NO._____

In The
Supreme Court of the United States

LUCAS KENNETH SABATINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX

Charles R. Brewer
ATTORNEY AT LAW
79 Woodfin Place, Suite 206
Asheville, NC 28801
828-251-5002
crboffice@aol.com

Counsel of Record for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

TABLE OF CONTENTS

PAGE

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4809

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LUCAS KENNETH SABATINO,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Max O. Cogburn, Jr., District Judge. (3:19-cr-00009-MOC-DCK-1)

Submitted: October 20, 2020 Decided: October 23, 2020

Before GREGORY, Chief Judge, DIAZ, Circuit Judge, and SHEDD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Charles Robinson Brewer, Asheville, North Carolina, for Appellant. Amy Elizabeth Ray, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Asheville, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Lucas Kenneth Sabatino appeals his conviction and the 15-year sentence imposed after Sabatino pled guilty pursuant to a plea agreement to sexual exploitation of children, in violation of 18 U.S.C. § 2251(a), (e). Sabatino's sole argument on appeal is that his counsel rendered ineffective assistance because she failed to raise issues relating to Sabatino's mental capacity when he committed his crime and at the time he entered his guilty plea. The Government has filed a motion to dismiss Sabatino's appeal, invoking the appellate waiver in Sabatino's plea agreement and asserting that ineffective assistance does not conclusively appear on the record. Although we deny the Government's motion to dismiss, we affirm the criminal judgment.

It is well established that a defendant may waive the right to appeal if that waiver is knowing and intelligent. *See United States v. Blick*, 408 F.3d 162, 169 (4th Cir. 2005). Even a valid waiver does not waive all appellate claims, however. Specifically, a valid appeal waiver does not preclude a challenge to a sentence on the ground that it exceeds the statutory maximum or is based on a constitutionally impermissible factor such as race, arises from the denial of a motion to withdraw a guilty plea based on ineffective assistance of counsel, or relates to claims concerning a violation of the Sixth Amendment right to counsel in proceedings following the guilty plea. *See United States v. Johnson*, 410 F.3d 137, 151 (4th Cir. 2005); *United States v. Craig*, 985 F.2d 175, 178 (4th Cir. 1993). Notably, the appellate waiver in Sabatino's plea agreement expressly excepted ineffective assistance of counsel claims from its coverage. As ineffective assistance of counsel is the sole claim raised on appeal, we deny the Government's motion to dismiss.

Turning to the merits, we have reviewed the record in conjunction with Sabatino's arguments on appeal and affirm the criminal judgment. Unless an attorney's ineffectiveness conclusively appears on the face of the record, ineffective assistance claims are not generally addressed on direct appeal. *United States v. Faulls*, 821 F.3d 502, 507-08 (4th Cir. 2016). Instead, such claims should be raised in a motion brought pursuant to 28 U.S.C. § 2255 in order to permit sufficient development of the record. *United States v. Baptiste*, 596 F.3d 214, 216 n.1 (4th Cir. 2010). We find that ineffectiveness of counsel does not conclusively appear on the face of the record before us. Therefore, Sabatino should raise this claim, if at all, in a § 2255 motion. *Faulls*, 821 F.3d at 508.

Based on the foregoing, we deny the Government's motion to dismiss and affirm the district court's judgment. 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.

AFFIRMED

FILED: October 23, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4809, US v. Lucas Sabatino
3:19-cr-00009-MOC-DCK-1

NOTICE OF JUDGMENT

Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

PETITION FOR WRIT OF CERTIORARI: The time to file a petition for writ of certiorari runs from the date of entry of the judgment sought to be reviewed, and not from the date of issuance of the mandate. If a petition for rehearing is timely filed in the court of appeals, the time to file the petition for writ of certiorari for all parties runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. See Rule 13 of the Rules of the Supreme Court of the United States; www.supremecourt.gov.

VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED COUNSEL: Vouchers must be submitted within 60 days of entry of judgment or denial of rehearing, whichever is later. If counsel files a petition for certiorari, the 60-day period runs from filing the certiorari petition. (Loc. R. 46(d)). If payment is being made from CJA funds, counsel should submit the CJA 20 or CJA 30 Voucher through the CJA eVoucher system. In cases not covered by the Criminal Justice Act, counsel should submit the Assigned Counsel Voucher to the clerk's office for payment from the Attorney Admission Fund. An Assigned Counsel Voucher will be sent to counsel shortly after entry of judgment. Forms and instructions are also available on the court's web site, www.ca4.uscourts.gov, or from the clerk's office.

BILL OF COSTS: A party to whom costs are allowable, who desires taxation of costs, shall file a Bill of Costs within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)).

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC: A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition and included in the docket entry to identify the cases to which the petition applies. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari. In consolidated criminal appeals, the filing of a petition for rehearing does not stay the mandate as to co-defendants not joining in the petition for rehearing. In consolidated civil appeals arising from the same civil action, the court's mandate will issue at the same time in all appeals.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this court, or another court of appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 3900 words if prepared by computer and may not exceed 15 pages if handwritten or prepared on a typewriter. Copies are not required unless requested by the court. (FRAP 35 & 40, Loc. R. 40(c)).

MANDATE: In original proceedings before this court, there is no mandate. Unless the court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).

FILED: October 23, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4809
(3:19-cr-00009-MOC-DCK-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

LUCAS KENNETH SABATINO

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

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

UNITED STATES DISTRICT COURT

Western District of North Carolina

UNITED STATES OF AMERICA	)	**JUDGMENT IN A CRIMINAL CASE**
	)	(For Offenses Committed On or After November 1, 1987)
V.	)	
	)	
LUCAS KENNETH SABATINO	)	Case Number: DNCW319CR000009-001
	)	USM Number: 66307-060
	)	
	)	Myra Cause
	)	Defendant's Attorney

THE DEFENDANT:

☒ Pleaded guilty to count(s) 1.

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

☐ Was found guilty on count(s) after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title and Section	Nature of Offense	Date Offense Concluded	Counts
18:2251(a) and 2251(e)	Sexual Exploitation of Children	7/20/2018	1

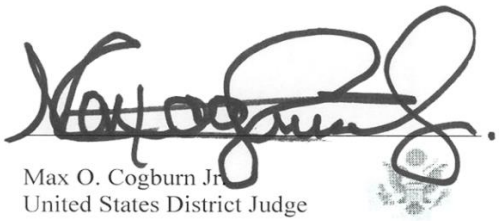
The Defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, United States v. Booker, 125 S.Ct. 738 (2005), and 18 U.S.C. § 3553(a).

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

☒ Count(s) 2 (is)(are) dismissed on the motion of the United States.

IT IS ORDERED that the Defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay monetary penalties, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: 10/22/2019



Max O. Cogburn Jr
United States District Judge

Date: October 28, 2019

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED EIGHTY (180) MONTHS.

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

1. Placed in a facility that can accommodate defendant's mental health needs, and/or, as close to Ashtabula, OH as possible, consistent with the needs of BOP.
2. Participation in any available educational and vocational opportunities.
3. Participation in the Federal Inmate Financial Responsibility Program.
4. Participation in any available mental health treatment programs as may be recommended by a Mental Health Professional.
5. Participation in sex offender treatment programs, if eligible.
6. Participation in any available substance abuse treatment program and if eligible, receive benefits of 18:3621(e)(2).

