Lane Durham petitions respectfully for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The United States Court of Appeals for the Tenth Circuit decided this case by unpublished order filed October 30, 2023. *See* attached Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered October 30, 2023. Petitioner did not seek rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in part:

> No person shall be...deprived of....liberty...without due process of law.

STATEMENT OF THE CASE

Durham was charged in the Western District of Oklahoma by Second Superseding Indictment filed April 7, 2015, with 17 counts: eight counts of interstate travel with intent to engage in illicit conduct with children in violation of 18 U.S.C. § 2241(c) (one count for each complaining witness); one count of foreign travel to engage in illicit sexual conduct in violation of 18 U.S.C. § 2423(b); and eight counts of engaging in illicit sexual conduct in a foreign place in violation of 18 U.S.C. § 2423(c) (one count for each complaining witness). Doc. 142.

Jury trial began on June 9, 2015, with closing arguments occurring on June 18, 2015. The jury returned verdicts on June 19, 2015, acquitting Durham on ten counts (including all the travel counts and one of the section 2423(c) counts). Doc. 331. During post-trial motions, this Court granted judgments of acquittal on counts 11, 13, and 14. Doc. 433. Thus, Durham was convicted on four substantive counts 10, 15, 16, and 17; and sentenced to 480 months.

Durham appealed to the Tenth Circuit, which affirmed in a published opinion filed August 19, 2018. *See United States v. Durham*, 902 F.3d 1180 (10th Cir. 2018). He thereafter sought certiorari review in this Court, which was denied on January 7, 2019. *See Durham v. United States*, No. 18-6854 (U.S.) (certiorari denied).

He thereafter sought post-conviction relief pursuant to 28 U.S.C. § 2255, claiming a Due Process violation and a right to a new trial based on newly discovered evidence.

The district court denied his claim on the basis that there was no Government action, and thus no Due Process violation. *See* Appendix B. The Tenth Circuit denied a Certificate of Appealability. *See* Appendix A.

STATEMENT OF THE FACTS

In essence, Durham was convicted and sent to federal prison for 40 years because he was convicted of sexually assaulting four children at an orphanage in Kenya.

TRIAL

Upendo Kids International is a non-profit organization based in Edmond, Oklahoma. Upendo has Oklahoma ties because the founder, Eunice Menja, who is also a native Kenyan and naturalized U.S. citizen, lives in Edmond. Upendo purchased land in Juja, Kenya, and ultimately established the Upendo Children's Home there in 2013.

Durham began volunteer work with Upendo in the summer of 2012, which led ultimately to travel to Kenya on four occasions. It was during these trips to the Upendo Children's Home in Kenya that Durham allegedly committed the crimes at issue here. He was ultimately convicted by the jury of sexually assaulting four children at Upendo.

L.M.: L.M. testified as Government witness number one. Tr. 44. She was 16-years-old at the time of trial. She testified that she was from Upendo, in Juja, Kenya, which she described as a children's home. *Id.* 45. Although she could speak some English, she testified at trial in Swahili. *Id.* 46.

She told the jury that the phrase "bad manners" was a euphemism for sex. *Id.* 48. She testified that Matthew had done "bad manners" to her four times. *Id.* 51.

L.G.: L.G. was eleven years old when she testified at trial. Tr. 792. She lived at Upendo.

Id. She testified that she knew Durham, and she also explained to the jury that the phrase "bad manners" was a euphemism for sexual conduct. Tr. 794-95.

She testified that Durham had done "bad manners" to her at Upendo in the sitting room, next to her bedroom. Tr. 795-96. She described being sexually assaulted by Durham. Tr. 797-98.

S.W.: S.W. was a 7-year-old when she testified at trial. Tr. 825. She was a first-grader at Upendo. *Id.* 826. She also used the "bad manners" euphemism to described sexual activity, and testified that "Matthew" did bad manners to her at Upendo. *Id.* 827-28.

J.N.: J.N. was in sixth grade and 13-years-old when he testified at Durham's trial. Tr. 845, 848. He had lived at Upendo for three years at that time. *Id.* He testified that Durham touched him in a way he did not want to be touched. *Id.* 847. He stated that this happened on two occasions. *Id.* 847-53.

The jury believed the testimony of each of these four children, convicted Durham, and this Court sentenced Durham to 40 years in federal prison.

