

No. 24-

IN THE
Supreme Court of the United States

DR. ASHU JOSHI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

PETITION FOR A WRIT OF CERTIORARI

RONALD W. CHAPMAN II
Counsel of Record
CHAPMAN LAW GROUP
1441 West Long Lake Road, Suite 310
Troy, MI 48098
rwchapman@chapmanlawgroup.com

Counsel for Petitioner

131173



COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the federal prosecution of Petitioner for sexual exploitation of a minor under 18 U.S.C. §§ 2251(a), 2423(a), and 2252A(a)(2) is unconstitutional as applied, where Petitioner and his legally recognized spouse under Kentucky law were married at the time in question, the spouse was of sufficient age to consent under Kentucky law, and the federal statutes fail to provide an exception for marital relationships, in violation of the Fifth and Tenth Amendments.
2. Whether Petitioner was denied effective assistance of counsel under the Sixth Amendment given the constitutional infirmities discussed throughout.

PARTIES TO THE PROCEEDING

Petitioner, defendant-appellant below, is Dr. Ashu Joshi.

Respondent is the United States of America, appellee below.

RELATED PROCEEDINGS

United States v. Joshi, No. 4:18-cr-00876-JAR, U.S. District Court for the Eastern District of Missouri. Judgment entered Oct. 7, 2020.

United States v. Joshi, No. 4:21-cv-01253-JAR, U.S. District Court for the Eastern District of Missouri. Judgment entered August 21, 2023.

United States v. Joshi, No. 24-2326, U. S. Court of Appeals for the Eighth Circuit. Judgment entered September 10, 2024.

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OPINIONS AND RULINGS BELOW

The district court's original criminal judgment sentencing Petitioner to 96 months' imprisonment and supervised release for life is unpublished and reprinted at Pet. App. 24a. Its order denying Petitioner's motion to vacate his sentence under 28 U.S.C. § 2255 is unpublished and reprinted at Pet. App. 3a. And its unpublished order denying Petitioner's motion to alter or amend the judgment denying his § 2255 motion, pursuant to Federal Rule of Civil Procedure 59(e), is reprinted at Pet. App. 7a. The Eighth Circuit's unpublished order denying a certificate of appealability and dismissing Petitioner's appeal is reprinted at Pet. App. 1a. The Eighth Circuit's order denying Petitioner's petition for rehearing en banc is reprinted at Pet. App. 48a.

JURISDICTION

The Eighth Circuit entered judgment on September 10, 2024, and denied rehearing on November 1, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1 U.S.C. § 7 provides:

- (a) For the purposes of any Federal law, rule, or regulation in which marital status is a factor, an individual shall be considered married if that individual's marriage is between 2 individuals and is valid in the State where the marriage was entered

into or, in the case of a marriage entered into outside any State, if the marriage is between 2 individuals and is valid in the place where entered into and the marriage could have been entered into in a State.

- (b) In this section, the term “State” means a State, the District of Columbia, the Commonwealth of Puerto Rico, or any other territory or possession of the United States.
- (c) For purposes of subsection (a), in determining whether a marriage is valid in a State or the place where entered into, if outside of any State, only the law of the jurisdiction applicable at the time the marriage was entered into may be considered.

18 U.S.C. § 2251(a) provides:

- (a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know

that such visual depiction was produced or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

U.S.C. § 2423(a) provides:

(a) A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life.

18 U.S.C. § 2252A(a)(2) provides:

(a) Any person who—
(2) knowingly receives or distributes—

- (A) any child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; or
- (B) any material that contains child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer.

INTRODUCTION

Currently in the United States a statutory scheme exists that criminalizes the consummation of a marriage that was otherwise valid under State law. Petitioner, Ashu Joshi, a Hindu man, lawfully married M.D. under Kentucky law on June 23, 2018, when she was 16-years-old. He was subsequently prosecuted, convicted, and jailed for violating 18 U.S.C. § 2252A(a)(2). In *Obergefell v. Hodges*, 576 U.S. 644 (2015), this Court recognized the “centrality of marriage to the human condition.” Further, “[t]here are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms.” *Id.* These words, though penned by this Court, reflect ideals

long embraced by many traditions, including the sacred texts of one of the world's oldest religions: Hinduism. This Court must grant Certiorari to reaffirm the closely held principle that individuals are free to marry the person of their choosing without fear of overly broad federal statutes criminalizing the marriage.

A. The Right to Marry

Throughout its history the Court has consistently recognized the fundamental importance of the right to marry. As early as 1888, the Court characterized marriage as "the most important relation in life" and as "the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888). See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978).

Since then, the Court has repeatedly upheld and protected the fundamental right to marry. See *Meyer v. Nebraska*, 262 U.S. 390 (1923) (recognizing the right "to marry, establish a home and bring up children" as a fundamental liberty interest); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (describing marriage as "one of the basic civil rights of man," "fundamental to the very existence and survival of the race"); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (explaining that marriage is "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred," and part of a fundamental "right of privacy older than the Bill of Rights"); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (affirming that the "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men");

Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977) (holding that personal decisions “relating to marriage, procreation, contraception, family relationships, and child rearing and education” are protected from unjustified government interference) (internal quotation marks and citations omitted).

Underlying this decision, and the Court’s broader jurisprudence on marriage, is the closely held principle that individuals are free to marry the person of their choosing, so long as both parties consent, irrespective of classifications like race or gender. *Obergefell v. Hodges*, 576 U.S. 644 (2015),

B. Marriage and State Sovereignty

The Tenth Amendment to the United States Constitution delineates the division of power between the federal government and the states. It provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const. amend. X. Among the 27 specifically enumerated powers granted to the federal government in the Constitution, marriage is not included. As an unenumerated power of the federal government, marriage remains “a social relation subject to the State’s police power...notwithstanding the commands of the Fourteenth Amendment.” *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (citing *Maynard v. Hill*, 125 U.S. 190 (1888)). In *United States v. Windsor*, 570 U.S. 744, 767-68, 769 (2013), the Court held:

The significance of state responsibilities for the definition and regulation of marriage dates to the Nation’s beginning; for “when

the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.” *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383-384, 50 S. Ct. 154, 74 L. Ed. 489 (1930). Marriage laws vary in some respects from State to State. For example, the required minimum age is 16 in Vermont, but only 13 in New Hampshire. Compare *Vt. Stat. Ann.*, Tit. 18, § 5142 (2012), with *N.H. Rev. Stat. Ann.* § 457:4 (West Supp. 2012). Likewise the permissible degree of consanguinity can vary (most States permit first cousins to marry, but a handful – such as Iowa and Washington, *see Iowa Code* § 595.19 (2009); *Wash. Rev. Code* § 26.04.020 (2012) – prohibit the practice). But these rules are in every event consistent within each State.

The States’ interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form “but one element in a personal bond that is more enduring.”¹²

1. *Lawrence v. Texas*, 539 U.S. 558, 567, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).

2. *See also Williams v. North Carolina*, 317 U.S. 287, 298 (1942) (“Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its

The *Windsor* Court examined Section 3 of the Defense of Marriage Act (“DOMA”), which, for the purposes of federal law, defined “marriage” as “a legal union between one man and one woman as husband and wife,” and “spouse” as “a person of the opposite sex who is a husband or a wife.” *Id.* at 752; *see also* 1 U.S.C. § 7 (repealed 2022). This definition effectively excluded same-sex couples from federal statutes, regulations, and rules applicable to all other married couples, thereby denying them federal protections and benefits. *See Id.*

While the Court held that DOMA effectively “divest[ed] same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept were DOMA not in force,” it stopped short of deciding whether this federal intrusion on state power to regulate the marriage violated constitutional principles of federalism. *Id.* at 768, 773. The Court did, however, clearly and unequivocally hold that the principal effect of DOMA was to identify a subset of state-sanctioned marriages and make them unequal by undermining both the public and private significance of state-sanctioned same-sex marriages; “for it tells those couples, and all the world, that their otherwise valid

borders”); *In re Burrus*, 136 U.S. 586, 593-94 (1890) (“The whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States”); *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (“[D]omestic relations [is] an area that has long been regarded as a virtually exclusive province of the States”); *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878) (“The State...has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved”).

marriages are unworthy of federal recognition,” and further, “demeans the couple, whose moral and sexual choices the Constitution protects.” *Id.* at 772.

