No.21-____

In The
Supreme Court Of The United States

BRIAN DAVID HILL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

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

PETITION FOR A WRIT OF CERTIORARI

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I. Questions Presented

Where the U.S. Court of Appeals didn't properly grant a Certificate of Appealability to an improperly dismissed § 2255 Motion/Case asserting Actual Innocence and later on asserted the ground of Fraud on the Court in the case while pending disposition. Both grounds of fraud on the Court and actual innocence, which are not subject to a one-year statute of limitations?

Where the U.S. District Court improperly and unlawfully dismissed § 2255 Motion/Case without an opportunity to conduct discovery, without an evidentiary hearing to address the actual innocence ground and without addressing the uncontested fraud on the court Hazel Atlas motions?

Where the U.S. Court of Appeals completely ignored and avoided the Supreme Court authoritative case law rulings regarding exceptions to the one-year statute of limitations under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") and improperly denied the Certificate of Appealability?

Where the U.S. District Court had erred on not allowing any expert witnesses to examine the seized

computer of Brian David Hill, formerly of USWGO Alternative News and examine Brian's false confession made on August 29, 2012 in the Town of Mayodan, Rockingham County, North Carolina?

Where the U.S. District Court had erred on not allowing any expert witnesses to examine why supposed files of interest which the prosecutor proclaimed was alleged child pornography was downloading between July 20, 2012, and July 28, 2013? Even after the seized computer of Brian David Hill, formerly of USWGO Alternative News was seized by, the Town of Mayodan Police Department on August 28, 2012 according to a copy of the Search Warrant filed pro se by Brian Hill?

Where case law precedent in this very Court and other appellate Courts all held that Actual Innocence and cause of showing prejudice can overcome a one-year statute of limitations. That the U.S. Court of Appeals had bucked this Court with autonomous case law Whiteside v. United States and acted in disregard for SCOTUS by ruling that there are no exceptions to the one year of limitations including no Actual Innocence Exception?

Where the "due process of law" clause of the U.S. Constitution, Amendment V, is being deprived and ignored by the U.S. District Court in the Middle district of North Carolina and the supervisory Court known as the U.S. Court of Appeals. That is by denying the Certificate of Appealability knowing that there were two Constitutional grounds which would be an exception to the AEDPA one year statute of limitations for Federal Writ of Habeas Corpus Petitioners aka § 2255 Motions?

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U.S. Court of Appeals for the Fourth Circuit; case no. #20-6034 and #19-7755; Petition for Rehearing denied on August 17, 2021, Appeal dismissed on December 18, 2020.

IV. Petition for Writ Of Certiorari

Brian David Hill ("Petitioner"), a criminal defendant and civil case 2255 Petitioner respectfully petitions this court for a writ of certiorari to review over the judgment of the U.S. Court of Appeals ("Appeals Court"), wrongfully denying the Certificate of Appealability (JA 5) for the judgment (JA 38, 40) of the United States District Court ("Trial Court"). That wrongful judgment of the Trial Court denying and dismissing the § 2255 civil case which that decision was favorable to the Respondent: United States of America, and to its officer Anand Prakash Ramaswamy, Assistant United States Attorney for the Middle District of North Carolina.

The U.S. Court of Appeals for the Fourth Circuit ("Appeals Court") under consolidated case nos. #19-7755 and #20-6034, are of the originating case(s) where the timely filed consolidated appeal(s), were originally filed and the very case(s), which are being appealed to the United States Supreme Court. This appeal is to undo a miscarriage of justice of the Appeals Court refusing to fix the miscarriage of justice of the Trial Court. The miscarriage of justice by denying Petitioner's § 2255 Motion and dismissing Petitioner's § 2255 case while pending uncontested Motions were still pending upon its record. Petitioner's contentions in all of those uncontested motions were undisputed. Undisputed contentions that Petitioner is

factually innocent of his original federal charge of possession of child pornography under Title 18, United States Code, Section 2256(8)(A). He was indicted on November 25, 2013. Wrongfully convicted on November 12, 2014. Uncontested and undisputed Motions concerning prime facie facts of the Prosecution consistently perpetuating frauds upon the Trial Court by the corrupt Assistant United States Attorney, an officer of the Court. That would be Anand Prakash Ramaswamy not contesting the fraud claims made by Petitioner on the record. Frauds concerning guilt of a criminal defendant points towards factual innocence. That is true, as a Prosecutor of a criminal case need not to commit a fraud whenever they feel that they have credible evidence against the guilty suspect. If a suspect is truly guilty then why does the Government need to commit any fraud at all against a criminal suspect? Committing the offenses of multiple frauds upon any Court is usually subject to vacatur and/or any other sanctions against the offending Officer of the Court. As a matter of law, those Motions should have been granted prior to disposing of the § 2255 case. One of those uncontested Motions such as Document #222 was about asking the Court for default judgment in Petitioner's favor in the pending § 2255 case. However, the U.S. Attorney in 21-days, even 30-days for Summary Judgment motions, did not contest that Motion.

The Appeals Court had failed and refused to hold that the Trial Court should have held an evidentiary hearing over all of the issues, evidence, and controlling case law brought to the Court's attention throughout the § 2255 case. The Appeals Court had failed and refused to hold that the Trial Court should have appointed counsel to assist the Petitioner and allow expert witnesses to examine the conflicting contradictory evidence of the corrupt U.S. Attorney Office.

The Appeals Court had failed and refused to hold that the Trial Court should have granted all uncontested Motions in the § 2255 case pursuant to Local Rule 7.3 paragraphs (f) and (k) MOTION PRACTICE. The law required the § 2255 Motion to succeed. The Local Rule required it. The SCOTUS law required it.

The Appeals Court had failed and refused to hold that the Trial Court should have considered all facts and prima facie evidence of those uncontested motions in the § 2255 case.

The Appeals Court had failed and refused to hold that the U.S. Supreme Court already had ruled for countless times that there is an "Actual Innocence" exception to the one-year statute of limitations under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). The Appeals Court had claimed in their opinion that there are only four commencement dates enumerated in 28 U.S.C. § 2255(f), and that there is no Actual Innocence exception for Federal

Writ of Habeas Corpus petition filers. There is an exception. Actual Innocence is the exception.

The Appeals Court had used contradictory case law under Whiteside v. United States, 775 F.3d 180, 182-83 (4th Cir. 2014) (en banc); and that very case contradicts with the following Supreme Court cases dealing with the one-year statute of limitations for those claiming the ground of **Actual Innocence**:

1. Bousley v. United States, 523 U.S. 614 (1998);
2. Murray v. Carrier, 477 U.S. 478 (1986);
3. McQuiggin v. Perkins, 569 U.S. 383 (2013);
4. Schlup v. Delo, 513 U. S. 298 (1995);
5. House v. Bell, 547 U. S. 518 (2006);
6. and Herrera v. Collins, 506 U. S. 390 –405 (1993).

The Fourth Circuit has no right to buck the existing precedential laws of this Supreme Court and make its own autonomous case law contradicting the Supreme Court's multiple established case laws. There is no purpose or reason for the U.S. Supreme Court to even exist if the inferior Courts do not wish to follow its verdicts and do not have to follow its verdicts. It is a waste of taxpayers' money to have a Supreme Court if the District Courts and Appellate Courts can simply ignore the Supreme Court and make counter case laws to directly contradict the laws of the Supreme

Court. The SCOTUS has a responsibility to ensure that the inferior Courts follow all past Supreme Court verdicts to resolve disputes between Circuit Courts when those verdicts have not been overturned at a later time. Appeals Courts cannot just say or act like they do not have to follow the Supreme Court rulings. That is treason. Dereliction of duty. SCOTUS must enforce its case law by making an example out of these rebellious Appeals Courts, otherwise SCOTUS case laws are deteriorating, and have no legal effect anymore. By not fixing these rebellious inferior Courts, the Supreme Court has no authoritative laws or rules in real effect anymore, they are now meaningless to the Trial Courts and Appeals Courts. They are the ones rebelling here. They are rebelling against your Court. They do not care.

V. Opinions Below

The decision by the U.S. Court of Appeals to deny the Certificate of Appealability (JA 5) was due to Whiteside v. United States, 775 F.3d 180, 182-83 (4th Cir. 2014) (en banc) which is erroneous in itself. That case law itself is contradictory to six or more case law authorities set by this Supreme Court. Actual Innocence is supposed to overcome the procedural hurdles and defects, this Court had said so multiple times.

Anyways, the judgment at issue is regarding the Appeals Court denying the Certificate of Appealability (JA 5), was reported in an unpublished opinion of UNITED STATES OF AMERICA v. BRIAN DAVID HILL, case Nos. 19-7755 and 20-6034 (December 18, 2020) by the panel of Chief Judge Gregory, Circuit Judge Diaz, and Circuit Judge Harris. Mr. Hill filed a petition for rehearing on the date of January 5, 2021. The U.S. Court of Appeals denied Mr. Hill's petition for rehearing or rehearing en banc on August 17, 2021 (JA 41). That order was unpublished and stated that:

"Brian David Hill seeks to appeal the district court's order accepting the recommendation of the magistrate judge and dismissing as untimely Hill's 28 U.S.C. § 2255 motion. See Whiteside v. United States, 775 F.3d 180, 182-83 (4th Cir. 2014) (en banc) (explaining that § 2255 motions are subject to one-year statute of limitations, running from latest of four commencement dates enumerated in 28 U.S.C. § 2255(f)). The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 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, as here, the district court denies relief on procedural grounds, the movant 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)). We have independently reviewed the record and conclude that Hill has not made the requisite showing… Accordingly, we deny a certificate of appealability and dismiss the consolidated appeals. 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." (Citations omitted)

In addition, the opinion denying the petition for rehearing had said: "The court denies the petition for rehearing and rehearing en

banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc. Entered at the direction of the panel: Chief Judge Gregory, Judge Diaz, and Judge Harris."

VI. Jurisdiction

Mr. Hill's petition for hearing to the U.S. Court of Appeals was denied on August 17, 2021 (JA 41). Mr. Hill invokes this Court's jurisdiction under 28 U.S.C. § 1254(1), having timely filed this petition for a writ of certiorari within sixty days of the United States Court of Appeal's final judgment under 28 U.S.C. § 2101.

VII. Constitutional Provisions Involved

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment VIII:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

VIII. Statement of the Case

This case is regarding an Actually Innocent man, Brian David Hill, the above named Petitioner, who'd been given a miscarriage of

justice in the above referenced appeal consolidated case numbers. In violation of the Eighth Amendment of the U.S. Constitution in prohibition of cruel and unusual punishments inflicted. Not just the Eighth Amendment but also the Fifth Amendment requiring that nobody at law or equity be "be deprived of life, liberty, or property, without due process of law".

He had proven his innocence and this Petition will explain why the Appeals Court should have granted the Certificate of Appealability as a matter of right and as a matter of law.

This case presents very important questions of exceptional circumstances as to whether or not the Appeals Court of the United States should have refused to render any appellate review by denying the Certificate of Appealability. These miscarriages of justice cannot be resolved in the lower courts anymore; they are ignoring the precedent set by this Court. They are ignoring all evidence, even the Prosecutor's evidence when it contradicts the Prosecutor's factual basis of the Guilt proclaimed against Petitioner. The whole criminal case against Petitioner was a farce, a contradiction; it is a fraud, a big fat fraud. This is just like with President Trump and the stolen elections. Petitioner is a victim of fraud after fraud after fraud. Due process violation after due process violation after another.