☒ The Defendant is remanded to the custody of the United States Marshal.

☐ The Defendant shall surrender to the United States Marshal for this District:

- ☐ As notified by the United States Marshal.
- ☐ At _ on _.

☐ The Defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ As notified by the United States Marshal.
- ☐ Before 2 p.m. on _.
- ☐ As notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at

_____, with a certified copy of this Judgment.

_____
United States Marshal

By: _____
Deputy Marshal

Defendant: Lucas Kenneth Sabatino
Case Number: DNCW319CR000009-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of LIFE.

☐ The condition for mandatory drug testing is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

CONDITIONS OF SUPERVISION

The defendant shall comply with the mandatory conditions that have been adopted by this court.

1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall not unlawfully possess a controlled substance.
3. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court (unless omitted by the Court).
4. ☒ The defendant shall make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. The defendant shall cooperate in the collection of DNA as directed by the probation officer (unless omitted by the Court).

The defendant shall comply with the standard conditions that have been adopted by this court and any additional conditions ordered.

1. The defendant shall report to the probation office in the federal judicial district where he/she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
2. The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
3. The defendant shall not leave the federal judicial district where he/she is authorized to reside without first getting permission from the Court or probation officer.
4. The defendant shall answer truthfully the questions asked by the probation officer.
5. The defendant shall live at a place approved by the probation officer. The probation officer shall be notified in advance of any change in living arrangements (such as location and the people with whom the defendant lives).
6. The defendant shall allow the probation officer to visit him/her at any time at his/her home or elsewhere, and shall permit the probation officer to take any items prohibited by the conditions of his/her supervision that the probation officer observes.
7. The defendant shall work full time (at least 30 hours per week) at lawful employment, unless excused by the probation officer. The defendant shall notify the probation officer within 72 hours of any change regarding employment.
8. The defendant shall not communicate or interact with any persons engaged in criminal activity, and shall not communicate or interact with any person convicted of a felony unless granted permission to do so by the probation officer.
9. The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer.
10. The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential informant without the permission of the Court.
12. If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk. The probation officer may contact the person and make such notifications or confirm that the defendant has notified the person about the risk.
13. The defendant shall refrain from excessive use of alcohol and shall not unlawfully purchase, possess, use, distribute or administer any narcotic or controlled substance or any psychoactive substances (including, but not limited to, synthetic marijuana, bath salts) that impair a person's physical or mental functioning, whether or not intended for human consumption, or any paraphernalia related to such substances, except as duly prescribed by a licensed medical practitioner.
14. The defendant shall participate in a program of testing for substance abuse if directed to do so by the probation officer. The defendant shall refrain from obstructing or attempting to obstruct or tamper, in any fashion, with the efficiency and accuracy of the testing. If warranted, the defendant shall participate in a substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise the defendant's participation in the program (including, but not limited to, provider, location, modality, duration, intensity) (unless omitted by the Court).
15. The defendant shall not go to, or remain at any place where he/she knows controlled substances are illegally sold, used, distributed, or administered without first obtaining the permission of the probation officer.
16. The defendant shall submit his/her person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), or other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer and such other law enforcement personnel as the probation officer may deem advisable, without a warrant. The defendant shall warn any other occupants that such premises may be subject to searches pursuant to this condition.
17. The defendant shall pay any financial obligation imposed by this judgment remaining unpaid as of the commencement of the sentence of probation or the term of supervised release in accordance with the schedule of payments of this judgment. The defendant shall notify the court of any changes in economic circumstances that might affect the ability to pay this financial obligation.
18. The defendant shall provide access to any financial information as requested by the probation officer and shall authorize the release of any financial information. The probation office may share financial information with the U.S. Attorney's Office.
19. The defendant shall not seek any extension of credit (including, but not limited to, credit card account, bank loan, personal loan) unless authorized to do so in advance by the probation officer.
20. The defendant shall support all dependents including any dependent child, or any person the defendant has been court ordered to support.
21. The defendant shall participate in transitional support services (including cognitive behavioral treatment programs) and follow the rules and regulations of such program. The probation officer will supervise the defendant's participation in the program (including, but not limited to, provider, location, modality, duration, intensity). Such programs may include group sessions led by a counselor or participation in a program administered by the probation officer.
22. The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

ADDITIONAL CONDITIONS:

23. The defendant shall participate in a mental health evaluation and treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise the defendant's participation in the program (including, but not limited to provider, location, modality, duration, and intensity). The defendant shall take all mental health medications as prescribed by a licensed health care practitioner.

SEX OFFENDER

CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court and any additional conditions ordered.

1. The defendant shall have no direct or indirect contact, at any time, for any reason with any victim(s), any member of any victim's family, or affected parties in this matter unless provide with specific written authorization to do so in advance by the U.S. Probation Officer.
2. The defendant shall submit to a psycho-sexual evaluation by a qualified mental health professional experienced in evaluating and managing sexual offenders as approved by the U.S. Probation Officer. The defendant shall complete the treatment recommendations and abide by all of the rules, requirements, and conditions of the program until discharged. The defendant shall take all medications as prescribed.
3. The defendant shall submit to risk assessments, psychological and physiological testing, which may include, but is not limited to a polygraph examination and/or Computer Voice Stress Analyzer (CVSA), or other specific tests to monitor the defendant's compliance with supervised release and treatment conditions, at the direction of the U.S. Probation Officer.
4. The defendant's residence, co-residents and employment shall be approved by the U.S. Probation Officer. Any proposed change in residence, co-residents or employment must be provided to the U.S. Probation Officer at least 10 days prior to the change and pre-approved before the change may take place.
5. The defendant shall not possess any materials depicting and/or describing "child pornography" and/or "simulated child pornography" as defined in 18 U.S.C. § 2256,or that would compromise the defendant's sex offender treatment, nor shall thedefendant enter any location where such materials can be accessed, obtained or viewed, including pictures, photographs, books, writings, drawings, videos or video games. The Court will not prohibit the possession or viewing of legal pornographic materials, including upon the recommendation of medical professionals.
6. The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which the defendant resides, works, is a student, or was convicted of a qualifying offense.
7. The defendant shall not have any contact, including any association such as verbal, written, telephonic, or electronic communications with any person under the age of eighteen (18) except: 1) in the presence of the parent or legal guardian of said minor; 2) on the condition that the defendant notifies the parent or legal guardian of their conviction or prior history; and, 3) has written approval from the U.S. Probation Officer. This provision does not encompass persons under the age of eighteen (18), such as waiters, cashiers, ticket vendors, etc. with whom the defendant must deal, in order to obtain ordinary and usual commercial services. If unanticipated contact with a minor occurs, the defendant shall immediately remove himself/herself from the situation and shall immediately notify the probation officer.
8. The defendant shall not loiter within 100 feet of any parks, school property, playgrounds, arcades, amusement parks, day-care centers, swimming pools, community recreation fields, zoos, youth centers, video arcades, carnivals, circuses or other places primarily used or can reasonably be expected to be used by children under the age of eighteen (18), without prior written permission of the U.S. Probation Officer.
9. The defendant shall not use, purchase, possess, procure, or otherwise obtain any computer (as defined in 18 U.S.C. § 1030(e)(1)) or electronic device that can be linked to any computer networks, bulletin boards, internet, internet service providers, or exchange formats involving computers unless approved by the U.S. Probation Officer. Such computers, computer hardware or software is subject to warrantless searches and/or seizures by the U.S. Probation Office.
10. The defendant shall allow the U.S. Probation Officer, or other designee, to install software designed to monitor computer activities on any computer the defendant is authorized to use. This may include, but is not limited to, software that may record any and all activity on computers (as defined in 18 U.S.C. § 1030(e)(1)) the defendant may use, including the capture of keystrokes, application information, internet use history, email correspondence, and chat conversations. The defendant shall pay any costs related to the monitoring of computer usage.
11. The defendant shall not use or have installed any programs specifically and solely designed to encrypt data, files, folders, or volumes of any media. The defendant shall, upon request, immediately provide the probation officer with any and all passwords required to access data compressed or encrypted for storage by any software.
12. The defendant shall provide a complete record of all computer use information including, but not limited to, all passwords, internet service providers, email addresses, email accounts, screen names (past and present) to the probation officer and shall not make any changes without the prior approval of the U.S. Probation Officer.
13. The defendant shall not have any social networking accounts without the approval of the U.S. Probation Officer.
14. The defendant shall not possess any children's items, including, but not limited to, clothing, toys, and games without the prior approval of the U.S. Probation Officer.
15. The defendant shall not be employed in any position or participate as a volunteer in any activity that involves direct or indirect contact with children under the age of eighteen (18), and under no circumstances may the defendant be engaged in a position that involves being in a position of trust or authority over any person under the age of eighteen (18), without written permission from the U.S. Probation Officer.

