No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TIMOTHY ANDREW FUGIT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Under 18 U.S.C. § 2422(b), one may not entice a minor "to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense." Does the "sexual activity" element require the defendant to make or attempt physical contact with a minor, as the Seventh Circuit holds, or may a single Internet chat and phone call with no attempted physical contact with a minor satisfy the element, so long as the defendant caller was involved in the "active pursuit of [his own] libidinal gratification," as the Fourth Circuit holds?

List of Parties

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The citation for the Fourth Circuit's opinion, which is reported, is *United States v. Fugit*, 703 F.3d 248 (4th Cir. 2012). (Pet. 1a-14a). The citation for the District Court's Opinion and Order, which is unreported, is *United States v. Fugit*, No. 4:07-cr-00065-JBF (E.D. Va. Aug. 19, 2010), ECF No. 57. (Pet. 15a-63a).

BASIS FOR JURISDICTION IN THIS COURT

The Fourth Circuit entered its opinion and judgment on December 31, 2012. (Pet. 1a-14a). The Fourth Circuit denied Petitioner's timely-filed petition for rehearing *en banc* on February 26, 2013. (Pet. 64a). This Court has jurisdiction under 28 U.S.C. § 1254(1) (2006).

STATUTE INVOLVED IN THE CASE

18 U.S.C. § 2422 (2006) - Coercion and enticement

(a) Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

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

STATEMENT OF THE CASE

1. At the time of his arrest, Timothy Andrew Fugit was 24 years old and employed by the United States Navy. (Pet. 68a). Virginia state investigators executed a state search warrant on Fugit on January 17, 2006. (Pet. 66a). Fugit immediately cooperated, telling an investigator that he had attempted to contact children on the computer and telephone. (Pet. 66a). State officers seized his computers and found incriminating evidence on them. (Pet. 66a-67a).

A federal grand jury then indicted Fugit on one count of distribution of child pornography, in violation of 18 U.S.C. § 2252A(a)(2) and (b)(1) (Count One); and one count of using a telephone and computer to "persuade, induce, entice, and coerce" a minor "to engage in any sexual activity for which any person can be charged with a criminal offense, and attempt to do so," in violation of 18 U.S.C. § 2422(b) (Count Two). Count Two is the subject of this petition.

Fugit and his trial counsel discussed whether Fugit should plead guilty to both counts. His trial counsel later acknowledged that Fugit "always expressed concern with the second count, about the elements of the offense and about the facts that would be sufficient to establish that." (4th Cir. J.A. at 522). Fugit "had issues with [Count Two] in terms of what his actions may have been and did his actions satisfy the statute . . . he kept saying but I never met anybody, I didn't go to meet with anybody." (4th Cir. J.A. at 542).

Trial counsel advised Fugit to plead guilty to both counts and erroneously advised him that he had to plead guilty to both or none of them. He later testified

that Fugit "thought that he could plead guilty to Count 1 and not guilty to Count 2. You can't do that. So he had to plead guilty to both or not guilty to both." (4th Cir. J.A. at 542).

Fugit pleaded guilty to both counts. As part of his plea change, Fugit and the government agreed on a Statement of Facts. (Pet. 65a-68a). The parties agreed that Fugit had on one occasion chatted online with a 10-year-old female minor for approximately 30-45 minutes and then telephoned five minutes later and "engaged the child in an inappropriate sexual conversation." (Pet. 65a). The parties further agreed that on another occasion Fugit had chatted online with an 11-year-old female minor and asked her about her breast size, how big her private parts were, her underwear, slumber parties, and if she got naked in front of guys; then telephoned her in Pennsylvania shortly thereafter and "engaged the child in an inappropriate sexual conversation" asking if she seen a grown man naked, if she minded if he came in to check on her while she was naked, if she would mind seeing him naked, and if she would get naked for him. (Pet. 67a).

The district court accepted the guilty plea as to both counts and sentenced Fugit to a total of 310 months, including 240 months on Count One and 70 months on Count Two. Still represented by his trial counsel, Fugit appealed to the Fourth Circuit, raising only sentencing issues. The court affirmed his sentence, in an opinion issued on October 11, 2008. *See United States v. Fugit*, 296 F. App'x 311 (4th Cir. 2008).

2. Within a year of the decision in his direct appeal, Fugit moved *pro se* to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (2006). The district court had jurisdiction under § 2255 and under 28 U.S.C. § 1331 (2006). Among other issues, Fugit contended that was factually innocent of Count Two and that he pleaded guilty based on his trial counsel's ineffective assistance. He alleged he was innocent "because (1) there was never any physical contact between him and his minor victim and (2) there was no evidence that petitioner ever intended to travel to meet his victim or performed any substantial step toward doing so." (Pet. 59a).

The district court denied relief on the actual innocence and related ineffective assistance ground. (Pet. 59a-61a). Fugit filed a *pro se* Notice of Appeal. The Fourth Circuit granted a certificate of appealability on two related issues:

> whether Fugit's stipulated conduct constituted attempted inducement of "sexual activity" of a minor within the meaning of 18 U.S.C. § 2422(b) (2006) and whether Fugit's counsel rendered ineffective assistance by advising him to stipulate to the inducement of "sexual activity" and guilt under 18 U.S.C. § 2422(b) (2006).

4th Cir. Dkt. No. 17.

After briefing and oral argument, the Fourth Circuit interpreted "sexual activity" as the "'active pursuit of libidinal gratification' on the part of any individual" and rejected Fugit's contention that the "sexual activity" element requires physical contact or attempted physical contact with a minor. (Pet. 8a). The government had not proposed the Fourth Circuit's interpretation, had focused on the definition of "sexual," and had argued that the court did "not ultimately have to settle on a comprehensive definition for § 2422(b)." U.S. 4th Cir. Br. at 32-33, 51.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S DECISION CREATES A CIRCUIT CONFLICT.

The Fourth Circuit's decision creates a circuit conflict on the meaning of "sexual activity" in 18 U.S.C. § 2422(b). On the one hand, the Seventh Circuit has held that "sexual activity" requires physical contact between two people. *United States v. Taylor*, 640 F.3d 255, 257-60 (7th Cir. 2011). On the other hand, the Fourth Circuit has held that "sexual activity" does not require physical contact between two people. *United States v. Fugit*, 703 F.3d 248, 254-56 (4th Cir. 2012).

In *Taylor*, an opinion authored by Judge Richard Posner, the Seventh Circuit rejected "the government's broad conception of 'sexual activity.'" 640 F.3d at 258. There the defendant met a police officer posing as a 13-year-old girl in an online chat room, made a number of sexual comments to her, masturbated in front of his webcam, and invited the "girl" to masturbate. *Id.* at 257. The defendant was convicted under § 2422(b), with his conduct having violated two Indiana statutes. The Seventh Circuit reversed, holding that "sexual activity" in § 2422(b) excludes solitary sex acts and requires physical contact with the victim. *Id.* at 259-60.

The court analyzed § 2422(b) and other federal criminal code sections at length. The court noted that "sexual activity" is not defined in the code and that Chapter 117, which includes § 2422(b), has no definition section. *Id.* at 257. The court noted that the very next section, § 2423, defines "illicit sexual conduct" by cross-referencing the definition of "sexual act" in § 2246. That section defines "sexual act" as "the intentional touching, not through the clothing, of the genitalia

of another person who has not attained the age of 16 years." *Id.* (quoting 18 U.S.C. § 2246(2)(D)). In 1998, the court noted, Congress had changed § 2422(b) by replacing "sexual act" with "sexual activity," but the committee report used the terms "sexual act" and "sexual activity" interchangeably, indicating that the terms have the same meaning and that the wording was changed for semantic uniformity, not to broaden subsection (b). *Id.* at 258. The court concluded that Congress uses the terms "sexual act" and "sexual activity" synonymously. *Id.* at 258-59.

In further support, the court noted that a nearby section, § 2427, defines "sexual activity for which a person can be charged with a criminal offense" for purposes of that section as including the production of child pornography. Such a definition, the court noted, is unnecessary unless "sexual activity" ordinarily requires physical contact. *Id.* at 259. Because the defendant had not made physical contact with the victim and had apparently not attempted or intended physical contact, the court reversed the conviction. *Id.* at 260.

In contrast, in the opinion in this case authored by Judge J. Harvie Wilkinson III, the Fourth Circuit held that the plain meaning of "sexual activity" in § 2422(b) "extends beyond interpersonal physical contact." *Fugit*, 703 F.3d at 254. The court defined the phrase "sexual activity" by piecing together separate definitions of "sexual" and "activity" from *Webster's New International Dictionary* (3d ed. 1993). The court first used *Webster's* second definition of "sexual," "of or relating to the sphere of behavior associated with libidinal gratification." *Id.* The court then used *Webster's* fifth definition of "activity," "an occupation, pursuit, or

recreation in which a person is active." *Id.* at 255. Combining the two definitions, the court interpreted "sexual activity" in § 2422(b) as comprising "conduct connected with the 'active pursuit of libidinal gratification' on the part of any individual." *Id.*

The court reasoned that "[t]he primary evil that Congress meant to avert by enacting § 2422(b) was the psychological sexualization of children, and this evil can surely obtain in situations where the contemplated conduct does not involve interpersonal physical contact." *Id.* The court further reasoned that its interpretation was not "open-ended." *Id.* The court stated that "Fugit appears to have pulled his proposed interpersonal physical contact requirement out of a hat," *id.* at 254, without addressing the *Black's Law Dictionary* definition of the phrase "sexual activity" that Fugit raised in district court and in the Fourth Circuit.[1]

The court explicitly disagreed with the Seventh Circuit's decision in *Taylor* that Congress uses the term "sexual activity" in § 2422(b) synonymously with how it uses the term "sexual act." *Id.* at 255-56.

The Fourth Circuit's decision creates a split between the circuit courts. Review is warranted to resolve this conflict.

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[1] The court also stated that it reviewed the case with the finality of convictions in mind, *see* Pet. 5a-6a, but the court's interpretation of "sexual activity" will apply to prosecutions at any stage, including trial and direct appeal. The court later stated that Fugit was "lucky to receive the deal that he did" because he could have had additional charges had he not pleaded guilty, *see* Pet. 13a, but there is no evidence that any charges were dropped or additional charges contemplated, and any additional charges would have been based on the same conduct of a single Internet chat followed by a single telephone call that Fugit challenges as insufficient. The additional detail in the pre-sentence report referred to by the Fourth Circuit, Pet. 4a, also related to the same online and telephone contact, not interpersonal physical contact or attempted physical contact.

II. THE FOURTH CIRCUIT'S DECISION RAISES AN IMPORTANT AND RECURRING ISSUE OF FEDERAL LAW.

The Fourth Circuit's interpretation of the "sexual activity" element in § 2422(b) is important for several reasons. First, how the Fourth Circuit uses dictionary definitions in its plain meaning analysis has significant implications for statutory interpretation. Second, the court's broad interpretation of "sexual activity" subjects mere speech to felony prosecution in federal court. Third, the court's broad interpretation is unnecessary because the states already prohibit the type of conduct in question in their indecent liberties statutes. Finally, the amount of commentary on § 2422(b) shows that the issue is important.

First, the Fourth Circuit failed to interpret the phrase "sexual activity" as a whole and ignored the *Black's Law Dictionary* definition of the term. Legal phrases should be construed as a whole. *See generally United States v. Morton*, 467 U.S. 822, 828 (1984) (noting that words should not be construed in isolation but should be construed as part of phrases and the statute as a whole); Francis Bennion, *Bennion on Statute Law* 191 (1990) ("[I]t is incorrect to assume that the whole is necessarily the sum of its parts. Because a certain meaning can be collected by taking each word in turn and then combining their several meanings, it does not follow that this is the true meaning of the phrase.").

Black's Law Dictionary defines "sexual activity" by cross-referencing the definition for "sexual relations." *Black's Law Dictionary* 1498 (9th ed. 2009). *Black's Law* defines "sexual relations" in two ways:

1. Sexual intercourse. – Also termed *carnalis copula*.

> 2. Physical sexual activity that does not necessarily culminate in intercourse. Sexual relations usu. involve the touching of another's breasts, vagina, penis or anus. Both persons (the toucher and the person touched) are said to engage in sexual relations. – Also termed *sexual activity*.

Id. at 1499.

By ignoring this definition in *Black's Law* and creating its own definition, the Fourth Circuit also ignored this Court's decisions that rely on *Black's Law* to interpret the plain meaning of words in judicial settings. *See, e.g.*, *Buckhannon Bd. and Care Homes, Inc. v. West Virginia Dep't of Health and Human Res.*, 532 U.S. 598, 616 (2001) (stating that *Black's Law* definitions had been rejected when they conflicted with the Court's precedent, but that the Court did not "simply reject a relevant definition of a word tailored to judicial settings in favor of a more general definition from another dictionary"); *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990) (using *Black's Law* in determining the definition of "child support" and reversing the Fourth Circuit); *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 164 (1988) (using *Black's Law* to define the phrase "finding of fact").

Instead of using the *Black's Law* definition of the whole phrase, the Fourth Circuit used a less reliable general dictionary, *Webster's*. *See* Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 Az. St. L. J. 275, 303 (1998) (explaining why "general dictionaries" such as *Webster's* are "unreliable for construing legal language"). Not only did the Fourth Circuit choose *Webster's* over *Black's Law*, the court pieced together one of the definitions of "sexual" and one of the definitions of "activity" in *Webster's New International Dictionary* (3d ed.

1993). The court used definition 5a of "activity" and definition 2b of "sexual." *Id.* at 22, 2082. In so doing, the court chose not to use earlier definitions in *Webster's*, such as definition 2 of "activity," "physical motion or exercise of force." *Id.* at 22. The court's use of separate definitions from a general dictionary instead of a whole phrase definition in *Black's Law* is inconsistent with this Court's precedent and merits review.

Second, the Fourth Circuit's interpretation of "sexual activity" in § 2422(b) as the "'active pursuit of libidinal gratification' on the part of any individual" allows prosecution of defendants who have done nothing more than speak with minors and not enticed the minors themselves to commit a crime. In this case, for example, Fugit had a single Internet chat and a single phone call with each minor. He attempted no further contact with them in the weeks and months before his arrest. Most importantly, he never made any attempt to meet the minors. He merely chatted online and spoke with them once, which is enough under the Fourth Circuit's interpretation of "sexual activity."

The Seventh Circuit has rejected such an expansive reading of § 2422(b), in both the *Taylor* opinion discussed above and in *United States v. Gladish*, 536 F.3d 646 (7th Cir. 2008). In *Gladish*, a 35-year-old man chatted with what he thought was a 14-year-old girl on an Internet chat room and said such things as "ill suck your titties," "ill kiss your inner thighs," and "ill let ya suck me and learn about how to do that." *Id.* at 650. The Seventh Circuit reasoned that his talk was "consistent with his having intended to obtain sexual satisfaction vicariously." *Id.* The court

held that the government had not shown the "substantial step" required for an attempted violation of § 2422(b), further reasoning:

> We are surprised that the government prosecuted him under section 2422(b). Treating speech (even obscene speech) as the "substantial step" would abolish any requirement of a substantial step. . . . . The requirement of proving a substantial step serves to distinguish people who pose real threats from those who are all hot air; in the case of Gladish, hot air is all the record shows.

Id. In *Taylor*, the Seventh Circuit similarly noted that nothing in the legislative history "suggest[s] a legislative purpose of subjecting less serious sexual misconduct (misconduct involving no physical contact) to the draconian penalties in subsection (b)." 640 F.3d at 258.[2]

Here, as in *Gladish* and *Taylor*, Fugit communicated from afar and neither made nor attempted physical contact. As in *Gladish*, Fugit at most "intended to obtain sexual satisfaction vicariously." Yet the Fourth Circuit's interpretation of § 2422(b) allows prosecution of this "less serious sexual misconduct."

An expansive interpretation of § 2422(b) such as the Fourth Circuit's subjects "sexting" between adults as young as 18 and minors to federal prosecution. *See, e.g.*, Stephanie Gaylord Forbes, Note, *Sex, Cells, and SORNA: Applying Sex Offender Registration Laws to Sexting Cases*, 52 Wm. & Mary L. Rev. 1717, 1733 n.110 (2013) (discussing the viability of § 2422(b) charges for "sexting" as related to statutory provisions of the Sex Offender Registration and Notification Act); Janis

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[2] While subsection (a) provides a sentence of "not more than 20 years" for enticing any individual to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, subsection (b) provides a greater sentence of "not less than 10 years" imprisonment and up to life. *See supra* at 1.

Wolak & David Finkelhor, *Sexting: A Typology* (Crimes Against Children Research Center, 2011) (examining the phenomenon of "sexting" as an emergent social behavior and evaluating the effect of "sexting" on young participants and law enforcement); Joanna L. Barry, *The Child as Victim and Perpetrator: Laws Punishing Juvenile "Sexting"*, 13 Vand. J. Ent. & Tech. L. 129 (2010).

Third, the Fourth Circuit's broad interpretation of "sexual activity" unnecessarily makes a federal crime out of conduct already addressed in state statutes prohibiting the taking of indecent liberties with minors. In Virginia state court, for example, where Fugit's case began, the state's indecent liberties statute made it a felony for an adult to propose that a "child expose his or her sexual or genital parts" to that person. Va. Code Ann. 18.2-370(1) (2009); *see also "Sexting"*, Va. State. Crime Comm'n (Sep. 16, 2009), *available at* http://services.dlas. virginia.gov/user_ db/ frmvscc.aspx? viewid=115 (examining the various state charges available for "sexting"). Most if not all other states have enacted indecent liberties legislation that effectively reaches the conduct here. *See, e.g.*, Conn. Gen. Stat. § 53a-90a (2007); Fla. Stat. § 847.0135 (2009); Mich. Comp. Laws § 750.145d (2013); Mo. Rev. Stat. §§ 556.151–153 (2008); N.H. Laws §§ 639:3, 649:B (2013); Pa. Cons. Stat. § 6318(b) (2007).

The point is that inappropriate sexual conduct directed at minors will not go unpunished absent the Fourth Circuit's expansive interpretation of § 2422(b). In *Taylor*, for example, the Seventh Circuit noted that its interpretation "will not allow the likes of the defendant to elude just punishment" because his more serious

Indiana state law offense could be punished by eight years in prison. 640 F.3d at 260. Here, Fugit was prosecuted under the Virginia code and admitted to violating it. Thus, public safety does not require the broad interpretation of § 2422(b) created by the Fourth Circuit.