Here are the facts for the Justices to consider:

1. The 2255 Motion, Brief, Evidence Exhibits, Additional Evidence

On November 14, 2017, Brian Hill filed under Document #125 a "MOTION to Vacate, Set Aside or Correct Sentence (pursuant to 28 U.S.C. 2255)". That same day, Petitioner filed Documents #128, #128-1, and #128-2; which is the brief and memorandum of law as it was split into pieces in attached documents of #128: "MEMORANDUM by BRIAN DAVID HILL re [125] Motion to Vacate/Set Aside/Correct Sentence (2255) filed by BRIAN DAVID HILL. Civil Case 1:17CV1036." Then Documents #129 and #130 contain evidence Affidavits by Petitioner. The Exhibits in attachment to the brief were filed as Documents #131, #132, #133, and #134. All were filed on the same day.

On Document #135, the U.S. Attorney was directed to file a response within 60 days of the date of the U.S. Magistrate Judge's order on November 16, 2017.

On December 4, 2017, Petitioner had filed Documents #136, #137, #138, and #139 Declarations with attached evidence proof documents. Document #137 was the first initial pleading with evidence proving that the U.S. Attorney Office for the Middle District of North Carolina had defrauded the Court in regards to its witness Kristy L. Burton of the U.S. Probation Office, Danville division. U.S. Probation Officer Kristy L. Burton of the Western District of Virginia had committed perjury before that Court. Kristy L. Burton was never punished for her crime despite the factual evidence of her perjury because charging her with perjury

would force the Corrupt Prosecutor Anand Prakash Ramaswamy to admit perjury fraud upon the Court so he will never prosecute his perjurer witness before the Court. Even a good FBI Agent would push to prosecute her. She has been protected by the Corrupt Prosecutor, to never face any charges, which is corruption and criminal activity by being allowed to commit perjury against Petitioner without ever facing criminal consequences for her actions. For example, in 2019, Roger Jason Stone had been SWAT team raided by the U.S. FBI and had faced multiple criminal charges of lying to Congress.

So why has USPO Kristy L. Burton not faced charges for lying under Oath in the Trial Court but yet the U.S. District Court in Washington, DC convicted Roger Stone of lying to Congress? A two tiered justice system maybe?

2. The Motion to Dismiss and attempting to bar Petitioner from filing; and cover up filings

On January 10, 2018, the corrupt U.S. Attorney Office for the Respondent: United States of America had filed under Document #141 a "MOTION to Dismiss Motion to Vacate, Set Aside, or Correct Sentence by USA". A Roseboro letter was issued under Document #142 by the Clerk, that same day. That motion was contested by the Petitioner and a timely response was filed on January 26, 2018 under Document #143. The Respondent had never filed a reply to the opposition brief when "Replies due by 2/9/2018."

On March 7, 2018, Petitioner had filed “Petitioner's Motion and Brief for Leave to File Additional Evidence” and the additional evidence that Petitioner was requesting permission for the Court to file in the § 2255 case under Documents #144, and #145.

On March 23, 2018, the Respondent had filed the “RESPONSE to Motion AND BRIEF FOR LEAVE TO FILE ADDITIONAL EVIDENCE AND GOVERNMENTS MOTION FOR PRE-FILING INJUNCTION” and brief / memorandum of law under Documents #148, and #149.

On April 6, 2018, the Petitioner had filed a timely response against the corrupt Respondent for filing this erroneous request for a pre-filing injunction under Document #150. Petitioner had contested that motion timely.

Out of fear of the U.S. Attorney Office completely disregarding Petitioner’s long-term health condition of Autism Spectrum Disorder and demanding a pre-filing injunction, Document #151 Motion was filed with “Petitioner's Motion for requesting Psychological/Psychiatric Evaluation to Determine actual Innocence factor under False Confession element and to resolve the controversy/conflict between Government and Petitioner…” That motion was uncontested when: “Response to Motion due by 7/17/2018.” Government never responded to that motion. That motion was never contested by Respondent(s).

The uncontested Motions showing Fraud on the Court and Actual Innocence forevermore:

On January 30, 2019, The Petitioner had filed his second uncontested motion under Document #169 in his § 2255 case such as "MOTION for Hearing and for Appointment for Counsel filed by BRIAN DAVID HILL. **Responses due by 2/20/2019**." That motion made claims, uncontested claims and I quote that:

Doc. #169 Citation: "I won't let a guy in a hoodie...stop me from proving my factual innocence in this case…The fraud upon the Court is caused by both ineffective assistance of Counsel forcing me to falsely plead guilty under Oath, and a fraud upon the Court by a false factual basis of guilt in this criminal case…The fraud in the fact that I never got to review over the entire discovery evidence with Attorney Eric David Placke, before he persuaded me to falsely plead guilty under Oath means I had plead guilty without understanding the full weight of the very evidence that the prosecution had used against me in my case…The "Factual Basis" of my guilt provided by the Government prior to sentencing was Fraudulent. My confession statements were proven to be inaccurate and false, a false confession caused by my Autism because of the way I was interrogated… The SBI, that is the State Bureau of Investigation and through their Case File (forensic report) reported files/images/videos of interest but there was NO affidavit verifying/confirming whether each such file could have been actual child pornography. In addition to that, the SBI case file said that 454 files had been downloaded with the eMule program between July 20, 2012, and July 28, 2013, while my computer was seized on August 28, 2012. The criminal Judgment of guilty on November 12, 2014, was a fraudulent Judgment based upon fraud on the Court. Letter respectfully filed with both the Hon. Magistrate Judge of the Court and the AUSA Ramaswamy on this the 24th day of January, 2019." (Citations omitted)

Again, "Responses due by 2/20/2019" but the U.S. Attorney Office who had defrauded the Court had not contested those exact

claims; Petitioner's contentions were undisputed. Petitioner is innocent. Brian David Hill = Innocence.

3. The Additional Motions for Sanctions

Petitioner was angry that the Government demanded a pre-filing injunction whenever they had defrauded the Court in many different ways, the way the Federal Prosecutor had lied about Petitioner in his case. Petitioner felt that justice needed to be done against the Prosecutor. He wanted sanctions against this bully.

On October 4, 2019, Brian Hill filed under Document #199 a Hazel Atlas "MOTION entitled "Motion for Sanctions and to Vacate Judgment in Plaintiff's/Respondent's Favor" "Motion and Brief/Memorandum of Law in Support of Requesting the Honorable Court in this case Vacate Fraudulent Begotten Judgment or Judgments" filed by BRIAN DAVID HILL. Response to Motion due by 10/25/2019. (Attachments: # 1 Supplement 1, # 2 Supplement 2, # 3 Exhibit 1, # 4 Exhibit 2, # 5 Envelope - Front and Back) (Civil Case number: 17CV1036) (Garland, Leah) (Entered: 10/04/2019)". That motion was uncontested by the United States Attorney and no response was ever filed by October 25, 2019 or any future date. 21-day response deadline.

On October 16, 2019, Brian Hill filed under Document #206 a Hazel Atlas "MOTION entitled "Petitioner's Second Motion for Sanctions and to Vacate Judgment that was in Plaintiff's/Respondent's Favor; Motion and

Brief/Memorandum of Law in support of Requesting the Honorable Court in this case Vacate Fraudulent begotten Judgment or Judgments" filed by BRIAN DAVID HILL. Response to Motion due by 11/5/2019. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Supplement 1, # 4 Supplement 2, # 5 Supplement 3, # 6 Supplement 4, # 7 Envelope - Front and Back) (Garland, Leah) (Entered: 10/16/2019)". That motion was uncontested by the United States Attorney and no response was ever filed by November 5, 2019 or any future date. 21-day response deadline.

On November 8, 2019, Brian Hill filed under Document #217 a "MOTION entitled "Request that the U.S. District Court Vacate Fraudulent Begotten Judgment, Vacate the Frauds upon the Court against Brian David Hill", filed by BRIAN DAVID HILL re: 199 Motion. Response to Motion due by 12/2/2019 (Attachments: # 1 Envelope - Front and Back) (Garland, Leah) Modified on 11/12/2019 to correctly link document. (Garland, Leah) (Entered: 11/08/2019)". That motion was uncontested by the United States Attorney and no response was ever filed by December 2, 2019 or any future date. 21-day response deadline.

On November 21, 2019, Brian Hill filed under Document #222 a "MOTION entitled "Petitioner's third Motion for Sanctions, Motion for Default Judgment in 2255 case and to Vacate Judgment that was in Plaintiff/Respondent's favor" filed by BRIAN DAVID HILL. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6

Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Supplement 1, # 12 Envelope - Front and Back) (Garland, Leah) (Entered: 11/21/2019)". That motion was uncontested by the United States Attorney on the U.S. District Court record as no response was ever filed addressing the allegations on the record of the U.S. District Court. Even if the Local Rules construe that this pro se Motion be treated as a Motion for Summary Judgment, the Respondent would have had 30-days to respond to that Motion after it was served upon them but never was responded to. There were other motions or pleadings with fraud claims, which were never contested. However, the Supreme Court will have the ability to review over those as well upon granting Certiorari and determine that the Trial court's record is riddled with fraud and jurisdictional defects/errors upon its judicial machinery. That would be enough to contaminate the entire case as fraudulent, out of bounds, outside of jurisdiction, Constitutional deprivations, Deprivations of Due Process of Law in excess of jurisdiction, and even prejudices of the Trial Court. All directly caused as a result of the Respondent's repeated pattern of fraud as outlined in Documents #169, #199, #206, #217, and #222, maybe even more Documents.

4. The U.S. Magistrate's recommendation that the § 2255 Motion case be dismissed, then case dismissal despite the uncontested Motion asking for Default Judgment in Petitioner's favor

On October 21, 2019, the U.S. Magistrate Judge had entered a Document #210: "ORDER AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE signed by MAG/JUDGE JOE L. WEBSTER on 10/21/2019, ORDERED that Petitioner's motion to file additional evidence (Docket Entry [144]) is granted. RECOMMENDED that the Government's motion to dismiss (Docket Entry [141]) be granted, that Petitioner's motion to vacate, set aside or correct sentence (Docket Entry [125]) be dismissed, or in the alternative denied, and that this action be dismissed." (Citation omitted). See JA 11-37.

On November 1, 2019, the Petitioner had timely filed his objections with the Court under Document #213 to the U.S. Magistrate Judge's ORDER and RECCOMMENDATION. Petitioner had contested the recommendations.

However, according to Document #211:

"Notice of Mailing Recommendation", it had said that: "A party may respond to another party's objections within 14 days after being served with a copy."

The Respondent aka the U.S. Attorney Office did not file a response to Petitioner's objections either. Petitioner's objections were not contested by the Government when given a written notice that the Respondent clearly could have filed a response within the allotted two-week deadline.

On December 31, 2019, on New Year's Eve, the Judgment and Order was entered dismissing the § 2255 case (JA 38-41). See order under Documents #236 and #237. That order was entered while pending Hazel

Atlas motions filed inside the § 2255 case were uncontested by the Government. One of those motions was asking for Default Judgment aka Summary Judgment in Petitioner's favor. That motion was uncontested and therefore the Government had waived their right to respond. Petitioner's § 2255 Motion and case had been illegitimately denied. Petitioner had been deprived of victory, deprived of due process of law. Petitioner had won his case, and he had proven his innocence. His uncontested motions had proven this.

Brian David Hill = Innocence. See why.

Local Rule 7.3 (f) and (k) said and I quote that:

LR 7.3 MOTION PRACTICE (k) "Failure to File and Serve Motion Papers. The **failure to file a brief or response within the time specified in this rule shall constitute a waiver of the right thereafter** to file such brief or response, **except upon a showing of excusable neglect**. A motion unaccompanied by a required brief may, in the discretion of the Court, be summarily denied. A response unaccompanied by a required brief may, in the discretion of the Court, be disregarded and the pending motion may be considered and decided as an uncontested motion. **If a respondent fails to file a response within the time required by this rule, the motion will be considered and decided as an uncontested motion, and ordinarily will be granted** without further notice."

