

No.

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH SAN PAOLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the Eighth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Dane K. Chase, Esquire
Florida Bar Number: 0076448
Chase Law Florida, P.A.
111 2nd Ave NE
Suite 334
Saint Petersburg, Florida 33701
Direct: (727) 350-0361
Facsimile: (866) 284-1306
Email: dane@chaselawfloridapa.com

* CJA Counsel of Record

QUESTION PRESENTED

Whether a conclusory response by a defendant to a court's inquiry into whether the defendant "understands" the charge is sufficient to establish that the defendant actually has sufficient knowledge and understanding of the charges to enter a knowing, intelligent, and voluntary plea?

PARTIES TO THE PROCEEDING

Parties to the proceeding include Joseph San Paolo (Appellant/Petitioner) and the United States of America (Appellee/Respondent).

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The decision of the Eighth Circuit Court of Appeal, *infra*, is attached as Appendix B.

JURISDICTION

The Judgment of the Eighth Circuit Court of Appeal was entered on September 1, 2026. A Petition for Panel Rehearing was timely filed and denied on September 25, 2026. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

28 U.S.C. § 2255 provides that:

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released 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, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the

judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

28 U.S.C. § 2255(a)-(b).

STATEMENT OF FACTS

On April 8, 2024, Mr. San Paolo filed a Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255, and a Memorandum of Law in Support thereof, in the United States District Court for the Western District of Missouri. In his Petition and Memorandum, Mr. San Paolo explained that in Case No. 22-03045-01-CR-W-SRB, in the United States District Court for the Western District of Missouri, he pled guilty, pursuant to a plea agreement, to two counts of attempted possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B) and (b)(2), and was ultimately sentenced to a total of 140 months imprisonment. Mr. San Paolo argued he was deprived of his right to the effective assistance of counsel by his trial counsel's failure to advise him as to the elements of the offense of attempted possession of child pornography prior to the entry of his plea, and that had he been properly advised, he would not have pled guilty, but instead would have proceeded to trial.

Specifically, Mr. San Paolo argued that his counsel failed to advise him that mere nudity alone does not qualify an image as child pornography, but, instead, the image must contain a lascivious exhibition that is sexual in nature, and that had he known of that element of the offenses he was charged with, he would not have pled guilty, but, instead, would have proceeded to trial, as the images he possessed contained mere nudity. Mr. San Paolo relied on *United States v. McCoy*, 55 F.4th

658, 661 (8th Cir. 2022), reh'g en banc granted, opinion vacated, No. 21-3895, 2023 WL 2440852 (8th Cir. Mar. 10, 2023), and on reh'g en banc, 108 F.4th 639 (8th Cir. 2024), for the proposition that the government was required to prove the images at issue contained a lascivious exhibition that is sexual in nature to constitute an image of child pornography. Mr. San Paolo requested an evidentiary hearing to resolve his claim.

The district court ultimately denied relief finding:

As to Movant's allegations that defense counsel should have reviewed McCoy and other cases to show that the conduct at issue amounts only to voyeurism and invasion of privacy and advised Movant accordingly, Movant fails to establish that the cases he cites in his motion were applicable to Movant's case. For instance, *McCoy* involved a defendant charged with production of child pornography, as opposed to here, where Movant was charged with attempted possession of child pornography. In fact, the Eighth Circuit cases Movant relies on demonstrate that the videos he possessed were pornographic material. See *United States v. Kemmerling*, 285 F.3d 644, 646 (8th Cir. 2002) (disagreeing with the defendant that the images and videotape were not pornographic because they did not depict sexually suggestive poses, sexual coyness, or a willingness to engage in sexual activity); *States v. Wallenfang*, 568 F.3d 649, 548 (8th Cir. 2009) (finding no court error in denying motion for judgment of acquittal, as a reasonable jury could have concluded that at least one of the twenty-five photographs depicted "lascivious exhibition of the genitals or pubic area."); *United States v. Johnson*, 639 F.3d 433, 440-42 (8th Cir. 2011) (where a coach concealed a camera and filmed naked girls weighing themselves, reinstating the jury's guilty verdict of attempted production of child pornography after explaining, "The fact that the young women in the videos were not acting in an obviously sexual manner, suggesting coyness or a willingness to engage in sexual activity, does not necessarily indicate that the videos themselves were not or were not intended to be lascivious."). In fact, defense

counsel correctly explained to Movant following his direct appeal that although the cases Movant cited in a letter could be a defense to his original charges, “it would not apply under the circumstances to an attempt.” Doc. 1-3, p. 7.

In support of Movant’s charges for attempted possession of child pornography, the factual basis section of the plea agreement contained an admission by Movant that on two occasions he secretly filmed a minor female in a bathroom in an attempt to possess images of the child engaging in sexually explicit conduct. Crim. Doc. 38, p. 2. As set forth above, Movant stated at his change of plea hearing that he understood the charges against him, had gone over the plea agreement with his attorney, and understood its contents and that no other promises had been made to him to induce his guilty pleas. Crim. Doc. 39, pp. 4-6. Movant agreed that he had read the factual basis within the plea agreement and that the statements therein were true. *Id.* at 9-10.