Finally, and of critical importance here, the Court forewarned of more serious unequal effects of DOMA through the invocation of the federal penal code, 18 U.S.C. § 115(a)(1)(A), which criminalizes the “assaul[t], kidna[p], or murde[r]...of the immediate family of a United States official, a United States judge, [or] a Federal law enforcement officer,” with the intent to influence or retaliate against that official. *Id.* at 773. DOMA made the protection—namely, that a “spouse” qualifies as a member of the officer’s “immediate family”—inapplicable to same sex-spouses. *Id.*

The Court invalidated Section 3 of DOMA as a violation of the Fifth Amendment, finding that it infringed upon the due process guaranteed therein, as well as the prohibition against denying any person the equal protection of the laws implicit within the Fifth Amendment’s Due Process Clause. *Id.* at 774. Later, in *Obergefell*, the Court again addressed the issue of marriage, this time invalidating state laws that refused to recognize the valid civil marriages of same-sex couples. The Court held that such refusals violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Obergefell*, 576 U.S. at 675-76. Granted, the right to marry is not without restrictions under the Fifth Amendment, and such restrictions may be legitimately imposed so long as they do not significantly interfere with the decision to enter into the marital relationship. *See Califano v. Jobst*, 434 U.S. 47, 58 (1977). In *Jobst*, the Court upheld sections of the Social Security Act that

terminated a dependent child’s benefits upon marriage to an individual not entitled to benefits under the Act, finding no attempt “to interfere with the individual’s freedom to make a decision as important as marriage.” *Id.* at 54.

C. Age of Consent Laws

As noted in the *Windsor* Court excerpt above, marriage laws can vary significantly between states. *Windsor*, 570 U.S. 744, 767-68. For example, California allows individuals under 18 to marry with parental or guardian consent and a court order, as provided in *Cal. Fam. Code* § 302. In contrast, North Carolina permits individuals aged 16 or 17 to marry, but only if the marriage is with someone no more than four years older, and it requires either a court order or written consent from a parent or guardian, as outlined in *N.C. Gen. Stat.* § 51-2. Simply put, while California does not have a statutory minimum age for marriage, North Carolina sets the minimum age at 16 and further restricts marriage to individuals no more than four years older than the minor, effectively limiting marriage between a 16-year-old and someone older than 20.

In March 2024, the United Nations International Children’s Emergency Fund (“UNICEF”) issued a report titled *The Fight to End Child Marriage in California*.³ In it, UNICEF, citing child marriage as an internationally recognized human rights violation and a global issue, acknowledges its occurrence “right here in the United

3. UNICEF USA, The Fight to End Child Marriage in California, <https://www.unicefusa.org/stories/fight-end-child-marriage-california>.

States.” Between 2000 and 2018, UNICEF estimates that nearly 300,000 children, some as young as 10, were married to adults. The report also highlights the lack of federal law governing the legal age of marriage and the patchwork of age limits across the states.

The fact that certain states, like California, have no statutory minimum age for marriage implies that, at some point, such marriages were deemed socially acceptable. As the Court has noted, under our federalist system, states serve as “social laboratories,” where novel experiments may be conducted without risk to the rest of the country. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932). That principle has allowed states not only to tolerate social norms such as child marriage in the past, but also to evolve beyond them. “To stay experimentation in things social... is a grave responsibility.” *Id.*

In keeping with this tradition of state-led reform, Vermont became the eighth state to ban child marriage in 2023.⁴ Similarly, Missouri is poised to follow suit with Senate Bill 66 (SB 66), which aims to raise the minimum marriage age to 18, effectively eliminating child marriage in the state. As of March 6, 2025, this bill has already passed in the Missouri Senate and is now awaiting consideration in the House.⁵

4. H.148, An Act Relating to the Age of Eligibility to Marry (Vt. 2023).

5. SB 66, Modifies provisions relating to the age of marriage, https://www.senate.mo.gov/25info/bts_web/Bill.aspx?SessionType=R&BillID=449.

In Kentucky, the state at issue, where individuals aged 16 and 17 were previously allowed to marry with parental consent, a 2018 amendment raised the minimum marriage age to 18, with limited exceptions permitting marriage at 17.⁶ *See Ky. Rev. Stat. §§ 402.020-030, 210.*

Following the *Windsor* and *Obergefell* decisions, the former of which required federal recognition of valid same-sex state marriages and the latter of which required state recognition of valid same-sex marriages performed by other states, the Respect for Marriage Act (“RFMA”) was signed into law on December 13, 2022, and repealed DOMA. Pub. L. No. 117-228, 117th Cong. (2022). Addressing both federal and state recognition of marriage, the RFMA mandates that the federal government and states recognize and “give full faith and credit to any public act, record, or judicial proceeding of any other State pertaining to marriage between 2 individuals, on the basis of the sex, race, ethnicity, or national origin of those individuals.” *Id.* For federal purposes, a marriage is valid if it “is between 2 individuals and is valid in the State where the marriage was entered into.” 1 U.S.C. § 7.

In Petitioner’s case, however, the federal government failed to comply with this mandate by refusing to recognize a marriage that was lawfully recognized and validated under Kentucky law. Additionally, for the reasons that follow, the laws under which the federal government charged Petitioner, despite such a valid marriage, are unconstitutional as applied, pursuant to *Windsor*.

6. SB48, An Act Relating to Child Marriage (Ky. 2018), <https://legiscan.com/KY/bill/SB48/2018>.

STATEMENT OF THE CASE

A. Factual Background

On June 23, 2018, Petitioner, Ashu Joshi, M.D. (“Petitioner”), then 46 years old, married a 16-year-old girl (“M.D.”) in a private religious Hindu ceremony in the Commonwealth of Kentucky.⁷ Petitioner originally met M.D. through her stepmother, one of his patients at the time, who permitted, fully condoned, and consented to their communications and eventual marriage.

This marriage was later recognized and validated by the Commonwealth of Kentucky on November 8, 2019, when the Honorable Stephen M. Jones of the 27th Judicial Circuit of the Knox Family Court Division signed an order recognizing the religious ceremony pursuant to the laws of the Commonwealth of Kentucky.⁸ Specifically, the Circuit Court Judge found and ordered that “the marriage conducted on June 23, 2018, between the parties is a valid marriage” and “that as of June 23, 2018 the parties are deemed married.”⁹ Put simply, Petitioner and M.D. were lawfully married as of June 23, 2018, as recognized by the Commonwealth of Kentucky. Petitioner and M.D. have a child together, A.J., as a result of their union.¹⁰ Despite this

7. Def.’s Mot. to Dismiss the Indictment at 2, No. 4:18-cr-876-JAR (E.D. Mo. 2020), ECF No. 118.

8. Pet’s Req. for Leave to Amend and Suppl. Mot. to Vacate, Set Aside, or Correct Sentence at 30-31, 4:21-cv-1253-JAR, (E.D. Mo. 2023), ECF No. 10.

9. *Id.*

10. Supra n. 6.

formal judicial recognition of the marriage, the federal Government denied the existence of a valid marriage.¹¹

Between August 9, 2018, to September 30, 2018, a Facebook Trust & Safety manager monitoring activity on the platform observed 333 images and one video of a private, sexual nature being uploaded by M.D. to Petitioner's private Facebook account. During the same period, Petitioner was also observed uploading 144 images to M.D.'s account.¹²

As detailed below, these findings led to an indictment alleging various child pornography charges. In response to these allegations, defending the validity of her marriage to Petitioner, M.D. explicitly stated that there was "nothing illegal about a husband and a wife sharing intimate photos."¹³

Petitioner moved to dismiss the charges on constitutional grounds, including the right to marry and due process protections. While that motion was pending, he entered a guilty plea to one count, and the remaining charges were dismissed. Petitioner later moved to vacate his sentence under 28 U.S.C. § 2255, asserting ineffective assistance of counsel for failing to properly advise him on his constitutional defenses. The district court denied the motion without a hearing, and the Eighth Circuit denied a certificate of appealability.

11. (Pet. App 5a).

12. Supra n. 6.

13. Associated Press, Doctor argues marriage to teen is defense against child porn, <https://apnews.com/general-news-af27eabc9dd6391e2c9ef8392b5c4148>.