Fourth, the proper interpretation of § 2422(b) has been the subject of much legal scholarship in recent years, showing the importance of the issue. *See, e.g.*, Forbes, *supra*; Wolak & Finkelhor, *supra*; Barry, *supra*; Andriy Pazunika, *A Better way to Stop Online Predators: Encouraging a More Appealing Approach to § 2422(b)*, 40 Seton Hall L. Rev. 691 (2010); Korey J. Christensen, Note, *Reforming Attempt Liability Under § 2422(b): An Insubstantial Step Back from* United States v. Rothenberg, 61 Duke L. J. 693 (2011); Bridge M. Boggess, *Attempted Enticement of a Minor: No Place for Pedophiles to Hide Under 18 U.S.C. § 2422(b)*, 72 Mo. L. Rev. 909 (2007).

III. THE FOURTH CIRCUIT ERRED IN CONSTRUING "SEXUAL ACTIVITY" IN 18 U.S.C. § 2422(b) TO MEAN ANY INDIVIDUAL'S "ACTIVE PURSUIT OF LIBIDINAL GRATIFICATION."

The Fourth Circuit erred in interpreting the plain meaning of "sexual activity" in § 2422(b). The term plainly means physical contact between two people. Even if the term's meaning were not plain, the legislative history would not support the Fourth Circuit's expansive interpretation of the term.

First, the Fourth Circuit has erred in determining the plain meaning of "sexual activity." As noted above, *Black's Law* defines the exact term "sexual activity" as either "[s]exual intercourse" or as "[p]hysical sexual activity" that

usually involves "the touching of another's breast's, vagina, penis or anus." *Black's Law Dictionary* 1499 (9th ed. 2009) (emphases added). The *Black's Law* definition then states, "Both persons (the toucher and the person touched) are said to engage in sexual relations. – Also termed *sexual activity*." *Id.* (emphasis added). Applied to § 2422(b), the *Black's Law* definition would not support a conviction based on the single Internet chat and phone call Fugit had, because he did not touch anybody or attempt to touch anybody.

The Seventh Circuit's interpretation of "sexual activity" is very similar to the *Black's Law* definition. Concluding that Congress used "sexual activity" and "sexual act" synonymously, the Seventh Circuit used the statutory definition of "sexual act," which is "the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years." 18 U.S.C. § 2246(2)(D) (2006) (quoted in *Taylor*, 640 F.3d at 257). Under that definition, Fugit again could not be convicted.

Canons of statutory construction also contradict the Fourth Circuit's interpretation. For starters, the Fourth Circuit overlooked the importance of interpreting phrases in a statute as a whole. *See, e.g., Boston Duck Tours, LP v. Super Duck Tours, LLC*, 531 F.3d 1, 18-19 (1st Cir. 2008) (stating that a "complete phrase may signify something different than the sum of its parts" and that "[t]he district court's decision to focus exclusively on the individual elements of the phrase, and each word's respective dictionary definition, removed the inquiry from its proper context and tainted the overall analysis").

The Fourth Circuit also overlooked the *ejusdem generis* and *noscitur a sociis* canons. Because § 2422(b) prohibits the enticement of minors "to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense," the specific prohibition of "prostitution" informs the interpretation of "sexual activity." Interpreting "sexual activity" as a single individual's active pursuit of libidinal gratification through speech, as the Fourth Circuit has done, is not akin to prostitution. *See Norfolk and Western Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 129 (1991) ("When a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration."); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) ("The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings to avoid the giving of unintended breadth.").

The Fourth Circuit also overlooked the principle that a limiting clause should ordinarily be read as modifying only the phrase that precedes it. *See, e.g.*, *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) ("[A] limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows."). Here, in § 2422(b), the phrase "to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense" follows the phrase "any individual who has not attained the age of 18 years." Therefore, § 2422(b) should be read as prohibiting the enticement of a minor from engaging in a sexual activity for which that minor could be charged with a criminal offense. The

Fourth Circuit's interpretation, however, reaches activity (being questioned online and on the telephone) for which a minor could not be charged with a crime.

The Fourth Circuit's interpretation of § 2422(b) also ignores the rule that "a statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004). Here, by defining "sexual activity" as the "'active pursuit of libidinal gratification' by any individual," the Fourth Circuit fails to give effect to the final "attempts to do so" clause of § 2422(b). If any individual's active pursuit of libidinal gratification is enough to satisfy the statute, then the "attempts to do so" clause is superfluous. The "pursuit" of one's own libidinal gratification is synonymous with "attempts to do so," making the "attempts" clause superfluous. As the Seventh Circuit reasoned in *Gladish*, a broad interpretation such as the Fourth Circuit's allows prosecution of someone who only "intended to obtain sexual satisfaction vicariously" and "would abolish any requirement of a substantial step." 536 F.3d at 650. The Seventh Circuit concluded, "Treating speech (even obscene speech) as the 'substantial step' would abolish any requirement of a substantial step." *Id.*

In addition to overlooking *Black's Law*, the statutory definition of "sexual act," and canons of statutory construction, the Fourth Circuit's interpretation of "sexual activity" is inconsistent with how some state statutes define the term. *See* Ark. Code Ann. § 5-71-101 (2012) (defining "deviate sexual activity" as an act of sexual gratification involving "[t]he penetration, however slight, of the anus or

mouth of one (1) person by the penis of another person" or "[t]he penetration, however, slight, of the vagina or anus of one (1) person by any body member or foreign instrument manipulated by another person"); Fla. Stat. § 800.04(1)(a) (2008) ("sexual activity" means "the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object"); Ind. Code Ann. § 35-42-4-13(b) (2008) ("sexual activity" defined as "sexual intercourse, deviate sexual conduct, or the fondling or touching of the buttocks, genitals, or female breasts"); Ohio Rev. Code Ann. § 2907.01 (West 2008) (stating that sexual activity means sexual conduct or sexual contact, which includes "any touching of an erogenous zone of another").

Finally as to plain meaning, the Fourth Circuit's interpretation of "sexual activity" was not proposed by the government, which relied on dictionary definitions of "sexual" alone and argued that the court did "not ultimately have to settle on a comprehensive definition for § 2422(b)." U.S. 4th Cir. Br. at 32-33, 51. For all these reasons, the Fourth Circuit erred in its plain meaning analysis. The term "sexual activity" in § 2422(b) plainly requires physical contact between the defendant and a minor or an attempt at physical contact.

Second, even if the meaning of "sexual activity" were not plain, the legislative history would not support the expansive definition created by the Fourth Circuit. The Fourth Circuit reasoned that "[t]he primary evil that Congress meant to avert by enacting § 2422(b) was the psychological sexualization of children." *Fugit*, 703 F.3d at 255. The court cited no authority for its "psychological sexualization"

reasoning, *id.*, and a review of legislative history shows that Congress rejected the expansive coverage the Fourth Circuit gives § 2422(b).

Section 2422(b) stems from the Mann Act, in which Congress sought to prohibit the merchandising and interstate transportation of young women for sexual intercourse and prostitution. *Hoke v. United States*, 227 U.S. 308, 322-23 (1913); *United States v. Nielsen*, 694 F.3d 1032, 1036 n.4 (9th Cir. 2012) ("The two subsections of § 2422(b) share a common lineage in the Mann Act of 1910, and they are nearly identical in wording, except that § 2422(b) specifically addresses minors."); *United States v. Laureys*, 653 F.3d 27, 41 (D.C. Cir. 2011) ("The modern enticement statute [§ 2422(b)] traces its origin to the Mann Act of 1910"). There is a significant difference between "the psychological sexualization" of children through speech and the merchandising and transporting of children for sexual intercourse and prostitution that Congress targeted in the Mann Act.

In the Telecommunications Act of 1996, Congress amended § 2422 to include subsection (b). Pub. L. No. 104-104, 110 Stat. 56 (codified as amended at 18 U.S.C. § 2422(b)) (1996). From then until 1998, § 2422(a) used the term "sexual activity" while § 2422(b) used the term "sexual act," though the two subsections were otherwise very similar. In 1998, as part of the Child Protection and Sexual Predator Punishment Act of 1998, Congress changed "sexual act" in § 2422(b) to "sexual activity," while keeping the term "sexual activity" in § 2422(a). Pub. L. No. 105-314, 112 Stat. 2974 (1998). Committee reports used the two terms interchangeably. H.R. Rep. No. 105-557, at 10, 20 (1998). This history supports the

Seventh Circuit's conclusion that "sexual activity" should be construed as synonymous with "sexual act" and thereby as requiring intentional touching, not through the clothing, of the genitalia of another person.

Moreover, in 1998, Congress also rejected a proposed third subsection that would have greatly broadened the scope of § 2422. The proposed subsection (c) would have prohibited predators from "knowingly . . . contact[ing] an individual [under the age of 18] for the purposes of engaging in any sexual activity." H.R. 3494, 105th Congress § 2422(c) (as reported in H.R. Rep. No. 105-557 at 2). The goal of the new subsection was described as "mak[ing] sure that when there is contact made over the Internet for the first time by a predator . . . with a child, with the intent to engage in sexual activity, whatever that contact is, as long as the intent is there to engage in that activity, he can be prosecuted for that crime." 144 Cong. Rec. H4497 (daily ed. June 11, 1998) (statement by Rep. McCollum).

The Senate removed proposed subsection (c). Senator Leahy explained the decision to remove the proposed subsection:

> H.R. 3494 would make it a crime . . . to do nothing more than "contact" a minor, or even just attempt to "contact" a minor, for the purposes of engaging in sexual activity. This provision . . . would be extremely difficult to enforce and would invite court challenges . . . . In criminal law terms, the act of making contact is not very far along the spectrum of an overt criminal act. Targeting "attempts" to make contact would be even more like prosecuting a thought crime.

144 Cong. Rec. S12263 (Oct. 9, 1998). The Fourth Circuit's broad interpretation of the "sexual activity" element therefore might have had some support in the rejected subsection (c), but it is not supported by § 2422(b) itself.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN J. KORZEN
Counsel for Timothy Andrew Fugit

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ly meets" rational basis scrutiny); *Vongxay*, 594 F.3d at 1114, 1118–19 (following *Lewis* post-*Heller* to hold that application of § 922(g)(1) to a felon with only nonviolent prior convictions satisfies rational basis review). Accordingly, Pruess' equal protection challenge also fails.

IV.

Because we find each of Pruess' claims on appeal to be without merit, we affirm the judgment of the district court.

AFFIRMED.

UNITED STATES of America, Plaintiff–Appellee,

v.

Timothy Andrew FUGIT, Defendant–Appellant.

No. 11–6741.

United States Court of Appeals, Fourth Circuit.

Argued: Oct. 25, 2012.

Decided: Dec. 31, 2012.

Background: Following affirmance on direct appeal of his convictions for distributing child pornography and attempted inducement of sexual activity of a minor, 296 Fed.Appx. 311, he moved to vacate. The United States District Court for the Eastern District of Virginia, Jerome B. Friedman, Senior District Judge, denied the motion. Defendant appealed.

Holdings: The Court of Appeals, Wilkinson, Circuit Judge, held that:

(1) interpersonal physical contact was not a requirement of the sexual activity element of the crime of inducement of sexual activity of a minor;

(2) court was not limited to defendant's stipulated conduct, in determining defendant's claim of actual innocence;

(3) evidence was sufficient to support conviction for attempted inducement of sexual activity of a minor; and

(4) defendant was not deprived of effective assistance of counsel in connection with his guilty plea.

Affirmed.

1. Criminal Law ⇐1437, 1438

A procedural default of a claim on a motion to vacate may be excused in two circumstances: where a person attacking his conviction can establish (1) that he is actually innocent or (2) cause for the default and prejudice resulting therefrom. 28 U.S.C.A. § 2255.

2. Infants ⇐1584

The offense of inducement of sexual activity of a minor comprises four elements: (1) use of a facility of interstate commerce, (2) to knowingly persuade, induce, entice, or coerce, (3) a person who is younger than 18 years old, (4) to engage in an illegal sexual activity. 18 U.S.C.A. § 2422(b).

3. Infants ⇐1584

Interpersonal physical contact was not a requirement of the sexual activity element of the crime of inducement of sexual activity of a minor; plain meaning of term "sexual activity" extended beyond such physical contact, and comprised conduct connected with the active pursuit of libidinal gratification on the part of any individual. 18 U.S.C.A. § 2422(b).

4. Statutes ⇐1079

Statutory interpretation necessarily begins with an analysis of the language of the statute.

5. Statutes ⇐1123

When analyzing the meaning of an undefined statutory term, a court must first determine whether the language at issue has a plain and unambiguous meaning.

6. Infants ⇐1584, 1591

Purpose of criminal statute prohibiting inducement of sexual activity of a minor is to protect children from the act of solicitation itself. 18 U.S.C.A. § 2422(b).

7. Infants ⇐1584

By forbidding the knowing persuasion, inducement, enticement, or coercion of a minor, the statute prohibiting inducement of sexual activity of a minor criminalizes an intentional attempt to achieve a mental state, a minor's assent, regardless of the accused's intentions concerning the actual consummation of sexual activities with the minor. 18 U.S.C.A. § 2422(b).

8. Criminal Law ⇐1437

To prove actual innocence, as may excuse the procedural default of a claim on a motion to vacate, the defendant must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him. 18 U.S.C.A. § 2422(b).

9. Criminal Law ⇐1437

Court was not limited to stipulated conduct of defendant who pled guilty to attempted inducement of sexual activity of a minor, in determining defendant's claim of actual innocence, as required to excuse procedural default of claim on motion to vacate; rather, all admissible evidence could be considered. 18 U.S.C.A. § 2422(b); 28 U.S.C.A. § 2255.

10. Criminal Law ⇐1437

Because acceptance of a claim of actual innocence from someone previously adjudicated guilty, as will excuse procedural default of a claim on a motion to vacate, represents an extraordinary form of relief, the scope of pertinent evidence is expansive. 28 U.S.C.A. § 2255.

11. Infants ⇐1591

Telecommunications ⇐1350

Evidence was sufficient to support defendant's conviction upon a guilty plea for attempted inducement of sexual activity of a minor; defendant conceded the conduct set forth in the presentence investigation report (PSR), which described how defendant engaged in online chat with 11-year-old victim, pretending to befriend her as a girl and asking about girl's sexual activity, and later telephoning the victim and asking her to engage in sexual activity. 18 U.S.C.A. § 2422(b).

12. Criminal Law ⇐1881

In order to establish ineffective assistance under the Sixth Amendment, a person must show (1) that his attorney's performance fell below an objective standard of reasonableness, and (2) that he experienced prejudice as a result, meaning that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. U.S.C.A. Const.Amend. 6.

13. Criminal Law ⇐1920

With respect to the prejudice prong of an ineffective assistance of counsel claim, where a conviction is based upon a guilty plea, a person must demonstrate a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. U.S.C.A. Const.Amend. 6.

14. Criminal Law ⇐1890, 1909

Just as it is reasonable for counsel not to raise unmeritorious claims, in the context of an ineffective assistance of counsel claim, it is equally reasonable for counsel not to advise clients of unmeritorious defenses. U.S.C.A. Const.Amend. 6.

15. Criminal Law ⇐1920

In deciding the prejudice prong of an ineffective assistance of counsel claim when the defendant has pleaded guilty, what matters is whether proceeding to trial would have been objectively reasonable in light of all of the facts. U.S.C.A. Const. Amend. 6.

16. Criminal Law ⇐1920

Defense counsel's alleged deficient performance in informing defendant that he could not enter a split plea of guilty to distributing child pornography and not guilty to attempted inducement of sexual activity of a minor, and allegedly informing defendant that if he pleaded guilty to both counts, his sentences would run concurrently, did not prejudice defendant, and thus, defendant could not show that he was deprived of effective assistance of counsel in connection with his guilty plea to the inducement offense; defendant's decision to proceed to trial on the inducement offense would not have been objectively reasonable, in light of overwhelming evidence of defendant's guilt and likelihood that defendant would have opened himself up to additional charges and a longer sentence. U.S.C.A. Const.Amend. 6; 18 U.S.C.A. § 2422(b).

ARGUED: Mary Beth Usher, Wake Forest University School of Law, Winston–Salem, North Carolina, for Appellant. Richard Daniel Cooke, Office of the United States Attorney, Richmond, Virginia, for Appellee. ON BRIEF: John J. Korzen, Director, Melissa Evett, Third Year Law Student, Wake Forest University School of Law, Appellate Advocacy Clinic, Winston–Salem, North Carolina, for Appellant. Neil H. MacBride, United States Attorney, Alexandria, Virginia, Lisa R. McKeel, Assistant United States Attorney, Office of the United States Attorney, Newport News, Virginia, for Appellee.

Before TRAXLER, Chief Judge, and WILKINSON and AGEE, Circuit Judges.

Affirmed by published opinion. Judge WILKINSON wrote the opinion, in which Chief Judge TRAXLER and Judge AGEE joined.

OPINION

WILKINSON, Circuit Judge:

Timothy Andrew Fugit moves for post-conviction relief in connection with his guilty plea for enticing or attempting to entice a minor to engage in illegal sexual activity, in violation of 18 U.S.C. § 2422(b). The district court denied Fugit's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. For the reasons that follow, we affirm the judgment.

I.

A grand jury in the Eastern District of Virginia returned a two-count indictment against Fugit on May 24, 2007. Count One charged him with distributing child pornography, in violation of 18 U.S.C. § 2252A(a)(2) and (b)(1). Count Two charged him with violating 18 U.S.C. § 2422(b), which provides, in pertinent part:

> Whoever, using the mail or any facility or means of interstate or foreign commerce, ... knowingly persuades, in-

> duces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

Count Two alone is at issue here.

On the advice of counsel, Fugit pleaded guilty to both counts on July 20, 2007. Although Fugit and the government did not enter a formal plea agreement, the parties agreed to a stipulated "Statement of Facts." This document described the following foundations for the charges.

