UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6842

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ERIC MARTIN PEPKE,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Louise W. Flanagan, District Judge. (5:15-cr-00319-FL-1; 5:17-cv-00631-FL)

Submitted: November 19, 2019 Decided: November 22, 2019

Before WILKINSON and RICHARDSON, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Eric Martin Pepke, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

Appendix A (2pp)

PER CURIAM:

Eric Martin Pepke seeks to appeal the district court's order accepting the recommendation of the magistrate judge and denying relief on his 28 U.S.C. § 2255 (2012) motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B) (2012). 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) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the motion states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Pepke has not made the requisite showing. Accordingly, although we grant Pepke's motion to file an amended informal brief, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

FILED: February 7, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6842
(5:15-cr-00319-FL-1)
(5:17-cv-00631-FL)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ERIC MARTIN PEPKE

Defendant - Appellant

ORDER

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

For the Court

/s/ Patricia S. Connor, Clerk

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:15-CR-319-FL-1
No. 5:17-CV-631-FL

ERIC MARTIN PEPKE,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

This matter is before the court on petitioner's motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, (DE 48), and the government's motion to dismiss, (DE 52). Pursuant to 28 U.S.C. § 636(b)(1)(B), United States Magistrate Judge Kimberly A. Swank entered memorandum and recommendation ("M&R"), (M&R (DE 69)), wherein it is recommended that the court deny petitioner's motion and grant respondent's motion. Petitioner timely filed objections to the M&R, and in this posture, the issues raised are ripe for ruling. For the reasons that follow, the court adopts the recommendation of the M&R, denies petitioner's motion, and grants respondent's motion.

BACKGROUND

On January 13, 2016, pursuant to a written plea agreement, petitioner pleaded guilty to one count of receipt of child pornography, in violation of 18 U.S.C. § 2252(a)(2). The court sentenced petitioner on May 4, 2016, to 97 months' imprisonment and a lifetime of supervised release. Petitioner appealed his sentence to the United States Court of Appeals for the Fourth Circuit. On November 7, 2016, the Fourth Circuit dismissed petitioner's appeal in part and otherwise affirmed

Appendix B (12 pp.)

the judgment. United States v. Pepke, 662 F. App'x 225, 226 (4th Cir. 2016). Petitioner then filed a petition for certiorari with the United States Supreme Court, which was denied.

On December 21, 2017, petitioner filed motion to vacate under 28 U.S.C. § 2255, alleging 1) the image at issue regarding his guilty plea was not child pornography, 2) he experienced "torture" and "written death threats" prior to signing his plea agreement, 3) ineffective assistance of counsel, 4) prosecutorial misconduct, where the prosecutor made false and prejudicial statements at petitioner's arraignment and hearing, 5) judicial misconduct, 6) 18 U.S.C. § 2252, of which petitioner was convicted, conflicts with witness intimidation law as set forth at 18 U.S.C. § 1512, 7) 18 U.S.C. § 2252 conflicts with intellectual property law, 8) denial of access to legal materials and the courts, 9) he received no Miranda warning, 10) he was subject to illegal search and seizure, 11) he was held under excessive bail, 12) the court lacked federal jurisdiction, and, in sum, 13) the previous allegations amount to a complete miscarriage of justice.

On January 29, 2018, the government filed its motion to dismiss petitioner's § 2255 motion. On October 31, 2018, the magistrate judge issued M&R, recommending denial of petitioner's motion and grant of the government's motion. On November 26, 2018, petitioner filed objection to the M&R, arguing the magistrate judge erred in that 1) petitioner's plea was not knowing and voluntary and 2) his constitutional challenge to his conviction under 18 U.S.C. § 2252 is not barred by his direct appeal, as well as claiming 3) ineffective assistance of counsel.

COURT'S DISCUSSION

A. Standard of Review

The district court reviews de novo those portions of the M&R to which specific objections are filed. 28 U.S.C. § 636(b). The court does not perform a de novo review where a party makes

only "general and conclusory objections that do not direct the court to a specific error in the magistrate's proposed findings and recommendations." Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982). Absent a specific and timely filed objection, the court reviews only for "clear error," and need not give any explanation for adopting the M&R. Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005); Camby v. Davis, 718 F.2d 198, 200 (4th Cir. 1983). Upon careful review of the record, "the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

A petitioner seeking relief pursuant to 28 U.S.C. § 2255 must show that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. § 2255(b). "The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, to the extent that they are not inconsistent with any statutory provisions, or the [§ 2255 Rules], may be applied to" § 2255 proceedings. Rules Governing Section 2255 Proceedings, Rule 12.

B. Analysis

1. Knowing and Voluntary Plea

On direct appeal of his conviction and sentence, the Fourth Circuit found that petitioner's guilty plea and plea waivers were knowingly and voluntarily made. Pepke, 662 F. App'x at 226 ("Our review of the record leads us to conclude that Pepke knowingly and voluntarily waived the

right to appeal his sentence, except for claims of ineffective assistance or prosecutorial misconduct not known to Pepke at the time of his guilty plea"). Petitioner, once again, argues that his guilty plea was unknowing and involuntary. (See DE 70 at 9-18). However, having unsuccessfully raised this issue on direct appeal, petitioner may not re-litigate it here. See United States v. Walker, 299 Fed.Appx. 273, 276 (4th Cir. 2008) (citing United States v. Roane, 378 F.3d 382, 396 n. 7 (4th Cir. 2004)). Thus, in light of the court of appeals order, this argument is unavailing.