ADDITIONAL CONDITIONS:

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments.

ASSESSMENT	FINE	RESTITUTION
$100.00	$0.00	**TBD**

☒ The determination of restitution is deferred until 1/20/2020. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

FINE

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

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

☒ The interest requirement is waived.

☐ The interest requirement is modified as follows:

COURT APPOINTED COUNSEL FEES

☐ The defendant shall pay court appointed counsel fees.

☐ The defendant shall pay $0.00 towards court appointed fees.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☐ Lump sum payment of $0.00 due immediately, balance due
☐ Not later than_____
☐ In accordance ☐ (C), ☐ (D) below; or

B ☒ Payment to begin immediately (may be combined with ☐ (C), ☒ (D) below); or

C ☐ Payment in equal Monthly (E.g. weekly, monthly, quarterly) installments of $50.00 to commence 60 (E.g. 30 or 60) days after the date of this judgment; or

D ☒ Payment in equal Monthly (E.g. weekly, monthly, quarterly) installments of $ 50.00 to commence 60 (E.g. 30 or 60) days after release from imprisonment to a term of supervision. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. Probation Officer shall pursue collection of the amount due, and may request the court to establish or modify a payment schedule if appropriate 18 U.S.C. § 3572.

Special instructions regarding the payment of criminal monetary penalties:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court costs:

☒ The defendant shall forfeit the defendant's interest in the following property to the United States as set forth in the Consent Order document 20 entered 5/2/2019.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States District Court Clerk, 401 West Trade Street, Room 210, Charlotte, NC 28202, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. All criminal monetary penalty payments are to be made as directed by the court.

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

STATEMENT OF ACKNOWLEDGMENT

I understand that my term of supervision is for a period of _____months, commencing on _____.

Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

I understand that revocation of probation and supervised release is mandatory for possession of a controlled substance, possession of a firearm and/or refusal to comply with drug testing.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ Date: _____
Defendant

(Signed) _____ Date: _____
U.S. Probation Office/Designated Witness

FILED: December 7, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4809
(3:19-cr-00009-MOC-DCK-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

LUCAS KENNETH SABATINO

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 Senior Judge Shedd.

For the Court

/s/ Patricia S. Connor, Clerk

CASE NO. 19-4809

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

LUCAS KENNETH SABATINO,
Defendant - Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
AT CHARLOTTE

OPENING BRIEF OF APPELLANT LUCAS KENNETH SABATINO

Charles Robinson Brewer
ATTORNEY AT LAW
Suite 206
79 Woodfin Place
Asheville, NC 28801
828-251-5002
crboffice@aol.com

Counsel for Defendant - Appellant

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction under 18 U.S.C. §3231. This Court has jurisdiction pursuant to 28 U.S.C.§1291 and 18 U.S.C. §3742. The district court imposed judgment on defendant on October 22, 2019, in open court. The written judgment was entered on October 28, 2019. JA 75. Subsequently an amended judgment was entered on or about January 1, 2020. JA 84. A notice of appeal was timely filed on October 29, 2019. JA 83. This appeal is from a final judgment.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

WHETHER DEFENSE COUNSEL COMMITTED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO RAISE ISSUES RELATING TO DEFENDANT'S MENTAL CAPACITY AT THE TIME OF COMMISSION OF THE ALLEGED CRIME AND AT THE TIME OF THE TRIAL.

STATEMENT OF THE CASE

This case was commenced with the filing of a bill of indictment in the Western District of North Carolina on January 15, 2019. JA 8. The defendant was charged in a two count bill of indictment. In Count One defendant was charged with inducing a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct in violation of Title 18, U.S.C. Sections 2251(a) and 2251(e). In Count Two he was charged with using a facility of interstate commence to persuade an individual under the age of 18 to engage in sexual activity for which

any person could be charged, to wit: the violation of North Carolina General Statute 14-202.1(a)(1), taking indecent liberties with children, in violation of Title 18, U.S.C. Section 2422(b). The indictment contained a notice of forfeiture and finding of probable cause. Defendant was arrested in Ohio and subsequently returned to face these charges in the Western District of North Carolina. He made an initial appearance in an arraignment and detention hearing held on February 20, 2019. He was appointed counsel. In an order of February 20, 2019, he was ordered detained. JA 10. On May 1, 2019, a factual basis was filed. JA 13. On May 1, 2019, a plea agreement was filed. JA 92. On May 2, 2019, a plea hearing was conducted by the magistrate judge who found a factual basis for the plea and accepted the same. JA 15. On that same date the magistrate judge accepted the guilty plea and entered a guilty plea. JA 37. On May 2, 2019, the magistrate judge entered a consent order and judgment of forfeiture. JA 41. On June 18, 2019, a draft of the presentence investigation report was filed. JA 98. Defendant's objections to the presentence report were filed on July 2, 2019. JA 111. On July 8, 2019, a final presentence report was filed. JA 113. On July 16, 2019, the defendant filed a *pro se* letter which the court treated as a motion for inquiry of counsel. JA 43.

A hearing into the inquiry of status of counsel was held before the magistrate judge on August 20, 2019. JA 127. On October 16, 2019, the defendant filed under seal a sentencing memorandum. JA 148. A sentencing hearing was held before

district judge Max O. Cogburn, Jr., on October 22, 2019. JA 45. The court's written judgment was entered on October 28, 2019. JA 75. In that judgment Count Two of the indictment was dismissed, and he was sentenced to 180 months imprisonment on Count One. The statement of reasons was entered that same day. JA 167. On October 29, 2019, the defendant timely filed his notice of appeal to the Fourth Circuit Court of Appeals. JA 83.