On November 28, 2005, while claiming to be a young girl named "Kimberly," Fugit held a conversation in an internet chat room with an eleven-year-old girl, "Jane Doe # 2." He asked her questions regarding her breasts and genitals, her underwear, slumber parties, and whether she had ever appeared naked in front of men. He also obtained her telephone number. Pretending to be Kimberly's father, Fugit telephoned Jane Doe # 2 shortly thereafter and engaged her "in an inappropriate sexual conversation." He asked whether she had "seen a grown man naked," whether "she minded if he came in to check on her while she was naked," whether "she would mind seeing him naked," and whether she would "get naked for him." Tracking the text of 18 U.S.C. § 2422(b), the Statement of Facts concluded its discussion of this incident by noting that Fugit "admits that he knowingly persuaded, induced, enticed or coerced Jane Doe # 2 to engage in a sexual activity, to wit; Taking Indecent Liberties with Children, in violation of § 18.2-370 of the Code of Virginia 1950, as amended, for which he could be charged."

Likewise, on December 12, 2005, once more posing as "Kimberly," Fugit chatted online with a ten-year-old girl, "Jane Doe # 1," and obtained her telephone number. Approximately five minutes later, he telephoned her, pretended to be Kimberly's father, and engaged her "in an inappropriate sexual conversation." The Statement of Facts further described how this latter incident precipitated an extensive police investigation. During the execution of a search warrant at his residence, Fugit told police that he had "attempted to contact children on the computer and telephone" and that an internet account of his had been "bumped" several times because of inappropriate contact with minors. Law enforcement discovered, "among other things" on Fugit's computer, that he had once distributed a child pornography image over e-mail.

Additionally, at his sentencing hearing, Fugit effectively admitted the facts contained in the pre-sentence report (PSR) prepared by the probation office. Specifically, he contested only one allegation, which is not at issue here, and affirmed that the remainder of the factual background was error-free. The PSR revealed a great deal of information beyond that contained in the Statement of Facts.

Apparently referencing the incidents discussed above, the PSR described how Fugit, in claiming to be Kimberly's father, asked Jane Doe # 2 "to masturbate and take her shirt off" and repeatedly demanded that she remove her pants. And with regard to Jane Doe # 1, among other statements, Fugit "informed her of the rules he would impose" if she spent the night at his house, "instructed her to call him 'Daddy,'" and stated that he "would perform a 'finger test' on [her] by rubbing her all over with his finger." Additionally, he said "that he would allow her to touch his penis" and asked her "to take her clothes off."

Moreover, the PSR made clear that the incidents involving Jane Does # 1 and # 2 were anything but isolated occurrences. Investigation revealed that Fugit had participated in internet chats with 129 individuals who appeared to be children, twelve of whom police confirmed were indeed minors between nine and twelve years old. During these dozen conversations, which occurred between March 2005 and January 2006, Fugit "always represented himself to be a child and often asked inappropriate questions," including

> the child's breast size, whether or not the child had pubic hair, whether or not the child slept in the nude, whether or not the child engaged in masturbation, what type of underwear the child wore, and whether or not the child had been naked in front of a member of the opposite sex.

As with Jane Does # 1 and # 2, Fugit often proceeded to engage these children in telephone conversations involving "inappropriate sexual comments."

Finally, the PSR disclosed that 289 still images and twenty-four videos of child pornography—at least some of which were extremely graphic—were found on Fugit's computers. In addition to the single occasion described in the Statement of Facts, the PSR revealed that law enforcement identified forty-three instances of child pornography distribution between September 2004 and January 2006, some involving multiple images.

Following a hearing on December 19, 2007, the district court sentenced Fugit to 240 months of imprisonment on Count One (the statutory maximum) and seventy months of imprisonment on Count Two, to be served consecutively, yielding a sentence of 310 months from a guideline range of 292 to 365 months. Represented by the same counsel as during the initial plea proceedings, Fugit appealed only his sentence, and this court affirmed the judgment of the district court. *United States v. Fugit*, 296 Fed.Appx. 311 (4th Cir.2008) (per curiam).

On October 1, 2009, Fugit filed a motion for post-conviction relief pursuant to 28 U.S.C. § 2255. He contested his convictions on ten grounds. The district court denied the motion in its entirety, rejecting each of Fugit's claims on the merits and also seeming to find that several were procedurally defaulted. This court granted a certificate of appealability on the following issues, which relate to Count Two only: (1) "whether Fugit's stipulated conduct constituted attempted inducement of 'sexual activity' of a minor within the meaning of 18 U.S.C. § 2422(b)" and (2) "whether Fugit's counsel rendered ineffective assistance by advising him to stipulate to the inducement of 'sexual activity' and guilt under 18 U.S.C. § 2422(b)."

II.

We underscore at the outset of our review the interest of the criminal justice system in the finality of convictions, an interest repeatedly confirmed the Supreme Court. *See, e.g., McCleskey v. Zant*, 499 U.S. 467, 492–93, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991); *Henderson v. Kibbe*, 431 U.S. 145, 154 n. 13, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977). "The historical evidence demonstrates that the purposes of the writ [of habeas corpus], at the time of the adoption of the Constitution, were tempered by a due regard for the finality of the judgment of the committing court." *Schneckloth v. Bustamonte*, 412 U.S. 218, 256, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (Powell, J., concurring). Relitigation of a conviction is a rear-view mirror, while a respect for finality encourages those in custody to contemplate the future prospect of "becoming a constructive citizen." *Id.* at 262, 93 S.Ct. 2041.

The Supreme Court has declared, moreover, that "the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas." *United States v. Timmreck*, 441 U.S. 780, 784, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979). In explaining this corollary to the finality principle, the Court remarked:

> Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas.

Id. (quoting *United States v. Smith*, 440 F.2d 521, 528–29 (7th Cir.1971) (Stevens, J., dissenting)). In addition to emphasizing the sheer volume of guilty pleas, the Supreme Court has located independent value in the fact that such a plea "usually rest[s] ... on a defendant's profession of guilt in open court," *United States v. Dominguez Benitez*, 542 U.S. 74, 82–83, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004), and allows him to demonstrate "that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary," *Brady v. United States*, 397 U.S. 742, 753, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). On the strength of these rationales, this circuit has long refused to permit the casual withdrawal of guilty pleas. *See, e.g., United States v. Lambey*, 974 F.2d 1389, 1394 (4th Cir.1992) (en banc).

Though high, the bar of finality is not insurmountable, even in the guilty plea context. It bears emphasis, however, that allowing a person to abrogate his guilty plea on collateral attack represents a rare exception to the rule of finality, and we proceed to review Fugit's claims with this foundational principle in mind.

III.

Fugit's primary contention is that the district court erred in interpreting 18 U.S.C. § 2422(b), the statute underlying his conviction on Count Two. The government argues, however, that the doctrine of procedural default bars this claim because Fugit failed to raise it during his initial plea proceedings or on direct appeal. *See Massaro v. United States*, 538 U.S. 500, 504, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003) (citing *United States v. Frady*, 456 U.S. 152, 167–68, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982)). This doctrine, too, rests on the law's basic interest in finality. *Id.* ("The procedural-default rule is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments.").

Fugit did not make the statutory argument he now presses during his initial plea proceedings before the district court, and although he "contested his sentence on appeal, [he] did not challenge the validity of his plea." *Bousley v. United States*, 523 U.S. 614, 621, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). It would appear, therefore, that Fugit has procedurally defaulted this claim. *See id.*

[1] A procedural default, however, may be excused in two circumstances: where a person attacking his conviction can establish (1) that he is "actually innocent" or (2) "cause" for the default and "prejudice" resulting therefrom. *Id.* at 622, 118 S.Ct. 1604. While a successful showing on either actual innocence or cause and prejudice would suffice to excuse the default, Fugit contends that he can accomplish

both. We consider Fugit's actual innocence claim first—an analysis that, incidentally, requires us to resolve the underlying statutory dispute.

[2] As outlined above, 18 U.S.C. § 2422(b) comprises four elements: "(1) use of a facility of interstate commerce; (2) to knowingly persuade, induce, entice, or coerce; (3) a person who is younger than eighteen; (4) to engage in an illegal sexual activity." *United States v. Kaye*, 451 F.Supp.2d 775, 782 (E.D.Va.2006). Fugit's claim of actual innocence focuses exclusively on the "sexual activity" component of the fourth element. He contests neither the other three elements nor the illegality component of the fourth, effectively conceding that his behavior violated § 18.2-370 of the Code of Virginia, which prohibits taking indecent liberties with children. Fugit acknowledges that his behavior was—to put it mildly—"reprehensible." Nevertheless, he argues that the phrase "sexual activity" in § 2422(b) incorporates an irreducible minimum of interpersonal physical contact—and that, because the relevant interactions with his victims neither included nor referenced such contact, he cannot have been guilty of violating the statute.

We first interpret the phrase "sexual activity" as used in § 2422(b) and then proceed to apply that interpretation to Fugit's actual innocence claim.

A.

[3] For the reasons that follow, we hold that interpersonal physical contact is not a requirement of § 2422(b)'s "sexual activity" element.

[4] "Statutory interpretation necessarily begins with an analysis of the language of the statute." *Chris v. Tenet*, 221 F.3d 648, 651 (4th Cir.2000). As far as the text of § 2422(b) is concerned, Fugit appears to have pulled his proposed interpersonal physical contact requirement out of a hat. The statute is simply not framed in the terms for which he contends: it mentions nothing about physical contact. In fact, it does not expressly demarcate the meaning of "sexual activity" in any way, instead leaving the term undefined. By contrast, where similar statutory terms were meant to encompass only a specific subset of conduct, Congress took care to define them explicitly for purposes of the sections or chapters in which they are found. *See, e.g.*, 18 U.S.C. § 2246(2) (defining "sexual act"); *id.* § 2246(3) (defining "sexual contact"); *id.* § 2256(2) (defining "sexually explicit conduct"); *id.* § 2423(f) (defining "illicit sexual conduct").

[5] When analyzing the meaning of an undefined statutory term, "we must first 'determine whether the language at issue has a plain and unambiguous meaning.'" *Chris*, 221 F.3d at 651 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997)). We think the meaning of "sexual activity" in § 2422(b) is indeed plain and that this meaning extends beyond interpersonal physical contact.

This court has long consulted dictionaries of common usage in order to establish the plain meaning of disputed statutory language. *See Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Allen*, 152 F.3d 283, 289 (4th Cir.1998). In determining the meaning of "sexual," we find instructive a definition from Webster's: "of or relating to the sphere of behavior associated with libidinal gratification." *Webster's New International Dictionary* 2082 (3d ed. 1993). This court has previously relied on this very definition in a related context. *See United States v. Diaz-Ibarra*, 522 F.3d 343, 349 (4th Cir. 2008) (interpreting the phrase "sexual abuse of a minor" for purposes of sentenc-

ing enhancement in U.S. Sentencing Guidelines Manual § 2L1.2). Likewise, we find the most pertinent definition of "activity" to be "an occupation, pursuit, or recreation in which a person is active." *Webster's*, *supra*, at 22.

Thus, as a matter of plain meaning, the phrase "sexual activity" as used in § 2422(b) comprises conduct connected with the "active pursuit of libidinal gratification" on the part of any individual. The fact that such conduct need not involve interpersonal physical contact is self-evident. *See Diaz-Ibarra*, 522 F.3d at 351–52 (concluding that "'sexual abuse of a minor' means the 'perpetrator's physical *or nonphysical* misuse or maltreatment of a minor for a purpose associated with sexual gratification'" (emphasis added)).

[6, 7] This meaning of the "sexual activity" element is not only plain; it also renders the statutory scheme coherent as a whole. This court has made clear that § 2422(b) "was designed to protect children from the act of solicitation itself." *United States v. Engle*, 676 F.3d 405, 419 (4th Cir.2012) (quoting *United States v. Hughes*, 632 F.3d 956, 961 (6th Cir.2011), *cert. denied*, — U.S. —, 131 S.Ct. 2975, 180 L.Ed.2d 257 (2011)). Consequently, by forbidding the knowing persuasion, inducement, enticement, or coercion of a minor, the statute "criminalizes an intentional attempt to achieve a *mental* state—a minor's assent—regardless of the accused's intentions concerning the actual consummation of sexual activities with the minor." *Id.* (quoting *United States v. Berk*, 652 F.3d 132, 140 (1st Cir.2011)). The primary evil that Congress meant to avert by enacting § 2422(b) was the psychological sexualization of children, and this evil can surely obtain in situations where the contemplated conduct does not involve interpersonal physical contact.

We cannot accept Fugit's contention that absent an interpersonal physical contact requirement, § 2422(b) becomes a trap capable of snaring all sorts of innocent behavior. For several reasons, our interpretation of the term "sexual activity" is hardly open-ended. First, wide swaths of behavior simply cannot be described as "sexual activity": indeed, the overwhelming preponderance of human interaction does not involve the "active pursuit of libidinal gratification" in any minimally tenable way.

Second, § 2422(b) concerns only conduct that is already criminally prohibited. That is, § 2422(b) does not criminalize enticement of "sexual activity," full stop; instead, it forbids enticement of "sexual activity *for which any person can be charged with a criminal offense*." The latter category is considerably narrower than the former. As a general matter, conduct that is innocuous, ambiguous, or merely flirtatious is not criminal and thus not subject to prosecution under § 2422(b).

Third, § 2422(b) addresses only behavior involving children. And there exists, of course, a vast range of everyday adult-child interactions that are neither remotely erotic nor independently illegal—from the salutary mentoring of teachers, coaches, and counselors to the unintentional jostling between strangers traversing a crowded city sidewalk.

Finally, we believe that the Seventh Circuit's decision in *United States v. Taylor*, 640 F.3d 255 (7th Cir.2011), upon which Fugit places great weight, was mistaken. The *Taylor* court held that the phrase "sexual activity" in § 2422(b) is synonymous with the phrase "sexual act," as defined in 18 U.S.C. § 2246(2). *Id.* at 259–60. That complex provision defines "sexual act" to require not only interpersonal physical contact but interpersonal physical contact involving the genitalia or anus—

and, for persons who are sixteen or older, requires either oral sex or actual penetration of the genital or anal opening.

We decline *Taylor*'s invitation to cut and paste this restrictive definition into § 2422(b) because doing so would contravene express statutory text. Section 2246 explicitly limits the definitions provided therein to the chapter in which it resides. Specifically, the very first words of the section are "[a]s used in this chapter" (with the various definitions following), and the section's title is "[d]efinitions for chapter." Whereas § 2246 appears in Chapter 109A of Title 18, § 2422(b) is situated in an entirely different location, Chapter 117. Simply put, we find "no indication that Congress intended to import the definitions of chapter 109A to [another] chapter." *United States v. Sonnenberg*, 556 F.3d 667, 670 (8th Cir.2009).

For the foregoing reasons, we hold that the phrase "sexual activity" in § 2422(b) denotes conduct connected with the "active pursuit of libidinal gratification" on the part of any individual—nothing more, nothing less—and, therefore, does not incorporate an invariable requirement of interpersonal physical contact.

B.

[8] Having thus determined the interpretation of § 2422(b)'s "sexual activity" element, we must analyze whether the conduct at issue in this case supports Fugit's claim of actual innocence. In order to succeed, Fugit "must demonstrate that, 'in light of all the evidence,' 'it is more likely than not that no reasonable juror would have convicted him.'" *Bousley*, 523 U.S. at 623, 118 S.Ct. 1604 (quoting *Schlup v. Delo*, 513 U.S. 298, 327–28, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995)).

1.

[9] At the threshold of the actual innocence inquiry, the parties spar over what universe of facts this court may take into account. Fugit asserts that this universe is small and strictly bounded. Invoking the precise text of the certificate of appealability, Fugit contends that our review is limited to whether his "*stipulated conduct* constituted attempted inducement of 'sexual activity' of a minor within the meaning of 18 U.S.C. § 2422(b)." He further argues that "stipulated conduct" refers only to the Statement of Facts to which he conceded as part of his guilty plea.

[10] For several reasons, we think that the range of relevant conduct is significantly broader—even assuming that Fugit is correct that the phrase "stipulated conduct" in the certificate of appealability denotes only the conduct discussed in the Statement of Facts. We are guided, first, by the Supreme Court's clear instruction that, because acceptance of a claim of actual innocence from someone previously adjudicated guilty represents an extraordinary form of relief, the scope of pertinent evidence is expansive. *Schlup's* requirement that a person prove actual innocence "in light of *all* the evidence" points to this principle, 513 U.S. at 328, 115 S.Ct. 851 (emphasis added), and in *Bousley*, the Court made it explicit:

> It is important to note ... that "actual innocence" means factual innocence, not mere legal insufficiency. In other words, the Government is not limited to the existing record to rebut any showing that petitioner might make ... [and may rely on] any admissible evidence of petitioner's guilt even if that evidence was not presented during petitioner's plea colloquy....

523 U.S. at 623–24, 118 S.Ct. 1604.

Moreover, the Supreme Court has specifically linked the notion that actual inno-

cence claims must surmount a high hurdle to the systemic interest in finality. *See, e.g., Schlup,* 513 U.S. at 324, 115 S.Ct. 851 (describing actual innocence jurisprudence as "seek[ing] to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case"); *Sawyer v. Whitley,* 505 U.S. 333, 345, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992) ("[P]etitioner's standard [for actual innocence claims] would so broaden the inquiry as to make it anything but a 'narrow' exception to the principle of finality that we have previously described it to be."). Given the Court's pronouncements, we can only greet skeptically Fugit's effort to constrict the universe of evidence relevant to his belated actual innocence claim.

Second, *Gonzalez v. Thaler,* —— U.S. ——, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012), confirms the propriety of considering a broad base of evidence despite the arguably narrow span of the certificate of appealability. At issue in *Gonzalez* was 28 U.S.C. § 2253(c), which requires that a person seeking to challenge an adverse district court judgment on collateral attack obtain a certificate of appealability. Specifically, § 2253(c) provides:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

The *Gonzalez* Court determined that, whereas the baseline requirement of a certificate's existence in § 2253(c)(1) is jurisdictional in nature, the directive stated in subsection (c)(3) constitutes a mere "claim-processing rule" and is consequently non-jurisdictional. *Id.* at 648–49. "Accordingly," the Court decided, "a judge's failure to 'indicate' the requisite constitutional issue ... does not deprive a court of appeals of subject-matter jurisdiction to adjudicate [an] appeal." *Id.* at 646.

By holding that the specific wording of the certificate of appealability does not limit a court's ability to adjudicate a collateral attack as a matter of subject matter jurisdiction, *Gonzalez* directs the conclusion that the reference to "stipulated conduct" in the certificate does not constrain our consideration of Fugit's actual innocence claim in view of all of the evidence in the record. In light of *Bousley*'s unequivocal message that resolving such claims on an artificially restricted record would eviscerate the critical systemic interest in finality, we believe that we would be mistaken to confine our analysis to the stipulated Statement of Facts. *Gonzalez* confirms that we need not do so.