In addition, a review of the plea colloquy reveals that petitioner's plea was both knowing and voluntary. The court may rely on the petitioner's sworn admissions during his Rule 11 hearing when determining whether a plea was knowing and voluntary. See Blackledge v. Allison, 431 U.S. 63, 73-74 (1977); United States v. Lemaster, 403 F.3d 216, 221 (4th Cir. 2005). "[I]n the absence of extraordinary circumstances . . . allegations in a § 2255 motion that directly contradict the petitioner's sworn statements made during a properly conducted Rule 11 colloquy are always palpably incredible and patently frivolous or false." Lemaster, 403 F.3d at 221 (citations omitted).

Petitioner and respondent entered into a plea bargain, where respondent agreed to dismiss one count of possession of child pornography and nine counts of receipt of child pornography. (Plea Agreement (DE 22)). In exchange, petitioner agreed to plead guilty to one count of receipt of child pornography and

> To waive knowingly and expressly all rights, conferred by 18 U.S.C. § 3742, to appeal the conviction and whatever sentence is imposed on any ground, including any issues that relate to the establishment of the advisory Guideline range, reserving only the right to appeal from a sentence in excess of the applicable advisory Guideline range that is established at sentencing, and further to waive all rights to contest the conviction or sentence in any post-conviction proceeding, including one pursuant to 28 U.S.C. § 2255, excepting an appeal or motion based upon grounds of ineffective assistance of counsel or prosecutorial misconduct not known to the Defendant at the time of the Defendant's guilty plea.

(DE 22 at 1).

At arraignment, petitioner was placed under oath. In response to the magistrate judge's inquiry as to petitioner's medical and physical condition, petitioner explained at length his bipolar disorder and diabetes, his inability to sleep, medication taken for sleeplessness while in custody as well as insulin taken, how his sleep medication was discontinued, and how his "mania is in the process of returning, it is significantly returned." (DE 39 at 12).

The following exchange then occurred:

> THE COURT: All right. Is there anything about your past diagnoses, current condition, prior medications, current medications or current conditions that would make you believe you're unable to understand what's going on this morning?
> THE DEFENDANT: I do not believe there's anything that makes me unable to understand this morning. There are things that make me unable to understand at various other times, and also, Your Honor, I face the problem of if I can't understand, it's very difficult for me to tell.
> THE COURT: Well, that kind of puts me in an awkward position.
> THE DEFENDANT: I know, Your Honor.
> THE COURT: How am I supposed to know that you know what's going on this morning?
> THE DEFENDANT: All I can say is that I believe I do.
> THE COURT: Okay. Mr. Ross, do you have any reservations about going forward this morning?
> MR. ROSS: I do not and cannot add anything else.
> THE COURT: All right. Well, Mr. Pepke, let me ask you this: Do you think that if I ask you directly whether you understand what's going on this morning, do you believe that you could give me an honest and accurate answer?
> THE DEFENDANT: Yes, Your Honor.

(Id. at 13).

The magistrate judge thereafter inquired whether petitioner had discussed his charges and case with his attorney, if he understood the charges, if he understood what was happening in court that morning, if he had discussed his case with his attorney, if he was satisfied with his attorney's advice and counsel, if he heard and understood previous explanation of petitioner's rights provided

earlier, if he understood the magistrate judge's general explanation regarding sentencing, if he understood what charges were pending, if he understood the charges that had been filed against him as well as the maximum punishment petitioner faced if convicted, if petitioner had signed the plea agreement, and if prior to that petitioner discussed the plea agreement with his attorney. In response to each of these questions, petitioner answered clearly in the affirmative.

The magistrate judge then addressed petitioner's understanding of the plea agreement more fully in the following exchange:

> THE COURT: Did you understand the terms, the language, the words, the sentences, even any legal phrases that are used in this plea agreement after you discussed it with Mr. Ross?
> THE DEFENDANT: I did, Your Honor.
> THE COURT: Do you understand that by entering into this plea agreement and entering a plea of guilty, that you will have waived or given up your right to appeal or to collaterally attack all or a part of your sentence?
> THE DEFENDANT: I understand something like that, but not quite that. I understand that I give up my right to appeal if it's – unless it's greater than the guidelines.
> THE COURT: Well, there's a paragraph on – do you have a copy of the plea agreement there at counsel table?
> THE DEFENDANT: Okay.
> THE COURT: Do you see on page 1 and on page 2, paragraph C, that it goes over from page 1 to page 2?
> THE DEFENDANT: I understand, Your Honor.
> THE COURT: Do you understand the contents of that paragraph?
> THE DEFENDANT: Yes, Your Honor.

