23-7796 ORIGINAL

No.

IN THE

SUPREME COURT OF THE UNITED STATES

STEWART BITMAN — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Stewart Bitman 56621-509 Unit-A
(Your Name)

Federal Correctional Institution
P.O. Box 7000
(Address)

Texarkana, TX 75505
(City, State, Zip Code)

903-838-4587
(Phone Number)

QUESTION(S) PRESENTED

1. Whether the Petitioner is actually innocent of the counts of conviction whereas, although the Petitioner actually committed the acts stipulated in the written plea agreement, those facts were insufficient to sustain a conviction for violation of 18 U.S.C. § 2422(b), specifically, with respect to count 1, where Petitioner sent unsolicited images of himself to a minor snapchat user, but did not entice her to reciprocate, and in the remaining counts, where Petitioner requested minor females to perform acts that, in and of themselves, were not illegal under Florida or Federal Statutes?

2. Whether counsel rendered Constitutionally deficient assistance wherein he recommended Petitioner enter into a plea agreement without first ensuring that counsel himself understood the laws his client was alleged to have violated and the relevant Guideline Provisions associated with those laws, resulting in 1) the erroneous advice that his client accept guilt for actions that were not violations of the charging statutes; and 2) the erroneous recommendation that entering into a plea agreement would lower his client's recommended sentencing range under the guidelines?

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

United States v. Bitman, 21-60248-CR-DIMITROULEAS,
U.S. District Court for the Southern District of Florida.
Judgment entered June 24, 2022.

Bitman v. United States, 23-61230-CIV-DIMITROULEAS,
U.S. District Court for the Southern District of Florida.
Judgment entered August 2, 2023.

Bitman v. United States, 23-12602,
U.S. Court of Appeals for the Eleventh Circuit.
Judgment entered March 21, 2024.

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CASES CONTINUED

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[x] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was March 21, 2024.

[x] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 5

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

United States Constitution, Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. § 2422(b)

Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

STATEMENT OF THE CASE

"Snapchat is a camera application for smartphones that allows users to, among other things, send disappearing images to other Snapchat users." United States v. Kushmaul, 984 F.3d 1359, 1361 n.3 (11th Cir. 2021)(internal citation omitted). "A hallmark of Snapchat is that photographs and text messages users send one another are automatically deleted after they are viewed." United States v. Confer, 2022 U.S. App. LEXIS 8357 (11th Cir. March 30, 2022)(unpublished).

Worded differently, "Snapchat is a social media platform which allows users to send and receive 'self-destructing' messages, pictures, and videos called 'snaps'. The sender of a snap has the option of setting a timer for how long the snap can be viewed. Once a snap has been viewed, it is deleted from Snapchat's system and is no longer visible to the recipient. Snapchat users can also send text messages to other users using the 'chat' feature." (Appendix C at pg. 3, n.2)

On May 14, 2020, law enforcement responded to a residence in Coral Springs, Florida, and met with a lady identified as A.M., who reported that her 13-year-old daughter was using her Snapchat account on April 3, 2020 when she received a friend request from Snapchat user "MATTARMSTROUD3" (a Snapchat account belonging to Petitioner). A.M. stated that her daughter (hereinafter "Snapchat_User_1" or "User_1") initially began receiving messages from Bitman pretending to be a 17-year-old boy. After a few days of messaging, however, Bitman advised that he was, in fact, much older. Snapchat_User_1 advised law

enforcement that between April 3, 2020 and April 10, 2020, she received between 9 and 10 pictures (or "snaps") of a male's penis and a picture of an older white male with white hair.[1]

Snapchat_User_1 took several screenshots documenting some of the conversations between her and Bitman on Snapchat prior to the Snaps being deleted. She also provided law enforcement with three different screenshots from Snapchat that Bitman sent of his exposed penis, as well as a screenshot of the image that he sent of himself. From these items, law enforcement was able to identify Mr. Stewart Bitman, the Petitioner herein.

Further investigation revealed that, between May 12, 2020 through June 7, 2020, Bitman used Snapchat to send sexually explicit messages to a 15-year-old female (Snapchat_User_2), who was interviewed by law enforcement. She advised that her 12-year-old friend (Snapchat_User_3) met Bitman on Snapchat and believed him to be 17 years old. Snapchat_User_2 was introduced to him on Snapchat and they began communicating. Ultimately, Bitman shared a picture of himself, revealing his true age. The Petitioner then offered to pay the two "hundreds" of dollars to expose themselves, perform sexual acts, and to send him sexually explicit "Snaps" while doing so.