NEWLY DISCOVERED EVIDENCE

After trial, counsel found out that J.M., a former Board member of Upendo, who also knew Durham, as well as other children who live at Upendo. Back on June 8, 2019, S.W. was in Edmond, Oklahoma, for an operation on her ear. S.W. had testified against Durham at trial, and the count involving her was one of the four on which Durham was convicted. *See* Tr. IV 825 (trial testimony of S.W.).

On this day, J.M. picked up S.W. and took her to a softball game, then out for ice cream, then back home where they went swimming and built a bonfire. According J.M., whom the kids call Grandma, "we were swimming and she looked over at me and she said, Grandma, you know we all

lied." J.M. "just stopped" and asked S.W. what she was talking about. S.W. replied: "We all lied about Matt." *Id.* J.M. was surprised by this and asked her to say it again. Again, S.W. said, "We lied."

J.M. was surprised because she had "bought into the whole story" that Durham was guilty of abusing the kids and believed him to be guilty, but S.W. again told her, "All of us lied and Matt never hurt any of us."

S.W. was about 10-years-old when she told this to J.M. J.M. did not prompt S.W. to say anything about Durham, nor was she questioning S.W. about the case when S.W. said out of the blue that they all lied and Matt never hurt any of the kids. At hearing this, J.M. did not pursue it further with S.W.

Several months later, J.M. called Joseph Nusheri (whom they call Uncle Nusheri), who worked at Upendo as a counselor, and was a person who interacted with the children all the time. During this call they discussed several things, and J.M. brought up the fact that S.W. "just blurted out that they lied about Matt." Nusheri responded, "Yeah, she says that all the time, all of them do[.]"

The COVID pandemic started shortly after that conversation with S.W., but J.M. continued to stay in contact with most of the children at Upendo. Most of them had phones and could call her.

J.M. had left the Upendo Board at the end of 2019. The catalyst for her resignation was a trip to Kenya during which she and others noticed that "things weren't right" concerning the finances of Upendo and the direction of the organization.

The next time J.M. had an interaction with one of the Upendo children was July 14, 2021, when L.M. (the subject of Count 16) sent a text to J.M. saying that she "wanted to talk to the judge."

J.M. replied, what judge? L.M. replied, "the judge in Oklahoma over Matt's case." J.M. took this to mean Judge Russell who presided over the criminal trial.

J.M. explained to L.M. that it does not work that way, and that L.M. could not just call the judge and talk to him about the case. When L.M. made this statement to J.M., L.M. had been sent out of Upendo. L.M. also said that, "[S.] always cries about having to lie about Matt, Matt did not harm any of us."

Counsel for Durham was able to have L.M. interviewed in Kenya, and also obtained an affidavit from L.M. in which she confirms the statements she made to J.M. about her allegations against Durham being false and coerced.

On August 29, 2021, L.G. (the subject of Count 15) contacted J.M. by FaceTime. At this time, Lydia had been "thrown out of the village." During this FaceTime call, L.G. "lost it." According to J.M., L.G. "started crying and she said, Grandma, you don't know what they did to us...they beat us so badly and told me what to say and she said, Grandma, I did not know what those words were and especially didn't even know–she was 10 years old–did not know...English words for penis or vagina...She had no clue what they were talking about."

L.G. was interviewed in Kenya about the allegations she made about Durham, and she confirmed the information she told to J.M. that Durham was a "good person" who was friendly with everyone, and who never assaulted her.

And, according to J.M. "the story keeps going" when J.N. (the subject of Count 17) contacted her. J.N. is one of the "kids that came here and testified against Matt." J.N. told J.M. that he had been threatened with jail if he did not say that he slept with Matt, which was not true. He apologized to J.M. for "saying wrong in court."

In addition, counsel has obtained an affidavit from J.N., and a recorded interview, corroborating his information to J.M. to the effect that he and other children at Upendo were coached and coerced to give false testimony against Durham.

Thus, after his trial, the minor accusers of Durham have all recanted their trial testimony as false and coerced.

REASONS FOR GRANTING THE WRIT

Durham asserts that this Court should grant the writ to determine whether the rule of *Herrera v. Collins*, 506 U.S. 390 (1993), which precludes a free-standing claim of actual innocence for *state* prisoners seeking federal review in the 2254 context, extends to *federal* prisoners raising such a claim in the 2255 context.

