No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

****

BENJAMIN JAKES-JOHNSON

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

****

APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI

****

TO THE HONORABLE SONIA SOTOMAYOR, ASSOCIATE JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SECOND CIRCUIT:

NOW COMES petitioner Benjamin Jakes-Johnson ("Petitioner"), who, pursuant to Supreme Court Rule 13.5, respectfully requests a 60-day extension of time for filing a petition for a writ of certiorari to the Supreme Court of the United States. This application is submitted at least ten (10) days prior to the scheduled filing date for the petition, which is September 16, 2025. Pursuant to Supreme Court Rule 30.1, Petitioner requests that the filing date be extended to November 17, 2025, the first business day following November 15, 2025, which is 60 days from the date when the petition was initially due.

In support of this application, Petitioner shows the following:

1. In 2020, Petitioner was convicted after a jury trial in the United States District Court for the Northern District of New York of one count of distributing child pornography

under 18 U.S.C. § 2252A(a)(1), one count of attempted receipt of child pornography under 18 U.S.C. § 2252A(a)(2)(a), and one count of possessing child pornography under 18 U.S.C. § 2252A(a)(5)(b), and sentenced to 200 months of imprisonment.

2. Petitioner initially filed a motion to vacate his conviction and sentence under 28 U.S.C. § 2255 (the "2255 Motion") on July 24, 2022, raising, among other claims, claims of ineffective assistance of counsel and prosecutorial misconduct. The 2255 Motion, along with discovery requests and a motion to amend, was denied by the District Court on October 16, 2024 in an 89-page order.

3. The District Court denied Petitioner a certificate of appealability ("COA"), and Petitioner thereafter sought a COA from the Second Circuit Court of Appeals on January 13, 2025, which request was denied on April 15, 2025 in a summary order, which offered no analysis. Petitioner then filed a motion for a panel rehearing on June 2, 2025, which was summarily denied on June 18, 2025, also with no analysis.

4. Since the Second Circuit denied Petitioner's request for a panel rehearing on June 18, 2025, Petitioner's petition for a writ of certiorari must be filed on or before September 16, 2025.

5. Counsel seeks a 60-day extension of time to file a petition for a writ of certiorari due to our small firm's scheduling conflicts with other matters, including a civil jury trial beginning on October 20, 2025, a federal sentencing on September 17, 2025, and an appellate brief arising out of a federal criminal trial due in the Fourth Circuit on October 6, 2025. Counsel further seeks an extension of time, as Petitioner is currently incarcerated at FCI Oakdale I in Oakdale, Louisiana, and it is difficult to schedule legal calls with him to discuss his appellate options.

6. Counsel has conferred with counsel for the United States, who has no objection to this motion and does not intend to file a response.

WHEREFORE, Petitioner Benjamin Jakes-Johnson respectfully requests that an order be entered extending his time for filing a petition for a writ of certiorari in this matter up to and including November 17, 2025.

This the 4th day of September 2025.

Respectfully submitted,

By: /s/ Kristen M. Santillo
Kristen M. Santillo
Gelber & Santillo PLLC
52 Duane Street, 7th Floor
New York, NY 10007
Phone: 212-227-4743
Email: ksantillo@gelbersantillo.com
Counsel for Petitioner
Benjamin Jakes-Johnson

List of Exhibits

1. Second Circuit order denying Petitioner's Motion for a Certificate of Appealability……..Exhibit A
2. Second Circuit Order denying Petitioner's Motion for Panel Rehearing……Exhibit B
3. District Court Order denying Petitioner's 2255 Motion……..Exhibit C

EXHIBIT A

N.D.N.Y.
18-cr-261
Suddaby, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of April, two thousand twenty-five.

Present:

Raymond J. Lohier, Jr.,
Joseph F. Bianco,
Eunice C. Lee,
Circuit Judges.

Benjamin Jakes-Johnson,

Petitioner-Appellant,

v. 24-3280

United States of America,

Respondent-Appellee.

Appellant moves for a certificate of appealability ("COA") and leave to file an oversized brief. Upon due consideration, it is hereby ORDERED that the motion for leave to file an oversized brief is GRANTED, but the COA motion is DENIED and the appeal is DISMISSED because Appellant has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

EXHIBIT B

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of June, two thousand twenty-five.

Present: Raymond J. Lohier, Jr.,
Joseph F. Bianco,
Eunice C. Lee,
Circuit Judges.

Benjamin Jakes-Johnson,

Petitioner - Appellant,

v.

United States of America,

Respondent - Appellee.

ORDER
Docket No. 24-3280

Appellant Benjamin Jakes-Johnson filed a motion for reconsideration and the panel that determined the motion has considered the request.

IT IS HEREBY ORDERED, that the motion is denied.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court

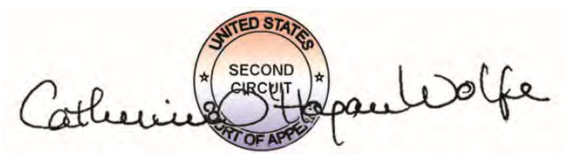

EXHIBIT C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v. 5:18-CR-0261 (GTS)

BENJAMIN JAKES-JOHNSON,

Defendant.

GLENN T. SUDDABY, United States District Judge[1]

DECISION and ORDER

Benjamin Jakes-Johnson ("Petitioner") moves to vacate his sentence pursuant to 28 U.S.C. § 2255. See dkt. # 200. The Government opposes the motion. See dkt. # 210. The Court has determined to decide the motion based on the parties' briefing and without argument. For the reasons set forth below, Petitioner's motion is denied.

I. RELEVANT BACKGROUND

The Government initiated this action on March 21, 2017, by filing a criminal complaint against the Petitioner, charging him with possession and distribution of child pornography in violation of 18 U.S.C. §§ 2252A(a)(2)(A) and 2252A(a)(5)(B).[2] See dkt. # 1. After Petitioner's arrest, U.S. Magistrate Judge Therese Wiley Dancks ordered his detention after Petitioner waived his right to a hearing. See Minute Entry for March 21, 2017, dkt. # 2. After a series of

---

[1] The Hon. Thomas J. McAvoy presided over this case through trial and appeal. The case was subsequently reassigned to the undersigned.

[2] The Court assumes familiarity with the underlying facts of the case and will not recite them in detail here. The Court will address the facts of the case in more detail in addressing the parties' arguments. The Court lays out the procedural history here because a large portion of the Petitioner's argument addresses delays in bringing the case to trial.

stipulations extending the speedy-trial time for Petitioner, a grand jury returned an indictment against the Petitioner on August 22, 2018. See dkt. # 22. The Indictment charged three counts. Count 1 alleged distribution of child pornography in violation of 18 U.S.C. §§ 2252A(a)(2)(A), (b)(1) and 2256(8)(A). Count 2 alleged attempted receipt of child pornography in violation of 18 U.S.C. §§ 2252A(a)(2)(A), (b)(1) and 2256(8)(A). Count 3 alleged possession of child pornography in violation of 18 U.S.C. §§ 2252(A)(a)(5)(B), (b)(2) and 2256(8)(A). The Indictment also alleged that Petitioner had a prior conviction for possession of child pornography in the Northern District of New York that affected the penalty provisions for the charges in Counts 1-3.

Petitioner filed a motion for release from custody on September 7, 2018. See dkt. # 30. On September 13, 2018, Judge McAvoy set a pre-trial scheduling order that set November 13, 2018 as the trial date. See dkt. # 37. After a hearing, Judge Dancks on September 17, 2018 granted the Government's motion for pre-trial detention. See Minute Entry for September 17, 2018. In a written order issued on September 18, 2018, Judge Dancks found that Defendant had not rebutted the presumption under the criminal law that "no conditions or combination of conditions . . . will ensure the person's return or the safety of the community" when probable cause exists to believe the person committed a crime against a child. See dkt. # 38 at 2. Judge Dancks also found that the Government had met its burden to demonstrate that no conditions of release would reasonably protect the public from Petitioner and assure that he returned for trial. Id. at 2-3.

After another stipulation from the parties, the Court on October 9, 2018 re-set the trial date to March 18, 2019. See dkt. # 40. On November 19, 2019 Petitioner filed notice pursuant to Federal Rule of Criminal Procedure 12.2(a) and (b) that he intended to pursue an insanity

defense. See dkt. # 41. After another stipulation from the parties, the Court re-set the trial date to June 17, 2019. See dkt. # 43.

On April 16, 2019, the Government filed a motion in limine to preclude the insanity defense and expert testimony on the issue. See dkt. # 46. The Government challenged the Petitioner's attempt to use the insanity defense and contended that Petitioner's expert report did not support such a defense in any case. Id. The Petitioner filed a response to that motion on May 10, 2019. See dot. #s 52-54. Judge McAvoy granted the Government's request to file a reply, and the Government did so on May 17, 2019. See dkt. #s 57, 60. Judge McAvoy then held a telephone conference with the parties where Judge McAvoy agreed to set a pretrial conference on expert testimony and to reschedule trial for mid-July, 2019, if the parties could agree to a stipulation extending the speedy-trial clock. See Minute Entry for May 22, 2019. After the parties submitted a stipulation, Judge McAvoy rescheduled trial for July 15, 2019. See dkt. # 63. Judge McAvoy also directed the Petitioner to submit to an examination by the Government's expert on May 28, 2019. See dkt. # 64.

On June 6, 2019, the Government wrote Judge McAvoy to report that the Government had "reached out to numerous potential experts" and had found one "willing [to] review the defense examination reports, perform the examination of the defendant and issue a report on said examination by September 1, 2019." See dkt. # 65. The Government had sought assistance from other experts "and this was the earliest date that was achievable." Id. The Government needed approval for funding for the expert, but expected to receive such approval by June 12, 2019. Id. The expert could not begin reviewing materials until this funding appeared. Id. The Government also reported that, after being informed of the June 15, 2019 trial date, attorneys contacted witnesses in the case to determine availability. Id. The Government informed the

Court that "the main government witness in the case," a New York State Police Investigator named Todd F. Grant, was scheduled to testify in another trial in Syracuse, New York from July 15-July 19, 2019. Id. Grant had interviewed Petitioner and "performed numerous other critical functions." Id. The Government attached a letter where Grant informed the Government of these conflicts. Id. The Government had reached out to defense counsel, who stated that he would like to request a court conference on these scheduling issues. Id. Counsel had agreed to waive his client's presence for that conference. Id. Defense counsel then wrote Judge McAvoy to request an in-person status conference. See dkt. # 66.

Judge McAvoy scheduled a telephonic status conference on June 20, 2019. See Text entry for June 14, 2019. At this conference, the Court scheduled a hearing on expert testimony on September 23, 2019 and rescheduled the jury trial until December 16, 2019. See Minute Entry for June 20, 2019. Petitioner filed a motion for bond on July 3, 2019. See dkt. # 72. After briefing, Judge Dancks denied that motion on September 9, 2019. See dkt. # 80. Judge Dancks found that the 33-month length of Petitioner's pre-trial detention weighed in favor of his relief, but that, given that Defendant's litigation strategy had contributed to the delays and that Defendant had stipulated to numerous extensions of time, most of the delay could not be directed to any conduct by the Government. Id. at 4-6. Moreover, Judge Dancks found, the grounds for detention—the strength of the case against Petitioner, the danger he presented to the public, and the chance of flight—also weighed in favor of continued detention. Id. at 6-7.

On September 11, 2019, Petitioner's counsel wrote Judge McAvoy to request a brief continuance for the expert-witness hearing. See dkt. # 81. Counsel was engaged in a murder trial in California that had taken longer to try than expected. Id. Counsel was uncertain whether the trail would conclude in time to allow counsel to prepare adequately for the September 23,

2019 hearing. Id. Counsel informed the judge that the Government had consented to a brief continuation of the hearing. Id. Judge McAvoy reset the hearing to October 2, 2019. See Text Notice of September 13, 2019. Judge McAvoy took testimony from an expert witness for both sides on that day. See Minute Entry for October 2, 2019. The Court directed the parties to file supplemental briefing two weeks after the Court Reporter filed the official transcript. Id. After the Court Reporter filed the transcript, Judge McAvoy ordered the supplemental briefing completed by November 7, 2017. See Text Order of October 25, 2019. The parties filed that briefing. See dkt. #s 90-91.

On November 12, 2019, Petitioner filed a motion in limine to suppress statements made in his interrogation. See dkt. # 93. Judge McAvoy directed the Government to respond by November 19, 2019 and scheduled a suppression hearing for November 19, 2019. See Text Order for November 12, 2019. After examining the filings, Judge McAvoy determined that a hearing was not necessary on the suppression motion. Judge McAvoy canceled the hearing on November 21, 2019, finding a hearing unnecessary to resolve the motion. See Text Order of November 21, 2019. The parties filed their pre-trial documents on December 2, 2019. See dkt. #s 102-121.

Judge McAvoy denied Petitioner's motion to suppress on December 3, 2019. See dkt. # 122. On December 5, 2019, he denied the Government's motion to prevent Petitioner from using an insanity defense. See dkt. # 123. Judge McAvoy also directed the parties to respond to the opposing side's motions in limine by December 9, 2019. See Text Order dated December 5, 2019. The Judge heard argument on the motions in limine and issued a text order granting the motions in part and denying them in part on December 12, 2019. See Minute Entry for

December 13, 2019 and Text Order dated December 13, 2019, dkt. # 130. The Court also adjourned the trail until January 6, 2019. Id.

On December 23, 2019, Assistant United States Attorney ("AUSA") Michael Gadarian wrote Judge McAvoy, informing him that his trial partner, AUSA Geoff Brown, had fallen and "fairly seriously injured his knee." See dkt. # 137. Brown had required surgery, and Gadarian understood that the recovery and rehabilitation required would make Brown unable to try the case starting on January 6, 2020. Id. Gadarian reported that he believed defense counsel was "generally amenable" to a continuance in light of those circumstances. Id. Defense counsel also wrote Judge McAvoy that day, informing him that counsel could agree to a new date to start trial. See dkt. # 138. Counsel proposed February 3, 2020 or February 24, 2020. Id. Judge McAvoy set a new trial date for March 2, 2020. See dkt. # 143. Defense counsel wrote the Judge after the Court set the new trial date to inform the Court that Petitioner did not want to waive his speedy trial right again, and that Petitioner did not wish to sign a waiver to that effect. See dkt. # 141. The next day, the Government filed a stipulation filed by counsel for both parties indicating that "[t]he parties stipulate and agree that the ends of justice served by granting this continuance outweigh the best interests of the public and the defendants [sic] in a speedy trial because . . . the delay is necessary in order to allow the parties the reasonable time necessary for effective preparation[.]" See dkt. # 142 at ¶ 3(b). Judge McAvoy entered an order accepting the stipulation and finding that "the ends of justice served by granting the requested continuance outweigh the best interests of the public and the defendants [sic] in a speedy trial" in order to allow effective preparation by both sides. Dkt. # 143 at ¶ 1.

On January 10, 2020, Petitioner filed another motion for bond pending trial. See dkt. # 144. Judge Dancks denied the motion by text order. See dkt. # 146. Judge Dancks explained as follows:

> The Court reviewed Defendant's Third Motion for Bond (Dkt. No. No. 144) and the Government's response (Dkt. No. 145). Defendant challenges the length of his pretrial detention on due process grounds. The Second Circuit has articulated the following factors for courts to consider when deciding whether a defendant's pretrial detention offends due process: (1) the length of detention, (2) the government's responsibility for the delay in proceeding to trial, and (3) the strength of the evidence justifying detention. *United States v. Briggs*, 697 F.3d 98, 101 (2d Cir. 2012). Defendant's motion is nearly identical to his previously denied Second Motion for Bond (see Dkt. Nos. 72, 80). with the only new evidence being the additional delay in the trial from December 16, 2019, to March 2, 2020. This delay, as the Government argues, is primarily Defendant's fault. To that end, Defendant requested the December 16, 2019 trial date be adjourned due to the holidays at that time of year. When the trial date needed to be moved again given an unforeseen medical emergency, it was Defendant's prerogative to acquiesce and to exclude additional time under the Speedy Trial Act. In other words, Defendant could have forced the Government to go to trial in January 2020, had it not stipulated to exclude that additional time. Thus, considering the modest additional length of pretrial detention, the uncontested strength of evidence justifying continued detention, and the Government's lack of fault for the additional delay, the Court denies Defendant's Third Motion for Bond.

Id.

A jury trial began on March 4, 2020.[3] At trial Petitioner presented an insanity defense. He did not deny that he possessed and distributed the child pornography in question. Instead, Petitioner argued that post-traumatic stress disorder ("PTSD") from which he suffered due to sexual abuse during childhood and during a previous incarceration for child-pornography offenses prevented him from understanding the nature and quality of his actions or their consequences. The jury returned a guilty verdict on all three counts against the Petitioner. See

[3] The parties agreed to move the start of trial to March 4, 2020 during a pre-trial conference with Judge McAvoy on February 27, 2020. See Minute Entry for February 27, 2020.

dkt. # 150. The jury rejected Petitioner's insanity defense. Id. Judge McAvoy then sentenced Petitioner to 200 months on each of the three counts, to be served concurrently. See Judgment, dkt. # 183.

Petitioner appealed his conviction and sentence. See dkt. # 180. On August 4, 2021, the Court of Appeals for the Second Circuit affirmed Petitioner's conviction and sentence. See dkt. # 191. Petitioner filed a motion to vacate. See dkt. # 193. He then filed the instant Amended Motion to Vacate pursuant to 28 U.S.C. § 2255. See dkt. # 200. The Government responded, and Petitioner filed a traverse. See dkt. #s 210, 219.

II. GOVERNING LEGAL STANDARD

"Pursuant to [28 U.S.C.] § 2255(a)., a federal prisoner may move to vacate, set aside, or correct his sentence on four grounds: (1) 'that the sentence was imposed in violation of the Constitution or laws of the United States, or [(2)] that the court was without jurisdiction to impose the sentence, or [(3)] that the sentence was in excess of the maximum authorized by law, or [(4)] is otherwise subject to collateral attack.'" United States v. Hoskins, 905 F.3d 97, 102 (2d Cir. 2018) (quoting 28 U.S.C. § 2255(a)). Thus, relief pursuant to section 2255 is available only "for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that constitutes 'a fundamental defect which inherently results in [a] complete miscarriage of justice.'" Graziano v. United States, 83 F.3d 587, 590 (2d Cir. 1996)(quoting United States v. Bokun, 73 F.3d 8, 12 (2d Cir. 1995)) (internal quotation marks and citations omitted). In a Section 2255 proceeding, a petitioner bears the burden of proof by a preponderance of the evidence. See Triana v. United States, 205 F.3d 36, 40 (2d Cir. 2000). "Airy generalities, conclusory assertions and hearsay statements will not suffice because none of these would be admissible evidence at a hearing." United States v. Aiello, 814 F.2d 109, 113 (2d Cir. 1987).

Moreover, "§ 2255 review is 'narrowly limited in order to preserve the finality of criminal sentences and to effect the efficient allocation of judicial resources.'" Hoskins, 905 F.3d at 102 (quoting Graziano, 83 F.3d at 590).

III. ANALYSIS

Petitioner offers several grounds for relief, which the Court will address in turn.

A. Alleged Prosecutorial Misconduct

The Court must first address a portion of Petitioner's argument that could shape the rest of the Court's conclusions in this matter. Petitioner accuses the Government of prosecutorial misconduct that violated his right to a speedy trial and his right to due process. He claims at a minimum that this alleged misconduct should estop the Government from asserting that the Second Circuit's mandate bars him from raising his speedy trial claims under the Constitution or the Speedy Trial Act. Petitioner further contends that the Government's alleged misconduct violated his due process rights and speedy trial rights in such an egregious fashion that the Court should vacate his conviction and dismiss the matter with prejudice.