Law enforcement obtained the contents of Snapchat_User_3's Snapchat account which included the chat conversations between Bitman and Snapchat_User_2.

1. Unless otherwise noted, the following statements related to Mr. Bitman's activities on Snapchat are taken from the Criminal Complaint filed in the above styled criminal action. (Appendix C)

On or about May 15, 2020, Bitman sent Snapchat_User_2 a message requesting a Snap of her breast. Snapchat returns confirm an image (a "Snap") was then sent to Bitman, who replied, "Very nice." The records obtained from Snapchat indicate that sexually explicit Snaps of the two users was sent to Bitman as well as a full frontal naked Snap of Snapchat_User_2.

Snapchat_User_2 confirmed in an interview with law enforcement that she did in fact create and send sexually explicit still and video Snaps of herself and Snapchat_User_3 to Bitman as requested.

From approximately January 6, 2021 through January 25, 2021, Bitman communicated with a 14-year-old female, Snapchat_User_4. Although she initially believed Bitman to be 19 years of age, he sent images of himself a short while later, showing his true age. Messages recovered between Bitman and Snapchat_User_4 revealed conversations wherein Bitman requested snaps of Snapchat_User_4 performing sexual acts upon herself. Bitman also sent a series of voice message files which were recovered by law enforcement where Bitman was describing the specific sexual acts he wanted her to perform on herself.

A search warrant was conducted on Mr. Bitman's residence and place of business. Forensic analysis of more than 100 electronic items did not identify a single instance of child pornography on any device. A formal Complaint was filed in the Federal District Court on July 21, 2021. A grand jury sitting in and for the Southern District of Florida subsequently handed

down a formal Indictment in this matter on August 31, 2021, charging Bitman in nine Counts.

Count 1 alleged that Bitman enticed Snapchat_User_1 "to engage in any sexual activity for which a person can be charged with a criminal offense" in violation of 18 U.S.C. § 2422(b).

Counts 2-4 used the same verbiage with Snapchat_Users 2-4, respectively, asserting that in each instance that Bitman enticed an individual under the age of eighteen (18) in each instance to engage in sexual activity "for which a person can be charged with a criminal offense" in violation of 18 U.S.C. § 2422(b).

Referencing Snapchat_Users 2 and 3 respectively, Counts 5 and 6 alleged that the Petitioner:

> did employ, use, persuade, induce, entice, and coerce a minor ... to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct and for the purpose of transmitting a live visual depiction of conduct, knowing and having reason to know that such visual depiction will be transmitted using any means and facility of interstate and foreign commerce, in violation of Title 18 United States Code, Section 2251(a) and (e).

Count 7 alleged an attempt to commit the crime charged in Counts 5 and 6.

Counts 8 and 9 charged the Petitioner with receiving Child Pornography, in violation of 18 U.S.C. § 2252(a)(2), during the time period that he was

communicating with Snapchat_Users 2 and 3.

Around the first day of February, 2022, Attorney Rydell met with Bitman and announced that he had negotiated a plea agreement with the prosecution that the attorney believed was both fair and likely the best offer he would receive on behalf of the Petitioner.[2]

As explained by counsel, in exchange for entering a plea of guilty to Counts 1-4 (Enticement of a Minor), the prosecution was willing to dismiss the remaining Counts in the Indictment. Counsel stated that this offer was significant in that Bitman would not be convicted for the most serious charge (Production of Child Pornography, which carried a minimum term of fifteen years imprisonment), but nor would he be pleading guilty to the least serious offense (Receipt of Child Pornography, which carried a five-year mandatory sentence). Pursuant to counsel's logic, a charge that fell in the middle of those two, in terms of seriousness and penalties, was a fair compromise between the defense and prosecution.

Counsel further noted that the ultimate sentence would be determined by the sentencing Judge, and that the maximum term Bitman could receive was still a life-term of imprisonment. Counsel advised, however, that the majority of sentences are based on the recommended sentencing range calculated by the United States Sentencing Guidelines, a manual that determines a recommended sentencing range primarily on a defendant's crime and criminal history.