Facts

The bill of indictment in this case was returned on January 15, 2019. JA 8. Defendant's court-appointed attorney made her first appearance on or about February 20, 2019. The defendant was ordered to be detained pending trial on February 20, 2019. JA 10. Defendant's plea agreement called for him to plead guilty to Count One in which he was charged with inducing a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct in violation of Title 18, U.S.C. Section 2251(a) and 2251(e). JA 92. The plea agreement provided that "either party may argue their respective positions regarding any other specific offense characteristics, cross-references, special instruction, reductions, enhancements, departures, and adjustments to the offense level." JA 94. Further, either party could seek a departure or variance from the guidelines. Additionally, defendant agreed to register as a sex offender. JA 94.

Defendant's counsel did not file any motion with the court which in any way

questioned his mental competency prior to filing his plea agreement. At his Rule 11 hearing on May 2, 2019, the magistrate judge inquired as to whether he was under the influence of any drug to which he responded, "No." JA 17. The magistrate judge inquired "(i)s your mind clear today and do you understand you're here to enter a guilty plea that cannot later be withdrawn." He responded: "Yes." JA 17 and 18. The magistrate judge then proceeded to advise him and ask him questions required by Rule 11 of the Federal Rules of Criminal Procedure concerning whether defendant understood various matters and things. Defendant was asked by the magistrate judge: "Have you had enough time to discuss with your lawyer any possible defenses you might have to these charges?" Defendant responded: "Not really." JA 29 and 30. The magistrate judge attempted to clear this up. JA 30 and 31. The magistrate judge asked defendant's counsel to comment. She said: "No, Your Honor. I think it's just a difficult matter, but I do think he's – he's ready to conduct this hearing with Your Honor and proceed." JA 31. The magistrate judge asked defendant "(h)ave you heard and understood all parts of this proceeding and do you still wish to plead guilty?" Defendant responded: "Yes." JA 31. Defendant further injected: "I didn't mean for this to happen." JA 32. Finally, defense counsel informed the court that she had reviewed all the features of the case with defendant, particularly the terms of his plea agreement, and she is satisfied that he understands these things and knows what he is doing. JA 32.

While this Rule 11 hearing was held on May 2, 2019, defendant was evaluated by a psychologist at the request of his counsel on May 9, 2019. JA 152. She prepared and submitted a report on June 12, 2019. JA 152. Her 12 page report was attached to a sentencing memorandum which his counsel filed with the court. JA 148. The entire report is adopted and incorporated herein by reference. JA 152-163. The curriculum vitae of the psychologist which is also adopted and incorporated herein by reference was also appended to the report. JA 164-166. Importantly, the report provided that defendant's "judgment was marginal to poor. He appeared to be of low average intelligence." JA 157. Without setting forth the report in great detail, particularly in view that it is adopted herein in its totality, the diagnosis of psychologist is unspecified neurodevelopmental disorder, post traumatic stress disorder, persistent depressive disorder, unspecified cannabis use disorder, unspecified alcohol use disorder, and other specified personality disorder with paranoid, borderline and avoidant traits. JA 159. The psychologist recommends, *inter alia*, that defendant "should continue to participate in mental health treatment, including a medication evaluation, with mood stability, depression, and nightmares as the target symptoms. The provider who prescribes his medications should be made aware of his substance abuse history." Further, the psychologist recommends the defendant "should continue with psychotherapy for his PTSD and depression". JA 162.

In a handwritten letter to Judge Cogburn filed July 16, 2019, defendant asserts, *inter alia,* "I would like a new attorney (I) feel my current one isn't looking out for my best interests." JA 44. He further asserts in that letter that he was forced into signing the plea deal. JA 43. He also says that

> (I) asked for help because (I) have mental health issue's and p.t.s.d from being shot in a house robbery back in 2015. I also come from a broken home as a kid growing up in the system (I)'m not trying to make excuses for what (I) did but all (I) want is help for my Mental health problem's so (I) can be a better person cause most of my life (I) just ignored my issue's cause I was afraid to admit (I) needed help (I) hope it's not to(o) late.

JA 43. The letter further says: "(I) really want to be happy and not depressed and mad at the world all the time." JA 44. The letter repeatedly says his lawyer is not working for his best interest. He even says she is working against him. JA 43. A hearing was held before a magistrate judge on August 20, 2019. JA 127. His presentence report addresses his mental and emotional health and his substance abuse in paragraphs 44 and 45. JA 121. Defendant's objections to the presentence report did not include any objection under U.S.S.G. Section 5H1.3. He should be entitled to a downward departure under that section.

SUMMARY OF ARGUMENT

In the argument raised in this appeal defendant asserts that he suffered from severe mental issues and substance abuse issues that would relate to his having the

mental capacity needed for the commission of a crime at the time of the offense and the capacity to plead at the time of his trial. Defense counsel was aware of these issues and failed to raise them under 18 U.S.C. Section 17(a) and under 18 U.S.C. Section 4248, 4241, and 4242. She also failed to assert this position under U.S.S.G. Section 5H1.3. Counsel's failures in this regard highly prejudiced defendant not only in regard to the entering of this plea but also in regard to his sentencing in that she failed to assert it appropriately under the United States Sentencing Guidelines Section 5H1.3.

ARGUMENT

DEFENSE COUNSEL COMMITTED PREJUDICIAL INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO RAISE ISSUES RELATING TO DEFENDANT'S MENTAL CAPACITY AT THE TIME OF COMMISSION OF THE ALLEGED CRIME AND AT THE TIME OF THE TRIAL.

Standard of Review

The standard of review on this issue is plain error for the reason that it was not raised at trial. The trial court was aware of the issue both in the form of the defendant's letter to the trial judge on July 16, 2019 (JA 43) and in defendant's sentencing memorandum filed October 16, 2019. JA 148. Therefore, it could arguably be reviewed *de novo.*

Argument

The facts which the Court needs to rule on this issue are set forth in the "*Facts*" found above. Under those facts it is clear that defendant was not competent to stand trial, was not mentally competent to commit the alleged crime, and in fact may have lacked mental capacity to form the *mens rea* requirement for criminal prosecution. "It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial." *Medina v. California,* 505 U.S. 437, 439, 112 S. Ct. 2572, 120 L.Ed.2d 353 (1992). Counsel's failure to investigate possible insanity defense is ineffective assistance of counsel. *United States v. Kauffman*, 109 F.3d 186 (3rd Cir. 1997). In this case there was a psychological evaluation and a handwritten letter from the client, but counsel failed to bring this for a judicial determination as to whether he was competent to stand trial and whether he had adequate mental competence at the time of the alleged offense. Counsel should have requested a competency hearing in that a failure to do so constitutes ineffective assistance of counsel if there was sufficient indication of incompetence to give objectively reasonable counsel reason to doubt his competency and if there was a reasonable probability that he would have been found incompetent to stand trial had the issue been raised and considered. *Taylor v. Horn,* 504 F.3d 416, 438 (3rd Cir. 2007). The Fifth Circuit in *Bouchillon v. Collins*, 907 F.2d 589, 592 (5th Cir. 1990) held that the court cannot accept a guilty

plea from a mentally incompetent and that the failure to investigate defendant's competence is prejudicial if there is a reasonable probability that he is incompetent to plead. *McLuckie v. Abbott,* 337 F.3d 1193, 1199 (10th Cir. 2003) said that "a failure to timely investigate a client's mental state, let alone a failure to assert a mental state defense at trial, falls well below an objective standard of reasonableness" when the defendant shows "severe mental problems".