(Appendix A, at 7-8).

Mr. San Paolo then appealed to the Eighth Circuit, and argued, *inter alia*, that accepting his assertions as true, as the court was required to do, his purported plea agreement admission was made without any knowledge as to what the government would be required to prove to demonstrate his guilt, and thus it did not conclusively refute his claim that he would not have made the admission and instead would have proceeded to trial with proper advice. Accordingly, Mr. San Paolo argued that because his allegations, if true, amount to ineffective assistance of counsel, a hearing had to be held to resolve his claim, and, as such, he was entitled to the reversal of the order denying his Motion, and to the remanding of his case with instructions that an evidentiary hearing be held to resolve his claim.

The Eighth Circuit affirmed, concluding Mr. San Paolo was not entitled to

relief because he acknowledged during his change of plea hearing “that he understood the terms of the written plea agreement, which included a stipulation that he ‘secretly filmed Jane Doe, a minor, on two separate occasions, in an attempt to possess visual depictions of the child while engaged in sexually explicit conduct[.]” *Joseph San Paolo Movant - Appellant v. United States of Am. Respondent - Appellee*, No. 24-2585, 2026 WL 2582575, at *1 (8th Cir. Sept. 1, 2026).

This Petition follows.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CIRCUIT SPLIT AND ESTABLISH THAT A CONCLUSORY RESPONSE BY A DEFENDANT TO A COURT'S INQUIRY INTO WHETHER THE DEFENDANT "UNDERSTANDS" THE CHARGE IS NOT SUFFICIENT TO ESTABLISH THAT THE DEFENDANT ACTUALLY HAS SUFFICIENT KNOWLEDGE AND UNDERSTANDING OF THE CHARGES TO ENTER A KNOWING, INTELLIGENT, AND VOLUNTARY PLEA.

At issue in this Petition is whether a defendant's rote response that he understands the charges against him demonstrates per se that his plea is knowingly, intelligently, and voluntarily entered. This Court should resolve the circuit split on the matter and establish that it does not.

The Eleventh Circuit has explained:

The fourteenth amendment due process clause requires that a plea of guilty be knowingly and voluntarily entered because it involves a waiver of a number of the defendant's constitutional rights. *Burden v. Alabama*, 584 F.2d 100, 101–02 (5th Cir.1978).

"A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving, ... or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." *Henderson v. Morgan*, 426 U.S. 637, 645 n. 13, 96 S.Ct. 2253, 2257 n. 13, 49 L.Ed.2d 108 (1976) (citation omitted). A plea is not voluntary in this latter sense, "unless the defendant received 'real notice of the true nature of the charge against him.' " *Id.* at 645, 96 S.Ct. at 2257 (quoting *Smith v. O'Grady*, 312 U.S. 329, 334, 61 S.Ct. 572, 574, 85 L.Ed. 859 (1941)).

The defendant receives "real notice" of the charge when he has been informed of both the nature of the charge to which he is pleading guilty and its elements. *See Henderson v. Morgan*, 426 U.S. at 645–47, 96 S.Ct. at 2258–59. This is

so because a plea of guilty represents, in essence, an admission as to each and every element of the offense. *See McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 1171, 22 L.Ed.2d 418 (1969). In addition, the defendant should understand how his conduct satisfies those elements. *United States v. Frye*, 738 F.2d 196, 199 (7th Cir.1984).

Due process does not require that the defendant, in pleading guilty, be informed of each element of the crime in question *at the plea hearing*. *See Moore v. Balkcom*, 716 F.2d 1511, 1525 (11th Cir.1983), *cert. denied*, 465 U.S. 1084, 104 S.Ct. 1456, 79 L.Ed.2d 773 (1984). The defendant may receive detailed information about the elements of the offense beforehand. Most commonly, his attorney provides such information. *Id.* Thus, for a plea to be knowing and voluntary, the defendant must be informed of the elements of the offense either at the plea hearing or on some prior occasion, and he must understand them.

The extent to which the elements must be explained to the defendant varies with the circumstances:

Instead of testing the voluntariness of a plea by determining whether a ritualistic litany of the formal legal elements of an offense was read to the defendant, ... the court should examine the totality of the circumstances and determine whether the substance of the charge, as opposed to its technical elements, was conveyed to the accused.

Henderson v. Morgan, 426 U.S. at 644, 96 S.Ct. at 2257. Factors to be considered in determining whether a plea is voluntary include “the degree of confusion or incapacity demonstrated by the defendant, the information available to the defendant to help him make his decision, and the importance of the defendant's calculations of the legal principles which he did not comprehend.” *Allard v. Helgemoe*, 572 F.2d 1, 3 (1st Cir.) (footnote omitted), *cert. denied*, 439 U.S. 858, 99 S.Ct. 175, 58 L.Ed.2d 166 (1978).

