# A P P E N D I X
# A

Decision of the Eleventh Circuit Court of Appeals:
Bitman v. United States, 23-12602 (3-21-2024)

# In the
# United States Court of Appeals
## For the Eleventh Circuit

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No. 23-12602

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STEWART BITMAN,

Petitioner-Appellant,

*versus*

UNITED STATES OF AMERICA,

Respondent-Appellee.

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Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:23-cv-61230-WPD

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ORDER:

Stewart Bitman appeals the denial of his 28 U.S.C. § 2255 motion and seeks a certificate of appealability ("COA"). Bitman has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). Accordingly, his COA motion is DENIED.

UNITED STATES CIRCUIT JUDGE

# A P P E N D I X
# B

Decision of the United States District Court for the Southern District of Florida, 23-61230-CIV-DIMITROULEAS (8-2-2023)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

STEWART BITMAN,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

CASE NO. 23-61230-CIV-DIMITROULEAS
(21-60248-CR-DIMITROULEAS)

**AMENDED[1] FINAL JUDGEMENT AND ORDER DENYING MOTION TO VACATE**

THIS CAUSE is before the Court on Movant's (Bitman's) June 22, 2023[2] *pro se* Motion to Vacate [DE-1], and his July 6, 2023 Motion to Vacate, erroneously filed by the clerk as a duplicate file, instead of an amended motion to vacate, on July 14, 2023 [DE-1 in 23-61355CV]. On July 17, 2023, this Court denied Bitman's Motion for Extension of Time to File Memorandum [DE-4-1]. The Court subsequently received the July 21, 2023 Memorandum [DE-7]. The Court has reviewed the court file[3] and Pre-Sentence Investigation Report (PSIR) and having presided over this cause, finds as follows:

1. On July 21, 2021, Magistrate Judge Jared Strauss signed a Criminal Complaint based upon an affidavit signed by Task Force Officer Jennifer Montgomery [CR-DE-1]. Bitman was

[1] The Court has now considered Bitman's untimely July 21, 2023 Memorandum [DE-7]
[2] Received June 27, 2023. On June 28, 2023, this Court denied Bitman's Motion to Place Case in Abeyance; however, the Court allowed Bitman to file a memorandum on or before July 8, 2023 [CR-DE-69]. The Court will consider the added fourth allegation in this amended motion, as it was filed before the July 8th deadline. The Court, by separate order, closed the erroneously opened duplicate file: 23-61355CV.
[3] Due to the frivolous and conclusory nature of the allegations, the Court has neither requested a response from the Government nor gone to the expense of ordering a formal transcript of the plea colloquy; however, the Court has reviewed a rough draft of the plea colloquy to confirm the Court's recollection of the hearing. Indeed, Bitman has confirmed parts of the plea colloquy in his Memorandum [DE-7, pp. 13,22]

arrested on July 23, 2021. On July 26, 2021, a detention hearing was held. [CR-DE-8]. Bitman was ordered to be detained until trial. [CR-DE-9].

2. On August 31, 2021, Bitman was indicted and charged with: four (4) counts of Enticement of a Minor in violation of 18 U.S.C. § 2422(b); two (2) counts of Production of Child Pornography in violation of 18 U.S.C. § 2251(a); Attempted Production of Child Pornography in violation of 18 U.S.C. § 2251(a); and two (2) counts of Receipt of Child Pornography, in violation of 18 U.S.C. § 2252(a)(2); there was also a Forfeiture Count. [CR-DE-14].

3. On February 18, 2023, Bitman pled guilty to the four (4) Enticement of a Minor counts [CR-DE-35] pursuant to a Plea Agreement [CR-DE-36]. There was a signed Factual Proffer Statement [CR-DE-37]. Included in that statement were detailed allegations against the movant regarding the four minor victims, the results of a search warrant served at Bitman's residence, and oral admissions made by Bitman, after having been read his *Miranda* rights. Sentencing was set for June 17, 2022. On June 3, 2022, sentencing was reset to June 24, 2022. [CR-DE-42].

4. The PSIR calculated an Offense Level 44 with a Criminal History Category One for a range of life in prison [CR-DE-40]. Included in those calculations were a four level increase for grouping and a five level increase for being a repeat and dangerous sex offender [CR-DE-45, p. 14]. Excluding either of those increases would have resulted in guidelines ranges still significantly above the 216 month sentence that was imposed. Defense counsel filed a response on June 15, 2022, seeking a sentence of ten (10) years. [CR-DE-43]. He also filed objections. [CR-DE-44]. Probation did not agree with the objections. [CR-DE-45-1].

5. On June 24, 2022, Bitman was sentenced to 216 months in prison. [CR-DE-52]. No appeal was taken.

6. In this timely motion to vacate, Bitman complains that the indictment was insufficient, that he is actually innocent, that trial counsel was ineffective in advising Bitman about the law and sentencing, and that trial counsel was ineffective in failing to argue against cross referencing in the guidelines calculations.

7. Bitman should be careful what he wishes for. *U.S. v. Hogg*, 723 F. 3d 730, 751 (6th Cir 2013). Should he obtain relief on this motion, the result would likely be a trial on all nine counts. In the event of a conviction, the court would no longer necessarily be bound by the prior finding of acceptance of responsibility or the prior 216 month sentence.

8. First, the indictment was sufficient. Bitman was told during the plea colloquy what the elements were for Enhancement of a Minor:

A. Knowingly persuaded, induced, enticed or coerced the victims to engage in sexual activity.

B. Used a computer to do so.

C. Victims were less than 18 years of age.

D. Could have been charged with a criminal offense under the laws of Florida.

Those elements are alleged in Counts One through Four of the indictment. A computer is a facility and means of interstate and foreign commerce. *See U.S. v. Hooks*, 353 Fed. Appx. 320, 322 (11th Cir. 2009). The indictment was clearly sufficient[4]. It tracked the statute and need not contain every fact to be proved. Moreover, during the plea colloquy, Bitman was told that he was waiving any and all defenses, including, specifically, the argument that the enticement

[4] A motion for Statement of Particulars could have clarified any possible ambiguity about the particular sexual activity and state laws violated in each count. For example, Counts Two and Three could have alleged a violation of F.S. § 800.04(5)(d) a third degree felony; Counts One and Four could have alleged violations of F.S. § 800.04(7)(a)(1), a second degree felony. *See also, Schmitt v. State,* 590 So. 2d 404 (Fla.) *cert denied,* 503 U.S. 964 (1991)

charges were not sufficient. Additionally, Bitman's guilty plea waived non-jurisdictional defects in the indictment. *U.S. v. Brown*, 752 F. 3d 1344, 1347 (11th Cir. 2014). Moreover, trial counsel cannot be faulted for failing to raise an issue that would have been resolved negatively to Movant. *Meders v. Warden,* 911 F. 3d 1335, 1354 (11th Cir.) *cert. denied,* 140 S. Ct. 394 (2019). Finally, no prejudice can be shown as any perceived defect could have been remedied by a Superseding Indictment.

9. Second, Bitman's conclusory allegations about being actually innocent are insufficient upon which to base any relief, *Herrera v. Collins*, 506 U.S. 390 (1993), and they are contradicted by both his signed Factual Proffer Statement and the factual basis given by the prosecutor during the plea colloquy.

10. Third, Bitman's conclusory allegations of ineffective assistance of counsel do not warrant any relief. *See, Lynn v. U.S.,* 365 F. 3d 1225, 1239 (11th Cir. 2004). No prejudice can be shown. As to the dismissed counts, Bitman ignores the screenshots saved by the victims. Finally, Bitman alludes to defense counsel's being an experienced criminal defense attorney [DE-7, p. 26], which can entitle his strategic decisions to be afforded a heightened presumption of correctness. *Chandler v. U.S.,* 218 F. 3d 1305, 1316 (11th Cir. 2000).