This Circuit remanded for hearing a claim of counsel's ineffectiveness for counsel's failure to investigate the defendant's competency despite signs of instability. *Becton v. Barnett*, 920 F.2d 1190 (4th Cir. 1990). The Sixth Circuit found trial counsel's ineffectiveness for failing to present an insanity defense. *Walker v. Hoffner*, 534 Fed. Appx. 406 (6th Cir. 2013). Failure to investigate and assert defendant's incompetency rendered his plea unknowing and involuntary. *Thomas v. Lockhart*, 738 F.2d 304 (8th Cir. 1994). The failure of counsel to pursue the possibility of defendant's mental instability created ineffective assistance of counsel. *Evans v. Lewis,* 855 F.2d 631, 636-39 (9th Cir. 1988). Evidentiary hearings are required for failing to present mental mitigation evidence and for failing to investigate the insanity defense. See *Wilson v. Sirmons,* 536 F.3d 1064, 1096 (10th Cir. 2008) and *McCoy v. Wainwright*, 804 F.2d 1196 (11th Cir. 1986).

In this case the plea agreement was filed May 1, 2019. The Rule 11 hearing was conducted May 2, 2019. The psychological examination was conducted at the

behest of defendant's counsel on May 9, 2019. It is not clear when defense counsel contacted the psychologist, but the plea agreement was signed by the defendant on April 17, 2019. JA 97. It was filed May 1, 2019. Clearly the defense counsel must have been placed on notice of defendant's mental problems before the Rule 11 hearing or she would not have ordered the psychological evaluation. The psychological evaluation begs for judicial determination of defendant's mental competence at the time of the alleged offense and his mental capacity to stand trial, yet she failed to do so to his great prejudice. She could have and should have filed proceedings under 18 U.S.C. Section 4248. Further, she should have and could have asserted defenses by notice or motion under 18 U.S.C. Section 17. 18 U.S.C. Section 17 (a) provides as follows:

> It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

18 U.S.C. 17(a).

Under 18 U.S.C. Section 3006A the defendant was entitled to adequate representation by court appointment if he is unable to afford same. This right, secured by that statute and by the Sixth Amendment to the United States Constitution, was effectively denied to him in that this representation was ineffective. Further, trial counsel should have filed a motion under 18 U.S.C. Section

4241 and 18 U.S.C. Section 4242 for determination of his mental competency to stand trial and for determination of existence of insanity at the time of the alleged offense. It is obvious from the foregoing that defense counsel had enough information to attempt to raise this defense, and her failure to do so is ineffective assistance of counsel. She should have but did not file a notice of insanity defense under Rule 12.2 of the Federal Rules of Criminal Procedure. Defense counsel ignored issues relating to diminished responsibility, diminished capacity and negating the *mens rea*. These issues should have been raised by motion or notice and decided by court, not by counsel. Defense counsel was aware of defendant's mental health information in that on July 2, 2019, she objected to the presentence report saying that she is continuing to gather records of defendant's mental health information. JA 111. U.S.S.G. Section 5H1.3 provides that "Mental and emotional conditions may be relevant in determining the conditions of probation or supervised release; e.g., participation in mental health program (see §§ 5B1.3(d)(5) and 5D1.3(d)(5))." Downward departures would be appropriate under the sentencing guidelines, but no such request was found in either the presentence report or in the defense objections thereto.

CONCLUSION

For the reasons set forth above, defendant requests that the case be remanded to the district court with instructions that the defendant's plea be stricken and that a

determination be made as to his mental competence at the time of the commission of the alleged offense and at the time of trial.

Respectfully submitted this the 17th day of June, 2020.

s/Charles R. Brewer
Charles Robinson Brewer
ATTORNEY AT LAW
Suite 206
79 Woodfin Place
Asheville, NC 28801
828-251-5002
crboffice@aol.com

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

1. This Opening Brief of Appellant has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman, 14 point.

2. Exclusive of the table of contents; table of citations; certificate of compliance and the certificate of service, this Opening Brief of Appellant contains less than 30 pages.

3. I understand that a material misrepresentation can result in the court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the brief and a copy of the word or line printout.

s/Charles R. Brewer
Charles Robinson Brewer
ATTORNEY AT LAW
Suite 206
79 Woodfin Place
Asheville, NC 28801
828-251-5002
crboffice@aol.com

Counsel for Appellant

CERTIFICATE OF SERVICE

I certify that, on June 17th, 2020, I electronically filed the foregoing Opening Brief of Appellant with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

I further certify, that on June 17th, 2020, I served the Joint Appendix Sealed Volume II, via USPS, on counsel listed below:

Amy Elizabeth Ray
Assistant U.S. Attorney
OFFICE OF THE UNITED STATES ATTORNEY
United States Courthouse
Room 233
100 Otis Street
Asheville, NC 28801

s/Charles R. Brewer
Charles Robinson Brewer
ATTORNEY AT LAW
Suite 206
79 Woodfin Place
Asheville, NC 28801
828-251-5002
crboffice@aol.com

Counsel for Appellant

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	DOCKET NO. 19-4809
Plaintiff-Appellee,	)	
	)	
vs.	)	
	)	
LUCAS KENNETH SABATINO,	)	
	)	
Defendant-Appellant.	)	
	)	

MOTION TO DISMISS APPEAL

Defendant Lucas Kenneth Sabatino appeals his conviction after guilty to enticing an individual he believed to be a minor to engage in sexual activity for the purpose of producing a visual depiction of that activity. Sabatino waived his right to appeal his sentence, except on the bases of ineffective assistance of counsel and prosecutorial misconduct. And Sabatino's theory of ineffective assistance of counsel warrants dismissal because the record does not conclusively establish that the performance of his attorney was constitutionally deficient. The United States, therefore, moves to dismiss Sabatino's appeal.

BACKGROUND

In July of 2018, when Sabatino was 36 years old, he made contact with a 13-year-old girl through the GroupMe chat application and asked the girl, "So what age you start with guys?" J.A. 117. The girl told Sabatino that she was 13 years old and that her "first time" had been that year. J.A. 117. Sabatino asked the girl to take a picture of herself with her legs open, "[s]howing everything." J.A. 117. After the girl sent Sabatino a picture of her vagina, he responded that it looked "nice" and "tight." J.A. 117. Sabatino discussed the size of his penis and asked the girl whether she would engage in oral sex, "ride" him, and try anal sex. J.A. 117.

Over the course of two days, Sabatino conversed with his victim and made plans to travel from Ohio to North Carolina to meet her. J.A. 117. Sabatino proposed staying "a week or more." J.A. 117. And when his victim asked what they would do when he was in North Carolina, he responded that they would get something to eat and hang out, "before the wild sex starts." J.A. 117.

When interviewed by the FBI, Sabatino admitted that he knew his victim was 13 years old and that he researched traveling to North

Carolina. J.A. 117. Sabatino denied, however, that he intended to travel to North Carolina. J.A. 117. Sabatino also admitted that he had engaged in chat conversation and had obtained nude photographs of five or six other minor girls, including another 13-year-old. J.A. 117. Sabatino had previously been convicted of corrupting a minor based on his admission that he had sex with a 13-year-old girl when he was 20 years old. J.A. 117.