(Id. at 19).[1]

Finally, the magistrate judge inquired as to whether anyone had made promises different than those found in the plea agreement in order to influence petitioner's plea or if any had "threatened

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[1] The paragraph discussed from the plea agreement is the paragraph quoted above in which petitioner "waive[d] knowingly and expressly all rights . . . to appeal the conviction and whatever sentence is imposed on any ground" excepting "an appeal or motion based upon grounds of ineffective assistance of counsel or prosecutorial misconduct not known to the Defendant at the time of the Defendant's guilty plea." (DE 22 at 1).

you in any way to persuade you to either accept this plea agreement or to plead guilty in this case." (Id. at 20). Petitioner responded clearly in the negative, again confirming that he was "pleading guilty of [his] own free will because [he] in fact [is] guilt. (Id.).

Petitioner confirms all statements made by him at Rule 11 colloquy were "scrupulously truthful" and petitioner is "happy to be bound by his statements," but denies that, based on these statements, petitioner's plea was knowing and voluntary. (See DE 70 at 9). Petitioner maintains his plea was a product of torture, although not coerced in that he is not arguing anyone sought to influence his plea,[2] that he was intimidated by counsel and the magistrate judge and not provided sufficient information, that it was clear to counsel and the magistrate judge that he was not sleeping while detained, and that his plea was not knowing due to his "faulty understanding of the very meaning of pleading guilty," apparently arguing he committed the act for which he pleaded but not did intend to plead the act itself was illegal. (Id. at 10, 18).

Petitioner's arguments are wholly inconsistent with petitioner's repeated representations at Rule 11 hearing. Petitioner's sworn statements at his Rule 11 hearing repeatedly confirmed his ability to understand the proceedings as well as his actual understanding of the proceedings, his knowledge of the terms of the plea agreement, his discussions with his attorney, and his admission

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[2] Petitioner alleges while being detained prior to entering into plea agreement that the following occurred:

> The diet at Franklin was insufficient for me to maintain my blood glucose levels as a diabetic, and staff who claimed to lack substantial medical training gave me my required insulin. After I unexpectedly came to consciousness after what I believe was a blood glucose crash, Franklin staff discontinued the medication that had been prescribed to enable me to sleep. Franklin staff confined me to an isolation cell with no opportunity to exercise and bright lights always on, making it impossible to sleep properly. I was awake for over 500 hours. While I was in the isolation cell, staff delivered to me lunch in a styrofoam clamshell box with what I saw as a death threat in Majik Marker on the top.

(DE 68 at 4).

of guilt as to one count of receipt of child pornography, thus rendering "palpably incredible" his current claim that his plea was not knowing and voluntary. Petitioner's present arguments that his plea was not knowing and voluntary fails and shall be dismissed.[3]

2. Challenge to Conviction under 18 U.S.C. § 2252

Petitioner argues 18 U.S.C. § 2252 is unconstitutional and that under this statute, "[n]o reasonable persons would consider the [image at issue in this case] to be child pornography or depict sexually explicit conduct." (DE 48-1 at 7; DE 70 at 3-6). Petitioner objects to the magistrate judge's recommendation that this claim is barred by the Fourth Circuit's holding regarding his conviction on direct appeal. More specifically, petitioner argues the Fourth Circuit did not "fully consider" this challenge nor did the Fourth Circuit address the constitutionality of the relevant statute. (See DE 70 at 3-6).[4]

The Fourth Circuit fully considered the issue as to whether the image at issue was child pornography. On appeal, the Fourth Circuit held as follows: "In his pro se supplemental brief, Pepke asserts that the images to which he pled guilty do not depict child pornography and that the images were 'intrastate.' This claim is belied by the record." Pepke, 662 F. App'x at 226.

This claim, raised on direct appeal, may not be relitigated on collateral review. The Fourth Circuit's address of petitioner's claim is sufficient. As stated by the Fourth Circuit:

> There is no requirement that a court specifically discuss every issue raised by an appellant . . . . Dyess raised Apprendi in his direct appeal, we noted that he had made the argument to the district court, and we affirmed his conviction and sentence

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[3] Although petitioner argues exceptional circumstances permit relitigation in this case, (see DE 70 at 6); the court finds no such exceptional circumstances are alleged or present.

[4] Petitioner takes issue with the Fourth Circuit's use of the phrase "child pornography," which petitioner argues he did not use, and the use of "images," in the plural, where petitioner's guilty plea only concerned one image. (DE 70 at 5). Petitioner's arguments do not impact the current analysis.

> in all respects. Nothing more is required. To the extent Dyess believes we overlooked his argument, the remedy was to file a petition for rehearing or—as Dyess unsuccessfully did—seek a writ of certiorari to the Supreme Court, not to file a § 2255 motion.

United States v. Dyess, 730 F.3d 354, 360 n.5 (4th Cir. 2013).

To the extent this claim was not raised on direct appeal, petitioner waived his right to bring such an argument in his plea agreement. As previously stated, the Fourth Circuit held that defendant "knowingly and voluntarily waived the right to appeal his sentence, except for claims of ineffective assistance or prosecutorial misconduct not known to Pepke at the time of his guilty plea." Pepke, 662 F. App'x at 226. Petitioner's instant claim is not one of ineffective assistance or prosecutorial misconduct not known to him at the time of his guilty plea.[5]

3. Ineffective Assistance of Counsel

Analysis of an ineffective assistance of counsel claim requires application of the two-part test established by Strickland v. Washington, 466 U.S. 668, 690-94 (1984). First, the petitioner must show that his counsel's performance was deficient in that it fell below the standard of reasonably effective assistance. Id. at 687-691. Second, the petitioner must show that there is a reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different. Id. at 694. The Sixth Amendment provides a criminal defendant with the right to competent counsel that "extends to the plea-bargaining process." Lafler v. Cooper, 566 U.S. 156, 162 (2012).