B. Procedural History

A federal grand jury returned a four-count Superseding Indictment against Petitioner in the United States District Court for the Eastern District of Missouri.¹⁴ Specifically, Count One charged Petitioner with sexual exploitation of a minor, in violation of 18 U.S.C. § 2251(a); Count Two charged him with transportation of a minor with intent to engage in criminal sexual activity, in violation of § 2423(a); Count Three charged him with distribution of child pornography, in violation of § 2252A(a)(2); and Count Four charged him with receipt of child pornography, in violation of § 2252A(a)(2).¹⁵

On November 22, 2019, Petitioner moved to dismiss the indictment, asserting, *inter alia*, that:

1. The charges were unconstitutional as applied because he and M.D. were married at the time in question, and M.D. was of sufficient age to consent under Kentucky law (Ky. Rev. Stat. § 510.020 (2017)); and
2. The charges were unconstitutional on their face because the federal statutes at issue do not provide an exception for married minors.¹⁶

14. Superseding Indictment, No. 4:18-CR-00876-JAR, (E.D. Mo. 2020), ECF No. 203.

15. *Id.*

16. Def.'s Mot. to Dismiss the Indictment at 3-12, No. 4:18-cr-876-JAR (E.D. Mo. 2020), ECF No. 118.

In opposing the motion, the government cited what the district court characterized as “persuasive” precedent, including *United States v. Wilson*, 565 F.3d 1059, 1069 (8th Cir. 2009), which held that the charged offenses are not constitutionally protected.¹⁷ In *Wilson*, the Eighth Circuit found that the ***First Amendment*** does not protect sexually explicit material involving minors and rejected a mistake-of-age defense. *See id.* at 1067.

Before the district court, however, Petitioner argued that the federal statutes at issue were unconstitutional not only under the First Amendment, but also under the Fourth, Fifth, Ninth, Tenth, and Fourteenth Amendments. He contended that, as written, the statutes fail to provide an exception for lawful marriages, thereby infringing upon the fundamental right to marry and the privacy interests inherently protected by the Constitution.¹⁸ Petitioner further asserted that, as applied to his particular circumstances—where he and his spouse were legally married under Kentucky law at the relevant time—the federal prosecution disregarded a valid marital relationship in violation of these constitutional protections.¹⁹ According to Petitioner, these challenges implicate not only the right to marry and attendant privacy rights, but also principles of federalism safeguarded by the Fifth and Tenth Amendments.²⁰

17. Pet. App. 12a.

18. Def.’s Mot. to Dismiss the Indictment, No. 4:18-cr-876-JAR (E.D. Mo. 2020), ECF No. 118.

19. *Id.*

20. *Id.*

Petitioner maintains that the courts below failed to meaningfully address these core constitutional claims. Specifically, he argued that the charges against him are unconstitutional as applied because (1) he and M.D. were legally married at the time in question; (2) M.D. was of sufficient age to consent under Kentucky law; and (3) the federal statutes at issue fail to account for or exempt lawful marriages, thereby rendering them constitutionally deficient. These arguments, Petitioner asserted, implicate constitutional protections not limited to the First Amendment but extending beyond it.

On April 3, 2020, while his motion to dismiss remained pending, Petitioner requested to withdraw the motion.²¹ The district court granted the request, and the motion was withdrawn on April 6, 2020.²² Thereafter, on September 16, 2020, Petitioner entered into a plea agreement, pleading guilty to Count Three (distribution of child pornography) in exchange for the government's agreement to dismiss the remaining counts.²³ ²⁴

On October 19, 2021, Petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, asserting that his defense counsel were ineffective for abandoning his primary defense theory—that the

21. Def.'s Req. to Withdraw Pretrial Mot., No. 4:18-cr-876-JAR (E.D. Mo. 2020), ECF No. 240.

22. Order Withdrawing Pretrial Mot., No. 4:18-cr-876-JAR (E.D. Mo. 2020), ECF No. 242.

23. Plea Agreement No. 4:18-cr-876-JAR (E.D. Mo. 2020), ECF No. 265.

24. Pet. App 8a.

charges against him were unconstitutional.²⁵ While the district court acknowledged that defense counsel had initially raised these constitutional arguments in the motion to dismiss, it held that the motion became moot upon Petitioner's entry of the plea agreement and was withdrawn accordingly. The court further concluded that “[t]here is nothing in the record to support [Petitioner's] claim that counsel's performance rendered his plea unknowing or involuntary in relation to his constitutional defense.”²⁶

The district court sentenced Petitioner to 96 months' imprisonment on Count Three and, pursuant to the plea agreement, granted the government's motion to dismiss the remaining counts.²⁷ It also ordered Petitioner to pay \$800,000 in restitution to M.D., the alleged victim.²⁸

The Eighth Circuit denied Petitioner's certificate of appealability, dismissed the appeal, denied Petitioner's motion to proceed in forma pauperis as moot, and denied his petition for rehearing en banc.²⁹ ³⁰ On April 4, 2025, the Eighth Circuit further clarified that Petitioner's certificate of appealability was denied “because he... failed to make a substantial showing of the denial of a constitutional right as to any of the claims he rais[ed] in

25. Pet. App 13a.

26. Pet. App 14a.

27. Pet. App. 25a.

28. Pet. App 40a.

29. Pet App. 1a.

30. Pet App. 48a.

his application,” pursuant to *Slack v. McDaniel*, 529 U.S. 473, 83-84.³¹

REASONS FOR GRANTING THE PETITION

A. Petitioner’s Constitutional Challenges Were Preserved, Substantial, and Ignored Below

This Court should grant certiorari because Petitioner’s as-applied constitutional challenges were squarely presented below and raise substantial questions regarding the intersection of federal criminal law, the right to marry, and principles of federalism. The lower courts failed to meaningfully engage with these arguments, despite the fact that they rest on well-established constitutional doctrines.

Petitioner’s prior counsel moved to dismiss the indictment based on the unconstitutional application of 18 U.S.C. §§ 2251, 2252A, and 2423(a) to conduct occurring within a lawful, state-recognized marriage. That motion identified serious constitutional concerns arising under the Fifth, Ninth, Tenth, and Fourteenth Amendments, including the fundamental right to marry, the right to privacy, and the limits of Congress’s power under the Commerce Clause. The motion further argued that, as applied to Petitioner, the federal statutes at issue impermissibly intrude upon Kentucky’s sovereign authority to regulate the validity of marriage and criminalize conduct that would otherwise be legal under state law.

31. Pet App. 1a.

Despite these detailed arguments, the district court found the motion to dismiss moot in light of Petitioner’s subsequent plea, and thus never addressed the substance of his as-applied constitutional claims. The appellate court likewise failed to provide meaningful analysis of these preserved and colorable issues. This omission is especially troubling given that Petitioner’s marriage to M.D. was legally recognized under Kentucky law, and the conduct at issue occurred within the confines of that marriage.

This Court has long held that fundamental rights, including the right to marry, cannot be abridged absent a compelling governmental interest and narrow tailoring. See *Obergefell*, 576 U.S. at 675-76; *Zablocki*, 434 U.S. at 384; *Loving*, 388 U.S. at 12. Yet the statutes here were applied in a manner that effectively nullified Petitioner’s state-recognized marriage, subjecting him to severe criminal penalties for conduct presumptively shielded by those very rights.

It is well established that federal statutes may be invalidated as unconstitutional under the Due Process Clause of the Fifth Amendment. See, e.g., *Windsor*, 570 U.S. 744; *Bolling v. Sharpe*, 347 U.S. 497 (1954); *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973). The effect of the statutes at issue here is to “diminish[] the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect,” and to “demean[] the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify.” *Windsor*, 570 U.S. at 772 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

To reiterate, the *Windsor* Court held that the federal government must recognize valid same-sex marriages sanctioned by the states, on Fifth Amendment grounds. *Id.* The Court concluded that Section 3 of DOMA unconstitutionally deprived such marriages of both public and private significance, rendering them unequal to other marriages recognized under state law. *Id.* The Court also cautioned that the consequences of denying federal recognition could be particularly grave in the context of the federal penal code, where such denial might strip married couples of statutory protections and exemptions available to other married individuals. *Id.* at 773.

Here, the *Windsor* Court’s warning has materialized: Petitioner was denied the very protections *Windsor* sought to safeguard, in violation of his substantive due process rights under the Fifth Amendment.

The failure of the courts below to address these substantial constitutional issues warrants this Court’s review. The Petition presents a live and recurring constitutional question about whether federal statutes lacking a marital exception can constitutionally apply to individuals lawfully married under state law. The Court should grant certiorari to resolve this conflict and restore uniformity and fidelity to the Constitution’s guarantees.

Federalism and State Sovereignty Require Resolution of the Tenth Amendment Conflict

A law may be “invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010)

(citing *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184 (2008)). Here, the Court’s intervention is needed to correct for the overly broad application of 18 U.S.C. § 2251(a); § 2423(a); § 2252A(a)(2); and § 2252A(a)(2).