11. Fourth, Bitman complains that trial counsel was ineffective in failing to argue against the cross refences under § 2251, but, as his motion to vacate concedes, he was sentenced under § 2422(b). Under that statute, § 2G1.3 controls, and he received 28 points under § 2G1.3(a)(3), 2 points for misrepresenting his identity under § 2G1.3(b)(2), and 2 points for use of a computer under § 2G1.3(b)(3), for a total of 32 points, which was the same total calculated under the cross reference in § 2G2.1[5] [CR-DE-45, p. 13]. No prejudice can be shown. Moreover, even under a

[5] Bitman erroneously concludes his calculation at the cross-reference point, without adding the Specific Offense Characteristic enhancements [CR-DE-45, p. 13].

different guidelines calculation, it would have still resulted in a downward variance to a fair and just sentence of at least 216 months. Finally, in the plea colloquy, Bitman acknowledged that the Court could impose a sentence higher than the advisory guideline range.

Wherefore, Bitman's Motion to Vacate [DE-1] is Denied.

His request for an extension of time to file a memorandum [CR-DE-76] was previously Denied.

The Clerk shall close this case and deny any pending motions as moot.

The Court again denies a Certificate of Appealability.

The Clerk shall mail a copy of this order to Bitman.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 2nd day of August, 2023.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Brooke Latta, AUSA
Francesse Lucius AUSA

Stewart Bitman, #56621-509
Inmate Mails
FCI Texarkana
PO Box 7000
Texarkana, TX 75505

# A P P E N D I X
# C

Criminal Complaint, United States v. Bitman, 0:21-cr-60248-WPD (S.D.Fla., 2021), Document 1

SEALED

SEALED

AO 91 (Rev. 08/09) Criminal Complaint



# UNITED STATES DISTRICT COURT

for the

Southern District of Florida

United States of America
v.
STEWART BITMAN,

*Defendant(s)*

Case No. 21-MJ-6430-STRAUSS

## CRIMINAL COMPLAINT

I, the complainant in this case, state that the following is true to the best of my knowledge and belief.

On or about the date(s) of April 2020 through January 2021 in the county of Broward in the Southern District of Florida, the defendant(s) violated:

| *Code Section* | *Offense Description* |
|---|---|
| 18 U.S.C. § 2251 | Production of Child Pornography; and |
| 18 U.S.C. § 2422(b) | Persuade, Induce, Entice, and Coerce a Minor to Engage in Sexual Criminal Activity. |

This criminal complaint is based on these facts:

See attached affidavit.

☑ Continued on the attached sheet.

*Complainant's signature*

Jennifer Montgomery, Task Force Officer, HSI
*Printed name and title*

Attested to by the applicant in accordance with the requirements of Fed. R. Crim. P. 4.1 by FaceTime on this 21st day of July, 2021.

*Judge's signature*

City and state: Fort Lauderdale, Florida

Jared M. Strauss, United States Magistrate Judge
*Printed name and title*

## AFFIDAVIT IN SUPPORT OF CRIMINAL COMPLAINT

I, Jennifer Montgomery, being first duly sworn, hereby depose and state as follows:

## AGENT BACKGROUND AND INTRODUCTION

1. This affidavit is being submitted in support of a criminal complaint which charges Stewart Bitman ("BITMAN") with violations of Title 18, United States Code, Sections 2251 (production of child pornography) and 2422(b) (persuade, induce, entice, and coerce a minor to engage in sexual criminal activity).

2. I am a Task Force Officer with the United States Department of Homeland Security (DHS), Homeland Security Investigations (HSI). Since 2007, I have been a member of the South Florida Internet Crimes Against Children Task Force, which assists federal, state, and local law enforcement agencies enhance their investigative responses to offenders who use the Internet, online communication systems, or computer technology to sexually exploit children. I have participated in a number of investigations into numerous types of criminal activities including racketeering, fraud, theft, dealing in stolen property, narcotics, and Internet crimes against children/child exploitation. These investigations have included the utilization of surveillance techniques, undercover activities, the interviewing of subjects and witnesses, and the planning and execution of search, arrest and seizure warrants. Your Affiant has participated in investigations involving pedophiles, preferential child molesters, and persons who collect and/or distribute child pornography, along with the importation and distribution of materials relating to the sexual exploitation of children. Your Affiant has specialized in this type of case since 2007. I have received training in the area of child pornography and child exploitation through the Federal Bureau of Investigation (FBI). I have observed and reviewed thousands of images and videos containing child pornography. I have also assisted in several child pornography and child exploitation investigations, which have involved

reviewing examples in all forms of media including computer media, and have discussed and reviewed these materials with other law enforcement officers.

3. Your Affiant has been a sworn Law Enforcement Officer in the State of Florida since April 2004 with the Broward County Sheriff's Office as a Deputy Sheriff, one (1) year with the Broward County Sheriff's Office as a Crime Intelligence Analyst, and one (1) year with the Ohio Department of Public Safety Investigations Division as an Investigative Aide.

4. I submit this Affidavit based on information known to me personally from the investigation, as well as information obtained from others who have investigated the matter or have personal knowledge of the facts herein. Because this Affidavit is being submitted for the limited purpose of establishing probable cause for the requested warrant, it does not include every fact known to me about this matter.

## PROBABLE CAUSE

5. Your affiant believes that BITMAN, a 65 year old male residing in Parkland, Florida[1] used a social media application, Snapchat, Inc. ("Snapchat")[2] to engage in sexually explicit communications with numerous minor females wherein he requested they perform sex acts and produce sexually explicit videos for him. In many cases, BITMAN identified himself as a teenage boy named "Matt" who attends a local high school, before ultimately admitting that he was an adult. The username of the Snapchat account that BITMAN used to facilitate these crimes is "MATTARMSTROUD3."

[1] Parkland, Florida, is in the Southern District of Florida.

[2] 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.

6. As part of the investigation, law enforcement sent a preservation request to Snapchat for the "MATTARMSTROUD3" account and subsequently obtained a state search warrant for its content. Responsive records from Snapchat identified "sethlamster@yahoo.com" as the email address used to open the "MATTARMSTROUD3" account, and provided the IP Address from which the majority of "MATTARMSTROUD3" messages and logins originated.

7. After identifying AT&T as the service provider for the IP Address, law enforcement issued a subpoena. AT&T responded by providing records showing the subscriber for the IP Address was BITMAN, with a service address of 5949 Northwest 63rd Way, Parkland. Florida Law enforcement determined that BITMAN, a gastroenterologist in Coral Springs, Florida, resides at this address.

8. Snapchat records also confirm that the "MATTARMSTROUD3" account communicated with over five hundred (500) Snapchat users, many of which law enforcement is still working to identify. While Snapchat records did not produce the images or videos during these conversations, Snapchat messages—along with audio files—were recovered.[3]

*Victim 1*

9. On May 14, 2020, law enforcement responded to a residence in Coral Springs, Florida, and met with Victim 1's mother, A.M. who reported that her 13-year-old daughter, Victim 1, was using her Snapchat account on April 3, 2020 when she received a friend request from Snapchat user "MATTARMSTROUD3" ("BITMAN's Account"). BITMAN initially began messaging Victim 1 pretending to be a 17-year-old boy. After a few days of messaging, BITMAN advised Victim 1 that he was, in fact, 49 years old and asked her not tell anyone.

[3] Because Snap's servers are designed to automatically delete most user content, and because much of a user's content is encrypted, Snapchat often cannot retrieve user content except in very limited circumstances. Memories content may be available until deleted by a user. Other content is encrypted, and although Snapchat can provide the data file, Snapchat has no way to decrypt the data. See https://storage.googleapis.com/snap-inc/privacy/lawenforcement.pdf.

10. Victim 1 advised law enforcement that between April 3, 2020, and April 10, 2020, she received numerous pictures of a male's penis from BITMAN via Snapchat. Victim 1 further stated that BITMAN sent a picture of an older white male with white hair. Victim 1 described that she received at least one video from an older man, believed to be BITMAN, masturbating. Victim 1 recalled BITMAN repeatedly reminding her not to tell anyone about their communications because she was only 13 years old. Victim 1 ultimately blocked BITMAN's Account and the communications between them ended.