Petitioner argues his attorney at arraignment was ineffective because he refused to tell petitioner "what he would be asked to plead guilty to" and was hostile in response to petitioner's efforts to learn more about the charge at issue. (DE 70 at 19). Essentially, petitioner is alleging

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[5] Additionally, although Petitioner's constitutional challenge to the statute at issue is not wholly clear, as noted by the Seventh Circuit, "the Supreme Court has rejected constitutional challenges to § 2252(a)." United States v. Muick, 167 F.3d 1162, 1167 (7th Cir. 1999) (citing United States v. X–Citement Video, Inc., 513 U.S. 64 (1994)).

again that he neither understood what was said to him at the Rule 11 hearing, nor understood what he was agreeing to by entering a guilty plea. However, as stated above, petitioner made no indication of such confusion at his Rule 11 hearing despite being offered ample opportunity to do so. As reviewed in detail above, petitioner's repeated sworn statements during the Rule 11 hearing indicated that he understood the charges and that he knowingly and voluntarily admitted his guilt.

Petitioner additionally argues that his attorneys at both the trial and appellate levels were ineffective in that petitioner was "virtually abandon[ed]" between sentencing and appeal, depriving petitioner of "continuous representation" and preventing petitioner from planning a better appellate brief, "thus resulting in procedural defaults." (Id.). However, petitioner was able to file multiple appellate briefs, all of which were considered on appeal. As stated by the Fourth Circuit, "Pepke's attorney has filed a brief . . . [and] Pepke filed a pro se supplemental brief, with a supplement." Pepke, 662 F. App'x at 226. Petitioner offers no allegation or argument that either trial or appellate counsel's performance was deficient in that it fell below the standard of reasonably effective assistance in the transition period nor that there is a reasonable probability that had petitioner had more access to counsel during this transition period, the result of his appeal would have been different.

Finally, petitioner argues that his competency to proceed at arraignment was in question, appearing to indicate that the magistrate judge and petitioner's counsel erred by not further investigating petitioner's competence. (See DE 70 at 15-16).[6] Petitioner does not argue he was incompetent to proceed, only that "he doubted his competence" at the time, warranting further investigation. (Id. at 15).

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[6] Although not clear, it appears petitioner argues that his competency was evaluated at some point prior to arraignment, and petitioner was found competent. (Id. at 15).

"In order to obtain relief on a claim for failure to investigate a petitioner's mental competency, a petitioner must demonstrate a reasonable probability that he was mentally incompetent at the time of the crime or his plea." Garrett v. United States, No. 5:08-CR-175-FL, 2013 WL 1694671, at *2 (E.D.N.C. Apr. 18, 2013); see also Felde v. Butler, 817 F.2d 281, 281 (5th Cir. 1987). For example, in Warford v. United States, No. 7:11-CR-136-FL, 2014 WL 793319 (E.D.N.C. Feb. 26, 2014), the court considered a petitioner's objection "that he is mentally ill and has an I.Q. level below 55, and therefore was not mentally capable of entering into a knowing and voluntary plea agreement." Id. at *4. In that case, the court found the petitioner's argument was "flatly contradicted by petitioner's statements at arraignment . . . . . [where] the court asked petitioner numerous questions . . . and carefully confirmed his ability to understand the proceedings." Id.; see also Lewis v. United States, No. 4:12-CR-68-FL-2, 2015 WL 2401514, at *6 (E.D.N.C. May 20, 2015) ("Petitioner's claim that he was not competent to proceed, and that his counsel should have investigated further his competency, is belied by petitioner's statements regarding his ability to communicate and understand on the date of the arraignment."). Here, too, petitioner's argument that he may not have been competent to proceed is belied by his statements at arraignment, reviewed above.[7]

4. Certificate of Appealability

A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate that reasonable

[7] Petitioner's argument that he was denied "access to courts" is unclear; petitioner alleges he has initiated a lawsuit concerning legal mail he alleges was never delivered and that petitioner was unable to communicate with his attorney without risk of monitoring. (DE 70 at 20). As stated by the magistrate judge, and not specifically objected to by petitioner, "Petitioner's allegations [regarding this claim]. . . do not support vacatur of Petitioner's conviction or sentence and therefore fail to state a claim cognizable under § 2255." (M&R (DE 69) at 10).

jurists could debate whether the issues presented should have been decided differently or that they are adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000). After reviewing the claims presented on collateral review in light of the applicable standard, the court finds that a certificate of appealability is not warranted.

CONCLUSION

For the foregoing reasons, the court ADOPTS the recommendation of the M&R. The government's motion to dismiss (DE 52) is GRANTED, and petitioner's motion to vacate, set aside, or correct his sentence (DE 48) is DENIED. A certificate of appealability is DENIED. The clerk is DIRECTED to close this case.

SO ORDERED, this the 24th day of May, 2019.