1. Alleged Misconduct

In his opening brief, Petitioner points to two specific areas in alleging that the prosecutors in the case engaged in unethical conduct that undermined his right to a speedy trial and to due process. The Court will address the factual background in detail for each of these alleged incidents. In his traverse, Petitioner points to several other areas of alleged misconduct, which the Court will address as appropriate.

a. Government's Procuring of an Expert to Examine Petitioner

In his initial brief, Petitioner argues as follows:

> Both with respect to its impact on his speedy-trial rights and his right to due process, the extensive prosecutorial misconduct here violated Jakes-Johnson's rights and mandates relief. This misconduct began with the prosecution's refusing to obtain an expert, thus ensuring that the June 17th trial was adjourned, but is most glaring with respect to the prosecutors' many false representations and their breaching their own agreement to go forward on January 6th with Gadarian trying the case alone. Starting on May 22nd and continuing through its June 6th letter to the Court and the next conference on June 20th, the prosecution falsely reported not having an expert, having to make a "nationwide" search, having just found an expert, and that this new expert needed less time than any of the other experts contacted. Mills's trial testimony demonstrated that all of these claims were false. It showed that the prosecution had retained him before May 22nd — possibly months earlier. And the documentary evidence confirms that Brown was well acquainted with Mills before May 22nd. Mills was the forensic psychiatrist who had testified for the prosecution in Solomon-Eaton (across from Goldsmith[4]). And Brown's May 17th motion-to-preclude reply shows that he was very familiar with that case. Thus, all of Brown's talk about having to conduct a "nationwide" search and "Upstate New York" not being "a hotbed" for psychiatric witnesses and his promising to "send an email to all of DOJ trying to figure out where the heck we can find a psych evaluation" was an act. He had an expert and he was just seeking to delay.

Petitioner's Brief, dkt. # 200-2, at 29-30.

A review of the history surrounding Petitioner's assertion of the insanity defense and the Government's response would be useful at this stage.

On November 9, 2018, Petitioner filed notice with that Court "that, pursuant to Fed. R. Crim. P. 12.2(a)[5] and (b),[6] defendant intends to assert a defense of insanity at the time of the

---

[4] Dr. Goldsmith was Petitioner's expert in this matter.

[5] Rule 12.2(a) provides, in relevant part, as follows:

> A defendant who intends to assert a defense of insanity at the time of the alleged offense must so notify an attorney for the government in writing within the time provided for filing a pretrial motion, or at any later time the court sets, and file a copy of the notice with the clerk.

Fed. R. of Crim. P. 12.2(a).

[6] Rule 12.2(b) provides, in relevant part, as follows:

alleged offense and introduce expert evidence relating to a mental disease or defect bearing on the issue of his guilt." See dkt. # 41.

On February 6, 2019, the parties filed a stipulation with Judge McAvoy that sought a 90-day continuance under the Speedy Trial Act. See dkt. # 42. The stipulation noted that the Court had previously excluded time between October 9, 2018 and February 5, 2019. Id. at ¶ 2. The stipulation provided that "Defense counsel believes that due to the complex nature of this case and the electronic evidence provided in discovery, that additional time is needed to review that discovery and prepare for trial and/or engage in pretrial negotiations." Id. at ¶ 3(a). The Government sought additional time "to review the expert Report received January 28, 2019 pursuant to the defendant's notice of an Insanity Defense pursuant to Federal Rule of Criminal Procedure 12.2(a) and (b)." Id. The Government sought to "thoroughly review the Expert Report submitted by the defendant and determine if it is subject to preclusion pursuant to a motion in limine or will require the government to retain an expert and examine the defendant

---

> If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case, the defendant must—within the time provided for filing a pretrial motion or at any later time the court sets—notify an attorney for the government in writing of this intention and file a copy of the notice with the clerk.

Fed. R. Crim. P. 12.2(b).

pursuant to 18 U.S.C. § 4242[7] and Federal Rule of Criminal Procedure 12.2(c)(1)(B).[8]" Id. Judge McAvoy issued an order that adopted the stipulation and excluded the time from February 6, 2019 until May 6, 2019 as required by the ends of justice. See dkt. # 43. The order directed motions be filed by May 28, 2019 and set trial for June 17, 2019.

On April 16, 2019, the Government filed a motion to preclude Petitioner from offering an insanity defense. See dkt. # 46. The Government pointed to the expert report that Petitioner had provided and argued that the report was insufficient to support an insanity defense. Id. at 1. The report from Dr. Eric Goldsmith, the Government argued, "purports to conclude that at the time the defendant distributed, attempted to receive, and possessed child pornography he was suffering from PTSD." Id. The report failed to satisfy the elements of an insanity defense under 18 U.S.C. § 17,[9] however, because "[n]owhere in Goldsmith's report does he opine that at the

---

[7] 18 U.S.C. § 4242(a) provides in relevant part as follows:

> Upon the filing of a notice, as provided in Rule 12.2 of the Federal Rules of Civil Procedure, that the defendant intends to rely on the defense of insanity, the court, upon motion of the attorney for the Government, shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court.

[8] Rule 12.2(c)(1)(B) provides, in relevant part, as follows:

> If the defendant provides notice under Rule 12.2(a), the court must, upon the government's motion, order the defendant to be examined under 18 U.S.C. § 4242. If the defendant provides notice under Rule 12.2(b) the court may, upon the government's motion, order the defendant to be examined under procedures ordered by the court.

Fed. R. Crim. P. 12.2(c)(1)(B).

[9] 18 U.S.C. § 17 provides as follows:

> (a) Affirmative defense. It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the

time of the commission of the acts constituting the offense, as a result of a severe mental disease or defect, was [Petitioner] unable to appreciate the nature and wrongfulness of his acts." Id. The Government claimed that the report served only "to justify and excuse the defendant's behavior." Id.

The Petitioner filed a response to the Government's motion on May 10, 2019. See dkt. #s 52, 53. The Government filed a reply on May 17, 2019. See dkt. # 57. The Petitioner's counsel requested a telephone conference to discuss scheduling. See dkt. # 56.

Judge McAvoy conducted the requested conference on May 22, 2019. See Transcript of Proceedings, dkt. # 94. Judge McAvoy started the proceedings by recognizing that allowing the Defendant's expert to testify on the issue of insanity would require more trial time. Id. at 2. The parties agreed that it would. Id. at 2-3. The parties then discussed generally whether testimony about Petitioner's mental state was admissible and the insanity defense available. Id. at 3—9. In explaining why, though he could not opine on the ultimate question, Petitioner's expert could testify to Petitioner's mental state when he viewed child pornography, Petitioner's counsel explained as follows:

> he can give the scientific, the medical basis for counsel then to present that defense and to allow a jury ultimately to decide whether or not he is suffering from such a severe mental illness that he did not appreciate the consequences of his act. And you're right, it is -- have we all seen this very often in child pornography cases? The answer is no, but both Judge Weinstein and Matsumoto, they have clearly -- they expressed it probably much better than I'm expressing why at least it's an issue to present during the trial. Whether or not your Honor --

---

> defense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.
>
> (b) Burden of proof. The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

18 U.S.C. § 17.

> we have presented sufficient facts to support a charge to the jury. We know that that issue then will be discussed during our jury charge but a defendant under IDRA[10] should not be precluded from at least getting those facts in front of a jury and then ultimately I know your Honor will decide whether or not there's sufficient facts to present. And that's why if you saw in both Judge Weinstein and Judge Matsumoto, they conducted that pretrial hearing to satisfy themselves that there's a factual basis.

Id. at 8-9. Petitioner's counsel explained that "[t]he entire defense is that he is so ill, even in a child pornography case, he did not appreciate the conduct is wrong." Id. at 11.

Judge McAvoy then stated that he understood the nature of the defense and that "a defendant is entitled to introduce evidence of his defense." Id. Moreover, he concluded that "expert testimony" was "the only way to introduce the element of mental incompetency" in the insanity defense. Id. at 12. "You've got to have somebody with some credentials" to explain "the working of the human mind" to explain "why he has PTSD, here's how it affects people, here's how it affected him and put that before the jury and let the jury draw the conclusion as to whether or not what he was doing in his house in Syracuse . . . was a result of or excused by, I don't which phrase to use, his mental illness." Id.

Judge McAvoy then asked the Government whether the prosecution had "any problems with the credentials of the defendant's expert." Id. After the Government offered no objection to the expert's credentials, Judge McAvoy confided that "we're not going to fight about whether or not this guy is qualified to testify on the existence and effects of PTSD." Id. Judge McAvoy then wanted to know whether the Government would "quarrel about him giving an opinion that this defendant was himself affected by the mental affliction, right?" Id. The Government responded that "we may quarrel with that depending if we're going to go down this road. We

---

[10] The Insanity Defense Reform Act of 1984, 18 U.S.C. § 17(a).

would have him evaluated by an expert, if that expert determines he was, in fact, suffering from PTSD, which quite frankly I don't believe he was." Id. at 13. Judge McAvoy responded with a question: "That's your job not to believe that. Have you had him examined?" The Government responded that "[w]e would have him evaluated ourselves under 4242. No." Id. Judge McAvoy responded, "[t]hat's no doubt. You have a right to have him evaluated. Why haven't you done it?" Id. The following exchange then took place:

> Mr. Brown: Haven't done it because we didn't see a valid report at the time we filed our motion six weeks early because under the—12(b) doesn't apply at all.
>
> The Court: Right.
>
> Mr. Brown: Now that the defendant's conceded—and then 12(a), he wasn't laying out in his initial report anything that would get to the heart of the matter where we're at today, where he's talking about a supplemental report.
>
> The Court: So I'm pointing the finger of recalcitrance in the wrong direction, right, that's what you're saying?
>
> Mr. Brown: Say again?
>
> The Court: I should be pointing at the defendant and say why didn't you lay this out all in your initial report and the defendant, it doesn't make what the defendant—
>
> Mr. Gottlieb: You Honor, this is Robert Gottlieb, if I can respond and, again, I emphasize that the government, Mr. Brown, from the beginning of certainly my involvement in this case has been absolutely a straight shooter. But factually, and it affects the reason why I requested and appreciate that you set up this conference, it affects the setting of the trial date. The problem is, and the reason why we're in somewhat of a pickle is we filed our notice of a psych defense in November of 2018. We served our expert report January 28 of 2019 and I know Mr. Brown will confirm this. I would text or e-mail him just to let me know when your expert is going to evaluate our client because I wanted to tell Mr. Jakes-Johnson their expert's going to be up there next week. We didn't hear anything until we were served with the motion in limine and what I would have hoped is that, if the government thought that they were going to preclude us from evening introducing the defense, they would have had their expert evaluate over the last—we're at the end, middle of May. So it's been what, some five months. Not having done that it became clear to me that over the last month that the June 17

date wasn't as rock solid and firm as I thought because I knew that the government would be compelled to answer the evaluation. And frankly, your Honor, I understood and assumed that your Honor would give the government time but it created a concern.

[counsel then stated concerns about scheduling and suggested other trial dates in the near future and stated] So what I was hoping again, all hope with fingers crossed, is that if we couldn't keep the June 17 date, that perhaps there was two weeks or so in July that somehow would be convenient to the Court and to the government. And, of course, that also they're going to have my client evaluated. Their expert obviously has to do whatever their expert needs to be done before that. And if we're going to present that defense, the trial isn't going to be extended a heck of a lot only because the factual issues are not going to be very great. It's all going to be the psychiatric defense.

The Court: Let me ask you, Mr. Brown: Assuming for a minute that I'm going to allow him to put his expert on, how soon can you get the defendant evaluated?

Mr. Brown: Well, your Honor, I haven't retained an expert. I would immediately endeavor to do that starting at the close of the conference call. These guys are obviously, most of them are professors at universities or full-time practicing physicians, so it's hard for me to project being able to do that, in any short—because they're going to have to either—as your Honor's probably well aware, Upstate New York isn't exactly a hot bed for psychiatric care or witnesses. So I probably will try to reach out nationwide to see if somebody would be available to fly here, evaluate and then produce a report. That's obviously going to take a significant period of time to, one, locate one; and, two, get them up here to evaluate the defendant. So I would think the fastest I could even conceive of trying to accomplish that would probably be around six weeks.

The Court: Well, it would appear to me that the US Attorneys' Office nationwide could probably come up with somebody very quickly that would be well enough versed in this matter to testify. The question would be that person's availability.

Mr. Brown: Right, and the availability to fly here and do a report on top of it. [the Court then asked if Petitioner could go to the office of the government's expert for an examination. Petitioner's counsel explained that he was incarcerated and]

Mr. Gottlieb: . . . That raises another complication in this case which I hate to, you know, again put in the bucket here, in the basket of this conversation but he's been incarcerated now since March of 2017. He continues to be incarcerated. Indictment was filed 2018. Again, a lot of this time was excluded properly

because even before I got involved, there's other attorneys. They were doing everything possible to cooperate and get other people who might have been involved. That, unfortunately, didn't work out for a number of reasons but not for lack of trying. So he has been incarcerated and Mr. Brown, when this issue came up about are we going to change the trial date, asked if he was going to waive speedy trial and, frankly, it's very difficult in light of the chronology that we've now discussed and laid out for Mr. Jakes-Johnson to waive the speedy trial because we really assumed this trial was going June 17.

Now, I will say that if it is delayed and I under, I understand the predicament. I really do. And I think Mr. Brown is being overly optimistic in thinking that even six weeks, because I know how these doctors operate also. If there is going to be a delay pursuant—probably now have to be delayed beyond November unless we can get that July date, the beginning of July date.

Mr. Brown: Your Honor, if I could interject. He's also in custody on the release violation so that needs to pointed out and the delay up to this point has been all to the defendant's request and benefit in his effort to try and cooperate. This hasn't been the government requesting delay, delay, delay. It's actually been the defendant requesting that as he tried to further his efforts to cooperate, which I'm sure defense counsel can confirm with his numerous other defense counsel. [Judge McAvoy then cut off continued argument about reasons for delay]

The Court: . . . We have to deal with where we are and what I'm going to require in terms of evidence in this trial and the time the trial's going to be set, giving due regard as much as I can to everybody's schedules. But, unfortunately, my clerk has informed me that I am packed solid with trials from here to eternity so somehow we're going to have to try to squeeze you guys in, which we'll do.

So I think the first thing is, Mr. Brown, if you go ahead and set up some kind of an examination for this guy, do it as fast as possible and we're going to take whatever speedy trial stipulations we can get to do that. If not, we're going to be going to trial, which may jeopardize the right of the defendant to put his defense in because I may not let him put it in if the government was frustrated somehow in not having the guy examined.

[after a discussion with another Assistant United States Attorney about what evidence might be introduced at trial through the expert and other witnesses regarding Petitioner's mental state, Judge McAvoy again addressed the government's potential expert]

The Court: . . . But I'd like the government to get this guy examined as quickly as possible and we'll set a date for a pretrial hearing on Dr. Goldsmith. [after a discussion with the attorneys about whether defendant was entitled to a hearing on the government's expert, Judge McAvoy concluded]: What we're

> going to go do now is we're going to try to set the trial date in the middle of July to accommodate defense counsel as best we can and ask the government to move speedily as they can to get the defendant examined and we'll see what we come up with when that is finalized. We may have to move stuff around. We'll do the best we can. That's all I can tell you. That tells you I'll probably let the defense put its evidence in unless I hear something on pretrial examination of Dr. Goldsmith that tells me it will be improper or over the line and it's my job to make sure that doesn't happen, so hopefully I can find out. I can un-blur the lines that the governments' counsel is talking about and find out pretty much what he's going to say, which if I can't do that I shouldn't even be on the bench, and we'll do that and then we'll go from there in trying to get, trying to get a trial date that will accommodate all of our problems. That's all I can really tell you.

Id. at 13-22.

On May 23, 2019, the parties filed a stipulation to continue the trial until July 15, 2019. See dkt. # 61. The Court signed the stipulation on May 28, 2019. See dkt. # 63. The Government filed a request for a Court order directing the Petitioner to submit to a mental examination. See dkt. # 62. The Assistant United States Attorney who signed the letter, Sahar L. Amandolare, explained that, "[a]s discussed, based on his May 10th motion response, the defendant has clarified his intention to present evidence of an insanity defense. The requested examination is necessary in order for the government to properly prepare this case for trial[.]" Id. Judge McAvoy issued such an order on May 28, 2019. See dkt. # 64.

On June 6, 2019, AUSA Brown wrote the Court. See dkt. # 65. Brown stated that the Court had determined at the end of the May 22, 2019, conference call that "defendant should be examined by a government expert and asked that the government provide a status report on its efforts to retain an expert for this purpose." Id. The Government also noted that the Court's order directed the Government to file the expert report with the Court. Id. Brown reported that "[t]he government has reached out to numerous potential experts and is pleased to report that it has identified an expert who is willing [to] review the defense examination reports, perform the

examination of the defendant and issue a report on said examination by September 1, 2019." Id. According to Brown, "[t]he government reached out to other experts as well and this was the earliest date that was achievable." Id. The Government also had to seek approval for funding of the examination from the Executive Office for United States Attorneys. Id. The Government anticipated final approval on June 12, 2019. Id. "Until said funding is approved the expert is not authorized to incur any expenses reviewing materials related to the case." Id. The Government also attached a letter from Todd Grant, the New York State Police Senior Investigator who would be the "main government witness in the case" stating that he had conflicts with the July 15, 2019 trial date." Id. Brown had spoken with defense counsel, and suggested the Court schedule a conference to discuss potential trial dates. Id. Defense counsel wrote on June 11, 2019, to request an in-person conference to request trial dates and discuss a speedy trial waiver if necessary. Id.

Judge McAvoy had a telephone conference with the parties on June 20, 2019. See Transcript, dkt. # 95. Upon confirming that the Government's expert could issue a report by September 1, 2019, Judge McAvoy moved to schedule an evidentiary hearing on the admissibility of the expert reports and the insanity defense. Id. at 2. Judge McAvoy concluded that both experts should testify on that day. Id. at 3. Defense counsel then raised the issue of delays in the trial. Id. at 3-4. Counsel pointed out that "the initial trial date was set by your Honor in February for Jun 17. On May 22 the Government, I'm sure you recall, indicated that it would not be ready to proceed on June 17 because it had not yet retained the forensic expert." Id. at 4. Judge McAvoy responded, "Well because they believed that your expert couldn't testify, then they were convinced that he can and---[.]" Id. Defense counsel cut off the judge to say "I understand that. I understand what they were thinking . . . But we were operating, this

close to scheduling, we were operating on a firm trial date of June 17 and then as a result of our conference on May 22, if was rescheduled for July 15." Id. Counsel further stated that "what is a bit not understandable is that the reason for the delay is the government's failure to retain the expert but yet our notice of the defense was filed on November 9, 2018 and our report was provided for the government on January 28 of 2019." Id. at 4-5. Judge McAvoy responded that the initial "report didn't contain the fact that your expert was prepared to say that the defendant didn't realize that what he was doing was wrong or understand the nature and characteristic of the act and later on more material was disclosed that allowed the government to be convinced the Court probably would let your guy testify and so that's what pushed everything back." Id. Counsel responded that the expert had not used those particular words because he did not think he could under federal rules, "but all the underlying facts were set forth and Mr. Brown and I had numerous conversations where he understood what our defense was." Id. Counsel then explained he had trials in August, September and November in other courts. Id. at 6. Counsel hoped for a trial in the first week of August. Id. Judge McAvoy was not available then. Id. at 7.

The Government was not available until the third week of September because of a district-wide meeting for United States Attorneys. Id. Brown also pointed out that "I think what's going to happen is, and [defense counsel] already said this in the first conference call, that on this matter—the fact of the matter is if this defense isn't allowed in, this guy is going to plead. I don't think we're really going to have a trial." Id. at 7-8. Defense counsel warned that a plea would not necessarily occur if Defendant was not permitted to plead insanity. Id. at 8.

The parties and Judge McAvoy also discussed the length of a potential trial and the availability of witnesses. Id. at 8-9. Brown stated that the Government had "two indispensable witnesses" and that he had "all their dates in front of me right now." Id. at 9. "One is Todd

Grant, other is Kevin Matthews, Special Agent from New Jersey." Id. "Counts one and two are based on the downloads from the defendant and the defense, attempted downloads and he has a District Court trial which is firm the week of 9/16 and 9/23." Id. Judge McAvoy suggested that the parties could stipulate to such testimony, but the parties stated that they could not do so. Id. Brown explained that "he's the one who, the undercover, the downloads from the defendant. I mean, he's going to be the first week. He's kind of the star witness." Id. In discussing why a trial in the first two weeks of September was possible, Brown stated that "the main witness, Kevin Matthews, has a trial in the District Court in New Jersey." Id. at 10.