And third, to treat the certificate of appealability as circumscribing the permissible ambit of arguments offered by the government—as Fugit would have it—entirely upends congressional intent as to the nature of appellate review over collateral challenges to convictions. The Federal Rules of Appellate Procedure make manifest that while the convicted individual "cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)," a certificate "is not re-

quired when a state or its representative or the United States or its representative appeals." Fed. R.App. P. 22(b)(1), (3); *see also* Fed. R.App. P. 22 advisory committee's note. The fact that the government need not obtain a certificate of appealability at all strongly indicates that the function of the certificate is to restrain the appeal of insubstantial claims on collateral attack, not to restrict artificially the government's capacity to respond to them.

Although we thus decline to confine our review of Fugit's actual innocence claim to the Statement of Facts, we find it unnecessary to explore the outer parameters of permissible evidence. In particular, the facts set forth in the PSR stand on a different—and firmer—footing than does other potentially inculpatory evidence uncovered during the police investigation. As discussed above, *Bousley* speaks of "*admissible* evidence of petitioner's guilt." 523 U.S. at 624, 118 S.Ct. 1604 (emphasis added). Here, Fugit conceded the conduct discussed in the PSR in open court (besides one allegation upon which we do not rely), and the trial judge accordingly used those allegations as the basis for his sentencing calculations, which this court has affirmed. There is no need for us to address other evidence.

2.

With the boundaries of inquiry thus established, Fugit's actual innocence claim fails by a wide margin.

[11] Given the interpretation of § 2422(b)'s "sexual activity" element established above, Fugit falls far short of proving that "it is more likely than not that no reasonable juror would have convicted him" on Count Two, the § 2422(b) enticement charge. *Schlup*, 513 U.S. at 327, 115 S.Ct. 851. In fact, Fugit's conceded conduct so surely satisfies the "sexual activity" element that it is difficult to conceive of any reasonable juror *not* convicting him.

Count Two appears to have been based on Fugit's behavior toward Jane Doe # 2. The conduct described in the PSR with respect to this victim is condemnatory. Fugit tricked this eleven-year-old child into providing her telephone number during an online chat in which he pretended to befriend her as a girl named "Kimberly." During that chat, Fugit "inquired as to the child's breast size, her underwear, and whether or not she had been nude in front of boys." When he telephoned her, "[t]he victim asked to speak to Kimberly, however, the defendant refused and stated that he was Kimberly's father and needed to ask the victim some questions first." Later in the conversation, he "inquired as to where the victim's parents were and told her he wanted her to go to another room." Fugit thus attempted to lure this young girl away from her protectors in hopes of exploiting her undisturbed. The PSR further describes Fugit's telephone inquiries to Jane Doe # 2 "about her underwear and bras" and whether she "had seen other girls naked," had been "in a hot tub with other girls and boys," had "seen a grown man naked," and "would mind seeing him naked." Following these questions, Fugit requested that she remove her shirt and, on more than one occasion, demanded that she take off her pants as well. He also asked her to masturbate. That such conduct qualifies as involving the "active pursuit of libidinal gratification" on Fugit's part is beyond question.

Nor is the conduct disclosed in the Statement of Facts at all exonerative. To the contrary, that document described how Fugit baited two children into participating in "inappropriate sexual conversation[s]" and asked at least one a barrage of questions regarding her anatomy, underwear, and experiences, as well as whether

the two of them could be naked in front of each other. Engaging young girls in the kind of discussions described above plainly involves them in "sexual activity"—that is, the "active pursuit of libidinal gratification." The idea of an adult man behaving in such a manner is utterly unpersuasive of "actual innocence," and Fugit's procedural default of his statutory claim cannot be excused on this ground.

C.

Fugit maintains, however, that he can satisfy the second ground for excusing procedural default, cause and prejudice, by establishing ineffective assistance of counsel under the Sixth Amendment. *See Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) ("Ineffective assistance of counsel ... is cause for a procedural default."). As an initial matter, this court has agreed to consider a limited subset of Fugit's ineffective assistance claims, and there is some question as to whether those theories are sufficiently connected to the procedural default in order to excuse it. We conclude, though, that we need not consider Fugit's ineffective assistance arguments for this purpose at all, given the above disposition of the dispute over the meaning of § 2422(b)'s "sexual activity" element. That is, because we have decided that Fugit's statutory claim fails on the merits, whether that claim is defaulted has become irrelevant.

IV.

Moreover, Fugit's ineffective assistance arguments provide no substantive grounds for relief. The Supreme Court has made clear that ineffective assistance challenges brought under the aegis of § 2255 are not themselves susceptible to procedural default. *Massaro v. United States*, 538 U.S. 500, 503–04, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003). We do not think, however, that Fugit's ineffective assistance claims provide any independent basis for overturning his conviction on Count Two.

[12, 13] The framework governing this analysis is familiar. In order to establish ineffective assistance under the Sixth Amendment, a person must show (1) that his attorney's performance "fell below an objective standard of reasonableness" and (2) that he experienced prejudice as a result, meaning that there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A different inquiry is necessary with respect to the prejudice prong, however, where a conviction is based upon a guilty plea. In that situation, a person must demonstrate "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, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). In discussing "the importance of protecting the finality of convictions obtained through guilty pleas," the Supreme Court recently declared that "[s]urmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 1484–85, 176 L.Ed.2d 284 (2010).

A.

[14] As for *Strickland*'s first prong, Fugit argues that his counsel's advice to plead guilty to Count Two constituted deficient performance for two reasons. First, Fugit contends that his attorney failed to inform him of a critical defense—specifically, the argument that § 2422(b)'s "sexual activity" element includes an interpersonal physical contact requirement. Given our rejection of this defense above, we find

that the performance of Fugit's attorney did not fall below an objective standard of reasonableness on this ground. Just as "[i]t is certainly reasonable for counsel not to raise unmeritorious claims," *Truesdale v. Moore*, 142 F.3d 749, 756 (4th Cir.1998), it is equally reasonable for counsel not to advise clients of unmeritorious defenses.

Next, Fugit argues that his attorney performed deficiently by imparting erroneous advice regarding the plea process and its consequences. Specifically, Fugit contends that his attorney incorrectly informed him that he could not enter a "split plea" of guilty to Count One and not guilty to Count Two because both counts were presented in the same indictment. Fugit also contends that his attorney told him that if he pleaded guilty to both counts, his sentences would run concurrently (again because both counts were contained in a single indictment), whereas, in actuality, the sentencing court retained discretion to select either concurrent or consecutive sentences and, in fact, ordered the latter. While any such advice would have been erroneous, Fugit nonetheless fails to satisfy the prejudice prong of the *Lockhart* inquiry.

B.

[15] As outlined above, in order to prove prejudice in the guilty plea context, a person challenging his conviction must establish "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Lockhart*, 474 U.S. at 59, 106 S.Ct. 366. The Supreme Court has specified, furthermore, that such an individual "must convince the court" that such a decision "would have been rational under the circumstances." *Padilla*, 130 S.Ct. at 1485. The challenger's subjective preferences, therefore, are not dispositive; what matters is whether proceeding to trial would have been objectively reasonable in light of all of the facts. *See Pilla v. United States*, 668 F.3d 368, 373 (6th Cir.2012) ("The test is objective, not subjective....").

[16] Fugit falls far short of satisfying this standard. He insists that "the record is ... clear" that he "would not have pleaded guilty to Count Two but for trial counsel's erroneous advice." Even if this statement is subjectively true, however, the decision to go to trial would not have been objectively reasonable for the reasons discussed above. The evidence on Count Two was overwhelming. Fugit conceded to contacting a young girl over both the internet and telephone, lulling her into a false sense of security by lying about his identity, asking her a sustained series of totally inappropriate questions, and making numerous patently lewd comments—including soliciting her to undress and to masturbate. What is more, had Fugit proceeded to trial, he would have undoubtedly opened himself up to multiple additional charges relating to multiple other victims and to child pornography as well.

Fugit, in other words, was lucky to receive the deal that he did. Pleading guilty generally involves a conscious decision to accept both the benefits and burdens of a bargain. That decision may not be lightly undone by buyer's remorse on the part of one who has reaped advantage from the purchase. Fugit, consequently, cannot show that declining to plead guilty "would have been rational under the circumstances," *Padilla*, 130 S.Ct. at 1485, and his remaining ineffective assistance arguments thus fail for lack of prejudice. *See Pilla*, 668 F.3d at 373 (finding that proceeding to trial would have been irrational where defendant "faced overwhelming evidence of her guilt" and "had no rational defense, would have been convicted and

would have faced a longer term of incarceration").

V.

There are cases where the most learned doctrines of law match the most untutored lessons of common experience. This is one of those. There is no innocence here, save that of the child victims. Collateral review has nothing to correct.

The judgment is affirmed.

AFFIRMED.

Gregory BROWN, Petitioner–Appellant,

v.

Burl CAIN, Warden, Louisiana State Penitentiary, Respondent–Appellee.

No. 12–30207.

United States Court of Appeals, Fifth Circuit.

Sept. 24, 2012.

Sarah Lynn Ottinger, Cecelia Trenticosta, Capital Appeals Project, New Orleans, LA, for Petitioner–Appellant.

Monisa Leola Thompson, District Attorney's Office, Baton Rouge, LA, for Respondent–Appellee.

Appeal from the United States District Court for the Middle District of Louisiana. USDC No. 3:09–CV–924.

Prior report: 2012 WL 243338.

ORDER

LESLIE H. SOUTHWICK, Circuit Judge:

Gregory Brown, Louisiana prisoner # 293455, moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 application challenging his convictions for attempted second degree murder and armed robbery. He contends that the district court abused its discretion in failing to conduct an evidentiary hearing on his claims of juror misconduct, his claims based on *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and his claim that excessive security measures violated his right to a presumption of innocence. Brown also contends that the district court applied an incorrect standard in reviewing his ineffective assistance of counsel claims and that counsel was ineffective in failing to file a motion for severance.

To obtain a COA, Brown must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller–El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). If a district court dismisses a claim on the merits, the applicant must show that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) (internal quotation marks and citation omitted).

Brown has not met the requisite standard. *See Slack*, 529 U.S. at 484, 120 S.Ct. 1595. Brown abandons the following claims by failing to raise them in his COA brief before this court: (1) trial counsel rendered ineffective assistance by failing to: (a) object to erroneous jury instructions on the element of intent, (b) in-

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division

TIMOTHY ANDREW FUGIT,

Petitioner,

v.

Criminal Action No. 4:07cr65
Civil Action No. 4:09cv135

UNITED STATES OF AMERICA,

Respondent.

OPINION AND ORDER

Currently before the court is a motion filed *pro se* by defendant Timothy Andrew Fugit ("petitioner") pursuant to Title 28, United States Code, Section 2255, to vacate, set aside, or correct the sentence previously imposed upon him in this case (the "motion"). The motion has been fully briefed. As an initial matter, the court GRANTS the government's request to place petitioner's motion, memorandum of law, and exhibits under seal because petitioner failed to redact uniformly the name of a minor child. After examination of the briefs and the record, and for the reasons stated herein, the court has determined that an evidentiary hearing is necessary with respect to certain of the grounds alleged by petitioner, and that, in light of petitioner's claims of ineffective assistance of counsel, petitioner must retain or be appointed new counsel to assist him in connection with that hearing. All of petitioner's other grounds are DENIED.

PROCEDURAL HISTORY

A criminal complaint was filed against petitioner on December 22, 2006, alleging distribution of child pornography in violation of 18 U.S.C. §§ 2252A(a)(2)(A) and 2256. See Docket No. 1. On May 24, 2007, a grand jury returned an indictment against petitioner, charging

him with two counts: (1) distribution of child pornography in violation of 18 U.S.C. §§ 2252A(a)(2)(A) and (b)(1), and (2) coercion and enticement, in violation of 18 U.S.C. § 2422(b). See Docket No. 8. On July 20, 2007, petitioner pled guilty to both counts of the indictment without the benefit of a plea agreement. See Docket Nos. 12 (text-only entry) & 31 (official transcript). In connection with petitioner's plea colloquy on that date, the government indicated its intention to seek a statutory sentence enhancement on Count One on the basis of an alleged prior conviction pursuant to 18 U.S.C. § 2252A(b)(1), which would have increased petitioner's maximum possible term of imprisonment from twenty to forty years and his mandatory minimum term of imprisonment from five to fifteen years. The court discussed the issue on the record and confirmed with both petitioner's former counsel, James O. Broccoletti, and petitioner himself that they had discussed and understood the possible applicability, and effect, of that enhancement. See Transcript of Plea Proceedings at 4:16–7:2, United States v. Fugit, Crim. Action No. 4:07cr65 (E.D. Va. July 20, 2007) ("Plea Tr.").

Thereafter, however, the court committed two separate errors in conducting the remainder of petitioner's plea colloquy. First, in the course of reviewing the nature and elements of Count Two and its associated penalties, the court erroneously advised petitioner that "[t]he maximum possible penalty provided by law for [Count Two] [was] imprisonment for a period not to exceed 10 years and a fine not to exceed $250,000." Plea Tr. at 7:14–16. The version of 18 U.S.C. § 2422(b) in effect as of the date of petitioner's plea colloquy—and still in effect today—instead provided for a term of imprisonment of "not *less* than 10 years or for life" (emphasis added). The version in effect at the times petitioner committed the offenses (late 2005 and/or early 2006) provided for a term of imprisonment of "not less than 5 years and not more than 30 years." See

18 U.S.C. § 2422(b), amended by The Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, Title II, § 203, 120 Stat. 613. Constitutional Ex Post Facto clause considerations, of course, would have counseled applying the statute as it existed at the time of the offense. In either case, the court clearly erred.

The court also erred in advising petitioner of the maximum possible term of supervised release to which he could be sentenced for the offenses to which he was pleading guilty.

> THE COURT: Do you understand that there will be a period of supervised release in addition to any sentence imposed?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: The period of time under the statute to which you are pleading guilty with regard to Count 1 is not more than three years, but if [the aforementioned] enhancement applies, then it would be not more than five years. The period of time under the statute to which you are pleading guilty with regard to Count 2 is not more than three years. Your failure to abide by the conditions of supervised release may subject you to an additional period of confinement, not in excess of the total number of years of supervised release originally imposed upon you. Do you understand that?
>
> THE DEFENDANT: Yes, sir.

Plea Tr. at 8:23-9:12. The court should instead have advised petitioner that "the authorized term of supervised release . . . for any offense under section . . . 2252A . . . [or] 2422 . . . is any term of years not less than 5, or life." 18 U.S.C. § 3583(k). Petitioner executed a Statement of Facts in connection with his guilty plea—see Docket No. 13—as well as a Sentencing Procedures Order—see Docket No. 14—and the court accepted his guilty plea. His sentencing was continued pending the preparation of a presentence report ("PSR").

The petitioner's PSR was prepared by Amber D. Kidd, a United States Probation Officer of this court, on September 7, 2007. By letter dated November 15, 2007, petitioner's former

counsel advised the Probation Officer of several objections to the Probation Officer's proposed calculations in the PSR pursuant to the United States Sentencing Guidelines (the "Guidelines"), to wit; to (1) a two-level enhancement of petitioner's offense level for Count 1 for distribution of child pornography, (2) a two-level enhancement for the use of a computer, and (3) a five-level enhancement for engaging in a pattern of activity involving the sexual abuse or exploitation of a minor. See Docket No. 17. The letter also reflected petitioner's denial of, and objection to, the portion of paragraph 12 of the PSR stating that he told one of his victims that he would come to her house and kill her and her mother, as well as his objection to penile plethysmograph testing as a condition of supervised release. See id. On November 26, 2007, petitioner's former counsel filed a position paper on behalf of petitioner, reiterating the foregoing objections, noting an objection to the statutory sentence enhancement for an alleged prior conviction that had previously been discussed during the plea colloquy, moving for a downward departure or variance, and requesting a sentence of not more than ten years of imprisonment for petitioner. See Docket No. 18. On November 27, 2007, the government moved for a reduction of petitioner's offense level for acceptance of responsibility. See Docket No. 19. On that same date, the government also moved the court for leave to submit evidence under seal for *in camera* review in connection with sentencing—see Docket No. 20—which the court granted by Order dated December 10, 2007. See Docket No. 21. On December 12, 2007, the government filed a response opposing all of petitioner's objections--see Docket No. 22—as well as a position paper indicating that it had no objections to the PSR. See Docket No. 23. On December 13, 2007, the government filed an additional response opposing petitioner's motion for a downward departure or variance. See Docket No. 24. Although the PSR indicated that petitioner faced a term of "5 to

30 years" of imprisonment on Count Two and a term of supervised release up to "Life" on both Counts—PSR at 1; accord PSR ¶¶ 67, 69 & Worksheet D at 3, 4— no objection or mention was made prior to sentencing by either the government or petitioner with regard to the errors made by the court in the course of conducting petitioner's plea colloquy.

Petitioner's sentencing hearing took place on December 19, 2007. At the hearing, petitioner confirmed, under oath and on the record, that he had reviewed the presentence report and its addendum, that he had had adequate time to review it with his attorney, that, to his knowledge, it contained no errors other than those alleged in his attorney's submissions to the court, and that, with the exception of omitting certain aspects of his work for the United States Navy, it fully covered his background. Transcript of Sentencing Proceedings (Docket No. 32) at 4:13–5:9, United States v. Fugit, Crim. Action No. 4:07cr65 (E.D. Va. Dec. 19, 2007) ("Sent. Tr."). The court confirmed with both counsel on the record that the statutory sentence enhancement previously discussed during petitioner's plea colloquy did not apply because the "prior conviction" in state court in Roanoke, Virginia, on which that enhancement was predicated, was, in fact, part of the offense for which petitioner was being sentenced in this court. See id. at 5:10–20. After hearing testimony from petitioner's expert witness and the arguments of both counsel, the court overruled petitioner's objections to the offense level enhancements for distribution, the use of a computer, and petitioner's pattern of activity involving the sexual abuse or exploitation of minors. See id. at 32:2–34:14. The court noted that petitioner's aforementioned objection to, and partial denial of, the conduct described in paragraph 12 of the PSR would not affect his guideline calculations either way, and overruled his objection in light of the government's representation that the language at issue came from the statement of the victim

of the offense. See id. at 34:15–24. The court calculated petitioner's offense level to be 40, which, combined with his criminal history category of I, resulted in a guideline range of 292 to 365 months of imprisonment. See id. at 35:7–10. The court adopted the factual statements contained in the PSR as its findings of fact—see id. at 57:13–15 and heard witness testimony, as well as the arguments of both counsel regarding petitioner's motion for a downward departure or variance and the appropriate sentence. The government requested that petitioner be placed on supervised release for life. See id. at 78:5–7. At no point during the sentencing hearing did petitioner or petitioner's former counsel raise any issue with respect to the errors made by the court in the course of conducting petitioner's plea colloquy. After considering the arguments of counsel and the case law cited in support of them, the court denied petitioner's request for a downward departure or variance—see id. at 84:9–13—and ultimately sentenced petitioner to 240 months of imprisonment on Count 1 and 70 months of imprisonment on Count 2, to run consecutively with the term imposed on Count 1. See id. at 92:17–25. The court explained that, in imposing those terms of imprisonment, it was giving petitioner credit for the time he had already served in state custody on state charges relating to the same offense conduct, even though giving such credit was not required by law. See id. at 93:1–9. The court also sentenced petitioner to supervised release for a term of life on both Counts, as requested by the government, and imposed numerous special conditions, including a condition requiring penile plethysmograph testing as part of his mental health treatment. See id. at 93:12–96:15. The court's written judgment was entered on December 20, 2007. See Docket No. 26.