At the very least, due process requires that the defendant, prior to tendering a plea of guilty, receive a description of

the “critical elements” of the charged offense, such as the element defining the requisite intent. *Henderson v. Morgan*, 426 U.S. at 647 n. 18, 96 S.Ct. at 2258 n. 18. An explanation of criminal intent is necessary because intent is a complex concept not readily understandable by a layman. *See Nash v. Israel*, 707 F.2d 298, 302 n. 6 (7th Cir.1983). Though a rote reading of the indictment or charging document may be sufficient to put a defendant on notice of the elements of the charge in some circumstances, *see Paulson v. Black*, 728 F.2d 1164, 1166 (8th Cir.), *cert. denied*, 469 U.S. 931, 105 S.Ct. 325, 83 L.Ed.2d 262 (1984), it is inadequate when the defendant has minimal intelligence, the charge is complex, and the sentence to be imposed is substantial. *See Alessi v. United States*, 593 F.2d 476, 480 (2d Cir.1979) (“[e]ven if we assume that the indictment was legally sufficient, this does not eliminate the need for making sure the defendant understands it”). Similarly, *conclusory responses by a defendant and his counsel to a court's inquiry into whether the defendant “understands” the charge is not sufficient to establish that the defendant actually has knowledge and understanding*, particularly when he possesses minimal intelligence. *See Monroe v. United States*, 463 F.2d 1032, 1035 (5th Cir.1972). In sum, the quality of the explanation of the offense and its elements must be such that, in the circumstances of the case, it is clear that the defendant knowingly and voluntarily entered his plea of guilty.

Gaddy v. Linahan, 780 F.2d 935, 943–45 (11th Cir. 1986)(footnotes omitted)(emphasis added).

“While the trial court need not follow any particular ritual, a routine boilerplate question to the defendant as to whether he understands the charges is not sufficient, and a single response by the defendant that he ‘understands’ the charge ‘gives no assurance or basis for believing he does’.” *Monroe v. United States*, 463 F.2d 1032, 1035 (5th Cir. 1972)(quoting, *Dorrough v. United States*, 385 F.2d 887, 890 (5th Cir.1967), rehearing denied, 397 F.2d 811, cert. denied, 394 U.S. 1019, 89 S.Ct. 1637,

23 L.Ed.2d 44 (1969)). “[A]ffirmative responses of defendant and his counsel to the court's inquiries whether defendant understood the charge are not a substitute for knowledge.” *Id.* In short, “[r]outine questions on the subject of understanding are insufficient, and a single response, by the defendant that he ‘understands’ the charge gives no assurance or basis for believing that he does.” *United States v. Lincecum*, 568 F.2d 1229, 1231 (5th Cir. 1978) (citing, *Sierra v. Government of Canal Zone*, 5 Cir. 1977, 546 F.2d 77, 79).

The Eighth Circuit has taken the opposite approach. Under the Eighth Circuit’s opinion in Mr. San Paolo’s case, it doesn’t matter whether the defendant actually understands the charges against him, so long as he states that he does. The Eighth Circuit’s approach makes little sense, and a simple example demonstrates why the Fifth and Eleventh Circuits’ approach is the proper one.

Take an individual who does not know the difference between an LED and a halogen lightbulb. The individual goes around town bragging to every lightbulb enthusiast he encounters that he is the proud owner of a brand-new LED lightbulb, when in fact he possesses a halogen bulb. Does the fact the individual told everyone who would listen that he owned an LED lightbulb demonstrate that he knew what an LED lightbulb was? Clearly not. The same is true here. Mr. San Paolo’s acknowledgement that he possessed images containing sexually explicit conduct does not demonstrate that he knew the definition of sexually explicit conduct and understood what his admission was relieving the government of having to prove. Only with an understanding of the law in relation to the facts could Mr. San Paolo’s

purported admission have any meaning. *See, McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969) (“a guilty plea is an admission of all the elements of a formal criminal charge, [and] it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.”)(footnotes omitted). Accordingly, Mr. San Paolo’s admission that he attempted to possess images containing sexually explicitly conduct does not demonstrate that trial counsel did not perform ineffectively by failing to advise him of the elements of the offense prior to the entry of his plea. To the contrary, it demonstrates why counsel performed ineffectively by failing to do so – as it led to Mr. San Paolo making an admission without a full understanding of what he was admitting to, thus rendering his plea involuntarily made. *See, McCarthy*, 394 U.S. at 466, 89 S.Ct. 1166.

Consequently, this Court should grant review, resolve the circuit split, and establish that a single response by the defendant that he “understands” the charges does not establish that his plea was knowingly, intelligently, and voluntarily entered, and remand Mr. San Paolo’s case to the district court for an evidentiary hearing to resolve his claim. *See, Linahan*, 780 F.2d at 943–45; *Monroe*, 463 F.2d at 1035; *Lincecum*, 568 F.2d at 1231; *Watson v. United States*, 493 F.3d 960, 964 (8th Cir. 2007) (“Where petitioner’s allegations, if true, amount to ineffective assistance of counsel, a hearing must be held unless the record “affirmatively refutes the factual assertions upon which [the claim] is based.”) (quoting, *Shaw v. United States*, 24 F.3d 1040, 1043 (8th Cir. 1994)

CONCLUSION

For the reasons stated above, this Court should grant the instant Petition for Writ of Certiorari.