To be sure, none of these statutes include an exception for married individuals. The government has thus enforced these statutes in ways that are inconsistent with the Congressional intent in enacting these statutes. Indeed, when Congress began dealing with child pornography in 1977, it purposefully sought to ensure the avoidance of potential constitutional infirmities: “[t]he legislative history should be clear on that so as to remove any chance it will lead into constitutional problems.” *United States v. X-Citement Video*, 513 U.S. 64, 73 (1994) (citing 123 Cong. Rec. 30935 (1977)); *id.* (adding “we do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution as construed by this Court.”). Thus, while Congress intended to “expand the child pornography statute to its full constitutional limits,” *id.*, there nonetheless remain limits. One of those limits, as defined by this Court, is marriage. *See Obergefell*, 576 U.S. at 657.

In fact, concerns about wrongfully prosecuting married individuals for lawful conduct have led many states to create exceptions or affirmative defenses for marriage in either the child pornography and/or sex offense statutes. See Cal. Pen. Code § 311.2(f) (West) (stating that child pornography offenses do not apply to lawful conduct between spouses when one is under the age of 18); Mich. Comp. Laws Ann. § 750.145c (West) (stating that it is an affirmative defense to a child pornography

offense when the child is emancipated by law); See also 13 V.S.A. § 3252(a)(3) (marriage is a defense to a sexual act involving a minor); Kan. Stat. Ann. § 21-5506 (allowing marriage as an affirmative defense to the crime of Indecent Liberties with a Child); N.C. Gen. Stat. Ann. § 14-190.13 (defining minors, for the purposes of sexual offenses, as a person less than 18 who is not married).

The Court should pay deference to these state exceptions for marriage given that the Tenth Amendment reserves powers not delegated to the federal government to the individual states themselves. *New York v. United States*, 505 U.S. 144, 157 (1992) (affirming the Tenth Amendment confirms that the power of the Federal Government is subject to limits that reserve certain powers to the States). This includes the authority to define and regulate marriage. *Loving*, 388 U.S. at 7. Indeed, marriage is a core aspect of state sovereignty, and Congress has historically deferred to state definitions of marriage. See, e.g., *Windsor*, 570 U.S. at 767-68.

The RFMA confirms as much. There, Congress affirmed that “No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family.” Pub. L. No. 117-228, § 2(1). Congress also recognized that there are diverse beliefs concerning the institution of marriage and that these varying beliefs, however divergent, should be respected by the federal government. *Id.* § (3). This principle was recognized and adopted by the Court even before the RFMA.

In *Windsor*, the Court recognized this diversity in marriage and observed that “the Federal Government, through our history, has deferred to state-law policy

decisions with respect to domestic relations.” 570 U.S. at 767; *see also De Sylva v. Ballantine*, 351 U.S. 570, 580 (1956) (deciding that to decide who is the widow or widower of a deceased author, or who are his executors or next of kin, under the Copyright Act requires a reference to the law of the State which created those legal relationships because there is no federal law of domestic relations). This prompted the Court to recognize that “the significance of state responsibilities for the definition and regulation of marriage dates to the Nation’s beginning.” *Windsor*, 570 U.S. at 746.

Here, the federal government’s prosecution of Petitioner circumvented Kentucky’s determination that his marriage was lawful. This direct conflict between state and federal authority presents a constitutional issue of national significance. This Court should grant review and hold that the federal government’s disregard of state-sanctioned marriage is an unconstitutional exercise of federal power subverting the Tenth Amendment.

Without guidance from this Court, lower courts lack uniformity in addressing the role of state-recognized marriages in federal criminal prosecutions, which will result in inconsistencies in how the federal government applies its statutes. In *Obergefell*, the Court wisely noted:

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right

of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed. Applying these established tenets, the Court has long held the right to marry is protected by the Constitution.

Obergefell, 576 U.S. at 664.

B. Petitioner's Plea was Unknowing and Involuntary Because Counsel Failed to Advise Him on the Viability of his As-Applied Constitutional Defenses

A guilty plea is valid only if it is entered knowingly, voluntarily, and intelligently. *See Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985). When a defendant is represented by counsel during the plea process and enters a plea upon counsel's advice, the voluntariness of the plea depends on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." *Id.* at 56 (quoting *McMann v. Richardson*, 397 U.S. 759, 770-771 (1970)).

To establish ineffective assistance of counsel in the plea context, Petitioner must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), as applied to guilty pleas in *Hill v. Lockhart*, 474 U.S. 52 (1985). Under *Strickland*, Petitioner must show that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) but for counsel's errors, there is a reasonable probability that Petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill*, 474 U.S. at 58-59 (citing *Strickland*, 466 U.S. at 694-95)).

Here, Petitioner's as-applied constitutional defenses were central to his case, implicating fundamental rights under the Constitution. Defense counsel operating within the constitutionally required range of competence must be able to recognize and assess constitutional defenses that could lead to dismissal or acquittal, particularly when such defenses challenge the very validity of the prosecution itself. Yet, despite the pending motion to dismiss raising these issues, counsel failed to adequately discuss the viability or significance of these defenses with Petitioner before advising him to plead guilty. This omission deprived Petitioner of the ability to make an informed decision and falls below the standard articulated in *McMann*.

Indeed, as the Court explained in *McMann*, “[i]t is no denigration of the right to trial to hold that when the defendant waives his...remedies and admits guilt, he does so under ***the law then existing***; further, ***he assumes the risk of ordinary error*** in either his or his attorney's assessment of the law and facts. Although he might have pleaded differently had later decided cases then been the law, he is bound by his plea and his conviction ***unless he can allege and prove serious derelictions on the part of counsel sufficient to show*** that his plea was not, after all, a knowing and intelligent act.” *Id.*

Petitioner's counsel was not operating in a legal vacuum. The constitutional principles at issue—including the fundamental right to marry, the prerogative of states to regulate marriage, and the substantive due process protections enshrined in the Fifth Amendment—were firmly established at the time of the plea. Unlike cases where subsequent legal developments undermine a plea in hindsight, Petitioner's defenses rested on clear precedent,

including *Loving v. Virginia*, *Zablocki v. Redhail*, *United States v. Windsor*, and *Obergefell v. Hodges*.

Counsel's failure to advise Petitioner on the strength and viability of those constitutional arguments, especially while a motion to dismiss based on those arguments remained pending, was not a strategic decision but a serious dereliction of professional duty. It rendered Petitioner's plea neither knowing nor intelligent, as required under *Hill* and *McMann*.

Moreover, the district court denied Petitioner's motion under 28 U.S.C. § 2255 without so much as a hearing, despite the fact that the record raised substantial questions as to whether Petitioner understood the nature and consequences of his plea in light of his constitutional defenses. At the very least, Petitioner respectfully submits that this matter should be remanded for a hearing on his § 2255 claim.

Accordingly, counsel's deficient performance rendered Petitioner's plea constitutionally invalid. Had Petitioner been properly advised on the significance of his constitutional defenses, he would have unquestionably rejected the same and opted to proceed to trial.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

RONALD W. CHAPMAN II
Counsel of Record
CHAPMAN LAW GROUP
1441 West Long Lake Road, Suite 310
Troy, MI 48098
rchapman@chapmanlawgroup.com

Counsel for Petitioner

APPENDIX

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**APPENDIX A — JUDGMENT OF THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH
CIRCUIT, FILED SEPTEMBER 10, 2024**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 24-2326

ASHU JOSHI,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from U.S. District Court for the
Eastern District of Missouri - St. Louis
(4:21-cv-01253-JAR)

JUDGMENT

Before BENTON, KELLY, and GRASZ, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed. The motion to proceed on appeal in forma pauperis is denied as moot.

2a

Appendix A

September 10, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

**APPENDIX B — MEMORANDUM AND ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI,
EASTERN DIVISION, FILED APRIL 23, 2024**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4:21CV1253 JAR

ASHU JOSHI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

April 23, 2024, Decided
April 23, 2024, Filed

MEMORANDUM AND ORDER

This matter is before the Court on Petitioner Ashu Joshi's Motion to Alter or Amend. ECF No. 35. For the reasons set forth below, Petitioner's Motion will be denied.

Background

The background of this case has been set out in detail in the Court's previous order [ECF No. 33] and is incorporated by reference herein. Briefly, on October 7, 2020, this Court sentenced Defendant to 96 months

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imprisonment and supervised release for life after he pleaded guilty to the crime of Distribution of Child Pornography in connection with his interactions with a 16-year-old girl from Kentucky (“M.D.”).¹ Petitioner timely filed and later amended a motion to vacate his sentence, pursuant to 28 U.S.C. § 2255, asserting five claims of ineffective assistance of counsel (“§ 2255 Motion”). ECF Nos. 1 and 110. On August 21, 2023, the Court denied Petitioner’s § 2255 Motion. ECF Nos. 33 and 34. On September 19, 2023. Petitioner filed the instant motion to alter or amend the Court’s Order and Judgment denying his § 2255 Motion. The Court interprets Petitioner’s Motion to be one filed pursuant to Rule 59(e).