2. Unless otherwise noted, assertions related to Mr Bitman's interaction with defense counsel are taken from the Petitioner's sworn statement in support of his § 2255 motion. (Appendix D at 11-13)

According to Attorney Rydell, the penalties as calculated by the Guidelines were much lower for Counts 1-4 than they were for Counts 5-7. To be clear, the sentence calculation as described to Bitman by his attorney did not anticipate a cross-reference to the guideline range for dismissed counts. Although counsel did not guarantee or promise that Bitman would receive a certain sentence, the advice of counsel that Bitman accept the guilty plea was premised on counsel's advice regarding the potential guideline sentencing range.

Further, in advising his client to enter into a plea agreement with the prosecution, it was counsel's stated opinion that Bitman would be convicted on every count of the indictment if he were to proceed to trial.

On February 3, 2022, Bitman entered into a Plea Agreement with the prosecution which incorporated a separate Factual Proffer. (Appendix E) In so doing, Bitman acknowledged guilt for Counts 1-4 of the Indictment and stipulated to the facts as originally filed in the initial Complaint. Bitman did not, however, acknowledge each element of the charged offenses, nor how the stipulated facts satisfied each element required for conviction.

On February 18, 2022, Bitman appeared before the Honorable William P. Dimitrouleas and entered a plea of guilty to Counts 1-4 of the indictment pursuant to the plea agreement.

As part of the change of plea process, Bitman responded to a series of

questions posed by this Court pursuant to F.R.Crim.P Rule 11. Among those responses, Bitman acknowledged under oath that he was, in fact, guilty of Counts 1-4 as charged in the indictment, that no promises were made to induce him to plead guilty, and that his guilty plea was both voluntary and with an understanding of the charges as explained to him by his defense counsel.

As factual support for the guilty plea, the prosecution read the Factual Proffer Statement, and Bitman acknowledged under oath that those facts were correct to the best of his knowledge.

The initial Presentence Investigation Report (PSR), generated by the Probation and Pretrial Services, was not placed on the record. However, on June 15, 2022, Attorney Rydell submitted a Sentencing Memorandum and entered Objections to the Presentence Investigation Report. (Appendix F) In his objection to the PSR, defense counsel stated the following:

> Counts One through Four each charge enticement of a minor, in violation of 18 USC § 2422(b). As reflected in paragraph two of the PSR, the government has agreed to seek dismissal of the remaining counts of the Indictment, after sentencing. Included in the charges which the government has agreed to seek dismissal, are Counts Five, Six, and Seven, which charge production and attempted of production of child pornography. The advisory guideline computations presented in the PSR are the same computations that would have been presented to the Court had Stewart Bitman pled guilty to all of the charges involving production and attempted production of child pornography. While it is likely that the government will argue that the benefit to Stewart Bitman is a lower statutory mandatory minimum exposure, the reality is that the PSR, as presented to the Court, reflects the guideline range is life and does not in any other way demonstrate to the Court the fact that the government has agreed to seek dismissal of the very counts of conviction that are driving an advisory guideline of life imprisonment.

On June 24, 2022, Bitman appeared before the Honorable Judge Dimitrouleas for sentencing. During the proceedings, the Court overruled all objections to the PSR and adopted the calculations for sentencing without change. The Court then departed downward from the calculated Guideline range and imposed sentence at 216 months incarceration. (See, generally, Appendix B)

1. Mr. Bitman is actually innocent, and his guilty plea is therefore constitutionally invalid, whereas the stipulated facts were insufficient to sustain a conviction for violation of 18 U.S.C. § 2422(b).

Actual innocence is a gateway in the case of procedural bar as well as time bar. McQuiggin v. Perkins, 133 S.Ct. 1933 (2013). Actual innocence means factual innocence, not mere legal insufficiency. Sawyer v. Whitley, 505 U.S. 333, 339 (1992). Actual innocence "is not itself a substantive claim, but rather serves only to lift the procedural bar caused by Appellant's failure to timely file his § 2255 motion." United States v. Montano, 398 F. 3d 1276, 1284 (11th Cir. 2005); See, Bousley v. United States, 523 U.S. 614, 622 (1998). Neither the Supreme Court nor the Eleventh Circuit has recognized freestanding claims of actual innocence in Section 2255 cases. See, McQuiggin, 133 S.Ct. at 1931 (noting that the Supreme Court has not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence.

However, reviewing federal courts may set aside a guilty plea for failure to satisfy due process. Finch v. Vaughn, 67 F.3d 909, 914 (11th Cir.