Respectfully Submitted,



Dane K. Chase, Esq.
Florida Bar No. 0076448
Chase Law Florida, P.A.
111 2nd Ave Ne
Suite 334
Direct: (727) 350-0361
Email: dane@chaselawfloridapa.com
CJA Counsel for Petitioner

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APPENDIX A

**UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION**

JOSEPH SAN PAOLO,	)	
	)	
Movant,	)	
	)	Case No. 24-03096-CV-S-SRB-P
vs.	)	Crim. No. 22-03045-01-CR-W-SRB
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

**ORDER DENYING MOVANT’S MOTION UNDER 28 U.S.C. § 2255, DENYING A
CERTIFICATE OF APPEALABILITY, AND DISMISSING CASE**

Movant, who is incarcerated at the FCI Seagoville in Seagoville, Texas, pursuant to a conviction and sentence entered in the above-cited criminal case, filed *pro se* this motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. Doc. 1. Respondent has filed suggestions in opposition to Movant’s motion. Doc. 6. Movant has filed a reply thereto. Doc. 8. Because this Court finds that the motion, files, and record conclusively show that Movant is not entitled to relief,¹ Movant’s motion is denied, a certificate of appealability is denied, and this case is dismissed.

I. Background.

On March 29, 2022, a grand jury indictment was entered in the Western District of Missouri charging Movant with production of child pornography, in violation of 18 U.S.C. § 2251(a) and (e). Crim. Doc. 1.² Movant subsequently pled guilty, pursuant to a written plea agreement, to a superseding information charging Movant with two counts of attempted possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B) and (b)(2). Crim. Docs. 34, 38.

In the factual basis set forth in the plea agreement, Movant admitted that on two occasions, he secretly filmed a minor female in a bathroom in an attempt to possess images of

¹ “A Section 2255 movant is entitled to an evidentiary hearing . . . unless the motion, files, and record conclusively show he is not entitled to relief.” *Roundtree v. United States*, 751 F.3d 923, 925 (8th Cir. 2014) (citation and internal quotation omitted).

² “Crim. Doc.” refers to the docket number entries in Movant’s criminal case, Case No. 22-03045-01-CR-W-SRB. “Doc.” refers to the docket number entries in Movant’s associated civil case, Case No. 24-03096-CV-S-SRB-P . Page number citations refer to the page numbers assigned by the CM/ECF electronic docketing system.

the child engaging in sexually explicit conduct. Crim. Doc. 38, p. 2. The plea agreement included an acknowledgement from Movant that the factual admissions would be used in determining his guilt and advisory sentencing range, including his base offense level. *Id.* at 3. The plea agreement also included acknowledgments from Movant that he understood the sentencing procedures to be utilized by this Court. *Id.* at 3-4. The Government agreed to dismiss the original indictment at the time of sentencing and to not recommend a sentence of more than fifteen years. *Id.* at 4-5. Movant agreed not to argue for a sentence of less than ten years. *Id.* at 8. In signing the plea agreement, Movant represented that he had read and understood the agreement and that he had consulted with his attorney and carefully reviewed every part of it. *Id.* at 16.

At Movant's change-of-plea hearing, Movant confirmed that he had seen the superseding information, he understood the charges against him and the statutory range of punishment for both charges, and he wanted to plead guilty to those charges. Crim. Doc. 39, pp. 2-5. Under oath, Movant said that he had gone over the plea agreement with his attorney and understood its contents and that no other promises had been made to him to induce his guilty pleas. *Id.* at 6. Movant also confirmed that he understood that his sentence would be determined by the Court and that he could receive a sentence above or below the Guidelines range. *Id.* at 8-9. Movant agreed that he had read the factual basis within the plea agreement and that the statements therein were true. *Id.* at 9-10. Movant stated that he understood the statutory range of punishment and that he could be exposed to a twenty-year sentence because the Government was asking for the counts to be run consecutively. *Id.* at 10-11. Movant affirmed that he had enough time to speak with his attorney and that he was satisfied with the representation he had received. *Id.* at 11. Finally, Movant acknowledged that he was waiving his right to appeal his sentence on any ground except claims of ineffective assistance of counsel, prosecutorial misconduct, or an illegal sentence and that an illegal sentence did not include less serious sentencing errors such as misapplication of the Sentence Guidelines. *Id.* at 11-12.

The magistrate judge found Movant's guilty pleas to be knowing and voluntary and recommended that this Court accept them. Crim. Doc. 37. On February 2, 2023, this Court accepted Movant's guilty pleas and entered an adjudication of guilt as to Counts One and Two of the superseding information. Crim. Doc. 40.

A Presentence Investigation Report ("PSR") was subsequently prepared, which contained a comprehensive recitation of the offense conduct. Crim. Doc. 49, pp. 5-7. The PSR calculated

a total offense level of 33 based on the following: a base offense level of 32 under U.S.S.G. § 2G2.1(a) and (c)(1); a two-level enhancement for an offense involving a minor who had attained the age of twelve but not the age of sixteen, under § 2G2.1(b)(1)(B); a two-level enhancement because the minor was otherwise in the custody, care, or supervisory control of Movant, under § 2G2.1(b)(5); and a three-level reduction under § 3E1.1(a) and (b) for acceptance of responsibility. *Id.* at 9-10. Combined with a criminal history category of I, the PSR calculated a final Guidelines range of 135 to 168 months' imprisonment. *Id.* at 17. The statutory provisions required a supervised release term of at least five years. *Id.* Defense counsel filed several objections to the PSR, including to the base offense level and cross reference application of § 2G2.2(c)(1), which applies if the offense involved causing or permitting a minor to engage in sexually explicit conduct for the purpose of producing images of such conduct. *Id.* at 21-23.