Legal Standard

“A district court has broad discretion in determining whether to grant or deny a motion to alter or amend judgment pursuant to Rule 59(e).” *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006). “Rule 59(e) motions serve the limited function of correcting ‘manifest errors of law or fact or to present newly discovered evidence.’” *Id.* (quoting *Innovative Home Health Care v. P.T.-O.T. Assocs.*, 141 F.3d 1284, 1286 (8th Cir. 1998)). “Such motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment.” *Bracht v. Grushewshy*, No. 4:04CV1286 HEA, 2007 U.S. Dist. LEXIS 1173, 2007 WL 43847, at *1 (E.D. Mo. Jan. 4, 2007) (quoting *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir. 1988)).

1. *United States v. Joshi*, Case No. 4:18CR876 JAR.

*Appendix B***Discussion**

Petitioner argues that the instant motion should be granted because there is a manifest error of law and fact as it relates to his relationship with M.D. Petitioner asserts that he and M.D. were lawfully married in the State of Kentucky, and the Court improperly relied on the Government's assertion that the marriage was invalid, which is barred under the *Rooker-Feldman* doctrine. Petitioner also argues there is a mistake of fact because the Court held that the motion to dismiss in the underlying case was withdrawn after a plea agreement was reached, when conversely, his counsel abandoned the arguments made in the motion.

In his § 2255 Motion, Petitioner raised multiple claims relating to ineffective assistance of counsel based on his lawyer's failure to raise the argument that Mo. Rev. Stat. § 566.061 (criminalizing sex with a minor) is unconstitutional as applied to him because he and M.D. were purportedly married at the time in question, including counsel's "abandoned" arguments related to the motion to dismiss. Petitioner also alleged the Government engaged in prosecutorial misconduct for attempting to verify or impeach the evidence of the marriage. The Court found that these claims were facially inadequate and completely refuted by the record. ECF No. 33 at pp. 4-6.

Here, Petitioner has not presented newly discovered evidence or a manifest error of law or fact as required under Rule 59(e). Petitioner instead attempts to persuade the Court to grant relief from its findings and conclusion

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denying his § 2255 Motion by relitigating the same issues raised therein. A Rule 59(e) permits a court to alter or amend a judgment, but it may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment. *See* 11 C. Wright & A. Miller, Federal Practice and Procedure § 2810.1, pp. 163-164 (3d ed. 2012) (Wright & Miller); accord, *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485-486, n. 5, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008) (quoting prior edition). Thus, there is no basis to alter or amend the Court's Order and Judgment denying his § 2255 Motion.

Conclusion

Based on the reasons stated above, Petitioner's Motion will be denied.

Accordingly,

IT IS HEREBY ORDERED that Petitioner Ashu Joshi's Motion to Alter or Amend the Court's Order and Judgment denying his Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 [ECF No. 35] is **DENIED**.

Dated this 23rd day of April, 2024.

/s/ John A. Ross
JOHN A. ROSS
UNITED STATES DISTRICT JUDGE

**APPENDIX C — MEMORANDUM AND ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI,
EASTERN DIVISION, FILED AUGUST 21, 2023**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:21-CV-01253 JAR

ASHU JOSHI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Filed August 21, 2023

MEMORANDUM AND ORDER

This matter is before the Court on Petitioner Ashu Joshi's amended motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. (Doc. 10). For the reasons set forth below, the Court will deny the motion without an evidentiary hearing. Joshi's motion for leave to amend his habeas petition to add a new basis for relief will also be denied. (Doc. 23).

*Appendix C***BACKGROUND**

In October 2018, Joshi was charged with production, distribution, and receipt of child pornography (18 U.S.C. § 2251(a) and § 2252A(a)(2)) and transportation of a minor across state lines to engage in criminal sexual activity (18 U.S.C. § 2423(a)) in connection with his interactions with a 16-year-old girl from Kentucky (“M.D.”).¹ He was 46 at the time. In a binding plea agreement pursuant to Rule 11(c)(1)(C), Fed. R. Crim. P., Joshi pleaded guilty to the distribution charge (Count III) and agreed to a sentence of 96 months in prison and restitution of \$800,000. (Crim. Doc. 265). In exchange for his plea, the Government dismissed the remaining charges. Pursuant to the agreement, Joshi waived his rights to appeal as well as his rights to challenge the conviction except for claims of prosecutorial misconduct and ineffective assistance of counsel. He also waived his right to obtain information about the Government’s investigation pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The agreement deferred to the Court to determine the terms of supervised release, with a duration anywhere between five years to life. The agreement also stated that Joshi was fully satisfied with his counsel’s representation and that his plea was voluntary.

At the guilty plea hearing, Joshi confirmed his satisfaction with counsel and his understanding of the plea agreement and associated waivers. (Crim. Doc. 307). He confirmed that the allegations set forth in the

1. *United States v. Joshi*, Case No. 4:18-cr-00876-JAR.

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plea agreement were true and correct. Based on Joshi's statements, the Court accepted his plea of guilty. At a separate sentencing hearing, Joshi again admitted the facts set forth in the plea agreement and expressed remorse for his conduct. (Crim. Doc. 308). Pursuant to the plea agreement, the Court sentenced Joshi to 96 months in prison and ordered him to pay \$800,000 in restitution. After considering all the facts and circumstances of this particular case, and over defense counsel's objections, the Court ordered Joshi's prison sentence to be followed by a life term of supervised release.

Joshi timely filed and later amended a motion to vacate his sentence, pursuant to 28 U.S.C. § 2255, asserting five claims of ineffective assistance of counsel. (Doc. 10). As further discussed below, Joshi asserts that his lawyers were ineffective for: (1) failing to raise the argument that Mo. Rev. Stat. § 566.061 (criminalizing sex with a minor) is unconstitutional as applied to him because he and M.D. were purportedly married at the time in question; (2) failing to advise him of the possibility of a lifetime of supervised release; (3) failing to properly construe the statutory element of knowledge; (4) filing and later withdrawing a deficient pre-trial motion to dismiss arguing that the charges were unconstitutional; and (5) improperly advising Joshi to waive his FOIA rights.

After Joshi filed his habeas motion, M.D. filed a separate civil lawsuit against him seeking statutory and punitive damages under 18 U.S.C. § 2255.² In light of

2. *Dole v. Joshi*, Case No. 4:22-cv-712-SRC (E.D. Mo.).

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this lawsuit, Joshi seeks to amend his habeas motion to add a new claim of ineffectiveness based on his lawyers' failure to advise him of the possibility of civil liability as a consequence of his guilty plea.

LEGAL STANDARDS

Pursuant to 28 U.S.C. § 2255, a federal prisoner may seek habeas relief "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). In order to obtain relief under § 2255, a movant must establish a constitutional or federal statutory violation constituting "a fundamental defect which inherently results in a complete miscarriage of justice." *United States v. Gomez*, 326 F.3d 971, 974 (8th Cir. 2003).

It is well-established that a petitioner's ineffective assistance of counsel claim is properly raised under § 2255 rather than on direct appeal. *United States v. Cordy*, 560 F.3d 808, 817 (8th Cir. 2009). The burden of demonstrating ineffective assistance of counsel is on the movant. *United States v. White*, 341 F.3d 673, 678 (8th Cir. 2003).

To prevail on an ineffective assistance of counsel claim, a defendant must show that counsel's performance was deficient, and the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). A movant must meet both prongs of the *Strickland*

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test. *Anderson v. United States*, 393 F.3d 749, 753 (8th Cir. 2005). The court's review of counsel's performance is "highly deferential," *Strickland*, 466 U.S. at 689, and the court presumes that "counsel's conduct falls within the wide range of reasonable professional assistance," *Anderson*, 393 F.3d at 753. To show prejudice in the plea context, "a defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Matthews v. United States*, 114 F.3d 112, 114 (8th Cir. 1997).

The Court must hold an evidentiary hearing on a movant's habeas claims unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief. 28 U.S.C. § 2255(b). A movant is entitled to an evidentiary hearing when the facts alleged, if true, would entitle the movant to relief. *Payne v. United States*, 78 F.3d 343, 347 (8th Cir. 1996). The Court may dismiss a claim without an evidentiary hearing if the claim is inadequate on its face or if the record affirmatively refutes the factual assertions upon which it is based. *Shaw v. United States*, 24 F.3d 1040, 1043 (8th Cir. 1994).