LR 7.3 MOTION PRACTICE (f) "Response to Motion and Brief. The respondent, if opposing a motion, **shall file a response, including brief, within 21 days after service of the motion** (**30 days if the motion is for summary judgment**; see LR 56.1(d)) (**14 days if the motion relates to discovery**; see LR 26.2 and LR 37.1). If supporting documents are not then available, the respondent may move for an extension of time in accordance with section (g) of this rule. For good cause appearing therefor, a respondent may be required to file any response and supporting documents, including brief, within such shorter period of time as the Court may specify."

The rule said again, that: "**failure to file a brief or response within the time specified in this rule shall constitute a waiver of the right thereafter**". The U.S. Attorney Office had waived the right to respond to all claims made by Petitioner in each and every uncontested motion. Petitioner's contentions are true. Innocent!

In fact, the Clerk had tried to enforce that same Local Rule 7.3 on Petitioner for any Motion the Government had filed against Petitioner. There is a reason why this Roseboro letter was entered after the Government's motion to Dismiss was filed when the Government did not receive a Roseboro letter for every pro se motion, which Petitioner had filed against the Government. That was because the Government lawyer is an officer of the Court while Petitioner is not an officer of the Court. The officers' of the Court know the rules; and have understood them. So that they have to follow all of the rules of the Court without a written reminder such as a Roseboro letter. Anyways, the Clerk had enforced that same rule on Petitioner in the Trial Court's Roseboro Letter under Document #142.

Under Document #142 partial citation and reformatted of the Roseboro Letter:

CITATION: Roseboro Letter, Re: Case: 17CV1036/13CR435; HILL v. USA "**Ordinarily, uncontested motions are granted**. Therefore, your **failure to respond or, if appropriate, to file counter affidavits or evidence in rebuttal within the allowed time may cause the court to conclude** that the **respondent's contentions are undisputed**. **As a result, the court may dismiss your suit or render judgment against you.** Therefore, unless you file a response in opposition to the respondent's motion, it is likely your case will be dismissed or summary judgment will be

granted in favor of the respondent. Any response or counter affidavits or other responsive material to a Motion to Dismiss **must be filed within 21 days from the date of service of the respondent's motion** upon you."

Again, Document #222 a "MOTION entitled "Petitioner's third Motion for Sanctions, **Motion for Default Judgment in 2255 case** and to **Vacate Judgment that was in Plaintiff/Respondent's favor**" was uncontested. The Respondent had waived their right to challenge and respond to Petitioner's contentions that he had won his case because Petitioner did not defraud the Court unlike Anand Prakash Ramaswamy, the Officer of the Court who had originally prosecuted the entire criminal case and was Respondent in the § 2255 case. Petitioner was entitled to his § 2255 Motion being granted as a matter of law on two grounds, which were not subject to a procedural time bar. Those two grounds are Ground #1, which is Actual Innocence, and Ground #2 is proving Fraud on the Court.

See this Court's decision under Chambers v. Nasco, Inc., 501 U.S. 32 (1991) (citation partially omitted) ("…Id. Chambers, 501 U.S. 32, 33 (1991) ("(a) Federal courts have the inherent power to manage their own proceedings and to control the conduct of those who appear before them. In invoking the inherent power to punish conduct which abuses the judicial process, a court must exercise discretion in fashioning an appropriate sanction, which may range from dismissal of a lawsuit to an assessment of attorney's fees.") Id. Chambers, 501 U.S. 32, 44 (1991) ("Of particular relevance here, **the inherent power also allows a federal court to vacate**

its own judgment upon proof that a fraud has been perpetrated upon the court. See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944); Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 580 (1946). This "historic power of equity to set aside fraudulently begotten judgments," Hazel-Atlas, 322 U.S., at 245, is necessary to the integrity of the courts, for "tampering with the administration of justice in [this] manner . . . involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public." Id., at 246. Moreover, a court has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud. Universal Oil, supra, at 580.")

Again, as to the Order dismissing the case, the Trial Court had ruled that: "Finding neither a substantial issue for appeal concerning the denial of a constitutional right affecting the conviction nor a debatable procedural ruling, a certificate of appealability is not issued." That decision was a mistake as it is not true. The substantial issues are of actual innocence and prosecutorial fraud on the Court.

Note: It should be noted that no evidentiary hearing was ever conducted prior to dismissal of the entire § 2255 action despite the uncontested claims of Petitioner and the Government's motion to dismiss being contested by Petitioner. No discovery was ever conducted, and neither was it allowed. Discovery would have shown the alleged

download dates of being 11 months and 8 days after Petitioner's computer was seized by Mayodan Police Department, and only one month while in Petitioner's custody. That right there smells of a set up operation or forensics gone wrong or both.

On January 3, 2020, Petitioner had filed a timely "NOTICE OF APPEAL without payment of fees by BRIAN DAVID HILL re: [236] Order and [237] Judgment 2255."

On September 11, 2020, the U.S. Court of Appeals had consolidated case Nos. 19-7755 and 20-6034 (JA 3).

On December 18, 2020, the U.S. Court of Appeals had denied the Certificate of Appealability and Dismissed the appeal of the Trial Court's decision with its docket entry entitled "JUDGMENT ORDER filed. Decision: Dismissed. Originating case number: 1:13-cr-00435-TDS-1,1:17-cv-01036-TDS-JLW. Entered on Docket Date: 12/18/2020. [1000867795] Copies to all parties and the district court/agency. Mailed to: Brian Hill. [19-7755, 20-6034] JSN [Entered: 12/18/2020 08:58 AM]". They also entered their "UNPUBLISHED PER CURIAM OPINION filed." See JA 5 and JA 9.

On January 5, 2021, the Petitioner had filed a timely "PETITION for rehearing and rehearing en banc by Brian David Hill in 19-7755, 20-6034. [19-7755, 20-6034] JSN [Entered: 01/06/2021 09:07 AM]".

On August 17, 2021, the U.S. Court of Appeals had denied the petition for rehearing with its docket entry entitled "COURT ORDER filed denying

Motion for rehearing and rehearing en banc [10] in 19-7755. Copies to all parties. Mailed to: Brian Hill. [1001005318] [19-7755, 20-6034] JSN [Entered: 08/17/2021 02:17 PM]". See JA 41-42.

II II II

IX. REASONS FOR GRANTING THE WRIT

A. This case presents an opportunity to ensure uniformity among the circuits and respect for the core principle of this Court that Actual Innocence overcomes the one-year statute of limitations to prevent a grave miscarriage of justice against an Innocent Man or Woman

This Court has the ability to use its authority to grant the Petition for Writ of Certiorari, then order and remand to keep the uniformity of the Circuits after the Supreme Court had created controlling case law over all Circuits. That is to resolve the issues with a resolution that Actual Innocence may overcome the procedural defects of a one-year statute of limitations.

Again, see the case law that this very Court had set:

1. Bousley v. United States, 523 U.S. 614 (1998);
2. Murray v. Carrier, 477 U.S. 478 (1986);
3. McQuiggin v. Perkins, 569 U.S. 383 (2013);
4. Schlup v. Delo, 513 U. S. 298 (1995);
5. House v. Bell, 547 U. S. 518 (2006);
6. and Herrera v. Collins, 506 U. S. 390 –405 (1993).

The Appeals Court had wrongfully used contradictory case law under Whiteside v. United States, 775 F.3d 180, 182-83 (4th Cir. 2014) (en banc). That Appeals Court's holding contradicts this Supreme Court's holdings on exceptions to the one-year statute of limitations under AEDPA. Whiteside was created after those Supreme Court authoritative cases as a rebellious backlash out of disagreement with the Supreme Court's earlier decisions and verdicts. It disrespects the authority of this Supreme Court and takes away from the Constitutional authority vested in this Supreme Court. The Appeals Court is rebelling against this Court for no good reason at all. They are rolling back six case laws by this Supreme Court with newer case law. They are rolling back the Actual Innocence exception with their own autonomous case law.

They are using defective case law that goes back to after the multiple rulings of this Supreme Court. The multiple rulings that proving Actual Innocence warrants an exception to the one-year statute of limitations under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). That single case of Whiteside v. United States in 2014 from the Appeals Court contradicts with the foregoing Supreme Court cases dealing with the one-year statute of limitations for those claiming the ground of Actual Innocence. Whiteside v. US is bad law and must be overwritten or modified by this Supreme Court

to maintain the uniformity of the Circuits so that things do not go into disarray. Whiteside case brings disarray and hopelessness.

Petitioner requests that this Court should hold that Whiteside v. United States, 775 F.3d 180, 182-83 (4th Cir. 2014) (en banc) conflicts with the SCOTUS's holdings of exceptions to the one-year statute of limitations, running from latest of four commencement dates enumerated in 28 U.S.C. § 2255(f). Petitioner requests with this Court to hold that Whiteside v. United States is bad law. Petitioner requests with this Court to hold that Whiteside v. United States should be modified by this Court to keep the uniformity with all Circuit Courts who comply with the controlling case laws of Bousley v. United States, 523 U.S. 614 (1998); McQuiggin v. Perkins, 569 U.S. 383 (2013); and House v. Bell, 547 U. S. 518 (2006).

Bousley v. United States, 523 U.S. 614, 615 (1998) ("To pursue the defaulted claim in habeas, he must first demonstrate either "cause and actual prejudice," e.g., Murray v. Carrier, 477 U.S. 478, 489, or that he is "actually innocent," id., at 496."). That is the law, your case law. Not, Whiteside.

McQuiggin v. Perkins, 569 U.S. 383, (2013) ("To overcome AEDPA's time limitations, he asserted newly discovered evidence of actual innocence, relying on three affidavits, the most recent dated July 16, 2002, each pointing to Jones as the murderer."). However, in

Petitioner's case the newly discovered evidence of Petitioner's actual innocence is the uncontested fraud on the court motions filed in the § 2255 case. Particularly Document #169 and Document #222. Uncontested claims of fraud by Petitioner is newly discovered evidence right from the record of the Trial Court. The claims made here does not relitigate what is already on the record, the truth and facts are there if the judges would simply review over it all. A certificate of appealability should have clearly been issued here.

McQuiggin v. Perkins, 569 U.S. 383, (2013) ("Actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808, and House v. Bell, 547 U.S. 518, 126 S. Ct. 2064, 165 L. Ed. 2d 1, or expiration of the AEDPA statute of limitations, as in this case. Pp. 391-398, 185 L. Ed. 2d, at 1030-1034.")

McQuiggin v. Perkins, 569 U.S. 383, (2013) ("(a) Perkins, who waited nearly six years from the date of the 2002 affidavit to file his petition, maintains that an actual-innocence plea can overcome AEDPA's one-year limitations period. This Court's decisions support his view. The Court has not resolved whether a prisoner may be entitled to habeas relief based on a freestanding actual-innocence claim, Herrera v. Collins, 506 U.S. 390, 404-405, 113 S. Ct. 853, 122 L.

Ed. 2d 203, but it has recognized that a prisoner "otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence," id., at 404, 113 S. Ct. 853, 122 L. Ed. 2d 203.").