Movant appeared for sentencing on May 23, 2023, at which time the Court overruled Movant's objections based upon the reasons set forth in the probation officer's response to the PSR. Crim. Doc. 66, pp. 4-5; Crim. Doc. 49, p. 22. With the cross reference applied, this Court determined the Guidelines range to be 135 to 168 months' imprisonment. Crim. Doc. 66, p. 6. The Court discussed the sentencing factors under 18 U.S.C. § 3553 and sentenced Movant to consecutive terms of imprisonment of 120 months on Count One and twenty months on Count Two, for a total term of 140 months' imprisonment, followed by fifteen years' supervised release. *Id.* at 14-16; Crim. Doc. 59.

Movant subsequently appealed, arguing that applying the § 2G2.2(c) cross reference was an inappropriate enhancement not supported by case law defining lasciviousness in *United States v. McCoy*, 55 F.4th 658 (8th Cir. 2022), *reh'g en banc granted, opinion vacated*, No. 21-3895, 2023 WL 2440852 (8th Cir. Mar. 10, 2023). On October 13, 2023, the Eighth Circuit concluded that Movant's appellate waiver was enforceable and dismissed the appeal. Crim. Doc. 69.

Movant now seeks relief under 28 U.S.C. § 2255. Doc. 1. Additional relevant facts in the record are set forth below in this Court's discussion of Movant's grounds for relief.

II. Standard

Title 28 U.S.C. § 2255 provides that an individual in federal custody may file a motion to vacate, set aside, or correct his or her sentence. A motion under this statute "is not a substitute for a direct appeal and is not the proper way to complain about simple trial errors." *Anderson v. United States*, 25 F.3d 704, 706 (8th Cir. 1994) (internal citations omitted).

Instead, § 2255 provides a statutory avenue through which to address constitutional or jurisdictional errors and errors of law that “constitute[] a fundamental defect which inherently results in a complete miscarriage of justice.” *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)).

III. Discussion

Movant indicates in his motion and an attached memorandum that he intends to raise four grounds for relief. Doc. 1, pp. 4-8; Doc. 1-1, pp. 4-25. However, Movant raises various subclaims within each ground and comingles his claims within each of his four grounds. In Ground 1, Movant enumerates that defense counsel was ineffective for: (1) inducing Movant’s guilty plea by erroneously informing Movant that he could not plead guilty to invasion of privacy; (2) failing to read the entire plea agreement to Movant before having Movant sign it, which resulted in Movant being unaware of various terms such as the appeal waiver or that he could not withdraw his plea; (3) failing to communicate with Movant and comply with Movant’s request to move to vacate his guilty plea prior to sentencing after Movant read *McCoy*; (4) failing to effectively argue that application of the cross reference in § 2G2.2(c)(1) to enhance his base offense level pursuant to § 2G2.1 “was added after [Movant] signed his plea;” (5) failing to send a copy of the PSR to Movant and review it with him; and (6) failing to use *McCoy* “to argue invasion of privacy, the crime that [Movant] thought he was pleading guilty to.” Doc. 1, p. 4; Doc. 1-1, pp. 4-5, 8-18.

In Ground 2, Movant claims that appellate counsel was ineffective for: (1) failing to communicate with Movant about the direct appeal and consulting Movant regarding what issues Movant wanted to raise or was allowed to raise; (2) failing to explain that Movant had a right to file a petition for writ of certiorari; (3) refusing to assist Movant in submitting a petition for writ of certiorari to the Supreme Court; (4) failing to file an *Anders* brief so that Movant could file his own *pro se* brief; (5) failing to raise various issues on appeal, such as “the failure to disclose an appeal waiver,” that Movant tried to withdraw his plea, and the § 2G2.2(c)(1) cross reference; (6) failing to raise that Movant’s plea agreement was not knowing and voluntary entered and that Movant was incorrectly told he could not withdraw his plea; and (7) failing to properly argue the “misapplication of the guidelines” and “error in law” on appeal and in a petition for writ of certiorari. Doc. 1, p. 5; Doc. 1-1, pp. 5-6, 18-20.

In Ground 3, Movant claims that the images at issue never met the definition of child pornography, so he should have been charged only with “voyeurism and/or invasion of privacy”

and his attorney was ineffective for failing to raise the issue. Doc. 1, p. 6; Doc. 1-1, pp. 7, 21-23. In Ground 4, Movant argues that defense counsel was ineffective for failing to research various cases, including *McCoy*, to challenge Movant's charges and enhancements and to argue for a lesser sentence. Doc. 1, p. 8; Doc. 1-1, pp. 7, 23-25.

Respondent argues that each of Movant's grounds for relief are without merit. Doc. 6, pp. 8-32. Because Movant's grounds for relief are heavily comingled, fail for many of the same reasons, and include common issues of law and fact, they will be discussed collectively.