Defense counsel then stated that "[w]hat were faced with, Your Honor, is if it doesn't go" in September, "then we're looking at mid-December or February based on the scheduling again. It was all based on what I've been operating on of this year." Id. at 10-11. Judge McAvoy replied that "[w]e're going to set it down now, depending on what happens with the experts because I don't know what's going to happen there, but we'll set if for December 16." Id. at 11. That parties also confirmed that a hearing on the experts would take place on September 23, 2019. Id. 12.

Petitioner contends that the Government's expert, Dr. Mark Mills, testified at trial that he had been retained at a date earlier than Brown told Judge McAvoy. Mills testified at the March 2020 trial that he had been retained by the Government "[i]n the spring of last year . . . after Dr. Goldsmith's initial report but prior to his second report." Trial Transcript, dkt. # 187-4, at 719-20.[11] On cross-examination, Mills agreed that his "involvement in this case starts with someone

[11] The Supplemental Report is dated May 7, 2019, and was filed with the Court on May 13, 2019. See dkt. # 54-1. Mills's testimony, then, would suggest that he was retained sometime before May 7, or perhaps May 13, when the Petitioner disclosed the report to the Court.

from the government, the US Attorney's Office calling" him in "the spring of 2019." Id. at 754. A person "on the other line . . . told [him] what the case was about . . . very briefly[.]" Id. He testified that in this "initial conversation" he understood his role was to "evaluate the defendant and form my impression of his mental state, A; and B, would I pay particular attention to the presence or lack thereof of Posttraumatic Stress Disorder." Id. at 754-55. After he informed the Government of his willingness to consult on the issues, "they sent me a significant chuck of the discovery[.]" Id. at 755

Brown submits a declaration in this matter. See dkt. # 210-1. In that declaration, Brown asserts that he had not, as Petitioner claims, "secretly retained a government expert . . . months" before the May 22, 2019 telephone conference. Id. at ¶ 4. He asserts that "[p]rior to the hearing on May 22, 2019, I had identified Dr. Mills as a potential expert witness because he had previously acted as a government expert in a similar case." Id. Brown asserts that he had not spoken with Dr. Mills before May 22, 2019, and had not retained him. Id. Instead, Brown asserts that he directed his legal assistant to contact Mills about serving as an expert on May 23, 2019. Id. Brown asserts that he first spoke to Mills on May 24, 2019. Id.

The Government submits an email addressed to Mills from Jennifer Buggs, Legal Assistant and Grand Jury Coordinator for the United States Attorney's Office for the Northern District of New York, dated May 23, 2019. See Exh. 1 to Brown Declaration, dkt. # 210-12. Buggs began the email by letting Mills know that "[i]t was wonderful speaking with you today and I look forward to speaking again." Id. Buggs explained that "[t]o begin, we will need your estimation of time for the review of records, examination of defendant in Syracuse, and testimony at trial, in order to prepare a contract for our budgeting department." Id. She also requested, "as discussed," a copy of Mills most recent C.V. Id. Buggs related that "[t]he case in

which you previously testified, and where we obtained your name, was US v. Solomon-Eaton and the trial was in 2014. The defense expert was Dr. Eric Goldsmith and Dr. Goldsmith is also the expert in the case" here. Id. Buggs also explained that Brown and another Assistant United States Attorney, Sahar Amandolare, were assigned to the Jakes-Johnson case. Id. Buggs also explained that the case involved child pornography. Id. Since, as they discussed, the trial was scheduled for July 15, 2019, "[w]e would need to move fairly quickly with the case review and defendant examination in order to be prepared for that trial date." Id. Buggs asked if Mills would be available on May 24, 2019 to speak with the attorneys, and suggested another date as well. Id. She told Mills that "[i]n the meantime, I will start working on getting the defense documents together for your review[.]": Id. Mills responded with an updated C.V. and an agreement to speak the next day. Id.

Brown's affidavit also contains correspondence from June 6, 2019 regarding hiring Mills as an expert for the case. See Exh. 2 to Brown Declaration, dkt. # 210-3. On June 6, 2019, at 12:43, Vanessa Gambelunghe, Budgeting/Contracting Officer for the U.S. Attorney's Office in the Northern District of New York, emailed Jason Diaz at the Department of Justice to inform him that "[w]e have an Expert Contract we need to award ASAP." Id. Gambelunghe explained that the court had ordered that an exam take place, and that "we've been working on this request." The budget for Mills included "three Round trips from Maryland to Syracuse for conducting the Exam, Attending an Evidentiary Hearing and Trial Attendance and Testimony." Id. Gambelunghe explained she "was hoping to be able to provide an authorization for the Expert to proceed prior to the award, BUT, at this point, I cannot authorize that as we cannot certify funding." Id. She hoped that Diaz advise her on how "to get this contract moving." Id.

Two hours later, Diaz wrote back to inform Gambelunghe that the funds had been approved for the expert. Id.

Immediately after receiving this correspondence, Gambelunghe wrote Tanya Johnson-Rankin and Michelle Jaeger in the Northern District of New York U.S. Attorney's Office seeking leave "to provide verbal authorization for Psychiatric Expert Witness Dr. Mark J. Mills to begin performance immediately, prior to the written contract being awarded[.]" Id. Administrative factors had slowed down issuing the written authorization, and Gambelunghe sought permission to use the requested amount "so that I can reach out to the Expert and the AUSA to notify them that they may proceed with scheduling work and report back to the Courts on the status." Id. Johnson-Rankin certified use of the funds at 4:23 pm on June 6, 2019. Id.

Gambelunghe sent Mills a copy of the contract on June 18, 2019. See Exh. 3 to Brown Declaration, dkt. # 210-4. Her email noted that "[t]he Performance Period of this contract is 06/6/2019 through 06/6/2021. Id. (emphasis omitted). "This is a confirming order for the verbal authorization for you to begin work provided on June 6, 2019." Id. (emphasis in original).

Petitioner also contends that the Government's arguments on Appeal at the Second Circuit indicate that Brown misrepresented when the Government had been in contact with Mills. At that argument AUSA Gadarian engaged in the following colloquy with Circuit Judge Susan L. Carney:

> Judge Carney: . . . . defense counsel suggests in their briefing that your colleague was not accurate with regard to the timing of the government's retention of an expert here, and I didn't see any response to that in the government's briefing. They say that the AUSA does not -- was not straightforward with the district court when you said at the May 22, 2019, conference that the government had not yet retained an expert witness and would reach out to experts nationwide immediately after the conference, but Dr. Mills testified he was retained in the spring of 2019 earlier, you know, May 7th. I was confused about this, and I didn't see any

clarification or rebuttal in the district court's briefing because that was a serious charge in my
view.
MR GADARIAN: Okay. So, your Honor, I think what -- and I'm -- I believe that the record would bear this out. It may be that it would need to be supplemented, and we can certainly do that if the court wants. The government writes a letter after the conference and explains exactly what happened here, which was truthful, which is that Dr. Mills had been contacted but not retained until the government could appropriate funds to do that. When at trial, he's asked when he was retained, he makes a commonsense answer and says, "Oh, I was contacted --" he uses the time that he was first contacted by the government, but he wasn't authorized to do --
JUSTICE CARNEY: But in the coll... --
MR GADARIAN: I'm sorry.
JUSTICE CARNEY: Sorry to interrupt you, but in the colloquy with the court he said, Well, I'm going to have to now reach out and do a nationwide search. It's going to be hard for me to do this. I have to -- you know, New York isn't a hotbed of psychiatric care. Upstate isn't. This is going to take a significant period of time. So the government's looking for more time. It's not that, We've contacted someone but haven't retained the person yet or we don't have the funds. It's like, We're starting fresh here. It seemed really, you know, inconsistent with what the other -- the government was otherwise portraying.
MR GADARIAN: Well, so I, of course, can't speak for my cocounsel. I don't think that that's what the -- I don't think that's what the import of what was being said or trying to be conveyed to the court was, We're going to do fulsome search, and maybe, to the point that Judge Bianco made earlier, there had been some effort to reach out preliminarily without retaining someone which, you know, for the government requires appropriating funds and getting everything lined up to do that. It's then done, you know, by June, which is a few weeks -- a few weeks later. I think when Dr. Mills testifies that he's retained in May, I think he's referring to the fact that that's when he was contacted. I don't know that the record suggests otherwise, but I understand that, you know, Counsel's relying on Mills' testimony. I'm trying to explain as best I can to the court that I think Mills is referring to when he was first contacted by the government, but he's actually put on --retained, that means a retention, I suppose, when he can do work because he can be paid for it, because before that happens he can't be paid for it, if --
JUSTICE CARNEY: Well --
MR GADARIAN: If that answers your question.
JUSTICE CARNEY: -- it still strikes me as inconsistent with the announcement that more time is going to be needed because I now have to start a nationwide search, but I don't want to linger on this. I (inaudible).
MR GADARIAN: Understood, your Honor. I mean the government does retain and obtain a report from an expert in approximately the same amount of time that it took the defendant to do that at the beginning of trial.

Exh. 21 to Petitioner, dkt. # 200-23, at 21-24.

The Court is unpersuaded that this evidence represents any misconduct by the Government. First, as Judge McAvoy recognized, the Government was not under any obligation to provide an expert report to counter the insanity defense for which Petitioner had provided notice. Federal law provides that "an affirmative defense" exists for a defendant who can show that, "as a result of a severe mental disease or defect," the defendant "was unable to appreciate the nature and quality or the wrongfulness of his acts." 18 U.S.C. § 17(a). "The defendant has the burden of proving the defense of insanity by clear and convincing evidence." 18 U.S.C. § 17(b). In such a case, the Government is not required to provide its own expert to rebut the insanity defense. See, e.g., United States v. Waagner, 319 F.3d 962, 965 (7th Cir. 2003) (concluding that the government did not need to produce an expert to counter expert of defendant pleading insanity when the expert's testimony on insanity was equivocal and rebuttable by the underlying facts of the case). Thus, while the Government could have sought out an expert to examine Petitioner as soon as he filed the notice of insanity defense, the Government instead filed a motion to preclude the defense within the time agreed to by the parties and approved by Judge McAvoy. The Government cannot be faulted for delay when the Government had no obligation to act.

The evidence from the May 22 conference makes clear that Judge McAvoy concluded that an examination of the petitioner was necessary, and that Judge McAvoy considered it necessary to have an evidentiary hearing on the issue of the insanity defense. The Government had not abandoned its position that Dr. Goldsmith's report was insufficient to support an insanity defense. Judge McAvoy made clear, however, that resolving the Government's motion to preclude the defense required an expert examination. If Judge McAvoy had adopted the

Government's position on the insanity defense, then obtaining the authorization for hiring an expert would have been unnecessary for the Government, and the case would likely have pled. Thus, Petitioner's suggestion that the Government procured a delay by failing to retain an expert earlier is not supported by the record.

The evidence does support a finding that Brown may have misstated to the Court whether the Government had an expert identified at the time of the May 22 conference. Drawing all inferences in the Petitioner's favor, the Government may have had some preliminary contact with Mills before that date.[12] The evidence also makes clear, however, that the Government had no formal agreement for Mills to perform any sort of evaluation, and no order from the Court that directed the Petitioner to submit to an examination. No funds existed to employ the expert.

---

[12] Petitioner submitted a letter to the Court arguing that additional evidence indicates that the Government was aware before June 6, 2019, that Mills would be the expert witness. See dkt. # 224. Counsel for Petitioner relates that questions still existed about when the Government first contacted and retained Mills, as Mills testified at trial that he had been retained before May 2, 2019. The Government had argued that Mills was mistaken in this statement. Counsel relates that she and an investigator had visited Mills, and that "[w]hile he said that he does not focus on the date on which he is retained, he also disclosed that the prosecution had sent him an email on May 31, 2019" containing a trial transcript from another case where a child-pornography defendant pled insanity. Id. Petitioner contends that "[t]his email shows that the prosecution was planning to use Mills well before June 6th," when Brown told the court the Government had reached out to a number of experts. Id. Petitioner argues Brown misled Judge McAvoy by not immediately letting him know that the Government had identified Mills as an expert for the case. Petitioner's letter does not support his argument. First, the letter could be read to say that Mills confirmed that he had been mistaken at trial about when the Government retained him. Second, the letter confirms that Buggs sent Mills, as she promised in her May 23, 2019 email, information related to the case. Third, the Petitioner's letter does nothing to undermine the statements that Brown made in his June 6 letter to the Court. The evidence summarized above demonstrates that Brown wrote the Court when he had retained Mills, just as he said he had. Brown did not delay or conceal anything, but simply acted as Judge McAvoy directed to obtain an expert who could opine on Petitioner's insanity defense. Petitioner's letter, as do his other filings, piles unsupported inference atop unsupported inference in attempt to convince the Court that some nefarious scheme existed to delay his trial. No reasonable reading of the record could lead to that conclusion.

Brown may have identified an expert, but he had not retained an expert and did not have approval from the Department of Justice to do so. After Judge McAvoy made clear that an expert was necessary, however, Brown immediately began working to secure Mills's services. Once the bureaucratic process worked itself out, Brown secured the expert that the Court ordered and had Petitioner examined, as Judge McAvoy directed. The Government did not admit to any misconduct on appeal, and accurately represented to the Second Circuit judges that Brown wrote the Court and explained the process of hiring the expert that is supported by the record. The Court of Appeals did not take up the Government's offer to supplement the record.

In the end, the Petitioner attempts to create an issue of misconduct where nothing substantial exists, even accepting all of the Petitioner's claims. At worst, the Government had made more progress towards finding an expert than Brown let on during the May 22, 2019 conference. As the law and the record of that conference makes clear, the Government had no obligation to obtain the expert until Judge McAvoy directed that the Government did so. The record makes clear, too, that funding for an expert had not been approved at the time of the phone conference and no funds were available to hire an expert until June, when the Department of Justice approved Brown's urgent request. Mills had not conducted an examination, done any research on the case, or begun to prepare a report on May 22, 2019, and could not have under the terms of the Government's employment of experts. The evidentiary hearing that Judge McAvoy ordered with the Petitioner's counsel's agreement could not occur until an examination occurred, and the evidence makes clear that Brown was correct to state that the Government did not even have an expert on May 22, when Judge McAvoy decided a hearing was necessary. The Government quickly obtained an expert when told by the Court to do so, and then the parties and the Court worked to schedule an evidentiary hearing as Judge McAvoy directed. No evidence

supports any finding of serious misconduct under the circumstances, and none that affected how Judge McAvoy scheduled the proceedings. At worst, Brown overstated the length of time required to find an expert and failed to disclose that he had begun the work of finding one, but he then worked with the dispatch Judge McAvoy required to obtain that expert and move the case forward.

b. Breach of Agreement for AUSA Michael Gadarian to Try the Case Himself

As another example of alleged prosecutorial misconduct, Petitioner contends that the Government agreed to have AUSA Michael Gadarian try the case himself on January 6, 2020, a date when Brown was unavailable because of a planned family vacation.

This issue arose during a pre-trial conference conducted by telephone by Judge McAvoy on December 12, 2019. See Transcript of Telephone Conference, dkt. # 139. Gottlieb appeared for the Petitioner, and AUSAs Brown and Gadarian for the Government. Id. After resolving a number of pre-trial motions and issues about witnesses, Judge McAvoy told the parties: "I want to know how long you guys are going to take to try this case. It's getting close to Christmas." Id. at 31. Gottlieb responded as follows:

> I am so grateful that you raise the issue because that was the last thing on my agenda and I didn't---dreading that I was going to have to raise it knowing that your Honor was going to say, Mr. Gottlieb, you're clearly a neophyte, you don't know how we operate up here.
>
> The Court: I don't think you're a neophyte. That's not what my sources tell me.
>
> Mr. Gottlieb: I will say this and I discussed this with Geoff [Brown] and Mike [Gadarian], as well. I am very concerned. I'm very concerned. I'm very anxious to try this case before your Honor but I'm concerned on Monday, we have Christmas Eve the following Tuesday. Geoff, Mike and I have actually been very cooperative. We're going to be stipulating to a number of witnesses, but I have to tell you . . . I'm very concerned that even if we could finish the live testimony Thursday or Friday, that the jury will then be charged, they'll be asked to

> deliberate with Christmas knocking on the door, Christmas Eve on Tuesday. So even, even if they got the case on Monday or Friday afternoon, I am very, very fearful that there will be enormous pressure for them to get a verdict. I think this is a complicated case that does require understanding of subject matter which is difficult. We certainly, I don't think, your Honor, we could tell the jury don't worry, you're not going to go into the following week. So based on everything that's developed, based on all the witnesses and the quality of the witnesses, I'm very concerned about starting the trial on Monday.

Id. at 31-32.

The Government expressed confidence that the evidence would be completed by the Thursday of the week before Christmas. Id. at 33. Judge McAvoy responded as follows:

> I don't think that's going to happen. I'm concerned, I'm sharing Mr. Gottlieb's concern. Just sitting back and thinking back over the thirty-three-and-a-half years I've been on the bench, I know damn well it's going to go longer than Thursday and I know it's going to go into next week. Now, as Mr. Gottlieb so correctly put it, we're knocking on the door of Christmas and, you know what, the jury's going to be thinking about, let's get the hell out of here. That's what's they're going to be thinking about. So the verdict may be ill considered and that's a concern for me. I don't care who wins or loses. If the government wins, it's another sentencing. Big deal. If the government loses, we'll go on to the next case. Big deal. I want it done right. I want to make sure both the government and the defendant are heard properly; that the evidence is before them and that the jury doesn't feel constrained to bring in a verdict because that's two days before Christmas. I think that would be grossly unfair to both sides.

Id. at 33-34. The Judge then asked the parties "how are you guys going to fix that?" Id. at 34. After a brief discussion where Judge McAvoy indicated that he doubted that a week would be enough time to finish the entire case, defense counsel suggested that "[i]f your honor is available the first week in January, January 2 or 3, "I will certainly do what I have to do to change, you know, my appointments, whatever, and if we can start right after the new year, I would appreciate that." Id. at 35.

After a discussion of Judge McAvoy's schedule, the Court proposed to the Government that trial start on January 6th. Id. at 36. The Court asked, "How about you guys from Syracuse, what do you say?" AUSA Brown responded as follows:

> Well, we were supposed to be out with, the kids actually have a vacation that week so we had planned to do a trip that first week in January with them. That's their Christmas break.
>
> Mr. Gottlieb: This is Robert Gottlieb, I do not want to interfere.
>
> The Court: How many people is it going to take to try this case for God's sakes. I know it's complicated. I realize that the expert testimony is probably going to be confusing to the jury and it's got to be dealt with in a proper way but the US Attorney's Office, my last count had about 20 people, so I mean there's got to be a combination of 2 of those 20 that can allow the vacation to come about and still we can try the case. Mr. Gadarian, you can try it by yourself, right?
>
> Mr. Gadarian: If the Court is inclined to go January 6.
>
> Mr. Brown: I'll make arrangements to make it happen.

Id. at 37.

When Brown expressed concerns about the availability to witnesses for trial beginning on January 6, Judge McAvoy directed the Government to arrange for the witnesses to appear and offered to issue subpoenas if necessary. Id. at 39-40. Brown responded that "[w]e'll let you know if someone is under subpoena for trial or if there's some other thing that we have to advise you of. We understand, your Honor." Id. at 40.

On December 23, 2019, Gadarian wrote the Court to request adjournment of the January 6, 2020 trial date. See dkt. # 137. Gadarian wrote that "[m]y trial partner Geoff Brown fell last night and fairly seriously injured his knee, requiring that he undergo surgery today." Id. Gardian stated that "[m]y understanding is that the anticipated post-surgery recovery and rehabilitation would make it impossible for him to try the case starting on January 6, 2020." Id.