DISCUSSION**Constitutionality As Applied**

In November 2019, in the underlying case, Joshi's counsel filed a 12-page motion to dismiss the indictment (Crim. Doc. 118) containing argument and legal authority on five theories: (1) the charges were unconstitutional

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“as applied” to Joshi because he and M.D. were married at the time in question, and M.D. was old enough to consent under Kentucky law. Ky. Rev. Stat. § 510.020; (2) the charges were unconstitutional because the federal criminal statutes at issue did not contain an exception for married minors; (3) the charges were unconstitutional “as applied” because Joshi’s conduct did not affect interstate commerce; (4) Count I (production of child pornography) was unconstitutional “as applied” because Joshi’s conduct was not “for the purpose” of producing or possessing images of a minor engaged in sexually explicit conduct; and (5) Count II (transporting a minor across state lines with the intent to engage in criminal sexual activity) was unconstitutional “as applied” because the married couple’s activity was legal.

In response to the motion (Crim. Doc. 199), the Government supplied persuasive authority holding that child pornography enjoys no constitutional protections. *United States v. Wilson*, 565 F.3d 1059, 1069 (8th Cir. 2009) (rejecting a mistake-of-age defense); *United States v. Buttercase*, 2014 WL 7331923, at *5 (D. Neb. Dec. 19, 2014) (citing *Wilson* and rejecting a marriage defense). The Government further noted that the Internet is a means of interstate commerce, and Joshi’s purpose and intent were questions for the jury. The Government denied the existence of a valid marriage based on the timing and circumstances of the purported decree and M.D.’s statements. Joshi’s motion remained pending until April 2020, when he withdrew it in light of the parties’ plea agreement. (Crim. Doc. 240).

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Joshi now asserts that his lawyers were ineffective for abandoning his defense theory that the charges against him were unconstitutional as applied to the facts of this case. Joshi's habeas motion contains multiple claims under this heading. First, Joshi reprises verbatim several pages of defense counsel's motion to dismiss to re-argue that the charges against him were unconstitutional because he and M.D. were married. Joshi further asserts that the Government engaged in prosecutorial misconduct by attempting to verify or impeach the evidence of the marriage, and that defense counsel was ineffective for failing to object to the violation of his constitutional rights. Joshi also claims that he never engaged in oral sex with M.D. in Missouri and that defense counsel was ineffective for failing to object to the Government's account of the facts during the plea hearing.

These claims are facially inadequate and also refuted by the record. As the Government notes in its response, counsel did advance the legal arguments that Joshi now accuses counsel of failing to raise. Joshi's assertion that counsel failed to understand the law as applied to the facts of his case is belied by substance of the motion to dismiss. (Crim. Doc. 118). And counsel did not "abandon" these arguments, as Joshi suggests; rather, the motion to dismiss became moot and was therefore withdrawn when the parties reached a plea agreement. (Crim. Doc. 240). The Court finds counsel's performance entirely competent.³ Further, at the plea hearing, Joshi confirmed

3. In a separate section of his operative habeas motion, Joshi repeats this claim that counsel was ineffective for filing and subsequently abandoning a deficient motion to dismiss. (Doc.

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that counsel did everything he wanted them to do, he was satisfied with their services, and he was entering the plea knowingly and voluntarily. (Crim. Doc. 307 at 13-15). There is nothing in the record to support Joshi's claim that counsel's performance rendered his plea unknowing or involuntary in relation to his constitutional defense. Joshi's assertion that the Government engaged in prosecutorial misconduct by scrutinizing the validity of the purported marriage is equally unavailing, particularly insofar as M.D. herself denied it. (Crim. Doc. 223 at 2-3).

Though Joshi now denies that any sexual activity occurred in Missouri, as relevant to the charge of transporting a minor across state lines, the plea hearing transcript reflects that Joshi admitted to transporting M.D. from Kentucky to Missouri and engaging in sex acts in Missouri. (Crim. Doc. 307 at 27-29). At sentencing, Joshi briefly equivocated but ultimately confirmed that the plea agreement was correct. (Crim. Doc. 308 at 10-11). The Court questioned Joshi at length about the accuracy of the plea agreement and his understanding of its terms. Counsel is not ineffective for failing to raise frivolous objections. *Jarrett v. Ramey*, 2023 WL 2631518, at *10 (E.D. Mo. Mar. 24, 2023). Additionally, at sentencing, counsel argued vigorously that the couple's travel to Missouri was not for the purpose of sex. (Crim. Doc. 308 at 25-27). In the Court's view, counsel's performance was quite competent. Joshi's claim that his plea was

10 at 23-24). The Court need not revisit this ground twice here. Moreover, Joshi appears to have abandoned this claim in later versions of his habeas motion accompanying his motion to amend. (Doc. 24, 31).

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unknowing is squarely refuted by the record. Moreover, the transporting charge was dismissed, and Joshi received a significant downward variance on the sole count of distribution included in the plea agreement. Joshi does not claim that he would have proceeded to trial but for this alleged discrepancy on a dismissed charge. As such, he cannot demonstrate prejudice.

Lifetime Supervision

Next, Joshi asserts that counsel was ineffective for failing to object to his life term of supervised release. He claims that the plea agreement is silent on this issue and counsel failed to disclose all sentencing mandates. This claim is squarely refuted by the record. The plea agreement explicitly states that the “Court may also impose a period of supervised release of not more than life and not less than five years.” (Crim. Doc. 265 at 7) (emphasis in original). This provision was specifically referenced at the plea hearing, and Joshi confirmed his understanding. (Crim. Doc. 307 at 29, 34). Joshi’s characterization of supervised release as a lifetime of confinement is simply inaccurate.

Further, Joshi’s counsel advocated effectively on his behalf with respect to sentencing matters left to the Court’s discretion. Counsel competently raised numerous objections to the Presentence Investigation Report and the Government’s proposed conditions of release and zealously argued Joshi’s positions at the sentencing hearing. (Crim. Doc. 268, 308). The Court’s imposition of a lifetime term of supervision, in spite of counsel’s efforts,

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is not a reflection on counsel's performance but rather a discretionary determination based on the Court's view of the totality of circumstances in the case. Counsel's performance was entirely competent.

Joshi also argues that his plea was unknowing because the plea agreement states that neither party would request a sentence above or below 96 months pursuant to the sentencing guidelines "or any other provision or rule of law." (Crim. Doc. 265 at 2). Joshi asserts that this language is ambiguous, so his plea with respect to sentencing was unknowing. Joshi fails to understand that this sentence actually protects him from any attempt by the Government to depart from the agreed sentence by invoking other provisions of law.

Lastly here, Joshi supplies no authority for his assertion that supervised release somehow violates the Separation of Powers and Non-Delegation doctrines. *See generally United States v. Haymond*, 139 S. Ct. 2369, 2387 (2019) (noting that supervised release has been part of the federal criminal justice system since 1984); *United States v. Hobbs*, 710 F.3d 850 (8th Cir. 2013) (affirming supervised release after defendant pleaded guilty to possessing child pornography).

Elements of the Offense

Additionally, Joshi asserts that his counsel was ineffective for failing to understand the elements of the crime of distributing child pornography under 18 U.S.C. § 2252A. As charged here, a person violates the statute

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by knowingly distributing child pornography through interstate commerce. Child pornography means any depiction involving the use of a minor (i.e., a person under age 18) engaging in sexually explicit conduct, the definition of which includes a lascivious exhibition of a person's genitals or pubic area. 18 U.S.C. § 2256. "Lascivious exhibition" requires consideration of the following factors:

- (1) whether the focal point of the picture is on the minor's genitals or pubic area; (2) whether the setting of the picture is sexually suggestive, that is, in a place or pose generally associated with sexual activity; (3) whether the minor is depicted in an unnatural pose or in inappropriate attire, considering the age of the minor; (4) whether the minor is fully or partially clothed, or nude; (5) whether the picture suggests sexual coyness or a willingness to engage in sexual activity; (6) whether the picture is intended or designed to elicit a sexual response in the viewer; (7) whether the picture portrays the minor as a sexual object; and (8) the caption(s) on the picture(s).

United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986); *United States v. Wallenfang*, 568 F.3d 649, 657 (8th Cir. 2009); Eighth Circuit Model Pattern Instruction 6.18.2252A (2021). An image need not involve all of these factors to constitute a lascivious exhibition; rather, it is for the fact-finder to decide the weight to be given to any of these factors. *Wallenfang*, 568 F.3d at 657. The inquiry is always case-specific. *Id.* at 658.