"A guilty plea waives all defects except those that are jurisdictional." *United States v. Todd*, 521 F.3d 891, 895 (8th Cir. 2008) (internal quotation omitted); *see also Walker v. United States*, 115 F.3d 603, 604 (8th Cir. 1997) ("[A] valid guilty plea forecloses an attack on a conviction unless on the face of the record the court had no power to enter the conviction or impose the sentence.") (internal quotation omitted). "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Instead, such a Movant "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in [*McMann v. Richardson*, 397 U.S. 759 (1970)]." *Id.* Statements made by a defendant in court under oath should not be lightly set aside and "constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977); *see also Ingrassia v. Armontrout*, 902 F.2d 1368, 1370 (8th Cir. 1990) (representations made during the plea hearing "carry a strong degree of verity and pose a formidable barrier in any subsequent collateral proceedings").

"A guilty plea is invalid only if it does not represent a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Easter v. Norris*, 100 F.3d 523, 525 (8th Cir. 1996). Accordingly, "a defendant must have knowledge of the law in relation to the facts." *Id.* (citation omitted). However, "[t]he rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision." *U.S. v. Gomez*, 326 F.3d 971, 975 (8th Cir. 2003) (quoting *Brady v. United States*, 397 U.S. 742, 757 (1970)).

To establish that counsel was ineffective, Movant must "show that his 'trial counsel's performance was so deficient as to fall below an objective standard of reasonable competence,

and that the deficient performance prejudiced his defense.” *Nave v. Delo*, 62 F.3d 1024, 1035 (8th Cir. 1995) (quoting *Lawrence v. Armontrout*, 961 F.2d 113, 115 (8th Cir. 1992)); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish prejudice, Movant must show that there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. Both prongs of this test must be established in order to be entitled to § 2255 relief; failure to establish either one of the prongs is fatal to a claim of ineffective assistance of counsel. *Id.* at 697. Claims of ineffective assistance of appellate counsel utilize the same legal standard as claims of ineffective assistance of trial counsel set out in *Strickland*. *Henderson v. Sargent*, 926 F.2d 706, 709-710 (8th Cir. 1991).

Initially, the Court notes that many of Movant’s allegations attempt to challenge the sufficiency of the evidence against him. Insofar as Movant intended any of his grounds for relief, including the primary claim in Ground 3 that he was charged with the “wrong element of the crime” (Doc. 1, p. 6), to challenge the sufficiency of the evidence, such claims are not cognizable under § 2255. *See Houser v. United States*, 508 F.2d 509, 514, 516 (8th Cir. 1974) (“Questions as to the sufficiency of the evidence or involving errors either of law or fact must be raised by timely appeal from the sentence if the petitioner desires to raise them.”). Similarly, claims concerning defects in the indictment or the sufficiency of the indictment are not cognizable grounds for relief in a § 2255 proceeding. *Id.* at 514-515.

As to Movant’s numerous claims of ineffective assistance of counsel, Movant fails to establish that defense counsel was ineffective under the foregoing standard in any of his grounds for relief or ancillary allegations. Insofar as Movant argues repeatedly in his motion that defense counsel should have had Movant charged only with voyeurism/ invasion of privacy, Movant did not have the right to dictate which statute he was charged under, and “the United States is not required to offer a choice of charges to a defendant.” *Entrekin v. United States*, 508 F.2d 1328, 1329 (8th Cir. 1974). Nevertheless, Movant’s own exhibits show that defense counsel emailed the Government and informed them that Movant would “plead to invasion of privacy but not the amended offer of possession of child pornography.” Doc. 1-3, p. 1. Defense counsel sent another email to the Government mentioning that he thought Movant was referencing 18 U.S.C. § 1801, which he described as “video voyeurism which would fit but for the ‘minor component of the case.’” Doc. 1-3, p. 2. It is clear from the record that the Government was not open to reducing Movant’s charges as he wished and was preparing for trial by emailing a proposed cell

phone stipulation and indicating that they would be seeking to admit Movant's past allegations of sexual abuse made by his ex-wife's sisters. *Id* at 1-2. Accordingly, defense counsel cannot be ineffective for obtaining a plea deal on charges the Government was not willing to make.

As to Movant's allegations that defense counsel should have reviewed *McCoy* and other cases to show that the conduct at issue amounts only to voyeurism and invasion of privacy and advised Movant accordingly, Movant fails to establish that the cases he cites in his motion were applicable to Movant's case. For instance, *McCoy* involved a defendant charged with production of child pornography, as opposed to here, where Movant was charged with *attempted* possession of child pornography. In fact, the Eighth Circuit cases Movant relies on demonstrate that the videos he possessed were pornographic material. See *United States v. Kemmerling*, 285 F.3d 644, 646 (8th Cir. 2002) (disagreeing with the defendant that the images and videotape were not pornographic because they did not depict sexually suggestive poses, sexual coyness, or a willingness to engage in sexual activity); *States v. Wallenfang*, 568 F.3d 649, 548 (8th Cir. 2009) (finding no court error in denying motion for judgment of acquittal, as a reasonable jury could have concluded that at least one of the twenty-five photographs depicted "lascivious exhibition of the genitals or pubic area."); *United States v. Johnson*, 639 F.3d 433, 440-42 (8th Cir. 2011) (where a coach concealed a camera and filmed naked girls weighing themselves, reinstating the jury's guilty verdict of attempted production of child pornography after explaining, "The fact that the young women in the videos were not acting in an obviously sexual manner, suggesting coyness or a willingness to engage in sexual activity, does not necessarily indicate that the videos themselves were not or were not intended to be lascivious.").³ In fact, defense counsel correctly explained to Movant following his direct appeal that although the cases Movant cited in a letter could be a defense to his original charges, "it would not apply under the circumstances to an attempt." Doc. 1-3, p. 7.