Durham's claim is that newly discovered evidence, that is, evidence discovered with due diligence after the jury had found him guilty, shows that he is factually innocent of the crimes for which he was convicted. The district court denied the claim on the basis that actual innocence is not cognizable in 2255 proceedings, applying the holding of this Court in *Herrera v. Collins*, 506 U.S. 390 (1993).

This holding appears to be in conflict with Tenth Circuit precedent in *Anderson v. United States*, 443 F.2d 1226 (10th Cir. 1971) (*per curiam*). In *Anderson*, a federal prisoner lodged an unsuccessful appeal, but thereafter brought a 2255 motion based on newly discovered evidence in the form of an affidavit by a fellow inmate claiming culpability for one of the crimes for which Anderson had been convicted. The district court denied relief in summary fashion, but the Tenth Circuit reversed and remanded to the district court with instructions to determine whether the facts alleged in the affidavit were true. *Anderson,* 443 F.2d at 1228.

On the way toward this conclusion, the Tenth Circuit noted that usually a claim based on newly discovered evidence would be raised in a Rule 33 motion. *Id.* 1227. However, that Rule required (at the time) the claim to be raised within two years, and Anderson was beyond that. *Id.*

Nonetheless, the Tenth Circuit concluded, "[t]he motion can however be properly entertained under § 2255." *Id.* (*citing Kaufman v. United States*, 394 U.S. 217 (1969) (which applied *Townsend v. Sain*, 372 U.S. 293 (1963), to federal prisoners). *Townsend* articulated the circumstances under which federal courts could review the state court criminal convictions of state prisoners, which included newly discovered evidence; and *Kaufman* extended this structure to federal prisoners in the 2255 context. *Kaufman*, 394 U.S. at 227-28.

Notably, this Court in *Townsend* placed an important qualifier on "newly discovered evidence" stating, "Of course, such evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." *Id.* 317.[1]

Townsend was decided in 1963. The Tenth Circuit decided *Anderson* in 1971. The *Anderson* Court no doubt had to be aware of *Townsend's* articulated standard regarding newly discovered evidence in 2254 cases involving state prisoners.

Nevertheless, *Anderson* held that relief under 2255 was available in a case of newly discovered evidence involving a confession by a third-party without any allegation that the

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[1] *Townsend* has been overruled, in part, regarding the standards for procedural defaults, but the holding relevant here is sound. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) (rejecting the "deliberate by-pass" standard of *Townsend* in favor of a cause-and-prejudice standard for state procedural defaults).

Similarly, *Kaufman* has been overruled, in part, regarding the availability of Fourth Amendment claims in collateral review, but that is not the issue here. *See Stone v. Powell*, 428 U.S. 465 (1976).

Government was involved in committing or contributing to the error.

The *Anderson* Court stated, "No one can doubt that a true confession by a stranger to the crime for which appellant has been convicted can be the basis for judicial relief for "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." *Anderson*, 443 F.2d at 1227 (*quoting Sanders v. United States*, 373 U.S. 1 (1963)).

The (unstated) constitutional right at issue in *Anderson* was presumably the right to Due Process by not being convicted of a crime for which the accused was factually innocent and the concomitant right to have newly discovered evidence of innocence heard and evaluated by a court.

Which brings us back to *Herrera*.

Herrera was a 2254 case brought by a state court prisoner sentenced to death, who alleged a claim of actual innocence based on newly discovered evidence, but without any accompanying constitutional claim. This Court sprung the counter-intuitive holding that a claim of actual innocence does not entitle a state court prisoner to habeas relief in a federal proceeding.

The *Herrera* Court in1993 simply applied the rule governing newly discovered evidence as articulated by the *Townsend* Court back in 1963. *See Herrera*, 506 U.S. at 399-400. So, in a sense, there was nothing new about the *Herrera* holding. Still, a few things emerge from it.

First, Justices Blackmun, Stevens, and Souter dissented, observing the common sense sentiment that nothing could be more contrary to contemporary standards of decency than allowing the State to execute an innocent person. *Id.* 430. So, Durham objects to *Herrera* on this basis and asserts that it should be overruled as wrongly decided.

More fundamentally, *Herrera* dealt with a *federal* court review of the conviction of a *state*

court prisoner. Durham has found no case from this Court extending the reasoning of *Herrera* to a case like his, one involving a prisoner asking the federal court that sentenced him to consider the validity of the judgment and sentence based on newly discovered evidence.