McQuiggin v. Perkins, 569 U.S. 383, (2013) ("The Court has applied this "fundamental miscarriage of justice exception" to overcome various procedural defaults, including, as most relevant here, failure to observe state procedural rules, such as filing deadlines. See Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640. The exception, the Court's decisions bear out, survived AEDPA's passage. See , e.g., Calderon v. Thompson, 523 U.S. 538, 558, 118 S. Ct. 1489, 140 L. Ed. 2d 728; House, 547 U.S., at 537-538, 126 S. Ct. 2064, 165 L. Ed. 2d 1. These decisions "see[k] to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." Schlup, 513 U.S., at 324, 115 S. Ct. 851, 130 L. Ed. 2d 808. Sensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is AEDPA's statute of limitations. Pp. 391-394, 185 L. Ed. 2d, at 1030-1031.")

The decision by the U.S. Court of Appeals is plainly incorrect, erroneous, contrary to, and contradictory to the very law set by this Court**. It is this Court's discretionary duty to grant Certiorari.**

B. To Correct an Injustice and to compel a Court to comply with its own Rules and the Laws set by this Supreme Court. To prevent a miscarriage of justice, misapplication of law. To protect an Innocent man.

This Court has the ability to use its authority to grant the Petition for Writ of Certiorari, then order and remand to correct an injustice and to prevent a permanent miscarriage of justice. To be able to compel the Appeals Court to comply with the Rules of this Court, and to compel the Trial Court to comply with its own rules and controlling case law of this Supreme Court.

It clearly is an injustice whenever Petitioner was compelled by the Local Rule 7.3 to answer the Government's motion to Dismiss the Petitioner's § 2255 case, but the Government does not have to be compelled to answer Petitioner's motions under Documents #169, #199, #206, and #222. However, the Government lawyer who is an officer of the Court is bound by the rules of the Court, bound by principles, and bound by his/her Oath of Office. The Government did not respond to any of Petitioner's pro se motions in the § 2255 case with exception to the § 2255 Motion under Document #125 and the Petitioner's request for leave of Court to file additional evidence under

Documents #144 and #145. The Respondent did not file any objection or opposition brief to any other Motion filed throughout the Petitioner's § 2255 case.

The same rules they had enforced on Petitioner in his 2255 case are not being enforced against the counsel of the Government aka the Respondent: United States of America. This is selective enforcement of the law. It makes the law virtually unenforceable or selectively enforced in violation of the Equal Protection Clause and Fifth Amendment under the U.S. Constitution.

Even though the Equal Protection Clause itself applies only to state and local governments, this Supreme Court held in Bolling v. Sharpe, 347 U.S. 497 (1954), that the Due Process Clause of the Fifth Amendment or Fourteenth Amendment nonetheless imposes various **equal protection requirements on the federal government via reverse incorporation**. **All laws must be enforced and be equally enforced, that is why we even have laws.** If an officer fails or refuses to fulfil his duty, then he has become essentially a useless official, wasting the resources, time, and legitimacy of his respective office. When a rule of each respective Court establishes that when a motion is not responded to by a certain time period deadline aka a statute of limitations or rule of limitations, that party of a case had waived their right to respond to that motion and had waived their right to challenge the facts presented in that motion. Without a response in opposition thereto, there is nothing challenging the validity of the claims said in a particular motion when not disputed by the parties affected by that filed motion.

It is clear that Petitioner had made uncontested factual claims of FACTUAL INNOCENCE. Again, let us review over part of Document #169 once again.

DOCUMENT #169, MOTION for Hearing and for Appointment for Counsel filed by BRIAN DAVID HILL. Responses due by 2/20/2019. (Attachments: # (1) Envelope - Front and Back) (Garland, Leah). That was never responded to either. As somebody who had read the State Bureau of Investigation forensic report from the discovery materials in 2015 and saw the download dates. Those download dates of being 11 months and 8 days after the computer was seized by law enforcement. That itself is evidence tampering, evidence planting, and breaks away any notion of any possibility of credible compliance with the strict forensic standards in computer forensics investigations. It is all a fraudulent prosecution. It is all entirely a fraud on the court and the Trial Court's duty was to throw out the entire case and grant those four uncontested motions as a matter of law. They did not.

> Citation: Document #169 said ""...a false confession caused by my Autism because of the way I was interrogated. The SBI, that is the State Bureau of Investigation and through their Case file (forensic report) reported files/images/videos of interest but there was NO affidavit verifying/confirming whether each such file could have been actual child pornography. In addition to that, the SBI case file said that 454 files had been downloaded with the eMule program between July 20, 2012, and July 28, 2013, while my computer was seized on August 28, 2012. The criminal Judgment of guilty on November 12, 2014 was a fraudulent Judgment based upon fraud on the Court…"

It is on the record on appeal that the fraud had been proven. The fact that Document #169 made bombshell claims against the reviewed discovery materials of the Federal Prosecution and they did not respond to it by the date of February 20, 2019, adds more credibility to Petitioner's claims that he had proven fraud on the court, multiple times; the entire criminal prosecution was grounded in fraud. Petitioner had proven his actual innocence; there is no doubt about that on the record. Discovery materials was entirely reviewed in 2015. Wrongfully convicted in 2014.

The Certificate of Appealability clearly should have been issued by the Court of Appeals. There is plenty of convincing proof.

The Trial Court had no jurisdiction to deny those uncontested motions under Local Rule 7.3; they were supposed to be granted as a matter of law. Criminal Case should have been dismissed and final conviction should have been vacated by default judgment through the inherit powers of the Court. The Appeals Court should have observed the exceptions to the AEDPA statute of limitations for the § 2255 Motions and that Petitioner's Motion should have been granted on Actual Innocence and Fraud as legitimate grounds as asked in the Document #222 Motion for Default Judgment. Default judgment was warranted.

Case laws: “Once jurisdiction is challenged, the court cannot proceed when it clearly appears that the court lacks jurisdiction, the court has no authority to reach merits, but, rather, should dismiss the action.” Melo v. US, 505 F2d 1026 (8th Cir. 1974). “The law requires proof of jurisdiction to appear on the record of the administrative agency and all administrative proceedings.” Hagans v. Lavine, 415 U. S. 533 (1974). “Once challenged, jurisdiction cannot be assumed, it must be proved to exist.” Stuck v. Medical Examiners, 94 Ca 2d 751. 211 P2d 389 (Cal. Ct. App. 1949). “The burden shifts to the court to prove jurisdiction.” Rosemound Sand Gravel Co. v. Lambert Sand, 469 F.2d 416 (5th Cir. 1972). “The law provides that once State and Federal Jurisdiction has been challenged, it must be proven.” Main v. Thiboutot, 100 S. Ct. 2502 (1980). “A court cannot confer jurisdiction where none existed and cannot make a void proceeding valid. It is clear and well established law that a void order can be challenged in any court”. OLD WAYNE MUT. L. ASSOC. v. McDONOUGH, 204 U. S. 8, 27 S. Ct. 236 (1907).

This case presents this Court with an opportunity to clarify that the Appeals Court, which had inappropriately denied the Certificate of Appealability. They had wrongfully allowed the wrongful judgment of the Trial Court dismissing the § 2255 Motion. That is a miscarriage of justice. It is a miscarriage of justice whenever inferior Courts refuse to

protect its integrity and judicial machinery by allowing factual fraud upon its record, allowing lies and misinformation upon its record. It is a miscarriage of justice whenever inferior Courts even refuse to grant uncontested motions of a factual prima facie nature when those very uncontested motions defaulted the credibility of the U.S. Attorney's entire prosecution as FRAUDULENT. Thus, it had brought forth a challenge to its jurisdiction to have ever entered such an order. The jurisdiction has been forfeited by the Government for what they have done. They are all null and void judgments. Absent intervention by this Court, the U.S. Court of Appeals and the U.S. District Court will work to undermine the duty of their respective offices by ignoring the Supreme Court laws and by denying any factual uncontested motions of proven fraud by any party or even by any attorney. They will ignore their own local rules but yet enforce those same local rules, but then refuse to enforce those very rules on the Government counsel.

This undoes carefully crafted procedural safeguards set by the Due Process of Law under the Fifth Amendment of the United States Constitution, and unifying case law across the country. Unifying case law that this Court and other Courts of this great country have spent for the past hundred or more of years developing the opinions regarding the inherit or implied powers of every Courthouse in the United States. Its own ability to undo fraudulent begotten judgments. It will create a

nationwide disconnect from the factual matter, facts will no longer matter as lies contaminate the Federal Court records, deception permitted in the records of the Federal Courts. That will contradict case law precedent across the country and will show all Courts of Appeals' and Trial Courts' that they do not have to follow the law and that the requirement for valid legal jurisdiction does not matter anymore. It will allow Courts to ignore the factual evidence of uncontested motions with proven claims that they want at their discretion when past case law ruled that judges are in excess of jurisdiction by not fulfilling their ministerial duties to correct any fraudulent begotten judgments upon any proof or undisputed claims of defrauding the Court which contaminates the Judicial Machinery. Petitioner had won his case, default judgment should have been granted in his favor. The Certificate of Appealability should have been issued as the record is well grounded in law and merit.

Speaking of merit, the Appeals Court erred when they overlooked a very serious issue of merit. The Trial Court admitted in its own OPINION from the Magistrate Judge that merits do not matter. The Trial Court held that even if Petitioner had proven his actual innocence aka even if Petitioner had proven he had merit, the Trial Court would have denied it as untimely filed. Deemed it as untimely filed under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") in complete

contradiction with this Court's holding that Actual Innocence may overcome a procedural defect. See the Trial Court's opinion below.

Citing Page 19 of Magistrate's Recommendation, JA 29: "g. The Merits; As explained above, all of Petitioner's grounds are time-barred. However, if the Court were to reach the merits of Petitioner's grounds for relief, it would deny them."

There you have it. The Magistrate had basically stated on the record that it does not matter if Petitioner had proven his merits, even if those merits are not subject to time bar. Saying that the Court would deny them even if Petitioner had proven his innocence. Like they ignored the uncontested motions and uncontested contentions of Petitioner. The Trial Court never wanted to believe in Petitioner's innocence and they never will; unless the Supreme Court demands that the Appeals Court reverse its erroneous decision, Order and Demand, and compel the Appeals Court to grant Petitioner's petition for a Certificate of Appealability. It is a due process violation and a due process deprivation to say that even if Petitioner had merit, the Court would deny it knowing that SCOTUS made multiple rulings regarding Actual Innocence exception must be afforded to Federal Writ of Habeas Corpus petitioners. The inferior Courts are completely ignoring due process of law. They are ignoring Actual Innocence as if the exception does not exist to the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). This Court had ruled otherwise. There is an exception. That

exception is being ignored by the Appeals Court. SCOTUS needs to correct this. S.O.S. Help!

X. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment of the U.S. Court of Appeals wrongfully denying the Certificate of Appealability, Order and Remand for further proceedings. Petitioner respectfully requests that this Court hold that the U.S. Court of Appeals issue a Certificate of Appealability for the issues of Actual Innocence, Fraud on the Court, and Constitutional issues.

II

DATED this 12th day of October, 2021.

Respectfully submitted,

Brian D. Hill
Signed
Brian D. Hill

Brian David Hill
Pro Se Petitioner
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JOINT APPENDIX

JA = Joint Appendix in Petition

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FILED: September 11, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7755 (L)
(1:13-cr-00435-TDS-1)
(1:17-cv-01036-TDS-JLW)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

BRIAN DAVID HILL

Defendant – Appellant

No. 20-6034
(1:13-cr-00435-TDS-1)
(1:17-cv-01036-TDS-JLW)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

BRIAN DAVID HILL

Defendant - Appellant.

O R D E R

The court consolidates case Nos. 19-7755 and 20-6034.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7755

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BRIAN DAVID HILL,

Defendant - Appellant.

No. 20-6034

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BRIAN DAVID HILL,

Defendant - Appellant.