11. A review of BITMAN's Snapchat account confirms that BITMAN asked Victim 1 how old she was, to which Victim 1 replied, "13." In response, BITMAN told Victim 1 that he was "an adult" and that "it has to be super secret." The Snapchat return also evidenced that BITMAN sent Victim 1 an image of his penis and asked questions such as "could I make it squirt please," "I want to cum for u ok??" and "Would u suck me?"

12. Another message, on or about April 10, 2020, revealed that BITMAN sent Victim 1 a picture depicting a white male who appears to be in his 60's with white hair, a white mustache and dark plastic-rimmed glasses. Shortly thereafter, BITMAN sent a picture of his penis. Victim 1 expressed that she did not want to see these photos and reminded BITMAN that she was only 13 years old.

13. Victim 1 took several screenshots documenting some of the conversations between her and BITMAN on Snapchat prior to the snaps being deleted. Victim 1 also provided law enforcement with three different photographs from Snapchat that BITMAN sent of his exposed penis, as well as the photograph that BITMAN sent of himself. Law enforcement was able to observe that the individual in the picture Victim 1 provided is the same individual pictured on BITMAN's driver's license. The photo is also consistent with the picture for BITMAN on www.healthgrades.com, as a Gastroenterology Specialist in Coral Springs, Florida.

***Victims 2 and 3***

14. Between on or about May 12, 2020, through on or about June 7, 2020, BITMAN used Snapchat to send sexually explicit messages to a 15-year-old female, Victim 2. Victim 2 was interviewed by law enforcement and advised that her 12-year-old friend, Victim 3, met BITMAN (known to them as "Matt") on Snapchat and believed him to be 17 years old. Victim 3 introduced Victim 2 to BITMAN and they began communicating on Snapchat. Initially, BITMAN told the children he was 17 years old, but ultimately disclosed that he was not, and shared a picture of himself. Victim 2 advised that BITMAN offered to pay her and Victim 3 "hundreds" of dollars to expose themselves, perform sexual acts, and to send him sexually explicit pictures and videos while doing so. Victim 2 stated she was inclined to do this because her mother was deceased, her father was struggling financially, and her sister was sick.

15. Law enforcement obtained the contents of Victim 2's Snapchat account which included the chat conversations between her and BITMAN. Approximately 1,729 messages were exchanged between Victim 2 and BITMAN between May 12, 2020 and June 7, 2020. There were also media files exchanged during these chats that included some pictures and voice memos. Although not exhaustive, messages recovered revealed the following communications between Victim 2 and BITMAN[4]:

a) On or about May 15, 2021, BITMAN messaged Victim 2 inquiring as to whether she and Victim 3 had ever performed oral sex upon one another. When Victim 2 responded, "No", BITMAN offered to pay Victim 2 and Victim 3 five-hundred ($500) dollars if Victim 2

[4] While Snapchat records produced these messages, the records did not produce the actual images and/or videos sent. The records did, however, indicate when an image and/or video was sent. Given the timestamps, date, and messages in response to the image and/or video, it is clear the messages provide context as to the content of the image and/or video sent.

let Victim 3 perform oral sex upon her. To persuade Victim 2, BITMAN emphasized, "I have a lot of money to help u and ur sister out."

b) On or about May 15, 2020, BITMAN sent Victim 2 a message requesting that Victim 2 send him a photograph of her breasts. Snapchat returns confirm a media file was then sent by Victim 2 to BITMAN, who in response replied, "Very nice". During the course of this conversation, Victim 2 sent BITMAN sexually explicit media files of her and Victim 3, to which BITMAN responded stating "Good girl"; "Keep going ur both doing great"; and "ur both real hot".

c) On or about May 16, 2020, BITMAN offered to pay Victim 2 two-hundred ($200) dollars if she sent him a "full frontal naked" media file. Victim 2 replied, "Ok. Hold on." Snapchat returns confirm that a media file was then sent from Victim 2 to BITMAN. BITMAN responded enthusiastically to Victim 2's media file, stating "Good job".

16. In addition to the aforementioned communications, BITMAN also inquired if Victim 2 had any friends who would want to participate in making videos with her, specifying it would have to be someone who was willing to touch her or show their breasts. In another conversation, BITMAN suggested that they meet in person.

17. Victim 2 confirmed with law enforcement that she did in fact create and send sexually explicit photographs and videos of herself and Victim 3 to BITMAN, as he requested.

***Victim 4***

18. Between on or about January 6, 2021, through on or about January 25, 2021, BITMAN communicated with a 14-year-old female, Victim 4. Snapchat messages revealed BITMAN introduced himself to Victim 4 as a 19-year-old named "Matt" from Florida. After BITMAN sent images of himself, Victim 4 learned that BITMAN was not 19 years old. On multiple occasions

Victim 4 informed BITMAN that she was only 14 years old. In response, BITMAN repeatedly told Victim 4 that "It's our secret ok."

19. Messages recovered revealed communications between Victim 4 and BITMAN[5] wherein BITMAN requested images and videos from Victim 4 to include nude images of Victim 4 and Victim 4 performing sexual acts upon herself. For example, among others, on or about January 18, 2021, BITMAN sent Victim 4 a message requesting that she "Show [him]" her vagina and spread her legs. When Victim 4 sent BITMAN a media file, BITMAN replied, "Good baby."

20. BITMAN also sent a series of voice message files which were recovered by law enforcement. Included in the voice message files is BITMAN instructing Victim 4 specifically which sexual acts he wanted her to perform on herself.

21. Law enforcement also found conversations in which BITMAN suggested to Victim 4 that they meet in person.

22. On or about July 1, 2021, Victim 4 was forensically interviewed and remembered communicating with BITMAN. Victim 4 specifically recalled that BITMAN had white hair, wore glasses, and a wedding ring. Victim 4 advised that BITMAN sent her numerous videos of himself masturbating.

23. In the presence of law enforcement, Victim 4 reinstalled her Snapchat application, and law enforcement was able to observe that that Victim 4's Snapchat account was still account friends with BITMAN's Account.

[5] While Snapchat records produced these messages, the records did not produce the actual images and/or videos sent. The records did, however, indicate when an image and/or video was sent. Given the timestamps, date, and messages in response to the image and/or video, it is clear the messages provide context as to the content of the image and/or video sent.

***Search Warrant of BITMAN's Residence***

24. On January 26, 2021, a state search warrant signed by the Honorable Hunter Davis, was executed on BITMAN's Residence.[6] BITMAN was present at the time. BITMAN was read his *Miranda* rights and agreed to speak to law enforcement. Post-*Miranda,* BITMAN admitted that the "MATTARMSTROUD3" account belonged to him and that he had been communicating with children using this account advising it was "just fantasy." BITMAN was shown the frontal photograph that he sent to Victim 1 and he identified the individual in the photograph as himself. When asked about showing his penis during his communications with children, BITMAN replied, "no comment." BITMAN was played three audio files by law enforcement which were sent to the minor children during the communications. BITMAN stated, "it sounds like me." BITMAN was subsequently arrested and charged by state authorities.

25. Law enforcement has determined based on BITMAN's Snapchat communications, that he was communicating with numerous other children that law enforcement is working to identity. As such, the investigation remains ongoing.

[SPACE INTENTIONALLY LEFT BLANK]

[6] Notably, just 8-hours prior to the execution of the search warrant on BITMAN's Residence, BITMAN was communicating with Victim 4 via Snapchat.

## CONCLUSION

Based on the aforementioned facts, I respectfully submit that there is probable cause to support the arrest of Stewart Bitman ("BITMAN") for violations of Title 18, United States Code, Sections 2251 (production of child pornography) and 2422(b) (persuade, induce, entice, and coerce a minor to engage in sexual criminal activity).

**FURTHER YOUR AFFIANT SAYETH NAUGHT.**

JENNIFER MONTGOMERY
~~Task Force Officer~~ (TFO)
Homeland Security Investigations

Attested to by the applicant in accordance with the requirements of Fed. R. Crim. P. 4.1 via FaceTime on this 21st day of July, 2021.