There are clues in *Herrera* that the relief sought by Durham is not foreclosed by *Herrera* because of this. The *Herrera* majority canvassed the history of new trials and observed that relief was available on this basis at the common law via writ of error *coram nobis* "for some errors of fact in felony cases." *Herrera*, 506 U.S. at 408.

Indeed, in *United States v. Morgan*, 346 U.S. 502 (1954), this Court rejected the argument of the Government that the All Writs Act codified *coram nobis* and restricted it to persons still "in custody." *Morgan*, 346 U.S. at 507. The All Writs Act provides that federal courts may issue writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. *See* 28 U.S.C. § 1651(A).

Durham is in a different posture, seeking relief from a federal court as a federal prisoner convicted in a federal court. So the question is whether the 2254 analysis in *Herrera* applies across the board to the 2255 context.

Durham asserts that it does not. He asks this Court to accept his case and consider the question.

CONCLUSION

For the reasons stated above, the Petitioner prays respectfully that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

DATED this 29th day of January, 2024.

Respectfully submitted,

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FILED
United States Court of Appeals
Tenth Circuit

October 30, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MATTHEW LANE DURHAM,

Defendant - Appellant.

No. 23-6003
(D.C. Nos. 5:22-CV-00608-R &
5:14-CR-00231-R-1)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MORITZ**, **BALDOCK**, and **KELLY**, Circuit Judges.

Matthew Lane Durham, a federal prisoner represented by counsel, moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion. We deny the motion.

As thoroughly explained in our published opinion resolving Durham's direct appeal, *see United States v. Durham*, 902 F.3d 1180, 1189–92 (10th Cir. 2018), Durham (an Oklahoma resident) went to Kenya in 2014 to work at a group home for impoverished children, and some of the children eventually accused him of sexual

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

abuse. Durham confessed such abuse to the group home's administrators, and he memorialized his confession in writing and on video.

Durham returned to the United States and a grand jury in the Western District of Oklahoma charged him with various offenses, including multiple counts of engaging in illicit sexual conduct while traveling in foreign commerce, *see* 18 U.S.C. § 2423(c). In 2015, the case went to a jury trial at which some of the victims testified. The jury convicted Durham of seven § 2423(c) violations. Through post-trial motions, the district court granted acquittal on three of the § 2423(c) convictions. Thus, Durham stood convicted of four counts of illicit sexual conduct while traveling in foreign commerce. The district court sentenced him to 480 months in prison. This court affirmed.

In July 2022, Durham (through counsel) filed his first § 2255 motion, claiming "newly discovered evidence of his actual innocence." Aplt. App. at 72.[1] He attached a sworn statement from an acquaintance named Judy Mullins who had also been involved with the Kenya group home and who knew the victims personally. Mullins said that all the victims had recently told her that staff members at the group home coerced them to accuse Durham and testify against him. Durham also attached sworn

[1] Durham asserted his claim was timely because he brought it within one year of discovering new evidence. *See* 28 U.S.C. § 2255(f)(4) (allowing a federal prisoner to bring a first § 2255 motion within one year from "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence"). The government and the district court never disputed timeliness. Because timeliness is not jurisdictional in this context, *see United States v. Miller*, 868 F.3d 1182, 1185 (10th Cir. 2017), we do not discuss it further.

statements to this effect from two of the alleged victims. Neither Mullins nor the alleged victims offered any reason why staff members at the group home wanted to frame Durham for his crimes. Moreover, Durham did not claim the government participated in coercing the witnesses, or that the government knew about the coercion. But he claimed his due process rights were violated in any event. The government responded that the motion should be denied for two reasons. First, there was no government involvement in the alleged coercion. Second, Ms. Mullins' statement (containing triple hearsay and numerous procedural deficiencies) and the victims' new affidavits were insufficient to overcome sworn trial testimony.

The district court ruled that actual innocence, unconnected to any constitutional violation committed by the government, is not a recognized constitutional claim. It therefore denied Durham's § 2255 motion, and Durham appealed.

This appeal may not proceed unless this court grants a COA. *See* 28 U.S.C. § 2253(c)(1)(B). To merit a COA, Durham must make "a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). This means he "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). In the same way that this court may affirm on any basis evident in the record, it may deny a COA on any basis evident in the record. *See Davis v. Roberts*, 425 F.3d 830, 834 (10th Cir. 2005).