Appeals from the United States District Court for the Middle District of North Carolina, at Greensboro. Thomas D. Schroeder, Chief District Judge. (1:13-cr-00435-TDS-1, 1:17-cv-01036-TDS-JLW)

Submitted: December 1, 2020 Decided: December 18, 2020

Before GREGORY, Chief Judge, and DIAZ and HARRIS, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Brian David Hill, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Brian David Hill seeks to appeal the district court's order accepting the recommendation of the magistrate judge and dismissing as untimely Hill's 28 U.S.C. § 2255 motion. *See Whiteside v. United States*, 775 F.3d 180, 182-83 (4th Cir. 2014) (en banc) (explaining that § 2255 motions are subject to one-year statute of limitations, running from latest of four commencement dates enumerated in 28 U.S.C. § 2255(f)). The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 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, as here, the district court denies relief on procedural grounds, the movant 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)). We have independently reviewed the record and conclude that Hill has not made the requisite showing.

Hill also argues that the district court judge should have recused himself. We review a judge's recusal decision for abuse of discretion. *United States v. Stone*, 866 F.3d 219, 229 (4th Cir. 2017). Hill fails to establish that recusal was required. *See Belue v. Leventhal*, 640 F.3d 567, 572-74 (4th Cir. 2011) (discussing valid bases for bias or partiality motion); *United States v. Lentz*, 524 F.3d 501, 530 (4th Cir. 2008) ("The presiding judge is not . . . required to recuse himself simply because of unsupported, irrational or highly tenuous speculation." (internal quotation marks omitted)).

Accordingly, we deny a certificate of appealability and dismiss the consolidated appeals. 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

FILED: December 18, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7755 (L)
(1:13-cr-00435-TDS-1)
(1:17-cv-01036-TDS-JLW)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

BRIAN DAVID HILL

Defendant - Appellant

No. 20-6034
(1:13-cr-00435-TDS-1)
(1:17-cv-01036-TDS-JLW)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

BRIAN DAVID HILL

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied and these appeals are dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

BRIAN DAVID HILL,	)	
	)	
Petitioner,	)	
	)	**1:17CV1036**
v.	)	**1:13CR435-1**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE

Petitioner Brian David Hill has brought a motion (Docket Entry 125) to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255, which he supports with over 1500 pages of pleadings, declarations, and exhibits. In 2014, Petitioner was charged with, and pled guilty to, possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(2). (Docket Entries 1, 19, 20; Minute Entry 6/10/2014.) On November 12, 2014, he was sentenced to ten months and twenty days of imprisonment, but not less than time served; ten years of supervised release; and a $100.00 special assessment. (Docket Entry 54; Minute Entry 11/10/2014.) Petitioner appealed on January 29, 2015, but it was dismissed as untimely on April 7, 2015. (Docket Entries 62, 74-75.)

Petitioner filed the instant motion on November 14, 2017 along with numerous supporting pleadings and exhibits (Docket Entries 125-134, 136-139) and a motion to seal (Docket Entry 140). The Government filed a motion to dismiss. (Docket Entry 141.) Petitioner, in turn, filed a response (Docket Entry 143), a motion for leave to file additional evidence (Docket Entry 144), and an additional brief (Docket Entry 145). The Government

responded to Petitioner's motion to file additional evidence and also filed a supporting memorandum (Docket Entries 148-49), to which Petitioner filed an additional response (Docket Entry 150). Petitioner also filed a motion entitled "Motion for Requesting Psychological/Psychiatric Evaluation" (Docket Entry 151), motion to appoint counsel (Docket Entry 153), a motion entitled "Petitioner Asks Court to Continue Supervised Release" (Docket Entry 154), a motion for "Summary Judgement or Case Dismissal of Supervised Release Violation" (Docket Entry 165), a motion seeking certified copies of certain pleadings previously filed (Docket Entry 168), a motion for a hearing and for the appointment of counsel (Docket Entry 169), and a request for transcripts (Docket Entry 194). The matter is now ripe for a ruling. *See* Rule 8, Rules Governing Section 2255 Proceedings.

Background

To best understand the legal analysis below, additional background of the proceedings in Petitioner's criminal case is relevant.

A. The Rule 11 Hearing

Petitioner pled guilty in this Court to possession of child pornography on June 10, 2014. (Minute Entry 6/10/2014.) Prior to his Rule 11 hearing, Petitioner had filed a number of letters with the Court, despite having been appointed counsel. (Docket Entries 15 and 16.)

At Petitioner's Rule 11 hearing, he was placed under oath and indicated that there was nothing about his mild autism or diabetes that prevented him from understanding the proceedings. (Docket Entry 113 at 4-8.) Petitioner stated that if his blood sugar were to drop during the hearing, he would notify the Court and it would stop the proceedings. (*Id.* at 8.)

Roughly mid-way through Petitioner's guilty plea, the Court stopped and asked him if he was "doing all right" and Petitioner, under oath, stated "Yeah. Yes, sir." (*Id.* at 17.) The Court further addressed Petitioner's pro se letters. (*Id.* at 9.) The Court informed Petitioner that a guilty plea would result in their being no further inquiry into those pleadings and they would be moot. (*Id.*) Petitioner indicated that he understood. (*Id.* at 10.)

Petitioner admitted he had read the indictment and discussed the charge and any possible defenses with his counsel, whose services with which he was satisfied. (*Id.* at 8-9.) The Court summarized the plea agreement and Petitioner agreed with that summary. (*Id.* at 10-11.) Petitioner indicated that he understood the plea agreement, had been presented with sufficient time to review the plea agreement and discuss it with counsel, and that it was the entire plea agreement. (*Id.* at 11.) Petitioner stated that no one had made any threats or promises other than those in the plea agreement to get him to plead guilty. (*Id.* at 14.) Petitioner indicated that he understood that he faced a statutory maximum sentence of ten years of imprisonment. (*Id.* at 15.)

The Court then explained to Petitioner his constitutional rights, which Petitioner stated he understood. (*Id.* at 19-20.) The Court then went over the elements of the crime of possession of child pornography, including the element of knowing possession. (*Id.* at 21.) Petitioner indicated that he understood these elements and that he was "admitting to the elements of the offense as those facts are described in the indictment." (*Id.*) Petitioner indicated he had no questions and was pleading guilty because he was, in fact, guilty. (*Id.* at

22.) The Court found Petitioner "fully competent and capable of entering an informed plea"[1] and found further that Petitioner was "aware of the nature of the charges and the consequences of his plea, and his plea of guilty [was] a knowing and voluntary plea." (*Id.*)

Petitioner next indicated that he had reviewed the factual basis with his attorney, had no objections to it, and "generally agree[d] with the facts described in the factual basis[.]" (*Id.* at 22-23.) That factual basis provides that:

> Detective Robert Bridge of the Reidsville Police Department conducted an investigation into online sharing of child pornography on peer-to-peer networks, finding an IP address logged as having previously identified files of child pornography available for sharing. Detective Bridge partially downloaded two of those files, finding the contents to constitute child pornography as defined in 18 U.S.C. § 2256(8). The subject IP address was found to be assigned to a residence in Mayodan, N.C. A state search warrant was obtained and executed on August 28, 2012, with defendant, BRIAN DAVID HILL, being found to reside at that location. In a consensual, non-custodial interview the following day, HILL admitted knowingly seeking and possess[ing] child pornography. A forensic examination of computer media possessed by HILL showed it contained child pornography as defined in 18 U.S.C. § 2256(8).

(Docket Entry 19.)

The Court then found that Petitioner's plea was supported by an independent factual basis containing each of the elements of the offense, and the Court, therefore, accepted Petitioner's plea and adjudged him guilty. (Docket Entry 113 at 23.) The Court also ordered

[1] When the Court determined that Petitioner was competent, it had before it a recently conducted psychiatric report supporting that finding. (Docket Entry 17.)

the preparation of a presentence report ("PSR") and further ordered Petitioner to participate in a psychosexual evaluation. (*Id.* at 23-25.)

The Court then left Petitioner with "one other thought":

> It seems to me after talking to you today and hearing your responses that for the most part some of your concerns have -- and fears have been allayed with respect to both the process as well as counsel in the case. I don't mind telling you that you are represented by very experienced and capable counsel in this court in a wide variety of matters, so in many respects you're very -- we'd expect that out of all lawyers with the public defender and Criminal Justice Act panel attorneys, but you've got a good one.
>
> Now, you need to give some thought about mailing items directly to the Court because they can hurt you – they can hurt this -- they can hurt you in this process in very unexpected ways. For example, I understand completely your concerns about various pieces of the process and, most notably, registration as a sex offender and various other things. But if you say the wrong thing, and that gets communicated to me, it becomes a factor I have to take into consideration in fashioning a sentence later.
>
> So let me strongly urge you that to the extent you want to send letters, give them to [counsel] for his review first rather than sending them directly to the Court, and I can assure you -- as a matter of fact, I'll direct [counsel] to do it if that makes you feel better. But to the extent the information needs to be conveyed to the Court, [counsel] will convey that information to me. . . .
>
> Part of what a lawyer does, and I'm sure you understand this, is stand as a buffer between client's statements that may be made without fully realizing the import of those statements and -- between the client and the Court in those circumstances. So I want to encourage you going forward to the extent frustrations may develop to send that communication to [counsel] first, and then you all decide together whether or not that's the kind of thing that should come to the Court.

(*Id.* at 25-27.)

B. The September 3, 2014 Hearing

Soon after Petitioner's guilty plea, he filed a pro se motion seeking to withdraw that plea, and the Court held a hearing. (Minute Entry 9/3/2014; Docket Entry 114 at 2.) During this hearing, Petitioner protested his innocence of possessing child pornography. (*Id.* at 5.) The Court found that Petitioner's allegations did not "rise anywhere near a level expressing . . . actual innocence . . . allowing [him] to withdraw his plea and proceed to trial in this case." (*Id.* at 18.) The Court noted that the letters Petitioner had submitted on his behalf, "ultimately present nothing more than a series of conclusory allegations unsupported by any evidence with respect to his innocence[.]" (*Id.*) The Court acknowledged further that, in addition to his mild autism, obsessive-compulsive disorder, and anxiety disorder, Petitioner had also been diagnosed as having a "delusional disorder, persecutory type." (*Id.* at 8, 19.) The Court observed that Petitioner's allegations seemed "entirely consistent with [that] disorder[.]" (*Id.* at 20.) The Court did not permit Petitioner to withdraw his guilty plea. (*Id.* at 2-24.)

C. The September 30, 2014 Hearing

After Petitioner's September 3, 2014 hearing, but prior to his September 30, 2014 scheduled sentencing hearing, Petitioner filed roughly a dozen new pro se pleadings and motions which essentially asserted his innocence of the crime to which he had pled guilty. (Docket Entries 29-32, 34-46.) Some of these pleadings contained statements by Petitioner and by third parties—apparently Petitioner's acquaintances through the internet—asserting that Petitioner had essentially been framed. By way of example, in one such pleading,

Petitioner asserted that "I have a lot of enemies through my political work with U.S.W.G.O. Alternative News" (Docket Entry 29 at 3) and indicated that one of these enemies planted child pornography on his computer (*id.* at 1-9). Another one of these pleadings contains a statement by a purported out-of-state entertainment attorney and blogger who stated that Petitioner was "most likely" "set-up" as has happened to "a solid number of the media activists who are more or less in [Petitioner's] circle." (Docket Entry 32 at 2; *see also* Docket Entry 46.)

At the ensuing September 30 hearing, the Court observed that "much of this motions practice by [Petitioner] is promoted by psychological factors that are more thoroughly described in the" PSR. (Docket Entry 115 at 2.) The Court then denied Petitioner's outstanding pro se motions. (*Id.* at 3.) Counsel was also permitted to withdraw, in part because Petitioner intended to file a lawsuit against him. (*Id.* at 13-17.)