JARED M. STRAUSS
UNITED STATES MAGISTRATE JUDGE

# A P P E N D I X
# D

Memorandum in Support of Motion for Post-Conviction Relief
Pursuant to 28 U.S.C. § 2255.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff/Respondent, | |
| v. | Crim. Action No.<br>0:21-cr-60248-WPD-1 |
| STEWART BITMAN,<br>Defedant/Movant. | Civil Action No.<br>0:23-cv-61230-WPD |
| | Judge: Dimitrouleas |

MEMORANDUM IN SUPPORT OF MOTION FOR POST-CONVICTION RELIEF PURSUANT TO 28 U.S.C. § 2255

COMES NOW, Stewart Bitman, Defendant, pro se, and respectfully submits this Memorandum in Support of his First Amended Motion for Post-Conviction Relief, pursuant to 28 U.S.C. § 2255.

In so doing, the Defendant states that the Indictment in the above styled criminal action was constitutionally deficient whereas it omitted crucial elements of each Count of conviction, that he is actually innocent of the charges alleged against him and the guilty plea did not admit to every element required for conviction, and that defense counsel lacked knowledge of the elements of the charges lodged against him and the structure of the Sentencing Guidelines and was therefore unable to provide competent advise regarding the entry of a guilty plea. Further, Movant avers that, absent counsel's deficiencies, he would not have entered a plea of guilty but would have insisted on going to trial instead.

STATEMENT OF THE CASE

On July 21, 2021, a Criminal Complaint was submitted to the Honorable Magistrate Judge Jared M. Strauss, alleging Stewart Bitman was involved with the production of child pornography and enticement of minors to engage in sexual criminal activity. (Dkt. 1)[1] The Movant was detained on July 23, 2021. (Dkt. 6) Attorney Joshua David Rydell filed an apearance for the defense on the same day and remained as defense counsel throughout the proceedings. (Dkt. 7)

On August 31, 2021, a Nine-Count Indictment was issued by a Grand Jury sitting in and for the Southern District of Florida, charging Movant with Enticement of a Minor (Counts 1-4); Production of Child Pornography (Counts 5-6); Attempted Production of Child Pornography (Count 7); and Receipt of Child Pornography (Counts 8-9). (Dkt. 14)

Movant appeared before the Honorable Magistrate Judge Lurana S. Snow on October 8, 2021 for arraignment. Counsel for the defense entered a plea of not guilty to all counts alleged in the Indictment. (Dkt. 21)

On February 18, 2022, Movant appeared with counsel before the Honorable Judge William P. Dimitrouleas and entered a plea of guilty pursuant to a written plea agreement to Counts 1 through 4 of the Indictment. (Dkt. 35) Pursuant to

1. References to the docket in the above styled criminal action will be cited as "Dkt. ___" and will refer to the docket number assigned by the Court Clerk.

the Plea Agreement, the remaining Counts were dismissed by motion of the prosecution. (Dkt. 36)

On June 15, 2022, a Sentencing Memorandum and Objections to the Presentence Investigation Report were submitted by counsel for the defense. (Dkt. 43,44)

The final Presentence Investigation Report (PSI) was filed two days later, on June 17, 2022. (Dkt. 45) Therein, the author recommended a sentence of Life imprisonment. (Id. at ¶126)

Sentencing was held on June 24, 2022 before the Honorable Judge Dimitrouleas. Therein, the Judge departed from the recommended Guideline sentence and imposed a term of 216 months incarceration to run concurrently on all Counts, to be followed by ten (10) years supervised release. (Dkt. 51,52)

The Movant did not file an appeal; the judgment and sentence became final on July 8, 2022 - fourteen (14) days after sentence imposed. (See, Fed. R. App. P. 4(b)(1)(A)).

On June 22, 2023, Movant filed a Motion for Post-Conviction Relief, pursuant to 28 U.S.C. § 2255, by placing it in the institutional legal mail system at the Federal Correctional Institution in Texarkana, Texas. (See, 0:23-cv-61230-WPD, Dkt. 1)

On July 6, 2023, Movant filed the First Amended Motion for Post-Conviction

Relief, again by placing it in the hands of prison officials for mailing. (See, USPS Certified Mail No. 7018 2290 0000 0978 0500.) In so doing, the Undersigned Moved this Honorable Court for a period of fifteen (15) days to perfect a Memorandum in Support.

This pleading ensued.

JURISDICTION

This Court has jurisdiction over the instant proceedings pursuant to 28 U.S.C. § 2255, which entitles a prisoner to relief if the court imposed a sentence that: (1) violated the Constitution or laws of the United States; (2) exceeded its jurisdiction; (3) exceeded the maximum authorized by law; or (4) is otherwise subject to collateral attack. See 28 U.S.C. § 2255(a); McKay v. United States, 657 F.3d 1190, 1194 n.8 (11th Cir. 2011).

Stated differently, relief under section 2255 "is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice." Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004)(citing United States v. Frady, 456 U.S. 152, 165, 102 S.Ct. 1584, 71 L.Eed.2d 816 (1982)). If this court finds a claim under § 2255 to be valid, the appropriate remedy would be to vacate and set the judgment aside; and either discharge or resentence the prisoner, grant him a new trial, or simply correct the sentence. 28 U.S.C. § 2255(b). In this instance, where the undersigned is challenging the validity of his guilty plea

and sentence, the appropriate remedy would be to vacate the conviction and start the process anew or to simply correct the sentence.

The Movant notes for the record that, with respect to each issue raised below, his conviction was the product of the constitutionally deficient representation and/or advice of defense counsel throughout the proceedings from arraignment through sentencing. Accordingly, "[t]he preferred means for deciding a claim of ineffective assistance of counsel is through a 28 U.S.C. § 2255 motion 'even if the record contains some indication of deficiencies in counsel's performance.'" United States v. Patterson, 595 F.3d 1324, 1328-29 (11th Cir. 2010)(citation omitted).

The instant First Amended Motion was filed in a timely manner pursuant to 28 U.S.C. § 2255(f)(1). The Movant's conviction became final on July 8, 2022, when the 14-day time limit to file a notice of appeal of his criminal judgment expired. See, Fed. R. App. P. 4(b)(1)(A); Murphy v. United States, 634 F.3d 1303, 1307 (11th Cir. 2011)(explaining that "when a defendant does not appeal his conviction or sentence, the judgment of conviction becomes final when the time for seeking that review expires"). Movant then had one year, until July 8, 2023, to file the instant motion. See, § 2255(f)(1). The instant First Amended Motion for Post-Conviction Relief was submitted on July 6, 2023 when he placed it in the hands of prison officials for mailing. See, Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001)(per curiam).

Lastly, the Movant is proceeding pro se in this matter. In assessing the

issues raised below, the Court should read the allegations in a liberal fashion. Haines v. Kerner, 404 U.S. 519, 520-21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). Movant respectfully requests this Honorable Court overlook any minor deficiencies in the instant pleading, whereas "[p]ro se pleadings are held to a less stringent standard than pleadings drafted by attorneys." Tannenbaum v. United States, 148 F.3d 1262, 1263 (11th Cir. 1998).

STATEMENT OF THE FACTS

"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." (Dkt 1 at pg. 3, n.2)

On[2] 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 the Movant). A.M. stated that her daughter (hereinafter "Snapchat_User_1" or "User_1") initially began receiving messages from Movant pretending to be a 17-year-old boy. After a few days of messaging, however, Movant 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 of a male's penis and a picture of an older white male with white hair.

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

Further investigation revealed that, between May 12, 2020 through June 7, 2020, Movant used Snapchat to send sexually explicit messages to a 15-year-old female (Snapchat_User_2), who was interviewed by law enfocement. She advised that her 12-year-old friend (Snapchat_User_3) met Movant on Snapchat and

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

believed him to be 17 years old. Snapchat_User_2 was introduced to Movant on Snapchat and they began communicating. Ultimately, Movant shared a picture of himself, revealing his true age. Movant then offered to pay the two "hundereds" 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 Movant and Snapchat_User_2.

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

From approximately January 6, 2021 through January 25, 2021, Movant communicated with a 14-year-old female, Snapchat_User_4. Although she initially believed Movant to be 19 years of age, he sent images of himself a short while later, showing his true age. Messages recovered between Movant and Snapchat_User_4 revealed conversations wherein Movant requested snaps of

Snapchat_User_4 performing sexual acts upon herself. Movant also sent a series of voice message files which were recovered by law enforcement where Movant was describing the specific sexual acts he wanted her to perform on herself.