In his COA motion, Durham argues that this court's decision in *Anderson v. United States*, 443 F.2d 1226 (10th Cir. 1971) (per curiam), allows district courts to consider newly discovered evidence of innocence under § 2255, and the evidence need not be connected to any alleged violation of the defendant's constitutional rights during the investigation or prosecution of the underlying crime. We are doubtful *Anderson* applies here, but we need not discuss it in any detail because Durham failed to preserve this argument. In the district court, Durham's legal argument comprised only the following:

- he declared his actual innocence based on the alleged recantations;
- he invoked a due process right to a fair trial and cited some cases about the voluntariness of witness testimony (without acknowledging that those cases require government involvement in the allegedly unconstitutional conduct); and
- he invoked the test, developed under Federal Rule of Criminal Procedure 33(b)(1), for granting a new trial based on newly discovered evidence (without citing Rule 33 or acknowledging its requirement that such a motion must be brought within three years of the verdict).

He nowhere in his motion, supporting brief, or reply brief pointed the district court to *Anderson* or the contours of an actual innocence claim under § 2255.

In the absence of any argument to the district court about *Anderson* (including any argument that § 2255 cases might be treated differently than § 2254 cases when it comes to actual innocence), the district court properly followed our published cases

holding that actual innocence is not a freestanding basis for collateral relief.[2] *See Farrar v. Raemisch*, 924 F.3d 1126, 1131 (10th Cir. 2019) (citing *Vreeland v. Zupan*, 906 F.3d 866, 863 (10th Cir. 2018) (denying certificate of appealability because freestanding assertions of actual innocence cannot support habeas relief); *LaFevers v. Gibson*, 238 F.3d 1263, 1265 n.4 (10th Cir. 2001) ("[A]n assertion of actual innocence . . . does not, standing alone, support the granting of the writ of habeas corpus."); *Sellers v. Ward*, 135 F.3d 1333, 1339 (10th Cir. 1998) ("[T]he claim of innocence . . . itself is not a basis for a federal habeas corpus no matter how convincing the evidence.")). Thus, "reasonable jurists would [not] find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484.

We therefore deny a COA and dismiss this matter.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

[2] *See United States v. Viera*, 674 F.3d 1214, 1220 (10th Cir. 2012) (denying COA on issues not presented to district court in § 2255 motion, in light of this court's "general rule against considering issues for the first time on appeal").

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. CR-14-231-R**
	)	
MATTHEW LANE DURHAM,	)	
	)	
Defendant.	)	

ORDER

Defendant, appearing through counsel, filed a Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255. The Court ordered the Government to respond and Defendant to file a reply, and both have done so. Accordingly, the motion is ripe for consideration. For the reasons set forth herein, Defendant's § 2255 motion is dismissed because the sole claim he asserts is not cognizable under § 2255.

The factual background of Defendant's case is taken from the decision of the Tenth Circuit Court of Appeals in *United States v. Durham*,

> On May 1, 2014, Mr. Durham, then 19 years old, arrived in Kenya on his fourth Christian missionary trip there. ROA, Vol. 12 at 1818 (TT 1204); ROA, Vol. 10a at 25. In Kenya, he volunteered at the Upendo Children's Home ("Upendo"), where 33 children from impoverished backgrounds live. ROA, Vol. 12 at 695-97, 787 (TT 81-83, 173). Upendo Kids International, an Oklahoma non-profit founded and directed by Eunice Menja, operates Upendo. Id. at 787, 960 (TT 173, 346), Aplee. Br. at 3. Ms. Menja's sister, Josephine Wambugu, is the manager of Upendo. ROA, Vol. 12 at 695, 788 (TT 81, 174).
>
> On his previous trips to Kenya, Mr. Durham had stayed with a host family, but on the fourth trip, he asked to stay at Upendo instead. Id. at 1811

(TT 1197). On June 12, 2014, Ms. Wambugu entered one of the girls' bedrooms and saw Mr. Durham lying on a bed with one of the girls. *Id.* at 705, (TT 91). When Ms. Wambugu came into the room, Mr. Durham left quickly. Id. at 705-06 (TT 91-92). Ms. Wambugu then spoke to some of the girls, who said they had "been doing bad manners" with Mr. Durham. ROA, Vol. 12 at 710-11 (TT 96-97). The children used "bad manners" to mean engaging in sexual acts. See id. at 662 (TT 48); 1412 (TT 798); 1443-44 (TT 829-30)