Petitioner's former counsel filed a notice of appeal on petitioner's behalf on December 27, 2007. See Docket No. 27. On appeal, petitioner's former counsel argued that this court had

erred in overruling his objections to the enhancements for distribution, the use of a computer, and petitioner's pattern of activity involving the sexual abuse or exploitation of minors, and that his sentence was unreasonable. No issue was raised by petitioner on appeal with respect to the terms of supervised release imposed by this court's judgment or the errors made by this court in the course of petitioner's plea colloquy. By unpublished per curiam opinion dated October 14, 2008, the United States Court of Appeals for the Fourth Circuit rejected the arguments of petitioner's counsel and affirmed the sentence imposed by this court. See Docket No. 34. The Fourth Circuit's judgment was entered that same day. See Docket No. 35. On November 25, 2008, the Fourth Circuit denied petitioner's subsequent petition for rehearing and rehearing en banc -- see Docket No. 37—and on December 3, 2008, the Fourth Circuit issued its mandate. See Docket No. 38.

Petitioner filed the instant motion and a memorandum of law attaching several exhibits, including an affidavit from his former counsel, on October 1, 2009. See Docket No. 45. By Order dated October 23, 2009, this court concluded that summary dismissal of the motion under Rule 4(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts without a response from the government was not appropriate, and accordingly ordered the United States Attorney's Office in Newport News, Virginia to file an answer, motion, or other response to the petition within sixty (60) days from the date of entry of that Order. See Docket No. 46.

The government thereafter filed two motions for the court to extend the government's time to respond to the petition, on December 3, 2009 and January 25, 2010, respectively. See Docket Nos. 47 &49. The court granted both of the government's motions. See Docket Nos. 48 & 50. The government ultimately filed its response to the petition, which attached another

affidavit from petitioner's former counsel, on February 9, 2010. See Docket No. 51. On February 25, 2010, the Clerk's office received a letter from petitioner, indicating that he had received the government's response on February 11, 2010, and inquiring about the deadline for him to file a reply. See Docket No. 52. By letter dated March 1, 2010, the Clerk's office responded to petitioner's letter, indicating that petitioner had fourteen days to file any reply, and that the Clerk's office would forward any such reply to this court upon receipt. See Docket No. 53. On March 11, 2010, the Clerk's office received from petitioner, under cover of letter, a motion for an extension of time to file his reply to the government's response to his petition. See Docket No. 54. By Order dated April 2, 2010, the court granted petitioner's motion, giving him until April 12, 2010 to file his reply. See Docket No. 55. Although petitioner's reply was not received and filed by the Clerk of this court until April 13, 2010, petitioner's certificate of service indicates that he mailed it on April 9, 2010. See Docket No. 56. The court will consider petitioner's reply to have been timely filed.

STANDARD OF REVIEW

A petitioner collaterally attacking his sentence or conviction bears the burden of proving that his sentence or conviction was imposed in violation of the United States Constitution or federal law, that the court was without jurisdiction to impose such a sentence, that the sentence exceeded the maximum authorized by law, or that the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255.

> 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.

Id. The petitioner bears the burden of proving his grounds for collateral relief by a preponderance of the evidence. Miller v. United States, 261 F.2d 546, 547 (4th Cir. 1958).

A collateral attack under 28 U.S.C. § 2255 is far more limited than an appeal. The doctrine of procedural default bars the consideration of a claim that was not raised at the appropriate time during the original proceedings or on appeal. A collateral challenge is not intended to serve the same functions as an appeal. United States v. Frady, 456 U.S. 152, 165 (1981). There are two instances, however, when a procedurally defaulted claim may be considered on collateral review. The first instance is when a petitioner shows both cause for the procedural default and actual prejudice resulting from the alleged error. Id. at 167; see also Wainwright v. Sykes, 433 U.S. 72, 84 (1977); United States v. Mikalajunas, 186 F.3d 490, 492–95 (4th Cir. 1999). The petitioner "must demonstrate that the error worked to his 'actual and substantial disadvantage,' not merely that the error created a 'possibility of prejudice.'" Satcher v. Pruett, 126 F.3d 561, 572 (4th Cir. 1997) (quoting Murray v. Carrier, 477 U.S. 478, 494 (1986)). Alternatively, if a petitioner can demonstrate that he is actually innocent, then the court should also issue a writ of habeas corpus in order to avoid a miscarriage of justice, regardless of whether the claim was procedurally defaulted. See Mikalajunas, 186 F.3d at 493 (citing Murray, 477 U.S. at 496).

Claims of ineffective assistance of counsel may properly be brought for the first time on a petition pursuant to 28 U.S.C. § 2255—see United States v. DeFusco, 949 F.2d 114, 120-21 (4th Cir. 1991)—and may be asserted as a means to establish "cause" to overcome a petitioner's previous failure to raise an independent claim unrelated to counsel's performance. Murray, 477 U.S. at 488. The Sixth Amendment to the United States Constitution provides, in relevant part,

that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The Sixth Amendment right to counsel includes the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). The United States Supreme Court's standard for assessing claims of ineffective assistance of counsel is "highly deferential," and courts considering such claims "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689; see also Kimmelman v. Morrison, 477 U.S. 365, 381–82 (1986) (discussing the "highly demanding" Strickland test). Moreover, as it is "all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence . . . [a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight" and that the court "evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. To establish a valid claim for ineffective assistance of counsel, petitioner must prove both (1) that his attorney's conduct fell below an objective standard of reasonableness and (2) that the attorney's deficient performance caused petitioner prejudice. Strickland, 466 U.S. at 687–91.

The first prong of the Strickland test requires a petitioner to establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. "[E]ffective representation is not synonymous with errorless representation," and establishing deficient performance requires more than a showing that counsel's performance was below average. Springer v. Collins, 586 F.2d 329, 332 (4th Cir. 1978); see also Strickland, 466 U.S. at 687–88.

The second prong of the Strickland test requires a petitioner to establish actual prejudice, which is demonstrated by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. A petitioner's conclusory statements will not suffice to prove such a reasonable probability.

A petitioner who alleges ineffective assistance of counsel in a case in which he pled guilty must demonstrate "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); accord Fields v. Att'y Gen. of Md., 956 F.2d 1290, 1297-98 (4th Cir. 1992); Hooper v. Garraghty, 845 F.2d 471, 475 (4th Cir. 1988) ("When a defendant challenges a conviction entered after a guilty plea, [the] 'prejudice' prong of the test is slightly modified."). An inquiry into whether a petitioner has presented sufficient evidence to demonstrate such a reasonable probability will often necessitate an inquiry into the likely results at trial. Hill, 474 U.S. at 59–60. That a plea bargain is "favorable" to a petitioner and that "accepting it was a reasonable and prudent decision" is evidence of the "voluntary and intelligent" nature of the plea bargain. Fields, 956 F.2d at 1299.

In evaluating a claim of ineffective assistance of counsel made after a guilty plea, statements made under oath, such as those made in a proceeding pursuant to Rule 11 of the Federal Rules of Criminal Procedure, are binding on the petitioner "[a]bsent clear and convincing evidence to the contrary." Id. "[A]llegations in a § 2255 motion that directly contradict the petitioner's sworn statements made during a properly conducted Rule 11 colloquy are always palpably incredible and patently frivolous or false." United States v. Lemaster, 403 F.3d 216,

221 (4th Cir. 2005) (internal quotation marks omitted). Accordingly, "a district court should, without holding an evidentiary hearing, dismiss any § 2255 motion that necessarily relies on allegations that contradict the sworn statements." Id. at 222.

ANALYSIS

Petitioner, having brought the instant motion *pro se*, is held to a less stringent standard than a petitioner represented by counsel, and the court must therefore construe the instant motion liberally.[1] See, e.g., Hill v. Braxton, 277 F.3d 701, 707 (4th Cir. 2002) (citing Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam)). Petitioner alleges numerous grounds for relief in the instant motion:

> Ground One: his plea was not knowingly, voluntarily, and intelligently made because the district court erred in informing him of the maximum possible penalty and imposed a sentence greater than the maximum stated in the plea colloquy;
>
> Ground Two: his former counsel rendered ineffective assistance at sentencing and on appeal by failing to object to and appeal the district court's Rule 11 violations during the plea colloquy;
>
> Ground Three: his plea was not knowingly, voluntarily, and intelligently made because he was not adequately informed of the "true nature" of Count Two;
>
> Ground Four: his plea was not knowingly, voluntarily, and intelligently made because the government withheld material evidence;
>
> Ground Five: his former counsel rendered ineffective assistance at sentencing and on appeal by failing "to pursue the inadequacy of the Petitioner's understanding of the nature of the charges;"
>
> Ground Six: his plea was not knowingly, voluntarily, and intelligently made because it was predicated on his former counsel's erroneous advice regarding his maximum exposure and whether his sentences would be concurrent or consecutive;

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[1] The court notes in this connection, however, that the instant motion is quite well written and includes extensive citations to, and generally cogent discussion of, the relevant case law.

> Ground Seven: his plea was not knowingly, voluntarily, and intelligently made because his former counsel "failed to adequately research and investigate the charged offenses;"
>
> Ground Eight: his former counsel rendered ineffective assistance by failing to move to suppress self-incriminating statements;
>
> Ground Nine: his plea was not knowingly, voluntarily, and intelligently made because he is "actually innocent" of Count Two and the district court lacked a sufficient factual basis for accepting his plea; and
>
> Ground Ten: his offenses should have been grouped pursuant to section 3D1.2 of the Guidelines and his sentences should have been ordered to run concurrently.

Docket No. 45 at 5–10-b. The court will address, in turn, each alleged substantive ground in tandem with its corresponding ineffective assistance of counsel ground.

I. The Court's Errors in Petitioner's Rule 11 Plea Colloquy

As noted above, it is clear from the transcript of petitioner's plea colloquy in this case that this court erred in advising him of both (1) the statutory maximum and minimum terms of imprisonment for the offense alleged by Count Two of the indictment and (2) the maximum possible terms of supervised release for the offenses alleged in both Counts of the indictment. The court will address each such error in turn.

A. Statutory Minimum and Maximum Terms of Imprisonment for Count Two

As noted above, the court erroneously advised petitioner that "[t]he maximum possible penalty provided by law for [Count Two] [was] imprisonment for a period not to exceed 10 years and a fine not to exceed $250,000"—Plea Tr. at 7:14–16—when, in fact, the term of imprisonment properly applicable to petitioner was not less than 5 years and not more than 30 years. This error alone obviously constitutes a violation of Rule 11 of the Federal Rules of Criminal Procedure, which explicitly requires courts to "inform the defendant of, and determine

that the defendant understands . . . any maximum possible penalty, including imprisonment . . . [and] any mandatory minimum penalty." Fed. R. Crim. P. 11(b)(1)(H)–(I). However, since petitioner did not raise this error with the court at the time of sentencing, on direct appeal, or even in the instant motion,[2] petitioner must show both cause and actual prejudice to avoid a finding that the issue was procedurally defaulted. See, e.g., Frady, 456 U.S. at 167. As noted above, claims of ineffective assistance of counsel, which may properly be brought for the first time on a petition pursuant to 28 U.S.C. § 2255—see DeFusco, 949 F.2d at 120–21—may be asserted as a means to establish "cause" in this connection. Murray, 477 U.S. at 488. Petitioner asserts such a claim, arguing that if his former counsel had raised the court's error at sentencing, several different outcomes would have been possible, and the burden on appeal would have shifted to the government to demonstrate that the court's error had been harmless. See Docket No. 56 at 20–21.

The analysis of petitioner's ineffective assistance of counsel claim on this point at least partially parallels the substantive analysis of whether the error itself merits habeas relief. Both claims essentially allege that petitioner was denied accurate information that he is entitled—indeed, required by Rule 11—to receive before deciding to plead guilty. Although petitioner subsequently received notice of the correct statutory minimum and maximum terms of imprisonment in the PSR, petitioner points out that "[v]iolations of Rule 11 . . . cannot be cured by the presentence report." United States v. Goins, 51 F.3d 400, 404 (4th Cir. 1995). As noted

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[2] The error appears to have been raised for the first time in the government's response to the instant motion. See Docket No. 51 at 11 n.8. Petitioner addressed this additional error, as well as the additional ineffective assistance of counsel claim that he bases upon it, in his reply. See Docket No. 56.

above, a petitioner who alleges ineffective assistance of counsel in a case in which he pled guilty must demonstrate "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," and an inquiry into whether a petitioner has presented sufficient evidence to demonstrate such a reasonable probability will often necessitate an inquiry into the likely results at trial. Hill, 474 U.S. at 59-60. Similarly, the court's error itself rises to a level justifying habeas relief only if petitioner can show, under the plain error standard,[3] that he "was actually unaware of" the correct statutory mandatory minimum and maximum possible terms of imprisonment at the time he pled guilty and that, "if he had been properly advised by the trial judge, he would not have pleaded guilty." United States v. Timmreck, 441 U.S. 780, 784 (1979); accord United States v. Dominguez Benitez, 542 U.S. 74, 83 (2004); Peguero v. United States, 526 U.S. 23, 28 (1999); United States v. Massenburg, 564 F.3d 337, 343 (4th Cir. 2009); United States v. Hairston, 522 F.3d 336, 341 (4th Cir. 2008); Goins, 51 F.3d at 402–05; see also United States v. Thorne, 153 F.3d 130, 133 (4th Cir. 1998).

If petitioner's former counsel did, in fact, advise petitioner prior to his guilty plea of the correct statutory minimum and maximum sentences on Count Two, then he clearly could not have been ineffective in this regard, because he communicated the correct information to petitioner and petitioner chose to plead guilty, anyway. This would also dispose of petitioner's

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[3] The plain error standard, of course, is typically employed not by district courts, but instead by courts of appeals when errors by district courts are appealed, and the court notes the parties' dueling arguments about whether the standard of review should be for harmless or plain error. The court also notes that, with respect to the instant motion, petitioner will have to show why ineffective assistance of counsel precluded petitioner from raising the district court's errors *both* at the time of sentencing *and* on direct appeal in order to avoid procedural default of this claim. There also remains the serious question of whether petitioner's failure to raise this particular error even in the instant motion itself constitutes a separate procedural default for which ineffective assistance of counsel is obviously an unlikely cause.

complaints regarding his former counsel's failure to raise the issue at sentencing or on direct appeal, since petitioner would be unable to argue, under the applicable test, that the result would have been different, because petitioner possessed the correct information all along. It would further effectively dispose of petitioner's substantive claim, because petitioner would be unable to show that he "was actually unaware of" the correct information at the time he pled guilty. Timmreck, 441 U.S. at 784.

If, on the other hand, petitioner's former counsel did not advise petitioner of the correct statutory minimum and maximum sentences on Count Two prior to his guilty plea—clearly a central function of counsel—and petitioner did not otherwise learn that information until receiving the PSR, then petitioner may well have valid claims both that his counsel had been ineffective in this regard (thus overcoming procedural default) and that the court's error merits habeas relief. It is certainly arguable that such a fundamental error by the court "'seriously affected the fairness, integrity or public reputation of judicial proceedings.'" United States v. Vonn, 535 U.S. 55, 63 (2002) (quoting United States v. Olano, 507 U.S. 725, 736 (1993)).

Since this error by the court was not raised by petitioner in the instant motion, but instead by the government in its response and petitioner in his reply, the briefs and the record do not provide the court with a sufficient factual basis to reach a decision as to whether petitioner has a valid substantive claim, ineffective assistance of counsel claim, or both with respect to the court's error. Consequently, an evidentiary hearing will be necessary to determine (1) whether petitioner was made aware (by his former counsel or otherwise) of the correct mandatory minimum and maximum possible terms of imprisonment on Count Two prior to pleading guilty,

notwithstanding the court's error in this regard during the plea colloquy, and (2) whether or not he would have pled guilty had he possessed the correct information.

B. Statutory Minimum and Maximum Terms of Supervised Release

Turning to the court's second error during petitioner's plea colloquy, relating to his potential terms of supervised release, the court mistakenly advised petitioner that:

> The period of time under the statute to which you are pleading guilty with regard to Count 1 is not more than three years, but if that enhancement applies, then it would be not more than five years. The period of time under the statute to which you are pleading guilty with regard to Count 2 is not more than three years.

Plea Tr. at 9:2–7. The maximum terms of supervised release discussed by the court during the colloquy were those that would normally have applied pursuant to 18 U.S.C. §§ 3559 and 3583(b), instead of those that properly applied pursuant to 18 U.S.C. § 3583(k), which, as noted above, specifically provides for a term of supervised release of "any term of years not less than 5, or life" for both of the offenses charged in the indictment. 18 U.S.C. § 3583(k).