The Court also addressed Petitioner's declarations of innocence and the declarations of third parties as to Petitioner's purported innocence. (*Id.* at 14.) The Court noted that it saw "not only an individual defendant making statements that are unsupported by anything I see in the record, [but] the defendant somehow has now assembled a group of individuals who are independently and on his behalf urging these alternate facts on the Court[.]" (*Id.* at 15.) The Court noted further that the statement by the purported attorney was "irresponsible" because "she nowhere in this declaration describes any familiarity with the statements that [Petitioner] made at the time of the arrest, with the forensic analysis of [Petitioner's] computer, nor, frankly . . . does she fully describe a connection between [Petitioner] and these other individuals." (*Id.* at 8.) The Court further noted that Petitioner's internet acquaintances

appeared to have "no familiarity with the specific facts of this case, the forensic analysis, or the statements of [Petitioner] given as reflected in the" PSR. (*Id.* at 13.)

D. <u>The October 14, 2014 Status Conference</u>

After the September 30, 2014 hearing and prior to an October 15, 2014 status conference, Petitioner filed four additional motions which sought to gather and place additional evidence of his purported innocence before the Court. (Docket Entries 48-51.) At the October 15, 2014 hearing, Petitioner's new counsel indicated that he had familiarized himself with Petitioner's criminal matter. (Docket Entry 116 at 5.) Counsel indicated that there were no grounds to withdraw the guilty plea and that, after speaking with Petitioner, Petitioner did not want to withdraw his guilty plea. (*Id.*) Counsel did not adopt any of Petitioner's pro se filings. (*Id.*) Counsel indicated that he had spoken to the purported out-of-state entertainment attorney and "to put it bluntly, don't put a lot of stock in what she has to say." (*Id.* at 6, 12.)

E. <u>Sentencing</u>

Petitioner was sentenced on November 10, 2014. (Docket Entry 117.) At the outset of sentencing, counsel indicated that he had spoken to Petitioner, who said he felt "okay." (*Id.* at 2.) Petitioner indicated that he had reviewed the PSR and that he generally agreed with it. (*Id.* at 2-3.) In pertinent part, the PSR states that when interviewed by law enforcement, Petitioner "admitted that he had been downloading and viewing child pornography for approximately one year." (Docket Entry 33, ¶ 8.) It further indicated that Petitioner had submitted a signed statement admitting his guilt of possessing child pornography. (*Id.*, ¶ 15.) The PSR further

indicated that Petitioner was diagnosed with, in pertinent part, insulin dependent diabetes, autism spectrum disorder, delusional disorder (persecutory type), obsessive compulsive disorder ("OCD"), and generalized anxiety disorder. (*Id.*, ¶¶ 42, 45.) He was described as "fully oriented" and "extremely intelligent regarding some information and very child-like with other information." (*Id.*, ¶ 43.) The PSR notes too that Petitioner's voluminous filings relate to his OCD and "[i]n many ways" were an attempt to "manage his anxiety" "because producing documents briefly reduces his anxiety."[2] (Docket Entry 33, ¶ 45.)

The Court ultimately granted a motion to depart downward from the 97 to 121 month advisory guidelines calculation in light of Petitioner's "several mental health issues and conditions." (Docket Entry 117 at 5-7.) He was sentenced instead to ten months and twenty days of imprisonment, which was essentially time served, along with ten years of supervised release. (*Id.* at 8, 10.) Petitioner did not speak at sentencing. (*Id.* at 7.) The Court noted that Petitioner had been represented by "two very capable attorneys" and that this was only the "second time" the sentencing judge had "imposed a probationary type sentence in a case involving" child pornography. (*Id.* at 14-15.)

F. <u>The First Supervised Release Hearing</u>

On June 30, 2015, the Court had a hearing to address whether Petitioner's supervised release should be revoked for verbally abusing his probation officer and failing to follow her directions. (Docket Entry 88; Docket Entry 123.) The Court found Petitioner to have been

[2] The PSR is under seal and the Court quotes it sparingly. Limited and selective reference to the PSR seems appropriate here, however, because Petitioner has put these parts of the PSR at issue and also because Petitioner freely mentions most or all of these facts in his many public filings. (Docket Entry 33.)

insolent and aggressive towards his probation officer. (Docket Entry 123 at 79-80.) Rather than revoke Petitioner's supervised release, however, the Court, in pertinent part, ordered six months of home incarceration. (*Id.* at 81.) The Court noted Petitioner's age and mental health in support of this decision. (*Id.* at 80.) At this hearing, the Court also remarked upon the large number of pro se pleadings Petitioner continued to file, which the Court observed "have a somewhat near delusional approach to his whole situation[.]" (*Id.* at 80.)

At this hearing, while it was not listed as a ground for which probation sought revocation of Petitioner's supervised release, it also became apparent that an image of child pornography had been found on a pre-purchased cell phone Petitioner was using. (*Id.* at 7.) Petitioner voluntarily brought this to the attention of his probation officer. (*Id.*) He said he "accidentally opened the document" which was "sent from an anonymous account." (*Id.* at 15.) The Court observed that it "sounds highly unlikely that somebody who has a prepaid cell phone would anonymously receive unsolicited child pornography." (*Id.* at 61.)

G. <u>The Second Supervised Release Hearing</u>

Petitioner was subsequently arrested in September of 2018 for exposing himself in public throughout his hometown in Martinsville, Virginia, in the early morning hours, proof of which was provided by photographs Petitioner took of himself on his camera at the time. (Docket Entry 198 at 1.) Petitioner initially claimed that he did so under duress related to threats from an unnamed man in a "hoodie" who insisted that he would harm Petitioner's mother unless he got "naked in public [and took] photos" of himself and then "placed them at the drop off point[.]" (Docket Entry 164 at 2.) Petitioner later asserted that he exposed

himself because he was suffering from carbon monoxide poisoning. (Docket Entry 181 at 2.) Petitioner was convicted in state court in Virginia in 2018, and his federal revocation proceeding followed. (Docket Entry 198 at 1.) The Court revoked Petitioner's supervised release on October 7, 2019 and he was sentenced to nine months of imprisonment. (Docket Entry 200.) He was ordered to self-report by noon on December 6, 2019. (*Id.*)

Grounds for Relief

Petitioner raises four grounds for relief. Petitioner's first ground for relief is one of "[a]ctual innocence" to the crime of possession of child pornography. (Docket Entry 125, Ground One.) Next, Petitioner asserts ineffective assistance of counsel. (*Id.*, Ground Two.) Third, Petitioner asserts due process violations during the pre-trial process of his criminal case. (*Id.*, Ground Three.) Last, Petitioner asserts prosecutorial misconduct. (*Id.*, Ground Four.) As explained below, these issues are all time-barred and also lack merit.[3]

Discussion

Respondent requests dismissal on the ground that Petitioner's motion was filed outside of the one-year limitation period imposed by the Antiterrorism and Effective Death Penalty Act of 1996, P.L. 104-132 ("AEDPA"). (Docket Entry 141.) 28 U.S.C. § 2255(f). The AEDPA amendments apply to all motions filed under § 2255 after their effective date of April 24, 1996. *Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997). Interpretations of 28 U.S.C. §§

[3] Petitioner's pleadings are voluminous. The pleadings, at times, are also difficult to follow. The undersigned has attempted to respond to all of the many variations of Petitioner's grounds and sub-grounds for relief. To the extent that any have not been specifically discussed, they should still be dismissed as time-barred and/or denied on the merits for essentially the reasons set out herein.

2244(d)(1) and 2255 have equal applicability to one another. *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999).

a. Subsection 2255(f)(1)

Under § 2255(f)(1), the limitation period runs from the date when the judgment of conviction became final. Upon the entry of judgment on November 12, 2014 (Docket Entry 54), Petitioner had fourteen days to file a notice of appeal, that is, until late-November of 2014, which he did not do. *United States v. Diallo*, 581 F. App'x 226, 227 (4th Cir. 2014) (citing *Clay v. United States*, 537 U.S. 522, 525 (2003), and Fed. R.App. P. 4(b)(1)(A)(i), (b)(6)); *see also United States v. Plascencia*, 537 F.3d 385, 387 (5th Cir. 2008) ("[The petitioner's] conviction became final when the time expired to file a timely notice of appeal on direct review . . . ."). Petitioner's one-year deadline began in late-November 2014 and ended a year later in late-November 2015. Petitioner did not file the instant motion pursuant to § 2255 until November of 2017. It is approximately two years late. Only if another subsection gives Petitioner more time to file will his motion be timely.[4]

[4] Petitioner's belated appeal has no impact on the analysis of the statute of limitations. *See, e.g.*, *United States v. Pascencia*, 537 F.3d 385 (5th Cir. 2008) (citing *Moshier v. United States*, 402 F.3d 116, 118 (2d Cir. 2005)); *Sanchez-Castellano v. United States*, 358 F.3d 424, 428 (6th Cir. 2004); *Kapral v. United States*, 166 F.3d 565, 577 (3d Cir. 1999) ("If a defendant does not pursue a timely direct appeal to the court of appeals, his or her conviction and sentence become final, and the statute of limitation begins to run, on the date on which the time for filing such an appeal expired."). *See also Ervin v. United States*, No. 1:08CR128-7, 2011 WL 5075651, at *3 (W.D.N.C. Oct. 25, 2011) ("The fact that the Petitioner filed the § 2255 motion within one year after the Fourth Circuit granted the Government's motion to dismiss his appeal is of no benefit to him.").

b. Subsection 2255(f)(2)

Subsection 2255(f)(2) requires an unlawful governmental action preventing Petitioner from filing a motion pursuant to § 2255. Petitioner invokes this provision. (Docket Entry 143 at 73-74; Docket Entry 145 at 9.) He asserts that the modification of his term of supervised release to include six months of house arrest was wrongful because it was based upon falsehoods told by his probation officer. (*Id.*) He asserts he could not perform legal research or gather additional evidence during this time. (*Id.*)

Petitioner's assertions do not render his motion timely. First, Petitioner has failed to demonstrate any unlawful governmental action here.[5] Second, home detention would not be a sufficient impediment to the filing of a motion pursuant to § 2255. Third, even assuming Petitioner's assertions were true, and there was a six-month impediment attributable to governmental action, which is not the case, his motion would still be time-barred. Petitioner states he was subject to home detention until December 30, 2015 and his motion was not filed until November of 2017, almost two years later. Six months would make no difference. Beyond this, nothing in any of Petitioner's filings meaningfully supports a finding of unlawful governmental action preventing him from filing. Any such assertions are vague, conclusory and unsupported and fail for those reasons alone. *See Nickerson v. Lee*, 971 F.2d 1125, 1136 (4th Cir. 1992) *abrog'n on other grounds recog'd*, *Yeatts v. Angelone*, 166 F.3d 255 (4th Cir. 1999).

[5] Any effort to recast this argument as a request for equitable tolling fails for the same reasons set forth above.

c. Subsection 2255(f)(3)

Subsection 2255(f)(3) allows the limitation period to run from the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized and made retroactively applicable to cases on collateral review. Petitioner does not allege that he is relying upon such a right, and the Court is unaware of any reason why this subsection might be applicable. This subsection does not apply.

d. Subsection 2255(f)(4)

Subsection 2255(f)(4) allows the limitation period to run from the date on which the facts supporting the claims presented could have been discovered through due diligence. Petitioner invokes this provision by asserting that he was not given full access to the discovery in this case. (Docket Entry 125, Ground Three.) However, Petitioner admits he had full access to his criminal case discovery material on January 22, 2015. (*Id.*) Even assuming January 22, 2015 triggered the onset of his one-year deadline, Petitioner's instant motion is still time-barred, because he did not file it until November of 2017. To the extent Petitioner makes any additional efforts to acquire a later starting date of the limitations period under this subsection, his efforts are equally unsuccessful. This is because the purported facts in question could have been discovered with due diligence, or because they are irrelevant, vague, conclusory, unsupported, and/or speculative in nature. (*Id.*) *See Nickerson*, 971 F.2d at 1136.

e. Equitable Tolling

Petitioner also seeks equitable tolling. The Supreme Court has determined that the one-year limitation period is subject to equitable tolling. *Holland v. Florida*, 130 S.Ct. 2549,

2562 (2010). Equitable tolling may apply when a petitioner "shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Id.* (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

First, to the extent Petitioner pleads ignorance of the one-year deadline because of his pro se status, this is not a basis for equitable tolling. *United States v. Sosa*, 364 F.3d 507, 512 (4th Cir. 2004). Second, the potential merits of a claim do not impact the timeliness analysis, so any argument along these lines must also fail. *See Rouse v. Lee*, 339 F.3d 238, 251-52 (4th Cir. 2003). Third, courts have been reluctant to consider a mistake of counsel grounds for equitable tolling and so any argument along these lines also fails. *See, e.g.*, *Gladden v. Washintgon*, No. 1:15CV207, 2015 WL 9025937, at *5 (M.D.N.C. Dec. 15, 2015).

Fourth, in asserting the existence of unlawful governmental action that purportedly impeded him from filing a motion under § 2255, Petitioner asserts that he was "emotionally upset" during his home detention, states that his OCD was worsening, and also seems to be implying that the purported unlawful governmental action damaged his health and made it impossible to file a timely motion. (Docket Entry 143 at 74.) However, equitable tolling due to a petitioner's mental capacity is available "only in cases of profound mental incapacity." *Sosa*, 364 F.3d at 513. Petitioner's assertion of a mental illness does not demonstrate the sort of extraordinary case of "profound mental incapacity" that would justify equitable tolling. Nothing on the record suggests that Petitioner's mental or physical health prevented him from filing a motion pursuant to § 2255 in a timely fashion.

Fifth, as demonstrated throughout this Recommendation, Petitioner has filed many pro se pleadings. Petitioner has failed to demonstrate why he was able to file all those pleadings diligently, but was unable to file a timely motion pursuant to § 2255.

Sixth, Petitioner also appears to assert that he is entitled to equitable tolling because he filed pleadings in 2015, which state they were filed in anticipation of later filing an actual motion pursuant to § 2255. (Docket Entry 143 at 78-79 referencing Docket Entries 71, 76, 81.) He states "[t]here is also a chance that the Court may consider that Petitioner had timely filed a defective pleading . . . which could have been construed as a § 2255 motion[.]" (*Id.* at 78.) Although couched in terms of a request for equitable tolling, this is instead an argument that Petitioner filed his motion under § 2255 in 2015, when it would have been timely, rather than in 2017, when it was not.

In any event, none of the documents Petitioner references are motions brought pursuant to § 2255. None were filed on the proper forms that would indicate they were § 2255 motions, and, more importantly, each of these documents indicates they were *not* motions brought pursuant to section § 2255 and were, at most, filed in anticipation of Petitioner perhaps later filing *either* a motion for a new trial *or* a motion pursuant to section § 2255. (*See* Docket Entry 71 at 1 ("Defendant plans to file a Motion for a New Trial or Petition for a Writ of Habeas Corpus to overturn his federal criminal conviction."); Docket Entry 76 at 1 ("This is NOT a Habeas Corpus Petition . . . . ."); Docket Entry 81 at 1 (same); *see also* Docket Entry 79 ("I am seeking for [sic] enough evidence for Writ of Habeas Corpus relief . . . .").) None of these documents change the Court's timeliness analysis.

Last, Petitioner sprinkles his pleadings with what may be considered additional equitable tolling arguments. (*See, e.g.*, Docket Entry 145 at 18 ("Petitioner thought it was safer to file the 2255 Motion after the election of Donald John Trump . . . .").) The Court will not address each such argument individually. Petitioner's arguments are some combination of irrelevant, vague, conclusory, unsupported, and speculative in nature. *See Nickerson*, 971 F.2d at 1136. Petitioner is not entitled to equitable tolling, much less the roughly two years of equitable tolling he would need to render his motion timely.

f. Actual Innocence

Petitioner spends the bulk of his pleadings contending in one way or another that he is innocent. (Docket Entry 125, § 18.) In other words, he contends that he is actually innocent of possessing child pornography, despite the fact that he confessed to the crime and pled guilty to it under oath in federal court, and then reaffirmed this at sentencing. (*Id.*)

The essence of Petitioner's actual innocence claim appears to be that someone put child pornography on his computer in retaliation for his independent reporting, which involved writing blog posts, making and posting YouTube videos, and employing other forms of social media. (*See, e.g.*, Docket Entry 128.) According to Petitioner, he reported on local corruption in his home town and reported about the unconstitutional nature of the Department of Defense's 2012 budget authorization, which he asserts permitted the abduction and torture of United States citizens. (*See, e.g.*, Docket Entry 130.) According to Petitioner, his confession and guilty plea to the possession of child pornography were, respectively, false and involuntary, and were motivated by (1) his poor health, including symptoms he suffers

attendant to his mild autism, diabetes, and other issues, (2) threats from one or more third parties against either him or against his family members, and (3) incompetent legal representation. (*See, e.g.*, Docket Entry 128.)

Petitioner is correct that there is an actual innocence exception to the one-year time limitation. *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1928 (2013). However, to establish actual innocence, "a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327 (1995); *see McQuiggin*, 133 S.Ct. at 1935. "[S]uch a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324. Petitioner has not met this high burden.

Petitioner references his criminal discovery file in this case, which he apparently sought through a Freedom of Information Act ("FOIA") request. (Docket Entry 125, § 18.) However, Petitioner has done no more than assert in a conclusory manner that there might be evidence supporting a claim of actual innocence, which is insufficient to warrant a later starting date. *See Nickerson*, 971 F.2d at 1136.

Beyond this, Petitioner has repeatedly admitted to possession of child pornography. First, after a comprehensive Rule 11 hearing, he voluntarily and knowingly plead guilty to the charge (Docket Entry 113) and agreed that the factual basis was accurate (*id.* at 23). The factual basis stated that Petitioner knowingly sought and possessed child pornography. (Docket Entry 19.) Second, during his pre-sentence interview in preparation of his PSR, Petitioner again

admitted his guilt. (Docket Entry 33, ¶ 15.) Third, Petitioner also filed a transcript of an interview with law enforcement in which he admits downloading and viewing child pornography.[6] (Docket Entry 132 at 7-8.) Fourth, Petitioner had no objections to the PSR at sentencing and that PSR, as noted, indicated that Petitioner knowingly possessed child pornography. (Docket Entry 117 at 2-3; Docket Entry 33, ¶¶ 8, 15.) None of this suggests that Petitioner is innocent. Petitioner does assert many additional reasons as to why he is actually innocent. (*See, e.g.*, Docket Entry 128.) However, none of them has merit. Petitioner's arguments are some combination of irrelevant, vague, conclusory, unsupported, and speculative in nature. (*Id.*) *See Nickerson*, 971 F.2d at 1136.

g. The Merits

As explained above, all of Petitioner's grounds are time-barred. However, if the Court were to reach the merits of Petitioner's grounds for relief, it would deny them.

Ground One

As noted, Petitioner's first ground for relief is that he is actually innocent of the crime of possession of child pornography. (Docket Entry 125, Ground One.) As explained above, he has not demonstrated any meaningful likelihood of his actual innocence.[7]

[6] Petitioner's assertion that he suffers from echolalia and simply repeated what the officers said to him when he confessed to possessing child pornography is unpersuasive and not borne out by the record. (Docket Entry 125 at 4.) And, beyond this, Petitioner also admitted in a signed statement that he was guilty of intentionally possessing child pornography. (Docket Entry 33, ¶ 15.)

[7] Any effort by Petitioner to amend his motion brought pursuant to § 2255 to raise an additional ground for relief attacking his guilty plea as involuntary would both be time barred and fail as a matter of law. *See United States v. Lemaster*, 403 F.3d 216, 221–22 (4th Cir. 2005) (concluding that absent "extraordinary circumstances, the truth of sworn statements made during a Rule 11 colloquy is conclusively established, and a district court should, without holding an evidentiary hearing, dismiss

Ground Two

Next, Petitioner asserts a myriad of ineffective assistance of counsel claims. (Docket Entry 125, Ground Two.) To prove ineffective assistance, a petitioner must establish, first, that his attorney's performance fell below a reasonable standard for defense attorneys and, second, that he was prejudiced as a result. *See Strickland v. Washington*, 466 U.S. 668, 688, 691-92 (1984). A petitioner bears the burden of affirmatively showing deficient performance. *See Spencer v. Murray*, 18 F.3d 229, 233 (4th Cir. 1994). To establish prejudice, a petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

Here, Petitioner has failed to demonstrate that any of his attorneys at any point in the proceedings acted in an objectively unreasonable manner, nor has he demonstrated any prejudice from any of the errors he attributes to counsel. At sentencing, the Court granted counsel's motion to depart downward from the 97 to 121-month advisory guidelines calculation. (Docket Entry 117 at 5-7.) Petitioner was sentenced to ten months and twenty days of imprisonment, which was essentially time served. (*Id.* at 8.) But for council's effective advocacy, Petitioner likely would have spent up to ten years in federal prison. Petitioner satisfies neither *Strickland* element here.

any § 2255 motion that necessarily relies on allegations that contradict the sworn statements"). To the extent Petitioner is seeking to raise this additional ground for relief, his request to amend is denied.

Ground Three

Third, Petitioner asserts due process violations during the pre-trial process of his criminal case. (Docket Entry 125, Ground Three.) For example, Petitioner asserts that he was not given full access to his discovery materials until January 22, 2015, which was after final judgment was entered in this case. (*Id.*) Petitioner asserts that he was "angry" and "furious" by this "swindle[ ]" and so he "filed a bunch of pro se motions with evidence, even though none of those had any statutory basis." (*Id.*)

It is unclear whether this is a claim for prosecutorial misconduct, ineffective assistance of counsel, or both. Regardless, this ground fails. "When asserting a prosecutorial misconduct claim, a defendant bears the burden of showing (1) that the prosecutors engaged in improper conduct, and (2) that such conduct prejudiced the defendant's substantial rights so as to deny the defendant a fair trial." *United States v. Alerre*, 430 F.3d 681, 689 (4th Cir. 2005).

Petitioner has satisfied neither element here. Beyond this, to the extent this is another assertion of ineffective assistance of counsel, it fails for want of prejudice. Petitioner pled guilty after a comprehensive Rule 11 hearing where he knowingly and voluntarily admitted that he was, in fact, guilty. Nothing Petitioner has pointed to meaningfully undermines his guilty plea. Petitioner has failed to demonstrate that he received ineffective assistance of counsel, or that he was deprived of due process, or that any of the errors he asserts somehow deprived him of fair criminal proceedings or prejudiced him.

Ground Four

Finally, Petitioner asserts prosecutorial misconduct. (*Id.*, Ground Four.) In making this argument he references *Brady v. Maryland*. (*Id.*) In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and its progeny, the failure by the prosecution to disclose "evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Kyles v. Whitley*, 514 U.S. 419, 432 (1995) (citation omitted); *see also Giglio v. United States*, 405 U.S. 150, 154-55 (1972). As such, a *Brady* violation occurs if evidence is (1) favorable to the accused (either exculpatory or impeaching), (2) suppressed by the prosecution (willfully or inadvertently), and (3) material (prejudicial). *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *see also Monroe v. Angelone*, 323 F.3d 286, 299-300 (4th Cir. 2003) (citation omitted).

Here, Petitioner again mentions the criminal discovery he apparently tried to gather in a FOIA request. (Docket Entry 125, Ground Four.) Nothing about this information appears favorable to him. Nor does it appear to have been suppressed by the Government. Nor does it appear material in any way that might aid his efforts. Beyond this, Petitioner has failed to prove that the prosecution acted improperly, nor has he demonstrated that the errors he attributes to the prosecution somehow prejudiced him. *See Alerre*, 430 F.3d at 689. This claim is also without merit. All of Petitioner's grounds for relief are without merit. They should all be dismissed as time-barred or denied.

Motion to Seal

Petitioner has filed a motion to seal. (Docket Entry 140.) He seeks to seal a document which has already been sealed. (Docket Entry 139.) This motion will be denied as moot.

Motion to File Additional Evidence

Petitioner has filed a motion for leave to file a brief and to file additional evidence in support of his claims. (Docket Entry 144.) The Court will grant this motion. The Court has considered all of Petitioner's many pleadings and exhibits. None of them have merit.

"Motion for Requesting Psychological/Psychiatric Evaluation"

Petitioner has filed a motion seeking a psychological or psychiatric evaluation to establish his innocence of his criminal conviction. (Docket Entry 151.) Petitioner was recently deemed competent. (Docket Entry 176, Attach. 1.) Petitioner has failed to provide good cause as to why an additional exam is warranted. This motion should be denied.

Motions to Appoint Counsel

Petitioner seeks the appointment of counsel as well as an evidentiary hearing. (Docket Entries 153 and 169.) He has failed to set forth good cause for why counsel should be appointed here or why a hearing is warranted. These motions will be denied.

"Petitioner Asks Court to Continue Supervised Release"

Petitioner seeks leave to remain on supervised release. (Docket Entry 154.) After this motion was filed, Petitioner's supervised release was revoked. (Docket Entry 200.) This motion should be denied as moot.

"Motion for Summary Judgement or Case Dismissal"

Petitioner has also filed a motion requesting dismissal of proceedings related to his violation of supervised release. (Docket Entry 165.) As noted, these proceedings are over (at least in this Court) and Petitioner's supervised release was revoked. This motion should also be denied as moot.

Motion for Certified Copies

In this motion, Petitioner seeks copies of documents previously filed in his criminal proceedings to help aid him in defending against the charge that he violated the terms of his supervised release. (Docket Entry 168.) Again, that proceeding, in which Petitioner was represented by counsel, is over. This motion is also moot.

Request for Transcript

In this motion, Petitioner seeks the transcript of his recent hearing involving his supervised release so that he may challenge its revocation on appeal. (Docket Entry 194.) Petitioner has counsel for this appeal who may secure that transcript. (Docket Entry 208.) This motion should be denied as unnecessary. *See United States v. Trent,* No. 3:08 CR 202, 2009 WL 2105717, at *1 (W.D.N.C. July 13, 2009) ("[T]he Defendant's pro se request is unnecessary, as the Defendant is represented by appointed counsel. Pursuant to the Criminal Justice Act, Defendant's counsel is entitled to request a copy of the trial transcript to be prepared at the Government's expense.").

Motion for Pre-Filing Injunction

In its response to Petitioner's request to file additional evidence, the Government requested a pre-filing injunction. (Docket Entry 148.) More specifically, the Government requests "a permanent pre-filing injunction barring [Petitioner] from filing any future motions, however captioned, that are directly or indirectly related to the above-captioned matters in any court, whether state or federal, without leave of this Court." (Docket Entry 149 at 2.) Although entitled a motion, this pleading is not docketed as such. Regardless, the undersigned recommends that it be denied.[8]

The All Writs Act, 28 U.S.C. § 1651, authorizes district courts to issue pre-filing injunctions to restrict access to the courts by "vexatious and repetitive litigants." *Cromer v. Kraft Foods N. Am., Inc.*, 390 F.3d 812, 817 (4th Cir. 2004). "In determining whether a pre-filing injunction is substantively warranted, a court must weigh all the relevant circumstances, including (1) the party's history of litigation, in particular whether he has filed vexatious, harassing, or duplicative lawsuits; (2) whether the party had a good faith basis for pursuing the litigation, or simply intended to harass; (3) the extent of the burden on the courts and other parties resulting from the party's filings; and (4) the adequacy of alternative sanctions." *Cromer*,

[8] The Government also requests that all of Petitioner's pleadings in this § 2255 proceeding, except for the initial motion, be sealed. (Docket Entry 149 at 17 ("[B]ecause Petitioner demonstrates repeated misuse of the ECF system to malign others rather than to support his actions, the government respectfully requests that Petitioner's filings as outlined below be placed under seal, or alternatively, that references to the parties against whom he makes conclusory allegations of misconduct or discloses personal information be redacted.").) However, the Government does not cite the standard for sealing or redacting documents, reference the relevant local rules, or specify exactly what it wants sealed or redacted. For example, the Government mentions sealing or redacting the "filings outlined below" but then cites no filings. (*Id.*) This request should be denied without prejudice to renew in the form of a proper application to seal or redact.

390 F.3d at 818. Such a drastic remedy should be used "sparingly." *Id.* at 817. "[E]ven if a judge, after weighing the relevant factors, properly determines that a litigant's abusive conduct merits a pre-filing injunction, the judge must ensure that the injunction is narrowly tailored to fit the specific circumstances at issue." *Id.*

The undersigned has considered the four *Cromer* factors above and concludes that, at present, they do not tip in favor of an injunction, especially where the Government itself admits that "there has been no judicial finding in the above-captioned matter that Petitioner's prior filings were 'frivolous.'" (Docket Entry 149 at 8.) In reaching this conclusion, the Court has considered the totality of the circumstances, including (but not limited to) Plaintiff's mental health. Nevertheless, a lesser remedy here does seem in order.

More specifically, Petitioner's pleadings are unnecessarily voluminous, at times uncivil and, beyond this, Petitioner himself has admitted that he has previously filed baseless pleadings in a fit of anger. (Docket Entry 125, Ground Three.) In light of this, instead of the drastic remedy of a permanent injunction, the undersigned recommends warning Petitioner that his pro se status does not entitle him to avoid the Rules Governing Section 2255 Proceedings and the Local Rules of this Court, which will be enforced. All filings and matters before the Court must be well grounded in fact and law and must also be presented in a civil manner. Pleadings should also be succinct. Failure to abide by these requirements will result in more drastic measures.

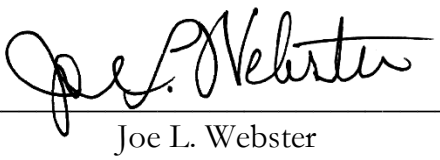
Conclusion

For all of these reasons, Petitioner's motion is time-barred and without merit. Neither the appointment of counsel, nor discovery, nor a medical evaluation, nor the appointment of a computer forensic expert, nor an evidentiary hearing, nor any other form of relief is warranted in this matter.

IT IS THEFORE ORDERED that Petitioner's motion to file additional evidence (Docket Entry 144) is granted.

IT IS RECOMMENDED that the Government's motion to dismiss (Docket Entry 141) be granted, that Petitioner's motion to vacate, set aside or correct sentence (Docket Entry 125) be dismissed, or in the alternative denied, and that this action be dismissed.

IT IS FURTHER RECOMMENDED that Petitioner's motion to file under seal (Docket Entry 140), motion for a psychological/psychiatric evaluation (Docket Entry 151), motions for the appointment of counsel (Docket Entries 153 and 169), motion to continue supervised release (Docket Entry 154), motion to dismiss (Docket Entry 165), motion for copies (Docket Entry 168), and request for transcript (Docket Entry 194) all be denied.



Joe L. Webster
United States Magistrate Judge

October 21, 2019
Durham, North Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

BRIAN DAVID HILL,	)	
	)	
Petitioner,	)	
	)	1:17CV1036
v.	)	1:13CR435-1
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

The Order and Recommendation of the United States Magistrate Judge was filed with the court in accordance with 28 U.S.C. § 636(b) and, on October 21, 2019, was served on the parties in this action. (Docs. 210, 211.) Petitioner objected to the Recommendation. (Doc. 213.)[1]

The court has appropriately reviewed the portions of the Magistrate Judge's report to which objection was made and has made a de novo determination, which is in accord with the Magistrate

[1] Petitioner has filed a host of other documents and motions with the court. Among them is a motion to disqualify the undersigned (Doc. 195), to which Petitioner refers in his objections (Doc. 213 at 1). This court previously addressed and rejected that motion. (Doc. 198.) It is noteworthy that Petitioner took the same tack as to the judge to whom Petitioner tendered his guilty plea and who sentenced Petitioner, when Petitioner charged him as "biased," having "ranted," and having refused to "accept the defendant's legal innocence." (Doc. 95.) The case was subsequently referred to the undersigned. But this court need not recuse itself because of "unsupported, irrational, or highly tenuous speculation" which has become a central component of Petitioner's litigation strategy. Assa'ad-Faltas v. Carter, No. 1:14-CV-678, 2014 WL 5361342, *2 (M.D.N.C. Oct. 21, 2014) (quoting United States v. DeTemple, 162 F.3d 279, 287 (4th Cir. 1998)).

Judge's report. The court therefore adopts the Magistrate Judge's Recommendation.

IT IS THEREFORE ORDERED that the Government's motion to dismiss (Doc. 141) be GRANTED, that Petitioner's motion to vacate, set aside or correct sentence (Doc. 125) be DISMISSED, and that this action be DISMISSED.

IT IS FURTHER ORDERED that Petitioner's motion to file under seal (Doc. 140), motion for a psychological/psychiatric evaluation (Doc. 151), motions for the appointment of counsel (Docs. 153 and 169), motion to continue supervised release (Doc. 154), motion to dismiss (Doc. 165), motion for copies (Doc. 168), and request for transcript (Doc. 194) all be DENIED. A judgment dismissing this action will be entered contemporaneously with this Order. Finding neither a substantial issue for appeal concerning the denial of a constitutional right affecting the conviction nor a debatable procedural ruling, a certificate of appealability is not issued.

/s/ Thomas D. Schroeder
United States District Judge

December 31, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

BRIAN DAVID HILL,	)	
	)	
Petitioner,	)	
	)	1:17CV1036
v.	)	1:13CR435-1
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

JUDGMENT

For the reasons set forth in the Order filed contemporaneously with this Judgment,

IT IS THEREFORE ORDERED AND ADJUDGED that the Government's motion to dismiss (Doc. 141) be GRANTED, that Petitioner's motion to vacate, set aside or correct sentence (Doc. 125) be DISMISSED, and that this action be DISMISSED. Finding neither a substantial issue for appeal concerning the denial of a constitutional right affecting the conviction nor a debatable procedural ruling, a certificate of appealability is not issued.

/s/ Thomas D. Schroeder
United States District Judge

December 31, 2019

FILED: August 17, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7755 (L)
(1:13-cr-00435-TDS-1)
(1:17-cv-01036-TDS-JLW)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

BRIAN DAVID HILL

Defendant - Appellant

No. 20-6034
(1:13-cr-00435-TDS-1)
(1:17-cv-01036-TDS-JLW)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

BRIAN DAVID HILL

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. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Gregory, Judge Diaz, and Judge Harris.

For the Court

/s/ Patricia S. Connor, Clerk