LOUISE W. FLANAGAN
United States District Judge

I certify the foregoing to be a true and correct copy of the original.
Peter A. Moore, Jr., Clerk
United States District Court
Eastern District of North Carolina

By: _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Nos. 5:15-CR-319-FL
5:17-CV-631-FL

ERIC MARTIN PEPKE, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	)	**ORDER AND MEMORANDUM & RECOMMENDATION**

This matter is before the court for consideration of Petitioner's 28 U.S.C. § 2255 motion to vacate filed on December 15, 2017 [DE #48].[1] The government has moved to dismiss [DE #52] for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6). Petitioner has responded in opposition and filed a separate motion for sanctions [DE #60]. The government has responded to Petitioner's sanctions motion, and the time for further filings has expired. These motions have been referred to the undersigned for memorandum and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and Rules 8(b) and 10 of the Rules Governing Section 2255 Proceedings. For the reasons stated herein, Petitioner's motion for sanctions is denied, and it is recommended that the government's motion to dismiss be granted and Petitioner's claims be dismissed.

[1] Although not received by the court until December 21, 2017, Petitioner's motion is deemed filed on December 15, 2017, when Petitioner delivered the motion to prison authorities for mailing. *See Houston v. Lack*, 487 U.S. 266, 276 (1988).

Appendix C 12pp

STATEMENT OF THE CASE

On August 14, 2014, Petitioner pleaded guilty, pursuant to a written plea agreement, to one count of receipt of child pornography, in violation of 18 U.S.C. § 2252(a)(2). On May 4, 2016, the court sentenced Petitioner to ninety-seven months' imprisonment and a lifetime term of supervised release. (Judgment [DE #33].) Petitioner appealed his sentence to the Fourth Circuit Court of Appeals. On appeal, Petitioner was represented by Assistant Federal Public Defender Eric J. Brignac, who filed an *Anders* brief finding no meritorious grounds for appeal but raising the following issue: "Whether the district court substantively erred in imposing a 97-month sentence on Mr. Pepke despite the fact that he did not intend to traffic in child pornography and had mental health issues?" Petitioner filed two pro se supplemental briefs challenging his conviction and sentence on other grounds. On November 7, 2016, the Fourth Circuit Court of Appeals issued a decision dismissing Petitioner's appeal in part and otherwise affirming the court's judgment. *United States v. Pepke*, No. 16-4271, slip op. (4th Cir. Nov. 7, 2016). Petitioner filed a petition for a writ of certiorari with the Supreme Court, which was denied on March 20, 2017. Petitioner timely filed the motion presently before the court in which Petitioner seeks to vacate his sentence pursuant to 28 U.S.C. § 2255.

DISCUSSION

Petitioner makes the following arguments in support of his § 2255 motion: (1) the image he pled guilty to receiving does not depict a minor engaging in sexually explicit conduct ("child pornography"); (2) his guilty plea was coerced; (3) he was deprived of effective assistance of counsel; (4) the prosecutor made false and prejudicial statements at Petitioner's arraignment and sentencing hearing; (5) Petitioner was prejudiced by judicial misconduct; (6) 18 U.S.C. § 2252, of which Petitioner was convicted, is unenforceable because it conflicts with the witness intimidation

statute set forth in 18 U.S.C. § 1512; (7) 18 U.S.C. § 2252 conflicts with intellectual property laws; (8) Petitioner was denied access to legal materials and the courts in connection with his appeal and certiorari petition; (9) Petitioner was not apprised of his *Miranda* rights prior to indictment; (10) law enforcement officers illegally searched and seized information from Petitioner's computer; (11) Petitioner was held under excessive bail on state charges; (12) the court lacked jurisdiction to enter judgment; and (13) the cumulative effect of the violations constitutes a complete miscarriage of justice.

I. Appeal

Petitioner's first, fourth, tenth, and twelfth claims were raised in his pro se *Anders* brief filed with the Fourth Circuit. The Fourth Circuit rejected each of these claims, either on the merits or as barred by Petitioner's plea. *Pepke*, slip op. at 2-4. "[I]t is well settled that [a petitioner] cannot 'circumvent a proper ruling . . . on direct appeal by re-raising the same challenge in a § 2255 motion.'" *United States v. Dyess*, 730 F.3d 354, 360 (4th Cir. 2013) (quoting *United States v. Linder*, 552 F.3d 391, 396 (4th Cir. 2009)). Petitioner is bound by the Fourth Circuit's decision and may not re-raise these claims on collateral review.

II. Waiver

Pursuant to his written plea agreement, Petitioner agreed to waive all rights

> to appeal the conviction and whatever sentence is imposed on any ground, including any issues that relate to the establishment of the advisory Guideline range, reserving only the right to appeal from a sentence in excess of the applicable advisory Guideline range that is established at sentencing, and further to waive all rights to contest the conviction or sentence in any post-conviction proceeding, including one pursuant to 28 U.S.C. § 2255, excepting an appeal or motion based upon grounds of ineffective assistance of counsel or prosecutorial misconduct not known to [him] at the time of [his] guilty plea.