As with the court's other error, this error normally would not entitle petitioner to relief pursuant to 28 U.S.C. § 2255 because, as noted above, he failed to raise it at sentencing or on direct appeal, and instead raised it for the first time in the instant motion. However, petitioner alleges that his failure to raise this issue was due to the ineffective assistance of his former counsel. The court's analysis of these tandem claims is thus similar to the analysis above with respect to the court's other error. The Fourth Circuit has explained that "[a] district court's failure to inform a defendant that his sentence will incorporate a term of supervised release and its further failure to explain the significance of supervised release is error. Failure to comply

with the dictates of Rule 11 is harmless, however, if the failure does not violate a defendant's substantial rights." Thorne, 153 F.3d at 133. The Fourth Circuit continued:

> In determining whether the district court's errors affected substantial rights, the appellate court will consider (1) what the defendant actually knows, based on an affirmative indication in the record, at the time he pleads guilty; (2) what information would have been added to the defendant's knowledge by compliance with Rule 11; and (3) how the additional or corrected information would likely have affected the defendant's decision. "If a review of the record indicates that the oversight influenced the defendant's decision to plead guilty and impaired his ability to evaluate with eyes open the direct attendant risks of accepting criminal responsibility, then substantial rights were violated."

Id. (quoting Goins, 51 F.3d at 402) (internal citation and quotations omitted).

The Fourth Circuit noted that "Thorne may have known that he was subject to five years of supervised release because his plea agreement contained notice of it, but he did not know of the nature of supervised release or of the consequences attendant on its violation." Id. (citing United States v. Good, 25 F.3d 218, 220 (4th Cir. 1994) & United States v. Garcia-Garcia, 939 F.2d 230, 232–33 & n.3 (5th Cir. 1991)). Although the Fourth Circuit "declined to go as far as the Seventh Circuit in endorsing a presumption that a Rule 11 failure affects the defendant's decision to plead, in this case Thorne was unable to 'evaluate with eyes open the direct attendant risks of accepting criminal responsibility.'" Thorne, 153 F.3d at 133 (quoting Goins, 51 F.3d at 403) (internal citation omitted). Consequently, the Fourth Circuit concluded that "[t]he district court's failure to inform him of the maximum sentence to which he was subject thus violated his substantive rights," and ordered that the defendant "be permitted to withdraw his guilty plea and to plead anew." Thorne, 153 F.3d at 133–34.

Central to the Fourth Circuit's harmless error analysis and conclusion in Thorne was the fact that the defendant's actual sentence exceeded the maximum the defendant was told he could receive. "'[F]ailure to discuss the nature of supervised release is harmless error if the combined sentence of incarceration and supervised release actually received by the defendant is less than the maximum term he was told he could receive.'" Id. at 133 (quoting Good, 25 F.3d at 220) (alteration in original). The Fourth Circuit applied this comparative rule more recently, under the plain error standard, in the case of United States v. Benton, in which a prosecutor had, in the course of reciting the terms of a plea agreement between the government and the defendant during a guilty plea colloquy before a United States Magistrate Judge,[4] erroneously advised the defendant that he faced not more than five years of supervised release on the charge to which he was pleading guilty, when, in fact, he faced a mandatory minimum of ten years of supervised release. United States v. Benton, 523 F.3d 424, 434 (4th Cir. 2008). The Fourth Circuit indicated that "while Benton was certainly misinformed as to the potential length of his supervised release, any error on this front is harmless." Id. at 435. Adopting the reasoning of the United States Court of Appeals for the Seventh Circuit in United States v. Schuh, 289 F.3d 968, 974 (7th Cir. 2002), the Fourth Circuit explained that "[s]imply put, it does not constitute reversible error to inadvertently misinform a defendant of the length of his term of supervised release, so long as his overall sentence fits within the sentencing range communicated to him at his plea colloquy." Benton, 523 F.3d at 435; accord Good, 25 F.3d at 220. Since the defendant's

[4] The defendant in Benton challenged the Magistrate Judge's jurisdiction to accept his guilty plea, despite the fact that he had consented, both in writing in his plea agreement and orally during his plea colloquy, to a Magistrate Judge conducting the plea colloquy. The Fourth Circuit found the defendant's arguments in this connection to be without merit.

"total sentence (including prison time and supervised release)" was "below his statutory maximum of life imprisonment, and within the sentencing range of 20 years to life communicated to him at his plea colloquy," the Fourth Circuit affirmed his sentence notwithstanding the error made by the prosecutor (and not corrected by the Magistrate Judge) during the defendant's plea colloquy. Id.

Although this comparative rule has been broadly employed by the Fourth Circuit and other United States Courts of Appeals in both reported and unreported decisions, and in cases under both the harmless and plain error standards, the court notes that those decisions generally related to offenses for which the correct maximum term of supervised release imposed was a limited number of years and/or the correct maximum term of imprisonment was life. See, e.g., United States v. West, 149 F. App'x 475, 476 (7th Cir. 2005) (holding that, under the plain error standard, a district court's misstatement that the defendant's supervised release range was three years to life instead of five years to life "was harmless because the combined total of imprisonment and supervised release—15 years—is less than the statutory maximum term of life imprisonment that the district court informed West about at his plea hearing") (internal citation omitted); United States v. Hanson, 86 F. App'x 175, 177 (7th Cir. 2003) (holding that a district court's failure to "inform Hanson of the effect of supervised release . . . could not be plain error . . . because Hanson's combined term of imprisonment and supervised release, 248 months, is less than the statutory maximum sentence of life imprisonment that Hanson was told he could receive"); United States v. Jones, 74 F. App'x 664, 668 (7th Cir. 2003) (noting that, even had the defendant raised the district court's error, the "omissions would likely constitute harmless error" and that the defendant "could not have been harmed by the judge's failure to discuss the nature of

supervised release because the combined total of imprisonment and supervised release that he received is less than the 20-year term of imprisonment that he was told he faced"); United States v. Forman, 63 F. App'x 948, 949 (7th Cir. 2003) (holding that a district court's failure to advise the defendant of a possible term of supervised release was "not plain error because Forman's 262-month prison term, when combined with his 8-year term of supervised release, is still within the statutory maximum of life imprisonment for his offense , and Forman knew of that maximum when he entered his plea") (internal citation omitted); Schuh, 289 F.3d at 975 ("the court's failure to explain the effect of supervised release is harmless because Lane's total sentence, 135 months' imprisonment and three years' supervised release, falls below the default statutory maximum of 20 years' incarceration for cocaine offenses and Lane knew of the maximum when he entered his plea") (internal citation omitted); United States v. Elkins, 176 F.3d 1016, 1021–22 (7th Cir. 1999) (quoting McCleese v. United States, 75 F.3d 1174, 1180 (7th Cir. 1996)); United States v. Andrades, 169 F.3d 131, 134 (2d Cir. 1999) ("We now join with those circuit courts of appeals holding that the error is harmless where the district court misinforms a defendant of the applicable supervised release term and the total sentence of imprisonment and supervised release actually imposed is less than that described during the plea allocution.") (collecting cases). In this case, of course, petitioner faced a maximum term of life supervised release on both Counts to which he pled guilty, but did not face the possibility of a term of life imprisonment on either Count. Consequently, in light of the reasoning in the foregoing cases, petitioner's argument for the validity of the converse proposition—namely, that it *would* constitute reversible error to inadvertently misinform a defendant of the length of his term of supervised release if his overall sentence *did not* fit within the sentencing range communicated to him at his plea colloquy—is

certainly plausible, even if it is not the only possible interpretation of the governing Fourth Circuit precedent. The United States Court of Appeals for the Second Circuit, for example, has ruled that it "would ordinarily not consider an understatement of the supervised-release maximum, combined with the sentencing of the defendant to a supervised-release term longer than that of which he was advised, to be an error that is harmless." United States v. Renaud, 999 F.2d 622, 625 (2d Cir. 1993) (citing United States v. Bachynsky, 934 F.2d 1349, 1360 (5th Cir. 1991) (per curiam) (en banc), overruled by United States v. Johnson, 1 F.3d 296 (5th Cir. 1993) (en banc)).

The parties differ in their approaches to employing this comparative rule in the instant case. Specifically, the parties dispute whether the duration of petitioner's "overall sentence," which the court must calculate in order to compare it with what petitioner was advised during the plea colloquy, properly includes the duration of the term of supervised release *itself* or, instead, only the maximum possible duration of any additional term of incarceration imposed for violations of the conditions of supervised release. The government, following the latter approach, argues that although the term of supervised release imposed on petitioner by this court is for life, even if petitioner were to violate the terms of his supervised release and this court were to revoke his supervised release for such violation(s), petitioner would face a statutory maximum term of imprisonment of thirty-six months for each of the two counts to which he pled guilty, neither of which was a Class A felony. Consequently, the government argues, since the term of imprisonment actually imposed on petitioner and the statutory maximum additional terms of imprisonment for violations of the terms of his supervised release, when combined, do not

exceed the statutory maximum term of imprisonment petitioner knew he was potentially facing at the time he pled guilty, the court's error does not merit habeas relief.

Although there is case law that supports the method of calculation urged by the government, the case law in the Fourth Circuit (which, of course, constitutes binding precedent for this court) appears to follow the former approach, simply adding the term of supervised release itself to the term of imprisonment to determine the "total sentence" for comparative purposes. As noted above, in Benton the Fourth Circuit characterized the defendant's "total sentence" as "including prison time *and supervised release*." Benton, 523 F.3d at 424 (emphasis added). The point is made even more explicitly in Thorne, where the Fourth Circuit noted that "[t]he maximum term Thorne understood he could receive was therefore less than *his actual sentence of 248 months* (188 months *plus five years (60 months) of supervised release*)." 153 F.3d at 133 (emphasis added). The court proceeded to note there that "[i]n the event he violated supervised release, he would be subject to a further five years of incarceration, *resulting in an even greater disparity*." Id. at 133–34 (emphasis added). The correctness of this approach also appears to have been acknowledged in Good, in which the government successfully argued that "the error was harmless because the total term of incarceration *and supervised release imposed*, that is 140 months [80 months of imprisonment and 60 months of supervised release], did not exceed the statutory maximum of forty years imprisonment which had been clearly explained to Good during the plea colloquy." 25 F.3d at 220 (emphasis added). This court also notes that the Fourth Circuit's approach appears to adhere more closely to the text of Rule 11 itself, which discusses supervised release as a separate penalty in and of itself. See Fed. R. Crim. P. 11(b)(1) (requiring the court to "inform the defendant of, and determine that the defendant understands

. . . any maximum possible *penalty*, including imprisonment, fine, *and* term of supervised release" before accepting a plea of guilty or nolo contendere) (emphasis added).

As noted above, case law from at least one other United States Court of Appeals appears to employ the method of calculation urged by the government. See Bachynsky, 934 F.2d at 1360; see also Johnson, 1 F.3d at 296. In Bachynsky, the Fifth Circuit explained that a district court's failure to inform a defendant regarding the possibility and effect of a possible term of supervised release "does not necessarily mandate reversing the conviction and vacating the sentence, *assuming* the *aggregate maximum period of incarceration* under the actual sentence of imprisonment and supervised release cannot exceed the statutory maximum explained to the defendant." 934 F.2d at 1360 (emphasis added). The Fifth Circuit further noted, however:

> We do not address whether in instances not within this assumption reversing the conviction and vacating the plea will always be necessary or whether there may be circumstances in which a reduction of the sentence (for example, by removing or reducing the term of the supervised release) may eliminate the prejudice, or might do so if accompanied by a hearing adequately establishing that the incomplete Rule 11(c)(1) advice did not affect the decision to plead guilty.

934 F.2d at 1360 n.11. In this connection, the Fifth Circuit went to great lengths to calculate what it called the "'worst case' hypothesis;" *i.e.*, the maximum term of *imprisonment* that the defendant could face if his supervised release were revoked due to a violation of the conditions thereof. See id. at 1353.

In the same vein, in Garcia-Garcia, the district court had advised the defendant during the plea colloquy of the maximum possible term of incarceration of five years, but utterly failed to mention anything regarding a term of supervised release. The Fifth Circuit, citing its then-recent

decision in Bachynsky, reversed the district court, vacated the sentence imposed, and remanded the case to permit the defendant to plead anew. The Fifth Circuit noted:

> Garcia . . . faces a possible period of incarceration in excess of the maximum penalty of which he was advised. As he was sentenced to twenty-seven months' imprisonment to be followed by three years' supervised release, Garcia faces a possible period of incarceration of five years and three months, and a potential restraint on his liberty (assuming revocation on the last day of the supervised release term) of eight years and three months. As each of these exceeds the five year maximum possible sentence of which he was advised, Garcia was prejudiced by the district court's total failure to even mention supervised release.

Garcia-Garcia, 939 F.2d at 232–33. Consequently, the Fifth Circuit was "unable to conclude the error was harmless." Id. at 233.

The relevance of the Fifth Circuit's approach in Bachynsky and Garcia-Garcia is of some relevance here because it was the source cited by the Seventh Circuit in adopting the comparative rule currently at issue, and the Fourth Circuit's decision in Benton, in turn, adopts the Seventh Circuit's approach. See United States v. Saenz, 969 F.2d 294, 297 (7th Cir. 1992) (quoting Bachynsky, 934 F.2d at 1360–61); Benton, 523 F.3d at 435 (citing Schuh, 289 F.3d at 974). It is not entirely clear, however, whether the Seventh Circuit, in adopting the Fifth Circuit's analysis, actually adopted the method of calculation that the Fifth Circuit used. In Saenz, the Seventh Circuit quoted extensively from Bachynsky and indicated that it found that "reasoning persuasive," but then further indicated that "if the term of supervised release plus the prison term (the maximum aggregate term of incarceration) exceeds the maximum prison term of which the defendant was advised, then the error is not harmless, and reversal is necessary." Saenz, 969 F.2d at 297 (citing United States v. Bounds, 943 F.2d 541, 545 (5th Cir. 1991) & Garcia-Garcia,

939 F.2d at 233). This language suggests that the Seventh Circuit's chosen method of calculation was, in fact, the same as the Fourth Circuit's.

There are further relevant divergences in the case law on this issue. For example, unlike the district courts in Garcia-Garcia and certain other cases, this court did not entirely fail to discuss the effect of supervised release during the plea colloquy in this case, but instead misinformed petitioner as to the maximum possible terms of supervised release he faced. On this point, the Seventh Circuit has questioned "whether a failure to instruct at all about an aspect of the sentence (*i.e.* supervised release, restitution) poses the same threat to substantial rights as an error in the instruction about the applicable term of supervised release (or the amount of the fine or restitution)." Saenz, 969 F.2d at 297. The Seventh Circuit opined in that case "that a failure to instruct and an error in the instructions pose basically the same danger to the defendant," and that "[i]t does not make a material difference if a defendant gets bad information or no information. If the defendant does not receive accurate data necessary to make an intelligent choice about pleading guilty, the plea cannot stand." Id. at 297–98. The court's error in this case was clearly more serious than other possible errors. As at least one court has pointed out, in a case involving a similar error, "[t]here is a huge difference between expecting a three year term of supervised release and expecting that one will be subject to such supervision for the rest of one's life." United States v. Rivera-Maldonado, 560 F.3d 16, 21 (1st Cir. 2009).

In other cases, courts have held that even where district courts entirely failed to apprise defendants of the possibility of *any* term of supervised release, such error was harmless because the defendants received notice of such possibility in the plea agreement. See, e.g., United States v. Bolt, 92 F. App'x 330, 332 (7th Cir. 2004) ("Rule 11 requires such a warning [that the

defendant could receive a term of supervised release], but counsel correctly notes that the omission would be harmless because Bolt was warned in his plea agreement about supervised release.") (internal citation omitted). In this case, however, there was no plea agreement, and there appears to be nothing else in the record to show definitively that petitioner was apprised of the possibility of life terms of supervised release prior to his guilty plea.

Finally, the court notes the government's argument that petitioner cannot prevail on this issue because he failed to claim affirmatively in the instant motion "that he would have withdrawn his plea had he been advised that he faced a lifetime of supervised release." Docket No. 51 at 13. Once again, the government appears to have some support in case law for its argument, but none that is binding precedent. In Renaud, the Second Circuit found the district court's error in understating the potential term of supervised release to be "harmless because Renaud wants to adhere to his plea," noting that "[u]pon learning from the PSR that the maximum supervised-release term was three years, rather than one as previously stated by the district court, Renaud made no protest and did not seek to withdraw his plea of guilty." 999 F.2d at 625. Renaud also failed to raise the issue at his sentencing or his subsequent re-sentencing, and on appeal "explicitly confirmed that he [did] not wish to withdraw his plea of guilty." Id. The United States Court of Appeals for the Eleventh Circuit also concluded in one case that a district court's failure to inform the defendant of the possibility of a term of supervised release did not merit vacatur of the defendant's conviction, because both the presentence report and the district court at sentencing advised the defendant of the mandatory term of supervised release, and neither the defendant nor his attorney objected at that time. United States v. Carey, 884 F.2d 547, 548–49 (11th Cir. 1989).

In this case, petitioner states in his motion that "[t]he possibility of being subjected to an additional period of confinement of any number of years, as opposed to a clearly defined maximum of six, would have influenced the Petitioner's decision to plead guilty." Docket No. 45 at 21 (Petitioner's Memorandum of Law in Support of 28 USC § 2255 ("Mot. Mem.") at 7). As discussed above, petitioner's statement is incorrect as a legal matter: pursuant to 18 U.S.C. § 3583(e)(3), even had the statutory sentencing enhancement applied to Count One, petitioner would have faced a maximum of three years imprisonment on each count *total*, regardless of the length of the terms of supervised release originally imposed or reimposed after any such terms of imprisonment. In other words, he would not be subject to *another* six years of possible imprisonment each time supervised release was reimposed. Instead, once he had served six years of imprisonment for supervised release violations, he would not be subject to further terms of imprisonment for any further violations, despite the fact that his supervised release could continue for the rest of his life. Despite petitioner's misunderstanding of the law in this regard, and especially in light of the less stringent standard to which the court must hold petitioner's *pro se* petition, the court believes that the above statement by petitioner was clearly intended to communicate his claim that he would not have pled guilty had the court correctly advised him in this regard.

On the basis of the foregoing analysis, an evidentiary hearing will be necessary to determine (1) whether petitioner was made aware (by his former counsel or otherwise) of the correct possible terms of supervised release on Counts One and Two prior to pleading guilty, notwithstanding the court's error in this regard during the plea colloquy, and (2) whether or not he would have pled guilty had he possessed the correct information.