In support of Movant's charges for attempted possession of child pornography, the factual basis section of the plea agreement contained an admission by Movant that on two occasions he secretly filmed a minor female in a bathroom in an attempt to possess images of the child engaging in sexually explicit conduct. Crim. Doc. 38, p. 2. As set forth above, Movant stated at his change of plea hearing that he understood the charges against him, had gone over the plea agreement with his attorney, and understood its contents and that no other promises had

³ The remainder of cases cited by Movant are further distinguishable for the reasons set forth in Respondent's response. See Doc. 6, pp. 13-14.

been made to him to induce his guilty pleas. Crim. Doc. 39, pp. 4-6. Movant agreed that he had read the factual basis within the plea agreement and that the statements therein were true. *Id.* at 9-10.

The same record contradicts any claim by Movant that he was unaware of various terms of the plea agreement, such as the appeal waiver. In fact, the Court spent considerable time reading the appeal waiver into the record and confirming that Movant understood he was waiving those rights by signing the plea agreement. *Id.* at 11-12. As set forth above, these statements carry a strong degree of verity, and Movant fails to set forth any appropriate reason for this Court to set them aside. Consequently, Movant fails to establish any act on behalf of defense counsel that resulted in Movant not entering into the plea agreement knowingly and voluntarily.

The record also contradicts Movant's claims that he attempted to withdraw his guilty plea after he read *McCoy* but that trial counsel failed to abide his request. Although Movant presents a letter he allegedly sent to counsel stating that he wanted to "take back the plea deal" (Doc. 1-3, pp. 3-5),⁴ at sentencing Movant accepted responsibility for his actions and never mentioned his desire to withdraw his plea. Crim. Doc. 66, p. 14. Even if this Court accepts as true Movant's allegation that he requested that counsel move to withdraw Movant's guilty plea, Movant cannot establish that he was prejudiced by defense counsel's alleged subsequent actions. Movant states that defense counsel informed him at sentencing that Movant could not undo his plea and that he would lose the three points for acceptance of responsibility if he tried. Crim Doc. 1-1, pp. 5-6. Such advice was not deficient in light of the circumstances facing Movant, and counsel is not ineffective for failing to file a motion to withdraw a defendant's guilty plea when, as here, a defendant fails to "set forth a reasonable or legitimate basis for the withdrawal of his plea." *Perry v. Lazaroff*, No. 1:16CV225, 2016 WL 8674485, at *14 (N.D. Ohio Nov. 4, 2016), report and recommendation adopted, No. 1:16CR225, 2017 WL 1251635 (N.D. Ohio Apr. 5, 2017); *see also United States v. Davis*, 583 F.3d 1081, 1092 (8th Cir. 2009) (finding that the defendant did not show a fair and just reason for requesting the withdrawal where the defendant filed his motion to withdraw more than a month after he pled guilty and eighteen days after the district court accepted the guilty plea).

⁴ The letter is not precisely dated, except for "March 2023" being written in the margin at the end of the letter. Doc. 1-3, p. 5.

Although Movant primarily suggests his reason to vacate his guilty plea was premised on his recent reading of *McCoy* and the PSR's enhancements to his sentence, this Court would not have permitted Movant to withdraw his guilty plea on such grounds or on any of the ancillary grounds raised throughout Movant's pleadings. As explained above, the *McCoy* opinion is inapplicable to Movant's case. Moreover, the *McCoy* opinion and judgment was vacated on March 10, 2023, during the time Movant allegedly sought to withdraw his plea and prior to his sentencing hearing on May 23, 2023. And as set forth elsewhere in this order, Movant agreed to the factual basis supporting the plea agreement, had been made fully aware of the Court's sentencing procedures, and specifically agreed that he would be unable to withdraw his guilty plea if he disagreed with the sentencing judge's decision. Crim. Doc. 39, pp 8-10; Crim. Doc. 38, pp. 3-4, 8. Because the record before this Court conclusively establishes that Movant entered into the plea agreement knowingly and voluntarily, each of Movant's allegations regarding this issue are without merit.