(Mem. Plea Agt. [DE #22] at 1.) A criminal defendant may waive his right to appeal or collaterally attack his conviction and sentence. *United States v. Lemaster*, 403 F.3d 216, 220 (4th Cir. 2005). Such waivers are valid and enforceable where they are knowingly and voluntarily made. *Id.*

On appeal, the Fourth Circuit determined that Petitioner's waiver was made knowingly and voluntarily. *Pepke*, slip op. at 2-3. Petitioner's judicial misconduct (claim five), conflict of laws (claims six and seven), lack of *Miranda* warnings (claim nine), illegal search and seizure (claim ten), and excessive bail (claim eleven) claims fall within the scope of the appeal waiver and are, therefore, barred by his valid waiver.

III. Procedural Default

A number of Petitioner's § 2255 claims are also subject to procedural default because they could have been raised on appeal but were not. Generally, "claims not raised on direct appeal may not be raised on collateral review" unless the petitioner demonstrates cause and prejudice or shows he is actually innocent of the charges against him. *Massaro v. United States*, 538 U.S. 500, 504 (2003). "The procedural-default rule is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments." *Id.*

Petitioner's claims asserting judicial misconduct (claim five), conflict of laws rendering 18 U.S.C. § 2252 unenforceable (claims six and seven), the lack of *Miranda* warnings (claim nine), and excessive bail (claim eleven) each could have been raised on direct appeal. Petitioner did not raise these issues on appeal, nor has he provided any explanation why they were not. Having failed to demonstrate cause and prejudice or a fundamental miscarriage of justice excusing his procedural default, Petitioner is precluded from bringing these claims in a § 2255 motion.

IV. Voluntariness of Plea

Petitioner's second claim alleges that his guilty plea was the product of "torture" and a death threat and was therefore not entered freely and voluntarily. As to this claim, Petitioner alleges that while in pretrial detention he was denied appropriate care to manage his diabetes and suffered "a blood glucose crash," after which correctional staff discontinued medication he had been receiving to help him sleep. (Am. Mem. Supp. § 2255 Mot. ¶¶ 3-4 at 4.) He states that he was confined "to an isolation cell with no opportunity to exercise and bright lights always on," causing him to be "awake for over 500 hours." (*Id.* ¶ 5 at 4.) He further alleges that while in isolation he received lunch in a styrofoam clamshell box with the words "Dead Man" written on top, which he interpreted to be a death threat. (*Id.* ¶ 6 at 4.)

"A guilty plea must be 'a voluntary and intelligent choice among the alternative courses of action open to the defendant,'" and a "defendant must know the direct consequences of his guilty plea in order for it to be knowing and voluntary." *United States v. Wagner*, 88 Fed. App'x 593, 594 (4th Cir. 2004) (quoting *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)). To ensure the voluntariness of a defendant's plea, Rule 11 requires the court to "address the defendant personally in open court" and "inform the defendant of, and determine that the defendant understands" his rights, the nature of the charges, the terms of any plea agreement, and the consequences of his plea, including his waiver of rights and the applicable penalties. Fed. R. Crim. P. 11(b)(1). Prior to accepting the plea, the court must further "determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement)." Fed. R. Crim. P. 11(b)(2). "Absent clear and convincing evidence to the contrary, [a petitioner] is bound by the representations he made during the plea colloquy." *Beck v. Angelone*, 261 F.3d 377, 396 (4th Cir.2001) (internal quotation marks omitted).

Prior to accepting Petitioner's plea, the court advised Petitioner of his rights, placed him under oath, and conducted the requisite Rule 11 colloquy. When asked about recent medical or psychiatric treatment or hospitalization for narcotic addiction, Petitioner provided a detailed description of his diagnosis and treatment for bipolar disorder. Petitioner also indicated he was an insulin-dependent diabetic but had not received his insulin "for the past couple of weeks, but now they've started me on the insulin again." (Rule 11 Tr. [DE #39] at 12.) When asked whether there was anything about his "past diagnoses, current condition, prior medications, current medications or current conditions that would make you believe you're unable to understand what's going on this morning," Petitioner stated that he "d[id] not believe there's anything that makes me unable to understand this morning." (*Id.* at 13.) Petitioner's attorney further advised the court that he did not have any reservations with Petitioner's ability to proceed with the plea proceeding. (*Id.*) Petitioner stated that he had received a copy of the charges against him at his "original Federal appearance" and had discussed the charges with his attorney. (*Id.* at 14.) The court asked Petitioner "[D]o you understand the charges against you in this case?" "[D]o you understand what's happening this morning?" "[H]ave you had the time to and have you in fact discussed your case with [your attorney]?" "Are you satisfied with his advice and counsel to you in this case?" "Did you hear and understand my explanation of your rights this morning?" As to each of these questions, Petitioner responded, "Yes, Your Honor." (*Id.* at 14-15.)

At one point, the court asked Petitioner whether he would like to have the indictment read to him. Petitioner replied, "I waive the reading, Your Honor." After being advised of the charges and the applicable penalties, Petitioner responded affirmatively when asked "[D]o you understand the charges that have been filed against you in this case as well as the maximum punishment you face if convicted of those charges?" (Rule 11 Tr. at 17.)