A federal grand jury indicted Sabatino and charged him with enticing an individual he believed to be a minor to engage in sexual activities for the purpose of producing child pornography, 18 U.S.C. § 2251(a), (e); and using a facility of interstate commerce to entice a minor to engage in sexual activity for which he could be charged with an offense, 18 U.S.C. § 2242(b). J.A. 8–9. Sabatino entered into a plea agreement with the United States, agreeing to plead guilty to the enticement offense. J.A. 92. The United States agreed to dismiss the remaining count against him. J.A. 92. Sabatino agreed, in exchange for the concessions made by the United States, to waive his right to appeal his conviction, except on the bases of ineffective assistance of

counsel or prosecutorial misconduct. J.A. 96. On the same day the parties filed their plea agreement, they also filed a written factual basis supporting Sabatino's guilty plea, in which Sabatino admitted to the enticement offense. J.A. 13–14.

The district court, Magistrate Judge David C. Keesler, conducted a hearing in accordance with Federal Rule of Criminal Procedure 11 and found that Sabatino's guilty plea was knowing and voluntary. J.A. 32–33. During the colloquy, Sabatino reported that he was not under the influence of "alcohol, medicines, or drugs of any kind," that his mind was clear, and that he understood that he was in court "to enter a guilty plea that [could not] later be withdrawn." J.A. 17. Sabatino affirmed that he understood the charge to which he was pleading guilty and its mandatory-minimum and maximum penalties, which included a mandatory-minimum term of 15 years in prison. J.A. 18–19. Sabatino also affirmed that he was guilty of the enticement offense to which he was pleading guilty. J.A. 23.

After the prosecutor summarized the terms of the parties' plea agreement, Sabatino affirmed that he had reviewed his plea agreement

carefully with his attorney and that he understood its terms. J.A. 27. Sabatino also affirmed that he understood that "the right to appeal [his] conviction and/or sentence ha[d] been expressly waived," except on the bases of ineffective assistance of counsel or prosecutorial misconduct. J.A. 27. Sabatino denied that anyone had threatened, intimidated, or forced him to enter his guilty plea. J.A. 29.

When asked whether he had had enough time to discuss with his lawyer "any possible defenses" he might have to the charges against him, Sabatino initially responded, "Not really." J.A. 29–30. But immediately thereafter, Sabatino affirmed that he had had enough time to talk with his lawyer about his case and that he had discussed possible defenses that he might have to the charges, explaining that he "guess[ed] there isn't many." J.A. 30. The magistrate judge told Sabatino that the time to discuss possible defenses to the charges against him was before he pleaded guilty, and Sabatino affirmed repeatedly that he had talked with his attorney about any possible defenses and did not need to talk with her further before entering his plea. J.A. 30–31.

When asked to comment, Sabatino's counsel stated that it was "just a difficult matter" but that Sabatino was ready to proceed. J.A. 31. She also stated that she had reviewed with Sabatino "all features of his case" and that she was satisfied that he understood the terms and consequences of his plea agreement. J.A. 32. At the conclusion of the hearing, when asked if he had any further comments, Sabatino stated, "Only thing I can really say is I'm sorry. I didn't mean for this to happen." J.A. 31–32.

Two-and-a-half months after Sabatino entered his guilty plea, he wrote a letter to the district court and reported that his attorney, Myra Cause, was "not looking out" for his best interests. J.A. 43. Sabatino stated that he felt that he was forced into signing his plea agreement and that he had "no other options." J.A. 43. Sabatino acknowledged that he "made a mistake," explaining that no one is perfect, and stated that he had asked for help because he had mental-health issues, including post-traumatic stress disorder from being shot in 2015 and wanted to be "a better person." J.A. 43. Stating that he understood that he had made a bad mistake and "should do time," Sabatino

complained that 15 years was too long, leading him to conclude that his attorney was working against him and not for him. J.A. 43. Sabatino stated that he wanted help so that he would never make that mistake again and offered to apologize to his victim's parents. J.A. 44.

Magistrate Judge Keesler conducted a hearing in response to Sabatino's letter. J.A. 127. Sabatino explained to the court that he did not feel that he had had adequate time to think through his decision to plead guilty and that he did not "fully understand what [he] was signing." J.A. 131. Sabatino also stated that he did not understand why there could not be "a better plea to help [him] overcome [his] mental health issues and a couple other issues." J.A. 134–35.

Cause explained that her efforts to secure a plea agreement that would have resulted in a mandatory-minimum sentence of 10 years were unsuccessful and that the best result she could achieve was to the enticement offense, which carried a 15-year mandatory minimum. J.A. 132. She told the court that she visited Sabatino numerous times, explaining his options in detail and reviewing the plea agreement carefully. J.A. 132–33. Cause told the court that she read the

agreement verbatim but also summarized each provision because "a lot of it is in legalese" and "that is difficult for many people, not just Mr. Sabatino." J.A. 133–34. At no time did Sabatino appear not to understand the terms of his agreement, and at no time did she pressure him to plead guilty. J.A. 133–34.

The magistrate judge asked counsel whether the mental-health issues Sabatino raised would be relevant at his sentencing hearing, and counsel responded that she had "already hired and had an expert talk with" Sabatino so that she could argue those issues in mitigation. J.A. 135. Cause also stated that her office had "been in contact with the [Bureau of Prisons] to ensure that [Sabatino would get] the proper treatment and medications." J.A. 135. After the magistrate judge stated that Cause had worked hard on his case and done a "very good job," Sabatino stated that it appeared that there would be no better offer for him and that he was "not trying to make excuses for what [he] did, wanting only "for people to understand that [he wants] help." J.A. 136–37. Finding that Cause had done "her usual good job," the magistrate judge declined to replace her as Sabatino's counsel, and

Sabatino acknowledged that he never had "any real doubt" that he would serve time in prison. J.A. 144–45.

The probation officer prepared a presentence report and concluded that the Sentencing Guidelines advised a sentence of 15 years in prison, the applicable mandatory-minimum term. J.A. 123. Attaching a psychological report conducted by Dr. Ashley King, Sabatino, through counsel, filed a sentencing memorandum asking the district court to impose the mandatory-minimum sentence. J.A. 148–63. In her report, Dr. King summarized the physical and sexual abuse Sabatino suffered as a child and reported that Sabatino was in the "low average range of intellectual functioning. J.A. 153–55, 158. Dr. King found that Sabatino has cognitive deficits and chronic post-traumatic stress disorder and that he "has trouble with using good judgment" related to a "neurodevelopmental problem, possibly rooted in childhood trauma." J.A. 159–61. Dr. King also found that Sabatino's test results were consistent with "an avoidant, paranoid, and borderline personality" but "clearly does not suffer from a psychotic disorder." J.A. 159. And Dr. King found that Sabatino suffered from an unspecified alcohol and

cannabis use disorder. J.A. 159. Dr. King made a number of treatment recommendations designed to reduce Sabatino's risk of recidivism. J.A. 161–63.