Snapchat_User_4 spoke with the authorities and advised that Movant sent numerous videos of himself masturbating.

On January 21, 2021, a warrant was issued for the search of Movant's home. The warrant authorized investigating officers to seize and conduct forensic examinations on basically any electronic device in the residence and to seize and/or review any printed materials (letters, photos, books, magazines, etc.) (Ex.1) [3]

The warrant was executed on January 26, 2021, and over 100 items were seized, including more than ten (10) smartphones, several electronic tablets, and over a dozen (12) computers. A large number of electronic storage devices were also taken. (Ex.2)

On February 2, 2021, a warrant was issued to search and/or seize an iMac computer and a safe belonging to Movant at another location. (Ex.3) Movant was not provided a property receipt nor return of the warrant in this instance.

Despite the large number of electronic and storage devices seized,

3. References to the exhibits attached hereto will be cited as "Ex.__" and will refer to the exhibit number assigned by the Movant.

forensic analysis did not identify a single instance of child pornography on any device.

A formal Complaint was filed in this Court on July 21, 2021, opening the above styled criminal action. (Dkt. 1) Movant was placed in custody shortly thereafter and stood before the Honorable Magistrate Judge Jared M. Strauss for his first appearance on July 23, 2021. (Dkt. 6)

By this time, Movant had already retained Joshua David Rydell (Attorney Rydell) to represent him throughout the proceedings. (Dkt. 7)

A grand jury sitting in and for the Southern District of Florida handed down a formal Indictment in this matter on August 31, 2021, charging Movant in nine Counts. (Dkt. 14)

Count 1 alleged that Movant 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 in each instance that Movant 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 Snap Snapchat_Users 2 and 3 respectively, Counts 5 and 6

alleged that the Movant:

> 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 & 9 charged the Movant 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 Movant 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 Movant.[4]

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 Movant 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

4. By executing this document, the Undersigned swears under penalty of perjury that every statement herein, including those regarding events that occurred off the record, are true and correct to the best of Movant's knowledge and/or recollection.

(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 Movant 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.

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 Movant by his attorney did not anticipate a cross-reference to the guideline range for dismissed counts. Although counsel did not guarantee or promise that Movant would receive a certain sentence, the advice of counsel that Movant 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 the Movant would be convicted on every count of the indictment if he were to proceed to trial.

On February 3, 2022, Movant entered into a Plea Agreement with the prosecution (Dkt. 36) which incorporated a separate Factual Proffer (Dkt. 37). In so doing, Movant acknowledged guilt for Counts 1-4 of the Indictment and stipulated to the facts as originally filed in the initial Complaint. The Movant 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, Movant 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. (Dkt. 35)

As part of the change of plea process, Movant responded to a series of questions posed by this Court pursuant to F.R.Crim.P. Rule 11. Among those responses, Movant 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 Movant acknowledged under oath that those facts were correct to the best of his knowledge.[5]

The initial Presentence Investigation Report (PSR), generated by the Probation and Pretrial Services, was not placed on the record. However, on

5. Transcripts of the proceedings have not been ordered, but are available through the Court Reporter, Elaine Rassie. (See, Dkt. 35 for contact information.)

June 15, 2022, Attorney Rydell submitted a Sentencing Memorandum and entered Objections to the Presentence Investigation Report. (Dkt. 43,44) 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 § 2442(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 pronography. 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.

(Dkt. 44)

The PSR was filed without change on June 17, 2022. (Dkt. 45) In the Addendum filed contemporaneously with the PSR, the Probation Officer stated,"[A]s instructed in the Guidelines Manual, the cross reference [under U.S.S.G. § 2G1.3] is appropriately applied." (Dkt. 45-1 at pg. 2)

On June 24, 2022, Movant appeared before the Honorable Judge Dimitrouleas for sentencing. (Dkt. 51) 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.

GROUNDS FOR RELIEF

In the first Amended Motion, the Movant raised Four (4) Grounds for review under this action. Each of these grounds will be discussed in the order they appeared in the motion. However, because the last two grounds deal with counsel's performance, they will be discussed together.

GROUND ONE: The indictment was constitutionally deficient.

The Movant was convicted in the above styled criminal action pursuant to a written plea agreement with the prosecution. A defendant who pleads guilty "waives all non-jurisdictional challenges to the constitutionality of the conviction," and may only attack the knowing and voluntary nature of the plea. See, Wilson v. United States, 962 F.2d 996 (11th Cir. 1992) Whether a claim is "jurisdictional," depends on "whether the claim can be resolved by examining the face of the indictment or the record at the time of the plea without requiring further proceedings." United States v. Tomeny, 144 F.3d 749, 751 (11th Cir. 1998) (quoting United States v. Caperell, 938 F.2d 975, 977-78 (9th Cir. 1991)). Therefore, a claim that an indictment failed to charge an offense is a jurisdictional claim that is not waived by the entry of a guilty plea. See, United States v. Meacham, 626 F.2d 503, 510 (5th Cir. 1980). However, not all defects in an indictment are jurisdictional. United States v. Cotton, 535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed. 2d 860 (2002). For instance, indictment omissions such as failing to allege an element of an offense are not jurisdictional whereas indictments that affirmatively allege conduct that is not

proscribed by the charging statute or is beyond the sweep of the charging statute, are jurisdictional. See United States v. Brown, 346 Fed. Appx. 481, 489 (11th Cir. 2009).

In Cotton, the Supreme Court explained that the view that indictment defects were jurisdictional derived from Ex parte Bain, 121 U.S. 1, 7 S. Ct. 781, 30 L. Ed. 849 (1887), and concluded that "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction, Bain is overruled." Id. at 631, 122 S. Ct. at 1785.

This Circuit then applied Cotton in United States v. Peter, 310 F.3d 709 (11th Cir. 2002). In Peter, we noted that the Supreme Court rejected the view that all indictment defects are jurisdictional and that this Court had distinguished between indictment omissions (such as failing to alledge an element of an offense) and indictments that affirmatively alleged conduct that either is not proscribed by the charging statute or is beyond the sweep of the charging statute. 310 F.3d at 713-14. Defendant Peter's guilty plea to conspiring to violate the Racketeering Influenced and Corrupt Organizations Act ("RICO") and the predicate crime of mail fraud was based on his admission that he made misrepresentations in license applications that he mailed to a Florida state agency. Id. at 711. The Defendant argued that his RICO conviction was invalid because his conduct was not a crime under the predicate mail fraud statute. Id.

In Peter, this Court agreed with the defendant that "the Government

affirmatively alleged a specific course of conduct [i.e., mailing state license applications containing misrepresentations] that is outside the reach of the mail fraud statue. Id. at 715. Thus the indictment charged a non-offense. Id.

The same is true in this instance. Herein, the indictment simply tracked the language of the statute, adding an approximate date and a victim number. The factual support for the charges stemmed from the complaint (Dkt. #1), which corresponded to the indictment in each count, date, and victim number. As with Peter, the facts in this case alleged acts that do not constitute a crime under 18 U.S.C. § 2422.

The defendant was indicted under 18 U.S.C. § 2422, in counts one through four. The statute is located in Title 18 of the United States Code Service, Chapter 117, Transportation for Illegal Sexual Activity and Related Crimes, which criminalized the transportation of a minor in interstate commerce to engage in sexual activity, until 1996 when subsection (b) was added and amended in 1998 to read:

> (b) Whoever, using any facility or means of interstate or foreign commerce, including the mail, 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 attempts to do so, shall be fined under this title, or imprisoned not more than ten years or both."

United States Code 18 U.S.C. § 2422, Amendment Notes.

The Eleventh Circuit pattern criminal jury instructions, offense

instruction 92.2 defines the elements of a § 2422(b) offense as follows:

> 1) That the defendant used a facility of interstate commerce (or the mails) as alleged in the indictment;
>
> 2) That the defendant knowingly persuaded (or enticed or coerced)[name of the individual] to engage in sexual activity (or prostitution);
>
> 3) That this sexual activity would violate [name of State] law; and,
>
> 4) That [said individual] was less than eighteen years old at the time of the acts alleged in the indictment.