1995)(internal quotations omitted). "The [due process] standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Alford, 400 U.S. 25, 30-31, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970). To satisfy due process, a defendant's waiver of the constitutional right associated with a criminal trial must be voluntary and knowing. See Finch, 67 F.3d at 914 (stating that "[f]or a guilty plea to be entered knowingly and intelligently, the defendant...must be reasonably informed of the nature of the charges against him, the factual basis underlying those charges, and the legal options and alternatives that are available")(internal quotations omitted)(emphasis in original).

In the case at bar, Bitman entered into a plea agreement with the government and swore under oath that he was guilty of the offenses as charged in counts 1-4 of the indictment, that the factual stipulations attached to his plea agreement were true and correct, that he had discussed both the nature of the charge and the potential sentences following conviction. Defendant does not refute those solemn declarations now. He did speak at length with his attorney; the substance of those conversations are discussed fully below. He did commit the acts alleged in the factual statements attached to the plea agreement, and to the best of his understanding at the time, those facts satisfied the requirements for conviction under 18 U.S.C. § 2422(b). Despite the fact that all of these statements are true, however, Bitman's guilty plea did not establish a factual basis to find him guilty of violating section 2422(b).

As stated earlier, conviction under § 2422(b) requires a showing that the defendant knowingly enticed a minor to engage in sexual activity that would constitute a crime. These requirements are not met with any count of conviction.

In Count 1, Bitman admitted that he sent unsolicited images to Snapchat_User_1, of his genitalia and of himself masturbating. She immediately expressed disgust, by threatening to go to the authorities, and ended contact with the Petitioner. At no time did he entice the recipient to perform any sexual acts or send any photos in return.

In Counts 2 and 3, Bitman admitted that he sent unsolicited images to Snapchat_User_2, and 3, and encouraged them to perform oral sex on each other. This act, between two minors, did not violate any law, state or otherwise.

In Count 4, Bitman encouraged Snapchat_User_4, to masturbate while he did the same. As noted, supra, not only is masturbation perfectly legal - even if the individual is a minor - it does not constitute sexual activity as required for conviction under section 2422.

Accordingly, although the Petitioner entered into a written plea agreement with the Government, and despite his statement under oath that the factual assertions in the addendum to the plea agreement were true and correct, Bitman is factually innocent of violations of 18 U.S.C. § 2422(b) and

acceptance of his guilty plea violated his constitutional guarantee of the due process.

2. Defense counsel was unfamiliar with the law and relevant Sentencing Guidelines provisions associated with those laws and provided constitutionally deficient advice as a result.

Because Mr. Bitman asserts that counsel rendered Ineffective Assistance, this court's analysis begins with the familiar rule that the Sixth Amendment affords a criminal defendant the right to "the Assistance of Counsel for his defense." U.S. Const. Amend. VI. To prevail on a claim of Ineffective assistance of counsel, a habeas petitioner must demonstrate both (1) that his counsel's performance was deficient, and (2) a reasonable probability that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2071, 2078, 80 L.Ed.2d 674 (1984). In assessing whether a particular counsel's performance was constitutionally deficient, courts indulge a strong presumption that counsel's conduct falls within the wide range of reasonable assistance. Id. at 689. This two-part standard is also applicable to Ineffective Assistance of Counsel claims arising out of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 57-59, 106 S.Ct. 366, 371-73, 88 L.Ed.2d 203 (1985).

Generally, a court first determines whether counsel's performance fell below an objective standard of reasonableness, and then determines whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Padilla v.

Kentucky, 559 U.S. 356, 365, 130 S.Ct. 1473, 1482, 176 L.Ed. 2d 284 (2010). In the context of a guilty plea, the first prong of Strickland requires petitioner to show his plea was not voluntary because he received advice from counsel that was not within the range of competence demanded of attorneys in criminal cases, while the second prong requires petitioner to show a reasonable probability that, but for counsel's error, he would have entered a different plea. Hill, 474 U.S. at 56-59. If the petitioner cannot meet one of Strickland's prongs, the court does not need to address the other prong. Dingle v. Sec'y for Dep't of Corr's, 480 F.3d 1092, 1100 (11th Cir.)

In his 2255 Motion, Mr. Bitman attributed constitutionally deficient assistance to defense counsel in the failure to familiarize himself with the elements of the charged offenses listed in the indictment and his lack of understanding of the substance and mechanics of the United States Sentencing Guidelines. Bitman asserts that these deficiencies resulted in counsel's faulty advice with regards to the plea agreement and his inability to effectively argue against the erroneous offense level calculation in the PSI.