Further, "defense counsel is generally amendable to an adjournment in light of the circumstances, which is appreciated." Id. Gottlieb wrote the Court the same day, relating that he had "received word of AUSA Brown's injury and impending surgery requiring an adjournment of the January 6, 2020 trial date." Id. He stated that "[t]he defense is agreeable to setting a new date for the commencement of the trial." Id. Gottlieb offered two dates in February, one at the beginning of the month and one at the end, as alternatives. Id.

Petitioner's briefing describes these events in the following way:

> After determining that proceeding on December 16th might jeopardize both parties' right to a fair trial, the Court ordered trial to proceed on January 6th with Gadarian trying it alone. Although the Court did not make an ends-of-justice finding and did not exclude the time, it made clear that it balanced both parties' interest in a fair trial against Jakes-Johnson's speedy-trial interests . . . At the same time, mindful that Jakes-Johnson had by then been jailed for more than 2½ years, the Court insisted that trial start as soon as possible. And, albeit not articulating the decision aloud, it determined that Jakes-Johnson's interest in a speedy trial outweighed the prosecution's interest in having Brown try the case and Brown's own interest in trying the case. It had earlier deemed the case "simple" and it made clear that it believed that a different prosecutor could try it with Gadarian or that Gadarian could try it alone. And neither prosecutor disagreed — to the contrary, Brown said that he would "make arrangements and make it happen." And the Court was unmoved when Gottlieb empathized with Brown and offered to delay by a month (37). Although willing to "entertain" "further submissions," it was firm — starting January 6th, it said, "will give us a couple of weeks to try the thing properly and correctly the best we can" (35-40).
>
> The Court's having decided that Jakes-Johnson's interest in a speedy trial trumped the prosecution's and Brown's interest in his trying the case, it is impossible to see how and why that changed between December 12th and 27th, when, after the prosecution announced that Brown fell and asked for a continuance, the Court agreed to adjourn the case to March 2nd. That in the first instance Brown was unavailable because he had a family vacation while in the second because he injured his leg was not a meaningful distinction. The plan was for Gadarian to try it anyway. Brown's suffering an injury should not have changed anything. If his vacation was now canceled, he would have been even more available to assist or try the case. As Jakes-Johnson's father stressed to Gottlieb, one can get back to work after arthroscopic surgery in a few days. If the vacation was not canceled, then this was just a way to revisit the Court's prior ruling.

Petitioner's Brief, dkt. # 200-2, at 13-15. Petitioner's briefing returns to this theme that the Government had agreed to have Gadarian try the case alone, and then used Brown's injury to renege on that agreement and further delay the trial.

The Court finds that this reading of the situation surrounding the postponement of the trial, first to January 6, 2020 and then to March 2, 2020 unworthy of credit or consideration, and certainly no basis to find prosecutorial misconduct. First, the telephone conference on December 12, 2019, makes clear that the prosecution had arranged for trial to begin on the following week and hoped to go forward despite Judge McAvoy's concerns about jurors' potential hasty verdict as Christmas approach. If the Government's view had prevailed, the trial would have been over before Brown's January vacation. No credible view of the situation on December 12, 2019 could conclude that the Government had a strategy of delaying the trial to keep Petitioner in jail.

The Government's concerns about the new trial date, January 6, 2020, came because of a previously scheduled family vacation for AUSA Brown. Petitioner's view is that the Government agreed to have Gadarian try the case without Brown. Petitioner points to Judge McAvoy's suggestion that someone besides Brown could try the case or that Gadarian could try the case alone and Brown's response that he would "make arrangements to make it happen" as evidence that the Government agreed to have Gadarian try the case alone. This is not a reading of the situation that deserves credit. First, the reading ignores the words that Brown used, which do not contain any agreement that Gadarian would try the case himself. The reading also ignores the portions of the transcript that immediately follow this alleged agreement for Gadarian to try the case alone. Once Judge McAvoy stated that the trial would go forward on January 6 Brown let the Court know that essential witnesses might not be available on that date. When Judge

McAvoy again remained firm on the trial date, Brown asked the Judge for assistance with subpoenas for witnesses if necessary because of their other commitments. Brown clearly intended to try the case on January 6. Moreover, the correspondence with the Court from Gadarian and Gottlieb on December 23, 2019 make clear that both sides understood that Brown intended to try the case. Petitioner has presented no evidence beyond speculation and misreading to support this claim. The Court therefore finds no basis for Petitioner's claim that prosecutors breached an agreement to have Gadarian try the case alone. The credible evidence clearly shows otherwise.[13]

c. Alleged Lies About Availability for Investigator Grant

Petitioner claims that Investigator Todd Grant lied to the Court about his availability for a trial before September 1, 2019. Petitioner contends that Grant told the Court he would be unavailable during the month of August because he was scheduled to testify in a homicide trial during much of that month. Petitioner alleges that Grant misstated the date of the trial, the county where it was to take place, and misled the Court about when the trial would occur. Since Grant was seated at counsel table through the entire trial, assisting the prosecutors, his conduct should be imputed to them, Petitioner claims.

Attached to Brown's letter to the Court on June 6, 2019 was a letter from Todd Grant to Brown dated June 6, 2019. See dkt. # 65. Grant wrote that he had been informed by Brown that he was an "indispensable witness" for the upcoming trial and wanted to inform Brown of certain

[13] As further evidence that there was no agreement for Gadarian to try the case himself, the Government submits a booking confirmation from the Doubletree by Hilton in Binghamton, New York. See Exh. 4 to Brown declaration, dkt. # 210-5. That confirmation, sent at 3:54 p.m. on December 13, 2019, indicates that Brown had reserved a room at the hotel for Sunday, January 5, 2020 to Friday January 10, 2010. Brown would not have needed the hotel room if he did not intend to try the case.

"testimonial conflicts." Id. Brown was scheduled to testify at a double murder trial in Syracuse from July 15 through July 19, 2019, where he would be "the main witness who among other responsibilities interviewed the trial defendant and a number of co-conspirators." Id. from August 26 through September 6, 2019, Grant would be involved in People v. Gustavo Segundo Clark, a murder trial in St. Lawrence County. Id. He was "the main witness in this matter who arrested the defendant and interviewed him." Id. Grant also had "personal conflicts" in August and July that he hoped "the Court could consider." Id. He had a "pre-paid personal vacation from July 26-August 1, 2019" with his family and another such vacation from August 17 through August 25. Id. Grant's letter is undated, but Brown represents that Grant's letter had been "received today[.]" Brown's letter to the Court is dated June 6, 2019. See dkt. # 65.

Citing to television reporting, Petitioner points out that a jury in Clinton County, New York, found Gustavo Segundo-Clark guilty of murdering his grandmother on August 15, 2019. Petitioner's exhibits also include a letter from a clerical assistant in the Clinton County Supreme and County Court that states that "[o]ur file does not indicate that the defendant was originally scheduled for Trial on 8/26/2019. However our records do show, that at a conference held 5/23/2019, parties were notified that the Trial was being adjourned from 6/24/2019 to 8/05/2019." See Exh. 15 to Petition, dkt. # 200-17.

The Court finds that Grant's letter to Brown misstated the time and place of the Segundo-Clark trial, which may have misled the Court about Grant's availability during August for any trial Judge McAvoy hoped to schedule. Making all inferences in Petitioner's favor, the Court could conclude that Grant deliberately misled the Court about his availability for that date. The Court could also conclude that Brown should have investigated the truth of Grant's statements about his availability for August and corrected the record that Grant provided. At the same time,

the Court notes that Brown's letter on the issue to the Court identifies a conflict for Grant only from July 15 to July 19, 2019, when Judge McAvoy had scheduled the Jakes-Johnson trial. See dkt. # 65. Brown makes no mention of Grant's availability for trial in August, and Petitioner does not dispute that Grant had a conflict because of the Syracuse trial scheduled for July.

The Court finds that this evidence does not support a finding of serious prosecutorial misconduct, even assuming Grant's misstatements could be imputed to Brown. Grant may have misstated his availability in August, but there appears to be no dispute that he was not available for trial on July 15, when Judge McAvoy had the trial scheduled. Brown accurately informed the Court of Grant's availability for that date, and also provided the Court with other dates when Grant might not be available. As Judge McAvoy was clearly more concerned with moving forward with an examination of Petitioner by the Government's expert and an evidentiary related to Petitioner's insanity defense than addressing Grant's availability, Grant's statements about his August availability are immaterial in any case. The Court scheduled the hearing with the experts for September. The Government did not procure a postponement based on Grant's alleged unavailability in August.[14]

d. Other Alleged Misconduct

In replying to the Government's response, Petitioner points to other incidents of alleged prosecutorial misconduct. See Petitioner's Reply, dkt. # 219, at 5-8. This alleged misconduct

[14] Petitioner contends that Grant's testimony was not essential to the trial and could have been provided by other witnesses. The Government responds that Grant had information about Petitioner's statements no other witness did, and that the Government, not the Petitioner, has the power to decide which witnesses to call. The record makes clear that Judge McAvoy did not postpone the July 15, 2019 trial date due to Grant's potential absence. Grant testified extensively at the eventual trial and submitted to extensive cross-examination. The Government's claim that Grant was an essential witness was not misconduct or misleading to Judge McAvoy.

occurred at nearly every stage of the case, Petitioner claims, from the Government's response to Petitioner's motion to suppress, to statements in briefing that opposed bail motions, during trial, in briefing and oral argument on appeal, and in responding to the motion to vacate. Petitioner alleges that the Government made a number of false statements, misstatements, and untenable arguments in each of these proceedings.

The Court is not persuaded that any of the conduct cited by the Petitioner amounts to prosecutorial misconduct. Indeed, the Court finds that Petitioner's allegations rest on such thin reeds that a detailed examination of any of them is unnecessary.[15] Suffice to say that Petitioner points to normal litigation conduct in an adversarial system, reads that conduct as somehow ill-intentioned and duplicitous, and urges the Court to find prosecutorial misconduct. Petitioner, for instance, contends that the Government committed misconduct on appeal by "omit[ing] all negative facts" about the delays in question in its briefing. Petitioner's Traverse, dkt. # 219, at 7. Petitioner was represented by counsel on appeal and had an opportunity to counter the Government's argument. No misconduct occurred in the Government pressing its case instead of adopting the Petitioner's arguments about the meaning of the evidence. None of the alleged misconduct by the Government cited by the Petitioner in reply is anything but the sort of faulty

[15] Petitioner contends that the Government misstated its role in the delay in trial while briefing the bail issue. Petitioner again misconstrues the issues and raises nothing of concern. First, as explained, the Government did not purposefully procure any delay in the trial with reference to the expert or Brown's injury. Second, Petitioner suffered no injury from any alleged misstatements in briefing. He was held on child pornography charges, as well as a probation violation on an earlier child-pornography conviction. He would have had to persuade Judge Dancks that he was not a threat to the public's safety, an unlikely proposition that would not have been aided by information that the Government did not immediately hire an expert to challenge Petitioner's insanity defense.

legal argument and factual presentation at trial that opposing counsel and courts address every day in the adversarial process.

The longest part of Petitioner's traverse in this respect contends in reply that Brown engaged in prosecutorial misconduct because he failed to move immediately after receiving notice of the insanity defense to have Petitioner examined by a government expert. Petitioner further takes issue with Brown's briefing on the insanity issue, claiming that he misread cases, misstated the issues, and made arguments that were unavailing. As explained, the Government was not required to seek an immediate examination of Petitioner when he filed his notice. Brown was entitled to seek to prevent use of the defense by moving to preclude because Petitioner's expert's report failed to satisfy his burden. Judge McAvoy eventually ruled that the Petitioner could present the defense. Having examined the briefing on the issue and Judge McAvoy's decision, the Court finds no prosecutorial misconduct in the Government taking a litigation position that Judge McAvoy eventually rejected.

In the end, the Court finds no misconduct that jeopardized Petitioner's due process rights in the Government's litigation efforts. In any case, as will be explained below, Petitioner has offered no convincing argument for how such conduct prejudiced him.

2. Analysis

Even assuming that the Court found substantial misconduct, the Petitioner would still need to demonstrate that he is entitled to relief from this alleged misconduct. Petitioner contends the alleged misconduct should estop the Government from making certain arguments in opposing the motion to vacate. He also argues that the Court should find the Government violated his due process rights and vacate his conviction.

Petitioner first contends that the alleged misconduct should lead the Court to apply equitable estoppel to prevent the Government from asserting certain defenses against the motion to vacate. "'Equitable estoppel is grounded on notions of fair dealing and good conscience and is designed to aid the law in the administration of justice where injustice would otherwise reside.'" In re Vebeliunas, 332 F.3d 85, 93 (2d Cir. 2003) (quoting In re Ionosphere Clubs, Inc., 85 F.3d 992, 999 (2d Cir. 1996)). Equitable estoppel applies "'where the enforcement of the rights on one party would work an injustice upon the other party due to the latter's justifiable reliance upon the former's words or conduct.'" In re Vebeliunas, 332 F.3d at 93 (quoting Kosakow v. New York Rochelle Radiology Assocs., P.C., 274 F.3d 706, 725 (2d Cir. 2001)). "The elements of estoppel are a material representation, reasonable reliance, and provable damages." Schwebel v. Crandall, 967 F.3d 96, 102 (2d Cir. 2020). "Equitable estoppel is available against the government in 'the most serious of circumstances,' and requires 'a showing of affirmative misconduct by the government.'" Schwebel, 967 F.3d at 102 (quoting Rojas-Reyes v. INS, 235 F.3d 115, 126 (2d Cir. 2000)).

Petitioner has not cited a habeas corpus case where a reviewing Court concluded that the Government should be prevented by misconduct at trial from making certain arguments. The Court has found none. Even assuming that estoppel could be used against the Government in the manner that Petitioner suggests, the Court finds no affirmative misconduct by the Government that represents a serious breach of the Petitioner's rights. As explained, Petitioner's claims that Brown misled the Court and procured an extended delay is not supported by the record. Petitioner's claim that the Government reneged on an agreement for Gadarian to try the case himself is fanciful. Grant's alleged misrepresentations about his availability and Brown's alleged use of them are immaterial. The other alleged violations represent ordinary litigation

conduct. No grounds exist to support Petitioner's argument, and the Court will not apply estoppel in these circumstances.

Petitioner also contends that this misconduct violated his due process rights. "The appropriate standard of review for a claim of prosecutorial misconduct on a writ of habeas corpus is 'the narrow one of due process, and not the broad exercise of supervisory power.'" Bossett v. Walker, 41 F.3d 825, 829 (2d Cir. 1994) (quoting Darden v. Wainwright, 477 U.S. 168, 181 (1986)). "To warrant reversal for prosecutorial misconduct, the misconduct 'must cause the defendant 'substantial prejudice' by 'so infecting the trial with unfairness as to make the resulting conviction a denial of due process.'" United States v. Djibo, 730 Fed. Appx. 52, 57 (2d Cir. 2018) (quoting United States v. Elias, 285 F.3d 183, 190 (2d Cir. 2002)). "Prosecutorial misconduct denies a defendant due process only when it is 'of sufficient significance to result in the denial of the defendant's right to fair trial.'" Blisett v. Lefevre, 924 F.2d 434, 440 (2d Cir. 1991) (quoting Greer v. Miller, 483 U.S. 756, 765 (1987)).

To review, Petitioner contends that Assistant United States Attorney Geoffrey Brown misled the Court about his contacts with a psychiatrist to examine Petitioner in connection with his insanity defense. Petitioner contends that Brown told Judge McAvoy that he would need considerable time to find such an examiner, and that he had not yet engaged anyone to undertake that task. This statement was false, Petitioner claims, because evidence shows that Brown had already contacted a psychiatrist. Brown's alleged misrepresentations, Petitioner claims, caused the Court to postpone a trial date of June 17, 2019, undermining Petitioner's right to a speedy trial. He argues that because "[t]he prosecution here did obtain the May and June continuances 'only by falsely representing' that he did not have an expert" the Government "is thus estopped

from controverting" Petitioner's "speedy-trial and due process claims."[16] As explained, the Petitioner has not pointed, however, to any case law that indicates that a remedy for prosecutorial misconduct in a criminal matter is estoppel of the Government from defending the conviction. The Court has not discovered any. The better standard, the Court finds, is the one stated above: "[p]rosecutorial misconduct denies a defendant due process only when it is 'of sufficient significance to result in the denial of the defendant's right to fair trial.'" Blisett, 924 F.2d at 440. If proved, this alleged misconduct delayed the trial, but it did not prevent Petitioner from offering his defense, did not prevent him from calling any witnesses, and did not prevent him having a jury decide his case based on admissible and relevant evidence. At worst, this alleged

---

16 In his traverse, Petitioner offers another version of this argument:

> Dismissal of the indictment here is therefore required on several grounds — due to Gottlieb's ineffectiveness and failure to advance Jakes-Johnson's objectives regarding the speedy-trial issues and to the speedy-trial violations themselves; based on the prosecution's "continuous," "egregious and deliberate" misconduct, United States v. Fields, 592 F.2d 638, 648 (2d Cir.1978); United States v. Mangano, 2022 WL 59697, at *3 (E.D.N.Y. 2022); and due to its intentional efforts to "distort[] the judicial fact finding process," United States v. De Palma, 476 F.Supp. 775, 780 n.13 (S.D.N.Y. 1979), during the bail-motion proceedings, on appeal, and here.

Petitioner's Traverse, dkt.# 261, at 15. Fields overruled dismissal of an indictment for prosecutorial misconduct finding that "the district court's extreme sanction of dismissal of the indictment is not justified on grounds of eliminating prejudice to the defendants in this criminal prosecution or deterring widespread or continuous official misconduct[.]" 592 F.2d at 648. Mangano addressed a motion to dismiss an indictment brought after a conviction in a second trial that followed a hung jury and a mistrial. 2022 WL 59697 at *1. Defendant argued that the Government had violated his rights by failing to disclose exculpatory material and introducing perjured testimony at the first trial. Id. at *2. Finding that the Government did not engage in sufficiently "egregious and flagrant" conduct to warrant an extreme sanction and that defendants had failed to demonstrate prejudice, the court denied a motion to dismiss the indictment brought after trial. Id. at *22. De Palma dealt with a post-trial motion for acquittal based in part on prosecutorial misconduct in granting immunity to a particular witness; the court's remedy was to order a new trial. 476 F.Supp. at 782. None of these cases dealt with a habeas petition, and they do not establish a standard for this matter.

misconduct undermined any attempt Petitioner may have made to challenge whether delays in bringing his case to trial violated Petitioner's speedy trail rights. The Court cannot find that the misconduct alleged by the Petitioner violated his right to a fair trial. The Court will deny the motion to vacate on these grounds.

B. Sixth Amendment and Speedy Trial Act Claims

Having concluded that the Government's conduct in this matter does not provide grounds to vacate the decision or estop the Government from applying prohibitions in *habeas corpus* law regarding relitigating matters resolved on appeal or barred by waiver, the Court will address the two claims that Petitioner raises which could fit into those categories. The issue here, however, is whether Petitioner's claims in this respect are barred by the Second Circuit's decision in this case.

1. Legal Standard

"As a general rule § 2255 petitioners may not raise on collateral review a claim previously litigated on direct appeal. Abbamonte v. United States, 160 F.3d 822, 924 (2d Cir. 1998). This "so-called mandate rule bars re-litigation of issues already decided on direct appeal." Mui v. United States, 614 F.3d 50, 53 (2d Cir. 2010). "The mandate rule also prevents re-litigation in the district court not only of matters expressly decided by the appellate court, but also precludes re-litigation of issues impliedly resolved by the appellate court's mandate." Mui, 614 F.3d at 53. In addition, "'[t]he failure to raise a particular ground on direct appeal will bar consideration of that claim in a § 2255 motion unless the movant can show that there was cause for failing to raise the issue, and prejudice resulting therefrom.'" Id. (quoting Douglas v. United States, 13 F.3d 43, 46 (2d Cir. 1993)). "Mindful that a § 2255 motion is not a substitute for direct appeal," a court "will not afford collateral review to claims that a petitioner failed properly to

raise on direct review unless the petitioner shows (1) good cause to excuse the default and ensuing prejudice, or (2) actual innocence." Harrington v. United States, 689 F.3d 124, 129 (2d Cir. 2012). "Habeas review is an extraordinary remedy and 'will not be allowed to do service for an appeal.'" Bousley v. United States, 523 U.S. 614, 621 (1998) (quoting Reed v. Farley, 512 U.S. 339, 354 (1994)).