Additionally, the court conducted an extensive inquiry into the voluntariness of Petitioner's guilty plea:

> THE COURT: All right. Have you had, Mr. Pepke, an opportunity to read and to discuss this plea agreement with your attorney and did you in fact do so before you signed it?
>
> THE DEFENDANT: I have, Your Honor.
>
> THE COURT: Does the plea agreement represent in its entirety any and all agreements that you have with the United States and the U.S. Attorney?
>
> THE DEFENDANT: It does, Your Honor.
>
> THE COURT: Did you understand the terms, the language, the words, the sentences, even any legal phrases that are used in this plea agreement after you discussed it with [your attorney]?
>
> THE DEFENDANT: I did, Your Honor.
>
> . . . .
>
> THE COURT: Okay. Has anyone made any other or different promises to you, Mr. Pepke, to get you to plead guilty in this case other than what is contained in the plea agreement?
>
> THE DEFENDANT: No, Your Honor.
>
> THE COURT: **Has anyone threatened you in any way to persuade you to either accept this plea agreement or to plead guilty**?
>
> THE DEFENDANT: No, Your Honor.
>
> THE COURT: Now, Mr. Pepke, sir, **are you pleading guilty of your own free will because you are in fact guilty?**
>
> THE DEFENDANT: Yes, Your Honor.
>
> . . . .
>
> THE COURT: Have you answered all of my questions truthfully?
>
> THE DEFENDANT: Yes, Your Honor.

> THE COURT: Do you need any more time to think about your plea or to discuss your case with [your attorney] before entering a plea?
>
> THE DEFENDANT: No, Your Honor.

(Rule 11 Tr. at 18-21(emphasis added).)

Throughout the Rule 11 proceeding, Petitioner's replies to the court's questions were clear, concise, and responsive. Petitioner repeatedly demonstrated his understanding of the charges, the penalties faced, and the consequences of his plea. Contrary to the statements made during the Rule 11 plea colloquy, Petitioner now claims he was coerced to plead guilty by "torture" and a death threat. However, Petitioner's claim is not supported by evidence of sufficient evidentiary force to demonstrate that the representations made at his Rule 11 hearing were untruthful or involuntary. *See Beck v. Angelone*, 261 F.3d 377, 396 (4th Cir. 2001). Accordingly, Petitioner is bound by the prior statements and this claim must be dismissed.

V. Ineffective Assistance of Counsel

In his third claim for relief, Petitioner argues he was denied effective assistance of counsel. Petitioner asserts that his trial attorney misinformed him that "it did not matter what the image in the plea agreement would be" and "never investigated [Petitioner's] competence." (Am. Mem. Supp. § 2255 Mot. [DE #55-1] ¶¶ 7-9 at 3.) Petitioner states, "I pled guilty still thinking that due process existed and I would have a chance to show I had done nothing illegal." (*Id.* ¶ 9 at 3.) Petitioner further claims that his attorney failed to talk with him about his appeal after sentencing. (*Id.* ¶ 10 at 4.)

To establish ineffective assistance of counsel, a petitioner must show that counsel's representation fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The reasonableness of counsel's performance must be judged according to

the specific facts of the case at the time of counsel's conduct. *Id.* at 690. Additionally, a petitioner must show he was prejudiced by his attorney's ineffectiveness. *Id.* at 694. In the context of a plea, a petitioner "must show there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). There is a strong presumption that counsel's conduct was within the wide range of reasonable professional assistance, and the petitioner bears the burden of demonstrating that counsel's assistance was neither reasonable nor the product of sound strategy. *Strickland*, 466 U.S. at 689.

Petitioner has failed to meet this burden. Petitioner was charged with ten counts of receipt of child pornography and one count of possession of child pornography. Petitioner's attorney negotiated an agreement whereby Petitioner agreed to plead guilty to one count of receipt of child pornography and the government agreed to dismiss the remaining ten child pornography counts. Pursuant to the Sentencing Guidelines, Petitioner's advisory guideline range was based upon all relevant offense conduct and encompassed a broader range of conduct than the offense of conviction. While Petitioner takes issue with his attorney's statements regarding the image underlying his conviction, he has not shown that his attorney's actions were anything other than sound strategy or an explanation that his sentence would be based upon the relevant offense conduct, not simply receipt of the one image. Nor has Petitioner demonstrated that a plea to any other count would have resulted in a different outcome.

Petitioner also criticizes his attorney's failure to investigate his competence and claims his attorney "appeared furious with me when I brought it up at the arraignment." (Am. Mem. Supp. § 2255 Mot. ¶ 9 at 3.) However, Petitioner has not alleged any facts that would have provided reasonable cause for his attorney to believe Petitioner was suffering from a mental disease or defect

rendering him unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense. *See* 18 U.S.C. § 4241(a) (standard for competency evaluation).

Petitioner has not demonstrated that his attorney's actions fell below the objective level of reasonableness or that he was prejudiced by his attorney's actions. Petitioner's unverified claim that "there is a substantial chance I would have pled differently" (Am. Mem. Supp. § 2255 Mot. at 10), fails to demonstrate the necessary prejudice – that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Therefore, Petitioner's ineffective assistance of counsel claims should be dismissed.