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Joshi contends that he did not knowingly distribute child pornography because (1) the images in question do not qualify as child pornography by application of the *Dost* factors and (2) he did not realize that the video chat image he captured was sent to M.D. These claims lack any plausible merit. The images in question readily satisfy multiple *Dost* factors. Any argument by counsel to the contrary would have been frivolous. And the record lacks any evidence supporting Joshi's claim that he was unaware of the distribution. Rather, the plea agreement specifically states that Joshi admitted to knowingly distributing to M.D. video and still images of self-produced child pornography. (Crim. Doc. 265). And Joshi confirmed to the Court at the plea hearing and again at sentencing that he understood the elements. (Crim. Doc. 307 at 23, 308 at 8). Though Joshi attempts to frame this claim as one of ineffectiveness, he in fact challenges the merits of the Government's indictment. His factual challenges are squarely refuted by the underlying record.

Joshi also asserts that counsel was ineffective for failing to object to the use of the word "child" to describe M.D., implying that such a characterization was prejudicial. This, too, is unavailing. As stated above, by definition, "child pornography" involves a minor, i.e., a person under the age of 18. The Government's word choice was accurate, and any objection would have been frivolous. Counsel is not ineffective for failing to raise unmeritorious objections. *Clemons v. Steele*, 2011 WL 5912617, at *8 (E.D. Mo. Nov. 28, 2011).

*Appendix C***FOIA Waiver**

Pursuant to the guilty plea agreement, Joshi waived his rights to obtain information about the Government's investigation and prosecution of the criminal case under FOIA or the Privacy Act. 5 U.S.C. §§ 552 and 552a. (Crim. Doc. 265 at 10). Joshi now contends that counsel was ineffective for failing to discuss this provision with him and for failing to object to it on grounds of unconstitutional ambiguity. He argues that the Government's files could be relevant to support a claim of prosecutorial misconduct. In response, the Government notes that this waiver is a standard provision of plea agreements in this district, and Joshi fails to establish how counsel's performance was ineffective in this regard or how he was prejudiced as a result.

Joshi provides no support for his assertion that this standard FOIA waiver is unconstitutionally vague. It is well-settled that FOIA rights are waivable. *Barnes v. Fed. Bureau of Investigation*, 35 F.4th 828, 831 (D.C. Cir. 2022); *Price v. U.S. Dep't of Justice Attorney Office*, 865 F.3d 676, 679 (D.C. Cir. 2017). The Court finds no deficiency in counsel's performance for failing to object to the waiver. And while the Court did not specifically cite this paragraph during the plea hearing, Joshi confirmed that he reviewed and understood the entire plea agreement. Joshi does not claim that he would not have pleaded guilty and instead would have proceeded to trial if only counsel had explained this standard term.

*Appendix C***Motion to Amend**

Finally, Joshi seeks leave to add another claim on the basis of “newly discovered evidence” in the form of M.D.’s separate civil lawsuit seeking statutory and punitive damages under 18 U.S.C. § 2255. (Doc. 23). On this proposed new claim, Joshi asserts that his lawyers were ineffective for failing to advise him of the possibility of civil liability as a consequence of his guilty plea and, therefore, that his plea was unknowing and involuntary. He states that he believed the \$800,000 restitution payment to constitute the totality of his liability, and he would not have pleaded guilty but instead would have proceeded to trial had he known of the potential for additional liability.

In response to Joshi’s motion to amend, the Government notes that M.D. is not a party to the plea agreement and thus not limited by its terms, which permit even the Government to take other civil action against him. The Government further argues that the restitution payment comprised only the mandatory obligation under 18 U.S.C. § 2259(a) but does not preclude a civil suit.

Upon review, the Court concludes that Joshi’s proposed amendment does not constitute a colorable basis for habeas relief because civil liability under 18 U.S.C. § 2255 is not a direct consequence of his guilty plea. In order for a plea to be voluntary and intelligent, a defendant must be informed of the direct consequences of the plea. *George v. Black*, 732 F.2d 108, 110 (8th Cir. 1984) (holding that civil commitment is not a direct consequence of a guilty plea). A defendant need not be informed of every

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indirect or collateral consequence. *Id.* The distinction between a direct and collateral consequence turns on whether it has a definite, immediate, and largely automatic effect. *Compare Padilla v. Kentucky*, 559 U.S. 356, 369 (2010) (holding that automatic deportation is a direct consequence). Failure to advise a defendant of a mere potential collateral consequence of a guilty plea does not give rise to a claim of ineffective assistance of counsel. *See e.g., Fugitt v. United States*, 2016 WL 1305950, at *3 (E.D. Mo. Apr. 1, 2016) (noting that civil liability is not an automatic consequence of a guilty plea); *Rasheed v. Lawrence*, 2017 WL 4011135, at *3 (E.D. Mo. Aug. 21, 2017) (denying a habeas claim where counsel failed to advise the defendant that his plea could be used in a subsequent prosecution in state court).

M.D.’s civil lawsuit is plainly a collateral event, initiated by a non-party to the plea agreement. Counsel cannot be deemed ineffective for failing to advise Joshi of the speculative possibility of a civil suit. Moreover, Joshi had reason to know that his restitution payment in the criminal case would not foreclose additional liability. At sentencing, Joshi acknowledged his ongoing child support obligations, and the plea agreement explicitly left open the possibility of further civil action by the Government. (Crim. Doc. 265 at 11).

Where an amendment to a habeas petition would be futile, the court may deny the motion for leave to amend. *Strayhorn v. United States*, 2021 WL 3186536, at *3 (E.D. Mo. July 28, 2021). The Court will therefore deny Joshi’s leave to amend his habeas motion to add this new claim.

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CONCLUSION

The Court may dismiss a claim without an evidentiary hearing if the claim is inadequate on its face or if the record affirmatively refutes the factual assertions upon which it is based. 28 U.S.C. § 2255(b); *Shaw*, 24 F.3d at 1043. Joshi's claims are facially inadequate and refuted by the underlying record. As such, his motion to vacate will be denied without an evidentiary hearing.

A certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). A substantial showing of the denial of a constitutional right requires that “issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings.” *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997). Applying relevant legal standards to the particular facts of this case, the Court finds that Joshi has not made a substantial showing of the denial of a constitutional right. Consequently, the Court will not issue a certificate of appealability.

Accordingly,

IT IS HEREBY ORDERED that Petitioner's motion for leave to amend is **DENIED**. (Doc. 23).

IT IS FURTHER ORDERED that Petitioner's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 is **DENIED**. (Doc. 1, 10).

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IT IS FINALLY ORDERED that no certificate of appealability will issue.

A separate judgment will accompany this Memorandum and Order.

Dated this 21st day of August 2023.

/s/ John A. Ross
JOHN A. ROSS
UNITED STATES DISTRICT JUDGE

**APPENDIX D — CRIMINAL JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI,
FILED OCTOBER 7, 2020**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA,

v.

ASHU JOSHI.

JUDGMENT IN A CRIMINAL CASE

Case Number: **4:18-CR-00876-JAR(1)**

USM Number: **48232-044**

N. Scott Rosenblum

Defendant's Attorney

THE DEFENDANT:

<input checked="" type="checkbox"/>	pleaded guilty to count(s)	3 of a multi-count Superseding Indictment on September 16, 2020.
<input type="checkbox"/>	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	

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<input type="checkbox"/>	pleaded nolo contendere to count(s) which was accepted by the court	
<input type="checkbox"/>	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

<u>Title & Section/ Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 2252A(a) (2)(A) and 18 U.S.C. § 2252A(b)(1)	10/10/2018	3rs
Distribution of Child Pornography		

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- The defendant has been found not guilty on count(s)
- Count(s) 1rs, 2rs, 4rs is are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments

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imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

October 7, 2020

Date of Imposition of Judgment

/s/ John A. Ross

Signature of Judge

JOHN A. ROSS

UNITED STATES DISTRICT JUDGE

Name and Title of Judge

October 7, 2020

Date

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DEFENDANT: ASHU JOSHI
CASE NUMBER: 4:18-CR-00876-JAR(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

96 month(s) as to count 3rs.