2. The Second Circuit Mandate

The mandate of the Court of Appeals issued on August 4, 2021. See dkt. # 191. That court issued a summary order that addressed four issues: (1) Judge McAvoy's limitation of expert testimony at trial; (2) whether Petitioner's speedy trial rights had been violated; (3) Judge McAvoy's admission of testimony regarding Petitioner's prior sexual contact with a minor; and (4) Judge McAvoy's admission of certain statements by investigator Todd Grant in his testimony. Id.

On the speedy trial issue, the Court of Appeals found as follows:

> Jakes-Johnson also argues on appeal that the nearly three-year delay between his arrest and trial violated his Sixth Amendment right to a speedy trial. In evaluating a Sixth Amendment speedy trial claim, courts apply the balancing test outlined in the Supreme Court's *Barker v. Wingo* decision, "in which the conduct of both the prosecution and the defendant are weighed." 407 U.S. 514, 530 (1972). In applying this test, we consider four factors: "(1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right in the run-up to the trial; and (4) whether the defendant was prejudiced by the failure to bring the case to trial more quickly." *United States v. Cain*, 671 F.3d 271, 296 (2d Cir. 2012). Because Jakes-Johnson did not raise a speedy trial claim in the district court, on appeal we review the claim under a plain error standard. *See United States v. Abad*, 514 F.3d 271, 274 (2d Cir. 2008).
>
> Applying the *Barker* factors here, we conclude that Jakes-Johnson's constitutional right to a Speedy Trial was not violated. The duration of Jakes-Johnson's pre-trial incarceration was under three years, and a substantial portion of that time is fairly attributed to Jakes-Johnson and his trial counsel's requested delays. Moreover, defense counsel consented to the adjournments of the case and did not assert the speedy trial right in a meaningful way. *See Abad*, 514 F.3d at 275. Finally, Jake-

> Johnson's speedy trial claim fails because he cannot establish prejudice arising from the pre-trial delay. "The Supreme Court has consistently emphasized three interests of a defendant that may be prejudiced by trial delay: [1] oppressive pretrial incarceration, [2] anxiety and concern of the accused, and [3] the possibility that the accused's defense will be impaired by dimming memories and loss of exculpatory evidence." *United States v. Ghailani*, 733 F.3d 29, 50 (2d Cir. 2013). While lengthy, this period of incarceration is not in itself "oppressive" under our caselaw. *Cf. United States v.Moreno*, 789 F.3d 72, 81-82 & n.10 (2d Cir. 2015). Nor is this case "one of those exceedingly rare instances in which the length of the delay alone supports a showing of prejudice." *Id.* at 82. And while Jakes-Johnson cites evidence from the Government's expert witness that his pre-trial incarceration made him suicidal, that same expert testified that he believed Jakes-Johnson was exaggerating his symptoms and might be malingering. Finally, Jakes-Johnson fails to persuasively argue that his defense was substantially impaired as a result of the delay. While "proof of particularized prejudice is not essential to every speedy trial claim," *Doggett v. United States*, 505 U.S. 647, 655 (1992), here, the other *Barker* factors do not weigh sufficiently in Jakes-Johnson's favor to overcome the absence of a prejudice showing in this case. Accordingly, Jakes-Johnson's Sixth Amendment speedy trial claim fails.

Id. at 6-7. In one footnote, the Court of Appeals found that Petitioner had argued for *de novo* review of his speedy-trial claim. The Court of Appeals concluded that "[w]e need not resolve the parties' dispute over the appropriate standard of review, however, because it is not dispositive here: Jakes-Johnson's constitutional speedy trial claim would fail for the same reasons on de novo review." Id. at 6 n.2.[17] The Court of Appeals also concluded that "[t]o the extent Jakes-Johnson also raises a claim for the violation of his rights under the Speedy Trial Act, that separate claim is waived because it was never raised in the district court. *See United*

[17] As part of his complaint that his counsel was ineffective, Petitioner argues that "[n]ot moving to dismiss could also have relegated Jakes-Johnson to a higher standard of review on appeal. In its decision, although allowing that de novo review might pertain, the Second Circuit applied plain error review because the motion had not been made. *See Jakes-Johnson*, 2021 WL 2944574 at *3 n.2." Petitioner misstates the court's finding here that, whether applying de novo or plain error review, Petitioner's Sixth Amendment speedy trial rights were not violated by the delays in going to trial. As far as the Sixth Amendment claim goes, then, failing to move to dismiss on Sixth Amendment grounds did not prejudice Petitioner.

States v. Holley, 813 F.3d 117, 121 (2d Cir. 2016) ("Under [18 U.S.C. § 3162(a)(2)[18]], if the defendant fails to move for dismissal on STA grounds in the district court, this Court cannot review any such claim on appeal, even for plain error."). Id. at 7 n.3.

3. Analysis

The Court of Appeals' decision makes clear that Petitioner raised his Sixth Amendment speedy trial claim on appeal, the Court of Appeals considered the issue, and rejected that claim. Plaintiff is therefore barred from raising that claim again here. As to the Speedy Trail Act claim, Petitioner did not raise that claim on appeal, because he did not file a motion before trial and was barred from raising the claim on appeal.

As to the Speedy Trial Act claim, all parties agree, and the Court of Appeals found, that a defendant who proceeds to trial waives any right to raise a claim under the Act on appeal. A petition under Section 2255 "'will not be allowed to do service for an appeal.'" Stone v. Powell, 428 U.S. 465, 477 n.10 (1976) (quoting Sunal v. Large, 332 U.S. 174, 178 (1947)). "For this reason, nonconstitutional claims that could have been raised on appeal, but were not, may not be asserted in collateral proceedings." Stone, 428 U.S. at 477 n.10. Claims that could not have been raised on direct appeal "can be raised on collateral review only if the alleged error constituted 'a fundamental defect which inherently results in a complete miscarriage of justice.'" Id. (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).

The Court has addressed the notion that a fundamental defect existed which resulted in a complete miscarriage of justice in the proceedings over which Judge McAvoy presided and

---

18 "Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section." 18 U.S.C. § 3162(a)(2).

found none. As such, the Petitioner may not raise direct claims regarding a violation of the Speedy Trial Act here either.

The Court therefore finds that Petitioner may not raise stand-alone grounds to vacate his conviction based on alleged violations of his Sixth Amendment speedy trial rights or the Speedy Trial Act. The Court will address those issues, however, in relation to the ineffective assistance of counsel claims discussed below.

C. Alleged Ineffective Assistance of Counsel

Petitioner argues that his trial counsel was ineffective in a number of ways that prejudiced him at trial. The Court will address each in turn, after reciting the legal standard for ineffective assistance of counsel claims.

1. Legal Standard

"One claim that may appropriately be raised for the first time in a § 2255 motion, 'whether or not the petitioner could have raised the claim on direct appeal,' is ineffective assistance of counsel." Harrington v. United States, 689 F.3d 124, 129 (2d Cir. 2012) (quoting Massaro v. United States, 538 U.S. 504, 509 (2003)). "The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process." Kimmelman v. Morrison, 477 U.S. 365, 374 (1986). The right to counsel is not satisfied simply because counsel is present: "the right to counsel is the right to effective assistance of counsel." Kimmelman, 477 U.S. at 377. An ineffectiveness claim asserts "that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." Id. at 374. "To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable

probability that, but for counsel's errors, the result of the proceeding would have been different." United States v. Pitcher, 559 F.3d 120, 123 (2d Cir. 2009). A court considering such a claim may evaluate either part of the test first; "if either is insufficient, the other need not be addressed." Giordano v. Brann, No. 22-1639, 2023 U.S. App. LEXIS 29474 at *3 (2d Cir. Nov. 6, 2023) (citing Strickland v. Washington, 466 U.S. 668, 697 (1984)). In evaluating counsel's performance, the Court "must 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance'" and "'[t]he reasonableness of counsel's performance is to be evaluated from the counsel's perspective at the time of the alleged error and in light of all the circumstances.'" Raysor v. United States, 647 F.3d 491, 495 (2d Cir. 2011) (quoting Kimmelman, 477 U.S. at 365). A court reviewing counsel's decisions are "not to 'second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim[.]'" Jackson v. Leonardo, 162 F.3d 81, 85 (2d Cir. 1998) (quoting Jones v. Barnes, 463 U.S. 745, 754 (1983)). This right to effective assistance "attaches at 'all critical stage[s]' of the case following the 'formal initiation of adversary proceedings.'" Pitcher, 559 F.3d at 123 (quoting Moran v. Burbine, 475 U.S. 412, 429, 432 (1986)). The right therefore implicates counsel's conduct during plea negotiations. Id. (citing Davis v. Grenier, 428 F.3d 81, 87 (2d Cir. 2005)).

As to the prejudice element of an ineffectiveness claim, "the likelihood of a different result in the absence of the alleged deficiencies in representation 'must be substantial, not just conceivable.'" Garner v. Lee, 908 F.3d 845, 849 (2d Cir. 2018) (quoting Harrington v. Richter, 562 U.S. 86, 112 (2011)). The strength of the case against the petitioner matters. "The prejudice inquiry is . . . ineluctably tied to the strength of the prosecution's evidence." Garner, 908 F.3d at 862. "'[A] verdict or conclusion with ample record support is less likely to have been affected

by the errors of counsel than 'a verdict or conclusion only weakly supported by the record.'" Id. (quoting Gen. Waiters v. Lee, 857 F.3d 466, 480 (2d Cir. 2017)). Thus, "'[e]ven serious errors by counsel do not warrant granting habeas relief where the conviction is supported by overwhelming evidence of guilt.'" Id. (quoting Lindstadt v. Keane, 239 F.3d 191, 204 (2d Cir. 2001))

2. Alleged Ineffectiveness in Protecting and Preserving Petitioner's Speedy-Trial Rights

Petitioner first addresses defense counsel's performance with regard to his right to a speedy trial. He contends that his attorney was deficient for failing to preserve his speedy trial rights under both the Sixth Amendment and the Speedy Trial Act. He further contends that such deficiencies prejudiced him because, had counsel asserted those rights by motion to Judge McAvoy, Judge McAvoy would have been compelled to grant the motion and dismiss the case with prejudice. The Government responds that counsel's performance was not deficient, and that, even if deficient, did not cause prejudice.

a. Sixth Amendment

Petitioner contends that, had Petitioner's counsel raised a Sixth-Amendment speedy trial claim, Judge McAvoy would have been forced to grant that claim and dismiss the case with prejudice. "The Sixth Amendment guarantees that, 'in all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial[.]'" Doggett v. United States, 505 U.S. 647, 651 (1992). This right is one "'fundamental' to our system of justice[.]" United States v. Black, 918 F.3d 243, 253 (2d Cir. 2019) (quoting Klopfer v. North Carolina, 386 U.S. 213, 223-26 (1967)). "Pursuant to the Sixth Amendment, the court and the government owe an 'affirmative obligation' to criminal defendants and to the public to bring matters to trial promptly." Black, 918 F.3d at

253 (quoting United States v. New Buffalo Amusement Corp., 600 F.2d 368, 377 (2d Cir. 1979)). That burden falls "particularly heavily on the government, which 'owe[s] the additional duty of monitoring the case and pressing the court for a reasonably prompt trial.'" Id. (quoting United States v. Vispi, 545 F.2d 328, 334 (2d Cir. 1976)). In determining whether a violation of the speedy trial right occurred, courts consider: "whether delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result." Doggett, 505 U.S. at 651 (citing Barker v. Wingo, 407 U.S. 514, 530 (1972) ("the Barker factors"). No "individual factor" is "a 'necessary or sufficient condition' for a speedy trial violation but instead the factors are 'related' and 'must be considered together' in the context of the case." Black, 918 F.3d at 254 (quoting Barker, 407 U.S. at 533). The speedy trial right "is 'triggered by arrest, indictment, or other official accusation.'" United States v. Moreno, 789 F.3d 72, 78 (2d Cir. 2015) (quoting Doggett, 505 U.S. at 655.

In assessing the Barker factors, "[p]rejudice should be assessed in regard to those interests the Sixth Amendment right to a speedy trial is designed to protect, namely '(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused, and (iii) to limit the possibility that the defense will be impaired.'" United States v. Tigano, 880 F.3d 602, 618 (2d Cir. 2018) (quoting Barker, 407 U.S. at 532). Impairment of the defense is the most important factor, but "it is only one of three interests protected by the" speedy trial right. Tigano, 880 F.3d at 618. "Affirmative proof of impairment is not required in order to find a Sixth Amendment violation." Id.

Petitioner argues that, if Gottlieb had moved to dismiss the case on Sixth-Amendment grounds, Judge McAvoy would have granted that motion. While the Court of Appeals rejected

that claim, the Court did so, Petitioner claims, "due largely to Gottlieb's having acquiesced in delays and the lack of prejudice shown by the direct-appeal record." Petitioner's Brief, dkt. # 200, at 22. Gottlieb could have shown the Court that Petitioner "wanted a speedy trial and urged him to obtain one." Id. Gottlieb could have created a strong record to demonstrate prejudice and bad faith from the Government. Petitioner claims that Gottlieb could have shown that the Government was the cause of much of the delay that prevented him from being tried in June 2019. Moreover, Petitioner contends, once Mills testified at trial that he had been retained before May 22, 2019, Gottlieb could have moved for dismissal on Sixth Amendment grounds and prevailed. Mills testimony, Petitioner insists, proved that Brown had lied to the Court about needing time to retain an expert and the time necessary to prepare a report, and lulled Petitioner into failing to assert his constitutional right to a speedy trial.[19] Plaintiff suffered prejudice because of intolerable conditions in the county jails in which he was held, where he suffered isolation and a lack of programming and became despondent.

The Court of Appeals already engaged in the analysis described above, employing the Barker factors. The Court is persuaded that such an analysis would have applied if Gottlieb had raised the motion earlier. First, while the delay was a long one, the length of the delay itself does not mandate finding a Sixth-Amendment violation. See McDaniel v. City of New York, No. 19-CV-3526, 2023 U.S. Dist. LEXIS 55737 at *9 (S.D.N.Y. Mar. 30, 2023) ("The first factor—

[19] Petitioner also contends that his failure to assert his Speedy Trial rights before trial should be excused because Mills testimony proves that his failure to assert those rights was not knowing and intelligent because it was based on a falsehood. As explained above, Brown did not misrepresent to the Court whether he had retained an expert by May 22, 2019. He had not, and had no authority to do so. Moreover, Mills had not examined Petitioner at that point, nor had he prepared a report. Again, Petitioner misrepresents that evidence before the Court in an attempt to manufacture an issue that does not exist.

length of delay---is held to be a threshold requirement that must be satisfied before considering the other factors.") (citing United States v. Cabral, 979 F.3d 150, 157 (2d Cir. 2020)). Petitioner here focuses on the second factor, whether the Government or the defendant is more to blame for the delay, but he does not address any delays before 2019. He would have to concede his role in procuring earlier delays in an effort to resolve the matter with a plea deal before trial. Petitioner therefore focuses on his allegations of misconduct surrounding the hiring of Mills and postponing the January trial date. As explained earlier, the Court is unpersuaded that the record shows misconduct by the Government in procuring delays with reference to the proceedings surrounding the insanity defense. Petitioner's claims about Gadarian's supposed agreement to try the case in January are similarly unpersuasive. Petitioner has not presented any evidence that would alter the conclusion of the Court of Appeals that the Government was not to blame for the delays.[20] While Petitioner has presented evidence that he suffered ignominy and anxiety from his pre-trial incarceration, Petitioner does not contend that the delays in trial impaired his ability to present a defense. Petitioner has no actual evidence that government misconduct was the cause of the delays; the cause of the delays was Judge McAvoy's attempt to assess fairly whether Petitioner could present his chosen defense. Petitioner did not suffer any trial prejudice in this respect, and his suffering while awaiting trial does not outweigh the fairness that the delays achieved when they allowed him to present a defense he believed could lead to a not guilty verdict.

[20] Indeed, the delays protected the Petitioner's right to present his chosen defense. He has not anywhere alleged that Gottlieb was ineffective for presenting this defense.

The Court thus finds that any deficient performance by Gottlieb in failing to move to dismiss on Sixth-Amendment grounds was not prejudicial within the meaning of Strickland and will deny the motion to vacate in this respect as well.

b. Speedy Trial Act

Persons accused of a crime have a constitutional right to a speedy trial, and "[t]o enforce this mandate, the Speedy Trial Act, 18 U.S.C. § 3161 et seq., provides a criminal case shall be brought to trial within 70 days, subject to limited exclusions." United States v. Pikus, 39 F.4th 39, 42 (2d Cir. 2022). "[T]he mandate of the Speedy Trial Act operates even if a defendant purports to waive its application." Pikus, 39 F.4th at 42. Under the Act, "[w]hen a trial is not commenced within the prescribed period of time, 'the information or indictment *shall be dismissed* on motion of the defendant'" Id. at 52 (quoting Zeder v. United States, 547 U.S. 489, 507 (2006) (in turn quoting 18 U.S.C. § 3162(a)(2) (emphasis added in Pikus)). Because the public also has a strong interest in speedy resolution of criminal matters, "the Speedy Trial Act requires dismissal even where the parties have consented to adjournments other than those expressly allowed in the Act." Id. The Act thus provides that "periods of delay attributable to specified reasons are excluded from the 70-day calculation." Id. Some of these exclusions are "automatic," such as "'delay resulting from any pretrial motion' or 'delay resulting from the absence or unavailability of an essential witness.'" Id. (quoting, in turn 18 U.S.C. §§ 3161(h)(1)(D) and 3161(h)(3)(A) (internal citation omitted)). Other reasons for delay are not automatically excluded, but a court may exclude such time periods by finding that "'the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.'" Id. (quoting 18 U.S.C. § 3161(h)(7)(A)). This provision provides the court "flexibility" to address case-specific circumstances, but the court "'must set forth, in the record

of the case, either orally or in writing, its reasons for finding that the ends of justice are served and they outweigh other interests.'" Id. (quoting Zerder, 547 U.S. at 506).

Petitioner focuses on three periods of delay in arguing that he was prejudiced by his attorney's failure to file a motion to dismiss under the Speedy Trial Act. Petitioner does not dispute that any periods excluded before May 2019 were appropriate, but contends that the continuances in May and June 2019 were grounds for a motion to dismiss under the act, as was the January 2020 continuance.

As to the May and June continuances, Petitioner argues that no ends-of-justice continuances were available during that period because the Government had failed to locate an expert witness after receiving notice of the intent to pursue an insanity defense. Even after receiving Gottlieb's report, the Government did nothing to procure an expert, causing an unjustifiable delay. Because of these delays caused by the Government's conduct, no ends-of-justice extension of the speedy-trial clock was available. Moreover, Judge McAvoy did not consult the Petitioner before granting the May continuance, which violated his rights.

Whatever merit to Petitioner's argument that the May and June continuances were improper on ends-of-justice grounds and that Gottlieb was deficient in not objecting to them, a motion related to either of those continuances would have been futile because the continuances were not necessary under the plain terms of the Speedy Trial Act. The Act excludes from the 70-day calculation "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of the motion." 18 U.S.C. § 3161(h)(1)(D). An exclusion also applies for "delay reasonably attributable, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the Court. 18 U.S.C. § 3161(h)(1)(H). Under these rules, a court "properly exclude[s] the period of

time from when the motion was filed until it was taken under advisement, as well as the first thirty days that it was under advisement." United States v. Bert, 814 F.3d 70, 78 (2d Cir. 2016) (internal citations omitted). The motion is not under advisement "where a district court awaits additional filings from the parties that are needed for proper disposition of the motion." Henderson v. United States, 476 U.S. 321, 330 (1986). The time excludable under this provision must only be the time "'reasonably necessary to conclude a hearing or to complete the submission of the matter to the court for a decision.'" United States v. Simmons, 763 F.2d 529, 531 (2d Cir. 1985) (quoting United States v. Cobb, 697 F.2d 38, 44 (2d Cir. 1982)). "'Under this view, long postponements of hearing dates, unless reasonably necessary, would not qualify as excludable time, nor would unnecessarily long extensions of time for the submission of papers.'" Simmons, 763 F.2d at 531 (quoting Cobb, 697 F.2d at 44). The trial judge "must in the first instance determine whether under all the circumstances the period of delay was reasonably necessary for processing the motion." Id.