Insofar as Movant takes exception to the application of the § 2G2.2(c)(1) cross reference, the record establishes that defense counsel challenged the cross reference within the PSR objections, at sentencing, and on appeal. Within counsel's PSR objections, he argued that there was no evidence to support the cross reference and that the base offense level should be 22. Crim. Doc. 49, pp. 21-22. During sentencing, counsel objected to application of the cross reference and argued that there was nothing indicating that Movant caused, transported, permitted, offered, or sought by advertisement the minor to engage in explicit conduct. Crim. Doc. 66, p. 3. Counsel even argued *McCoy*, stating that mere nudity and utilizing the bathroom was not sexually explicit conduct. *Id.* at 3-4. Then, counsel argued *McCoy* on appeal, claiming this Court made an error of law in applying the cross reference. *United States v. San Paolo*, No. 23-2391, (8th Cir. Oct. 13, 2023). Movant fails sufficiently to set forth any additional argument or authority that counsel should have made in this regard that reasonably would have resulted in a different outcome in Movant's case. And even if the cross reference was inapplicable and the Guidelines range was adjusted accordingly, this Court still would have imposed the same sentence.

Insofar as Movant alleges that appellate counsel failed to advise him of his right to file a petition for a writ of certiorari and failed to assist him in the filing of such, "[d]ue process does not [] guarantee a constitutional right to counsel for a litigant seeking to file a certiorari petition in the United States Supreme Court." *Steele v. United States*, 518 F.3d 986, 988 (8th Cir. 2008);

Simpson v. Norris, 490 F.3d 1029, 1033 (8th Cir. 2007) (“[W]here there is no constitutional right to counsel there can be no deprivation of effective assistance.”). And considering the appeal waiver in the plea agreement that Movant knowingly and voluntarily signed and which the Eighth Circuit found enforceable, Movant fails to establish that appellate counsel was ineffective for any other reason. Movant fails otherwise to present any arguments on appeal that, if raised, create a reasonable probability of a different outcome in Movant’s case. For these reasons, each of Movant’s claims of ineffective assistance of counsel are without merit.

Ultimately, none of Movant’s arguments or claims establish that his plea or sentence are invalid or were otherwise the result of ineffective assistance of counsel. Rather, the record before this Court indicates that Movant entered a knowing and voluntary plea and received an appropriate sentence within the statutory range of punishment. For these reasons and in light of the record before this Court, Movant’s § 2255 motion is denied.

IV. Certificate of Appealability

Pursuant to Rule 11 of the Rules Governing Section 2255 Proceedings, the Court must issue or deny a certificate of appealability when it enters a final order adverse to Movant. A certificate of appealability may be issued “only if [Movant] has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Because Movant has made no such showing, the Court declines to issue a certificate of appealability.

V. Conclusion

For the foregoing reasons, Movant’s motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 is denied, a certificate of appealability is denied, and this case is dismissed.

It is so **ORDERED**.

Dated: July 9, 2024.

/s/ Stephen R. Bough
STEPHEN R. BOUGH
UNITED STATES DISTRICT JUDGE

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 24-2585

Joseph San Paolo

Movant - Appellant

v.

United States of America

Respondent - Appellee

Appeal from United States District Court
for the Western District of Missouri - Springfield

Submitted: July 22, 2026
Filed: September 1, 2026
[Unpublished]

Before L.R. SMITH, KELLY, and GRASZ, Circuit Judges.

PER CURIAM.

In 2023, Joseph San Paolo pleaded guilty to two counts of attempted possession of child pornography, after he used a tablet to secretly make video recordings of a minor as she stepped into and got out of a shower in his bathroom. He was sentenced to an aggregate prison term of 140 months, and his direct appeal

was dismissed on the government’s motion pursuant to the waiver included in his plea agreement.

San Paolo then filed a 28 U.S.C. § 2255 motion, which the district court¹ denied, and he argues through appointed counsel on appeal that the district court abused its discretion for failing to conduct an evidentiary hearing before resolving his claims concerning whether the images he possessed constituted child pornography, whether he intended to possess images containing lascivious exhibitions, and whether he was properly advised by trial counsel to plead guilty, even though the images he possessed depicted mere nudity. Because San Paolo’s plea proceedings included his acknowledgment that he understood the terms of the written plea agreement, which included a stipulation that he “secretly filmed Jane Doe, a minor, on two separate occasions, in an attempt to possess visual depictions of the child while engaged in sexually explicit conduct,” and that the materials used to produce the depictions had been transported in interstate commerce, we conclude that an adequate factual basis for an attempt conviction was established, whether or not the images he possessed depicted child pornography. See 18 U.S.C. § 2252(a)(4)(B) (possession of child pornography offense); United States v. Johnson, 639 F.3d 433, 439-41 (8th Cir. 2011) (reinstating jury verdict finding defendant guilty of attempted sexual exploitation of children under 18 U.S.C. § 2251 after he secretly videotaped minor girls weighing themselves while nude; defendant’s success in attaining criminal objective is not necessary for attempt conviction). DeRoo v. United States, 223 F.3d 919, 925 (8th Cir. 2000) (defendant faces heavy burden to establish ineffective assistance, or that reasonable probability exists, but for counsel’s errors, he would not have pleaded guilty and would have proceeded to trial).

Accordingly, we affirm the judgment of the district court.

¹The Honorable Stephen R. Bough, United States District Judge for the Western District of Missouri.

APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 24-2585

Joseph San Paolo

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Springfield
(6:24-cv-03096-SRB)

ORDER

The petition for rehearing by the panel is denied.

September 25, 2026

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

/s/ Susan E. Bindler