The district court, the Honorable Max O. Cogburn, Jr., presiding, conducted Sabatino's sentencing hearing. J.A. 45–73. At the beginning of the hearing, Sabatino affirmed that his guilty plea was knowing and voluntary. J.A. 48. During his allocution, Sabatino told the court that he had not wanted "this to happen" and that if he had gotten help earlier, it probably would not have happened. J.A. 58. Sabatino stated that he was angry, depressed, and had a lot of "rage from people getting away with doing things to [him]." J.A. 59. Sabatino denied that he ever intended to travel to North Carolina to meet his victim and that while he could be angry, he "just want[ed] all this pain to go away." J.A. 60. Describing Sabatino's offense as "serious," the district court sentenced him to 180 months in prison, the mandatory-minimum term. J.A. 61–63, 76. Sabatino filed a timely notice of appeal. J.A. 83.

ARGUMENT

Because Sabatino waived his right to appeal his sentence and ineffective assistance of counsel does not conclusively appear from the record, this Court should dismiss his appeal.

A. Standard of Review

Whether a defendant effectively waived his right to appeal is a matter of law that this Court reviews *de novo*. *United States v. McCoy*, 895 F.3d 358, 362 (4th Cir. 2018).

B. Discussion

This Court should dismiss Sabatino's appeal. This Court will consider a claim of ineffective assistance of counsel on a direct appeal from a criminal conviction "only if it conclusively appears from the record" that the appellant's counsel "did not provide effective assistance." *United States v. Martinez*, 136 F.3d 972, 979 (4th Cir. 1998). Ineffective-assistance claims that do not meet this standard are "not cognizable on direct appeal," *United States v. Allen*, 491 F.3d 178, 191 (4th Cir. 2007), and should be dismissed, *see United States v. Hoyle*, 33 F.3d 415, 418 (4th Cir. 1994); *accord United States v. Carrasco*, 619 F. App'x 248, 249 (4th Cir. 2015) (unpublished decision). The

appropriate vehicle for a defendant in an ordinary federal criminal case to challenge the effectiveness of his counsel is a motion to vacate, set aside, or correct a sentence under 28 U.S.C. § 2255, to permit development of the record. *See United States v. Baptiste*, 596 F.3d 214, 216 n.1 (4th Cir. 2010).

Sabatino's ineffective-assistance theory is subject to dismissal because the record does not conclusively establish that his attorney was constitutionally deficient. To prevail on a theory of ineffective assistance of counsel, Sabatino must establish that his attorney's performance fell below an objective standard of reasonableness, judged "from counsel's perspective at the time," *Strickland v. Washington*, 466 U.S. 668, 689 (1984). He must also establish prejudice in the form of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. An appellate record is ordinarily insufficient to conclusively establish these elements unless the challenged attorney has had an opportunity to explain his conduct. *United States v. DeFusco*, 949 F.2d 114, 121 (4th Cir. 1991) ("[I]t would be unfair to adjudicate the issue without any

statement from counsel on the record."). But the record does not establish either of these elements, conclusively or otherwise, in any event.

The decision by Cause to present Sabatino's mental-health issues in mitigation of his culpability and not to seek an evaluation of his competency to plead guilty or his capacity at the time of the offense to understand the nature and quality of the wrongfulness of his offense conduct was well within the bounds of reasonable professional judgment. Nothing in Dr. King's report or in any of Sabatino's statements in the district court suggests that he was unable at the time he communicated with his minor victim to understand the nature and quality of his actions or their wrongfulness. *See* 18 U.S.C. § 17(a) (providing an affirmative defense where the defendant, "as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts"). To the contrary, during his interview with investigators, Sabatino admitted that he had discussed engaging in sex with his victim but denied that he actually intended to travel to North Carolina, evidencing his understanding that

traveling to engage in sex with a minor would make him more culpable. Sabatino repeatedly apologized for his offense conduct. And while Dr. King's report suggests that Sabatino suffered from post-traumatic stress disorder and other mental-health conditions, there is no suggestion in the report that he was unable at the time of his offense of appreciating his actions or that they were wrong.

Nor does the record contain any evidence that Sabatino suffered 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," warranting a motion to determine his competency. *See* 18 U.S.C. § 4241(a). Sabatino's responses during his guilty-plea colloquy and during his status-of-counsel and sentencing hearings were appropriate, and he capably expressed his concerns and his remorse. While Sabatino expressed concern about Cause's advice to him to accept the United States' plea offer, that concern demonstrated that he understood that he had pleaded guilty to an offense that required a prison sentence of not less than 15 years. And

Cause's description of their meetings makes clear that she did not perceive any incompetency.

The record also does not support Sabatino's suggestion that his counsel should have sought a downward departure under Sentencing Guidelines § 5H1.3. That provision authorizes a district court to consider mental and emotional conditions when determining whether a downward departure is warranted. But Sabatino's advisory Guidelines range was governed by the statutory mandatory minimum. Section 5H1.3 does not authorize a downward departure below the statutory minimum. Nothing in the record overcomes the presumption of reasonableness that counsel's decision enjoys, let alone conclusively establishes "incompetence under prevailing professional norms," *Harrington v. Richter*, 526 U.S. 86, 105 (2011).

The record also does not establish prejudice in the form of a reasonable probability of a different result because nothing in the record suggests that Sabatino suffered from a mental defect or disease that would have supported an insanity defense or a finding of incompetency. Without any evidence that Sabatino suffered from a

mental-health condition severe enough to support a finding of insanity or incompetency, the record does not conclusively establish the prejudice required to support a claim of ineffective assistance of counsel.

The record does not establish, let alone conclusively establish, either deficient representation or prejudice. This Court should, therefore, dismiss this appeal.

CONCLUSION

Sabatino waived his right to appeal and has not presented conclusive evidence on the record of ineffective assistance of counsel. The United States respectfully requests, therefore, that this Court dismiss this appeal.

RESPECTFULLY SUBMITTED, this 19th day of August, 2020.

R. ANDREW MURRAY
UNITED STATES ATTORNEY

s/Amy E. Ray
Assistant United States Attorney
Room 233, U.S. Courthouse
100 Otis Street
Asheville, North Carolina 28801
Telephone: (828) 271-4661
Fax: (828) 271-4670
E-mail: Amy.Ray@usdoj.gov

CERTIFICATE OF SERVICE

I certify that on this 19th day of August, 2020, a copy of the foregoing ***Motion to Dismiss Appeal*** was served upon Defendant herein by serving his attorney of record through electronic case filing.

s/Amy E. Ray
Assistant United States Attorney
USAO Asheville, NC

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

RECORD NO. 19-4809

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

V.

LUCAS KENNETH SABATINO,

Defendant/Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA

DEFENDANT/APPELLANT'S RESPONSE TO PLAINTIFF/APPELLEE'S MOTION TO DISMISS APPEAL

Charles R. Brewer
ATTORNEY AT LAW
79 Woodfin Place, Suite 206
Asheville, NC 28801
(828) 251-5002
NC Bar No. 6051
crboffice@aol.com

Counsel for Appellant

NOW COMES the defendant/ appellant, by and through counsel, responding to the plaintiff/appellee's motion to dismiss (Doc. 34) as follows. It is the respectful contention of the defendant/ appellant herein that his plea agreement contains certain waivers relating to his ability to appeal; however, paragraph 18 thereof specifically exempts ineffective assistance of counsel from the waiver. JA 96. Defendant/appellant's opening brief sets forth as its sole issue for review the ineffective assistance of counsel. Appellant's brief at p. 1. Therefore, he is entitled to appeal this issue which he has done. The motion to dismiss the appeal is improvident. This is different from a situation where the defendant/ appellant has attempted to raise in an appeal an issue that was waived by a plea agreement. In such case a motion to dismiss would be proper, but it is not proper here. This appeal should proceed in normal fashion with the appellee filing its response brief and thereafter the appellant filing, if appropriate, a reply brief.

It appears that the issues of mental health did appear of record both in the presentence report at paragraph 44 (JA 121) and in the report of the psychologist filed with the court as an addendum to the defendant's sentencing memorandum (JA 152-166). Additionally, it was raised in the defendant's *pro se* letter to the trial judge (JA 43-44). It was also referred to in the inquiry of counsel before the magistrate judge on August 20, 2019. JA 127 *et seq.* Specifically, the defendant

referred to his mental health issues at that hearing at JA 134, line 25. At that hearing the court made reference to the defendant's mental health issues. JA 135, lines 14-21. Appellant's trial counsel made reference to them at that hearing. JA 136, lines 8-18. The court again referred to mental health treatment at that hearing. JA 137, line 25. In short, it is the position of the undersigned counsel that this appeal should not be terminated but should be allowed to proceed in normal course.

In conversations with the defendant/appellant, his undersigned counsel was advised that in his hearing regarding the inquiry of counsel he attempted to raise an issue before the court about a previous charge which was thwarted by his counsel. JA 142. Apparently, an old charge in Pennsylvania state court prior to 2000 was raised. The defendant/appellant is of the opinion that his counsel failed to make known all the relevant facts concerning this conviction to the court; in particular he thought that it was important, and asserts that the record thereof would show, that the victim lied to him about her age. Further, he asserted in that phone conversation that the facts related by AUSA De La Rosa at the hearing before the magistrate judge on inquiry of counsel advised the court that there was a video "where (victim) was idly rubbing lotion on her vagina". JA 139, line 14. Defendant/ appellant asserts that she was rubbing lotion on her breast and that the victim had sent this video to him despite his request that she not do so.

Defendant/appellant asserts that he advised his counsel of this inaccuracy. Moreover, proper review of the discovery would have revealed this inaccuracy and that she should have corrected it.

CONCLUSION

For the reasons stated above along with the reasons stated in the defendant/appellant's opening brief it is request that the motion to dismiss be denied.

This the 14th day of September, 2020.

s/Charles R. Brewer
Charles R. Brewer
Counsel for Appellant
79 Woodfin Place, Suite 206
Asheville, NC 28801
(828) 251-5002

CERTIFICATE OF SERVICE

The undersigned certifies that on September 14, 2020, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Amy Ray
amy.ray@usdoj.gov

s/ Charles R. Brewer
Charles R. Brewer

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

RECORD NO. 19-4809

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

V.

LUCAS KENNETH SABATINO,

Defendant/Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA

DEFENDANT/APPELLANT'S PETITION FOR PANEL REHEARING AND/OR REHEARING *EN BANC*

Charles R. Brewer
ATTORNEY AT LAW
79 Woodfin Place, Suite 206
Asheville, NC 28801
(828) 251-5002
NC Bar No. 6051
crboffice@aol.com

Counsel for Appellant

NOW COMES the defendant/ appellant, by and through counsel, respectfully petitioning this Court for a panel rehearing and/or rehearing *en banc.* In support of this petition it is respectfully shown unto the Court that defendant/appellant in due and apt time filed an opening brief on or about June 17, 2020. Doc. 25. Contemporaneously, he filed a joint appendix. Doc. 26. Thereafter, without filing a responsive brief, the United States filed a motion to dismiss the appeal on August 19, 2020. Doc. 34. The government also filed a motion to suspend the briefing schedule. Doc. 35. This Court granted the motion to suspend the briefing schedule on August 20, 2020. Doc. 36. The Court directed the defendant to respond to the motion to dismiss his appeal. Doc. 37. On September 14, 2020, defendant filed his response to the motion to dismiss. Doc. 42.

In his response defendant/appellant advised the Court that his plea agreement contained certain waivers relating to his ability to appeal; however, paragraph 18 of the plea agreement specifically exempts claims of ineffective assistance of counsel from the waiver. JA 96. His opening brief sets forth as its sole issue for review ineffective assistance of counsel. Appellant's Br., p. 1. In response he concluded that he is entitled to appeal this issue, which he has done, and the motion to dismiss the appeal was improvident. The response asserts that this situation is different from a situation where the appellant attempts to raise in an

appeal an issue that was waived by plea agreement. The response asserts that in such case a motion to dismiss would be proper. The response requests that the appeal should proceed in normal fashion with appellee filing its response brief and thereafter the appellant filing, if appropriate, a reply brief.

In this appeal issues of mental health did appear of record both in the presentence report at paragraph 44 (JA 121) and in the report of the psychologist filed with the court as an addendum to defendant's sentencing memorandum. JA 152-166. Further, it was raised in the defendant's *pro se* letter to the trial judge. JA 43-44. It was also referred to in the inquiry of counsel before the magistrate judge on August 20, 2019. JA 127 *et seq*. Specifically, the defendant referred to his mental health issues at that hearing. JA 134, line 25. At that hearing the court made reference to defendant's mental health issues. JA 135, lines 14-21. His trial counsel made reference to them at that hearing. JA 136, lines 8-18. The court again referred to mental health treatment at that hearing. JA 137, line 25.

In conversations with defendant/appellant his undersigned counsel was advised that in his hearing regarding the inquiry of counsel he attempted to raise an issue before the court about a previous charge which was thwarted by his counsel. JA 142. Apparently, an old charge in Pennsylvania state court prior to 2000 was raised. Defendant/appellant is of the opinion that his counsel failed to make known

all the relevant facts concerning this conviction to the court; in particular he thought it was important, and asserts the record thereof would show, that the victim lied to him about her age. Further, he asserted in that phone conversation that the facts related by AUSA DeLaRosa at the hearing before the magistrate judge on inquiry of counsel advised the court that there was a video "where (victim) was idly rubbing lotion on her vagina." JA 139, line 14. Defendant/ appellant asserts that she was rubbing lotion on her breast and that the victim had sent this video to him despite his request that she not do so. Defendant/ appellant asserts that he advised his counsel of this inaccuracy. Moreover, proper review of the discovery would have revealed this inaccuracy and that his counsel should have corrected it.

Nonetheless, this Court in an unpublished *per curiam* decision dated October 23, 2020, denied the government's motion to dismiss but affirmed the judgment. It is the position of defendant/appellant that this short circuiting of the appeal without either a response brief from the government or a reply brief from the appellant is fundamentally flawed. Either the panel or the Court *en banc* should determine that the appeal should go forward in proper form.

This the 12th day of November, 2020.

s/Charles R. Brewer
Charles R. Brewer
Counsel for Appellant
79 Woodfin Place, Suite 206
Asheville, NC 28801
(828) 251-5002

CERTIFICATE OF SERVICE

The undersigned certifies that on November 12, 2020, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Amy Ray
amy.ray@usdoj.gov

s/ Charles R. Brewer
Charles R. Brewer