VI. Access to Courts

In his eighth claim, Petitioner asserts that prison officials deprived him of access to legal materials needed to prepare his pro se appellate brief and certiorari petition to the Supreme Court following entry of the court's judgment. While Petitioner's allegations might be relevant to excuse a tardy filing, they do not support vacatur of Petitioner's conviction or sentence and therefore fail to state a claim cognizable under § 2255.

VII. Miscarriage of Justice

Petitioner having failed to state any claims for which relief can be granted, there is no cumulative error resulting in a complete miscarriage of justice. Accordingly, Petitioner's thirteenth claim must be dismissed.

VIII. Motion for Sanctions

Also before the court is Petitioner's motion for sanctions "against the government and its agents for multifarious violations" of Rule 11 of the Federal Rules of Civil Procedure. Petitioner contends that the government's motion to dismiss is frivolous and was filed for the purposes of harassment, causing unnecessary delay, and needlessly increasing the cost of litigation. For the

reasons set forth above, the court finds that the government's motion is not without grounds. Nor is there any reason to believe it was presented for an improper purpose. The court, therefore, denies Petitioner's motion for sanctions.

CONCLUSION

For the foregoing reasons, Petitioner's Motion for Sanctions [DE #60] is DENIED and it is RECOMMENDED that the government's Motion to Dismiss [DE #52] be GRANTED and Petitioner's Motion to Vacate [DE #48] be DISMISSED for failure to state a claim upon which relief can be granted.

IT IS DIRECTED that a copy of this Memorandum and Recommendation be served on the parties or their counsel of record. Each of the parties is advised as follows: You shall have until **November 16, 2018**, to file written objections to the Memorandum and Recommendation. The presiding district judge must conduct his or her own review (that is, make a de novo determination) of those portions of the Memorandum and Recommendation to which objection is properly made and may accept, reject, or modify the determinations in the Memorandum and Recommendation; receive further evidence; or return the matter to the magistrate judge with instructions. *See, e.g.,* 28 U.S.C. § 636(b)(l); Fed. R. Crim P. 59(b); Fed. R. Civ. P. 72(b)(3); Local Civ. R. 1.1 (permitting modification of deadlines specified in local rules), 72.4(b), E.D.N.C. If you do not file written objections to the Memorandum and Recommendation by the foregoing deadline, you will be giving up the right to review of the Memorandum and Recommendation by the presiding district judge as described above, and the presiding district judge may enter an order or judgment based on the Memorandum and Recommendation without such review. In addition, your failure to file written objections by the foregoing deadline may bar you from appealing to the Court of Appeals

from an order or judgment of the presiding district judge based on the Memorandum and Recommendation. *See Wright v. Collins*, 766 F.2d 841, 846-47 (4th Cir. 1985).

This 31st day of October 2018.

KIMBERLY A. SWANK
United States Magistrate Judge

2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who--

(1) knowingly transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mails, any visual depiction, if--

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or through the mails, if--

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(3) either--

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title [18 USCS § 1151], knowingly sells or possesses with intent to sell any visual depiction; or

(B) knowingly sells or possesses with intent to sell any visual depiction that has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce, or has been shipped or transported in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported using any means or facility of interstate or foreign commerce, including by computer, if--

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; or

(4) either--

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of

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this title [18 USCS § 1151], knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction; or

(B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if--

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b) (1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but if such person has a prior conviction under this chapter, section 1591 [18 USCS § 1591], chapter 71, chapter 109A, or chapter 117 [18 USCS §§ 2251 et seq., §§ 1460 et seq., 2241 et seq., or 2421 et seq.], or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 10 years, or both, but if any visual depiction involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117 [18 USCS §§ 2251 et seq., §§ 1460 et seq., 2241 et seq., or 2421 et seq.], or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

(c) **Affirmative defense.** It shall be an affirmative defense to a charge of violating paragraph (4) of subsection (a) that the defendant--

(1) possessed less than three matters containing any visual depiction proscribed by that

paragraph; and
(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any visual depiction or copy thereof--
(A) took reasonable steps to destroy each such visual depiction; or
(B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

§ 2256. Definitions for chapter

For the purposes of this chapter [18 USCS §§ 2251 et seq.], the term--

(1) "minor" means any person under the age of eighteen years;

(2) (A) Except as provided in subparagraph (B), "sexually explicit conduct" means actual or simulated--

(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) bestiality;

(iii) masturbation;

(iv) sadistic or masochistic abuse; or

(v) lascivious exhibition of the genitals or pubic area of any person;

(B) For purposes of subsection 8(B) of this section, "sexually explicit conduct" means--

(i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;

(ii) graphic or lascivious simulated;

(I) bestiality;

(II) masturbation; or

(III) sadistic or masochistic abuse; or

(iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "organization" means a person other than an individual;

(5) "visual depiction" includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format;

(6) "computer" has the meaning given that term in section 1030 of this title [18 USCS § 1030];

(7) "custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained;

(8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where--

(A) the production of such visual depiction involves the use of a minor engaging in

sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

(9) "identifiable minor"--

(A) means a person--

(i)

(I) who was a minor at the time the visual depiction was created, adapted, or modified; or

(II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

(ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and

(B) shall not be construed to require proof of the actual identity of the identifiable minor.

(10) "graphic", when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted; and

(11) the term "indistinguishable" used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.