II. Elements of the Offense Alleged in Count Two

Petitioner next argues that his guilty plea was not knowingly, voluntarily, or intelligently made because he did not receive notice of the "true nature" of the offense alleged in Count Two of the indictment prior to or at the time of his guilty plea. Specifically, petitioner claims that certain details of his offense conduct that were subsequently included in paragraph 12 of the PSR "did not appear in any document known to the defense prior to the PSR." Mot. Mem. at 12. His claim in this regard includes, but is not limited to, the portion of paragraph 12 to which he previously objected at sentencing. Petitioner claims that these details of his offense conduct constituted essential elements of the offense alleged in Count Two, and that the court's failure to advise him or ascertain his knowledge of them prior to or during his guilty plea violated his substantial rights.

Petitioner's argument is without merit. As the Fourth Circuit explained in DeFusco, the district "court is given a wide degree of discretion in deciding the best method to inform and ensure the defendant's understanding" of the nature of the charge to which the defendant proposes to plead guilty. 949 F.2d at 117. The district court "must take into account both the complexity of the charge and the sophistication of the defendant," and "may look at the availability of counsel . . . the defendant's personal characteristics, such as age, education, and intelligence," as well as "whether a written plea agreement exists, what its terms are, and whether the defendant has read the agreement." Id.

> Although the defendant must receive notice of the true nature of the charge rather than a rote recitation of the elements of the offense, the defendant "need not receive this information at the plea hearing itself. Rather, a guilty plea may be knowingly and intelligently made on the basis of detailed information received on occasions before the plea hearing."

Id. (quoting LoConte v. Dugger, 847 F.2d 745, 751 (11th Cir.)) (internal citation omitted). In DeFusco, "[t]he plea agreement contained a detailed outline of the charges, complete with each element of both offenses and the facts necessary to support each element." Id. After reviewing all of the relevant circumstances, the Fourth Circuit concluded that the district court had not abused "its discretion in relying on [the defendant's] review of the plea agreement and criminal information with his attorney, and his verbal statements in open court that he understood the nature of the charges against him." Id.

The course of events in this case bears a strong resemblance to the circumstances of DeFusco. Although there was no plea agreement in this case, petitioner did, as noted above, execute a Statement of Facts in connection with his guilty plea. See Docket No. 13. The Statement of Facts provided an extremely detailed account of the offense conduct underlying Count Two of the indictment, even going so far as to describe several specific topics raised by petitioner in the course of his inappropriate sexual conversation with the minor victim on November 28, 2005. See Docket No. 13 at 3. During petitioner's plea colloquy, petitioner indicated that he was 26 years old, and had attended one year of college. Plea Tr. at 3:18–21. Petitioner confirmed, under oath, that he had received, understood the nature of, and reviewed the indictment with his former counsel. Id. at 4:7–15. The court reviewed the elements of both offenses charged in the indictment, the nature of the enhancement sought by the government with respect to Count One, and the possible penalties for both counts, and petitioner confirmed that he understood those penalties. Id. at 5:11–7:18. The court confirmed that petitioner had, in fact, signed the Statement of Facts, and had read and understood it before signing. Id. at 16:16–21.

Petitioner further confirmed that the facts as indicated in the Statement of Facts were true and correct, and that he agreed with them. Id. at 16:22–25.

Petitioner is correct to assert that the particular details of his offense conduct about which he now complains were not included in the Statement of Facts. However, contrary to his arguments, those details were neither essential elements of the offense nor necessary factual predicates for his guilty plea with respect to Count Two. As noted above, the Statement of Facts executed by petitioner provided abundant details of the inappropriate sexual conversation that was the basis for Count Two. See Docket No. 13 at 3. As petitioner himself acknowledges, that Statement of Facts was filed by the court and made part of the record of this case in the course of petitioner's plea colloquy—see Plea Tr. 17:6–7—and the court thereafter concluded on the basis of it that, *inter alia*, petitioner's guilty plea was "supported by an independent basis in fact for each of the essential elements of the offenses." Id. at 18:7–8. In other words, the court determined at that time that the details of petitioner's offense conduct provided in the Statement of Facts sufficed *by themselves* to establish the factual predicate for petitioner's guilt with respect to Count Two. The Probation Officer's subsequent inclusion of *additional* details of petitioner's offense conduct in the PSR in no way altered the validity of that determination by the court, and in no way rendered petitioner's guilty plea unknowing or involuntary, regardless of whether petitioner was aware of evidence supporting such additional details at the time of his plea or not. Petitioner pled guilty, and was found guilty by this court, on the basis of the facts contained in the Statement of Facts, and not on the basis of the offense conduct as subsequently described in the PSR. The details about which petitioner now complains simply did not figure in his guilty plea. Even if the court had granted petitioner's objection at sentencing and stricken the language

in paragraph 12 regarding the death threat, and even if the court were able or inclined to strike at this time both that portion *and* the portion stating that petitioner asked the victim to disrobe and masturbate (notwithstanding the fact that petitioner never raised an issue with the latter portion prior to the instant motion), neither action would have any effect whatsoever on the validity of petitioner's guilty plea. Ground Three of petitioner's motion is thus without merit.

On the basis of the foregoing discussion, it is clear that petitioner's former counsel did not err by failing to move to withdraw petitioner's guilty plea on this basis or raise this issue on appeal. Since the additional details of petitioner's offense conduct provided in the PSR did not constitute essential elements, their inclusion did not alter the validity of petitioner's guilty plea, and provided no basis for withdrawing that plea. Petitioner's former counsel objected to one of the additional details, as instructed by petitioner, and that objection was overruled. Nothing more was required of petitioner's counsel in that connection. Consequently, Ground Five of petitioner's motion is also without merit.

III. Evidence Allegedly Withheld by the Government Regarding Count Two

In tandem with the foregoing argument, petitioner also argues that the government withheld from him the evidence underlying the details of paragraph 12 of the PSR about which he now complains in violation of the principles set forth by the Supreme Court in Brady v. Maryland, 373 U.S. 83 (1963). Prior to filing the instant motion, petitioner received, through a Freedom of Information Act request, a partially redacted copy of a police report that he believes to be the sole factual basis for the specific details at issue. See Mot. Mem. Ex. C. Petitioner notes that, although the details at issue appear in that report, they do not appear in the Affidavit of Probable Cause, which had been produced to petitioner by the government in the course of

discovery. See Mot. Mem. Ex. D. Petitioner also claims that the report itself indicates that it was given to the Assistant United States Attorney who prosecuted this case, but that it was nevertheless not produced by the government in discovery. Petitioner argues that "this report was material to the preparation of the defense insofaras [sic] the information would have affected his decision to plead guilty . . . and was therefore discoverable under Rule 16." Mot. Mem. at 17. He further claims that details contained in the report "went to the heart of the Petitioner's guilt or innocence on Count 2 and could have been used to impeach government witnesses." Id. at 17–18. "As such," petitioner continues, "it was material under Brady and should have been disclosed. There is a reasonable probability that had this report been disclosed, the Petitioner would not have pled guilty but would have insisted on going to trial . . . ." Id. at 18.

As discussed above, however, the specific details currently at issue were not included in the Statement of Facts executed by petitioner, and thus did not form part of the factual predicate that the court found sufficient to support petitioner's plea of guilty at the conclusion of his plea colloquy. In other words, even absent those details, petitioner had already stipulated to sufficient facts to support his guilty plea with respect to Count Two, and he does not now claim in the instant motion that any aspect of that Statement of Facts is incorrect. Instead, petitioner is simply expressing dismay over the subsequent inclusion of additional details in the PSR that he claims are untrue. However, in this connection, petitioner cannot escape his sworn answers during his plea colloquy, which indicate his awareness and acceptance of the possibility of further factual disputes in connection with the PSR:

> THE COURT: The Court advises you that it may take into consideration all your activities in sentencing you, including activities for which you are not charged. So

do you understand the Court may take into consideration all your activities in considering these sentencing factors?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that a presentence report must be prepared by the probation office of this Court setting forth your personal history, as well as the facts of this case?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that until such a presentence report is completed, it's impossible for either the Court or Mr. Broccoletti to be aware of many of the factors that the Court must consider in determining an appropriate sentence?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that it may be necessary to resolve disputed facts in the presentence report, and that the resolution of these facts may affect your sentence?

THE DEFENDANT: Yes, sir.

Plea Tr. at 13:5–14:1. As previously indicated, the Probation Officer included the details at issue in the description of petitioner's offense conduct in the PSR. Although petitioner is correct to characterize those details at issue as being "far more egregious than what the government had put forth in the Statement of Facts," the fact remains that the inclusion of them in the PSR had no effect whatsoever on the validity of his guilty plea.[5] Indeed, they arguably had no effect in the case, at all. They did not render him guilty of any additional crime. They did not subject him to

[5] It should also be noted that, in this connection, petitioner's motion lumps both the United States Attorney's Office for this district and the Probation Office of this court together under the aegis of "the government." They are, of course, entirely separate entities—one an agency of the Executive Branch of the federal government and one an office within the Judicial Branch—and although the Probation Office certainly interacts extensively with the United States Attorney's Office (and, it should be noted, with defendants) in conducting its presentence investigations, it prepares its PSRs independently. Indeed, in some cases the United States Attorney's Office objects to the inclusion or omission of certain facts from a PSR.

any statutory sentence enhancement with respect to Count Two. They did not figure into the Probation Officer's sentencing guideline calculations for Count Two (which were, in any case, effectively irrelevant, because his offense level for Count One was significantly higher than his offense level for Count Two).

As noted above, petitioner objected to the portion of paragraph 12 regarding the death threat, and although the court initially stated, "I don't know whether it was said or whether it wasn't said," the court continued to note that "[t]he only evidence that the Court has at this point is that it was said" and, on that basis, concluded that the language would "remain in the presentence report." Sent. Tr. at 34:15–24. Later in that hearing, the court "adopt[ed] the factual statements contained in the presentence report as its findings of fact," including the language in paragraph 12 about which petitioner now complains. Id. at 57:13–15. However, the portion containing petitioner's death threat explicitly did not figure into the court's consideration of the appropriate sentence for petitioner. As explained by the court, the language to which petitioner objected in paragraph 12 did not "affect the Court one way or the other because it doesn't affect the advisory guidelines, number one, and I'm not going to take that statement into account in determining what the sentence should be." Sent. Tr. 34:19–22.

The court is also unconvinced that the police report constitutes exculpatory Brady material or impeachment material as contemplated by Giglio v. United States, 405 U.S. 150 (1972). Even assuming that, at the time of petitioner's plea, the government, in fact, had a copy of the police report in question, or otherwise was aware of the specific details contained in it that are currently at issue, the report does not appear to contain any information that is remotely exculpatory, or that could be used in cross-examination to challenge the credibility of any

potential government witness. Even if the report did contain impeachment material, the Supreme Court has held unanimously "that the Constitution does not require the Government to disclose impeachment evidence prior to entering a plea agreement with a criminal defendant." United States v. Ruiz, 536 U.S. 622, 633 (2002). The Supreme Court explained:

> [T]his court has found the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor.

Id. at 630 (collecting cases). Moreover, "[t]here is no general constitutional right to discovery in a criminal case, and Brady did not create one." Weatherford v. Bursey, 429 U.S. 545, 559 (1977); accord Ruiz, 536 U.S. at 629 ("the Constitution does not require the prosecutor to share all useful information with the defendant"). Ground Four of petitioner's motion is without merit.

IV. Concurrent Versus Consecutive Sentences and Grouping of Counts One and Two

Petitioner claims that his decision to plead guilty was predicated upon being misinformed by his former counsel that (1) "the government was seeking so many sentencing enhancements that he could be facing life without parole if he went to trial and was found guilty of both counts" and (2) "the sentences [on Counts One and Two] would run concurrent because the charges were on the same indictment." Mot. Mem. at 23. Petitioner argues with respect to the first claim that, contrary to his former counsel's claim, his "maximum exposure under law was actually an aggregate total of thirty years: twenty years on Count 1 and ten years on Count 2." Id. Both of petitioner's figures are incorrect, albeit for different reasons. With respect to the former figure, although the court determined *at the time of sentencing* that the statutory enhancement sought by the government on Count One did not apply, thus reducing petitioner's range of imprisonment to

a statutory mandatory minimum of five years and a maximum of twenty years, *at the time petitioner pled guilty* he was advised that, if the enhancement applied, he faced a statutory mandatory minimum of fifteen years and a maximum of forty years of imprisonment. The proper focus is not on whether the enhancement was *ultimately* found by the court to be applicable, but rather on the information possessed by petitioner at the time he pled guilty. With respect to the latter figure, as discussed above, although the court erroneously advised petitioner that he faced no more than ten years of imprisonment on Count Two, he actually faced (taking into consideration Ex Post Facto clause considerations) a statutory mandatory minimum of five years and a maximum of thirty years of imprisonment. As petitioner's former counsel states in his affidavit attached to the government's response, he explained to petitioner "that if the government was successful [in seeking potential sentencing enhancements], [petitioner's] offense level was 45 which called for a sentence range of 300 [sic] months to life." Docket No. 51 Ex. A ¶ 4. Petitioner's former counsel further notes that "at the onset of the case, when the guidelines were explained to [petitioner], the potential of a 70-year sentence did in fact exist," and that petitioner's claim that he was told he could face life imprisonment "confuses the potential guideline range with the actual punishment range."[6] Id. Moreover, regardless of the precise words petitioner's former counsel might have used in describing the magnitude of petitioner's

[6] It is unclear from this statement whether or not petitioner's former counsel actually *advised* petitioner prior to his guilty plea that he faced up to a total of 70 years of imprisonment (*i.e.*, 40 years on Count One and 30 years on Count Two). If petitioner's former counsel did so, that fact would obviously tend to discredit any claim by petitioner that he "was actually unaware of" the correct statutory mandatory minimum and maximum possible terms of imprisonment on Count One at the time he pled guilty (notwithstanding the court's error) or that, "if he had been properly advised by the trial judge, he would not have pleaded guilty." Timmreck, 441 U.S. at 784. The court presumes that this will be among the issues addressed at the evidentiary hearing ordered herein.

potential term of imprisonment, petitioner's former counsel correctly points out that petitioner confirmed under oath during his plea colloquy that "he understood [that] the maximum penalty was a term of years and not life." Id. Petitioner's own sworn answers thus appear to belie any claim of ineffective assistance of counsel in this regard.[7]

With respect to petitioner's second claim, regarding whether his sentences were to run concurrently or consecutively, the government argues that the Fourth Circuit has already affirmed the reasonableness of petitioner's sentence, which would preclude petitioner from raising that issue again in this context. The government also argues that petitioner was advised prior to sentencing of the Probation Officer's rationale for not grouping Counts One and Two, and thus could have, but did not, raise that related issue at the time of sentencing. The court believes that the former argument is without merit, because the issues of concurrent versus consecutive sentences and grouping were not addressed specifically in the Fourth Circuit's opinion. The latter argument is the subject of a factual dispute. Petitioner's former counsel claims:

> I did not advise Mr. Fugit that his sentences would be grouped. When the presentence report was returned, and the counts were not gro[u]ped, I inquired of the probation officer as to why, and she explained it to me, and I, in turn, explained it to Mr. Fugit. No objections were filed on this issue. Later, Mr. Fugit requested a written explanation which the probation officer provided.

Docket No. 51 Ex. A ¶ 5; see also Mot. Mem. Ex. G. Petitioner, however, claims that although he raised the issue with counsel prior to sentencing, counsel did not pursue the issue until after sentencing. See Docket No. 56 at 15; Mot. Mem. at 23–25. This factual dispute, however, is

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[7] The irony is not lost on the court that some of the information that petitioner confirmed he understood during the plea colloquy was, in fact, incorrect. With respect to this particular issue, however, there is no overlap between those errors committed by the court *during* the plea colloquy and the advice of petitioner's former counsel *in advance of* the plea colloquy.

ultimately of no consequence to the disposition of this issue in the instant motion. As the Fourth Circuit has explained, "grouping and stacking are separate concepts relevant in different stages of the sentencing process." United States v. Chase, 296 F.3d 247, 251 (4th Cir. 2002). Contrary to petitioner's apparent belief that he would not have received consecutive sentences on Counts One and Two had they been grouped, the Fourth Circuit has explicitly held that "grouping does not preclude the imposition of consecutive sentences under [U.S.S.G.] § 5G1.2." Chase, 296 F.3d at 250. Instead, courts must consider the factors enumerated in 18 U.S.C. § 3553(a) in determining whether a defendant's sentences are to run concurrently or consecutively. 18 U.S.C. § 3584(b). This court did precisely that. See Sent. Tr. at 81:22–85:12.

Petitioner's former counsel states in his affidavit that petitioner "was certainly concerned with concurrent versus consecutive sentences, but it was not the reason for a guilty plea." Docket No. 51 Ex. A. Notwithstanding any disputes about the veracity of that statement, petitioner explicitly confirmed his understanding during his plea colloquy that he would not be entitled to withdraw his plea of guilty because of any erroneous advice from his counsel regarding his ultimate sentence.

> THE COURT: Have you discussed with Mr. Broccoletti the factors that the Court must consider in determining an appropriate sentence?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Has he explained to you the various considerations which go into determining these factors?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Now, do you understand that at this point it's unlikely that he can be specific as to the factors which will apply in your case because he may not have all the necessary information, and he obviously has not seen the presentence report?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that you will not be able to withdraw your plea on the ground that his prediction as to your sentence prove[d] to be in error or inaccurate?

THE DEFENDANT: Yes, sir, I understand.

Plea Tr. at 14:2–18. Thus, even if the court were to find that petitioner's former counsel erred in advising petitioner regarding whether his sentences would run concurrently or consecutively, and even if the court were to find that such errors would fall below an objective standard of reasonableness, petitioner would nevertheless be unable to show any resulting prejudice, because this court did not abuse its discretion in ordering, pursuant to its review of 18 U.S.C. § 3553(a)'s factors, that petitioner's sentences on Counts One and Two run consecutively. See, e.g., United States v. Puckett, 61 F.3d 1092, 1097 (4th Cir. 1995).