On June 13, Ms. Menja, Ms. Wambugu, Jason Jeffries (another American volunteer at the home), and Tom Mutonga (a local supporter of Upendo) met with Mr. Durham at Upendo. *Id.* at 817, 825 (TT 203, 211). When he entered the meeting, Mr. Durham yelled, "You can fire me, fire me now." *Id.* at 825 (TT 211). Ms. Menja accused him of hurting the girls and asked for his response. *Id.* at 826 (TT 212). Mr. Durham said he did not remember, and asked to speak to Ms. Wambugu alone. *Id.* at 826-27 (TT 212-13).

Once alone, he asked Ms. Wambugu to defend him, and she asked him whether he had done the acts reported by the girls. *Id.* at 723 (TT 109). He said, "Yes, I did it. Yes, I did." *Id.* at 723 (TT 109). But when he went back to talk to the group, Mr. Durham again said he could not remember assaulting the children. He added that he had been struggling with child pornography and homosexuality. *Id.* at 724, 828 (TT 110, 214). Ms. Menja told Mr. Durham she was going to take him to a different location, explaining that, for the safety of the children, she did not want him to stay at the children's home. *Id.* at 829 (TT 215). He spent the next three days at an empty house owned by Ms. Menja's father-in-law. *Id.* at 830 (TT 216). One of the volunteers had taken Mr. Durham's passport after hearing about the allegations. *Id.* at 1052 (TT 438).

During his time away from Upendo, Mr. Durham sent his father text messages stating: "I don't want to live anymore" and "I hate myself. I deserve to burn in hell." ROA, Vol. 9 at 78 (Gov't Exh. 29). He sent a text to Ms. Menja saying: "Tell all the kids how sorry i am, and i am praying for their forgiveness every hour." Id. at 18 (Gov't Exh.10) (errors in original).

Mr. Durham's great-uncle arranged for Mr. Durham to fly back to Oklahoma. ROA, Vol. 12 at 1682-83 (TT 1068-69). On June 17, before he flew out, Mr. Durham met with Ms. Menja, Ms. Wambugu, and Mr. Mutonga at the Seagull restaurant. Id. at 855 (TT 241). Ms. Menja video recorded some of the ensuing conversation in multiple videos on her cellphone (the "Seagull Confession Videos"). Id. at 856 (TT 242). Mr. Durham knew that he was being recorded and asked that the video be kept on. Gov't Exh. 4 at 12:09.

On the longest video, Ms. Menja asked Mr. Durham about the allegations. He responded that he had struggled with a "temptation to touch children and to be with other men." Gov't Exh. 4 at 1:55-2:01. When Ms. Menja started asking about specific children who had accused him of abuse, Mr. Durham admitted to assaulting those children. *See, e.g., id.* at 5:39-6:15.

After Ms. Menja stopped recording the video, she said she could not listen any more, and Mr. Durham offered to write down his confession. ROA, Vol. 12 at 865 (TT 251). He wrote detailed statements about how he abused or otherwise engaged in inappropriate behavior with over ten of the children. ROA, Vol. 9 at 8-16. The following relate to three of the four charges of conviction and each concerns a different victim:

- "I would take her to the bathroom at night and hold her down and rape her. This happened on several occasions. I also made her watch me do things to [another girl]. I told her never to tell anyone, and that I loved her." ROA, Vol. 9 at 8 (Gov't Exh. 9).
- "I would take her to the bathroom and have her take off her clothes. I would touch myself and her. I don't know how many times it occurred. Also, when we had our sleepovers Friday night, [she] always made a point to sleep by me. I would spoon with her until I woke up." Id. at 15 (Gov't Exh. 9).
- "I took her to the bathroom and force[d] her to have sex with me. This happened on more than one occasion. I made her swear to never tell anyone . . . . Any time I try to read the bible or pray, this image comes to my [head]." Id. at 16 (Gov't Exh. 9).

Ms. Wambugu next spoke to the Kenyan police, who told her they could not arrest Mr. Durham. ROA, Vol. 12 at 873-74 (TT 259-60). Ms. Menja returned Mr. Durham's passport to him, and he flew out of Kenya the night of June 17. *Id.* at 874-75 (TT 260- 61).