See, United States v. Daniels, 685 F.3d 1237 (5th Cir. 2012).

In count one of the indictment, the defendant was charged with violating § 2422, for having communication with a then 13-year-old female and sending her images of himself exposing his genitals and masturbating. Reading this charge in a light as favorable to the prosecution as possible, only two of the four elements were met. 1) The alleged victim was a minor, and 2) There was a facility of interstate commerce alleged:

> Attempt and ultimate failure to attach so-called "contact amendment" to 18 U.S.C. § 2422 illustrates fact that this statute is intented to counter sexual predators who use the internet to lure children into illegal sexual activity and not to merely achieve mental state in the victim; Congress understood § 2422 (b) as requiring more than merely engaging in sexually explicit conversation that endangered, encouraged, or incited thought of accent to possible sex; nor does it make criminal "cybersex".

United States v Schell, 71 M.J. 574, 2012 CCA LEXIS 352 (A.C.C.A. Sept 12, 2012)

> [T]he offense remains "enticing," and making a sexual act "more appealing," in the absence of an intent to entice is not a crime. If jurors thought that "Joseph," only wanted to make "Julie," think that sexual conduct with him would be more appealing, but did not intend to entice her to engage in

such conduct with him, they would have convicted him for having "cybersex" conversation, which is not a crime, but not for violating section 2422(b).

United States v. Howard, 766 F.3d 414 (5th cir. 2014)(citing United States v. Joseph, 542 F.3d 13, 18 (2nd Cir. 2008).

The indictment failed to meet several of the elements required by § 2422(b), beginning with the fact that there was no sexual activity that the defendant incited, coerced, etc. the victim to participate in.

The second element that the Government did not meet, was the fact that there was no law violated by Snapchat_User_1, as a participant. In fact the indictment does not point to any law that the victim was knowingly persuaded, induced, etc. to violate. The defendant admittedly contacted Snapchat_User_1, through Snapchat, sent her numerous illicit images of himself, and videos, but did not attempt to persuade, induce, entice, coerce, etc., Snapchat_User_1, into any sexual activity legal, or otherwise. His sole purpose was to satisfy his sexual urges vicariously, as the government has proven with the records from Snapchat.

Counts two through three were substantively the same. The defendant contacted the alleged victims through Snapchat, and sent them sexually illicit pictures of himself. However, in these counts the defendant did persuade, induce, entice, etc. the girls to take part in a form of sexual activity, however that activity between two minors was not illegal. The indictment the Government fails to specify any statute that was violated by these two girls.

With respect to count 4, the factual support for the charge demonstrates that the defendant engaged in mutual masturbation with a minor. In an analguous case, the Seventh Circuit found this to be insufficient to state an offense under § 2422:

> Defendant's conviction for violating 18 .U.S.C. § 2422(b), based on two states offenses, Ind. Code § 35-42-4-5-(c) and § 35-42-4-6(b)(3), involved masturbating in front of his webcam in an online chatroom to person he thought was a minor, and inducing "girl", to masturbate, was reversed because conduct proscribed by offense was not "Sexual Activity" within the meaning of § 2422(b); "Sexual Activity" was synominous with "Sexual Act" in Title 18, and "Sexual Act" required contact.

United States v Taylor, 640 F.3d 255 (7th Cir. 2011).

Therein, the court found that the § 2422(b) conviction should be vacated because the Government failed to prove that the defendant took any substantial steps towards committing the prohibited act, i.e. enticing the purported girl to engage in sexual activity with him. The fact that defendant unmistakably proposed sex was not, by itself, a sufficient substantial step given the fact that he and the girl were strangers. While he may have intended to actually meet the girl, defendant's statements were equally consistent with an intent to obtain sexual gratification vicariously.

The Movant respectfully submits that a review of the foregoing provides ample support for this initial ground for relief. While the Government charged him with violation of 18 U.S.C. § 2422 and tracked the language of the statute to ensure all of the elements were properly alleged, the factual basis to support the allegations as set out in the initial complaint and admitted under

oath by the Movant fall outside the scope of Section 2422. Counts 1-4 of the Indictment, therefore, allege conduct that is "beyond the sweep of the charging statue," and are jurisdictionally deficient. United States v. Tomney, 144 F.3d 749, 751 (11th Cir. 1998).

GROUND TWO: Actual Innocence

The Movant incorporates Ground One , by reference as if fully restated herein.

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, movant 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, Movant'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, Movant 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 Movant. At no time did he entice the recipient to perform any sexual acts or send any photos in return.

In count 2 and 3 Movant 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 four, Movant 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 Movant 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, Movant 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.

GROUNDS THREE AND FOUR: Ineffective Assistance of Counsel

STANDARD OF REVIEW

Because the movant asserts in his petition 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 Stickland'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.)

The movant incorporates grounds one, and two above by reference as if fully restated herein.

In these final two grounds for post-conviction relief, Movant attributes 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. Movant asserts that these deficienies 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, Movant 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.

Discussion

Attorney Joshua D. Rydell, has maintained a legal practice for over sixteen (16) years that prides itself on personal service and superior legal knowledge. The firm represents a wide range 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 Movant'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 Movant 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 Movant enter a plea of guilty to count 1, which required a showing that Movant 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 Movant 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 Movant as they applied to the Counts of conviction (U.S.S.G. § 2G1.3) without anticipationing 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 Movant's guideline calculation.

GROUND THREE: Counsel's Faulty Advice

In cases where a guilty plea has been entered, application of Strickland's second prong requires a showing that there is a reasonable probability that, but for counsel's alleged errors, the defendant would not have plead guilty and would have insisted on going to trial. Hill, 474 U.S. at 58. However, the defendant's "mere allegation that he would have insisted on trial..., although necessary, is ultimately insufficient to entitle him [or her] to relief." United States v.Clingman, 288 F.3d 1183, 1186 (10th Cir. 2002. There must be some showing that the decision to proceed to trial would have been rational under the circumstances. See Padilla v. Kentucky, 559 U.S. 356, 372, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). In many guilty plea cases, this inquiry will closely resemble the inquiry that the court would engage in to determine whether the result would have been different had the petitioner proceeded to trial, and will generally include assessment of matters such as the strength of the prosecution's case, any available defenses, the plea colloquy and negotiations, and the potential sentencing exposure. See Hill 474 U.S. at 59-60.

As Movant discussed in detail under Ground Two, supra, counsel's advice as to Counts 1-4 was constitutionally defective whereas he is actually innocent of those Counts. However, counsel's misinterpretation of the law does not stop there: Movant is also factually innocent of Counts 5-7 as well.

Counts 5-6 of the Indictment charge Movant with production of child pornography with regards to Snapchat_Users_2, and 3, respectively, and Count 7 charges Movant 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 a 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 Movant's interaction with each individual was limited to Snapchat. As a result, every single image that Movant 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. The same is true in this circuit, 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 differen 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 volunary, 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 Movant was guilty of all Counts was constitutionally defective. At the very least, Movant 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 mispresentation 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 conseqences. 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 Movant is factually innocent of Count 1-7 of the indictment and whereas the plea agreement represented the worst possible outcome, even if Movant had proceeded to trial and lost on every Count, there is no question that, absent counsel's constitutionally deficient performance Movant would have rejected the plea agreement and would have insisted on going to trial.

GROUND FOUR: Ineffective Assistance at Sentencing

Movant incorporates ground Three by reference as if fully restated herein.

Because counsel was unfamiliar with the elements of 18 U.S.C. § 2251, he was unable to argue against the incorrect cross-application of Counts 4-7 to the sentencing guidelines. Absent counsel's deficient performance in this regard, Movant'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.