With respect to the prejudice prong under Strickland, he states that, absent counsel's erroneous advice, he would have insisted on proceeding to trial, and alternatively, the PSI would have calculated the offense level correctly under the Guidelines.

Defense counsel, Joshua D. Rydell, has maintained a legal practice for over sixteen years that prides itself on personal service and superior legal knowledge. The firm represents a wide range of clients including DUI, and traffic offenses, personal injury, family law, and counsel of record for the city of Coconut Creek, Florida. The firm also represents criminal defendants, both at trial and on appeal. (Source: law offices of Joshua D. Rydell, on linkedin.com). Counsel's reputation, both in and out of courtroom undoubtedly played a major factor in Mr. Bitman's decision to retain him as counsel for the defense in the instant criminal matter.

A review of cases on LEXIS, however, indicates that the majority of attorney Rydell's criminal clients are charged at the state level. In fact, the only defendant represented in federal court of a similar nature appears to be that of a defendant who was extradited from Florida, to Nebraska, to face charges with a number of co-defendants, all of whom were exchanging child pornography online. See, United States v. Joshua Welch, 2015 U.S. Dist. LEXIS 10847 (D. Neb. 2015).

When attorney Rydell reviewed the facts of this case, he automatically assumed that Bitman was guilty of the charges brought against him without first familiarizing himself with the elements of each charge of the offense. This much is evident in counsel's advice that his client enter a plea of guilty to Count 1, which required a showing that Bitman enticed Snapchat_User_1, into some form of sexual conduct. Even the most cursory review of the evidence, however, shows that she blocked him immediately after

he sent inappropriate pictures of himself, before he had a chance to coerce, entice, or even suggest that she perform any act whatsoever.

Although Count 1 is the most glaring example, counsel's advice that Bitman enter a guilty plea for any Count of the Indictment indicates that he did not familiarize himself with the elements of each charged offense. See, Ground Two, Supra, and Ground Three, Infra.

Counsel's faulty understanding of the law was further compounded by his lack of knowledge when it came to the United States Sentencing Guidelines. The government met with attorney Rydell, shortly after arraignment and offered a plea agreement that was similar in form and substance to those used in the state courts: If your client will plead guilty to the first four Counts of the indictment, we will dismiss the remaining Counts. In most states' judicial systems, an offer of this nature means exactly what it says. When a state defendant pleads guilty to certain charges designated by the prosecution, he is sentenced for those charges alone.

Because of counsel's misunderstanding of the federal sentencing structure, he reviewed the guidelines with Bitman as they applied to the Counts of conviction (U.S.S.G. § 2G1.3) without anticipating any cross reference based on dismissed Counts in the indictment.

It is understandable, then, that counsel and his client were equally surprised and disappointed when the PSI recommended a sentence of life

imprisonment and noted that the plea agreement had no significant impact on Bitman's guideline calculation.

Not only did counsel's advice misinterpret the legal requirements for conviction on the Counts to which Bitman entered a plea of guilty, he was also incorrect in the assumption that his client could be convicted on the remaining counts.

Counts 5-6 of the Indictment charge Mr. Bitman with production of child pornography with regards to Snapchat_Users_2, and 3, respectively, and Count 7 charges him with the attempt to produce child pornography with respect to Snapchat_User_4.

18 U.S.C. § 2251(a) makes it unlawful to use, or attempt to use, a means of interstate commerce to persuade or coerce a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct. The problem with the government's case in this instance is that Bitman's interaction with each individual was limited to Snapchat. As a result, every single image that he viewed disappeared immediately thereafter without creating a data file, temporary or otherwise.

A "visual depiction" is defined in 18 U.S.C. § 2256(5) as "undeveloped film and videotape, data stored on a 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 it is stored in a permanent format."

Every circuit to view a conviction under § 2251(a) has upheld a conviction only when, at a minimum, a data file had been created that could produce a permanent image, even when Snapchat was involved in the offense. See, United States v. Sanchez, 30 F.4th 1063 (11th Cir. 2022) (Defendant conversed with victim on Snapchat, but obtained photos and videos through a different medium); United States v. Plummer, 2022 U.S. App. LEXIS 24007 (11th Cir. 2022)(unpublished) (Defendant sent letter, and threatening messages through Snapchat, but obtained photos and videos through another source); United States v. Pritchard, 2022 U.S. App. LEXIS 13376 (11th Cir. 2022)(unpublished) (Defendant and victim exchanged images and videos on Snapchat, but permanent images were stored on defendant's phone from other sources).