Here, the parties agreed to a 90-day continuance on February 6, 2019, which Judge McAvoy approved and entered on that date. See dkt. #s 42-43. The Government then filed a motion in limine to preclude the insanity defense on April 16, 2019. See dkt. # 46. Petitioner responded to the motion on May 10, 2019. See dkt. #s 52-53. Judge McAvoy approved the Government's request to file a reply on May 14, 2019. See dkt. # 57. The Government filed a response on May 17, 2019. See dkt. # 60. The events surrounding the Government procuring an expert described above then followed. After Mills examined Petitioner and filed his report, the Court held an evidentiary hearing on October 2, 2019. See Minute Entry for October 2, 2019. Judge McAvoy then gave the parties three weeks after production of a transcript of the proceedings to file supplemental briefing. Id. The court reporter filed the transcript on October

17, 2019. The parties filed their supplemental briefing on November 7, 2019. See dkt. #s 90—91. Judge McAvoy issued a decision denying the Government's motion on the insanity issue on December 5, 2019. See dkt. # 123.

The timeline above indicates that the time from when the Government filed its motion to preclude the insanity defense on April 16, 2019 until when Judge McAvoy issued his decision on December 5, 2019, was excludable under 18 U.S.C. §§ 3161(h)(1)(D) and 3161(h)(1)(H). The Court also finds that the time spent in deciding the motion was reasonable under the circumstances of the case. Having examined the briefing and Judge McAvoy's decision on the matter, the Court finds that the Government filed the motion in good faith and made reasonable and necessary arguments in seeking to preclude the defense. The Court has already explained why the Government had no obligation to seek to examine Petitioner earlier, and why the delays in having Petitioner examined once Judge McAvoy determined doing so was necessary were also reasonable. Once the hearing occurred, the time required to produce the record and provide supplemental briefing, a little less than five weeks, was not extensive. Finally, Judge McAvoy returned a decision in less than thirty days, which complied with the Speedy Trial Act. Thus, all the time was excludable, and filing any motion in relation to that period would have been fruitless. Moreover, because no prejudice could exist from agreeing to continuances for time already excluded under the terms of the Act, no prejudice exists from failing file a motion in relation to the May and June continuances. The motion to vacate will be denied in this respect.

Petitioner next complains that his attorney was ineffective for agreeing to a stipulation shortly before trial was scheduled to begin on January 6, 2020 that excluded the time until March 2, 2020, the date when the trial actually occurred. See dkt. # 142.

Judge McAvoy's order relied on 18 U.S.C. § 3161(h)(7)(A), and concluded that a continuance "serve[d] the ends of justice in a manner that outweighs both the public interest and the defendant's rights." See dkt. # 143. Judge McAvoy relied on the facts stated in the parties' stipulation, which included that "[i]n light of the parties' estimate of the duration of trial the Court decided, consistent with the defendant's request, that the December 16 trial date was too close to a holiday to allow for an effective and complete presentation of the government's case and defendant's insanity defense while allowing the jury an adequate time to deliberate." See dkt. # 142, at ¶ 3(a). "Thereafter," the stipulation stated, "counsel for the government sustained an injury that the parties agree in the interest of justice should result in a continuance of this matter until the date of March 2, 2020 to adequately allow each side to prepare for trial." Id.

Petitioner contends that Gottlieb was ineffective because he did not move to dismiss once Judge McAvoy refused to order that the trial begin once Gottlieb informed the court that Petitioner opposed any further delay. Petitioner contends that Judge McAvoy had not provided a sufficient basis for his finding that the ends-of-justice required postponing the trial, and a motion to dismiss would have prevailed at that point. Petitioner further argues that the delay of the trial until March 2, 2020 ignored the parties' agreement to have Gadarian try the case alone, which meant that Judge McAvoy had already decided that the Petitioner's interest in a speedy trial outweighed the Government's interest in having Brown try the case. Moreover, Petitioner contends, Judge McAvoy failed to consider Gottlieb's report to the Court on January 2, 2019, that Petitioner did not want to sign another continuance. Rather than press for Petitioner's wishes, Gottlieb instead pressured Petitioner to agree to a continuance and failed to inform him that Gadarian could try the case himself.

The Court is not persuaded by these arguments. Judge McAvoy's order stated accurately the reasons for postponing the December 16, 2019 trial date and then explained that the Government's counsel had injured himself and was not available to begin the trial scheduled on January 6, 2020. The record, discussed above, provides ample support for Judge McAvoy's findings in this respect. As explained, Petitioner's contention that an agreement existed for Gadarian to try the case relies on misreading the record and ignoring the context of later events. Judge McAvoy's conclusion that the trial should be delayed in light of Brown's injuries was not unreasonable; Brown had prosecuted the case from the beginning, and his injury was unfortunate and unintentional. Petitioner's complaint that he was not informed of the stipulation and would not have agreed to it may reflect poorly on his attorney, but does not establish that Judge McAvoy would have been required to deny the ends-of-justice continuance simply because Petitioner objected. "The STA does not include the defendant's consent among the factors a court must consider in weighing whether the ends of justice would be served by granting a continuance." United States v. Lynch, 726 F.3d 346, 355 (2d Cir. 2013). In the end, "a district court may grant a continuance sought by counsel without consent of the defendant so long as the district court determines that the ends of justice would be served upon its analysis of the factors articulated in 18 U.S.C. § 3161(h)(7)(B) and sets forth its reasons on the record." Lynch, 726 F.3d at 356. Judge McAvoy reasonably did so here. A motion by Gottlieb to dismiss on Speedy Trial Act grounds would have been futile at this point, and no prejudice occurred.

Even if Judge McAvoy had been compelled to dismiss the case for violation of the Speedy Trial Act, in most cases such dismissal does not preclude the Government from re-indicting a defendant who obtains such a dismissal. In considering whether to dismiss with prejudice, the court is to consider three statutory factors: "'the seriousness of the offense; the

facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.'" United States v. Bert, 814 F.3d 70, 79 (2d Cir. 2016) (quoting 18 U.S.C. § 3162(a)(2)). A court should also consider "'prejudice to the defendant[.]'" Bert, 814 F.3d at 79 (quoting United States v. Wilson, 11F.3d 346, 352 (2d Cir. 1993)). In applying these factors, courts recognize that "'[w]here the crime charged is serious, the sanction of dismissal with prejudice should ordinarily be imposed only for serious delay.'" Id. (quoting United States v. Simmons, 786 F.2d 479, 485 (2d Cir. 1986)). Still, "the fact that the underlying offense is serious may be outweighed by the other factors, and the length of the delay may contribute to such counterweight." Id. at 80.

Petitioner contends that these factors favor dismissal with prejudice. He agrees that the offense was serious, but contends that the Government's "bad faith is manifest." He contends that the Government's refusal to have Petitioner examined until Judge McAvoy directed such action demonstrates that the Government acted with an intent to delay the trial. Moreover, Petitioner claims, the Government "reneged" on agreement to have Gadarian try the case himself in January. The Government also, Petitioner claims, misstated to the Magistrate Judge that the Petitioner was responsible for the December and January continuances when Petitioner sought bail.[21] Petitioner also remained in jail for a lengthy period of time, which increases the serious of the violation and constitutes both a hardship punishment, which should not be applied in the

[21] Petitioner's briefing alleges misconduct in the Government's argument in the bail hearing, alleging that the Government misled the Magistrate Judge about who was responsible for the delays. As with all of the instances of alleged misconduct, the Petitioner misreads the Government's arguments, casting in an unsupportable light. To the extent that Petitioner claims he was prejudiced by misconduct in this instance, the Court is unpersuaded. Petitioner, who was held on child pornography charges, had the burden to prove he could be safely released and the Magistrate Judge repeatedly found that he could not be so released.

pre-trial context. Dismissing with prejudice would have had a salutary effect on the administration of justice, since such dismissal would encourage the Government to act quickly to address issues raised by an insanity defense and to be candid with the Court.

Here, there can be no doubt that the crime charged was serious. Petitioner was charged with child pornography offenses. He was allegedly a repeat offender, and faced a long minimum sentence. Petitioner had allegedly attempted to evade surveillance by probation officers, solicited other adult men to view child pornography, and shared child pornography online and in person. This factor weighs in favor of dismissal without prejudice.

In assessing the facts and circumstances of the delay, the court is to focus "equally on the impact of the court's conduct and the impact of the government's conduct on any judicial delay." Id. In evaluating this factor, "courts must hold themselves accountable for ensuring their own compliance with the Speedy Trial Act's requirements." Id. A finding that the facts and circumstances weigh towards dismissal with prejudice "does not always require a finding of 'evil motive,'" but "may tip in favor of dismissal with prejudice in situations where the delay is attributable to a 'truly neglectful attitude.'" Id. (quoting United States v. Taylor, 487 U.S. 326, 338 (1988)). "A factually supported finding of a pattern of neglect, thus showing a 'truly neglectful attitude,' either on the part of the government or the court, may alone suffice to tip the 'facts and circumstances' factor in favor of dismissal with prejudice." Id. at 81 (quoting United States v. Hernandez, 863 F.3d 239, 244 (2d Cir. 1988)). "Finally, it is firmly established that the length of the delay, as 'a measure of the seriousness of the speedy trial violation,' is a critical consideration in evaluating the facts and circumstances that led to the dismissal." Id. (quoting Taylor, 487 U.S. at 340) (internal citation omitted).

While Petitioner has spent much of his briefing on this issue alleging misconduct by the Government, as explained above, the Court has found no serious or prejudicial misconduct by the Government that caused an extensive delay. While 2 ½ years elapsed between arrest and trial, the parties' papers explain that delay in the case before 2019 occurred while Petitioner and the Government attempted to negotiate a plea deal. Additional delay occurred because Petitioner exercised his right to assert an insanity defense and the Government opposed his effort. Judge McAvoy had to adjudicate that motion. Perhaps a delay could be assigned to Judge McAvoy for insisting on the Government having the Petitioner examined and conducting an evidentiary hearing, but a judge acting to acquire the information he feels necessary to decide a motion hardly represents an unnecessary delay. The Court also notes that Judge McAvoy did not provide excessive time for additional briefing and issued an opinion quickly. The delays here largely occurred because the case, and particularly the defense, created complications. While Petitioner was in jail a long time before the trial and the conditions were not ideal, the situation was not so intolerable as to require dismissal of the case with prejudice.[22]

In considering the third factor, the impact of reprosecution on the administration of the act and the administration of justice, courts should remain aware of the purpose of the act and the public's interest in the speedy administration of justice. Id. at 82-83. The danger of dismissal with prejudice ensures that prosecutors do not abuse the system, as "[t]he Act's purpose of expeditiously bringing criminal cases to trial would not be served by assuring those charged with this responsibility that they need not fear the more severe sanction" of dismissal with prejudice "as long as they refrain from intentional efforts to circumvent the Act." Id. at 83. The "threat of

[22] As explained, Petitioner was also held on a parole violation.

dismissal with prejudice in cases of administrative neglect" also "[incentivizes] courts to police their own dockets." Id. Here, where the Government did not purposefully procure the delay in an effort to coerce a plea, and where the delays allowed Petitioner to present an unusual defense, the Court can find nothing that undermined the administration of justice in the delays that occurred. An insanity defense is unusual under these circumstances. The interests of justice were served by allowing the parties the time necessary to litigate that defense. This factor too weighs in favor of permitting reindictment.

Finally, the Court is to consider the prejudice to the defendant. Id. at 81. While a lack of prejudice to the defendant is "'not dispositive,' it can be 'another consideration in favor of permitting reprosecution.'" Id. (quoting United States v. Wells, 893 F.2d 535, 540 (2d Cir. 1990)). "'The longer the delay, the greater the presumptive or actual prejudice to the defendant, in terms of his ability to prepare for trial or the restrictions on his liberty.'" Id. Two types of prejudice exist in this respect: "(1) trial prejudice, i.e., prejudice in the defendant's ability to mount a defense at trial; and (2) non-trial prejudice," from restrictions on the defendant's liberty, whether in jail or out on bail. Id. at 82. Such restrictions "'may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.'" Id. (quoting Taylor, 487 U.S. at 340-41.

The Court finds that no trial prejudice occurred here. Indeed, the delays permitted the Petitioner to present his unusual and complicated defense, and permitted a jury adequate time to consider his claims. He was able to present the witnesses he believed necessary to make that defense, and to challenge the Government's expert's views of his defense. While Petitioner suffered the indignity of a long jailing before his trial, such discomfort does not outweigh the other factors. Judge McAvoy could not have dismissed the case with prejudice, even if he had

found a violation of the Speedy Trial Act. Petitioner has made no showing of prejudice from any ineffectiveness in this respect. The Court will deny the motion on these grounds. To the extent that Petitioners' trail counsel was ineffective for failing to respect his wishes to have a speedy trial, the Court finds that any ineffectiveness in this respect was not prejudicial for the reasons stated above and will deny the motion in that respect as well.

2. Litigation of Petitioner's Suppression Motion

Petitioner next alleges ineffectiveness in litigating his suppression motion. Petitioner moved to suppress statements he made to investigators after they served a warrant and conducted a search of his apartment. Judge McAvoy denied the motion without a hearing after concluding that the briefing and materials related to the motion were sufficient to resolve the motion. Judge McAvoy did have transcripts of the conversation in question.

Judge McAvoy described the issue this way:

> On March 20, 2017, police in Syracuse, New York, searched a residence used by Defendant Benjamin Jakes-Johnson. At the time of the search, New York State Police Investigator Todd Grant and FBI Special Agent Heather Weber interviewed Defendant in an unmarked vehicle. That interview, Defendant claims, was a custodial interrogation. He contends that he did not receive a proper *Miranda* warning while in custody, and that agents ignored his invocation of his right to counsel. As a result, he seeks to suppress the statements he made during that interview.

Dkt. # 122, at 1. Judge McAvoy further described the events of the interview in question, relying largely on an affidavit from New York State Investigator Todd Grant:

> Grant states that he was assigned to the Major Crimes Unit with the State Police in March 2017. Dkt. # 98-1, at ¶ 1. He also served as a member of the FBI Mid-State Child Exploitation Task Force. Id. The FBI had obtained a federal search warrant authorizing search of Defendant's residence at 377 Onondaga Street, Syracuse, New York. Id. at ¶ 3. Grant helped execute the warrant at around 2:45 p.m. on March 20, 2017. Id.

Grant entered the apartment with a master key provided by building management. Id. He "encountered" Defendant in the kitchen and informed him of the FBI warrant. Id. He asked Defendant to put down his cell phone and come with him to the hallway of the apartment building. Id. Grant conducted a pat-down search of the Defendant to ensure officer safety. Id. He did not use the authority the warrant provided to perform a physical search of the Defendant. Id.

Grant and Defendant went to the stairwell in the apartment building. Id. Defendant sat down on the stairs, and Grant introduced himself as a State Police Officer working with the FBI. Id. Grant "informed [Defendant] that he was not under arrest but" Grant wanted "to have a conversation with him about what was going on today with respect to the search warrant." Id. Special Agent Weber joined them thirty seconds later and introduced herself. Id.. Grant again "told Jakes-Johnson he was not under arrest," but that the two investigators wanted to speak with him about the warrant. Id.

Defendant, Grant claims, stated that he "was willing to talk to us but wanted to do so in a more private location[.]" Id. Defendant, Grant avers, did not want his neighbors to know what was happening. Id. Grant informed Defendant that he had an unmarked vehicle outside the building, and that they could speak there if Defendant wished. Id. Defendant agreed to do so. Id. Defendant, Grant, and Weber went to the vehicle, a rented black 2017 Hyundai Santa Fe. Id. This rental car "had no police equipment in it." Id.

Defendant got in the Hyundai's back seat on the passenger side. Id. at ¶ 4. Grant and Weber removed their protective equipment and "put on jackets that concealed [their] law enforcement identifiers and weapons." Id. Grant got his audio recorder and turned it on as he entered the back seat of the car on the driver's side. Id. After a few minutes, Weber got into the driver's seat. Id. Neither officer locked the doors. Id. Defendant was not restrained in any way and no one told him he was not free to leave. Id.

Grant contends that when he got into the vehicle he "began my standard routine of reading *Miranda* warnings." Id. at ¶ 5. He had not arrested the Defendant, he claims; he attempted to offer the warnings "because this is my standard practice before questioning a suspect who is the subject of a search warrant." Id. Before Grant could continue, he alleges, Defendant "immediately interrupted me and began making spontaneous admissions that were not in response to any questioning from me." Id. Grant believed the statements were "admissions" that showed that Defendant "understood what he was looking at and believed he was guilty." Id.

Defendant, Grant claims, "almost immediately" expressed a desire to negotiate concerning potential charges against him, and raised the issue of his attorney:

> Defendant: What I would like is I probably should have my attorney.
>
> Grant: Okay.
>
> Defendant: I probably–I need to think of who I want as an attorney.
>
> Grant: Okay. I can tell you this. You absolutely–you don't have to talk to us a hundred percent. You can have your attorney, however, that process, that's great, it's not something we're gonna do today. Id. at ¶ 6.
>
> Grant claims he did not understand Defendant's statement that he "probably should have my attorney" and his desire "to think of who I want as an attorney" to be a request to speak to counsel. Id. Grant contends that his responses were meant to convey that Defendant had a right to speak with counsel and that to confirm that Grant could not "negotiate with him or an attorney about potential charges or resolutions to potential charges." Id. Grant states that he did not seek "to mislead or confuse the defendant[.]" Id. Grant did not notice any confusion in Defendant's subsequent "statements" and "demeanor." Id.
>
> Shortly thereafter, Grant relates, he again began reading Defendant the *Miranda* warnings, which Defendant "interrupted" and "began reciting his rights" and told Grant "he wanted a 'cooperation agreement.'" Id. Not long after that exchange, Grant read Defendant the full *Miranda* warning. Defendant confirmed to Grant, Grant claims, "that he wished to waive those rights and speak to me." Id.

Dkt. # 122, at 2-4.

Judge McAvoy found that Petitioner was not in custody when he made the statements in question. After explaining that the threshold question under the circumstances was whether Petitioner was in custody when he made the relevant statements, Judge McAvoy found as follows:

> As evidence that he was in custody at the time of his interrogation, Defendant argues that Weber and Grant "removed" him from his residence and put him in an unmarked vehicle to question him. Once in the vehicle, Grant informed Defendant that they were "going to have a conversation." Grant told Defendant that he was the subject of an investigation, and that undercover officers had traded child pornography with him online. All of these statements, Defendant argues, which came in the context of a search of Defendant's home and while in a vehicle with officers, put him in custody and required a *Miranda* warning.

> The affidavit supplied by Grant, as well as the transcript of the conversation between Grant, Weber and Defendant, indicate that Defendant was not in custody before Grant provided Defendant with a formal *Miranda* warning. Defendant has provided no evidence to dispute Grant's statement that the three ended up in a rental vehicle out of Defendant's expressed desire for a more private location to talk. He has also provided no evidence to dispute that Grant and Weber did not display weapons or protective clothing, nor does he point to any evidence to dispute that the car remained unlocked and that he was never told he was not free to leave. The transcript and recording of the conversation also indicates that Defendant spoke voluntarily and often spontaneously, even ignoring Grant's two attempts to advise him of his rights. Defendant engaged in conversation with Grant, even as Grant attempted to warn him of the risks of doing so, and he expressed an understanding of those rights before Grant was able to provide them. Under these circumstances, a reasonable person would not consider his freedom of movement curtailed to the point of formal arrest. As such, the Court finds that Defendant was not in custody until after Grant provided Defendant with the *Miranda* warnings, and that the statements and admissions he made before receiving the warnings are not subject to suppression. In addition, suppressing the statements under these circumstances–where Grant attempted to provide the rights twice and Defendant continued talking–would not serve the "prophylactic" purpose of the *Miranda* rule. See New York v. Quarles, 467 U.S. 649, 654 (1984) ("The prophylactic *Miranda* warnings therefore are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'") (quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974)).

Id. at 9-10.

Judge McAvoy also rejected Petitioner's argument that he had invoked his right to an attorney after being read his Miranda warnings, and that any statements made after that invocation were inadmissible. Judge McAvoy explained that the law required that any request for an attorney under the circumstances must be unequivocal to require the police officer to desist from questioning a defendant. Id. at 18-19. Judge McAvoy found that none of the statements in question contained an unequivocal invocation of the right to counsel, and denied the motion in that respect as well. Id. at 19-25.

Petitioner contends that Gottlieb's performance fell below a reasonable standard in litigating this motion. Gottlieb allegedly failed to lay out the law concerning when a person is in

custody and failed to provide an affidavit from the Petitioner which would help establish that he was in custody. Gottlieb also failed to speak with Petitioner to obtain such information. Doing so would have allowed Petitioner to counter Grant's claims regarding where he introduced Weber to Petitioner and clarified the circumstances under which officers entered Petitioner's apartment. Instead, Gottlieb attempted to rely on a transcript of the interrogation. Gottlieb amended his own affidavit when the Government pointed out this failing, but Petitioner claims that he still failed to investigate the case and challenge the statements made by Investigator Grant in his affidavit. Petitioner also contends that Gottlieb failed to use discovery, such as FBI reports ("302s") that showed nine agents and investigators entered Petitioner's apartment and showed that Grant had earlier claimed that he gave Petitioner Miranda warnings in the apartment.

Petitioner submits an affidavit that in relevant part addresses the search of his apartment and the statements he made to investigator Grant. See dkt. # 200-3. In the affidavit, Petitioner contends that agents entered his apartment while he was with two JC Penney employees, who were there to hang blinds. Id. at ¶ 2. Petitioner was looking at his phone "when, suddenly, the door . . . opened and law enforcement agents with guns drawn burst in, shouting." Id. An agent, who had a law enforcement insignia on his jacket, "grabbed my phone from my hand, patted me down on my chest and both sides, took me by the elbow, and hustled me out of my apartment" into a hallway. Id. at ¶ 3. That man was Grant, who "steered" Petition to an elevator. Id. at ¶ 4. Petitioner asked Grant if they could take the stairs, scared that his neighbors would see him "arrested like that." Id. Grant agreed, and followed Petitioner into the stairwell. Id. at ¶ 5. Petitioner "was hyperventilating and dizzy"; he had to sit down because he "was in shock." Id. Grant told Petitioner "he was an investigator with the New York State Police and worked with the FBI and that we were going to his car." Id. at ¶ 7. Petitioner states that Grant "certainly

never said that I was not under arrest" or that he simply wanted to "hav[e] a conversation." Id. Webb did not meet them in the stairwell. Id. at ¶ 8. He saw her in the vehicle, after he and Grant got in the car. Id. He does not recall making statements to Grant in the stairwell, and never said he wanted to go to a more private location. Id. Grant "firmly took my arm and steered me toward the SUV" when they reached the parking lot behind the building. Id. at ¶ 9. Grant put petitioner in the rear passenger seat, went to back of the vehicle, and opened the rear door. Id. at ¶ 10. Grant then entered the car by the rear door on the opposite side of Petitioner. Id. "His next words were those recorded on the taped statement, telling me to sit up and saying "'You and I need to have a conversation.'" Id. Petitioner contends that heard door locks clicking after Agent Weber entered the car and sat in the driver's seat "a few minutes later." Id. at ¶ 11. He later tried to open the car's windows, but found them locked. Id. Petitioner relates that he asked Grant to unlock the window, but does not relate whether Grant did so. Id.

Petitioner contends that Gottlieb was not effective because he did not elicit this statement and submit it with his papers in relation to the suppression motion. In the context of whether an attorney's performance fell below an objective standard of reasonableness, a court should recognize that "counsel must have 'wide latitude' in making tactical decisions." Henry v. Poole, 409 F.3d 48, 63 (2d Cir. 2005) (quoting Strickland, 466 U.S. at 689). Moreover, "the court must make 'every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time,' and 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Henry, 409 F.3d at 63 (quoting Strickland, 466 U.S. at 689). Actions or omissions that 'might be considered sound trial strategy' do not constitute ineffective assistance." Id. (quoting Strickland, 466 U.S. at 689).

"'Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable,' and even strategic choices made after less than complete investigation do not amount to ineffective assistance—so long as the known facts made it reasonable to believe that further investigation was unnecessary." Id. (quoting Strickland, 466 U.S. at 690-91). When it comes to investigating the facts of a case, "[t]he reasonableness of an investigation is obviously a reflection of the facts of a case" and a court is to "make a careful examination of counsel's efforts on a case-by-case basis." Greiner v. Wells, 417 F.3d 305, 321 (2d Cir. 2005). Thus, often "reasonable investigation will require defense counsel to 'speak before trial with readily available fact witnesses whose non-cumulative testimony would directly corroborate the defense's theory of important disputes.'" Greiner, 417 F.3d at 321 (quoting Pavel v. Hollins, 261 F.3d 210, 221 (2d Cir. 2001)). Therefore "as a general matter, where there is 'reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.'" Pavel, 261 F.3d at 221 (quoting Strickland, 466 U.S. at 691).

The Government provides an affirmation from Robert C. Gottlieb, Petitioner's trial attorney. See dkt. # 210-8. Gottlieb explains that he purposefully chose not to include an affidavit from Petitioner in the papers he filed in connection with the suppression motion. Id. at ¶ 25. Gottlieb had "concerns about the veracity of the facts which he intended to submit." Id. Moreover, Gottlieb explains, submitting a sworn affidavit "posed a strategic issue for any hearings and trial." Id. at ¶ 26. Submitting such a statement, Gottlieb felt, would expose Petitioner to examination "on that information at a suppression hearing, which could seriously impact not only his own testimony at trial, but also Dr. Goldsmith's testimony if information presented in his affidavit or hearing testimony was inconsistent with information provided to Dr.

Goldsmith and incorporated as part of his expert report." Id. If Petitioner testified at trial, Gottlieb also worried that any affidavit or suppression testimony could be used to impeach him then. Id. Thus, "[t]he safest route to preserve the trial strategy was to submit the motion without an affidavit." Id.

The Court finds that Gottlieb's failure to submit an affidavit from the Petitioner in connection with the suppression motion was sound trial strategy and did not fall below an objective standard of reasonableness. Petitioner's defense was that, because of his severe PTSD, he could not appreciate the nature and consequences of his actions at the time of the offense. Avoiding the introduction of evidence that could be used at trial to undermine this defense was a reasonable strategy, and the Court's role is not to use the benefit of hindsight to second-guess that strategy. Petitioner's claim regarding the failure to introduce an affidavit fails in this respect under the Strickland standard.

Even assuming that Gottlieb did not engage in sufficient investigation when he failed to elicit a statement from Petitioner about the circumstances of his interrogation and then use the statements in the 302s and other investigation data in an effort to impeach Grant during a suppression hearing, the Court finds that those failings did not prejudice Petitioner because the information that Petitioner now provides would not have changed the outcome of the suppression motion. Petitioner contends that officers had guns drawn when the entered the apartment to serve a no-knock warrant, but he does not contest Judge McAvoy's finding that no officers had guns or other police implements showing when he arrived at the car. The fact that Petitioner was upset is of no matter, since, as Judge McAvoy explained, the question is not one about Petitioner's subjective feeling that he was under arrest, but a question about whether a reasonable person under the circumstances would feel that way. In short, the evidence that Petitioner claims

Gottlieb should have presented at a proposed suppression hearing did not add any meaningful evidence for Judge McAvoy to consider and would not have changed the outcome of that proceeding. The Court could deny the motion in this respect on either element of the Strickland standard.

Petitioner also argues that Gottlieb fell below a reasonable professional standard in the arguments he made regarding Petitioner's alleged invocation of counsel. Petitioner contends that counsel should have argued that his statement that he "probably" should speak to counsel was an unequivocal invocation of the right to counsel. Petitioner's briefing spends several pages arguing that case law supports a finding that using "probably" is an invocation of counsel. Petitioner's Brief at 44-47. He also points to other legal arguments that Gottlieb could have made. Id. at 47-49.

In this respect, Petitioner's argument is largely that Gottlieb made the wrong arguments. The briefing does not deny, however, that Gottlieb argued that certain statements were equivocal, and Judge McAvoy's decision examined those statements and decided they were equivocal, citing to relevant case law and apply that law to the statements that Gottlieb cited. See Suppression Decision at 19-25. Counsel for Petitioner here handled Petitioner's Appeal. Petitioner did not challenge Judge McAvoy's suppression decision on appeal, though all of these arguments were available there. See Appellate Brief, dkt. # 213-3. If Petitioner's brief is correct, Petitioner could have prevailed on appeal. In any case, the Court has examined Judge McAvoy's decisions and the authorities cited therein and finds that Gottlieb made no prejudicial

error in his arguments. Even if he had made the arguments that Petitioner suggests he should, he would not have prevail on his argument that Petitioner invoked his right to counsel.[23]

Finally, even if the Court is incorrect and Gottlieb was ineffective and the Petitioner suffered some sort of prejudice from not having the evidence suppressed, the Court would still find that no grounds for granting the motion to vacate exist because even suppressing the

---

[23] Petitioner's briefing reads like a reargument of the suppression motion, which is not appropriate on collateral appeal. In any case, Petitioner's arguments are no more persuasive than when Gottlieb made them. Petitioner contends, for instance, that when Grant asked him "Do you want me to take a statement? You want me to take a statement from you?" and he answered "What I would like I probably should have my attorney . . . I probably—I need to think of who I want as an attorney", he unequivocally invoked his right to attorney. Petitioner argues that he "was clear that he wanted a lawyer." Petitioner's Brief at 46. No reasonable judge would accept this argument. Indeed, many courts in many federal jurisdictions have rejected just such a claim. See, e.g., United States v. Cowettel, 88 F.4th 95, 101 (1st Cir. 2023) (officers appropriately sought clarification about whether defendant invoked his right to counsel when he said he "probably" should speak to an attorney); United States v. Lieber, 566 F.Supp.3d 110, 115 (D.Mass. 2021) (statement by defendant that he "probably" should have an attorney not an unambiguous invocation of counsel); United States v. McGhee, No. 99-CR-105E(F), 2000 U.S. Dist. LEXIS 15066, at *26-27 (W.D.N.Y. May 26, 2000) (defendant's statement that I suppose I need a lawyer was equivocal); Scott v. Epps, No. 3:07cv101-P-A, 2008 U.S. Dist. LEXIS 90404 (N.D. Miss. Sept. 6, 2008); Weissert v. Palmer, No. 1:10-cv-851, 2015 U.S. Dist. LEXIS 130397 (W.D.Mich. July 31, 2015); United States v. McNamara, No. 2:17-cv-307-SPC-NPM, 2021 U.S. Dist. LEXIS 20084 (N.D. Ill. October 18, 2021)(statement "'I think I should probably talk a little more with a lawyer' lacks the clarity found in unambiguous invocation of counsel."); United States v. Smith, No. CR09-5088BHS, 2009 U.S. Dist. LEXIS 39657, at *1-2 (W.D. Wash. Sept. 27. 2009); United States v. Cloud, 594 F.3d 1042, 1046 (8th Cir. 2010); United States v. Wetsch, No. 12-0045 (SRN/JJG), 2013 U.S. Dist. LEXIS 51682, at *95 (D. Minn. February 8, 2013) (Defendant's argument that the use of the word 'probably' constitutes an unambiguous request for counsel flies in the face of Supreme Court precedent that the invocation of counsel must be a clear one."); United States v. Gibson, No. 2:14-cr-00287, 2017 U.S. Dist. LEXIS 58132 at *14 (D. Nev. January 11, 2017) (statement in reference to a question that to "that one, I probably want to talk to a lawyer about because I have to be careful about what I say" was not an unambiguous request for counsel); United States v. Garrett, 805 Fed. Appx 709, 716 (11th Cir. 2020) (statement that defendant "probably" should have a lawyer present meant "[h]e merely *suggested* that he may have wanted his counsel present" and was ambiguous) (emphasis in original); United States v. Edwards, 834 Fed. Appx. 559, 560 (11th Cir. 2020). Gottlieb cannot be faulted for not convincing Judge McAvoy to ignore the plain meaning of the word probably or the context in which it was uttered.

statements that Petitioner claims should have been suppressed would not have prevented the jury from considering statements that the jury would have undermined Petitioner's defense.

Judge McAvoy also found that certain statements of the Petitioner would be admissible even if he was in custody at the time he made them. Judge McAvoy concluded as follows:

> The government argues that statements Defendant made in initially speaking with Grant in the vehicle are admissible, regardless of whether he was in custody, because those statements were spontaneous admissions, and not made in response to any questions. These statements by Defendant included "I know I can't negotiate with you," and "[s]o what I'm trying to do–I know my life is over as I speak right now," and "I know what's going on." Transcript of Interview ("T"), dkt. # 93-1, at 2-3. Defendant also stated that "I understand what I'm facing right now . . . I'll be a very old man before I ever get out, I know that." Id. at 2. Courts are clear that "statements made spontaneously by a defendant are generally exempted from the *Miranda* requirements because they are not the result of the deliberate elicitation by the officers." United States v. Wiggins, No. 12cr6114L, 2013 WL 1645180 at *8 (W.D.N.Y. April 16, 2013) (citing United States v. Innis, 446 U.S. 291, 299-300 (1981)). No questions elicited these statements, and they would be admissible even if Defendant were in custody at the time.

Id. at 9-10 n.3.

Petitioner's defense in this matter was that he was insane at the time he committed the crimes in question. Petitioner pleaded his defense under the Insanity Defense Reform Act of 1984 ("IDRA"), 18 U.S.C. § 17. That act, passed in 1984, "made two substantial changes to the insanity defense." United States v. Garcia, 94 F.3d 57, 61 (2d Cir. 1996). First, Congress "narrowed the definition of insanity that had evolved from the caselaw." Garcia, 94 F.3d at 61. Second, "it shifted to the defendant the burden of proving the insanity defense by clear and convincing evidence." Id. As such, "[a]t trial, a defendant who seeks to prove he was legally insane when the offense occurred must prove by clear and convincing evidence (1) 'he had a severe mental disease or defect' at the time of the offense; and (2) 'as a result he had been unable to appreciate the nature and quality of the wrongfulness of his acts.'" United States v. Bumagin,

136 F.Supp.3d 361, 372 (E.D.N.Y. 2015) (quoting United States v. Polizzi, 545 F.Supp.2 270, 272 (E.D.N.Y. 2008)).

As will be further explained below, the Government introduced substantial evidence through witnesses who were aware of Petitioner's use of child pornography that Petitioner knew the nature and quality of his acts. The Government also introduced evidence that Petitioner kept an apartment in Syracuse that he did not disclose to his probation officer, and where he kept child pornography. Even if Petitioner's statements to Grant and Walsh were suppressed by Judge McAvoy for the reasons stated here by Petitioner, that evidence would still have been introduced to the jury, along with the excited utterances outlined above. Those statements indicate the Petitioner knew exactly the consequences of his actions. Even without the evidence that was subject to suppression, Petitioner would not have met his burden in proving the insanity defense, and the motion to vacate would be denied in this respect as well.

3. Alleged Deficiencies in Trial Performance

Petitioner next contends that Gottlieb was ineffective in his performance at trial. He complains that Grant's testimony at trial was improper for a variety of reasons, and that Gottlieb was ineffective for failing to object on a number of bases. Petitioner contends that these errors were compounded by Gottlieb's alleged failure to investigate the case and prepare for trial. He did not provide Petitioner's expert, Dr. Goldsmith, with discovery before Goldsmith wrote his report. This allowed Brown to effectively cross-examine Goldsmith about his lack of knowledge of Petitioner's statements to investigators, which undermined the insanity defense. Gottlieb also failed to discuss the facts of the case with the Petitioner, and thus could not cross-examine Grant effectively when he made inculpatory statements about Petitioner's use of hotel rooms to hide his IP address when he accessed child pornography. Further, Gottlieb did nothing to verify

Petitioner's claims that he had entered into a sexual relationship for protective purposes during his earlier stint in prison. He also did not discuss with Petitioner's parents the money they sent to that man. These failings meant that he could not contradict Grant's statements at trial that the FBI had investigated this alleged prison abuser and found no such inmate.

The Government responds that these decisions from Gottlieb were strategic ones based on Petitioner's chosen defense and his chosen trial strategy. Since Petitioner admitted to possessing and exchanging child pornography, Gottlieb preferred to focus less on Grant's factual testimony about the child pornography and more on Petitioner's mental state. Moreover, much of the testimony that Petitioner claims Gottlieb should have sought to exclude was provided by or corroborated by other witnesses, and keeping such testimony out would not have materially aided Petitioner's defense.

Gottlieb's affirmation explains his trial strategy as follows:

> At trial, the defense was that due to a severe mental disease or defect, Mr. Jakes-Johnson could not appreciate the nature of his actions or that they were wrong. The defense did not assert that Mr. Jakes-Johnson did not possess and trade child pornography. I determined that to proceed with that defense was without any factual basis and would undermine the defense's credibility to convince the jury to seriously consider the insanity defense. My strategy was to downplay the actual child pornography itself and focus on the personal trauma that Mr. Jakes-Johnson had endured during his childhood which had led to his Complex PTSD and which, I argued, negated his criminal liability for otherwise criminal conduct. The entire trial was focused on this defense theory and focused on horrific childhood sexual abuse by his cousin.

Gottlieb Affirm. at ¶ 28.

Petitioner complains that Gottlieb was ineffective in several ways in how he addressed the trial testimony of Investigator Grant. Petitioner claims that Grant testified to opinions as a lay witness that he lacked the personal knowledge to form in violation of the Federal Rules of Evidence. Grant purportedly testified about certain file sharing groups without

proper foundation, and thereby miscast Petitioner as being involved with the worst types of child pornography. He also gave improper opinion testimony about Petitioner's knowledge of legal terms, procedures, and personnel. Grant also allegedly grave improper testimony about the type of prison in which Petitioner was housed, basing his knowledge on the security levels of the prison based on his prior knowledge, rather than any investigation of the actual location of Petitioner's imprisonment. Grant further testified improperly about Jakes-Johnson's online activities when he sought encounters with other men; Grant testified that he was seeking other men with an interest in children, which was not supported by Petitioner's statements in question. Grant's testimony was also unduly prejudicial, since it cast Petitioner as a person who had sexual interest in children and overstated Petitioner's role in trading and collecting child pornography. In the end, Petitioner claims, Grant testified as a lay witness to provide "completely unfounded testimony not just about Jakes-Johnson's purported "activities" but potentialities." Petitioner's Brief at 59. Gottlieb's failure to object to any of this testimony harmed Petitioner's appeal as well, since Judge McAvoy's admission of the evidence was subject only to plain-error review.

Because of Gottlieb's trial strategy, and because the child pornography that Petitioner possessed was "explicit and extremely disturbing," Gottlieb relates that he "deliberately chose not to spend time going back and forth with Investigator Grant on the specific nature of the" materials Petitioner possessed. Id. at ¶ 29. Gottlieb thought that the jury, if presented with too much information about the child pornography, would focus on that salacious material more than on the insanity defense. Id. Pressing Grant on the details may have exposed "a minor contradiction" in his testimony that the defense in any case argued was irrelevant and "at worst it would have given Investigator Grant the ability to reinforce his direct testimony and potentially open the door to the introduction of more explicit child pornography images than permitted by

Judge McAvoy." Id. Since the Petitioner admitted to possessing child pornography, "[t]here was nothing to gain by vigorously attacking Investigator Grant's credentials or his description of the materials recovered from Mr. Jakes-Johnson's apartment[.]" Id.