CONCLUSION

WHEREAS, the indictment was constitutionally flawed and did not charge every element of the alleged offense;

WHEREAS, Movant's guilty plea was constitutionally deficient as a result whereas it did not admit to every element of alleged charged offense;

WHEREAS, Movant is actually innocent of the offenses alleged in Counts 1-4 of the Indictment;

WHEREAS, defense counsel was unfamiliar with the elements required for conviction on each of the charged offenses in the Indictment;

WHEREAS, defense counsel was therefore unable to give competent advice regarding the plea agreement offered by the prosecution;

WHEREAS, absent counsel's constitutionally deficient assistance, Movant would not have entered a plea of guilty, but would have insisted on going to trial; and

WHEREAS, defense counsel was unable to submit a competent objection to the erroneous sentence calculation in the PSI;

WHEREFORE, the Movant, Stewart Bitman, respectfully moves this Honorable Court to:

1) VACATE the judgement of conviction and allow him to plead anew, or

2)VACATE the sentence imposed in the instant criminal action, and

3)CORRECT the sentence to a comparable downward departure from the bottom end of the appropriate Guideline range.

I hereby certify under penalty of perjury that the foregoing statements and assertions of fact are true and correct to the best of my knowledge and/or recollection.

Respectfully submitted,

Dated:_____

/s/

Stewart Bitman
56621-509 Unit-A
P.O. Box 7000
Federal Correctional Inst.
Texarkana, Texas 75505

# A P P E N D I X
# E

Plea Agreement and Factual Proffer, United States v. Bitman.

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**CASE NO. 21-CR-60248-WPD**

**UNITED STATES OF AMERICA**

**v.**

**STEWART BITMAN,**

**Defendant.**
_____/

## PLEA AGREEMENT

The United States Attorney's Office for the Southern District of Florida ("this Office") and Defendant Stewart Bitman (the "Defendant") enter into the following agreement:

1. The Defendant agrees to plead guilty to Counts 1, 2, 3, and 4 of the indictment, which charge him with Enticement of a Minor, in violation of Title 18, United States Code, Section 2422(b).

2. This Office agrees to seek dismissal of the remaining counts of the indictment, as to this Defendant, after sentencing.

3. The Defendant is aware that the sentence will be imposed by the Court after considering the advisory Federal Sentencing Guidelines and Policy Statements (hereinafter "Sentencing Guidelines"). The Defendant acknowledges and understands that the Court will compute an advisory sentence under the Sentencing Guidelines and that the applicable guidelines will be determined by the Court relying in part on the results of a pre-sentence investigation by the Court's probation office, which investigation will commence after the guilty plea has been entered. The Defendant is also aware that, under certain circumstances, the Court may depart from the advisory sentencing guideline range that it has computed, and may raise or lower that advisory sentence under the Sentencing Guidelines. The Defendant is further aware and understands that

the Court is required to consider the advisory guideline range determined under the Sentencing Guidelines, but is not bound to impose a sentence within that advisory range; the Court is permitted to tailor the ultimate sentence in light of other statutory concerns, and such sentence may be either more severe or less severe than the Sentencing Guidelines' advisory range. Knowing these facts, the Defendant understands and acknowledges that the Court has the authority to impose any sentence within and up to the statutory maximum authorized by law for the offense identified in paragraph 1 and that the Defendant may not withdraw the plea solely as a result of the sentence imposed.

4. The Defendant also understands and acknowledges that as to Counts 1, 2, 3, and 4 of the indictment, the Court *must* impose a statutory minimum term of imprisonment of ten (10) years. The Court *may* impose a statutory maximum term of imprisonment of life, followed by a term of supervised release of not less than five (5) years and up to life.

5. The Defendant further understands and acknowledges that, in addition to a term of imprisonment and supervised release, the Court may impose a fine of up to $250,000, under 18 U.S.C. § 3571, may order forfeiture, and must order restitution. The Defendant further understands, acknowledges, and agrees that restitution will be ordered in this case for all counts of the indictment. Therefore, under 18 U.S.C. § 2259, the Defendant must pay restitution that is not less than $3,000 per victim.

6. The Defendant further understands and acknowledges that, in addition to any sentence imposed under paragraph 4 of this agreement, a special assessment in the amount of $100 will be imposed on the Defendant. *See* 18 U.S.C. § 3013. The Defendant agrees that any special assessment imposed shall be paid at the time of sentencing. If a Defendant is financially unable to pay the special assessment, the Defendant agrees to present evidence to this Office and the Court

at the time of sentencing as to the reasons for the Defendant's failure to pay. In addition to the special assessment that will be imposed under 18 U.S.C. § 3013, the Court will also impose an additional special assessment of $5,000 pursuant to the Justice for Victims of Trafficking Act of 2015. *See* 18 U.S.C. § 3014. Moreover, the Court will impose an assessment of not more than $50,000 under 18 U.S.C. § 2259A(a)(3).

7. This Office reserves the right to inform the Court and the probation office of all facts pertinent to the sentencing process, including all relevant information concerning the offenses committed, whether charged or not, as well as concerning the Defendant and the Defendant's background. Subject only to the express terms of any agreed-upon sentencing recommendations contained in this agreement, this Office further reserves the right to make any recommendation as to the quality and quantity of punishment.

8. This Office agrees that it will recommend at sentencing that the Court reduce by two levels the sentencing guideline level applicable to the Defendant's offense, pursuant to Section 3E1.1(a) of the Sentencing Guidelines, based upon the Defendant's recognition and affirmative and timely acceptance of personal responsibility. If at the time of sentencing the Defendant's offense level is determined to be 16 or greater, this Office will file a motion requesting an additional one level decrease pursuant to Section 3E1.1(b) of the Sentencing Guidelines, stating that the Defendant has assisted authorities in the investigation or prosecution of the Defendant's own misconduct by timely notifying authorities of the Defendant's intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the Court to allocate their resources efficiently. This Office, however, will not be required to make this motion if the Defendant: (1) fails or refuses to make a full, accurate and complete disclosure to the probation office of the circumstances surrounding the relevant offense

conduct; (2) is found to have misrepresented facts to the government prior to entering into this plea agreement; or (3) commits any misconduct after entering into this plea agreement, including but not limited to committing a state or federal offense, violating any term of release, or making false statements or misrepresentations to any governmental entity or official.

9. The Defendant is aware that the sentence has not yet been determined by the Court. The Defendant also is aware that any estimate of the probable sentencing range or sentence that the Defendant may receive, whether that estimate comes from the Defendant's attorney, this Office, or the probation office, is a prediction, not a promise, and is not binding on this Office, the probation office or the Court. The Defendant understands further that any recommendation that this Office makes to the Court as to sentencing, whether pursuant to this agreement or otherwise, is not binding on the Court and the Court may disregard the recommendation in its entirety. The Defendant understands and acknowledges, as previously acknowledged in paragraph 2 above, that the Defendant may not withdraw his plea based upon the Court's decision not to accept a sentencing recommendation made by the Defendant, this Office, or a recommendation made jointly by the Defendant and this Office.

10. The Defendant further agrees to forfeit to the United States voluntarily and immediately any property used, or intended to be used, in any manner or part, to commit or facilitate the commission of the violations.

11. The Defendant knowingly and voluntarily waives all constitutional, legal and equitable defenses to the forfeiture of the assets in any judicial or administrative proceeding, including any claim or defense under the Eighth Amendment to the United States Constitution; waives any applicable time limits to the initiation of administrative or judicial proceedings, and waives any right to appeal the forfeiture.

12. The Defendant further agrees that forfeiture is independent of any assessments, fines, costs, restitution orders, or any other penalty that may be imposed by the Court.

13. The Defendant understands that by pleading guilty, he will be required to register as a sex offender upon his release from prison as a condition of supervised release pursuant to 18 U.S.C. § 3583(d). The Defendant also understands that independent of supervised release, he will be subject to federal and state sex offender registration requirements, and that those requirements may apply throughout Defendant's life. The Defendant understands that he shall keep his registration current, shall notify the state sex offender registration agency or agencies of any changes to the Defendant's name, place of residence, employment, or student status, or other relevant information. The Defendant shall comply with requirements to periodically verify in person defendant's sex offender registration information. The Defendant understands that he will be subject to possible federal and state penalties for failure to comply with any such sex offender registration requirements. The Defendant further understands that, under 18 U.S.C. § 4042(c), notice will be provided to certain law enforcement agencies upon the Defendant's release from confinement following conviction.

14. As a condition of supervised release, the Defendant shall initially register with the state sex offender registration in Florida, and shall also register with the state sex offender registration agency in any state where the Defendant resides, is employed, works, or is a student, as directed by the Probation Officer. The Defendant shall comply with all requirements of federal and state sex offender registration laws, including the requirement to update the Defendant's registration information. The Defendant shall provide proof of registration to the Probation Officer within 72 hours of release from imprisonment.

15. This is the entire agreement and understanding between this Office and the Defendant. There are no other agreements, promises, representations, or understandings.

JUAN ANTONIO GONZALEZ
UNITED STATES ATTORNEY

Date: 2/3/2022 By: _____
BROOKE ELISE LATTA
ASSISTANT UNITED STATES ATTORNEY

Date: 2-3-22 By: _____ #20377
JOSHUA RYDELL
ATTORNEY FOR DEFENDANT

Date: 02/03/2022 By: _____
STEWART BITMAN
DEFENDANT

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**CASE NO. 21-CR-60248-WPD**

**UNITED STATES OF AMERICA**

**v.**

**STEWART BITMAN,**

**Defendant.**
_____/

## FACTUAL PROFFER

The United States of America and the Defendant, **Stewart Bitman ("BITMAN")**, through counsel, hereby stipulate and agree that had this case gone to trial, the United States would have proven the following facts, among others, beyond a reasonable doubt:

1. BITMAN, a 65 year old male residing in the Southern District of Florida, used a social media application, Snapchat, Inc. ("Snapchat") [1] to engage in sexually explicit communications with numerous minor females wherein he requested they perform sex acts and produce sexually explicit videos for him. In many cases, BITMAN identified himself as a teenage boy named "Matt" who attends a local high school, before ultimately admitting that he was an adult. The username of the Snapchat account that BITMAN used to facilitate these crimes is "MATTARMSTROUD3."

[1] While Snapchat records produced these messages, the records did not produce the actual images and/or videos sent. The records did, however, indicate when an image and/or video was sent. Given the timestamps, date, and messages in response to the image and/or video, the messages provide context as to the content of the image and/or video sent.

***Victim 1***

2. On May 14, 2020, law enforcement responded to a residence in Coral Springs, Florida, and met with Victim 1's mother who reported that her 13-year-old daughter, Victim 1, was using her Snapchat account on April 3, 2020, when she received a friend request from Snapchat user "MATTARMSTROUD3" ("BITMAN's Account"). BITMAN initially began messaging Victim 1 pretending to be a 17-year-old boy. After a few days of messaging, BITMAN advised Victim 1 that he was, in fact, 49 years old and asked her not to tell anyone.

3. Victim 1 advised law enforcement that between April 3, 2020, and April 10, 2020, she received numerous pictures of a male's penis from BITMAN via Snapchat. Victim 1 further stated that BITMAN sent a picture of an older white male with white hair. Victim 1 described that she received at least one video from an older man, believed to be BITMAN, masturbating. Victim 1 recalled BITMAN repeatedly reminding her not to tell anyone about their communications because she was only 13 years old.

4. Subpoena returns of BITMAN's Snapchat account confirms that BITMAN asked Victim 1 how old she was, to which Victim 1 replied, "13." In response, BITMAN told Victim 1 that he was "an adult" and that "it has to be super secret." The Snapchat return also evidenced that BITMAN sent Victim 1 an image of his penis and asked questions such as "could I make it squirt please," "I want to cum for u ok??" and "Would u suck me?"

5. Another message, on or about April 10, 2020, revealed that BITMAN sent Victim 1 a picture depicting a white male who appears to be in his 60's with white hair, a white mustache and dark plastic-rimmed glasses. Shortly thereafter, BITMAN sent a picture of his penis. Victim 1 expressed that she did not want to see these photos and reminded BITMAN that she was only 13 years old.

6. Law enforcement was able to observe that the individual in the picture Victim 1 provided is the same individual pictured on BITMAN's driver's license.

***Victims 2 and 3***

7. Between on or about May 12, 2020, through on or about June 7, 2020, BITMAN used Snapchat to receive sexually explicit images from a 15-year-old female, Victim 2, and a12-year-old female, Victim 3. Victim 2 was interviewed by law enforcement and advised that her friend, Victim 3, met BITMAN (known to them as "Matt") on Snapchat and believed him to be 17 years old. Initially, BITMAN told the children he was 17-years-old, but ultimately disclosed that he was not, and shared a picture of himself. Victim 2 advised that BITMAN offered to pay her and Victim 3 "hundreds" of dollars to expose themselves, perform sexual acts, and to send him sexually explicit pictures and videos while doing so.

8. Law enforcement obtained the contents of Victim 2's Snapchat account which included the chat conversations between her and BITMAN. There were also media files exchanged during these chats that included some pictures and voice memos. For example, on or about May 15, 2021, BITMAN offered to pay Victim 2 and Victim 3 five hundred ($500) dollars if Victim 2 let Victim 3 perform oral sex upon her. On the same day, BITMAN sent Victim 2 a message requesting that Victim 2 send him a photograph of her breasts. Snapchat returns confirm a media file was then sent by Victim 2 to BITMAN, who in response replied, "Very nice". During the course of this conversation, Victim 2 sent BITMAN sexually explicit media files of her and Victim 3, to which BITMAN responded stating "Good girl"; "Keep going ur both doing great"; and "ur both real hot".

9. Victim 2 confirmed with law enforcement that she did in fact create and send sexually explicit photographs and videos of herself and Victim 3 to BITMAN, at his request.

***Victim 4***

10. Between on or about January 6, 2021, through on or about January 25, 2021, BITMAN communicated with a 14-year-old female, Victim 4. Snapchat messages revealed BITMAN introduced himself to Victim 4 as a 19-year-old named "Matt" from Florida. After BITMAN sent images of himself, Victim 4 learned that BITMAN was not 19 years old. On multiple occasions Victim 4 informed BITMAN that she was only 14 years old. In response, BITMAN repeatedly told Victim 4 that "It's our secret ok."

11. Messages recovered revealed communications between Victim 4 and BITMAN wherein BITMAN requested images and videos from Victim 4 to include nude images of Victim 4 and Victim 4 performing sexual acts upon herself. For example, on or about January 18, 2021, BITMAN sent Victim 4 a message requesting that she "Show [him]" her vagina and spread her legs. When Victim 4 sent BITMAN a media file with the requested sexually explicit image, BITMAN replied, "Good baby."

12. BITMAN also sent a series of voice message files which were recovered by law enforcement. Included in the voice message files is BITMAN instructing Victim 4 specifically which sexual acts he wanted her to perform on herself.

13. Victim 4 further advised law enforcement that BITMAN sent her numerous videos of himself masturbating.

***Search Warrant of BITMAN's Residence***

14. On January 26, 2021, a state search warrant was executed on BITMAN's Residence. BITMAN, who was present at the time, was read his *Miranda* rights and agreed to speak to law enforcement. Post-*Miranda,* BITMAN admitted that the Snapchat "MATTARMSTROUD3" account belonged to him and that he had been communicating with

children using this account on his Apple iPhone. BITMAN was shown the frontal photograph that he sent to Victim 1 and he identified the individual in the photograph as himself. BITMAN was played three audio files by law enforcement which were sent to the minor children during the communications. BITMAN stated, "it sounds like me."

15. During all communications with Victims 1 through 4, BITMAN was in the Southern District of Florida, specifically Broward County.

16. Cellphones and the Internet are facilities and/or instrumentalities of interstate and foreign commerce.

The parties agree that these facts, which do not include all facts known to the government and the defendant, are sufficient to prove the charges beyond a reasonable doubt.

JUAN ANTONIO GONZALEZ
UNITED STATES ATTORNEY

Date: 1/31/2022 By: */s/ Brooke Elise Latta*
BROOKE ELISE LATTA
ASSISANT UNITED STATES ATTORNEY

Date: 2-3-2022 By: #28372
JOSHUA RYDELL
COUNSEL FOR DEFENDANT

Date: 02/03/2022 By:
STEWART BITMAN
DEFENDANT