Ms. Menja took six victims to a doctor the next day, June 18. *Id.* at 875 (TT 261). Medical workers examined them and determined five out of six had perforated hymens. *Id.* at 1187-88 (TT 574-75). Ms. Menja later reported what had happened to the U.S. Embassy. *Id.* at 875 (TT 261).

902 F.3d 1180, 1189-1191 (10th Cir. 2018)(footnotes omitted). Durham was charged with seventeen counts and on June 19, 2015, the jury found Defendant guilty on seven counts of traveling in foreign commerce and engaging in illicit sexual conduct with a minor in

violation of 18 U.S.C. § 2423(c). Defendant was acquitted of the remaining counts. Thereafter this Court granted judgment of acquittal on three counts because the prosecution had not proven that Defendant engaged in "sexual conduct" as defined by the relevant statute. Other post-trial motions were denied. The Court sentenced Defendant to 480 months in prison. On appeal the Tenth Circuit affirmed the conviction and sentence.[1] Defendant, appearing through counsel, filed the instant § 2255 motion, arguing he is entitled to a new trial.

Section 2255 entitles a federal prisoner to relief if this Court finds that "the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or [is] otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack." 28 U.S.C. § 2255(b). Defendant's motion argues that the testimony of L.M., L.G., S.W., and J.N. was coerced by Josephine Wambugu, who beat and threatened the children so they would accuse and testify against the Defendant. He argues he "discovered newly discovered evidence of his actual innocence and moves this Court for an evidentiary hearing to support his claim and to vacate his convictions and sentences in this case." (Doc. No. 495, p. 12).

Defendant argues that his right to due process was violated because of alleged witness coercion. The Government contends that Defendant cannot prevail on his due process claim because the alleged coercion was not the result of government action. "The

[1] Defendant unsuccessfully sought certiorari review from the United States Supreme Court. *Durham v. United States*, 139 S.Ct. 849 (2019).

Fifth Amendment guarantees that the government will not deprive a defendant of life, liberty, or property without due process of law. U.S. Const. amend. V. This guarantee does not protect against conduct by private parties, [*Colorado v.*] *Connelly*, 479 U.S. [157,] 166, [107 S.Ct. at 521]. . . ." *United States v. Guerro*, 983 F.2d 1001, 1004 (10th Cir. 1993); *see also United States v. Raymer*, 876 F.2d 383, 386 (5th Cir. 1989) ("[t]he relevant test ... focuses ... on the presence or absence of police coercion"); *United States v. McCullah*, 76 F.3d 1087, 1101 (10th Cir.1996)(a statement is involuntary if the government's conduct caused the witness' will to be overborne)(quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225–26 (1973).[2] Accordingly, Plaintiff argues, Defendant is not entitled to § 2255 relief, because he does not contend that Government's agents coerced the children's testimony.

In reply Defendant argues that the procedural posture of this case distinguishes his argument from those cases in which the issue was the admissibility of testimony. He argues, "it is a motion for a new trial based upon newly discovered evidence of coercion of the minor complaining witnesses." (Doc. No. 500, p. 2).[3] Circling back to Defendant's original argument, the question is whether Defendant may proceed under § 2255 with his claim on the premise that he is actually innocent in light of the alleged recantations. In short, the answer, is no, because a stand-alone claim of actual innocence does not arise under the United States Constitution. Defendant does not argue that his rights were violated

[2] The Government addresses the use of knowingly perjured testimony however, Defendant makes no argument that the Plaintiff was aware that one or more of the children testified falsely.

[3] Although Defendant asserts at points that this is a motion for new trial, he relies upon 28 U.S.C. § 2255 as the basis for his claim, not Federal Rule of Criminal Procedure 33. Because Defendant, who is represented by counsel, did not invoke Rule 33 or address the time constraints set forth in Rule 33(b)(1), the Court will limit its consideration to the motion under § 2255. Nothing in the Court's current Order precludes Defendant from properly filing a Rule 33 motion, which would grant the Government the ability to address the timeliness of such a motion should it desire to do so.

because the government withheld exculpatory information that convicted an innocent person. Rather, his claim is a freestanding claim of actual innocence, not cognizable under § 2255.