In United States v. Confer, 2022 U.S. App. LEXIS 8357 (11th Cir. 2022). The Eleventh Circuit upheld a conviction for interactions that occurred exclusively on Snapchat because the jury at trial "could have determined that Confer could have preserved any pornographic photos via screenshot or via taking a photo of the incoming images." In the instant matter, however, such a claim would have been impossible for the prosecution to make whereas Snapchat logs indicate when a screenshot has been made, and investigators confiscated over 100 electronic devices without finding a single instance of child pornography, taken from incoming Snapchat images or otherwise.

For a guilty plea to represent an informed choice so that it is constitutionally knowing and voluntary, the "[c]ounsel must be familiar with the facts and the law in order to advise the defendant of the options available." Finch v. Vaughn, 67 F.3d 909, 916 (11th Cir. 1995)(quoting Scott v. Wainwright, 698 F.2d 427, 429 (11th Cir. 1983)).

Counsel's advice, therefore, that his client was guilty of all counts was constitutionally defective. At the very least, Mr. Bitman could not have been convicted on the allegation that he produced child pornography.

Compounding counsel's faulty advice was his misunderstanding of the sentencing guidelines. If counsel had known that a guilty plea offered by the prosecution exposed his client to the heaviest possible penalty, he would have been obligated to explain as much to his client.

Attorney's "affirmative misrepresentation in response to a specific inquiry from the defendant may, however, under certain circumstances, constitute ineffective assistance of counsel." United States v. Campbell, 778 F.2d 764-69 (11th Cir. 1985). An attorney has a duty to advise a defendant, who is considering a guilty plea, of the available options and possible sentencing consequences. Brady v. United States, 397 U.S. 742, 756, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). The case law does not clearly define how much and what kind of information must be conveyed to a defendant in order to satisfy the performance of the Strickland standard, but several Circuits, including the Eleventh, have held that a defense attorney's unreasonably

inaccurate advice to his or her client related to accepting or rejecting a proposed plea agreement can rise to the level of ineffective assistance. See e.g., United States v. Gordon, 156 F.3d 376, 380 (2d Cir. 1998) (By grossly underestimating Gordon's sentencing exposure in a letter to his client, Dedes breached his duty as a defense lawyer in a criminal case...); Finch v. Vaughn, 67 F.3d 909, 916 (11th Cir. 1995) (holding that attorney was ineffective where he mistakenly informed his client that his state and the remainder of his federal term of imprisonment would be served concurrently).

Whereas Mr. Bitman is factually innocent of Count 1-7 of the indictment and whereas the plea agreement represented the worst possible outcome, even if he had proceeded to trial and lost on every Count, there is no question that, absent counsel's constitutionally deficient performance the Petitioner would have rejected the plea agreement and would have insisted on going to trial.

Because counsel was unfamiliar with the elements of 18 U.S.C. § 2251, he was also unable to argue against the incorrect cross-application of Counts 4-7 to the sentencing guidelines. Absent counsel's deficient performance in this regard, Mr. Bitman's base offense level would have been 28 under U.S.S.G. § 2G1.3(a)(3) with a total offense level of 32 for each Count of conviction. With a four level enhancement for each Count under 3D1.4, less 3 points for acceptance of responsibility, the resulting total offense level would have been 33. With a Criminal History level of I, the sentencing range would have been 135-168 months, from which a comparable downward departure would have been applied.

REASONS FOR GRANTING THE PETITION

The Petitioner respectfully submits that the instant Petition for Writ of Certiorari should be granted whereas the courts below have decided one or more important questions of federal law that have not been, but should be, settled by this Court:

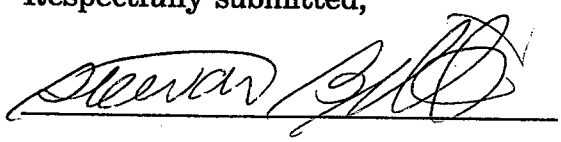
1. Whether a defendant can be convicted for violating 18 U.S.C. § 2422(b) without actually enticing a minor to perform any act prohibited by state or federal law?

2. Is an attorney required to be intimately familiar with the federal law and/or United States Sentencing Guidelines provisions related to the law his client is accused of violating?

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: JUNE 7, 2024