"Decisions about 'whether to engage in cross-examination and if so to what extent in what manner, are . . . strategic in nature' and generally will not support an ineffective assistance claim." Dunham v. Travis, 313 F.3d 724, 732 (2d Cir. 2002) (quoting United States v. Nersesian, 824 F.2d 1294, 1321 (2d Cir. 1987)). Having examined the record, the Court is persuaded that Gottlieb made reasonable strategic decisions regarding his cross-examination of Grant. Petitioner's complaint is largely that Gottlieb should have challenged Grant about his characterizations of the type of child pornography that Petitioner had viewed, the nature of the groups in which he participated, the nature of his sexual activity, and the amount of danger that Petitioner presented with children. The Court concludes that deciding not to challenge testimony about Petitioner's sexual activity, the groups in which he participated, and the types of material which he collected was a reasonable strategy for an attorney pursuing an insanity defense in a child-pornography matter. Petitioner did not deny that he had collected the child pornography in question, and Gottlieb could have reasonably concluded that engaging in long disputes about the nature of the material and the sources for it would do nothing to advance Petitioner's contention that he collected the material and engaged in the conduct while suffering from complex PTSD that rendered him unable to recognize the nature of his conduct. Gottlieb could reasonably have thought that encouraging the jury to consider the nature of the material in question or the groups in question would have undermined Petitioner's legal position. Not objecting and moving on was a reasonable strategy under the circumstances.

In any case, even if Gottlieb had objected specifically to Grant's testimony and convinced Judge McAvoy to exclude it, a wealth of other testimony covering much the same material existed at trial. Petitioner does not contend that Gottlieb was ineffective for failing to seek to exclude that testimony. For instance, a probation officer who supervised Petitioner after his release from prison testified that Petitioner violated the terms of his probation by renting an apartment in Syracuse not disclosed to probation and staying at hotels in Syracuse without authorization by probation.[24] Trial Transcript, dkt. # 187-1 at 146-7, 164-5. The apartment was not "an approved second residence." Id. at 166. Petitioner also violated the terms of his probation by possessing computers, storage devices, and internet-capable devices without informing his probation officer. Id. at 147. Petitioner also failed to inform his probation officer that he was accessing a "file sharing network called GigaTribe." Id. at 148. Petitioner also told his probation officer that he had an "interest in keeping up-to-date on child pornography laws." Id. The officer had noted that Petitioner was searching websites and news articles on the subject, and Petitioner "described himself as an advocate and wanted to keep abreast of policy recommendations and the like and that he donated to reform sex offender laws in the ACLU in order to make a push for criminal justice reform." Id. at 149.

Jordan Cohen also testified in this matter. Cohen testified that in the Summer of 2016 he posted on Craiglist.com in a "section for men who are looking for sexual encounters with other men." Id. at 174. He "posted ads looking for other men in that summer to meet up to watch child pornography that I was in possession of at that time." Id. To attract such men, he would

---

[24] Petitioner resided in Manhattan but travelled to Syracuse to work at a company his parents owned. He was supposed to stay with his parents while in Syracuse, and report if he stayed someplace else. T. at 146-147.

use "words like perv, words like yng which is sort of the euphemism for young, meaning under 18. This was all in reference to the child pornography." Id. When he was looking for men for sexual acts that did not involve child pornography he would not include those terms. Id. at 175. Between the summer of 2016 and his arrest on March 3, 2017, Cohen estimated that he had 15-20 encounters with men that involved child pornography. Id. at 177. Cohen explained how people exchanged messages on Craigslist, and also explained that he used another service, Kik, which was "basically text messaging but you don't have to use your personal phone number." Id. at 180. Cohen eventually testified to conversations with Petitioner on Kik that included discussions of sexual preferences and the interest that Petitioner and Cohen had in children. Id. at 198-9. Petitioner stated that he was interested in boys "8 to 14" and asked if "You have pics of hotness boys." Id. at 199. Petitioner denied that he had any pornography but stated that "we can watch and fuck or jerk." Id. at 200. The two then negotiated to meet. Id. at 200-203. Cohen testified that Petitioner came to Cohen's apartment in Manhattan, where they went to Cohen's bedroom. Id. at 206. A third person the two had discussed was already in the bedroom, naked on the bed. Id. at 207. Cohen's laptop was in the room, and he eventually placed it on a desk near the bed. Id. at 208. "There was child pornography playing on the laptop." Id. Petitioner did not object to the child pornography during the time the three men were in the room, which lasted between 25 and 40 minutes. Id. at 211. After he left, Petitioner messaged Cohen to say, "fucking hot" and that he "[a]bsolutely love[d] to see the most hardcore vids while jacking with you." Id. While the two messaged in a similar vein several times, they never again met up. Id. at 213-216.

Kevin Matthews, an FBI special agent, also testified at trial. Among Matthews's duties was investigating "[t]he distribution, receipt, [and] production of child pornography." Id. at 271.

Matthews testified that he had "received training in peer-to-peer programs to include BitTor and GigaTribe areas." Id. at 272. "Peer-to-peer is essentially software that enables two computers to communicate with each other." Id. That technology also "allows computers to share files with each other, communicate with each other." Id. Matthews explained that "GigaTribe is a peer-to-peer program . . . that allows computers to communicate with each other." Id. at 273. Matthews testified that GigaTribe allowed users to "create [their] own network" and "invite" others to join. Id. Others can also invite another user to join their network. Id. Both users need to be online to share or communicate with each other, and GigaTribe does not store information for users. Id. Each "user is essentially their own network administrator where they can choose what files to share on the program." Id. at 274.

Users on GigaTribe can join "tribes," which are "essentially special interests within a group." Id. While there are sections for those interested in sports or the arts, "the big section is like an erotic section . . . and within there there's several different tribes that are sexual in nature." Id. GigaTribe also permits users to chat when both are online at the same time. Id. Such chats can occur while the users trade files. Id. To trade files, users could make a folder on their computer or on an external drive like a thumb drive visible to the other user. Id. at 275. The user can put a password on the file, and the file would not be visible to the other user without that password. Id. at 275-76. The FBI sometimes obtains the username and identity of a GigaTribe user caught with child pornography in an attempt to target that user's contacts. Id. at 276. That function is useful to agents because the GigaTribe user whose identity the agent assumes is trusted by others seeking child pornography. Id. at 277. Since the agent cannot share child pornography, assuming an identity is a good way to contact other suspects. Id.

Matthews described assuming the identity of a GigaTribe user and conducting an investigation where he attempted to connect with other users. Id. at 278-79. He invited a user named 377daga to join his network, and 377daga accepted in December 2016. Id. at 282. 377daga "initiated a chat" with Matthews in December 2015, asking if "I want to trade." Id. 377daga "[s]tated that they traded boys" and "[a]sked me if I knew, if I had hardcore" and asked how Matthews defined "hardcore." Id. Matthews responded, "tied or forced," and 377daga "seemed to agree on that definition." Id. 377daga shared a folder which was password protected and provided the password. Id. Matthews provided a password for a folder he shared. Id. at 283. There was no actual child pornography in that folder. Id. The folder 377daga provided contained child pornography. Id. at 284. Matthews was able to download around 25 files, including images and videos, before 377daga removed the folder. Id. at 285. Data onscreen indicated that daga377 had 265 files to share. Id. at 307. 377daga attempted to download a folder from Matthews's account, which did not contain any child pornography but was titled "7YO cum shot with sound." Id. at 305. The jury saw an image received from 377daga that "appear[ed] to depict two boys, one prepubescent boy, another young boy on a bed. There's an adult male lying on the bed, one of the boys is on his stomach and the adult male is penetrating the anus of the boy that's on top of him and the younger boy is off to the side." Id. at 312.

Matthews testified that, after the GigaTribe session he attempted to identify the user of the 377daga account. Id. at 316. Investigation revealed the Petitioner was the subscriber of the account used to create the 377daga GigaTribe account. Id. at 316-321. He also testified that 377daga was a member of a number of different "tribes" on GigaTribe, including "Pervd4rmbirth, Gayrape-22, Forcedincest, Boytoys, YboyU16, Boyzzz, Oni, Boy_vids, Bibcam-trade, Boys4more, Boysarabic, and boy_beauty." Id. at 323. Investigation also revealed

that the account had been accessed from a Candlewood Suites hotel at a time where Petitioner was a guest there. Id. at 325-26.

Zahan Mistry testified to the search of Petitioner's apartment and the various electronic devices recovered there. Id. at 341-54. Mistry also testified to the search of Petitioner's automobile. Id. at 356. In the car was a package containing a book titled *Refining Child Pornography Law: Crime, Language and Social Consequences*. Id.

FBI special agent Jenelle Bringuel also testified. Her work has a "focus on investigations involving child exploitation." Id. at 361. Bringuel testified about examining electronic evidence and creating reports on the material. Id. at 362-64. Bringuel analyzed a 64 gigabyte thumb drive seized from Petitioner's apartment. Id. 364. Bringuel's analysis revealed "[a]pproximately 489" files containing child exploitation material, around half of them videos and half images. Id. at 376. The files contained images of "prepubescent boys" and "prepubescent girls." Id. Bringuel estimated that the ages of the children depicted ranged between 2 and 12 or 13. Id. at 377. The images depicted sex acts, including "[o]ral sex, anal and vaginal." Id. Bringuel found that the images were stored on the drive between August 2015 and January 2017. Id. at 378. The images were created on "about a dozen" different dates. Id. The Government introduced and Bringuel described clips of videos from the thumb drive that depicted sex acts between adult men and children. Id. at 381-83.

The evidence related here demonstrates that Petitioner did not suffer any prejudice from the portions of Grant's testimony to which Petitioner claims Gottlieb should have objected. Matthews testified about GigaTribe before Grant did, and explained Petitioner's membership in various groups. Gottlieb did not object, and Petitioner does not complain about that. Matthews and Bringuel testified to images that Petitioner possessed of young children engaged in sexual

acts with adult men, and Petitioner does not complain about Gottlieb's lack of objection to such testimony. The jury would have had information similar to that provided by Grant even if Judge McAvoy had excluded Grant's testimony on those points. Matthews's testimony also established a connection between Petitioner and hotel rooms where he accessed child pornography. Cross-examination of Grant with Petitioner's explanations for his presence there would not have overcome the information that Matthews already provided. Likewise, establishing that Grant misspoke about the nature of Petitioner's prison assignment and failed to investigate the alleged assault would not have contradicted any of these damning facts. The Court therefore finds that Gottlieb's performance in cross-examining grant, even if it fell below an objective standard of reasonableness, did not prejudice Petitioner.

Likewise, even assuming that Gottlieb fell below a reasonable standard in failing to provide discovery to Goldsmith, Petitioner's insanity expert, before he wrote his report, such failings did not prejudice Petitioner. Goldsmith was allegedly unaware of Petitioner's proffer statements and his statements to Grant when he wrote his report finding that, due to complex PTSD, Petitioner was unable to understand the nature and consequences of his actions at the time of his offenses. Sharing discovery of this sort would not have helped Goldsmith find that Petitioner failed to understand his actions, since the evidence in question established that Petitioner understood exactly what he was doing and attempted to work with investigators to avoid or limit legal responsibility for his actions. For example, Grant testified at trial that during their first interview, Petitioner had suggested that he and the Government could work out a cooperation agreement, where he would identify others involved in child pornography in exchange for a lighter sentence. T. at 420. Petitioner used the term "5K," a technical term used when a federal defendant cooperates, which was "the first time [Grant] ever had a defendant use

a term like that to me in the hundreds and hundreds of cases I was involved in." Id. at 421. Grant testified that Petitioner appeared to have a deep knowledge of sentencing on child pornography and he found this unusual because Petitioner was "interacting with me and certainly appears, the way I took it, trying to negotiate something." Id. at 423. Grant also took Petitioner as offering to go undercover in on-line child-pornography groups to help catch other perpetrators. Id. at 424. The other evidence Petitioner contends Gottlieb should have shared with Goldsmith likewise would not have supported his conclusions. Perhaps Gottlieb erred in not doing so, but doing so would surely not have advanced Petitioner's legal position.

In the end, "[e]ven if counsel's strategy is 'professionally unreasonable,' there is no ineffective assistance of counsel 'if the error had no effect on the judgment." United States v. Rosemond, 968 F.3d 111, 122 (2d Cir. 2020) (quoting Strickland, 466 U.S. at 691). Relief is unavailable when a petitioner faces "a plethora of evidence against him" and "there is little reason to believe that alternative counsel would have fared any better." United States v. Simmons, 923 F.2d 934, 956 (2d Cir. 1991). In this case, Petitioner, who was on probation for possessing child pornography, rented an apartment in Syracuse, New York without informing his probation officer. There, he possessed child pornography and concealed it from probation. Evidence at trial, related above and introduced by multiple witnesses whose testimony and Gottlieb's performance in relation to that testimony Petitioner does not challenge, demonstrated that Petitioner sought out other adult men to watch child pornography and have sex. That evidence also demonstrated Petitioner's enthusiastic reaction in online chats and in person to the prospect of viewing such child pornography. The results of the search of his apartment indicated both that he had purposefully evaded restrictions on possession of certain devices while on probation, and a jury could certainly conclude from his reading materials that he sought a fuller

understanding of child-pornography law. Petitioner's statements to officers shortly after the search also indicated he knew what he was doing and why it was wrong, as well as the consequences of such conduct.

While Petitioner presented evidence at trial that he suffered from Complex PTSD that prevented him from appreciating the nature of actions and their wrongfulness, the unchallenged evidence presented to the jurors demonstrated that Petitioner knew exactly what he was doing when he sought out, traded, and viewed child pornography. It also showed he was concerned about the potential legal consequences of his actions. A different cross-examination of investigator Grant and the introduction of testimony that may have called into question Grant's statements about Petitioner's abuse during his earlier prison term would not have overcome this overwhelming evidence. Petitioner came nowhere near meeting his burden to prove his affirmative defense at trial. Better cross-examination would not have helped him. The Court must find that, even assuming that Petitioner's counsel fell below an objective standard of reasonableness, he was not prejudiced by such conduct.

The Court will therefore deny the motion to vacate in its entirety.

D. Request for Evidentiary Hearing

Petitioner asserts that an evidentiary hearing is necessary to resolve the questions he raises. Federal law provides that "'[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.'" Puglisi v. United States, 586 F.3d 209, 213 (2d Cir. 2009) (quoting 28 U.S.C. § 2255(b)). "The procedure for determining whether a hearing is necessary is in part analogous to, but in part different from, a summary judgment proceeding." Puglisi, 586 F.3d at 213. A court's

role is to examine the motion, any affidavits or other documents attached thereto, and the case record. Id. The court then decides, viewing the "record in the light most favorable to the petitioner," whether the petitioner "may be able to establish at a hearing a *prima facie* case for relief." Id. When material facts are in dispute, the court will usually hold a hearing. Id.

The Court finds an evidentiary hearing unnecessary to resolve this matter. Petitioner has provided the Court with extensive documentation of his claims and provided a number of affidavits to support his argument. Even making all factual inferences in his favor and reading the record in the light most favorable to the movant, however, Petitioner has not convinced the Court that any government misconduct or prejudicial ineffectiveness by counsel occurred. While the Petitioner has offered a number of heated accusations of misconduct, such allegations all depend on a fundamental misreading of the record. The Court will not hold an evidentiary hearing simply because a Petitioner alleges misdeeds unsupported by any part of the record. That portion of the motion to vacate is likewise denied.

E. Request for Discovery

Petitioner requests discovery on this motion to vacate. "A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of course." Bracy v. Gramley, 520 U.S. 899, 904 (1997). To obtain discovery, a petitioner must demonstrate "'good cause.'" Dranke v. Portuondo, 321 F.3d 338, 345 (2d Cir. 2003) (quoting Bracy, 520 U.S. at 904). "Where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." Bracy, 520 U.S. at 908-09. Still, "'a petitioner bears a heavy burden in establishing a right to discovery.'" James v. MacIntosh, No. 22-CV-1120, 2024 U.S. Dist. LEXIS 13674, at *4

(E.D.N.Y. Jan. 25, 2024) (quoting Naranjo v. United States, No. 16-CV-7386, 2019 U.S. Dist. LEXIS 172112, 2019 WL 3879297 (S.D.N.Y. Oct. 3, 2019)). The federal habeas rules do "not license a petitioner to engage in a 'fishing expedition' by seeking documents 'merely to determine whether the requested items contain any grounds that might support his petition, and not because the documents actually advance his claims of error.'" James, 2024 U.S. Dist. LEXIS 13674, at *4 (quoting Edwards v. Superintendent, Southport C.F., 991 F. Supp.2d 348, 364 (E.D.N.Y. 2013)).

Petitioner's discovery requests largely concern the Government's communications with and retention of Dr. Mills, as well as communication with Grant regarding the case and communications with a cooperating witness who testified that he met with Petitioner in a hotel room, watched child pornography, and engaged in sexual activity. The Court will exercise its discretion and deny the motion for discovery in this habeas matter. As the Court has explained, Petitioner's accusations of prosecutorial misconduct are baseless, and these requests only serve to amplify baseless requests. A mere accusation of misconduct is not sufficient to present good cause for discovery in a habeas matter. Moreover, as the Court has explained, Petitioner has not demonstrated any prejudice from the alleged misconduct in any case. The Court will deny this request as well.

F. Request for Oral Argument

Because the Court after careful consideration finds oral argument unnecessary to decide Petitioner's motion to vacate (based on the thorough briefing of the issues by counsel), the Court will deny the Petitioner's request for such argument. See dkt. # 217.

G. Motion for Reconsideration

After the Court struck Petitioner's pleading, filed as a motion to amend after Judge McAvoy directed the parties not to file any supplemental pleading, Petitioner filed a motion for reconsideration. See dkt. #s 239, 240. Petitioner argues that Judge McAvoy erred in considering the motion to amend as simply an attempt to supplement briefing after he directed the parties that the pleadings were closed. Petitioner contends that Judge McAvoy should have treated the filings as a motion to amend and considered the additional evidence that he provided in support of filing an amended motion to vacate.

When a party files a motion for reconsideration, "[t]he standard for granting such a motion is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked–matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Shrader v. CSX Transp., 70 F.3d 255, 257 (2d Cir. 1995). Such a motion is "not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking 'a second bite at the apple[.]'" Analytical Surveys, Inc. v. Tonga Partners, L.P., 684 F.3d 36, 41 (2d Cir. 2012) (quoting Sequa Corp. v. GBJ Corp., 156 F.3d 136, 144 (2d Cir. 1998)). Reconsideration should be granted when the moving party shows "'an intervening change in controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992) (quoting 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4478 at 790).

The Court finds that Judge McAvoy did not commit clear error of law in treating the motion to amend as an attempt to supplement briefing and avoid the Court's direction to the

parties not to file an additional briefing. Judge McAvoy permitted Petitioner to file a 70-page opening brief and then allowed Petitioner to file a traverse of more than fifty pages. Petitioner also filed hundreds of pages of exhibits, as well as declarations containing legal arguments, in connection with both filings. The additional information which supposedly should have caused Judge McAvoy to permit an amended petition and more briefing from both sides merely amplified the claims and accusations that Petitioner had already made. Judge McAvoy rightly declined a request for more argument and exhibits. The motion for reconsideration will be denied as well.

H. Certificate of Appealability

"When a district court issues a final order in a § 255 proceeding, an appeal may not be taken to [the Court of Appeals] unless either the district judge or a judge of [the Court of Appeals] issues a certificate of appealability." Krantz v. United States, 224 F.3d 125, 126 (2d Cir. 2000). "A court may issue a certificate of appealability 'only if the applicant has made a substantial showing of the denial of a constitutional right.'" Gray v. United States, 980 F.3d 264, 265 (2d Cir. 2020). "That standard is met when 'reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner.'" Welch v. United States, 578 U.S. 120, 127 (2016) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)).

The Court finds that reasonable jurists could not debate whether the petition should have been resolved differently. The Court declines to issue a certificate of appealability.

ACCORDINGLY, it is

ORDERED that the Petitioner's motion to vacate, Dkt. No. 200, is **DENIED**; and it is further

ORDERED that Petitioner's request for oral argument, Dkt. No. 217, is **DENIED**; and it is further

ORDERED that Petitioner's motion for reconsideration, Dkt. No. 240, of this Court's Text Order of June 26, 2024, is **DENIED.**

Dated: October 16, 2024
Syracuse, New York

Glenn T. Suddaby
U.S. District Judge