> Petitioner alleges that newly discovered evidenced demonstrates that a factual injustice occurred, not a constitutional error. As held in *Herrera*, 506 U.S. 390 (1993), a § 2255 does not extend to claims of 'actual innocence' independent of a constitutional claim. Without bringing a constitutional claim within Petitioner's allegation, newly discovered evidence in not a ground for federal habeas relief. *See Herrera*, 506 U.S. at 400. "[W]hat we have to deal with [on habeas review] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved." *Id.* (quoting *Moore v. Dempsey*, 261 U.S. 86, 87-88 (1923)).

Galati v. United States, 2020 WL 6883450, *3 (D.N.J. Nov. 24, 2020). Similarly, the law in the Tenth Circuit is clear, there is no freestanding actual innocence claim on a § 2255 motion.

> A distinction exists between claims of actual innocence used as a gateway and as a freestanding basis for habeas relief. As a gateway, a claim of actual innocence "enable[s] habeas petitioners to overcome a procedural bar" in order to assert distinct claims for constitutional violations. *McQuiggin v. Perkins*, 569 U.S. 383, 386, 133 S.Ct. 1924, 185 L.Ed.2d 1019 (2013). Because gateway claims are "procedural, rather than substantive," they do not "provide a basis for relief." *Schlup v. Delo*, 513 U.S. 298, 314–15, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). By contrast, a freestanding claim asserts actual innocence as a basis for habeas relief. *See House v. Bell*, 547 U.S. 518, 554, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006); *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 71, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009).
>
> The Supreme Court has repeatedly sanctioned gateway actual innocence claims, but the Court has never recognized freestanding actual innocence claims as a basis for federal habeas relief. To the contrary, the Court has repeatedly rejected such claims, noting instead that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceedings." *Herrera v. Collins*, 506 U.S. 390, 400, 113 S.Ct. 853, 122

> L.Ed.2d 203 (1993). In rejecting such claims, the Court has observed that "[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence." *Id.* at 401.
>
> We have thus held that actual innocence does not constitute a freestanding basis for habeas relief. *See Vreeland v. Zupan*, 906 F.3d 866, 883 n.6 (10th Cir. 2018) (denying a certificate of appealability because freestanding assertions of actual innocence cannot support habeas relief); *LaFevers v. Gibson*, 238 F.3d 1263, 1265 n.4 (10th Cir. 2001) ("[A]n assertion of actual innocence ... does not, standing alone, support the granting of the writ of habeas corpus."); *Sellers v. Ward*, 135 F.3d 1333, 1339 (10th Cir. 1998) ("[T]he claim of innocence ... itself is not a basis for federal habeas corpus no matter how convincing the evidence.").

Farrar v. Raemisch, 924 F.3d 1126, 1130–31 (10th Cir. 2019)(footnotes omitted).[4] In short, Defendant's argument that his due process rights were violated despite the absence of allegations of government coercion is without merit and he cannot, via § 2255, prevail on his actual innocence claim.[5]

"In a § 2255 proceeding, the district court is not required to grant an evidentiary hearing on a [defendant's] claims where 'the motion and the files and records of the case conclusively show that the [defendant] is entitled to no relief....'" *U.S. v. Miller*, 20 F. App'x 800, 802 (10th Cir. 2001) (quoting 28 U.S.C. § 2255(b)) (unpublished decision cited as persuasive pursuant to 10th Cir. R. 32.1(A)). The record in this case conclusively demonstrates that Defendant is not entitled to relief on his claim because the claim does not assert a constitutional violation.

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[4] The court in *Farrar* reinforced that federal habeas relief cannot be based on perjured testimony unless the government knew the testimony was false. Id. *at 1131-32.*

[5] The Court acknowledges that if a freestanding claim of actual innocence existed under § 2255 the applicable standard would be the same as the Rule 33 standard for granting a new trial based on newly discovered evidence.

Finally, under Rule 11(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts, this Court must issue or deny a certificate of appealability when it enters a final order adverse to the defendant. To obtain a certificate of appealability, a defendant "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). Because Defendant does not assert a recognized constitutional claim, he cannot satisfy this standard. Therefore, he is not entitled to a certificate of appealability.

For the reasons set forth herein, Defendant's motion pursuant to 28 U.S.C. § 2255 is DISMISSED.

IT IS SO ORDERED this 9th day of November 2022.

David L. Russell

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE