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APPENDIX A

Opinion of the United States Court of Appeals for the Fourth Circuit Denying a Certificate of Appealability (Feb. 23, 2026)

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-6577

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROBERT MICHAEL FALL,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Jamar Kentrell Walker, District Judge. (2:17-cr-00012-JKW-DEM-1; 2:21-cv-00556-JKW)

Submitted: February 19, 2026 Decided: February 23, 2026

Before WYNN and HARRIS, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Brandon Creighton Sample, CRIMINAL CENTER LLC, Washington, D.C., for Appellant. Elizabeth Marie Yusi, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Norfolk, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Robert Michael Fall seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2255 motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 580 U.S. 100, 115-17 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the motion states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Limiting our review of the record to the issues raised in Fall's informal brief, we conclude that Fall has not made the requisite showing. *See* 4th Cir. R. 34(b); *see also Jackson v. Lightsey*, 775 F.3d 170, 177 (4th Cir. 2014) ("The informal brief is an important document; under Fourth Circuit rules, our review is limited to issues preserved in that brief."). Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

APPENDIX B

Order of the United States District Court for the Eastern District of Virginia Denying Motion Under 28 U.S.C. § 2255, ECF No. 195 (Apr. 25, 2024)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA

v.

ROBERT MICHAEL FALL,

Defendant/Petitioner.

Case Nos. 2:17-cr-12
2:21-cv-556

MEMORANDUM OPINION & ORDER

Before the Court is Petitioner Robert Michael Fall's Motion to Vacate, Set Aside, or Correct a Sentence, filed pursuant to 28 U.S.C. § 2255. ECF No. 164. The filing also includes motions for discovery, appointment of counsel, and bail. ECF No. 164-1 at 12–14. The Court has reviewed the record and finds that an evidentiary hearing is not necessary because the record conclusively demonstrates that the petitioner is not entitled to relief on the § 2255 petition. *See* R. Gov. § 2255 Proc. in U.S. Dist. Cts. 8(a). For the reasons set forth below, the motion to vacate is **DISMISSED AND DENIED.** The motions for discovery, appointment of counsel, and bail are **DENIED.**

I. BACKGROUND

The petitioner's adult niece discovered child pornography on a laptop computer she believed to be the petitioner's. The niece brought that laptop to the police and showed them the images she discovered. Based on the images they viewed, the police obtained a warrant to search the petitioner's house, where they found additional electronic devices containing child pornography. ECF No. 80 at 2. The grand jury indicted the petitioner on February 8, 2017, for crimes related to child pornography. ECF No. 1.[1]

The petitioner was originally represented by Attorney Richard Doummar. ECF No. 11. After the petitioner's communication with his retained counsel broke down, Attorney Doummar filed a motion to withdraw. ECF Nos. 29, 33 (motions). The Honorable Henry Coke Morgan, Jr., to whom this case was originally assigned, granted the motion to withdraw. ECF No. 34 (order). On August 25, 2017, Judge Morgan appointed Assistant Federal Public Defender Keith Kimball to represent the petitioner. ECF No. 32. Attorney Kimball represented the petitioner through trial and appeal.

On January 2, 2018, the government filed a motion in limine seeking a pretrial ruling on the admissibility of trade inscriptions on the electronic devices attributed to the petitioner, which tended to prove that the devices were manufactured outside the United States and, therefore, necessarily moved in interstate or foreign commerce—one of the elements the government would have to prove at trial. ECF No. 64. On January 12, 2018, Attorney Kimball submitted a written opposition to the government's motion in limine, in which he asserted that the defense would hold the government to its burden to prove the interstate or foreign commerce element beyond a reasonable doubt. ECF No. 72.

[1] The government obtained a superseding indictment on October 11, 2017, and a second superseding indictment on November 1, 2017. ECF Nos. 35, 40. On January 11, 2018, the government dismissed counts 1, 2, and 9 of the Second Superseding Indictment. ECF Nos. 71 (motion), 73 (order).

On January 11, 2018, Attorney Kimball filed a motion to "suppress all evidence obtained as a result of" the government's searches. ECF No. 75 at 2. He argued that the Virginia Beach Police Department's (VBPD's) warrantless search of the laptop was unreasonable because the device was presented to them by a third party, who lacked authority to consent to the search. Attorney Kimball further argued that the warrant to search the petitioner's home was invalid, because it was based on probable cause developed through illegal access to the laptop. *Id.* Because the Second Superseding Indictment did not include any charges related to the child pornography found on the computer the petitioner's niece presented to the police, the government stipulated that it would not introduce any evidence at trial concerning data obtained through forensic analysis of that computer (though it did plan to introduce evidence about the material the niece saw on the computer before she brought it to the police). ECF No. 77 at 6. After a hearing, Judge Morgan denied the motion to suppress. ECF No. 80.

The petitioner's jury trial began on January 17, 2018. ECF No. 84. At trial, there was a question as to whether, by questioning witnesses about their own actions on the computer the petitioner's niece found, defense counsel opened the door to the government presenting forensic evidence they had previously agreed not to admit. The government maintained that it did not wish to admit evidence concerning data obtained through forensic analysis of the computer the petitioner's niece presented to the police. However, the parties entered a stipulation stating, in essence, that neither the niece nor the police compromised the integrity of computer. ECF No. 87.

On January 22, 2018, a jury convicted the petitioner of Receipt of Images of Minors Engaging in Sexually Explicit Conduct, in violation of 18 U.S.C. § 2252(a)(2); Transportation of Images of Minors Engaging in Sexually Explicit Conduct, in violation of 18 U.S.C. § 2252(a)(1); and Possession of Images of Minors Engaging in Sexually Explicit Conduct, in violation of 18 U.S.C. § 2252(a)(4)(B). ECF No. 89.

On February 5, 2018, Attorney Kimball filed a motion to dismiss either Count Seven or Count Eight or, in the alternative, for judgment of acquittal. ECF No. 96. On February 20, 2018, the government filed a motion to dismiss Counts Seven and Eight. ECF No. 97. Therefore, Judge Morgan dismissed those counts but denied the petitioner's motion for judgment of acquittal. ECF No. 104. On August 8, 2018, Judge Morgan sentenced the petitioner to 96 months of incarceration on each remaining count, to be served concurrently, with a period of 20 years of supervised release to follow. ECF No. 109.

On September 12, 2018, the petitioner appealed to the United States Court of Appeals for the Fourth Circuit. ECF No. 114. The Fourth Circuit affirmed the district-court judgment on April 3, 2020. ECF No. 132. While the petitioner's appeal was pending, he submitted two letters to the court. ECF Nos. 127, 130. Because the issues the petitioner raised in his letters were before the court of appeals, Judge Morgan declined to address them. ECF No. 129. The petitioner requested rehearing in the Fourth Circuit, and that motion was denied. ECF No. 134. The petitioner sought a writ of certiorari to the United States Supreme Court, and his petition was denied.

ECF No. 142. While the cert petition was pending, the petitioner filed an emergency motion for a stay. ECF No. 141. That motion was also denied. ECF No. 144.

On December 8, 2020—after the petitioner had exhausted the appellate process—Attorney Kimball was permitted to withdraw from the case. ECF Nos. 145 (motion), 147 (order). Between December 31, 2020, and January 4, 2021, the petitioner filed three letters. ECF Nos. 149, 150, 151. On February 8, 2021, the petitioner filed a motion for compassionate release. ECF No. 155. That motion was denied on October 7, 2021. ECF No. 174. In June 2021, he filed two more letters. ECF Nos. 159, 160. In August 2021, the petitioner filed yet another letter (ECF No. 162) and a supplement to the motion for compassionate release (ECF No. 163). The petitioner filed the instant motion to vacate pursuant to 28 U.S.C. § 2255 on September 29, 2021, alleging ineffective assistance of counsel. ECF No. 164. The case was reassigned to this Court on March 17, 2023.

II. LEGAL STANDARDS

A. Motions to Vacate Under 28 U.S.C. § 2255

Collateral review under 28 U.S.C. § 2255 allows a prisoner in federal custody to challenge the legality of a federal conviction by moving the district court "to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). To obtain such relief, a petitioner must prove by a preponderance of the evidence that: (1) their sentence or conviction was "imposed in violation of the Constitution or laws of the United States;" (2) the district court "was without jurisdiction to impose such sentence;" (3) the sentence exceeds "the maximum authorized by law;" or (4) the sentence or conviction is "otherwise subject to collateral attack." *Id.*; *Miller v. United States*, 261 F.2d 546, 547 (4th Cir. 1958).

The right to pursue collateral review of a sentence or conviction under § 2255 does not displace direct appeal as the "usual and customary method of correcting trial errors." *United States v. Allgood*, 48 F. Supp. 2d 554, 558 (E.D. Va. 1999). Once a petitioner's opportunity to pursue a direct appeal has been waived or exhausted, the "final judgment commands respect." *Id.* at 565–66. Accordingly, to obtain relief under § 2255, a petitioner "must clear a significantly higher hurdle than would exist on direct appeal." *United States v. Frady*, 456 U.S. 152, 166 (1982).

A § 2255 petition "is expected to state facts that point to a real possibility of constitutional error." *Blackledge v. Allison*, 431 U.S. 63, 75 n. 7 (1977) (punctuation omitted). Courts construe filings by *pro se* petitioners liberally. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007). However, "[i]f it plainly appears from the motion and any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion." *United States v. Dyess*, 730 F.3d 354, 359 (4th Cir. 2013) (quoting R. Gov. § 2255 Proc. in U.S. Dist. Cts. 4(b)).

B. Ineffective Assistance of Counsel Claims

The Sixth Amendment to the United States Constitution assures that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the [a]ssistance of [c]ounsel for his defense." U.S. Const. amend. VI. A claim of ineffective assistance of counsel is appropriate when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial did not result in a just outcome."

Strickland v. Washington, 466 U.S. 668, 686 (1984). To prevail on claims of ineffective assistance of counsel, a petitioner must establish two prongs: deficient performance and actual prejudice. *Id.* at 692. "[F]ailure of proof on either prong ends the matter." *United States v. Roane*, 378 F.3d 382, 404 (4th Cir. 2004).

To establish deficient performance, the petitioner "must show that counsel's representation fell below an objective standard of reasonableness," gauged by "prevailing professional norms." *Strickland*, 466 U.S. at 688; *see Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Review under this prong is "highly deferential," and courts strongly presume that counsel exercised reasonable professional judgment. *Strickland*, 466 U.S. at 689; *see also Kimmelman v. Morrison*, 477 U.S. 365, 381-82 (1986) (discussing *Strickland*'s "highly demanding" standard). Further, the court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. It is not enough for the petitioner to make "vague and conclusory allegations [] in a § 2255 petition"—they must identify specific "acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment," *id.*, and "show that counsel's actions were not supported by a reasonable strategy," *Massaro v. United States*, 538 U.S. 500, 501 (2003) (citation omitted). "Only in relatively rare situations will a § 2255 petitioner establish that, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Tice v. Johnson*, 647 F.3d 87, 102 (4th Cir. 2011) (quoting *Strickland*, 466 U.S. at 690) (punctuation omitted).

Prejudice is proved when a petitioner shows "there is a reasonable possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" of a different result exists when the error is "sufficient to undermine confidence in the outcome." *Id.* Thus, the petitioner must show that counsel's failure was "so serious as to deprive [the petitioner] of a fair trial." *Id.* at 687.

III. ANALYSIS

A. § 2255 Petition

The petitioner asserts 10 grounds to vacate his conviction based upon ineffective assistance of counsel:

(1) Counsel unreasonably "open[ed] the door" to forensic evidence found on the computer the petitioner's niece provided to police, and the petitioner "did not want to sign" the stipulation regarding that computer;

(2) counsel should have made more suppression arguments during trial;

(3) counsel failed to challenge the "vague" nature of the search warrant and investigate alleged discrepancies;

(4) counsel "never gave" the petitioner a report presented by an expert witness;

(5) counsel "advised" the petitioner to refrain from testifying;

(6) counsel failed to raise allegations of improper juror conduct with the court;

(7) counsel "seemed to not work as hard" after an alleged interaction with law enforcement officers;

(8) counsel "forgot" to submit evidence at trial;

(9) counsel was not knowledgeable about the relevant statute; and

(10) counsel failed to challenge evidence the government presented.

ECF. No. 164-1 at 2–11.

The Court finds that many of the petitioner's claims against his counsel are largely unsupported by the record or any evidence. Further, the petitioner fails to prove either deficient performance or actual prejudice for any of his 10 grounds, as required under *Strickland*. The Court addresses each ground in turn.

i. Ground One: The Stipulation

The petitioner asserts that he received ineffective assistance of counsel when Attorney Kimball "made the mistake of opening the door" during cross-examination to forensic evidence found on the computer that the petitioner's niece delivered to the VBPD, then "went against [the petitioner's] wishes" by agreeing to the stipulation during trial. ECF No. 164-1 at 2. While the petitioner clearly alleges that "[he] did not want to sign" the stipulation, he makes no argument about how the stipulation changed the outcome of the trial.

Moreover, having reviewed the record, the Court concludes that counsel's entry of the stipulation likely *prevented* prejudice to the petitioner's case. The government raised the possibility that Attorney Kimball had opened the door to evidence found on the computer the petitioner's niece presented—evidence the jury otherwise would not have seen. *See* ECF No. 176-1 at 4. By entering the stipulation, counsel avoided having Judge Morgan decide whether the door was opened. *See id.* Thus, Attorney Kimball maintained the status quo, and the jury did not see that additional evidence.[2]

The Court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. At the time Attorney Kimball entered the stipulation, there was a risk that the jury would learn more incriminating evidence against the petitioner. Counsel's actions prevented that from happening. The petitioner has provided no evidence to suggest that, had Attorney Kimball not entered the stipulation, "the result of the proceeding would have been different" such that the factfinder "would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 694-95. Thus, the petitioner has failed to meet his burden. The petition will be **DENIED** as to Ground One.

[2] It is not clear whether the petitioner intends to separately argue that counsel was ineffective for asking the questions that may have opened the door; but out of an abundance of caution, and in deference to the petitioner's *pro se* status, the Court has considered whether such a claim could succeed. It could not. By securing the government's agreement not to present any additional evidence found on the laptop the petitioner's niece presented to the VBPD, the stipulation eliminated any risk of prejudice associated with opening the door.

Furthermore, this conclusion helps to reinforce the reason that the petitioner has not demonstrated actual prejudice with respect to the stipulation. The only evidence the jury heard as a result of counsel allegedly opening the door, or as a result of the stipulation, was that the police did not tamper with the laptop the niece presented. The petitioner does not suggest that, were the stipulation not entered, he would have pursued a theory that his niece or law enforcement tampered with evidence. Therefore, he presents no explanation for how entry of the stipulation left him worse off than he was before.

ii. Grounds Two and Three: The Search Warrant

The petitioner alleges that counsel filed just one motion to suppress, when he "could have" filed more. ECF No. 164-1 at 3-4. Specifically, the petitioner claims that (1) the search warrant's reference to an attached affidavit was insufficient, *id.* at 3, (2) police seized more than just child pornography, *id.*, and (3) police were not permitted to take items off the petitioner's property before searching them, *id.* Assuming without deciding that the petitioner's assessment of the law is correct on these points, the Court notes that the petitioner admits Attorney Kimball's approach was "strategy." ECF No. 164-1 at 3; *see Massaro,* 538 U.S. at 501 (requiring proof "that counsel's actions were not supported by a reasonable strategy"). Additionally, the petition fails to identify any specific piece of evidence that was admitted at trial but without which the jury might have acquitted. Therefore, the petition will be **DENIED** as to Ground Two.

The petitioner also alleges ineffective assistance of counsel based on Attorney Kimball's failure to investigate alleged discrepancies regarding the search warrant. ECF No. 164-1 at 5. The petitioner boldly asserts that a state magistrate's signature was falsified and argues that counsel "should have seen and investigated" alleged discrepancies in the judge's signature style and time stamps. *Id.* However, the petitioner provides no specific basis for his claims. Thus, the Court determines that counsel had no obligation to investigate the matter further. *See Strickland,* 466 U.S. at 691 ("In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."). Therefore, the petitioner fails to establish the deficiency prong under *Strickland*, and Ground Three will be **DENIED.**

iii. Ground Four: The Dropbox Report

The petitioner argues that Attorney Kimball "never gave" him a "Drop Box report" that an expert witness presented at trial. ECF No. 164-1 at 6. The petitioner believes that if he had received the alleged report before trial, it would have "show[n] that the transportation charge did not happen," because "it [would] show it came from another service provider[] th[a]n the one [the petitioner] had at that time." *Id.*

There is no Dropbox report on the list of exhibits admitted at trial. ECF No. 88-1; *see also* ECF No. 176-1 at 5 (Attorney Kimball "does not recall a 'report from [Dropbox]' presented by the government expert witness at trial"). Therefore, the Court concludes that counsel could not have been ineffective for failing to show such a report to the petitioner. Moreover, the petitioner's claim fails because he does not demonstrate any prejudice resulting from counsel's failure to provide the alleged report. Dropbox is an online file storage service that is accessible on the Internet through any "service provider." ECF No. 164-1 at 6. The Court cannot see—and the petitioner does not explain—how a Dropbox "report" could "show" that anything "came from" a particular "service provider." *Id.* More importantly, the petitioner has not demonstrated that a discrepancy about the "service provider" could have defeated the "transportation charge." *Id.* The petitioner has not shown a "reasonable probability" that access to the alleged report would have resulted in a different outcome at trial. *Strickland*, 466 U.S. at 694. Therefore, the petition will be **DENIED** as to Ground Four.

iv. Ground Five: Trial Testimony

The petitioner claims that counsel was ineffective by allegedly advising him not to testify at trial. ECF No. 164-1 at 7-8. According to the petitioner, he would have testified that his niece: (1) knew where his laptop was because she had "taken" it before; (2) had more knowledge of computers "th[a]n she [led] the jury to believe;" (3) had used his computer before; (4) had "us[ed] drugs" and "[stole] things;" (5) and "was molested by her brother," for which she erroneously "blames" the petitioner. ECF No. 164-1 at 7-8. In summary, it appears the petitioner claims he would have testified that his niece was responsible for the presence of child pornography found on the laptop presented to the VBPD.

As an initial matter, the Court finds that the record belies the petitioner's allegations as to deficiency. Judge Morgan colloquied the petitioner extensively regarding his decision not to testify at trial. ECF No. 123 at 386–87. While under oath, the petitioner admitted discussing his right to testify with defense counsel, and he affirmed after multiple inquiries that the decision not to testify was his alone. *Id.*

Additionally, the petitioner fails to demonstrate prejudice. *See United States v. Robinson*, 700 F. App'x 178, 182 (4th Cir. 2017) (unpublished) (holding that where the evidence of guilt on the record is overwhelming and defendant's alleged testimony would have been more prejudicial, inquiry of deficient performance under *Strickland* was unnecessary). The VBPD developed probable cause for a warrant to search the defendant's home based on viewing the contents of a laptop the niece showed them containing child pornography. ECF No. 105 at ¶ 7. To find a "reasonable probability" that the petitioner's proffered testimony would have changed jurors' minds, the Court would have to find that a reasonable juror could believe the niece reported her *own* child pornography possession to the police, unprompted. *Strickland,* 466 U.S. at 687.

After the petitioner spoke to detectives and declined to consent to a search of his home, the petitioner's neighbor saw "a male climb out onto the roof of [the petitioner's residence] from an open window, throw a laptop on the roof, and then jump off the roof and flee." ECF No. 105 at ¶ 8. To find a "reasonable probability" the petitioner's testimony would have changed the jury's mind, the Court would have to conclude a reasonable juror could find that, when alerted that the police were investigating *him*, the petitioner disposed of evidence of his *niece*'s possession of child pornography—which, even though the niece was a short-term guest, was somehow stored on the *petitioner's* laptop. *Strickland,* 466 U.S. at 687.

During the police's execution of the search warrant, VBPD seized numerous DVDs from the petitioner's bedroom and bedside table containing numerous images of child pornography. ECF No. 105 at ¶¶ 9–10. To find a "reasonable probability" that the petitioner's testimony about his niece would have changed the verdict, the Court would have to believe a reasonable juror could think the niece planted those DVDs next to the petitioner's bed. *Strickland,* 466 U.S. at 687.

As in *Robinson,* the Court finds that the overwhelming evidence of guilt against the petitioner "allows for no reasonable probability" that the jury's verdict would have been different if the petitioner had testified. 700 F. App'x at 183. Because the petitioner failed to prove either deficient performance or prejudice, the Court rejects this claim of ineffective assistance of counsel. The petition will be **DENIED** as to Ground Five.

v. Ground Six: Failure to Report Improper Juror Conduct

The petitioner claims he received ineffective assistance of counsel when his attorney failed to raise with Judge Morgan an accusation of improper juror conduct. Reportedly, the petitioner's parents "overheard some of the jurors talking about the trial" while eating lunch at a restaurant during trial recess. ECF No. 164-1 at 9. The petitioner's parents allegedly overheard one of the jurors say, "[T]hey just need to let us in the back and do what we need to do." *Id.* The petitioner's parents allegedly reported the incident to Attorney Kimball, who "did not do anything." *Id.* The petitioner fails to present an affidavit from either parent to corroborate these allegations. Instead, the petitioner contends that despite his requests, the petitioner's mother cannot complete an affidavit because "she is so busy working and trying to take care of [the petitioner's] father." *Id.* The petitioner contends that if counsel had brought the incident to the attention of the court, "[T]he Judge could have talked to the jurors and removed that juror or done something to fix it." *Id.*

The Fourth Circuit has considered whether counsel's failure to bring a juror's statement directed to the defendant's father to the court's attention amounted to constitutionally deficient representation. *United States v. Powell,* 850 F.3d 145, 147–49 (4th Cir. 2017). In support of his *pro se* § 2255 motion, Powell submitted two affidavits: his own and one from his father. *Id.* at 147. According to the father's statement, a juror told Powell's father that "everything would be alright and that [he] needed to give [his] son a good kick in the butt." *Id.* at 149. When Powell told his counsel about the juror's statement, counsel "neglected to make any motion, objection, or even inform the District Court of this matter [altogether]." *Id.* at 148. Crediting Powell's allegations of fact regarding the juror's statement to his father as true, the Fourth Circuit nonetheless concluded that Powell's "counsel's failure to pursue the issue was not so problematic as to make her performance constitutionally deficient." *Id.* at 150. Here, like in *Powell,* the petitioner does not provide evidence to overcome the "strong presumption" that his counsel's performance fell outside "the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689.

The Fourth Circuit also held that Powell was not prejudiced because the juror's statement did not indicate sufficient bias such that his Sixth Amendment guarantee to an impartial jury had been violated, because "the juror [could] lay aside [her] impression or opinion and render a verdict based on the evidence presented in court." *Id.* at 149 (quoting *Irvin v. Dowd,* 366 U.S. 717, 722 (1961)). Here, the petitioner provides no evidence of prejudice that could extend the instant case beyond the bounds of the Fourth Circuit's conclusion in *Powell.*

Following the reasoning in *Powell,* the Court finds that Attorney Kimball's handling of the juror comment, even if it were exactly as the petitioner alleges, did not make his representation constitutionally deficient and did not result in prejudice to the petitioner. Thus, the petition will be **DENIED** as to Ground Six.

vi. Ground Seven: Failure to Work After Encounter with Police

The petitioner alleges that he received ineffective assistance of counsel when his attorney "seemed to not work as hard" and "let things go" after an alleged encounter with VBPD officers. ECF No. 164-1 at 10. The petitioner recounts an alleged conversation: "When [defense counsel] got on the elevator, a few of the Virginia Beach police officers got on too. They started questioning [counsel] about the trial and his strategy." *Id.* Attorney Kimball denies any such encounter with VBPD officers occurred during the trial. ECF No. 164-1 at 10. But even if it did, the petitioner's allegations do not meet the *Strickland* standard.

The motion presents no specific allegations as to how Attorney Kimball's performance faltered after the alleged encounter with the VBPD officers or how different conduct by counsel could have resulted in a different outcome at trial. The petitioner's "vague and conclusory allegations," *Strickland*, 466 U.S. at 690, that counsel "seemed to not work as hard" and "let things go," ECF No. 164-1 at 10, are insufficient. Because the petitioner fails to present any evidence that counsel's performance was objectively unreasonable and offers no evidence demonstrating prejudice, this claim cannot succeed. Accordingly, the petition will be **DENIED** as to Ground Seven.

vii. Ground Eight: Failure to Submit Evidence

The petitioner asserts that after the case was submitted to the jury, he asked Attorney Kimball "why he did not submit all the evi[dence]," and counsel said that he "forgot." ECF. No. 164-1 at 10. The petitioner fails to establish deficiency, because he does not identify any specific evidence counsel did not present, nor why failure to present such evidence was less than a strategic decision. *See Strickland*, 466 U.S. at 690; *Massaro*, 538 U.S. at 501. The motion also fails to establish prejudice, because it offers no argument as to how the evidence counsel allegedly "forgot" would have changed the jury's verdict. *See Strickland*, 466 U.S. at 690. Therefore, the petition will be **DENIED** as to Ground Eight.

viii. Ground Nine: Failure to Understand the Relevant Statute

The petitioner alleges that defense counsel was constitutionally ineffective because he failed to understand the law that required proof that the child pornography images moved in interstate or foreign commerce. This claim relies on an email between Attorney Kimball and his co-counsel about drafting jury instructions. ECF No. 164-1. In the email, Attorney Kimball wrote: "I have to say, the interstate commerce language in the CP statutes could not be any more difficult to read and/or understand. You would think that educated people in Congress—or their staff members could draft clearer language ??? Or is it just me." ECF No. 165 at 1. (SEALED).

Counsel's assessment that Congress wrote a statute that is difficult to read does not amount to an admission that he himself does not understand the law. On the contrary, the record demonstrates that Attorney Kimball understood the interstate-or-foreign-commerce requirement well. ECF No. 164-1 at 10. In a post-trial motion, counsel thoroughly challenged the sufficiency of the evidence on that element of the petitioner's offense. *See* ECF No. 95 at 10–13. The Court concludes that defense counsel was not deficient on this ground. Moreover, the petitioner fails to identify any prejudice based on counsel's alleged misunderstanding of the law. Accordingly, the petition will be **DENIED** as to Ground Nine.

ix. Ground Ten: Failure to File Post-Trial Motions

Last, the petitioner alleges that counsel was ineffective for failing to file post-trial motions "challenging the production and internet usage." ECF No. 164-1 at 11. The petitioner claims that the child pornography located on his computer "could have come from a local area network or ethernet" source. The Court understands this as an argument that Attorney Kimball should have challenged the sufficiency of the evidence at trial as to the interstate-commerce element.

Contrary to the petitioner's allegations, Attorney Kimball prepared and filed two post-trial motions: one for judgment of acquittal and one for dismissal. ECF Nos. 95–96. In the motion for judgement of acquittal, counsel *did* challenge the sufficiency of the evidence that the images traveled in interstate or foreign commerce. ECF No. 95 at 10–13. Counsel also challenged the sufficiency of the evidence that the petitioner knowingly received the charged images in Counts Three, Four, and Five. *Id.* On this basis, the Court finds that counsel's assistance was reasonable and well in compliance with "prevailing norms of practice as reflected in the American Bar Association standards." *Strickland*, 466 U.S. at 688.

The petitioner's final claim also fails because he makes no showing of prejudice. Even though Attorney Kimball *did* file the post-trial motion the petitioner asks for, the Court finds "no reasonable probability that . . . the result of the proceeding would have been different" if he had not. *Strickland*, 466 U.S. at 694. Failure to prove deficient performance or sufficient prejudice regarding post-trial motions defeats the petitioner's claim. The petition will be **DENIED** as to Ground Ten.

The Court recognizes that the petitioner is likely disappointed with the outcome of his case. However, he has not proved that Attorney Kimball was constitutionally deficient or that his performance prejudiced the verdict at trial. On the contrary, the Court finds that the petitioner benefited from the effective assistance of very experienced, qualified counsel.

B. Motion for Discovery

Along with his § 2255 motion, the petitioner submitted a motion for discovery. ECF No. 164-1 at 12. The Supreme Court has held that "[a] habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Whether to grant post-conviction discovery in relation to a § 2255 petition is within the complete discretion of the Court. *Id.* at 908-09. Discovery may be granted only upon a showing of "good cause." R. Gov. § 2255 Proc. in U.S. Dist. Cts. 6(a). The requisite showing of "good cause" exists when there is "reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief." *Bracy*, 520 U.S. at 908-09. As discussed, this Court finds no reason to believe that additional facts would entitle the petitioner to relief. Therefore, the motion for discovery will be **DENIED.**

C. Motion for Appointment of Counsel

The petitioner also requests the appointment of counsel to pursue his § 2255 petition. ECF No. 164-1 at 13. As an initial matter, there is no constitutional right to counsel in a post-conviction proceeding. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). In § 2255 matters, appointment of counsel is mandated either when discovery is necessary or if the matter proceeds to an evidentiary hearing. *See* R. Gov. § 2255 Proc. in U.S. Dist. Cts.6(a), 8(c). Finding neither discovery nor an evidentiary hearing necessary in this matter, the Court determines that appointment of counsel is not appropriate. The motion for appointment of counsel will be **DENIED.**

D. Motion for Bail

The petitioner further moves to obtain bail. ECF No. 164-1 at 14. "To prevail on a motion for release on bail in a habeas case, the appellant must show that his petition presents a substantial constitutional claim upon which he has a high probability of success, and that extraordinary circumstances warrant his release." *United States v. Perkins*, 53 F. App'x 667, 669 (4th Cir. 2002) (unpublished) (citing *Aronson v. May*, 85 S. Ct. 3, 4–5 (1964) (Douglas, J., in chambers)). The petitioner has not made such a showing here. Accordingly, his motion seeking bail will be **DENIED.**

IV. CERTIFICATE OF APPEALABILITY

"An appeal may not be taken from the final order in a § 2255 proceeding unless a judge issues a certificate of appealability ("COA")." *United States v. Day*, No. 3:07-cr-154, 2018 WL 4714778, at *2 (E.D. Va. Oct. 1, 2018) (citing 28 U.S.C. § 2253(c)(1)(B)); *see also* R. Gov. § 2255 Proc. in U.S. Dist. Cts. 11(a). Further, a "COA will not issue unless a prisoner makes a substantial showing of the denial of a constitutional right." *Day*, 2018 WL 4714778, at *2. (quotation marks omitted). Such a showing turns on whether "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted). The Court finds that the petitioner has not met this standard. Accordingly, a certificate of appealability will be **DENIED.**

V. CONCLUSION

For the foregoing reasons, the petitioner's Motion to Vacate, Set Aside, or Correct a Sentence under 28 U.S.C. § 2255 (ECF No. 164) is **DISMISSED AND DENIED.**

The petitioner's motions for discovery, appointment of counsel, and bail (ECF No. 164-1 at 12–14) are likewise **DENIED.**

Because the petitioner failed to demonstrate a substantial showing of a denial of a constitutional right, a Certificate of Appealability is **DENIED.**

The petitioner is **ADVISED** that he may appeal from this final Memorandum Opinion and Order by forwarding a written notice of appeal to the Clerk of the United

States District Court, United States Courthouse, 600 Granby Street, Norfolk, VA 23510. The Clerk must receive this written notice within 60 days of the date of this Memorandum Opinion and Order.

The Clerk is **DIRECTED** to send a copy of this Memorandum Opinion and Order to the petitioner, the petitioner's former counsel, and counsel of record for the government.

IT IS SO ORDERED.

JKW

/s/

Jamar K. Walker
United States District Judge

Norfolk, Virginia
April 25, 2024

APPENDIX C

Order of the Court of Appeals Denying Rehearing and Rehearing En Banc (Apr. 24, 2026)

FILED: April 24, 2026

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-6577
(2:17-cr-00012-JKW-DEM-1)
(2:21-cv-00556-JKW)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ROBERT MICHAEL FALL

Defendant - Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 40 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wynn, Judge Harris, and Senior Judge Traxler.

For the Court

/s/ Nwamaka Anowi, Clerk

APPENDIX D

Search Warrant for Petitioner's Residence (Excerpt of Record)

SEARCH WARRANT

Commonwealth of Virginia VA. CODE §§ 19.2-56, 19.2-57

TO ANY AUTHORIZED OFFICER:

You are hereby commanded in the name of the Commonwealth to forthwith search the following place, person or thing either in day or night

The residence, curtilage, and vehicles located at [redacted] Virginia Beach, VA 23455. The building is a two-story red brick and off-white vinyl siding house with blue garage doors and blue shutters. Above the garage doors is written "One Hundred Five" And red Ford truck bearing Virginia license plate [redacted]

Exhibit 5.1

for the following property, objects and/or persons:

See Attached

You are further commanded to seize said property, persons, and/or objects if they be found and to produce before the Virginia Beach Circuit Court an inventory of all property, persons, and/or objects seized.

This SEARCH WARRANT is issued in relation to an offense substantially described as follows:

Possession of Child Pornography 18.2-374.1:1

I, the undersigned, have found probable cause and believe that the property or person constitutes evidence of the crime identified herein or tends to show that the person(s) named or described herein has committed or is committing a crime and further that the search should be made, based on the statements in the attached affidavit sworn to by

Det R J Sweeney VBPD

NAME OF AFFIANT

08/04/2016 07:35 PM

DATE AND TIME

DP 1114

[ ] CLERK [X] MAGISTRATE [ ] JUDGE

D P. Kellam

FILE NO.

SEARCH WARRANT

COMMONWEALTH OF VIRGINIA

v./In re

[redacted]

Va Beach, VA 23455

16 AUG -5 PM 2:46

SWN: 810CM1600036920

APPENDIX E

Statement of Defense Counsel, ECF No. 176-1 (Dec. 30, 2021)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

ROBERT MICHAEL FALL,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Docket No. 2:17-cr-12**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.		

<u>STATEMENT OF DEFENSE COUNSEL REGARDING PETITONER'S 2255 CLAIMS</u>

In response to the claims made by Robert Michael Fall in his motion filed pursuant to 18 U.S.C. § 2255, Keith Loren Kimball and Lindsay McCaslin of the Federal Public Defender's Office provide the following statement, under oath:

<u>Preliminary Information</u>

The Federal Public Defender's Office was appointed to represent Mr. Fall on August 22, 2017.[1] *See* ECF No. 31. Supervisory Assistant Federal Public Defender Keith Loren Kimball was assigned to Mr. Fall's case. Assistant Federal Public Defender Lindsay McCaslin was also later assigned to Mr. Fall's case. Investigator Susan Harrison Jones of the Office of the Federal Public Defender assisted in the defense and representation of Mr. Fall. From the beginning of AFPD Kimball's representation of Mr. Fall, counsel treated his case as serious. Knowing that Mr. Fall rejected plea offers and consistently voiced his desire to go to trial, counsel devoted considerable time, attention, and resources to the case.

[1] Mr. Fall's retained counsel had filed a motion to withdraw as counsel. ECF No. 29. At the hearing on the motion, Judge Morgan appointed the Federal Public Defender as additional counsel for Mr. Fall and reserved ruling on retained counsel's motion. *See* ECF Nos. 31, 32. A second motion to withdraw as counsel by retained counsel was granted by Judge Morgan on October 11, 2017. *See* ECF Nos. 33, 34.

AFPD Kimball saw Mr. Fall on a regular basis and kept him informed of his and the defense team's efforts and developments in the case. AFPD Kimball also shared, reviewed, and discussed the discovery and expected government evidence received from the United States Attorney's Office with Mr. Fall multiple times. In addition, copies of discovery was timely provided to Mr. Fall. Moreover, Mr. Fall was involved in the formulation of his defense and AFPD Kimball worked with him in the preparation of his defense.

Counsel have reviewed Mr. Fall's 2255 motion. By Order filed October 8, 2021, defense counsel were ordered to file an affidavit in response to Mr. Fall's claim of ineffective assistance of counsel. *See* ECF No. 175.

This statement is based on defense counsels' recollection and review of their case file and is true and accurate to the best of their knowledge.

Mr. Fall's Claims

In his motion and attachments, Mr. Fall states multiple grounds alleging ineffective assistance of counsel. Defense counsel understand that Mr. Fall's claims concern:

- That Mr. Fall did not agree to the stipulation and did not want to sign it;
- That the search warrant is "vague" and counsel should have filed other suppression motions to suppress the evidence;
- That the state magistrate's signature on the search warrant is false and counsel should have seen this and investigated it;
- That counsel failed to provide a Drop Box report to Mr. Fall;
- That counsel prevented Mr. Fall from testifying;

- That counsel failed to report to the Court that Mr. Fall's parents reportedly saw some of the jurors talking about the trial;
- That as a result of AFPD Kimball being approached by police officers in the elevator during a recess from trial and questioned about the trial and his strategy, counsel "seem[ed] to not work as hard and he let things go that we had talked about";
- That counsel "forgot to submit evidence";
- That counsel did not understand nexus of the statutes; and
- That counsel should have filed a post-trial motion challenging the production and the internet usage.

The Stipulation

The parties entered into a stipulation regarding a laptop that Mr. Fall's niece discovered and took to the Virginia Beach Police Department – 3rd Precinct. *See* ECF No. 87. Mr. Fall claims that he did not want to sign the stipulation and that counsel "went against his wishes" regarding the stipulation. Mr. Fall is correct that before trial he refused to sign any stipulations. Prior to trial, defense counsel did discuss several proposed stipulations provided by the prosecutors with Mr. Fall. However, defense counsel did not recommend to Mr. Fall that he agree to or sign those particular stipulations. With the particular stipulation that was made and agreed to during the trial, however, defense counsel discussed this stipulation with Mr. Fall before agreeing to it. And Mr. Fall agreed to the stipulation and signed it. If Mr. Fall had told counsel that he did not want to agree to the stipulation, defense counsel would have abided by his desire. But that did not happen. Mr. Fall was agreeable to the stipulation.

The prosecutors had informed defense counsel prior to trial that they did not intend to offer any forensic evidence from this particular laptop. During the trial, the prosecutors believed that the defense had opened the door to the admission of this evidence. The prosecutors brought this issue up with defense counsel and Judge Morgan. Instead of having Judge Morgan decide whether defense counsel had opened the door, counsel agreed on the stipulation.

Counsel's recollection is that the stipulation was agreed to because there was a concern that if the Court found that the door had been opened, the government would elicit testimony and evidence about what was found on that laptop from a forensic examination of it. Defense counsel knew that there were multiple images and videos of child pornography on that laptop. Since that particular laptop was not the subject of any of the charged counts, defense counsel did not want additional evidence of Mr. Fall receiving, possession, viewing and presumably enjoying before the jury. And, as noted above, defense counsel discussed this issue with Mr. Fall and the stipulation before it was agreed to and signed. Mr. Fall agreed to the stipulation.

The Search Warrant

Mr. Fall argues that the search warrant is "vague" and that the state magistrate's signature is false. He claims that defense counsel should have investigated the signature and should have filed other motions to suppress or made other arguments attacking the search warrant.

On January 3, 2018, counsel filed a motion for leave to file a motion to suppress after the motion cut-off date. ECF No. 65. The Court granted the motion and docketed the motion to suppress as filed. *See* ECF Nos. 74, 75. Defense counsel raised the following grounds to suppress the evidence: (1) the Virginia Beach Police and the Homeland Security Investigations (HSI) performed a search on a laptop brought to the police station without a warrant; (2) third-party consent to search did not apply because the third party lacked both common authority and apparent authority over the laptop; (3) the Virginia Beach Police secured a warrant for Mr. Fall's residence based on the warrantless search of the laptop, and thus the items seized were the fruits of the poisonous tree; and (4) the search warrant for the residence was insufficient to support a finding for probable cause because it relied on illegally obtained information, omissions, and false statements. The Court held a hearing on this motion (and three defense motions in limine) on January 16, 2018, and unfortunately, denied the motion. *See* ECF Nos. 79, 80.

Admittedly defense counsel should have identified these issues earlier. However, upon the identification and appropriate research of the raised issues in the suppression motion, defense counsel promptly filed a motion for leave to file the motion. *See* ECF No. 65. As the motion was granted and the Court conducted a hearing on the motion, Mr. Fall was not prejudiced by the late filing of the motion to suppress. In addition, defense counsel raised all potentially meritorious issues in the motion to suppress. Defense counsel had no basis to suspect the state magistrate's signature on the search warrant was in any way false so did not investigate that.

Drop Box report

Defense counsel does not recall a "report from drop box" presented by the government expert witness at trial. Defense counsel provided Mr. Fall with copies of the discovery documents, records and reports that counsel received from the Assistant United States Attorneys. This included all documents pertaining to drop box.

Mr. Fall's decision not to testify

Mr. Fall claims that defense counsel "advised [him] not to testify at trial." Mr. Fall further claims that he told counsel he would testify and that he wanted to testify.

AFPD Kimball understood from his initial meeting with Mr. Fall that he would not plead guilty and was proceeding to trial. He never wavered on this position. AFPD Kimball discussed Mr. Fall's right to testify and to remain silent with Mr. Fall multiple times before trial. Mr. Fall understood that he had both a right to testify and a right not to testify and remain silent. At no time prior to trial or during trial did Mr. Fall voice a desire to testify. So while defense counsel recommended to Mr. Fall that he should not testify, it was never an issue because Mr. Fall never expressed a desire to testify.

Jurors talking at lunch

Mr. Fall claims that his parents overhead some jurors talking about the trial during lunch. He further claims that his parents reported this to defense counsel who failed to report this to Judge Morgan. Defense counsel do not remember Mr. Fall's parents telling this to them. If his parents reported such an incident to counsel and counsel believed it to be serious and credible, defense counsel would have reported the incident to Judge Morgan.

Police Officers approaching counsel in the elevator

Mr. Fall claims that AFPD Kimball told him that during a trial recess, Virginia Beach police officers were in the elevator with him and questioned him about the trial and his strategy. Counsel does not recall whether Virginia Beach police officers were in the elevator with him at some point during the trial. However, AFPD Kimball would remember if the police officers had questioned him about the trial and his strategy. In short, that did not happen.

Forgetting to submit evidence

Mr. Fall claims that defense counsel "forgot to submit evidence." This is false. Defense counsel did not forget to submit evidence. Defense counsel recalls introducing an exhibit into evidence during the cross examination of Agent Ryan Chabot. Defense counsel also recalls introducing an exhibit into evidence during the cross examination of the government expert witness. The defense also called a witness to testify after the denial of the Rule 29 motion. That witness was Virginia Beach Detective Ryan Sweeney.

Failure to understand nexus of statute

Defense counsel are not exactly sure but it appears that Mr. Fall claims that AFPD Kimball did not understand the interstate nexus elements in the charged offense statutes. In every case, and certainly in Mr. Fall's case, defense counsel reviewed the statutes of the charged offenses. In this case that was 18 U.S.C. § 2252(a)(2) and 18 U.S.C. § 2252(a)(4)(B). Defense counsel understood the interstate nexus element – as well as the other elements – that the government was required to prove beyond a reasonable doubt.

Failure to file a post-trial motion

Mr. Fall claims that defense counsel should have filed a post-trial motion challenging "the production and internet usage." After the trial, defense counsel did prepare and file a motion for judgment of acquittal with memorandum of law. *See* ECF No. 95. In the motion, counsel challenged the sufficiency of the evidence to establish that Mr. Fall knowingly received the charged images in Counts 3, 4 and 5. *Id.* Counsel also challenged the sufficiency of the evidence to establish that either the images or materials used to produce the images traveled in interstate or foreign commerce with respect to Count 8. *Id.* Additionally, defense counsel filed a motion to dismiss either count 7 or 8 or alternate motion for judgment of acquittal with memorandum of law. *See* ECF No. 96. These were the only two post-trial motions defense counsel filed. If defense counsel believed that there were other meritorious post-trial motions to file, counsel would have filed them.

Conclusion

In conclusion, undersigned defense counsel state that they investigated and properly prepared for Mr. Fall's trial. In addition, Mr. Fall was involved with their trial preparation and knew what the government evidence was going to be and what counsel intended to argue in his defense. Mr. Fall never stated that he wanted to testify. Finally, defense counsel state that they did their best and at all times acted in Mr. Fall's best interest.

Date: November 1, 2021

Respectfully Submitted,

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APPENDIX F

Informal Opening Brief, No. 24-6577 (4th Cir. Aug. 5, 2024)

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Appellee,	)	
	)	
v.	)	No. 24-6577
	)	
ROBERT FALL ,	)	
	)	
Appellant	)	

INFORMAL OPENING BRIEF

Robert Fall, by and through the undersigned counsel, respectfully submits this informal opening brief.

I. Jurisdiction

1. This is an appeal from the denial of a *pro se* 28 U.S.C. § 2255 motion from the U.S. District Court for the Eastern District of Virginia. The district court denied § 2255 relief on April 25, 2024. (ECF 195, Page ID 2971-2993). The Clerk entered judgment the same day. (ECF 196, Page ID # 1994).

2. Fall timely appealed the district court's order and judgment on June 12, 2024. (ECF 198, Page ID # 3000).

3. This Court has jurisdiction under 28 U.S.C. § 1291.

II. CERTIFICATE OF APPEALABILITY

4. The district court denied a certificate of appealability as part of its order denying § 2255 relief. (ECF 195; Page ID # 2991-2992)

III. ISSUES FOR APPEAL

5. Whether the district court erred in denying Fall's § 2255 motion without an evidentiary hearing.

IV. ARGUMENT

6. Fall argued in his § 2255 motion that his counsel was ineffective for failing to challenge the warrant that resulted in the recovery of child pornography. (ECF 164-1, Page ID # 2639-2640). Specifically, Fall alleged that the warrant was defective because the items to be searched were referenced by "see attached" without anything actually attached. (ECF 164-1, Page ID # 2639). Fall also alleged that the signature of the magistrate judge who verified the warrant application and issued the search warrant was falsified. (ECF 164-1, Page ID # 2641).

7. Fall supported his allegations with copies of relevant pages from the search warrant application and search warrant. (ECF 164-1, Page ID # 2659-2666).

8. While the district court discounted Fall's allegations, the documents attached to Fall's § 2255 motion raise questions about the authenticity of the warrant application and search warrant.

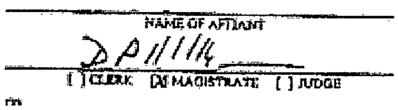
9. For instance, Fall attached two pages of what appear to be a continuation page of Section 4 of the search warrant application. (ECF 164-1, Page ID # 2559-2660). The lower right hand corner of each of these pages contain what purports to be the signature of Magistrate Judge D.P. Kellam of the Virginia Beach Circuit Court, along with initials of what appear to be Detective R. J. Sweeney. However, the signature and initials are not identical on each page. Moreover, it is unclear why the same pages of the warrant application were signed twice. Furthermore, when you compare these pages to what the Government describes as the true search warrant and application, there are no duplicates of any page. *See*, (ECF 77-1, Page ID # 479-484).

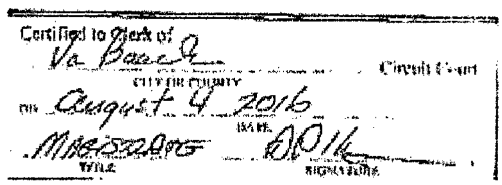
10. The same issue of duplicate pages with signatures in different places is also present with the Section 7 continuation page of the warrant application. (ECF 164-1, Page ID # 2662-2663).

11. In addition, there are two versions of Page Two of the search warrant application, each which have notably different signatures for

the "Applicant" and "Magistrate." (ECF 164-1, Page ID # 2664-2665). The Government's official version of the warrant only has one version of Page Two. (ECF 164-1, Page ID # 481).

12. And when you look closely at the magistrate judge's signature on the affidavit for search warrant, it is noticeably different from the signature on the search warrant. *Compare* (ECF 164-1, Page ID # 2661) *with* (ECF 164-1, Page ID # 2666).





13. Where there are substantial questions about whether a warrant was actually signed off by a judge, or there are questions about alterations to a warrant or its application, an evidentiary hearing is needed. *United States v. Taylor*, 63 F.4th 637, 661 (7th Cir. 2023).

14. The district court created the "classic catch-22" by disallowing a hearing on this claim. *Porter v. Zook*, 898 F.3d 408, 427 (4th Cir. 2018).

15. Accordingly, the Court should grant a COA on whether the district court erred in denying § 2255 relief on this claim without an evidentiary hearing.

Respectfully submitted,

/s/Brandon Sample
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Counsel for Robert Fall

LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I. This petition complies with the type-volume limitation of Fed. R. App. P. 32 because the motion contains 810 words.

II. This informal brief complies with the typeface and the type style requirements Fed. R. App. P. 32(a)(5) & (a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

August 5, 2024

/s/Brandon Sample
Brandon Sample