No. 24-

IN THE

Supreme Court of the United States

ANDRE RICARDO BRISCOE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Prosecutors, judges, and defense lawyers know that the statute of limitations for almost all federal crimes is five years: "[N]o person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." 18 U.S.C. § 3282(a). That means that prosecutors must obtain an indictment (from a grand jury) or "institute" an information (with the defendant's consent) within those five years to properly proceed.

The question presented here is:

Whether the government's filing of a knowingly invalid information, without the defendant's waiver of indictment as required for felonies by Federal Rule of Criminal Procedure 7, is sufficient to "institute" the information within the meaning of 18 U.S.C. § 3282(a) and thereby toll the statute of limitations in a criminal case.

PARTIES TO THE PROCEEDING

Petitioner Andre Briscoe was the defendant in the district court and the appellant in the Fourth Circuit. Respondent is the United States.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Briscoe*, 101 F.4th 282 (4th Cir. 2024);

- *United States v. Briscoe*, 2020 WL 5076053 (D. Md. August 26, 2020).

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PETITION FOR A WRIT OF CERTIORARI

Andre Briscoe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The decision of the court of appeals (App. 1a) is available at *United States v. Briscoe*, 101 F.4th 282 (4th Cir. 2024). The court of appeals' order denying Briscoe's petition for rehearing en banc (App. 61a) is not published in the Federal Reporter. The order of the district court (App. 51a) also is not published.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 30, 2024. (App. 1a). A motion for en banc review was denied on June 6, 2024. (App. 61a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND OTHER PROVISIONS INVOLVED

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 3282(a)

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

Fed. R. Crim. P. 7 (in relevant part)

(a) **When Used**.

(1) Felony. An offense (other than criminal contempt) must be prosecuted by an indictment if it is punishable:

(A) by death; or

(B) by imprisonment for more than one year.

. . .

(b) **Waiving Indictment**. An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant—in open court and after being advised of the nature of the charge and of the defendant's rights—waives prosecution by indictment.

STATEMENT OF THE CASE

Although the government knew that the 5-year statute of limitations against Andre Briscoe would expire on May 27, 2020, the government did not properly charge him with a crime before that date. A grand jury did not timely indict him. And an information was not properly instituted against him. Instead of obtaining a grand jury indictment or a valid information with the defendant's consent, on May 26, 2020, the government filed an invalid information without the defendant's consent in violation of Federal Rule of Criminal Procedure 7.

After the statute of limitations expired, the government indicted Briscoe and argued that the indictment related back to the May 26 Information filed without Briscoe's consent. Although the district court permitted these machinations and the Fourth Circuit affirmed, other courts around the country have said that such a procedure is unlawful because an information is not properly "instituted" under § 3282(a) when it is filed without first obtaining a defendant's valid consent. In fact, this Court ruled in a similar context that an unlawful charging instrument did not institute a criminal proceeding. *United States v. Jaben*, 381 U.S. 214, 217-220 (1965).

The bright line 5-year statute of limitations is important so that people under investigation can move on with their lives when the 5 years passes. It is also important to the administration of justice. It is extremely difficult to prosecute, defend, or preside over stale cases.

When the COVID-19 pandemic hit, the Department of Justice asked Congress to extend the 5-year statute of

limitations because many grand juries around the country were suspended. But a bipartisan Congress quickly and definitively rejected DOJ's request, expressly declining to extend the statute of limitations.

As a result of Congress' choice not to extend the statute despite the limited availability of grand juries, DOJ nonetheless had several options in cases where the statute was expiring. It could get the consent of the defense to an information. Many defendants agreed because they were cooperating and did not want to risk the re-emergence of grand juries where they would be seen as obstructionist. Or the government could seek an indictment in a district with operative grand juries. Many prosecutors did just that.

But Mr. Briscoe did not consent to an information and the government did not obtain a valid indictment from another district. Instead, it tried an end-run around the 5-year statute of limitations by filing an information without Briscoe's consent. It then obtained a grand-jury indictment after the statute of limitations had expired, and convinced the district court that the information filed without Briscoe's consent satisfied the statute of limitations and that the untimely indictment related back to the invalid information. In doing so, the government unilaterally bought itself an extension of the statute of limitations.

Following an old and much-criticized Seventh Circuit case, *United States v. Burdix-Dana*, 149 F.3d 741, 743 (7th Cir. 1998), the Fourth Circuit approved the ploy and found that the indictment related back to the invalid information.

This decision is wrong as it conflicts with *Jaben*, 381 U.S. 214, which held that a criminal case was not "instituted" based on an invalid criminal complaint. The Fourth Circuit's opinion has also deepened a conflict in the lower courts. As other courts have pointed out, the Fourth Circuit's conclusion means that the executive branch can grant itself an unconstitutional work around to the requirement that a grand jury return an indictment against a defendant within the statute of limitations. This case presents an ideal vehicle to remedy this wrong, provide much needed guidance to the lower courts, and prohibit the executive branch from creating its own extension to the Congressionally mandated limitations in the statute.

PROCEDURAL BACKGROUND

The Fifth Amendment to the Constitution requires that to prosecute an individual for a felony, a grand jury must return an indictment. U.S. Const. amend. V. Like other constitutional rights, a defendant may waive his right to be charged via the grand jury. Federal Rule of Criminal Procedure 7 sets forth the procedures for such a waiver, permitting a felony charge to proceed "by information if the defendant—in open court and after being advised of the nature of the charge and of the defendants rights—waives prosecution by indictment."

That procedure did not occur here. Instead, on May 26, 2020, the government filed an information without Briscoe's consent, alleging a conspiracy to distribute controlled substances, possession with intent to distribute, and felon in possession of a firearm. App. 6a. Because of the COVID-19 pandemic, the District of Maryland had

suspended grand jury proceedings. *Id.* Based on the alleged criminal activity, which ended on May 27, 2015, the government had five years, i.e., until May 27, 2020, to "f[i]nd" an indictment or to "institute" an information.

After grand jury proceedings reconvened, a grand jury indicted Briscoe on July 1, 2020 after the statute of limitations had run. *Id.* The indictment was "nearly identical to the information." *Id.*

Briscoe moved to dismiss the charges, arguing that the indictment could not relate back to an invalid information and was therefore barred by the statute of limitations. *Id.* The district court denied that motion, concluding that the indictment related back to the earlier filed information, even though the information was filed without Briscoe's consent. App. 7a.

The government ultimately superseded the indictment three times. *Id.* Some of the charges in the superseding indictment are not at issue here because they do not implicate the statute of limitations. *Id.* However, three of the counts (Counts One, Two and Three) carried forward from the initial information filed on May 26, 2020.

On June 8, 2022, after a twelve day trial, a jury found Briscoe guilty on all counts. App. 8a. The district court sentenced Briscoe to life imprisonment. *Id.* Briscoe timely appealed. *Id.*

On appeal, Briscoe made a number of arguments, including that Counts 1, 2, and 3 (the narcotics and firearm offenses) violated the statute of limitations. App. 10a. Briscoe argued that the statute of limitations ran on May

27, 2020, and that the original indictment filed on July 1 was therefore untimely. *Id*. The government conceded that the indictment was filed after the statute of limitations, but argued that the information was timely filed and therefore the indictment "related back" to the information. *Id*.

Briscoe explained that the indictment could not relate back to the information because the information was filed without his consent as required by Rule 7(b). App. 11a.

Relying on an old and criticized case from the Seventh Circuit, *United States v. Burdix-Dana*, 149 F.3d 741, 743 (7th Cir. 1998), the Fourth Circuit concluded that the filing of an information, even if invalid, is "sufficient to institute it within the meaning of 18 U.S.C. § 3282." App. 13a-14a. The Fourth Circuit either ignored or did not meaningfully engage with the courts that have criticized *Burdix-Dana* and come out the other way, including *United States v. Gatz*, 2023 WL 8355363 (S.D. Fla. Dec. 1, 2023) (holding that an invalid information did not toll the statute of limitations and explaining in detail why *Burdix-Dana* was "not correctly decided"); *United States v. Machado*, 2005 WL 2886213 (D. Mass. Nov. 3. 2005) (same).

The Fourth Circuit also failed to address this Court's decision in *Jaben*, 381 U.S. at 217-220, which held that the mere filing of an invalid criminal complaint was not sufficient to "institute" criminal proceedings.

Briscoe filed a petition seeking rehearing en banc, which was denied. App. 61a. This petition for certiorari follows.

REASONS FOR GRANTING THE WRIT

Pursuant to the governing statute in this case, "no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." 18 U.S.C. § 3282(a).

There is no dispute that Briscoe was not indicted by a grand jury in the 5-year period on Counts 1, 2, and 3 following his last alleged criminal act.[1] Accordingly, the question here is whether the information was "instituted" within the five years.

While it is true that the government *filed* an information against Briscoe within the five years, the government did not *institute* one. In order for a charging instrument to be "instituted," it must not only be filed but must be actually effective to commence a federal criminal case, which in the case of a felony charge means it must be accompanied by a waiver of indictment. *See* Fed. R. Crim. P. 7(b) ("An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant—in open court and after being advised of the nature of the charge and of the defendant's rights—waives prosecution by indictment").

An invalid information no more institutes a case than does an indictment that was not issued by a grand

1. Should the Court grant this petition and ultimately reverse on these three counts, this Court should remand to the Fourth Circuit to determine whether Briscoe is entitled to a new trial on the remaining counts.

jury.[2] *See*, *e.g.*, *United States v. Teran*, 98 F.3d 831, 835 (5th Cir. 1996) ("In the absence of a valid waiver, the lack of an indictment in a felony prosecution is a defect affecting the jurisdiction of the convicting court."); *United States v. Moore*, 37 F.3d 169, 173 (5th Cir. 1994) ("Unless there is a valid waiver, the lack of an indictment in a federal felony case is a defect going to the jurisdiction of the court." (quoting *United States v. Montgomery*, 628 F.2d 414, 416 (5th Cir. 1980))); *United States v. Wessels*, 139 F.R.D. 607, 609 (M.D. Pa. 1991) ("Unless there is a valid waiver, the lack of an Indictment in a federal felony case is a defect going to the jurisdiction of the court.").

The "jurisdictional nature of the waiver is grounded in the Fifth Amendment, which requires the government to prosecute felonies by indictment." *United States v. Machado*, 2005 WL 2886213, at *2 (D. Mass. Nov. 3, 2005). Without a valid waiver under Rule 7(b), "an information filed with the clerk of court cannot perform the same charging function as an indictment. Indeed, a court in possession of an information but not in possession of a waiver of indictment lacks subject matter jurisdiction over the case; such an information is virtually meaningless." *See also Wessels*, 139 F.R.D. at 609 ("Without the waiver required by Rule 7(b) of the Federal Rules of Criminal Procedure, an information charging a felony offense is virtually meaningless.").

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2. An indictment that is merely filed with the court, without having been acted on by the grand jury, has not been "found" and cannot satisfy the statute of limitations. *See*, *e.g.*, *United States v. Ellis*, 622 F.3d 784, 792 (7th Cir. 2010); *United States v. Thompson*, 287 F.3d 1244, 1251-52 (10th Cir. 2002).

Here, the government did not obtain a waiver of indictment from Briscoe, rendering the information invalid. Although the case could not proceed on the information, the Fourth Circuit found this was irrelevant and said that an invalid information nevertheless "instituted" proceedings against Briscoe, tolling the statute of limitations. The Fourth Circuit's decision conflicts with an opinion from this Court, splits with a number of lower courts, presents a case of great importance, and is a perfect vehicle to review this important issue. The Court should grant a writ of certiorari to the Court of Appeals for the Fourth Circuit.

A. The Fourth Circuit's decision conflicts with *Jaben v. United States*, 381 U.S. 214 (1965).

In *Jaben v. United States*, 381 U.S. 214 (1965), this Court determined that a case was not "instituted" for purpose of tolling the statute of limitations in a felony tax evasion by the filing of a complaint the day before the statute was to expire, followed by a grand jury indictment after the statute had already run. *Id.* The applicable statute provided that "[w]here a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States." *Id.* at 215-16. Just as the government did here, in *Jaben* it argued that the mere filing of a complaint operated to toll the statute of limitations. *Id.* at 217. Accordingly, the government contended, it was irrelevant that the complaint was insufficient because it did not establish probable cause, a necessary condition to issuance of an arrest warrant and a preliminary hearing. *Id.*; *see also* Fed. R. Crim. P. 4–5.

This Court disagreed, explaining that the government's position "provides no safeguard whatever to prevent the government from filing a complaint at a time when it does not have its case made, and then using the nine-month period to make it." *Id.* at 220. The Court rejected the very procedural machination attempted by the government in this case:

> [I]t follows from its position that once having filed a complaint, the government need not further pursue the complaint procedure at all, and, in the event that the defendant pressed for a preliminary hearing and obtained a dismissal of the complaint, that the government could nonetheless rely upon the complaint . . . as having extended the limitation period.

Id. at 218. Rejecting the government's position, the Court interpreted the word "instituted" to require that the complaint be "adequate *to begin effectively* the criminal process prescribed by the Federal Criminal Rules." *Id.* at 220 (emphasis added).

Thus, *Jaben* rejected the suggestion that the mere filing of a complaint "institutes" it. *Id.* at 220. A felony information to which a defendant does not consent is not "adequate to begin effectively the criminal process prescribed by the Federal Criminal Rules." *Id.* Because Briscoe did not waive prosecution by indictment—a fact the government knew when it filed the information—the information was not "instituted" for purposes of Section 3282.

Although the Fourth Circuit did not mention *Jaben* in its analysis, numerous lower courts have explained that *Jaben* controls this situation. For example, Judge Middlebrooks of the Southern District of Florida explained that this Court "analyzed the meaning of 'is instituted,' language identical to that at issue here. None of the Justices agreed with the argument now made by the government." *United States v. Gatz*, 2023 WL 8355363 at *7 (S.D. Fla. Dec. 1, 2023). "The context here is the same, and the analysis in *Jaben* is directly applicable." *Id.* at *8. *See also United States v. De La Torre*, 20-20182-Cr-Williams/Torres (Doc. 71) (S.D. Fla. Oct. 21, 2022) (explaining that *Burdix-Dana* "neglect[ed] to meaningfully engage with *Jaben* [ ], a case that is arguably binding on this Court and is certainly highly instructive. . . ." *Id.* at 18 (internal citations omitted).

Jaben is not an outlier in this Court for the proposition that prosecutors may only proceed on a valid charging document. In *Smith v. United States*, 360 U.S. 1 (1959), the government attempted to charge a capital offense by information after it obtained a waiver of indictment. But under the then-applicable version of Rule 7(a), a capital offense could only be prosecuted by indictment (even with a waiver from the defendant). This Court held that because "the United States did not have authority to file an information," the information "did not confer power on the convicting court to hear the case." *Smith*, 360 U.S. at 10. Here, as in *Smith*, because the government did not have authority under the now-applicable version of Rule 7 to initiate a charge by information without a waiver of indictment, the information did not confer power on the Court to proceed on the charges.

B. There is a split in the lower courts.

Lower courts have split on the meaning of the word "instituted." The Fourth Circuit in this case relied on *United States v. Burdix-Dana*, 149 F.3d 741 (7th Cir. 1998), which held that the term 'instituted' requires only that the government *file* an information within the five-year period. A number of district courts have also followed *Burdix-Dana.*[3]

The Eleventh Circuit had occasion to consider the issue in *United States v. B.G.G.*, 53 F.4th 1353 (11th Cir. 2022). Although the panel ended up deciding the case on a procedural issue, Judge Wilson addressed the merits in dissent, saying that prosecutors "concocted what they hoped was a workaround" of the statute of limitations, and that the district court (which dismissed the information) "saw through the government's ploy." *Id.* at 1371 (Wilson, J., dissenting). Judge Wilson would have reached the merits of the issue and affirmed the district court's dismissal of the information. He emphasized that the prosecution's tactic in filing an invalid information was "plain and simple," in "bad faith and for the purpose of harassment" and was "'to achieve a tactical advantage in derogation of [B.G.G.'s] rights.'" *Id.* at 1362 (citations omitted).

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3. *See, e.g.*, *United States v. Rothenberg*, 554 F. Supp. 3d 1039 (N.D. Cal. 2021) (holding that "a waiverless information" tolls the statute of limitations); *United States v. Webster*, Case No. 20-20172, 2021 WL 4952572 (S.D. Fla. Sept. 28, 2021) (same, but pending before the Eleventh Circuit); *United States v. Weiss*, 588 F. Supp. 3d 622 (E.D. Pa. 2022) (siding with the "weight of authority"); *United States v. Rosecan*, 528 F. Supp. 3d 1289, 1294 (S.D. Fla. 2021) (applying *Burdix-Dana*, 149 F.3d 741);*United States v. Holmes*, 2020 WL 6047232 (N.D. Cal. Oct. 13, 2020) (same).

On remand, the government indicted B.G.G. under his name, Dr. Bart Gatz. The district court again dismissed the charges in a lengthy order explaining that the invalid information did not toll the statute of limitations. *United States v. Gatz*, 2023 WL 8355363 (S.D. Fla. Dec. 1, 2023). Calling it "something of a ploy," the district court found that "[t]he *filing* of an information is not the same as *instituting* it." *Id.* at *4 (emphasis in original). The court explained that *Burdix-Dana* was not correctly decided: "the court did not devote any meaningful effort to explaining the reasoning for its holding, even while acknowledging that Rule 7(b) does not permit a defendant to be prosecuted for a felony offense based upon an unconsented information." *Id.* at *6. The court continued that while *Burdix-Dana* "equate[d] two different words with two different plain meanings," it declined to render "institute" and "file" into the same word. *Id.* The court went on, in a lengthy order, explaining its textual analysis, the legislative history of 3282, and why other cases were more persuasive than *Burdix-Dana*.

The government did not appeal that order to the Eleventh Circuit, creating widespread confusion and uncertainty in that Circuit.

In addition to *Gatz*, a number of courts have rejected the reasoning of *Burdix-Dana* and *Briscoe.*

In *United States v. Machado*, 2005 WL 2886213 (D. Mass. Nov. 3, 8 2005), the court addressed facts similar to *Briscoe*: the government filed an information before the statute of limitations expired, but the defendant did not waive indictment until after the statute had run. The court held that the filing of the information did not "institute" it

for purposes of Section 3282, and it dismissed the charges as time-barred. *Id.* at *3. The court applied standard tools of statutory construction to determine the plain meaning of the term "institute," *id.* at *2, and reached the conclusion that "institute" did not mean the same as "file." It noted that an information without a waiver does not bestow subject matter jurisdiction over the case, and that it is instead "virtually meaningless." *Id.* (quoting *Wessels*, 139 F.R.D. at 609). The court reasoned that "since an information is the functional and constitutional equivalent of an indictment only when accompanied by a valid waiver of indictment, no reason exists why that rule should not apply in the statute of limitations context." *Id.* at *2. The Court rejected *Burdix-Dana* because the decision "defies logic and reason." Although the court in *United States v. Stewart*, 425 F. Supp. 2d 727 (E.D. Va. 2006), felt bound to follow *Burdix-Dana*, it explained that the *Machado* court had the "better argument."

And in *United States v. Sharma*, 2016 WL 2926365 (S.D. Tex. May 19, 2016), the court found that the timely filing of an information was not sufficient to toll the statute of limitations where the defendant did not waive indictment. Noted the court, "[t]he fact is, an offense of a felony nature can only proceed to prosecution by an indictment, unless the indictment is waived by the defendant. . . . No waiver was obtained within the limitations period; therefore, no case was 'initiated' that the government was 'able to prosecute.'" *Id.* at *4. "An information that is filed within the limitations period is not automatically timely filed. . . . The fact is, an offense of a felony nature can only proceed to prosecution by an indictment, unless the indictment is waived by the defendant. . . . No waiver was obtained within the limitations period; therefore, no case was

'initiated' that the government was 'able to prosecute.'" *Id.* at *5. (internal citations omitted).

In *United States v. De La Torre*, 20-20182-Cr-Williams/Torres (Doc. 71) (S.D. Fla. Oct. 21, 2022) the court found that "the government's filing of something other than a Grand Jury indictment" is not sufficient "to satisfy the relevant statutes of limitations absent the consent of the accused." It recognized that the *Burdix-Dana* case was "non-binding" and explained:

> Putting aside for a moment that *Burdix-Dana* is not binding on this Court, the case itself is cursorily reasoned and thereby less persuasive. For example, the Seventh Circuit made no reference whatsoever to the text of the Constitution that provided the defendant's right to be prosecuted pursuant to a Grand Jury indictment; nor did the opinion consider the practical and historical importance of that right. If it had done so, then it may have considered and addressed that discerning the meaning of "instituted" is not merely a question of statutory interpretation but also a nuanced issue of constitutional criminal procedure . . . That nuance is described persuasively in Judge Middlebrooks's [*B.G.G.*] decision.

Id. at *16-17). The *De La Torre* court went on to harshly criticize *Burdix-Dana*'s "flawed" reasoning for "having overlooked the constitutional implications" of the case, "ultimately ignor[ing] the express command from the Supreme Court that 'criminal limitations statutes are to be liberally interpreted in favor of repose.'" *Id.* at 18 (internal citations omitted).

The *Machado* court correctly explained the harmful consequences of following *Burdix-Dana*: "It would allow[ ] prosecutors to file an information, wait indefinitely, then present the matter to a grand jury well beyond the statute of limitations but within six months of the dismissal of the information." 2005 WL 2886213, at *3.

C. This case is an ideal vehicle to address the important question of whether prosecutors can unilaterally extend the statute of limitations.

This case is the ideal vehicle for resolving an issue that is confounding lower courts. It squarely presents a pure legal issue of statutory construction that was preserved below and appealed on a timely basis. Had Briscoe appeared before Judge Middlebrooks in the Southern District of Florida, the indictment would have been dismissed, but if he had appeared before Judge Altman of the same court, the result would have been exactly the opposite and his case would have been permitted to go forward.

No further percolation is necessary. The positions on both sides of the issue have been laid out in detail. And because the issue is a pure and classic statutory construction question as to what the word "institute" means, further explication by other lower courts will not meaningfully add anything to this Court's resolution of the matter.

D. The lower court decision is wrong.

The Fourth Circuit's conclusion that an information filed in court without the defendant's consent tolls the

statute of limitations is wrong and it is important to correct it as it conflicts with the statutory text, history, and structure, and raises a number of constitutional concerns.

The central premise of the government's position in this case is that due to the challenges of the COVID-19 era it should be excused for its failure to afford Mr. Briscoe his constitutional right to a timely indictment by grand jury (among the most bedrock principles of our legal system). The government, however, does not argue for a pandemic-limited exception in the vein of impossibility, and the Fourth Circuit did not create a pandemic exception. Instead, the government has convinced a number of courts that existing procedural rules permit it to grant itself an extension to obtain a grand jury indictment at will, simply by filing and then dismissing an unconsented-to information. While the backdrop of the government's action was the pandemic *this time*, the government now has a blank check in the Fourth and Seventh Circuits for an extension of the statute in every case in its unfettered discretion. But even a pandemic "is no excuse for the delayed indictment of [a] defendant." *Gatz* at *24.

The government's contention that the word "instituted" means the same as the word "filed" is belied by the fact that in other sections of the same chapter of Title 18, Congress expressly based the statute of limitations on the mere "filing" of an information. *See* 18 U.S.C. § 3293 ("No person shall be prosecuted, tried, or punished for a violation of, or conspiracy to violate [various laws relating to financial institutions] . . . unless the indictment is returned or the information is filed within 10 years after the commission of the offense."); § 3294 ("No person shall be prosecuted, tried, or punished for a violation of or

conspiracy to violate section 668 [regarding the theft of major artwork] unless the indictment is returned or the information is filed within 20 years after the commission of the offense."); § 3300 ("No person may be prosecuted, tried, or punished for a violation of section 2442 [regarding the recruitment or use of child soldiers] unless the indictment or the information is filed not later than 10 years after the commission of the offense.").

Where it wants to, Congress knows how to write statutes of limitations that are satisfied by the "filing" of an information. Reading "instituted" to mean "filed" would violate the fundamental canon that "[w]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993).

While the Fourth Circuit reasoned that the procedure of filing an information without the defendant's consent put him on notice of the charges and therefore satisfied the purpose of the statute, it is well established that "criminal limitations statutes are to be liberally interpreted in favor of repose." *Toussie v. United States*, 397 U.S. 112, 115 (1970) (internal quotation marks omitted). This principle is grounded in the basic purpose of criminal statutes of limitations—"to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." *Toussie*, 397 U.S. at 114-15. This principle should apply with particular strength in this case given that the requirement of a grand jury

indictment for felonies is protected by the Constitution and may be excused if and only if the defendant consents. If, in spite of the plain language of Rule 7, the government is permitted to unilaterally file and then dismiss a felony information without waiver, and then charge the defendant by indictment after the statute of limitations has expired, this would grant the government unchecked power to extend the statute of limitations for six months or more in every criminal case. That is not and cannot be the law and would render meaningless the statute of limitations set forth in 18 U.S.C. § 3282.

Recent history also confirms that the government's position is untenable and is simply an attempted power grab from Congress. Early in the coronavirus pandemic, the Department of Justice asked Congress to enact legislation that would suspend or toll statutes of limitation during emergencies. For example, a proposed 18 U.S.C. § 3302, titled "Emergency Suspension of Limitations," would have suspended the statute of limitations for all federal crimes during the period of any national emergency and for one year afterward, upon a finding by the Chief Justice "that emergency conditions will materially affect the functioning of the federal courts."

The only reasonable presumption to be drawn from Congress' decision to expressly reject the executive branch's proposed tolling of the statute of limitations due to COVID is that Congress did not want the statute of limitations to be tolled. The Department of Justice asked for this provision precisely because it knew that existing law did not give it the extension it wanted.[4] Despite the

4. There was withering condemnation from across the political spectrum that greeted DOJ's proposed legislation.

congressional rebuke, the executive branch is attempting to usurp congressional decision-making.

In fact, the Fifth Circuit just rejected the government's attempt to toll the statute of limitations based on a purported "global health crisis" exception to the statute of limitations. *United States v. Plezia*, --- F. 4th ---, 2024 WL 3894911 at *7 (5th Cir. August 22, 2024). The court explained that Congress has "expressly provided for the extension or tolling of criminal statutes of limitations" in certain limited circumstances, but "[a]bsent from this list of exceptions is any word from Congress providing that a global health crisis suspends a criminal statute of limitations." *Id.* The court vacated the defendant's count of conviction that violated the statute of limitations and refused to allow the "government's arguments" to "eclipse the plain language of § 3282." *Id.*

This Court should grant the petition for certiorari to check the executive's attempted end-run around Congress.

Senator Mike Lee (Republican—Utah) tweeted, "OVER MY DEAD BODY." Senate Minority Leader Chuck Schumer (Democrat—NY) tweeted, "Two Words: Hell No." Representative Alexandria Ocasio-Cortez (Democrat—NY) tweeted, "Absolutely not," and Doug Stafford, chief strategist for Senator Rand Paul (Republican—KY), agreed. Representatives Justin Amash (Independent—MICH) and Earl Blumenauer (Democrat—ORE) likewise condemned the DOJ proposal. These emphatic bipartisan reactions suggest that legislators thought the DOJ was exploiting the pandemic to infringe upon the vital protections that criminal statutes of limitations afford.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED APRIL 30, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4013

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANDRE RICARDO BRISCOE, A/K/A POO,

Defendant-Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Richard D. Bennett, Senior District Judge. (1:20-cr-00139-RDB-1)

Affirmed by published opinion. Judge Thacker wrote the opinion in which Judge Wilkinson and Judge Floyd joined.

March 22, 2024, Argued
April 30, 2024, Decided

Before WILKINSON and THACKER, Circuit Judges, and FLOYD, Senior Circuit Judge. Judge Thacker wrote the opinion in which Judge Wilkinson and Judge Floyd joined.

Appendix A

THACKER, Circuit Judge:

Andre Ricardo Briscoe ("Appellant") was involved in the purchase and sale of narcotics in the Baltimore area. He learned from a contact, Kiara Haynes, that Jennifer Jeffrey had received a large supply of heroin. Appellant and Haynes decided to rob Jeffrey. Appellant went to Jeffrey's house, robbed her of at least 80 grams of narcotics, shot and killed her, and shot and killed her seven year old son, K.B., whom Appellant feared might testify against him.

Appellant was arrested on a criminal complaint and initially charged by information with possession with intent to distribute narcotics, conspiracy to distribute narcotics, and possessing a firearm as a convicted felon. A later superseding indictment added three new counts: two counts of murder with a firearm during the commission of a drug trafficking crime and one count of killing a witness to prevent communication with law enforcement. After a twelve day jury trial, Appellant was convicted on all charges.

Appellant now appeals his judgment of conviction on five bases. First, he argues that three of his charges were barred by the statute of limitations. Second, he argues that his Fourth Amendment rights were violated when police used a cell site simulator to determine his location, searched the apartment in which he was found, and searched his person. Third, he argues that the Government committed a *Brady*[1] violation by failing to

1. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) ("[S]uppression by the prosecution of evidence favorable

investigate whether a broken security camera found in the kitchen of the murder victims had recorded any footage from the time of the murder. Fourth, he argues that the Government used perjured testimony at trial. And fifth, he argues that the district court should have granted his Rule 29 motion for a judgment of acquittal based upon the insufficiency of the evidence.

As detailed below, each of these five contentions lacks merit. Therefore, we affirm.

I.

A.

Appellant participated in a narcotics distribution conspiracy in the Baltimore area between March 2015 and October 2015. His co-conspirators were Haynes, Jeffrey, and Tony Harris. Their ultimate source for narcotics, which they believed to be heroin, was Curtis Williams, Jeffrey's housemate. Jeffrey and Williams supplied drugs to Harris, who, in turn, supplied drugs to Appellant. Appellant's cousin, Wane Briscoe, testified at trial that Appellant asked him to help Appellant sell heroin, and Appellant's uncle, Alfred Harris, testified that he knew Appellant was selling heroin because he tried Appellant's product and, as a longtime heroin user, he recognized its appearance and effects.

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to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

B.

In May 2015, Williams was arrested and detained for possession with intent to distribute cocaine. In a recorded jail call, he directed Jeffrey to retrieve 80 grams of narcotics and sell them to Appellant in order to raise money for Williams' bail. When Appellant learned that Jeffrey had acquired these drugs, he decided to rob Jeffrey and kill her. Haynes was also in on the plan. Haynes helped Appellant obtain a .45 caliber firearm on May 26, 2015, in a transaction brokered by Haynes's nephew.[2] That night, Appellant visited Jeffrey at her home, where she showed him the 80 grams of narcotics.

Shortly before noon the next day, Appellant returned to Jeffrey's house and robbed her of at least 80 grams of narcotics. He then murdered her, shooting her multiple times, and then went upstairs to murder her seven year old son, K.B., whom he also shot multiple times in the head and neck. He later told several witnesses about the robbery and the murders. And he told them he had killed K.B. because he feared the boy would testify against him.

C.

On May 28, Jeffrey's brother discovered the bodies of Jeffrey and K.B. Baltimore City Police homicide detectives responded to the scene and opened an investigation into the murders. They found a flip phone that belonged to

2. Because the nephew was incarcerated at the time, this arrangement was documented on a recorded jail call.

Jeffrey and discovered that the last dialed call, placed one day before the murders, was to a number ending in -2413. That number belonged to Appellant.

The investigators obtained a tracking order[3] from the Circuit Court for Baltimore City to identify, among other things, cell site location information connected to Appellant's phone. Using this information, on June 5, 2015, they pinged Appellant's phone using a cell site simulator,[4] which led them to an apartment building. Investigators then obtained a warrant to search apartment 101 because the cell site data was directing them to that unit. After unsuccessfully searching apartment 101, the officers continued to receive cell site data indicating that Appellant's phone was nearby. Thus, the officers went to the second floor where they attempted, but failed, to enter apartment 201. They then knocked on the door of apartment 202, the unit where Appellant was ultimately located. The occupant who opened the door of apartment 202 allowed them to enter.

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3. A tracking order is an order issued by a judicial officer, pursuant to Maryland law, which authorizes investigators to use location data to identify the present location of a cell phone. Md. Code Ann., Crim. Proc. § 1-203.1(b)(1)(ii) ("A court may issue an order authorizing . . . a law enforcement officer to use a cell site simulator or obtain location information from an electronic device after determining from [an application prescribed by the statute] that there is probable cause to believe" that the information sought is evidence of a crime or will lead to evidence of a crime.).

4. A cell site simulator is a device that can track a cell phone's real time location by mimicking a cell tower.

Once inside apartment 202, the officers secured Appellant and his cell phone and conducted a protective sweep of the apartment. They discovered narcotics and drug paraphernalia in a bedroom and brought everyone in the apartment, including Appellant, to the police department for questioning. Appellant was charged with narcotics possession, but the charges were later dropped, and Appellant was released from detention on October 7, 2015.

D.

Federal investigators opened an investigation into Jeffrey and K.B.'s murders. Though Appellant was not initially charged with the murders, as a result of the investigation, Appellant was arrested on May 22, 2020, for drug charges and possessing a firearm as a convicted felon. The Government filed a criminal information on May 26, 2020, charging Appellant with conspiracy to distribute narcotics, possession with intent to distribute narcotics, and possession of a firearm by a convicted felon. Appellant did not waive indictment, but the Government could not indict Appellant at that time because the District of Maryland had suspended grand jury proceedings in light of the COVID-19 pandemic.

Appellant was ultimately indicted on July 1, 2020, when grand jury proceedings resumed. The indictment was nearly identical to the information apart from alleging a different end date to the facts underlying the conspiracy charge. Appellant moved to dismiss the indictment as barred by the statute of limitations. The district court

denied that motion, concluding that the indictment related back to the earlier filed information.

On September 23, 2020, the Government filed a superseding indictment which added three new charges: two counts of causing murder with the use of a firearm during and in relation to a drug trafficking crime and crime of violence (for the deaths of Jeffrey and K.B.), and one count of killing a witness to prevent communication with law enforcement. The Government filed a second superseding indictment on June 23, 2021, to add Haynes as a co-defendant, and filed a third superseding indictment (the operative indictment) on December 8, 2021, which added two counts of murder and one count of killing a witness to prevent communication with law enforcement.

The operative indictment alleged six counts: (1) conspiracy to distribute and possession with the intent to distribute controlled substances, in violation of 21 U.S.C. § 846; (2) possession with intent to distribute controlled substances, in violation of 21 U.S.C. § 841(a)(1); (3) possession of a firearm and ammunition by a prohibited person, in violation of 18 U.S.C. § 922(g)(1); (4) use and carry of a firearm during and in relation to a drug trafficking crime and crime of violence, causing the murder of Jennifer Jeffrey, in violation of 18 U.S.C. § 924(j)(1); (5) use and carry of a firearm during and in relation to a drug trafficking crime and crime of violence, causing the murder of K.B., in violation of 18 U.S.C. § 924(j)(1) and 18 U.S.C. § 3559(c)(2)(F), (d) and (f); and (6) killing a witness, K.B., to prevent communication to law enforcement, in violation of 18 U.S.C. § 1512(a)(1)(C) and (a)(3)(A) and 18 U.S.C. § 3559(c)(2)(F), (d) and (f).

E.

On June 8, 2022, after a twelve day trial, a jury found Appellant guilty on all counts. In special findings,[5] the jury found that Appellant, being 18 years of age or older, intentionally killed K.B., a child under the age of 14 years. On January 1, 2023, the district court sentenced Appellant to 480 months as to Count One and 480 months as to Count Two (the drug charges), and 120 months as to Count Three (the firearm possession charge). The court sentenced Appellant to life imprisonment as to Counts Four, Five, and Six consistent with the special findings. The special findings equated to a life sentence because 18 U.S.C. § 3559(c)(2)(F), (d), and (f), require a mandatory sentence of "imprisonment for life" if a defendant commits "a serious violent felony," such as murder, against a victim under 14 years old and the victim dies as a result.

Appellant timely appealed.

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5. Special findings are specific questions of fact submitted to the jury for resolution. A jury may be asked to make special findings when, as here, the circumstances triggering enhanced punishment "'had to be pled in the indictment and the facts supporting those enhancements found by the jury beyond a reasonable doubt.'" *United States v. Udeozor*, 515 F.3d 260, 271 (4th Cir. 2008) (quoting *United States v. Robinson*, 213 F. App'x 221, 223 (4th Cir. 2007)); *United States v. Hedgepeth*, 434 F.3d 609, 613 (3d Cir. 2006) (noting that special findings may be necessary when a determination of certain facts will be crucial to the sentence).

II.

There are five issues in this appeal. First, Appellant argues that the charges against him should have been dismissed because his indictment was filed after the statute of limitations had run. Second, Appellant argues his Fourth Amendment rights were violated when police used a cell site simulator to determine his location, searched the apartment in which he was found, and searched his person. Third, Appellant argues the Government committed a *Brady* violation by failing to comprehensively investigate whether a broken video camera in the kitchen of the murder victims had recorded any footage from the time of the murder. Fourth, Appellant argues the Government used perjured testimony of three witnesses in securing a guilty verdict. Fifth, Appellant argues the district court erred when it denied his Rule 29 motion for a judgment of acquittal based upon the insufficiency of the evidence.

We address each issue in turn.

A.

Statute of Limitations

Appellant contends his indictment should have been dismissed because it was filed after the statute of limitations had run. Appellant moved to dismiss his indictment below, but the district court denied his motion, holding that the indictment related back to a timely instituted information, which satisfied the statute of limitations. We review *de novo* the question of whether

the district court properly denied Appellant's motion to dismiss. *United States v. Ojedokun*, 16 F.4th 1091, 1108 (4th Cir. 2021).

Pursuant to Federal Rule of Criminal Procedure 7(b), an "offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant—in open court and after being advised of the nature of the change and of the defendant's rights—waives prosecution by indictment." Fed. R. Crim. P. 7(b). Appellant did not waive prosecution by indictment, and his crimes were punishable by imprisonment for more than one year. Thus, the Government was required to timely indict Appellant.

The statute of limitations is five years. It is undisputed that this window is established by 18 U.S.C. § 3282(a), which provides, "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."[6]

"[S]tatutes of limitations normally begin to run when the crime is complete." *Toussie v. United States*, 397 U.S. 112, 115, 90 S. Ct. 858, 25 L. Ed. 2d 156 (1970). The information filed against Appellant on May 26, 2020 alleged conspiracy to distribute controlled substances beginning on April 20, 2015, possession with intent to

6. The only charges that are arguably at issue for purposes of this argument are Counts One, Two, and Three, the narcotics and firearm offenses; the other Counts, Four, Five, and Six are potential capital offenses, which are not governed by 18 U.S.C. § 3282(a).

distribute on May 27, 2015, and felon in possession of a firearm. And on July 1, 2020, a grand jury returned an indictment against Appellant, effectively realleging the charges contained in the information.

Given that the latest date of alleged conduct in connection with the drug and firearm charges was May 27, 2015, Appellant contends the statute of limitations ran five years later on May 27, 2020, and that the original indictment filed on July 1 was, therefore, untimely. While the Government acknowledges that the indictment was filed *after* the statute of limitations had run, it emphasizes that the information was filed *before* the statute of limitations had run. The Government argues the indictment related back to the information, thereby making the indictment timely. Accordingly, we must determine whether (1) filing the information tolled the statute of limitations and (2) whether the indictment related back to the information.

The second issue is not disputed. Appellant does not contest that the indictment substantially realleges what was contained in the information. Regarding successive indictments, we have held a later "indictment relates back to the date of the original indictment 'so long as a strong chain of continuity links the earlier and later charges.'" *Ojedokun*, 16 F.4th at 1109 (quoting *United States v. Snowden*, 770 F.2d 393, 398 (4th Cir. 1985)). And, although we have not yet addressed the issue with respect to indictments following an information, other circuits have held that, when an indictment simply realleges what is contained in an information, it is "timely since it relate[s] back to the earlier [i]nformation." *United States v. Avery*,

747 F. App'x 482, 484 (9th Cir. 2018); *see also United States v. Saussy*, 802 F.2d 849, 852 (6th Cir. 1986) ("We can discern no principled reason why, if an indictment relates back to an earlier filed indictment, a subsequently filed indictment should not relate back to an earlier filed information.").

The governing statute provides that a defendant is timely charged when an information is "instituted" within five years. 18 U.S.C. § 3282. Given that Appellant does not contest the substantive continuity between the information and the indictment, here the question is whether filing the information is equivalent to the statutory requirement of "institut[ing]" the information so as to pass statute of limitations muster. 18 U.S.C. § 3282(a). On that question, we agree with the district court. The Government satisfied the five year statute of limitations by filing an information on May 26, 2020.

We read the word "institute" according to its plain meaning, which, if it is unambiguous, controls our interpretation of the statute. *Espinal-Andrades v. Holder*, 777 F.3d 163, 166-67 (4th Cir. 2015). The plain meaning of the word "institute" is "[t]o set in operation, set on foot, initiate, 'start' (a search inquiry, comparison, etc.)." *Institute*, Oxford English Dictionary, https://perma.cc/2RLY-UQNR (last visited Apr. 12, 2024). "Institute" also means "to originate and get established: set up: cause to come into existence: . . . to set on foot." *Institute*, Merriam-Webster's Unabridged Dictionary, https://perma.cc/KJD3-5A24 (last visited Apr. 12, 2024). Filing an information unambiguously fits this definition of

"instituting" an information because filing sets it on foot and brings it into existence.

Reading 18 U.S.C. § 3282 in this way comports with its purpose. Statutes of limitations are designed to "limit exposure to criminal prosecution following an illegal act . . . 'when the basic facts may have become obscured by the passage of time.'" *United States v. Smith*, 373 F.3d 561, 563 (4th Cir. 2004) (quoting *Toussie*, 397 U.S. at 114). A charging document comports with that purpose when it puts a defendant on notice of the crimes charged within the period designated by the statute. *Saussy*, 802 F.2d at 852 ("The concerns generally underlying statutes of limitations have to do with placing a defendant on notice of the charges brought against him before those charges are presumptively stale."). Thus, in the context of superseding indictments, we have called notice the "'touchstone' of the relation-back inquiry." *Ojedokun*, 16 F.4th at 1112 (quoting *United States v. Salmonese*, 352 F.3d 608, 622 (2d Cir. 2003)); *see also United States v. Liu*, 731 F.3d 982, 997 (9th Cir. 2013) ("The central concern in determining whether the counts in a superseding indictment should be tolled based on similar counts included in the earlier indictment is notice."). We see no reason why a timely filed information cannot serve the same purpose when, as here, an information puts a defendant on notice of the charges and the subsequent indictment substantially realleges those charges.

The other circuits that have addressed this issue agree that filing an information is the same as instituting one. *United States v. Burdix-Dana*, 149 F.3d 741, 743 (7th

Cir. 1998) ("[T]he filing of the information is sufficient to 'institute' it within the meaning of 18 U.S.C. § 3282."); *accord United States v. Cooper*, 956 F.2d 960, 962-63 (10th Cir. 1992) ("[T]he information could have been filed within the period of limitations, thus providing a valid basis for the prosecution."); *see also Ragland v. United States*, 756 F.3d 597, 600-01 (8th Cir. 2014) (noting the prevailing authorities on this issue but declining to decide it).

Thus, we hold the Government properly tolled the statute of limitations by filing an information within the five year period. The subsequent indictment, filed on July 1, 2020, related back to that filing, and Appellant was, therefore, timely charged and prosecuted. Accordingly, we reject Appellant's argument that the district court erred in failing to dismiss the charges against him as untimely.

B.

Fourth Amendment

Appellant contends his Fourth Amendment rights were violated in several ways during the investigation following the murders. First, Appellant contends his rights were violated when investigators used a cell site simulator to obtain his location. Second, Appellant contends that police had no right to search the apartment where they found him because the warrant they relied upon did not advise the judge that a cell site simulator had been used. And third, Appellant contends that police lacked authority to search his person when they entered the apartment, and that he had standing to challenge their

search as an overnight guest. The Government contests each of these arguments.

Below, Appellant moved to suppress the evidence and subsequent searches procured through use of cell site data, including the searches of his phone, his person, the apartment where he was found, and his location data. After holding a hearing on the motion to suppress, the district court denied the motion.

We review the district court's factual findings for clear error and its legal determinations *de novo. United States v. Abdallah*, 911 F.3d 201, 209 (4th Cir. 2018). Because the motion to suppress was denied, we review the facts in the light most favorable to the Government. *Id.*

1.

First, Appellant contends that the police lacked authority to use a cell site simulator to obtain his location because they never obtained a search warrant to do so. The Government responds that the police obtained the functional equivalent of a warrant: "a tracking order," procured pursuant to Maryland law, that "authorized police to track [Appellant's] location in real time." Response Br. at 27; *see also* J.A. 109-114 (reproducing the Application for Order to Obtain Electronic Device Location Pursuant to Md. Code Ann., Crim. Proc. § 1-203.1).[7] The Government emphasizes that a tracking

7. Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

order of the kind police obtained here required them "to swear, upon a written affidavit, that a factual basis existed for finding probable cause that the location information was or would lead to evidence of a crime." Response Br. at 28 (citing Md. Code Ann., Crim. Proc. § 1-203.1(b)(1)(ii), (b)(2)).

A search warrant may not issue without probable cause. *United States v. Blakeney*, 949 F.3d 851, 859 (4th Cir. 2020) (citing U.S. Const. amend. IV). Probable cause means "a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 236, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)). A judge's decision to issue a search warrant is reviewed with "great deference" -- they need only "a 'substantial basis' for finding probable cause." *United States v. Jones*, 942 F.3d 634, 638 (4th Cir. 2019) (quoting *Gates*, 462 U.S. at 236-38). As applied to warrants, the Fourth Amendment's "particularity" requirement means "the executing officer reasonably can ascertain and identify from the warrant the place to be searched and the items to be seized." *Blakeney*, 949 F.3d at 861 (citing *United States v. Owens*, 848 F.2d 462, 463 (4th Cir. 1988)). We review the validity of a warrant de novo. *Jones*, 942 F.3d at 638.

The investigators in this case obtained a tracking order which authorized them to use a cell site simulator. Maryland law provides a procedural mechanism for executing a search by means of cell site simulator. *See generally* Md. Code Ann., Crim. Proc. § 1-203.1. "A court may issue an order authorizing . . . a law enforcement

officer to use a cell site simulator or obtain location information from an electronic device after determining from [an application prescribed by the statute] that there is probable cause to believe" that the information sought is evidence of a crime or will lead to evidence of a crime. Md. Code Ann., Crim. Proc. § 1-203.1(b)(1)(ii). Baltimore City Police used this statutory procedure to obtain a tracking order in this case. They submitted an application for a tracking order with a supporting affidavit, which was granted by a state circuit court judge.

Appellant does not even address the tracking order application or the judge's order. Nonetheless, our review of the tracking order indicates that, like a search warrant, it set forth the requirement of probable cause and provided facts supporting probable cause. *Jones*, 942 F.3d at 638 (asking whether judicial officer had "substantial basis" for identifying a "fair probability that contraband or evidence of a crime will be found in a particular place") (citing *Gates*, 462 U.S. at 238). The application for a tracking order required the affiant officer to swear that there was "probable cause to believe that a misdemeanor or felony has been, is being, or will be committed by the owner of the [cell phone.]" J.A. 109. It required the affiant to swear that "there is probable cause to believe that the location information being sought is evidence of, or will lead to evidence of, the misdemeanor or felony being investigated." *Id.*

It then set forth the phone number that was the subject of the search, Appellant's identity, and the facts supporting probable cause. These facts included a description of the

crime scene at Jeffrey's home; the fact that Appellant's cell phone number was the last number dialed on the phone belonging to Jeffrey; that Appellant was the last person to see Jeffrey (according to her family); and that Appellant was the last person to speak with the Jeffrey via cell phone. Further, the affiant officer noted that Appellant discontinued a prior pattern of calls to the victim around the time of the murder. A judge for the Circuit Court of Maryland for Baltimore City granted the officer's application and authorized the tracking order.

Accordingly, we reject Appellant's argument that the Government lacked probable cause to use a cell site simulator to obtain his location information.

2.

Next, Appellant contends the police lacked authority to search the apartment where they found him because the warrant they obtained omitted the fact that police used a cell site simulator to discover Appellant's location. The Government points out that police did not rely on the warrant to search the apartment because they obtained consent to enter and because their subsequent actions which led to finding Appellant in the apartment were taken as part of a protective sweep.

While the Fourth Amendment generally prohibits warrantless searches, "valid consent to seize and search items provides an exception to the usual warrant requirement." *United States v. Buckner*, 473 F.3d 551, 554 (4th Cir. 2007) (citing *Schneckloth v. Bustamonte*,

412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)). Consent is "valid" if it is "knowing and voluntary" and "given by one with authority to consent." *Id.* (citations omitted). Consent may be "inferred from actions as well as words." *United States v. Hylton*, 349 F.3d 781, 786 (4th Cir. 2003). "And because the question is one of fact, review on appeal is conducted under the clear error standard." *United States v. Azua-Rinconada*, 914 F.3d 319, 324 (4th Cir. 2019) (citing *United States v. Lattimore*, 87 F.3d 647, 650 (4th Cir. 1996) (en banc)).

Following a hearing on Appellant's motion to suppress, the district court held that investigators obtained consent to search the apartment and detained Appellant pursuant to a lawful protective sweep. J.A. 625 ("[T]his Court concludes that officers lawfully entered Apartment 202 with consent."). The court determined that when officers arrived at apartment 202 where Appellant was located, they knocked on the door, and "the man who opened the door appeared to answer the officer calmly and step back so as to allow officers into the residence." *Id.*; *see also id.* at 388-89 (investigating officer testifying the occupant "[k]ind of stepped back and -- as if to wave him or allow the Baltimore Police officer and subsequent officers in"). The court thus held, "Nothing in the record, including the statements of the individual who opened the door himself, supports a finding that the consent in this case was anything but voluntary." *Id.*

Appellant presents no reason to doubt the district court's determination that officers had consent to enter apartment 202. Thus, we reject Appellant's argument

that the search of apartment 202 was unlawful on the basis that officers did not specifically state in the search warrant application that they had relied on information obtained via a cell site simulator. The officers did not rely on the search warrant because they had consent to enter the apartment. *See Azua-Rinconada*, 914 F.3d at 325 (holding the district court did not clearly err "in finding that consent to enter was given voluntarily" when occupant "opened the door . . . and with a degree of graciousness invited the officers into the trailer").

3.

Last, Appellant argues that police lacked authority to search his person once they entered the apartment and that, as an overnight guest, he had standing to challenge their search. Appellant emphasizes that the district court "erroneously focused on the issue that he was not a true overnight guest . . ., ignoring the fact that the appellant's argument was that the standing issue did not relate to the apartment search but related to the search and seizure of the appellant's person and possessions." Response Br. at 14. The Government counters that police had authority to search Appellant's person during their protective sweep of the apartment.

A warrantless protective sweep "can be justified when law officers have an interest 'in taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack.'" *United States v. Everett*, 91 F.4th 698, 709 (4th

Cir. 2024) (quoting *Maryland v. Buie*, 494 U.S. 325, 333, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990)). This exception to the warrant requirement requires "'articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.'" *Id.*

We conclude that the officers lawfully detained Appellant in the course of a lawful protective sweep of the apartment. Following the motion to suppress hearing, the court below determined that "officers . . . saw several individual[s] running towards the back room"; officers "conducted a protective sweep of the apartment to locate all individuals and ensure that there was no threat to law enforcement"; and "[i]n the course of their protective sweep, officers located [Appellant] on a couch in a common room [and] confirmed his identity." J.A. at 625-26.

Appellant does not contend that any part of this sweep was unlawful. Rather, he argues that the district court erroneously determined that Appellant did not have standing to challenge the search of the apartment because he was not an overnight guest. But the standing issue is beside the point. Even assuming standing, the officers' seizure of Appellant was justified by their need to conduct a protective sweep of the apartment.

Accordingly, we reject Appellant's argument that the search and seizure of his person was unconstitutional.

C.

Brady **Evidence**

Appellant contends that the Government committed a *Brady* violation by failing to follow up on possible evidence tied to a security camera found in the kitchen of the murder victims. Under *Brady*, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). When evidence may only be "potentially useful," a defendant must show that the Government acted in "bad faith" in failing to preserve the evidence. *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988). To establish a *Brady* violation, a defendant must prove that the evidence at issue was "(1) favorable to the defendant (either because it was exculpatory or impeaching), (2) material to the defense (that is, prejudice must have ensued), and (3) suppressed (that is, within the prosecution's possession but not disclosed to [the] defendant)." *United States v. Young*, 916 F.3d 368, 383 (4th Cir. 2019) (citing *United States v. Sarihifard*, 155 F.3d 301, 309 (4th Cir. 1998)).

A crime scene technician determined that the camera was not operational and a detective assigned to the case corroborated the technician's report. Nonetheless, Appellant argues on appeal that the Government should have determined whether Comcast, the service provider associated with the security camera, retained any video

footage. The Government responds that *Brady* does not impose upon it an affirmative obligation to seek out exculpatory evidence; that the ostensible footage was never in the Government's possession such that *Brady* does not apply; and that, in any case, there was no reason beyond mere speculation to think there might be footage on a broken camera.

Appellant's *Brady* argument fails in two respects. First, he cannot demonstrate that the footage on the camera would have been favorable to his case. Appellant can only speculate as to what the footage would have shown, and "rank speculation as to the nature of the allegedly suppressed materials . . . cannot establish a *Brady* violation." *Young*, 916 F.3d at 383; *United States v. Caro*, 597 F.3d 608, 619 (4th Cir. 2010) ("Because Caro can only speculate as to what the requested information might reveal, he cannot satisfy *Brady*'s requirement of showing that the requested evidence would be [favorable]."). And second, Appellant cannot demonstrate that the Government suppressed favorable evidence -- it never had possession of the recording to begin with because the camera was broken. *United States v. Stokes*, 261 F.3d 496, 502 (4th Cir. 2001) (noting that a defendant must show "that the prosecution had the materials and failed to disclose them"). Thus, Appellant fails to satisfy the test of *Brady*, not to mention the higher "bad faith" showing required to demonstrate a violation under *Youngblood*, which arguably applies here because the evidence was only "potentially useful" to Appellant. *Youngblood*, 488 U.S. at 55, 58. Thus, we reject Appellant's argument that the Government committed a *Brady* violation by failing

to follow up on whether any footage was contained on the broken camera.[8]

D.

Alleged Use of Perjured Testimony

Appellant contends that the Government used perjured testimony in order to secure his conviction. Appellant argued in his briefing and at oral argument that the Government knowingly relied on false testimony, but Appellant provides no evidence demonstrating that any specific testimony relied upon to secure his conviction was false, much less that the Government knowingly suborned perjury. Appellant argues that three witnesses who testified against him at trial gave equivocal, and sometimes contradictory, testimony. The Government responds that these arguments attack the witnesses' credibility and the weight of their testimony, but that Appellant has not proved the testimony they gave was actually false.

In general, the Government's knowing use of false testimony to acquire a conviction violates due process. *United States v. Barko*, 728 F.3d 327, 335 (4th Cir. 2013) (citing *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)). "A new trial is required when the

8. Appellant also argues that the Government committed a *Brady* violation by failing to check whether security cameras near the house had footage from the time of the murder. For the same reasons discussed, we reject Appellant's argument about a *Brady* violation relating to these cameras as well.

government's knowing use of false testimony could affect the judgment of the jury." *Id.* (citing *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)). To obtain relief upon a claim that the Government used false testimony, Appellant must establish that the Government knowingly used false testimony, creating a false impression of material fact. *Id.* And Appellant bears "the heavy burden of showing that [witnesses] testified falsely." *United States v. Griley*, 814 F.2d 967, 971 (4th Cir. 1987).

In attempt to support his argument, Appellant points to the testimony of three witnesses:

- Kiara Haynes testified that she conspired with Appellant to acquire a gun, rob the victim of the drugs in her possession, and then murder the victim. Appellant emphasizes that Haynes "lied to the government on numerous occasions prior to her testimony at trial." Opening Br. at 23 (citing J.A. 1628). Specifically, Appellant points to Haynes's testimony that she lied before the grand jury.

- Alfred Harris, III, Appellant's uncle, testified that Appellant confessed to killing both victims, including Jeffrey's young son, K.B., who Appellant was worried might be a witness against him. Appellant argues Harris's testimony was unreliable because Harris had a long history of heroin use and an extensive criminal record. Appellant also points out that

when Harris was first interviewed by police, he insisted he knew nothing about the murders. It was not until later that he agreed to cooperate with the Government, including by wearing a wire during conversations with Appellant.

- Wane Briscoe testified that he gave Appellant a car ride on the day after the murders and that Appellant made incriminating statements to him. Appellant argues that Briscoe was unreliable because he had previously lied to police, telling them he did not sell drugs (even though he did) and that he knew nothing about the murders, "leaving open the question was he lying previously or was he lying now." Opening Br. at 25-26.

Appellant argues that these witnesses were not credible because they changed their stories or otherwise indicated they were unreliable. Regarding Haynes specifically, Appellant argues she had "credibility issues." Opening Br. at 24. Regarding Harris, Appellant argues he had "credibility problems." *Id.* at 25. And regarding Briscoe, Appellant argues he was "another unreliable witness" who changed his story. *Id.*

These credibility issues and contradictions are not equivalent to false testimony. *Griley*, 814 F.2d at 971 ("Mere inconsistencies in testimony by government witnesses do not establish the government's knowing use of false testimony."). And credibility and reliability were for the jury to decide. "[W]e are not entitled to assess

witness credibility." *United States v. Savage*, 885 F.3d 212, 219 (4th Cir. 2018) (quoting *United States v. Taylor*, 659 F.3d 339, 343 (4th Cir. 2011)) (internal quotation marks omitted). Appellant had an opportunity to challenge the credibility of these witnesses on cross examination. The jury heard the testimony, including the cross examination, weighed the evidence, including the reliability of the witnesses, and convicted Appellant.

Accordingly, we reject Appellant's argument that the Government knowingly relied upon false testimony to secure his conviction.

E.

Rule 29: Sufficiency of the Evidence

Appellant argues that the evidence was insufficient to convict him on two bases: (1) the Government charged Appellant with heroin related charges, but it never proved that the substance in question was, in fact, heroin; and (2) the Government never proved that the robbery and murder affected interstate commerce. The Government responds that (1) there was witness testimony that Appellant sold heroin, and, in any case, proving the specific substance at issue was not a required element of the drug offenses; and (2) no nexus to interstate commerce was necessary because Appellant was charged with multiple predicate offenses that did not all require such a nexus, and, in any case, it did prove a nexus.

"We review de novo a district court's denial of a motion for judgment of acquittal." *United States v. Davis*, 75 F.4th 428, 437 (4th Cir. 2023). The verdict must be upheld if it is supported by substantial evidence, and we review the evidence in the light most favorable to the Government. *United States v. Reid*, 523 F.3d 310, 317 (4th Cir. 2008).

1.

Drug Charges

Appellant challenges the sufficiency of the evidence on Count One, conspiracy to distribute heroin, and Count Two, possession with intent to distribute heroin. Appellant argues that these counts should have failed due to the lack of evidence that the substance in question was, in fact, heroin. Appellant points out that no drugs were seized in this case and that witness testimony suggested that the substance in question was actually liquid Percocet, or oxycodone rather than heroin.

The Government responds that it did not need to prove the actual chemical composition of the substance at issue because the Government introduced lay testimony sufficient to prove that Appellant possessed, distributed, and conspired to distribute heroin. Specifically, Alfred Harris, Appellant's uncle, testified that he sometimes bought heroin from Appellant. As a longtime heroin user, Harris testified that he was familiar both with the appearance and effects of heroin. Further, one of Appellant's cousins, Briscoe, testified that Appellant asked him to help sell heroin. Appellant's supplier, Williams,

testified that Appellant was attempting to buy heroin, but that the supplier was producing liquid hydrocodone and other substances, which Appellant believed were heroin.

The Government also argues that the specific substance Appellant was trafficking is not decisive because the charging statute for Count Two requires only "specific intent to distribute a controlled substance or to possess with intent to distribute a controlled substance." *United States v. Ali*, 735 F.3d 176, 186 (4th Cir. 2013). "[I] t does not require . . . specific knowledge of the controlled substance." *Id.* The Government argues that the same is true of the Count One, the conspiracy count because that count borrows the mens rea of the charge for possession with intent to distribute.

We agree with the Government on both points. The circumstantial evidence was sufficient for the jury to find that Appellant possessed, distributed, and conspired to distribute heroin. *See United States v. Dolan*, 544 F.2d 1219, 1221 (4th Cir. 1976) ("[L]ay testimony and circumstantial evidence may be sufficient, without the introduction of an expert chemical analysis, to establish the identity of the substance involved in an alleged narcotics transaction."); *United States v. Scott*, 725 F.2d 43, 45 (4th Cir. 1984) ("[T]he character of cocaine . . . may be established circumstantially by lay testimony . . . ."); *United States v. Uwaeme*, 975 F.2d 1016, 1019-20 (4th Cir. 1992) (same). Two witnesses testified that Appellant was selling heroin, including a longtime user who recognized the appearance and effect of the drug. *See Dolan*, 544 F.2d at 1221 ("Such circumstantial proof may include evidence

of the physical appearance of the substance [and] evidence that the substance produced the expected effects when sampled by someone familiar with the illicit drug . . . ."); *Scott*, 725 F.2d at 46 ("The substance had the appearance of illicit cocaine; when sampled and tested by an experienced user of cocaine, it had the effect of cocaine . . . ."). There was also testimony that Appellant was buying what he at least intended was heroin from his supplier. *See Scott*, 725 F.2d at 46 (affirming the Government's use of testimony that "all persons dealing with the substance treated and dealt with it as cocaine"). All of this testimony combined was sufficient for a jury to find that Appellant possessed, distributed, and conspired to distribute heroin. *See Reid*, 523 F.3d at 317 ("[W]e will uphold the verdict if, viewing the evidence in the light most favorable to the government, it is supported by substantial evidence.").

Further, regardless of the specific chemical composition of the drug at issue, the evidence was sufficient for the jury to convict. *See Uwaeme*, 975 F.2d at 1020 ("[W]e will uphold a conviction as long as the evidence that the substance was illegal is adequate.") (citing *Scott*, 725 F.2d at 45 (4th Cir. 1984)). The act prohibited by the statute under which Appellant was charged, 21 U.S.C. § 841(a), is "knowingly or intentionally" "manufactur[ing], distribut[ing], or dispens[ing], or possess[ing] with intent to manufacture, distribute, or dispense, a controlled substance." The Government is correct that the jury could have found Appellant guilty of violating that statute whether the substance at issue was heroin, liquid oxycodone, or liquid hydrocodone. *Ali*, 735 F.3d at 186 ("Thus, while the statute requires specific

intent to distribute *a controlled substance* or to possess with intent to distribute *a controlled substance*, it does not require that the defendant have, within that intent, specific knowledge of the controlled substance or any of the chemicals, derivatives, isomers, esters, ethers, or salts that constitute the controlled substance.") (emphasis in original); *see also United States v. Barbosa*, 271 F.3d 438, 458 (3d Cir. 2001) ("[T]he structure and plain text of § 841 affords no support for a requirement that the Government must prove more than the defendant's knowledge that he was trafficking in a controlled substance."). The same analysis applies to Count One, the conspiracy count, pursuant to 21 U.S.C. § 846. *Ali*, 735 F.3d at 186 ("Because § 846 looks to an underlying offense, the mens rea of § 846 is derived from that of the underlying offense, in this case § 841(a)."). "Of course, the fact that the defendant must only know that the [substance] he is distributing or possessing with intent to distribute contains an unspecified *controlled substance* does not relieve the government of proving that that substance was in fact on the controlled substance list." *Id.* (emphasis in original). But here, that is not at issue because liquid hydrocodone and oxycodone are Schedule II controlled substances, just as heroin is a controlled substance. 21 C.F.R. § 1308.12.

Therefore, we reject Appellant's argument that the evidence was insufficient to convict him on Counts One and Two.

2.

Robbery and Murder

Appellant also challenges the sufficiency of the evidence on Counts Four and Five, use and carry of a firearm during and in relation to a drug trafficking crime and a crime of violence, causing the two murders. He contends that the evidence was insufficient to convict on these counts because the Government did not prove a nexus to interstate commerce.

The Government argues that Appellant misunderstands the charging statute -- that he is presupposing that the "murder" element of § 924(j)(1) means felony murder with Hobbs Act robbery as a predicate offense. And since Hobbs Act robbery requires a nexus to interstate commerce, Appellant therefore asserts the Government was required to prove that nexus.

The elements required for the Government to prove Counts Four and Five, are (1) a predicate § 924(c) drug-trafficking offense or crime of violence; (2) use of a firearm during and in relation to the predicate offense; and (3) that in the course of using the firearm, Appellant caused the murder of another person. *United States v. Foster*, 507 F.3d 233, 245 (4th Cir. 2007). "Murder," in turn, means "the unlawful killing of a human being with malice aforethought." 18 U.S.C. § 1111. Appellant does not identify under which element he believes the Government was required, yet failed, to prove a nexus to interstate commerce. Even liberally construing his argument as

related to the first and third elements, it is without merit in either instance.

The first element -- a predicate offense -- was supported by substantial evidence. Because one of the predicate § 924(c) offenses was Hobbs Act robbery, the district court instructed the jury as to the elements of that offense, including the nexus to interstate commerce element. But the Government did not need to prove Hobbs Act robbery, because that was only one of three possible predicate offenses. The other two offenses were the conspiracy and drug trafficking crimes alleged in Counts One and Two, which, as discussed above, were supported by substantial evidence. Because the Government proved these counts, the predicate element was satisfied, and there was sufficient evidence for the jury to convict on the two § 924(j)(1) counts. *See United States v. Said*, 26 F.4th 653, 659 (4th Cir. 2022) ("[A] § 924(c) conviction may stand even if the jury based its verdict on an invalid predicate, so long as the jury also relied on a valid predicate.").

The second element -- causing murder with a firearm -- was also supported by substantial evidence. Alfred Harris, Briscoe, and Tonya Harris each testified that Appellant confessed to killing Jeffrey and K.B. Haynes testified that she and Appellant planned to rob Jeffrey of the narcotics and kill her with the .45 caliber gun, and that Appellant admitted to having killed both Jeffrey and K.B. The victims were discovered with gunshot wounds at the crime scene, and a forensic pathologist testified that Jeffrey and K.B. died from gunshot wounds. Thus, there was substantial evidence from which the jury could

find "the unlawful killing of a human being with malice aforethought" as to both Jeffrey and K.B. 18 U.S.C. § 1111.

As a result, we reject Appellant's argument that the evidence was insufficient to convict him of the murder charges and we affirm the district court's denial of Appellant's motion for judgment of acquittal.

III.

In sum, we reject each of Appellant's contentions on appeal. The judgment of conviction is

AFFIRMED.

APPENDIX B — JUDGMENT IN A CRIMINAL CASE, UNITED STATES DISTRICT COURT, DISTRICT OF MARYLAND, FILED JANUARY 4, 2023

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Case Number: RDB-1-20-CR-00139-001

UNITED STATES OF AMERICA

v.

ANDRE RICARDO BRISCOE

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed on or After November 1, 1987)

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) , which was accepted by the court.

☒ was found guilty on counts 1ssss, 2ssss, 3ssss, 4ssss, 5ssss, and 6ssss of the Third Superseding Indictment after a plea of not guilty.

Appendix B

Title & Section	**Nature of Offense**	**Date Offense Concluded**	**Count Number(s)**
21:846	Conspiracy To Distribute and Possess With The Intent To Distribute Controlled Substances	October 2015	1ssss
21:841(a)(1); 18.2	Possession With Intent To Distribute Controlled Substances; Aiding and Abetting	October 2015	2ssss

The defendant is adjudged guilty of the offenses listed above and sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 as modified by *U.S. v. Booker*, 543 U.S. 220 (2005).

☐ The defendant has been found not guilty on count(s) _____

Appendix B

☒ Counts of the Information, Indictment, Superseding Indictment, and Second Superseding Indictment are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

January 4, 2023
Date of Imposition of Judgment

/s/ Richard D. Bennett
Richard D. Bennett
United States District Judge

January 4, 2023
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:922(g)(1);18:2	Possession Of A Firearm and Ammunition By A Prohibited Person; Aiding and Abetting	October 2015	3ssss

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18:924(c) And((j) (1);18:2	Use and Carry Of A Firearm During and In Relation To A Drug Trafficking Crime and Crime Of Violence Causing The Death Of Another; Aiding and Abetting		4ssss
18:924(c) And((j) (1);18:2	Use and Carry Of A Firearm During and In Relation To A Drug Trafficking Crime and Crime Of Violence Causing The Death Of Another; Aiding and Abetting	October 2015	5ssss
18:1512(a) (1)(C) And(a)(3) (A);18:2	Killing A Witness To Prevent Communication To Law Enforcement; Aiding and Abetting	October 2015	6ssss

Appendix B

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **480 months as to count 1; 480 months as to count 2; 120 months as to count 3; Life as to count 4; Life as to count 5; Life as to count 6; Terms to run concurrent, with credit given for time served from May 22, 2020**.

☒ The court makes the following recommendations to the Bureau of Prisons:

1. That the defendant be designated to the USP Allenwood at Allenwood, Pennsylvania for service of his sentence.
2. That the defendant **NOT** be designated to the FCI at Morgantown for service of his sentence.
3. That the defendant participate in any appropriate psychological and mental health counseling/ evaluation and treatment program.
4. That the defendant participate in any appropriate vocational training program.

☒ The defendant is remanded to the custody of the United States Marshal

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ a.m./p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender, at his/her own expense, to the institution designated by the Bureau of Prisons at the date and time specified in a written notice to be sent to the defendant by the United States Marshal. If the defendant does not receive such a written notice, defendant shall surrender to the United States Marshal:

☐ before 2pm on _____.

A defendant who fails to report either to the designated institution or to the United States Marshal as directed shall be subject to the penalties of Title 18 U.S.C. §3146. If convicted of an offense while on release, the defendant shall be subject to the penalties set forth in 18 U.S.C. §3147. For violation of a condition of release, the defendant shall be subject to the sanctions set forth in Title 18 U.S.C. §3148. Any bond or property posted may be forfeited and judgment entered against the defendant and the surety in the full amount of the bond.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

/s/_____
UNITED STATES MARSHAL

By: /s/_____
DEPUTY U.S. MARSHAL

Appendix B

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **4 years as to count 1; 4 years as to count 2; 3 years as to count 3; 5 years as to count 4; 5 years as to count 5; 5 years as to count 6; terms to run concurrent for a total of 5 years**.

The defendant shall comply with all of the following conditions:

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

A. MANDATORY CONDITIONS

1) You must not commit another federal, state or local crime.

2) You must not unlawfully possess a controlled substance.

3) You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)

4) You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (*check if applicable*)

5) You must cooperate in the collection of DNA as directed by the probation officer.

6) ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)

7) ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page

B. STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

2) After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

3) You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4) You must answer truthfully the questions asked by your probation officer.

5) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7) You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time

employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8) You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

1) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

2) You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

3) You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

4) If the probation officer determines that you pose a risk to another person (including an organization),

the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

5) You must follow the instructions of the probation officer related to the conditions of supervision.

C. SUPERVISED RELEASE

ADDITIONAL CONDITIONS

1. You must not communicate, or otherwise interact, with the family of the victims, either directly or through someone else, without first obtaining the permission of the probation officer.

2. You must participate in a vocational services program and follow the rules and regulations of that program. Such a program may include job readiness training and skills development training.

3. You must participate in a mental health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).

4. You must participate in a substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).

Appendix B

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature /s/_____ Date _____

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 5B.

	Assessment	Restitution	Fine
TOTALS	$600.00	$.00	WAIVED

	AVAA Assessment*	JVTA Assessment**
TOTALS	$.00	

☐ CVB Processing Fee $30.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including

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* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	**Total Loss*** **	**Restitution Ordered**	**Priority or Percentage**

TOTALS $_____ $_____

☐ Restitution amount ordered pursuant to plea agreement _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ In full immediately; or

B ☐ $_____ immediately, balance due (in accordance with C, D, or E); or

C ☐ Not later than _____; or

D ☐ Installments to commenceday(s) after the date of this judgment.

E ☐ In _____ (*e.g. equal weekly, monthly, quarterly*) installments of $_____ over a period of _____ year(s) to commence when the defendant is placed on supervised release.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Unless the court expressly orders otherwise, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Bureau of Prisons Inmate Financial Responsibility Program, are to be made to the Clerk of the Court.

☐ **NO RESTITUTION OR OTHER FINANCIAL PENALTY SHALL BE COLLECTED THROUGH THE INMATE FINANCIAL RESPONSIBILITY PROGRAM.**

If the entire amount of criminal monetary penalties is not paid prior to the commencement of supervision, the balance shall be paid:

☐ in equal monthly installments during the term of supervision; or

☐ on a nominal payment schedule of $_____ per month during the term of supervision.

The U.S. probation officer may recommend a modification of the payment schedule depending on the defendant's financial circumstances.

Special instructions regarding the payment of criminal monetary penalties:

☐ Joint and Several

Appendix B

Case Number Defendant and Co-Defendant Names (*including defendant number*)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, FILED AUGUST 26, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. RDB-20-0139

UNITED STATES OF AMERICA,

v.

ANDRE RICARDO BRISCOE,

Defendant.

Filed August 26, 2020

MEMORANDUM OPINION

Defendant Andre Ricardo Briscoe ("Defendant" or "Briscoe") is charged in all three counts of a three-count Indictment (ECF No. 19), to wit: conspiracy to distribute and possess with the intent to distribute controlled substances, in violation of 21 U.S.C. § 846 (Count One); possession with intent to distribute controlled substances, in violation of 21 U.S.C. § 841(a)(1) (Count Two); and possession of a firearm and ammunition by a prohibited person, in violation of 18 U.S.C. § 922(g)(1) (Count Three).

Now pending is Briscoe's Motion to Dismiss All Counts for Failure to Indict within the Statute of Limitations

(ECF No. 11) and Supplemental Motion to Dismiss All Counts (ECF No. 24). The parties' submissions have been reviewed, and a remote hearing on this matter was conducted on August 25, 2020. For the reasons stated herein, the Defendant's Motion to Dismiss All Counts (ECF No. 11) and Supplemental Motion to Dismiss All Counts (ECF No. 24) are DENIED IN PART. The parties agree that the arguments presented in their submissions as to Count One are not yet ripe. Accordingly, those arguments shall be held in abeyance and the Motions (ECF Nos. 11 and 24) remain pending.

BACKGROUND

On May 28, 2015 at approximately 8:26 a.m., a seven-year-old boy (Victim 2) and his mother (Victim 1) were found murdered in their Baltimore home. (20-mj-1328-CBD, Complaint Aff. ¶ 7, ECF No. 29-1 *SEALED*). There is evidence that the victims likely died between 11:41 a.m. and 1:29 p.m. on May 27, 2015. (*Id.* at ¶¶ 10, 15, 20.) The Government alleges that Briscoe murdered Victim 1 in furtherance of a narcotics distribution conspiracy. (ECF No. 29 at 4-5.) It is alleged that Victim 1 was a heroin dealer and that Defendant Briscoe was her weekly or twice weekly customer. (ECF No. 29 at 4.) Briscoe claims to have been with his cousin on the morning of May 27, 2015, and that, later in the day, he was dropped off on Broadway Street near the Perkins Homes neighborhood in Baltimore. (ECF No. 29 at 16.)

On Wednesday, May 20, 2020, United States Magistrate Judge Charles B. Day signed a sealed

Criminal Complaint and arrest warrant supported by an affidavit of probable cause. The defendant was arrested two days later on Friday, May 22, 2020. (*See* SEALED docket CBD-20-1328). On Tuesday, May 26, 2020, the Government filed a Criminal Information charging Briscoe with conspiring from March 2015 to June 2015 to distribute and possess with intent to distribute 100 grams or more of heroin (Count One), possessing with intent to distribute 100 grams or more of heroin on May 27, 2015 (Count Two), and possessing a firearm he was prohibited from having as a result of felony conviction on the same day. (ECF No. 1.) At that time, an Indictment could not be obtained because Standing Orders of this Court had suspended the convening of all grand juries in this District in light of the COVID19 pandemic since approximately March 13, 2020. (ECF No. 15 at 2; ECF No. 29 at 9.) The Information was filed because the Government anticipated that Defendant would argue that the statute of limitations expired on May 27, 2020. The Defendant never waived prosecution by Indictment.

On June 1, 2020, U.S. Magistrate Judge Mark Coulson presided over Briscoe's detention hearing and ordered Defendant's pretrial detention. (Order of Detention, ECF No. 4.) On June 5, 2020, Magistrate Judge Thomas DiGirolamo made a further probable cause finding after presiding over Defendant's preliminary hearing. (ECF No. 9.) Finally, on July 1, 2020, the first grand jury to convene in this District since March 13, 2020, returned the pending Indictment. (ECF No. 19.)

Appendix C

ANALYSIS

Briscoe argues that dismissal of Counts Two and Three is appropriate because the Government has failed to abide by the statute of limitations set forth 18 U.S.C. § 3282(a). Briscoe additionally claims that the Government violated his due process rights by unduly delaying the institution of charges in this case. Briscoe's claims are addressed in turn.

I. Counts Two and Three Are Not Barred by the Statute of Limitations.

18 U.S.C. § 3282(a) requires an indictment to be "found" or an information to be "instituted" within five years of the occurrence of a non-capital offense. In this case, the parties agree that the relevant statute of limitations deadline is May 27, 2020. The parties further agree, and it is a matter of record, that an Information was filed within that deadline (on May 26, 2020), but that the Indictment was filed well outside of it (on July 1, 2020). Finally, the parties agree that the Indictment is only timely if "relates back" to the Information, and if the Information is valid. The Defendant argues (1) that an indictment can *never* "relate back" to an information; (2) that the Indictment does not relate back to the Information in this case; and (3) that the Information is invalid because (a) the Defendant did not waive prosecution by Indictment (*see* Fed. R. Crim. P. 7) and (b) the Defendant was not issued a warrant or summons in connection with the Information (*see* Fed. R. Crim. P. 9).

Appendix C

A superseding indictment filed outside of the limitations period may "relate back" to an earlier, timely indictment. *See United States v. Snowden*, 770 F.2d 393, 398 (4th Cir. 1985). "As long as a superseding indictment does not broaden or substantially amend the original indictment, the superseding indictment relates back to the filing of the original indictment, even if the superseding indictment is filed outside of the statute of limitations period." *United States v. Brown*, 580 F. Supp. 2d 518, 520 (W.D. Va. 2008) (citing *United States v. Grady*, 544 F.2d 598, 601-02 (2d Cir. 1976)). Although the rule is ordinarily applied as between superseding and original indictments, there is no reason why a subsequent indictment cannot relate back to a preceding, valid information because the two forms of charging documents are treated the same for statute of limitations purposes. *See* 18 U.S.C. § 3282(a). In this case, Counts Two and Three of the Indictment are identical to Counts Two and Three of the Information and, accordingly, may "relate back" to the Information.

Contrary to the Defendants' arguments, the Information in this case is valid and does not offend Fed. R. Crim. P. 7(b) or 9. Although Fed. R. Crim. P. 7(b) requires the Defendant to waive an Indictment before being "prosecuted by Information," 18 U.S.C. § 3282(a) requires only that an Information must be "instituted" within the 5-year statute of limitations period to be timely. The terms "prosecuted" and "instituted" are not equivalent. An information is "instituted" when it is properly filed, regardless of the Defendant's waiver. Further prosecutorial actions – such as a trial or a plea agreement – would require waiver, as Rule 7(b) sets forth.

This interpretation comports with the plain language of the statute and Rule, and is consistent with the majority view of those Courts which have addressed this issue. *See United States v. Burdix -Dana*, 149 F.3d 741 (7th Cir. 1998) ("We hold that the filing of the information is sufficient to institute it within the meaning of 18 U.S.C. § 3282."); *United States v. Cooper*, 956 F.2d 960 (10th Cir. 1992) ("Rule 7(b) does not prohibit the filing of an information in the absence of a waiver. . . ."); *United States v. Marifat*, WBS-17-0189, 2018 WL 1806690, at *2-3 (E.D. Cal. Apr. 17, 2018) (following *Burdix -Dana*); *United States v. Hsin–Yung*, 97 F.Supp.2d 24, 28 (D.D.C. 2000) (same); *United States v. Stewart*, 425 F. Supp. 2d 727, 731-35 (E.D. Va. 2006) (same); *United States v. Watson*, 941 F. Supp. 601, 603-04 (N.D.W.Va.1996) (same).[1] Accordingly, the Information in this case satisfies the statute of limitations even though Defendant did not waive his right to an indictment.

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1. Defendant cites one case which does not follow *Burdix-Dana*, namely, *United States v. Machado*, RWZ04-10232, 2005 WL 2886213 (D. Mass. Nov. 3, 2005). In *Stewart*, *supra*, the Eastern District of Virginia declined to follow *Machado* on stare decisis grounds, noting that *Machado* was the only case that departed from *BurdixDana*. *Stewart*, 425 F. Supp. 2d at 734-35. For this same reason, this Court declines to follow *Machado*. As in *Stewart*, this Court is satisfied that there remains a distinction between "prosecuting" a Defendant through an Information, which would require waiver of an indictment, and "instituting" an Information for purposes of tolling the statute of limitations, which would not require a waiver. Additionally, *Machado* is distinguishable from this case on the grounds that, as a result of the suspension of grand jury proceedings due to the COVID19 pandemic, it was impossible for the Government to make full use of the limitations period to obtain an Indictment.

As to Defendant's second contention, this Court rules that Fed. R. Crim. P. 9 does not require the issuance of a warrant or summons to render the Information valid. Rule 9 requires the Court to issue a warrant or, if the Government requests, a summons, upon a showing of probable cause accompanying an Information. There is nothing in Rule 9 which indicates that the failure to issue a warrant renders the Information a nullity. The rule protects the Defendant only insofar as it requires a probable cause finding before a warrant issues. Nevertheless, it is difficult to imagine how Rule 9 would operate in this case, because Briscoe had been arrested just a few days earlier on an arrest warrant issued in conjunction with the Criminal Complaint. The Complaint apprised Briscoe of the general nature of the charges; and the subsequent Information, filed merely a few days later and within the limitations period, afforded him even more notice. Under those circumstances, the Information is not rendered a nullity merely because the Defendant was not arrested *again* despite already being in federal custody. Accordingly, the Information is valid. Counts Two and Three of the Indictment may "relate back" to the identical counts in the Information, which was filed within the limitations period, and are therefore timely.

II. The Government Did Not Violate Briscoe's Due Process Rights through Pre-Indictment Delay.

Defendant claims that his due process rights have been violated by the Government's delay because he can no longer locate a potential alibi witness and because potentially useful surveillance footage has not been

preserved. Pre-indictment delay only offends due process when it causes "substantial prejudice" to a defendant's right to a fair trial and only if the delay was an "intentional device" designed to give the Government a "tactical advantage." *United States v. Shealey*, 641 F.3d 627, 633 (4th Cir. 2011) (quoting *United States v. Marion*, 404 U.S. 307, 324, 92 S. Ct. 455 (1971)). The defendant faces a "heavy burden" to show actual, substantial prejudice – that is, that his ability to defend against the Government's charges were meaningfully impaired by the delay. *Shealey*, 641 F.3d at 633-34 (quoting *Jones v. Angelone*, 94 F.3d 900, 907 (4th Cir. 1996)). To show prejudice resulting from the unavailability of a witness, the defendant must identify that witness, describe their expected testimony, demonstrate that the defendant has made efforts to locate the witness, and show that the witness's proffered testimony is not available from other sources. *Angelone*, 94 F.3d at 908.

In this case, Defendant has failed to show either "actual prejudice" or that the Government intentionally delayed to gain a tactical advantage. Briscoe has identified a potential alibi witness only as "a woman" who he visited on the date of the alleged murders. He has not described her testimony or his efforts to locate her. (ECF No. 24 at 4.) Based on Briscoe's statements to police officers, there are other potential alibi witnesses in this case, including Briscoe's cousin. (ECF No. 29 at 16.) Furthermore, the loss of CCTV camera footage on Broadway Street near Perkins Homes, where Briscoe claims to have been dropped off on the day of the alleged murders, cannot be attributable to the Government's delay. Briscoe claims that such footage is routinely deleted after 30 days when there has been no

request to preserve it. If that is the case, then the deletion of the footage has nothing to do with the Government's delay. Rather, it is more likely that the Government did not preserve this footage because Briscoe never made clear to investigators the precise time or location of his arrival in the Perks Homes area. Under those circumstances, the routine deletion of this footage cannot be attributed to the timing of the Government's charges.

Finally, and most importantly, the delay in this matter is attributable to the COVID-19 pandemic, not to any deliberate tactical maneuvering. Grand Jury proceedings were suspended between March 13, 2020 and July 1, 2020 to prevent the spread of the novel coronavirus. *See* Standing Orders 2020-03 through 2020-16. Accordingly, the Government was not able to obtain an Indictment during a significant portion of the statute of limitations period. The suspension of these proceedings, though necessary to safeguard the public health, is equally detrimental to the Government and the Defendant. Accordingly, Briscoe's due process claim is without merit.

Appendix C

CONCLUSION

For the reasons stated above, Defendant's Motion to Dismiss All Counts (ECF No. 11) and Supplemental Motion to Dismiss All Counts (ECF No. 24) are DENIED IN PART. The parties agree that the arguments presented in their submissions as to Count One are not yet ripe. Accordingly, those arguments shall be held in abeyance and the Motions (ECF Nos. 11 and 24) remain pending.

A separate order follows.

Dated: August 26, 2020

/s/
Richard D. Bennett
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED JUNE 6, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4013
(1:20-cr-00139-RDB-1)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANDRE RICARDO BRISCOE, A/K/A POO,

Defendant-Appellant.

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court
/s/ Nwamaka Anowi, Clerk