With regard to whether petitioner's offenses should, in fact, have been grouped pursuant to section 3D1.2 of the Guidelines, even if petitioner were able to establish that ineffective assistance of counsel caused his procedural default of this issue *both* at sentencing *and* on direct appeal,[8] it does not appear that petitioner's substantive argument has merit. The letter from petitioner's former counsel to petitioner, reflecting the Probation Officer's reasons for not grouping the offenses, readily disposes of several of the possible grounds for grouping. See Mot. Mem. Ex. G. As noted therein, Counts One and Two do not involve the same victim and the same or common acts or transactions, involve no overlapping elements, and, even on a case-by-case basis, do not have guideline ranges based on aggregate harm. Petitioner nevertheless argues

[8] The court notes in this connection that prejudice would appear to be established by the fact that petitioner received a one-level increase to his offense level because his offenses were not grouped. See PSR Worksheet B.

that they should have been grouped because the offense conduct constituting Count Two was "treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to" Count One. U.S.S.G. § 3D1.2(c). As noted above, pursuant to section 2G2.2(b)(5) of the Guidelines, petitioner received a five-level enhancement for engaging in a pattern of activity involving the sexual abuse or exploitation of a minor, which is listed as a specific offense characteristic in that section. See PSR Worksheet A. At sentencing, the court cited the "two exchanges that the defendant had with minors that began with a sexually inappropriate Internet chat in which the defendant posed as a young girl, and that escalated into phone conversations in which the defendant posed as . . . [the] father of the fictitious young girl and asked sexually inappropriate questions." Sent. Tr. at 33:23–34:6. Obviously one of the exchanges discussed there was the offense conduct constituting Count Two. However, the court also noted that paragraphs 5, 11, 12, *and* 20 "indicated that the defendant had been using chat rooms to talk to younger girls for approximately five years prior to his arrest." Id. at 34:7–10. The court explained that "[t]he fact that these and other episodes occurred during the course of the instant offense or did not result in specific convictions for the conduct does not preclude the application of the enhancement," and overruled petitioner's objection to the enhancement. Id. at 34:10–14. Thus, the enhancement would have been justified even absent the specific offense conduct constituting Count Two. Consequently, it cannot be said that Count Two, in and of itself, constituted a specific offense characteristic of, or an adjustment to, Count One. Consequently, Grounds Six and Ten of petitioner's motion are both entirely without merit.

V. **Counsel's Failure "to Adequately Research and Investigate the Charged Offenses"**

Petitioner argues that his former counsel improperly allowed petitioner to plead guilty even though (1) "[t]he government lacked sufficient evidence to satisfy the interstate nexus requirement of 18 USC [sic] § 2252A(a)(2)" and (2) "[t]he government had insufficient evidence to support a conviction under 18 USC [sic] § 2422(b)." Mot. Mem. at 27, 28. Both arguments are without merit. With respect to the interstate nexus for Count One, the Statement of Facts executed by petitioner provided "that on November 30, 2005, the defendant distributed, through his e-mail account, to another person, an image of 'child pornography,'" identified and described that image, and further indicated that the image "had been mailed and shipped and transported in interstate and foreign commerce by any means, including by computer." Docket No. 13 at 2–3. With respect to the interstate nexus for Count Two, the Statement of Facts provided that petitioner's victim, Jane Doe #2, was located in Columbia, Pennsylvania, whereas petitioner was located in Newport News, Virginia. See id. at 3. It also provided that petitioner and Jane Doe #2 engaged in an AOL chat session by computer, and that petitioner made phone calls to her on his cell phone. Id. "'[P]roof of transmission of pornography over the Internet . . . satisfies the interstate commerce element of the offense.'" United States v. Ellyson, 326 F.3d 522, 533 (quoting United States v. Hilton, 257 F.3d 50, 54–55 (1st Cir. 2001)); accord United States v. Kaye, 451 F. Supp. 2d 775, 782 (E.D. Va. 2006), aff'd, 243 F. App'x 763, 2007 WL 1978226 (4th Cir. 2007) (unpublished per curiam opinion) ("A transmission of communication by means of the telephone or Internet constitutes the use of a facility of interstate commerce."). Consequently, counsel could not have been ineffective by failing to research or investigate these issues, and these aspects of Ground Seven of petitioner's motion are without merit. Petitioner's

claim of ineffective assistance of counsel with regard to his claimed "actual innocence" of Count Two will be discussed below in connection with his substantive "actual innocence" claim.

VI. Counsel's Failure to Move to Suppress Self-Incriminating Statements

Petitioner claims that he was not adequately advised of his Miranda rights by law enforcement at the time the search warrant was executed on his residence, and therefore claims that his former counsel was ineffective because he failed to move to suppress a statement made by petitioner to his wife in the presence of a law enforcement officer with a tape recorder. Specifically, petitioner claims that although law enforcement advised him of his right not to speak with them and his right to counsel, he was not informed of his right to court-appointed counsel or that his statements could be used as evidence against him. Petitioner claims that the circumstances of the execution of the search warrant were the functional equivalent of an interrogation.

Petitioner's former counsel notes that the transcript of the tape recording clearly shows that when petitioner "asked to speak to his wife, he was told that because a search warrant was being executed, he could not do it alone, but law enforcement would have to be present. [Petitioner] agreed and spoke to his wife." Docket No. 51 Ex. A ¶ 6; see also Mot. Mem. Exs. E at 7–8 & F at 1. Petitioner's former counsel explains that "[o]n that basis, there was no justification for filing a motion to suppress." Id. The government argues that petitioner was not in custody during his recorded conversation "because (1) he was told repeatedly that he was not under arrest, and (2) he was told at the onset of the conversation that he did not have to answer questions from the investigator, (3) he repeatedly reinitiated the conversation with" law enforcement. Docket No. 51 at 33 (citing United States v. Colonna, 511 F.3d 431, 436 (4th Cir.

2007)). After reviewing the transcripts provided by petitioner, the court agrees with the government that petitioner was not in custody during the execution of the search warrant, rendering petitioner's claimed Miranda violations inapposite. Petitioner voluntarily made the statements to his wife after law enforcement honored his request to speak with her, without handcuffs on, upon her return to their residence. Moreover, the court notes that petitioner explicitly indicated under oath during his plea colloquy that he did not feel that his constitutional rights had been violated in any way in connection with the instant case:

> THE COURT: Mr. Fugit, do you feel that any of your constitutional rights have been violated in any way in connection with the seizure of any physical or tangible evidence relating to your offense by any police or other law enforcement agent, federal or state?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Do you feel that any of your constitutional rights have been violated in any way in regard to the taking of any oral or written statement from you by any police, governmental or law enforcement agency or by anyone else?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Has anyone, including your attorney or the United States attorney, made any promise of leniency or promise of any kind in return for your plea of guilty?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Has anyone threatened you in any way or used force against you to induce you to plead guilty?
>
> THE DEFENDANT: No, sir.

Plea Tr. 11:3–21. Consequently, there was clearly no basis for filing a motion to suppress, and Ground Eight of petitioner's motion is thus without merit.

VII. Actual Innocence on Count Two

Petitioner further claims that he is actually innocent of coercion and enticement of a minor because (1) there was never any physical contact between him and his minor victim and (2) there was no evidence that petitioner ever intended to travel to meet his victim or performed any substantial step toward doing so, which he claims are requisite elements of the offense charged in Count Two. As the government points out, petitioner failed to raise any claim of actual innocence at sentencing or on direct appeal, and such a claim directly contradicts petitioner's sworn testimony during his plea colloquy. Of course, as noted above, if petitioner can demonstrate that he is actually innocent, then the court should issue a writ of habeas corpus in order to avoid a miscarriage of justice, regardless of whether the claim was procedurally defaulted. See Mikalajunas, 186 F.3d at 493 (citing Murray, 477 U.S. at 496). As discussed above, however, petitioner confirmed under oath in the course of his plea colloquy that he had reviewed the indictment with counsel, was advised of the essential elements of the offenses and the potential penalties, confirmed the accuracy of the conduct attributed to him by the Statement of Facts, and pled guilty to both counts. The court filed the Statement of Facts and accepted petitioner's guilty plea.

Even if petitioner's claim were procedurally appropriate, it would still fail, because it is predicated on a fundamental misunderstanding of the nature of Count Two. Simply put, contrary to petitioner's arguments, which are premised primarily on definitions from Black's Law Dictionary, the crime of coercion and enticement does not necessarily require any physical contact between perpetrator or victim. See, e.g., United States v. Cochran, 534 F.3d 631, 634 (7th Cir. 2008) (indicating that "[t]here is no reason . . . to find that [enticing a minor to engage

in illegal, physical sexual contact] constitute[s] a floor on what is required to satisfy the persuasion, inducement, enticement, or coercion element, especially when the underlying criminal sexual activity does not require a face-to-face meeting or physical contact").

Section 2422(b) punishes anyone who "knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in . . . any sexual activity for which any person can be charged with a criminal offense, or attempts to do so." 18 U.S.C. § 2422(b). As the government points out, the Statement of Facts to which petitioner stipulated explicitly provided that "[t]he defendant admits that he knowingly persuaded, induced, enticed or coerced Jane Doe #2 to engage in a sexual activity, to wit; Taking Indecent Liberties with Children, in violation of § 18.2-370 of the Code of Virginia 1950, as amended, for which he could be charged." Docket No. 13 at 3. Even upon cursory review, the details of petitioner's inappropriate sexual conversation with the victim enumerated in the Statement of Facts reflect, at a minimum, that petitioner "propose[d] that [Jane Doe #2] expose . . . her sexual or genital parts to" petitioner, which is clearly one of the acts criminalized by section 18.2-370 of the Virginia Code, and which, by its very terms, does not require actual physical contact, but instead only a "proposal." Va. Code. § 18.2-370; see also Docket No. 13 at 3 (petitioner asked Jane Doe #2 "if she minded if he came in to check on her while she was naked, if she would mind seeing him naked and will she get naked for him"). Moreover, section 18.2-370 of the Virginia Code has been construed not to "make any distinction between whether the crime actually occurred or was merely inchoate, i.e., an attempted violation. Similarly, [it does not] require[] the victim be an" actual minor. Vanderwall v. Virginia, Action No. 1:05cv1341 (JCC/TRJ), 2006 WL 6093879, at *4 (E.D. Va. Aug. 9, 2006); accord United States v. Kelly, 510 F.3d 433, 441 n.7 (4th Cir. 2007)

(collecting cases); Kaye, 451 F. Supp. 2d at 781-87; United States v. Kaye, No. 1:06cr205 (JCC), 2006 WL 2252116, at *2-3 (E.D. Va. Aug. 4, 2006). In Vanderwall, the defendant challenged being required to register with the Virginia Sex Offender and Crimes Against Minors Registry because of his conviction for, *inter alia*, attempted indecent liberties with children. The court held it to be irrelevant that the defendant:

> dispute[d] the existence of a victim because (1) his crime was only inchoate and he never physically interacted with a minor or person; (2) his interaction with a minor occurred only in the virtual world of the Internet; or (3) the person on the other end of his Internet conversation was, in fact, not really 13 years old.

Id. at *2 n.7. In this case, petitioner stipulated in the Statement of Facts that he was guilty of a sexual activity for which he could be charged with a criminal offense under Virginia law. Consequently, petitioner cannot be "actually innocent" of Count Two, and Ground Nine of petitioner's motion is without merit. For these same reasons, petitioner's claim in Ground Seven that counsel was ineffective by failing to research or investigate this issue is also without merit.

CONCLUSION

For the foregoing reasons, petitioner's motion pursuant to 28 U.S.C. § 2255 is hereby **DENIED**, except with respect to Grounds One and Two relating to the court's errors in conducting petitioner's plea colloquy and the alleged ineffectiveness of petitioner's former counsel in connection with those errors. Pursuant to Rule 8 of the Rules Governing Section 2255 Proceedings for the United States District Courts, the court has determined that an evidentiary hearing on Grounds One and Two is warranted, and hereby **ORDERS** that such a hearing shall be held as soon as practicable.

In light of petitioner's claims of ineffective assistance by his former counsel, petitioner is **ORDERED** to advise the Clerk of this court in writing within fourteen (14) days after the date of this Opinion and Order whether he intends to retain new private counsel to represent him in connection with the evidentiary hearing ordered herein. Should petitioner elect to retain new private counsel, such counsel must file a notice of appearance in this matter no later than thirty (30) days after the date of this Opinion and Order. If the Clerk receives no such notice from petitioner within fourteen (14) days after the date of this Opinion and Order, or petitioner advises the Clerk that he does not intend to retain new private counsel, then the Clerk is **DIRECTED** to appoint petitioner new counsel to represent him in connection with the evidentiary hearing. Once petitioner's new counsel is either retained or appointed, counsel for the government is hereby **ORDERED** to confer with both petitioner's new counsel and the court to set a hearing date that gives both counsel adequate time to investigate and prepare.

Finding no substantial issue for appeal concerning the denial of a constitutional right affecting the conviction, nor a debatable procedural issue, a certificate of appealability with respect to all of the other grounds asserted by petitioner in his motion is **DENIED**. See Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). The court advises petitioner that, after the court has held the evidentiary hearing and ruled on the remaining Grounds of the instant motion, he may appeal from this court's denial of a certificate of appealability by forwarding a written notice of appeal to the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia, 23510 within sixty (60) days from the date of the final order of this court regarding the instant motion.

The government's request to place petitioner's motion, memorandum of law, and exhibits under seal is hereby **GRANTED**, and the Clerk is **DIRECTED** to place those documents **UNDER SEAL**, immediately.

The Clerk is **REQUESTED** to mail a copy of this Opinion and Order to petitioner, petitioner's former counsel, and the United States Attorney's Office in Newport News, Virginia.

It is so **ORDERED**.

/s/
Jerome B. Friedman
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
August 19, 2010

FILED: February 26, 2013

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-6741
(4:07-cr-00065-JBF-JEB-1)
(4:09-cv-00135-JBF-DEM)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

TIMOTHY ANDREW FUGIT

Defendant - Appellant

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Newport News Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO. 4:07CR65
	)	
TIMOTHY ANDREW FUGIT	)	
	)	

STATEMENT OF FACTS

If the United States were to try this case, the evidence that would be proved beyond a reasonable doubt would be:

On or about December 12, 2005, a ten year old female minor in Vinton, Virginia, Jane Doe #1, was in an America OnLine (hereinafter AOL) chat room, "Kid2Kid" chatting for approximately 30-45 minutes with Soccerbabe2u143" who claimed to be a 10 year old female named "Kimberly". Jane Doe#1 received permission from her grandmother to give out their phone number. Approximately five minutes later, an adult male claiming to be the father of Kimberly called Jane Doe #1 on the telephone. The adult male engaged the child in an inappropriate sexual conversation. Shortly thereafter, Jane Doe # 1 reported the incident to her grandmother, who promptly called the Vinton Police Department. A subsequent investigation revealed that the defendant, TIMOTHY ANDREW FUGIT, called Jane Doe #1. A short time later, investigators with the Virginia Internet Crimes Against Children Task Force, located in

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Bedford, Virginia, joined the investigation.

On January 17, 2006, investigators with the Vinton Police Department along with Virginia Internet Crimes Against Children Task Force (hereinafter Va ICAC) obtained and executed a state search warrant on the defendant's two places of abode in Newport News, Virginia. During the execution of the search warrant, Investigator Rodney Thompson of the Va ICAC, spoke with the defendant who agreed to speak with Investigator Thompson after being advised that he was not under arrest and could have an attorney present. Investigator Thompson asked the defendant if he knew why he was there and the defendant responded "Because I have attempted to contact children on the computer and telephone". He also admitted that he used AOL and his AOL account had been previously bumped several times for inappropriate chat/contact with minors. When the defendant's wife arrived at the home during the search, the defendant told his wife that the police were there because he had a problem and he was a pedophile. The computers and other electronic storage media devices were seized during the search.

A forensic computer exam was conducted by United States Secret Service Examiner J. Luther Perry. He discovered on the defendant's computer, among other things, that on November 30, 2005, the defendant distributed, through his e-mail account, to another person, an image of "child pornography", as defined in Title 18, United States Code, § 2256 (2)(A)(B) and (8). This image was entitled "MA12233765-0002/1%20sis%20n%20bros.jpg," and it depicted an actual female child engaging in sexually explicit conduct with two male children, specifically, oral to genital sex and masturbation. The image depicts a prepubescent "minor" as defined in

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Title 18, United States Code, § 2256 (1). Furthermore, the image had been mailed and shipped and transported in interstate and foreign commerce by any means, including by computer.

On November 28, 2005, an 11 year old female minor in Columbia, Pennsylvania, Jane Doe #2, was in an AOL children's chat room #1, chatting with "Soccerbabe2u143" who claimed to be a female named "Kimberly". During the chat session on the computer, Kimberly asked questions of Jane Doe#2, regarding her breast size, how big her private parts were, her underwear, slumber parties and if she got naked in front of guys. The two exchanged telephone numbers and shortly thereafter an adult male claiming to be the father of Kimberly called Jane Doe #2 on the telephone. The adult male engaged the child in an inappropriate sexual conversation. Specifically, he asked her; had she seen a grown man naked, if she minded if he came in to check on her while she was naked, if she would mind seeing him naked and will she get naked for him. Shortly thereafter, Jane Doe # 2 reported the incident to her grandmother and mother and they called the police. Officers with the Columbia Borough Police Department obtained a search warrant to determine the identity of the screen name, "Soccerbabe2u143". AOL complied with the search warrant and identified the user as the defendant, TIMOTHY ANDREW FUGIT, living in Newport News, Virginia.

The defendant's cell phone records were obtained and he made a number of phone calls in the afternoon of November 28, 2005, using a pre-paid calling card.

The defendant admits that he knowingly persuaded, induced, enticed or coerced Jane Doe #2 to engage in a sexual activity, to wit; Taking Indecent Liberties with Children, in violation of §18.2-370 of the Code of Virginia 1950, as amended, for which he could be charged.

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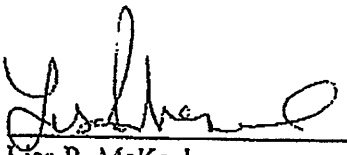
The defendant, at the time of these offenses was 24 years old, lived in Newport News, Virginia, and was employed with the United States Navy.

These events occurred in the Eastern District of Virginia and elsewhere.

Respectfully submitted,

Chuck Rosenberg
United States Attorney

By: 

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After consulting with my attorney and pursuant to the plea agreement entered into this day between the defendant, and the United States, I hereby stipulate that the above Statement of Facts is a partial summary of the evidence which is true and accurate, and that had the matter proceeded to trial, the United States would have proved the same beyond a reasonable doubt.

TIMOTHY ANDREW FUGIT — 7/20/07 Date

I am TIMOTHY ANDREW FUGIT's attorney. I have carefully reviewed the above Statement of Facts with him. To my knowledge, his decision to stipulate to these facts is an informed and voluntary one.

James O. Broccoletti, Esq.
Counsel for defendant — 7-20-07 Date