- The court makes the following recommendations to the Bureau of Prisons:
While in the custody of the Bureau of Prisons, it is recommended the defendant be evaluated for participation in mental health treatment and the Sex Offender Management Program (SOMP). It is also recommended the defendant be evaluated for participation in an Occupational/Educational program in an area that he has an interest. It is finally recommended that the defendant be housed at FCI Seagoville. Such recommendations are made to the extent they are consistent with the Bureau of Prisons policies.
- The defendant is remanded to the custody of the United States Marshal.
- The defendant shall surrender to the United States Marshal for this district:

at a.m. p.m. on

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- as notified by the United States Marshal.
- The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
 - before 2 p.m. on
 - as notified by the United States Marshal.
 - as notified by the Probation or Pretrial Services Office.

MARSHALS RETURN MADE ON SEPARATE PAGE

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DEFENDANT: ASHU JOSHI
CASE NUMBER: 4:18-CR-00876-JAR(1)

SUPERVISED RELEASE

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

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*

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5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

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DEFENDANT: ASHU JOSHI
CASE NUMBER: 4:18-CR-00876-JAR(1)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.

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5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone

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has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me

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with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

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DEFENDANT: ASHU JOSHI
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SPECIAL CONDITIONS OF SUPERVISION

While on supervision, the defendant shall comply with the standard conditions that have been adopted by this Court and shall comply with the following additional conditions. If it is determined there are costs associated with any services provided, the defendant shall pay those costs based on a co-payment fee established by the probation office.

You must participate in a mental health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).

You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation.

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You must not possess and/or use computers (as defined in 18 U.S.C. § 1030(e)(1)) or other electronic communications or data storage devices or media without approval of the probation office.

You must advise the probation office of all computer, electronic equipment, and web enabled equipment, including cell phones, to which he possesses or has access within 24 hours of obtaining same.

You must not access the Internet except for reasons approved in advance by the probation officer.

You must allow the probation officer to install computer monitoring software on any computer (as defined in 18 U.S.C. § 1030(e)(1)) you use.

To ensure compliance with the computer monitoring condition, you must allow the probation officer to conduct initial and periodic unannounced searches of any computers (as defined in 18 U.S.C. § 1030(e)(1)) subject to computer monitoring. These searches shall be conducted for the purposes of determining whether the computer contains any prohibited data prior to installation of the monitoring software; to determine whether the monitoring software is functioning effectively after its installation; and to determine whether there have been attempts to circumvent the monitoring software after its installation. You must warn any other people who use these computers that the computers may be subject to searches pursuant to this condition.

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You must not view or possess any “visual depiction” (as defined in 18 U.S.C. § 2256), including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of “sexually explicit conduct” (as defined in 18 U.S.C. § 2256).

You must not have direct contact with any child you know or reasonably should know to be under the age of 18, not including your own children, without the permission of the probation officer. If you do have any direct contact with any child you know or reasonably should know to be under the age of 18, not including your own children, without the permission of the probation officer, you must report this contact to the probation officer within 24 hours. Direct contact includes written communication, in-person communication, or physical contact. Direct contact does not include incidental contact during ordinary daily activities in public places.

You are prohibited from engaging in any occupation, business, profession, or volunteer work where you have access to children under the age of 18 without prior written approval from the probation office. You must not go to, or remain at, any place where you know children under the age of 18 are likely to be, including parks, schools, playgrounds, and childcare facilities. You must not go to, or remain at, a place for the primary purpose of observing or contacting children under the age of 18.

You must participate in a sex offense-specific treatment program and follow the rules and regulations of that

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program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).

You must submit to periodic polygraph testing at the discretion of the probation officer as a means to ensure that you are in compliance with the requirements of your supervision or treatment program.

You must not communicate, or otherwise interact, with (M.D.), either directly or through someone else, without first obtaining the permission of the probation officer.

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DEFENDANT: ASHU JOSHI
CASE NUMBER: 4:18-CR-00876-JAR(1)

**SPECIAL CONDITIONS OF SUPERVISION
(CONTINUED)**

If the judgment imposes a financial penalty, you must pay the financial penalty in accordance with the Schedule of Payments sheet of this judgment. You must also notify the court of any changes in economic circumstances that might affect the ability to pay this financial penalty.

You must provide the probation officer with access to any requested financial information and authorize the release of any financial information. The probation office may share financial information with the U.S. Attorney's Office. This condition will be effective until such time as you have completely paid the restitution and financial penalties.

You must not incur new credit charges, or open additional lines of credit without the approval of the probation officer. This condition shall be effective until such time as you have completely paid the restitution and financial penalties.

You must apply all monies received from any anticipated and/or unexpected financial gains, including any income tax refunds, inheritances, or judgments, to the outstanding Court-ordered financial obligation. You must immediately notify the probation office of the receipt of any indicated monies.

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DEFENDANT: ASHU JOSHI
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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payment page.

	Assessment	Restitution	Fine
TOTALS	\$100.00	\$800,000.00	\$.00

	AVAA Assessment*	JVTA Assessment**
TOTALS		\$5,000.00

- The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (A0245C)* will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

NON-PUBLIC VICTIM \$800,000

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

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- Restitution amount ordered pursuant to plea agreement \$ 800,000
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the schedule of payments page may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the
 - the interest requirement for the
 - fine
 - fine
 - Restitution
 - restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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IT IS FURTHER ORDERED that pursuant to 18 U.S.C. § 3663A, the defendant shall make restitution in the total amount of \$800,000. The Court adopts and incorporates the parties stipulation as to restitution (document #282).

Payments of restitution shall be made to the Clerk of the Court for transfer to the victims. The interest requirement for the restitution is waived.

IT IS FURTHER ORDERED that the defendant shall pay to the United States a special assessment of \$100, which shall be due immediately.

IT IS FURTHER ORDERED the defendant shall pay to the United States an additional special assessment of \$5,000, pursuant to 18 U.S.C. § 3014. Payments of the additional special assessment are to be made to the Clerk of the Court. The interest requirement for the additional special assessment is waived.

All criminal monetary penalties are due in full immediately. The defendant shall pay all criminal monetary penalties through the Clerk of Court. If the defendant cannot pay in full immediately, then the defendant shall make payments under the following minimum payment schedule: During incarceration, it is recommended that the defendant pay criminal monetary penalties through an installment plan in accordance with the Bureau of Prisons' Inmate Financial Responsibility Program at the rate of 50% of the funds available to the defendant. If the defendant

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owes any criminal monetary penalties when released from incarceration, then the defendant shall make payments in monthly installments of at least \$300, or no less than 10% of the defendant's gross earnings, whichever is greater, with payments to commence no later than 30 days after release from imprisonment. Until all criminal monetary penalties are paid in full, the defendant shall notify the Court and this district's United States Attorney's Office, Financial Litigation Unit, of any material changes in the defendant's economic circumstances that might affect the defendant's ability to pay criminal monetary penalties. The defendant shall notify this district's United States Attorney's Office, Financial Litigation Unit, of any change of mailing or residence address that occurs while any portion of the criminal monetary penalties remains unpaid.

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DEFENDANT: ASHU JOSHI
CASE NUMBER: 4:18-CR-00876-JAR(1)

SCHEDULE OF PAYMENTS

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

- A. Lump sum payments of \$ 805,100.00 due immediately, balance due
 - not later than _____, or
 - in accordance with C, D, E, or F below; or
- B. Payment to begin immediately (may be combined with C, D, or F below); or
- C. Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after the date of this judgment; or
- D. Payment in equal 20 (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after release from imprisonment to a term of supervision; or

Appendix D

E. Payment during the term of supervised release will commence within _____ (*e.g., 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F. Special instructions regarding the payment of criminal monetary penalties:
IT IS FURTHER ORDERED that the defendant shall pay to the United States a special assessment of \$100, **which shall be due immediately.** (See terms for payment of restitution and JVTA assessment on page 7 of this judgment.)

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

See above for Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Appendix D

- Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.
- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

Appendix D

DEFENDANT: ASHU JOSHI
CASE NUMBER: 4:18-CR-00876-JAR(1)
USM Number: 48232-044

**UNITED STATES MARSHAL
RETURN OF JUDGMENT IN A CRIMINAL CASE**

I have executed this judgment as follows:

Date defendant was delivered with certified copy of this judgment: _____

Name and location of facility: _____

- Defendant was sentenced to Time Served and was released on: _____
- Defendant was sentenced to _____ months/years of Probation and was released on: _____
- Defendant was sentenced to _____ months/years of Supervised Release and was released on: _____

NAME OF US MARSHAL/WARDEN

By: NAME OF DEPUTY US MARSHAL/CSO

**APPENDIX E — ORDER OF THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH
CIRCUIT, FILED NOVEMBER 22, 2024**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 24-2326

ASHU JOSHI,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from U.S. District Court for the
Eastern District of Missouri - St. Louis
(4:21-cv-01253-JAR)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 22, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik