

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

| | | |
|---------------------------|---|---------------------|
| GREGORY JOHN MITCHEL, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | Nos. 7:05-cr-00090; |
| |) | 7:08-cv-80076 |
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Respondent. |) | |

**UNITED STATES’ RESPONSE TO PETITIONER’S MOTION FOR RELIEF
PURSUANT TO TITLE 28, UNITED STATES CODE, SECTION 2255**

The United States of America, by and through counsel, hereby responds to Petitioner Gregory John Mitchel’s (“Mitchel”) motion for relief pursuant to Title 28, United States Code, Section 2255 and his supporting memorandum (collectively, the “Motion”), and seeks denial of said Motion for the reasons set forth below. The Government asserts that Mitchel is not entitled to any of the relief requested and requests that his Motion be dismissed without an evidentiary hearing.

STATEMENT OF FACTS

In or about July 2005, a 19-year-old man named Justin Berry approached the U.S. Department of Justice and provided information regarding several individuals, including himself, who were involved in the production, sale, and distribution of child pornography. Berry provided information on various child pornography websites, including mexicofriends.com, justinsfriends.com and/or justinsfriends.net, all of which contained images and videos that depicted minors engaging in sexually explicit conduct. Although these websites contained some free content, full access to the websites and the child pornography content required membership through a paid subscription. Berry provided this information on his own accord; at the time, law

enforcement was unaware of his or the other individuals' criminal activities. Mitchel was one of the individuals regarding whom Berry provided information.

On September 12, 2005, the Federal Bureau of Investigation (FBI) executed a search warrant at Mitchel's residence in Dublin, Virginia and arrested Mitchel. After being advised of his rights, Mitchel waived his right to an attorney and confessed to a number of child exploitation crimes. Exhibit 1. Mitchel admitted that he had been a member of the mexicofriends.com website, and that he knew that Berry was a minor in the pornographic videos on the website. *Id.* Mitchel's relationship with Berry began after Mitchel contacted Berry online. *Id.* Mitchel sent gifts and money to Berry. *Id.* In 2003, Berry was a minor living in Mazatlan, Mexico and Mitchel traveled there to meet Berry in person. *Id.*; Exhibit 2. Mitchel referred to Berry as his "ex-boyfriend," stated that their relationship was sexual, and said that he flew Berry to Virginia for sexual purposes. Exhibit 1.

Mitchel also admitted to a business relationship with Berry, and stated that they created, owned, and managed the "justinsfriends" website together. *Id.* The "justinsfriends" website featured some of the same child pornographic content as the "mexicofriends" website. Mitchel admitted that he and Berry opened bank accounts together and that they both financially benefited from the website memberships that were sold. *Id.* Mitchel said that proceeds from the "justinsfriends" website were directly deposited into his bank account by the website's credit card processor Neova.net, a company which was owned by an individual named Aaron Brown. *Id.* Mitchel also admitted to participating with Berry in the production of videos of underage boys masturbating in Mitchel's bedroom. *Id.*

Mitchel said that after Berry left the business, "Casey" (i.e., Timothy Ryan Richards' online name or nickname) stole the "justinsfriends" website from Mitchel and Berry, and that

Richards was now managing the website. *Id.* Mitchel stated that he thought law enforcement might be coming to arrest him for child pornography because Richards had contacted him and informed him that the FBI had raided a server facility and seized the server that contained the “justinsfriends” website. *Id.*

During the search, law enforcement seized Mitchel’s computer systems and related media, and the forensic analysis of these items corroborated Mitchel’s confession. Exhibit 3. Images and videos of child pornography of Berry, other known minors, and unknown minors were found. *Id.* These videos include (1) the computer video file “Justin and Greg.mpg”, which depicts Berry (John Doe 2) when he was a minor and Mitchel engaging in sexually explicit conduct with each other; (2) the computer video file “justinpreview2[1].wmv”, which depicts Berry when he was an adult and John Doe 1, a minor, both masturbating while sitting next to each other on a bed in Mitchel’s bedroom; (3) the computer video file “greg.wmv”, which depicts Mitchel first talking to a different known minor, John Doe 3, who then masturbates on a bed in Mitchel’s bedroom after Mitchel leaves; and (4) the computer video file “[Redacted]1.mpg”,¹ which depicts John Doe 3 masturbating. *Id.* Berry, John Doe 1, and John Doe 3 all were determined to be minors in the foregoing respective videos based upon their identification by law enforcement, their birth certificates, and forensic evidence obtained from Mitchel’s computers that proved that each of these computer files existed on the computers before the minors depicted therein turned 18 years old. *Id.*; Exhibit 2 (Berry); Exhibit 4 (John Doe 1); Exhibit 5 (John Doe 3); Exhibit 6; Exhibit 7A to Motion. That is, each computer video file necessarily had been produced when the depicted boy was a minor because the files were saved to or created on Mitchel’s computer before each of the respective minors’ 18th birthdays. Exhibit 3. In addition, other child pornography images and videos depicting different,

¹ The file name is partially redacted because it reflects the minor’s first name.

unidentified minors were found on Mitchel's computers. *Id.* Some of this child pornography depicted prepubescent minors with their hands and/or feet bound or tied up. *Id.*

Mitchel's computers also contained e-mail communications between himself, Berry, and others involved in the "mexicofriends" and "justinsfriends" child pornography websites, including Timothy Richards and Aaron Brown. *Id.* These communications confirmed that before Berry turned 18 years old, Mitchel visited Berry in Mexico. *Id.*, Attachments 3, 8; Exhibit 2. The communications also confirmed Mitchel's substantive role in the administration and management of the websites, his status as Berry's business partner, and that he financially benefited from the website's paid subscriptions. Exhibit 3, Attachments 8, 9, 11, 12, 13, 14, 19, 20, 23, 26, 27, and 29. Mitchel registered the domain name for the "justinsfriends.com" child pornography website. *Id.*, Attachment 24. Mitchel communicated with both Richards (i.e., "Casey") and Brown in order to address billing and server issues with Berry's websites. *Id.*, Attachments 4, 17, 18, and 26. Mitchel performed customer service by communicating with current and prospective members of the "mexicofriends" and "justinsfriends" websites. *Id.*, Attachments 5, 22, 25, and 28. The communications also showed Mitchel's efforts to advertise and promote the websites through affiliate marketing² and other means. *Id.*, Attachments 6, 7, 9, 10, and 21.

On September 14, 2005, the District Court appointed Charles Gregory Phillips, Esq. to represent Mitchel. United States v. Gregory John Mitchel, W.D. Va. No. 7:05-cr-00090, Docket No. 13 (hereafter "Mitchel Dkt."). On September 20, 2005, the Government and Mitchel entered a letter agreement for a limited grant of use immunity because Mitchel expressed interest in a

² Affiliate marketing allows website operators to earn financial compensation by "referring," also known as directing, website traffic to another website. Individuals who make these referrals are commonly known as "affiliates."

proffer to provide further information to the Government regarding other individuals. Exhibit 7.

In the body of the letter, it was stated:

It is our understanding that your client, Gregory J. Mitchel wished to provide information to the government which may be of assistance in the criminal investigation and prosecution of others for violations of federal criminal laws, including the production and distribution of child pornography. Mitchel has agreed to do this voluntarily recognizing the government has made no promises or representations that he will be provided with any benefit at all for doing so. While no agreement as to your client's cooperation have been made, the government hereby agrees to interview your client and to assess the information he provides at said interview and whether his further cooperation with the government is appropriate.

Id.

Mitchel separately certified the following statement: "I, Gregory J. Mitchel, certify by my signature below that I have carefully reviewed this agreement and fully understand its meaning, purpose, and consequences, and that I have discussed the same with C. Gregory Phillips, my attorney, to my complete satisfaction." *Id.*

Following the execution of this agreement, Mitchel was interviewed by law enforcement on September 20, 2005 in the presence of Phillips and Government attorneys. Exhibit 6. Mitchel provided information regarding Richards, Brown, an individual named Ken Gourlay, and others. *Id.* Mitchel admitted to producing a sexually explicit video of John Doe 3 by inviting the minor boy to his bedroom and promising John Doe 3 the opportunity to view pornography.³ *Id.*; Exhibit 5. Mitchel had secretly turned his web camera on in the hope that he

³ In the limited use immunity letter agreement, dated September 20, 2005, it was agreed that "[s]hould Mitchel ever testify contrary, in material ways, to the substance of the proffer, or otherwise present in any legal proceeding a position materially inconsistent with the proffer, the statements Mitchel made in the proffer may be used against him by the government as impeachment or rebuttal evidence, or as the basis for a prosecution for perjury or false statement." Exhibit 7. Further, the Plea Agreement provides that if Mitchel breaches "any provision of this agreement, at any time, including any attempt to withdraw [his] guilty plea, the United States Attorney's office may, at its election ... (g) use this plea agreement, any

would catch John Doe 3 masturbating on camera while watching pornography. Exhibit 6.

Mitchel was successful, and he admitted that he then uploaded the video of John Doe 3 to the “justinsfriends” website. *Id.* Mitchel admitted that as late as July 2005, he was still receiving financial compensation from the “justinsfriends” website. *Id.*

On September 22, 2005, law enforcement arrested Richards in Nashville, Tennessee. The affidavit in support of the arrest warrant included information regarding Richards that was obtained from both Berry and Mitchel, as well as law enforcement’s independent investigation.

On October 6, 2005, Mitchel was interviewed again by law enforcement pursuant to a limited grant of use immunity. Exhibit 8. Mitchel provided more information regarding Gourlay, and other individuals. *Id.* On the same day, Mitchel was indicted on six counts of child exploitation offenses and one forfeiture count. Mitchel Dkt. 24. In Count One, Mitchel was charged with the production of child pornography in violation of 18 U.S.C. § 2251(a) and (e) (“Sexual exploitation of children”). *Id.* Although the Indictment language in Count One references two minors (i.e., John Doe 1 and John Doe 2), the Indictment does not limit the Government’s proof of the charge to the exploitation of any particular minor or to any particular computer image or video files produced. *Id.* In Count Two, Mitchel was charged with advertising child pornography in violation of 18 U.S.C. § 2251(d)(1)(A) and (e). *Id.* In Count Three, Mitchel was charged with the transportation of child pornography in violation of 18 U.S.C. § 2252A(a)(1) and (b)(1). *Id.* The Indictment language in Count Three does not limit the Government’s proof of the charge to any particular computer image or video files transported,

statement [Mitchel] made during any guilty plea hearing (including [his] admission of guilt), any proffer session, or during [his] attempt to provide substantial assistance, against [him] in this or any other proceeding.” Mitchel Dkt. 39, ¶ 16. Since Mitchel has breached the Plea Agreement (by appealing, and collaterally attacking the judgment and sentence) and he is now presenting positions in this habeas proceeding that are materially inconsistent with his proffer, the Government asserts that Mitchel’s proffer statements may be used against him.

but states that such files include “computer files depicting John Doe 1, at the age of 13 years.” *Id.* In Count Four, Mitchel was charged with the receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(2). *Id.* In Count Five, Mitchel was charged with the sale of child pornography in violation of 18 U.S.C. § 2252A(a)(4)(B) and (b)(1). *Id.* In Count Six, Mitchel was charged with the possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). *Id.* In Counts One, Two, Three, and Five, Mitchel also was charged with conspiracy to commit said offenses. *Id.*

On December 22, 2005, Phillips sent a letter to the U.S. Attorney’s Office regarding additional information that Mitchel wished to provide to the Government regarding another individual. Exhibit 9.

On January 20, 2006, the U.S. Attorney’s Office sent a letter to Phillips with a proposed plea agreement. Exhibit 10. In the letter, counsel for the Government stated:

As to the current status of a substantial assistance motion, one is not ruled out but is unwarranted at this point. Mr. Mitchel could wind up as a witness in the credit card processor investigation, or perhaps other cases, but he should not plead based on an expectation of a 5K motion or later Rule 35 motion.

*Id.*⁴

On January 26, 2006, Mitchel executed a written plea agreement (the “Agreement”) with the Government, in which he agreed to enter a plea of guilty to the following four counts of the Indictment: production of child pornography (Count One), transportation of child pornography (Count Three), sale of child pornography (Count Five), and possession of child pornography (Count Six). Mitchel Dkt. 39. Mitchel initialed each page of the Agreement, in which he also agreed to the following:

⁴ The referenced “credit card processor investigation” was of Brown, who was later indicted on May 24, 2006. United States v. Aaron Campbell Brown, W.D. Va. No. 7:06-cr-00044, Docket No. 3 (hereafter “Brown Dkt.”).

My attorney has informed me of the nature of these charges and the elements of these charges which must be proved by the United States beyond a reasonable doubt before I could be found guilty as charged.

I acknowledge that I have had all of my rights explained to me and I expressly recognize that I have the following constitutional rights and, that by voluntarily pleading guilty, I knowingly waive and give up these valuable constitutional rights:

- a. The right to plead not guilty and persist in that plea.
- b. The right to a speedy and public jury trial.
- c. The right to assistance of counsel at that trial and in any subsequent appeal.
- d. The right to remain silent at trial.
- e. The right to testify at trial.
- f. The right to confront and cross-examine government witnesses.
- g. The right to present evidence and witnesses in my own behalf.
- h. The right to compulsory process of the court.
- i. The right to be presumed innocent.
- j. The right to a unanimous guilty verdict.
- k. The right to appeal a guilty verdict.

I am pleading guilty as described above because I am in fact guilty and because it is in my best interest to do so and not because of any threats or promises. In addition, I am not under the influence of any substance that would impede my ability to fully understand this Plea Agreement. There has been no representation made whatsoever by any agent or employee of the United States to me as to what the final disposition of this matter should or will be.

It is understood that the matter of sentencing is within the sole discretion of the Court, subject to the advisory United States Sentencing Guidelines ("Sentencing Guidelines") and this Agreement. I understand that the Sentencing Guidelines apply to this charge and may create a presumption of a mandatory period of incarceration. I have discussed sentencing issues with my attorney and realize that there is a substantial likelihood that I will be incarcerated. I understand that I will not be eligible for parole during any term of imprisonment imposed. I understand that the advisory guideline sentence will be determined from a variety of factors involved in the offense and related conduct, including my role in the offense and my prior criminal history.

Id., ¶ 1.

The Agreement provided for the possibility of a departure from the U.S. Sentencing Guidelines range based upon substantial assistance: “I agree that no grounds exist for a downward departure from the sentencing guidelines, other than a potential departure for substantial assistance, and that I will not seek a downward departure from the sentencing guidelines.” *Id.*, ¶ 8.

Mitchel expressly agreed to waive any right to collaterally attack the judgment and sentence imposed by the District Court:

I am aware that I may have a right to later attack my conviction and/or sentence in a proceeding separate from this criminal proceeding. In return for the promises in this plea agreement, I agree to waive my right to collaterally attack, pursuant to Title 28, United States Code, Section 2255 or any other provision of law, the judgment and any part of the sentence imposed upon me by the Court.

Id., ¶ 10.

Mitchel agreed that Phillips had provided effective assistance of counsel, and waived his right to raise a claim of ineffective assistance of counsel:

I have discussed the terms of the foregoing plea agreement and all matters pertaining to the charges against me with my attorney and am satisfied with my attorney and his advice. I understand that I have the right to make known to the Court, at any time, any dissatisfaction I may have with my attorney's representation. I agree to make known to the Court no later than at the time of sentencing any dissatisfaction or complaint I may have with my attorney's representation. I hereby waive any claim I may have for ineffective assistance of counsel known and not raised by me with the Court at the time of sentencing.

Id., ¶ 19.

Mitchel also agreed that he carefully reviewed the Agreement with Phillips, his understanding was that the Agreement did not provide for a specific sentence, the sentence could

be more severe than he expected, and any calculation of his sentencing range under the Guidelines by the Government or by Phillips was speculative and not binding on the Court:

I understand that if the sentence is more severe than I expected, I will have no right to withdraw my guilty plea.

I understand that a thorough presentence investigation will be conducted and sentencing recommendations independent of the United States Attorney's Office will be made by the presentence preparer, which the Court may adopt or take into consideration. I understand that any calculation regarding the guidelines by the United States Attorney's Office or by my attorney is speculative and is not binding upon the Court, the Probation Office or the United States Attorney's Office. No guarantee has been made by the United States Attorney's Office regarding the effect of the guidelines on my case.

* * *

I have consulted with my attorney and fully understand all my rights with respect to the offenses charged in the pending indictment. Further, I have consulted with my attorney and fully understand my rights with respect to the provisions of the Guidelines. I have read this plea agreement and carefully reviewed every part of it with my attorney. I understand this agreement and I voluntarily agree to it. Being aware of all of the possible consequences of my plea, I have independently decided to enter this plea of my own free will, and am affirming that agreement on this date and by my signature below.

Id., ¶ 20.

On January 27, 2006, the change of plea hearing occurred before the District Court. Mitchel Dkt. 38. Under oath, Mitchel confirmed that he understood the charges against him, what the Government would have to prove for each offense in order for him to be found guilty at trial, the possible sentence he faced and the effect on that sentence of his prior convictions. Mitchel Dkt. 68, 10:12-17:20. Under oath, Mitchel expressed satisfaction with the legal representation provided by Phillips:

THE COURT: Have you fully discussed those charges and this case in general with Mr. Phillips, your counsel?

THE DEFENDANT: Yes, sir.

THE COURT: Are you fully satisfied with the counsel representation and advice given to you in this case by your attorney?

THE DEFENDANT: Yes, sir.

Id., 8:18-8:25.

Mitchel denied that his guilty plea was the result of any promises made or other pressure:

THE COURT: Is there anything about that [plea] agreement you do not understand?

THE DEFENDANT: No, sir.

THE COURT: Has anyone made any other or different promise or assurance to you of any kind in an effort to induce you to enter a plea of guilty in this case?

THE DEFENDANT: No, sir.

THE COURT: Has anyone attempted in anyway to force you to plead guilty in this case?

THE DEFENDANT: No, sir.

Id., 9:16-10:1.

Mitchel also expressed his understanding that he was waiving rights to collaterally attack both his judgment and sentence:

THE COURT: Do you also understand that you're waiving your right to collaterally attack your plea and sentences that have been explained to you as well?

THE DEFENDANT: Yes, sir.

Id., 18:11-18:15.

In the recitation of the factual basis for the plea, counsel for the Government described the evidence the Government would have introduced if the case had gone to trial. In support of Count One, which charged Mitchel with the production of child pornography, counsel for the Government described Mitchel's production of child pornography of two different minor victims:

... Justin Berry was interviewed at some length about his knowledge of child pornography and related a number of facts relating to this case; basically said that he had started when he was about 13-years-old with a web camera. Initially, it was fairly innocent. He rapidly got approached by older men to engage in explicit conduct. Eventually he did when he was about 15-years-old. That's also when he met the defendant, Mr. Mitchel. So that would have been about 2001 that he first met Mr. Mitchel. He related that he had engaged in sexual conduct with Mr. Mitchel and also indicated that he had produced child pornography with Mr. Mitchel that was posted on a website. There was one in particular he described was of Mr. Berry shortly after he had turned 18 and another young man from this area, who was 14-years-old at the time.

Id., 21:5-21:22.

Although counsel for the Government specifically referred to only one video, the attorney also made clear that Mitchel was involved in the production of more than just one child pornography video:

THE COURT: ... From the evidence, first of all, as to count one, production of child pornography between on or about May 1, 2003 to September 12, 2005. Specifically of the evidence that you've recounted, what would that evidence establish as to count one?

MR. MOTT: Among others, the specific one charged is the video of John Doe 1 and John Doe 2. The evidence would've been that was a video produced by Mr. Mitchel depicting Justin Berry and a minor from this area engaged in masturbation. That was made in

his bedroom in Dublin and later posted on the Justin's Friends website.

Id., 24:24-25:10 (emphasis added).

Count One alleged that Mitchel produced child pornography of two different minors (i.e., John Doe 1 and John Doe 2), but the Indictment did not specify any particular video or videos. Mitchel Dkt. 24. Therefore, counsel for the Government misspoke in describing the video of an adult Berry and the minor masturbating as “the specific one charged.” Nonetheless, Mitchel's involvement in that video's production of child pornography of John Doe 1 was sufficient to establish his guilt for a single count of production of child pornography (i.e., Count One).

Following the recitation of the factual basis, Mitchel stated his agreement with the Government attorney's summary of the evidence. Mitchel Dkt. 68, 26:14-17. Mitchel entered guilty pleas to Counts One, Three, Five, and Six and confirmed that he was pleading guilty because he was in fact guilty of those offenses. *Id.*, 20:6-9, 26:18-27:5. Mitchel also executed the guilty plea form affirming that his plea of guilty was made “knowingly and voluntarily and without threat of any kind or without promises other than those disclosed here in open court.” Mitchel Dkt. 40; Mitchel Dkt. 68, 27:8-20.

On March 16, 2006, the Probation Department completed Mitchel's Presentence Investigation Report (the “PSR”). Mitchel Dkt. 52. In calculating Mitchel's sentence pursuant to the U.S. Sentencing Guidelines, the PSR grouped Mitchel's offenses of conviction differently than had been agreed in the Agreement. *Id.*, ¶ 14 (“Offense Level Computations”). Pursuant to USSG § 3D1.2(d), the PSR grouped Mitchel's convictions on Counts Three, Five, and Six together, whereas in the Agreement, Count Three had been grouped with Count One. *Id.*, ¶ 14;

Mitchel Dkt. 39, ¶ 3 (“Offense Characteristics”). Neither the Government nor Mitchel filed any objections to the PSR.

On July 14, 2006, the day of Mitchel’s sentencing hearing, the Probation Department discovered a base offense level error in its PSR and advised the District Court. Mitchel Dkt. 61, 7:11-15. A similar error had been made in the Agreement. Mitchel Dkt. 39, ¶ 3 (“Offense Characteristics”). Through the correction of the error, Mitchel’s total offense level under the advisory Sentencing Guidelines increased from 41 to 44, which is life imprisonment under the Guidelines. Mitchel Dkt. 61, 7:22-8:23.

At the hearing, the Government did not introduce evidence. Phillips called the FBI case agent to testify regarding the cooperation and assistance that Mitchel had provided to law enforcement in the investigation of Richards in Tennessee:

Q When you arrested him [Mitchel], did he advise you there was a situation in Nashville, Tennessee?

A He did.

Q What did he tell you specifically?

A He advised that there was another individual [Richards] involved in his website that had access to a young minor boy of 13 years old.

Q Did he tell you that the young boy, 13 years old, was in grave danger at that particular time?

A He did feel that, yes, and he told us that.

Q Were you able to direct individuals in Nashville to, I guess, stop any harm that would come to that child?

A We did. We immediately deployed agents to survey out that location, and subsequent to that, he was actually arrested and the boy was actually taken away from that man.

Q In addition to that helpful information that Mr. Mitchel gave, was he also cooperative with you in other investigations? Does he continue to be cooperative with you?

A Yes, he does. I've proffered with him several times.

Q Has he been remorseful for his actions in this offense?

A Yes, he appears to, from my perspective.

Q And although no 5K motion has been filed today, he will continue to work with you?

A Yes, I would hope so.

Id., 10:22-11:20.

In the cross-examination of the FBI case agent, the Government clarified that before the interviews with Mitchel, law enforcement already had been investigating the matter of a minor boy living with Richards based upon information previously provided by Berry:

Q Special Agent Winkis, isn't it true prior to interviewing Gregory Mitchel, the defendant in this case, that you were aware with the situation with the minor Dew?

A Yes, we already had that information prior to Mr. Mitchel's advising us.

Q So it wasn't new information to you?

A It wasn't new information. There was a little more information he provided that we did not have.

Q And you were already investigating the whereabouts and location of Dew at the time of your interview with Mr. Mitchel?

A Yes, we were already looking into it.

Q And that came from the complaining witness [Berry] in the investigation?

A Yes.

Id., 61, 12:1-15.

The District Court acknowledged Mitchel's prior and continuing cooperation with the Government. *Id.*, 15:14-15; 21:1-8. However, upon consideration of the sentencing factors in 18 U.S.C. § 3553 and the Sentencing Guidelines range, the District Court sentenced Mitchel to 1,800 months imprisonment. Mitchel Dkt. 49; Mitchel Dkt. 61, 30:7-10.

On July 31, 2006, Phillips filed a timely notice of appeal of Mitchel's sentence. Mitchel Dkt. 54. On April 30, 2007, the U.S. Court of Appeals for the Fourth Circuit dismissed Mitchel's appeal based upon his waiver of the right to appeal a sentence within the advisory U.S. Sentencing Guidelines range finding that "[t]he record reveals, and Mitchel does not contest, that Mitchel agreed to this waiver knowingly and voluntarily." *United States v. Mitchel*, No. 06-4786, 2007 WL 1245170, 225 Fed. Appx. 167, 168 (4th Cir. Apr. 30, 2007).

ISSUES PRESENTED

On July 29, 2008, Mitchel filed his Motion under 28 U.S.C. § 2255 seeking to vacate and set the judgment aside, or alternatively, to resentence him, grant a new trial, or correct the sentence imposed by the District Court. Mitchel does not allege his actual innocence of the four child pornography charges to which he pleaded guilty in either his Motion or his Declaration, which is dated September 27, 2008 and was filed on October 15, 2008. Rather, Mitchel rests his motion on the following grounds, each of which is addressed below:

(1) Ineffective assistance of counsel in pre-plea representation by Phillips by allegedly failing to investigate or to prepare for trial, or to advise competently regarding the Government's plea offer;

(2) Ineffective assistance of counsel at sentencing by Phillips by allegedly failing to review and discuss the PSR with Mitchel, to file objections to the PSR, to attempt to renegotiate the Agreement, to seek withdrawal of the guilty plea based upon his ineffective assistance of counsel, to advise the District Court of Mitchel's cooperation with and assistance to the Government, and to confer with Mitchel during the sentencing hearing;

(3) The Government's alleged violation of *Brady v. Maryland*, 373 U.S. 83 (1963), for allegedly failing to provide the complete FBI 302 report of an interview with the minor John Doe 1, and impeachment information regarding Berry;

(4) The Government's alleged grand jury abuse for indicting Mitchel on Count 1, which alleged Mitchel's sexual exploitation of two minors in violation of 18 U.S.C. § 2251(a) and (e), and on Count 3, which alleged Mitchel's transportation of computer files containing child pornography, including depictions of John Doe 1;

(5) The Government's alleged inadequate notice of Mitchel's prior 1999 conduct, which was raised in argument at the sentencing hearing;

(6) The Government's alleged misrepresentations at the sentencing hearing regarding Mitchel's cooperation and assistance;

(7) The District Court's failure to determine that Mitchel had read and discussed the PSR with Phillips pursuant to Fed. R. Crim. P. 32(i)(1)(B); and

(8) Sentencing disparities between Mitchel's sentence and the sentences received by Aaron Brown, Kenneth Gourlay, and Timothy Richards.

STANDARD OF REVIEW

After conviction and the exhaustion of appeals, a court is "entitled to presume [the defendant] stands fairly and finally convicted." *United States v. Frady*, 456 U.S. 152, 164-65

(1982) (stating that “[o]ur trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless postconviction collateral attacks”). “[A] final judgment commands respect.” *Id.* at 165. In order to obtain collateral relief via a motion under 28 U.S.C. § 2255, “a prisoner must clear a significantly higher hurdle than would exist on direct appeal.” *Id.* at 166. “[A]n error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.” *Id.* at 165.

In habeas proceedings, “the scope of review of non-constitutional error is more limited than that of constitutional error.” *United States v. Mikalajunas*, 186 F.3d 490, 495 (4th Cir. 1999). A defendant must establish either an error of “constitutional or jurisdictional magnitude” or an error which “could not have been raised on direct appeal, and if condoned, would result in a complete miscarriage of justice.” *United States v. Shaid*, 937 F.2d 228, 232 n.7 (5th Cir. 1991) (citing *Hill v. United States*, 368 U.S. 424, 428 (1962); *United States v. Capua*, 656 F.2d 1033, 1037 (5th Cir. 1981)). Thus, 28 U.S.C. § 2255 applies to non-jurisdictional, non-constitutional errors based on a federal statute or rule only if the claim alleges a “fundamental defect which inherently results in a complete miscarriage of justice” or “an omission inconsistent with the rudimentary demands of fair procedure.” *Hill*, 368 U.S. at 428; *see also United States v. Addonizio*, 442 U.S. 178, 185 (1979); *United States v. Timmreck*, 441 U.S. 780, 783-84 (1979) (holding formal violation of Fed. R. Crim. P. 11 to be “neither constitutional nor jurisdictional” and thus not cognizable on collateral review).

Claims of error raised for the first time in a § 2255 motion are generally not cognizable in federal court unless the defendant demonstrates “both (1) ‘cause’ excusing his ... procedural default, and (2) ‘actual prejudice’ resulting from the errors of which he complains.” *Frady*, 456

U.S. at 167-68. This two-prong requirement applies to errors to which no objection was raised in the district court and to errors that were not raised on direct appeal. *Bousley v. United States*, 523 U.S. 614, 621-22 (1998) (ground for appeal defaulted when not raised on direct appeal). However, ineffective assistance of counsel claims may be raised for the first time in a § 2255 motion without a showing of cause and actual prejudice. *Massaro v. United States*, 538 U.S. 500, 504-09 (2003).

In order to establish “prejudice,” the error to which defendant failed to object and/or timely appeal must have resulted in an “*actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” *Frady*, 456 U.S. at 170. The defendant must show more than “just the possibility of prejudice.” *Id.* The burden on the defendant to prove prejudice justifying collateral relief is “significantly higher” than it would be to prove error on direct appeal. *Id.* at 166. If a defendant is unable to show that actual prejudice resulted, the court is not required to consider whether adequate cause has been shown. *Id.* at 168.

In order to establish “cause,” there must be an objective factor beyond the defendant’s control that impeded or prevented him from presenting the claim on direct appeal. *Coleman v. Thompson*, 501 U.S. 722, 753 (1991). The cause prong of the test for procedurally defaulted errors “must turn on something external to the defense, such as the novelty of the claim or a denial of effective assistance of counsel.” *Mikalajunas*, 186 F.3d at 493 (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). Thus, if a defendant relies upon ineffective assistance of counsel to establish cause, he is required to satisfy the two prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and show that his attorney’s performance fell below an objective standard of reasonableness and that he suffered prejudice as a result. *Mikalajunas*, 186 F.3d at 493; *see also* Section I.A., *infra*.

Even if a defendant cannot show cause for a procedural default, the Supreme Court has “recognized a narrow exception to the general rule when the habeas applicant can demonstrate that the alleged constitutional error has resulted in the conviction of one who is actually innocent of the underlying offense, or in the capital sentencing context, of the aggravating circumstances rendering the inmate eligible for the death penalty.” *Dretke v. Haley*, 541 U.S. 386, 388 (2004); *see also Bousley*, 523 U.S. at 623 (stating that “[i]t is important to note in this regard that ‘actual innocence’ means factual innocence, not mere legal insufficiency”); *Mikalajunas*, 186 F.3d at 493 (stating that “in order to demonstrate that a miscarriage of justice would result from the refusal of the court to entertain the collateral attack, a movant must show actual innocence by clear and convincing evidence”). Further, “[i]n cases where the Government has forgone more serious charges in the course of plea bargaining, petitioner’s showing of actual innocence must also extend to those charges.” *Bousley*, 523 U.S. at 624. The Fourth Circuit has held that actual innocence claims apply “in non-capital sentencing only in the context of eligibility for application of a career offender or other habitual offender guideline provision.” *Mikalajunas*, 186 F.3d at 494-95 (reasoning that “[i]f the actual innocence exception is available anytime a [U.S. Sentencing Guidelines] guideline is misapplied (such that the defendant is ‘actually innocent’ of the application of the guideline), the actual innocence exception would swallow the rule that issues not raised on appeal cannot be considered in a § 2255 motion absent a showing of cause and prejudice to excuse the default”).

ARGUMENT

Mitchel’s motion pursuant to 28 U.S.C. § 2255 should be denied because he has failed to establish any error of constitutional or jurisdictional magnitude, or any other error that has resulted in a complete miscarriage of justice. Mitchel received the effective assistance of

counsel in both pre-plea representation and at sentencing. Mitchel entered a voluntary and intelligent guilty plea pursuant to a plea agreement in which he waived the right to collaterally attack both his conviction and sentence. Further, in regard to many of Mitchel's claims of error, no such error occurred or the claims are not cognizable on collateral review because they are procedurally defaulted by his failure to show actual prejudice and sufficient cause for his failure to raise the claims on appeal. Such procedural default cannot be excused in the absence of a claim of actual, factual innocence, which Mitchel has not raised and cannot credibly raise given the overwhelming evidence of his guilt.

I. Mitchel Has Not Established His Counsel's Ineffective Assistance In Pre-Plea Representation Or That His Guilty Plea Was Not Voluntary And Intelligent As A Result

Mitchel alleges that his guilty plea was not voluntary and intelligent because he received ineffective assistance of counsel in pre-plea representation. Mitchel's ineffective assistance claim is unavailing because Phillips provided objectively reasonable legal representation in the circumstances of Mitchel's confession and other evidence of his guilt, and Mitchel cannot demonstrate any prejudice as a result. Mitchel's voluntary, intelligent guilty plea and his satisfaction with counsel are evident from his own representations in the Agreement and at the change of plea hearing, which directly rebut his instant claim.

A. The Strickland Standard

It is well settled that no defendant is entitled to flawless representation by an omniscient attorney. In the course of representation, counsel has to make decisions, evaluate strategies, and choose which issues to emphasize and which issues to downplay. In order "to establish a Sixth Amendment claim for ineffective assistance of counsel a defendant must show (1) objectively unreasonable performance and (2) prejudice stemming from that performance." *See United*

States v. Benton, 523 F.3d 424, 435 (4th Cir. 2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). A defendant must demonstrate “that counsel's performance was deficient” and that “the deficient performance prejudiced the defense.” *Bustos v. White*, 521 F.3d 321, 324 (4th Cir. 2008) (quoting *Strickland*, 466 U.S. at 687). “If the defendant cannot demonstrate the requisite prejudice, a reviewing court need not consider the performance prong.” *Fields v. Attorney General*, 956 F.2d 1290, 1297 (4th Cir. 1992) (citing *Strickland*, 466 U.S. at 697). Failure to prove either prong of the *Strickland* test is fatal to the claim that a defendant received ineffective assistance of counsel. 466 U.S. at 697.

(1) **Prejudice**

“To demonstrate prejudice,” a defendant “must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Bustos*, 521 F.3d at 324 (quoting *Strickland*, 466 U.S. at 694). “A reasonable probability is a probability sufficient to undermine confidence in the outcome” of the proceeding. *Strickland*, 466 U.S. at 694. “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.” *Id.* at 693. In cases where a defendant pleads guilty, this prejudice burden requires the defendant to establish “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). “This is an objective inquiry, ... and dependent on the likely outcome of a trial had the defendant not pleaded guilty.” *Meyer v. Branker*, 506 F.3d 358, 369 (4th Cir. 2007) (citing *Hill*, 474 U.S. at 59-60; *Hooper v. Garraghty*, 845 F.2d 471, 475 (4th Cir. 1988)). Thus, it is not sufficient to merely show that the defendant would have proceeded to trial; rather, the defendant also must show that the result would have been different. *Hill*, 474 U.S. at 59.

(2) **Objectively Unreasonable Performance**

In order to show inadequate performance, a defendant “must show that counsel's representation fell below an objective standard of reasonableness” measured by “prevailing professional norms.” *Strickland*, 466 U.S. at 687-88. To establish incompetence, one “must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.” *Strickland*, 466 U.S. at 690. However, courts “must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance” and “[j]udicial scrutiny of counsel's performance must be highly deferential.” *Strickland*, 466 U.S. at 689. The court's examination of counsel's performance is highly deferential in order to eliminate the distorting effects of hindsight. *See id.*; *Truesdale v. Moore*, 142 F.3d 749, 753 (4th Cir. 1998). Thus, the court, in reviewing counsel’s acts or omissions, must determine if they are outside the wide range of professionally competent assistance while recognizing the existence of a strong presumption that counsel has provided adequate assistance. *Strickland*, 466 U.S. at 690.

B. Mitchel Has Not Established Prejudice From Phillips’ Pre-Plea Representation Under *Strickland*

Mitchel has failed to meet the prejudice prong of the *Strickland* test. Even assuming Phillips’ alleged ineffective assistance of counsel, Mitchel has not demonstrated that had his counsel performed competently (1) he would have gone to trial instead of entering a guilty plea and (2) if he had gone to trial, a different result at trial was a reasonably likely outcome.

Mitchel’s bare, subjective assertion that he would have chosen to go to trial on the six child pornography charges he faced is insufficient and must be viewed critically in the face of the overwhelming evidence against him. *See* Statement of Facts, *supra*. As stated in *Hooper*, although Mitchel’s representation “carries some probative value, such a statement suffers from

obvious credibility problems and must be evaluated in light of the circumstances the defendant would have faced at the time of his decision.” 845 F.2d at 475. Although Mitchel claimed prior to the imposition of sentence, and continues to claim, that he would have gone to trial if he had known his correctly calculated advisory Sentencing Guidelines range, this is unlikely given the strength of the evidence against him, the absence of any possibly successful defense, and the certainty that any chance of leniency or substantial assistance credit would evaporate if the case proceeded to trial. *Braxton v. United States*, 358 F.Supp.2d 497, 504-05 (W.D. Va. 2005) (finding no prejudice where defendant pleaded guilty “primarily because he hoped the government would move to reduce his sentence at a later time for his substantial assistance” and would have done so even if attorney’s representation was objectively unreasonable).

However, assuming that Mitchel would have insisted upon trial despite these circumstances, Mitchel has not objectively shown that the result likely would have been different. Mitchel cites to no possible defenses that could have been raised to any of the six charges he would have faced, and nor does he claim his actual innocence on any of the charges.

The evidence developed prior to Mitchel’s guilty plea conclusively established his guilt on the charges to which he pleaded guilty, and supported the dismissed charges of advertising and receipt of child pornography. In his initial confession, Mitchel made significant admissions regarding the child pornography charges he faced, which were corroborated by forensic evidence extracted from his seized computers. Exhibit 1; Exhibit 3. Importantly, Mitchel has never alleged that his initial confession was subject to suppression, including in the instant proceeding.

In regard to Count One, which charged production of child pornography (including conspiracy to commit such offense), Mitchel admitted to participating with Berry in the production of child pornography and specifically, the production of videos of underage boys

masturbating in Mitchel's bedroom. Exhibit 1. In the forensic analysis of Mitchel's computers, three such child pornography videos were found and they each depict an identified minor boy masturbating on a bed in Mitchel's bedroom: "justinpreview2[1].wmv" (John Doe 1), "greg.wmv" (John Doe 3), and "[Redacted]1.mpg" (John Doe 3). Exhibit 3. Another video was found depicting Berry when he was a minor and Mitchel engaging in sexually explicit conduct with each other: "Justin and Greg.mpg." *Id.* Based upon a review of the video "Justin and Greg.mpg," Mitchel appears to have set up the camera. *Id.*

In regard to Count Two, which charged advertising of child pornography (including conspiracy to commit such offense), Mitchel admitted to selling child pornography through the commercial "justinsfriends" website, which featured a "free" preview page advertising the website content available if a website subscription was purchased. Exhibit 1. The "justinpreview2[1].wmv" child pornography video of John Doe 1 was featured as a sample of the website's content. In addition, e-mail communications from Mitchel's computers demonstrate his efforts to increase the number of paid members to the "mexicofriends" and "justinsfriends" child pornography websites through affiliate marketing and other means. For example, in an e-mail sent on February 17, 2004 to contact@markslivecam.com, Mitchel stated: "Hi, well I have access to a number of different places to do advertising. I am currently helping my friend Justin out with his site www.mexicofriends.com and in a month of helping promote his site I have gotten him 138 members." Exhibit 3, Attachment 9.

In regard to Count Three, which charged the transportation of child pornography (including conspiracy to commit such offense), the forensic analysis of Mitchel's computers revealed that on March 30, 2004, Mitchel e-mailed two visual depictions of Berry engaging in sexually explicit conduct (i.e., the computer image files Justin32A.jpg and HPIM0502). *Id.*,

Attachment 16 (child pornography images redacted). On October 4, 2003, Mitchel e-mailed five visual depictions of Berry engaging in sexually explicit conduct (i.e., the computer image files Justin32A.jpg, Justin 22A.jpg, Justin20A.jpg, Justin3A.jpg, and Justin0A.jpg) and other erotic images of Berry. *Id.*, Attachment 2 (child pornography and child erotica images redacted).

Based upon the dates of these two sent e-mails, which precede the date on which Berry turned 18 years old, he is a minor in the attached images. *Id.*, Attachments 2, 16; Exhibit 2. In addition, after being produced in Mitchel's bedroom, the child pornography video "justinpreview2[1].wmv" was uploaded via the Internet to the "justinsfriends" website.⁵

In regard to Count Four, which charged the receipt of child pornography, Mitchel admitted that he was a member of the "mexicofriends" website and he knew that Berry was underage in the website's sexually explicit images and videos. Exhibit 1. Some of these images and videos were found on Mitchel's computers, in addition to other child pornography. Exhibit 3. In addition, peer-to-peer file sharing software was found on one computer and in the software's "Shared" folder, numerous child pornography videos were found.⁶ *Id.*

In regard to Count Five, which charged the sale of child pornography, Mitchel admitted to selling child pornography through the commercial "justinsfriends" website. Exhibit 1. In the forensic analysis of his computers, numerous communications were found that demonstrated

⁵ The evidence is clear that Mitchel and Berry were partners in the website business and Mitchel participated in the production of the "justinpreview2[1].wmv" video, although the evidence to date does not definitively establish who uploaded the video to the "justinsfriends" website. Since Mitchel was charged with both transportation of child pornography and conspiracy to transport, the exact identity of the individual who in fact pushed the computer buttons to upload the video from Mitchel's home to the website is of no matter. Moreover, Count Three as charged did not limit the Government's proof to the transportation of any particular child pornography image or video, and the evidence is clear that Mitchel e-mailed child pornography images, which also supports Count Three. Exhibit 3.

⁶ This evidence also was relevant to the child pornography transportation charge in Count Three because Mitchel made these child pornography videos available to others on the Internet by retaining those computer files in the "Shared" folder. Exhibit 3.

Mitchel's active management role in both the "mexicofriends" and "justinsfriends" websites.

Exhibit 3.

Finally, Mitchel's admitted membership to a website that he knew to contain child pornography, coupled with his other admissions, and the numerous videos and images of child pornography found on his computers, all support Count Six, which charged the possession of child pornography. Exhibit 1; Exhibit 3.

Thus, if Mitchel had gone to trial, the record objectively establishes that the result would not have been different.⁷ Since Mitchel has not demonstrated prejudice as a result of Phillips' pre-plea representation, his claim of ineffective assistance of counsel for the period of legal representation prior to his change of plea must be denied.

C. Mitchel Has Not Established His Counsel's Objectively Unreasonable Performance In Pre-Plea Representation

While a reviewing court need not consider *Strickland*'s performance test when a defendant fails to demonstrate prejudice, the record provides no more support to Mitchel on this prong. Mitchel's claim that his counsel's performance was deficient for allegedly not investigating the charges against him, preparing for trial, or advising Mitchel competently regarding the Government's plea offer are without merit. Mitchel's argument completely ignores that by the time Phillips was appointed, Mitchel already had confessed in detail to his child exploitation crimes. *See Benton*, 523 F.3d at 435 (finding no conclusive evidence of counsel's objectively unreasonable performance or prejudice based upon counsel's failure to explain to defendant the *mens rea* element of the conspiracy crime to which defendant pleaded guilty where defendant had confessed and other strong evidence of his guilt existed). In the face of Mitchel's immediate confession, the child pornography saved on his computer (of which

⁷ Indeed, based upon the foregoing evidence, a jury probably would have convicted Mitchel on all six child pornography charges that he faced, and not just the four charges to which he pleaded guilty.

Mitchel was well aware), and other forensic evidence, Phillips' early decision to pursue a cooperation strategy was objectively reasonable under the circumstances. Exhibit 1; Exhibit 3; Declaration of Gregory J. Mitchel, dated September 27, 2008 (hereafter "Decl. of Mitchel"), ¶ 11; Mitchel Dkt. 61, 19:3-6.

In *United States v. Prior*, 107 F.3d 654 (8th Cir. 1997), the Eighth Circuit addressed a factually similar case and denied the defendant's claim of ineffective assistance regarding pre-plea representation. Following a search of defendant's vehicle and storage unit, in which a large quantity of both methamphetamine and cash was found, the defendant was charged with violating 21 U.S.C. § 841(a)(1). *Id.* at 656. The Government provided notice that it intended to seek the mandatory minimum sentence of life imprisonment without the possibility of parole based upon the drug quantity and the defendant's prior criminal history. *Id.* Three days later, under the advice of counsel, the defendant waived indictment and a detention hearing, and entered a plea agreement that provided for life imprisonment, defendant's cooperation and the possibility of a reduction in sentence through a substantial assistance motion at the Government's discretion. *Id.* at 656-58. The district court accepted the defendant's guilty plea. *Id.* at 657. At sentencing, the Government did not make a substantial assistance motion and the defendant was sentenced to the mandatory minimum of life imprisonment. *Id.*

On appeal, the defendant claimed that he received ineffective assistance of counsel from his attorney when he signed the plea agreement and at the change of plea hearing. *Id.* at 661. The Eighth Circuit rejected the defendant's claim holding that the defendant was not prejudiced by his counsel's representation, which was objectively reasonable. *Id.* at 661-62. The Court found that given the strength of the Government's case, the lack of feasible defenses, the defendant's criminal history and the resulting high sentence faced by the defendant, the

attorney's decision with the defendant's consent to move quickly to secure a plea agreement with the possibility of a substantial assistance motion was "reasonable and prudent." *Id.* The Court also refused to consider the defendant's ultimate sentence, which was not reduced by a substantial assistance motion, as irrelevant finding that the "fact that this strategy has now proven unsuccessful ... does not render counsel's performance deficient." *Id.* at 662 (*citing James v. State of Iowa*, 100 F.3d 586, 590 (8th Cir. 1996)). The Court also found no prejudice because there was no credible evidence that the defendant would have insisted upon going to trial given the Government's "strong case." *Id.*

Similarly, Mitchel's prior criminal history coupled with the strength of the Government's case made very clear early on that Mitchel's sentencing exposure would be significant. Despite Mitchel's assertions to the contrary, the 1998 disposition of the 27 child pornography possession charges he faced in Florida⁸ qualified as prior convictions under the statutory sentencing enhancements for each of the six child pornography charges he faced, regardless of whether the Florida adjudication was "withheld."⁹ *See, e.g., United States v. Maupin*, 520 F.3d 1304, 1308 (11th Cir. 2008) (holding that "[t]he district court did not err in enhancing Maupin's sentences pursuant to 18 U.S.C. § 2252A(b)(1) and (b)(2), based on a 1991 *nolo contendere* plea with

⁸ Mitchel received 18 months probation on each count to be served concurrently. Mitchel Dkt. 52, ¶ 56.

⁹ Mitchel cites to the firearm case, *United States v. Willis*, 106 F.3d 966 (11th Cir. 1997), for the proposition that a state plea with adjudication withheld does not qualify as a prior conviction for federal sentencing purposes. *See* Motion, p. 28 n.36. However, as discussed in *Maupin*, the *Willis* decision is plainly distinguishable from the instant case because the firearm statutes at issue specified that state law controlled regarding what constitutes a prior conviction: "In *United States v. Willis* ... we held entry of a *nolo contendere* plea with adjudication withheld did not qualify as a predicate, prior conviction for purposes of 18 U.S.C. § 922(g)(1). ... Section 922 relies on 18 U.S.C. § 921 to define its statutory terms. Section 921(a)(20) specifically provides that what constitutes a conviction 'shall be determined in accordance with the law of the jurisdiction in which the proceedings were held.' Therefore, state law was controlling in *Willis*. ... Unlike *Willis*, the statute at issue here [18 U.S.C. § 2252A] does not provide the jurisdiction in which the proceedings were held should determine whether an offense constitutes a prior conviction. ... [T]he language of § 2252A does not prohibit the use of federal law or require reference to state law to define prior conviction." 520 F.3d at 1307.

adjudication withheld to Florida charges related to possession of child pornography”); *United States v. Storer*, 413 F.3d 918, 921-22 (8th Cir. 2005) (holding that prior *nolo contendere* plea with adjudication withheld to felony lewd and lascivious charge qualified as a prior conviction to trigger a sentence enhancement under § 2252A(b)(2)). As a result, Mitchel faced a possible maximum sentence of 240 years imprisonment for the six counts.¹⁰

Thus, as in *Prior*, a life sentence for Mitchel was virtually certain if he had gone to trial given the strength of the Government’s case, which included Mitchel’s confession, the absence of any plausible defense, the statutory mandatory minimum sentences he faced on each count, the possible maximum sentence he faced, other U.S. Sentencing Guidelines enhancements, no credit for acceptance of responsibility, and the high unlikelihood of leniency or a substantial assistance motion by the Government. Phillips’ decision to immediately pursue a cooperation strategy and to schedule a proffer session between the Government and Mitchel, with a letter agreement securing certain immunity protections, was therefore “reasonable and prudent.”¹¹ As conceded by Mitchel, Phillips also met with the Government’s attorneys and law enforcement to view the child pornography images and videos and other evidence at issue. Motion, pp. 25, 60

¹⁰ For Counts One and Two, Mitchel faced a mandatory minimum sentence of 25 years and a maximum of 50 years for each count. 18 U.S.C. § 2251(e) (stating that “if such person has one prior conviction ... under the laws of any State relating to ... possession ... of child pornography, such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years”). For Counts Three, Four, and Five, Mitchel faced a mandatory minimum sentence of 15 years and a maximum of 40 years for each count. 18 U.S.C. § 2252A(b)(1) (stating that “if such person has a prior conviction ... under the laws of any State relating to ... possession ... of child pornography, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years”). For Count 6, Mitchel faced a mandatory minimum sentence of 10 years and a maximum of 20 years. 18 U.S.C. § 2252A(b)(2) (stating that “if such person has a prior conviction ... under the laws of any State relating to ... possession ... of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years”).

¹¹ Although Mitchel appears to allege that some unspecified harm resulted from his two proffer sessions with the FBI (*see* Decl. of Mitchel, ¶¶ 17-19, 22; Motion, p. 20), both sessions were pursuant to the letter agreement obtained by Phillips and except in limited circumstances, Mitchel’s statements could not have been used against him if he chose to go to trial. Exhibit 7.

n.54. Phillips also made Mitchel available for a second proffer session and forwarded additional information from Mitchel to the Government in order to support a possible substantial assistance motion. Exhibit 8; Exhibit 9.

Mitchel has not alleged that he is actually innocent of the four charges to which he pleaded guilty or cited any possible defense that could have been raised to the charges. *See Thompson v. Blackburn*, 776 F.2d 118, 124 (5th Cir. 1985) (finding no ineffective assistance of counsel in plea bargain that relied on hope of leniency where defendant had fully confessed and it appeared unlikely that any plausible defense would have been presented had the case gone to trial). He has not cited to any evidence that could have been discovered by Phillips had a fuller factual investigation been conducted that would have provided a strong enough defense that he would have rejected the hope offered by the plea bargain. Mitchel received a benefit from the Agreement, including credit for acceptance of responsibility, the dismissal of Counts Two and Four (which charged advertising and receipt of child pornography), consideration of Mitchel's sexual exploitation of only two minors rather than three minors, and application of the specific offense characteristic USSG § 2G2.2(b)(7)(C), which did not account for the higher number of child pornography images in his possession.¹² *See United States v. Lagrone*, 727 F.2d 1037, 1038 (11th Cir. 1984) (rejecting ineffective assistance of counsel claim where plea bargain resulted in dismissal of two charges).

As set forth in Section III.A, *infra*, the specific offense characteristics stipulated to in the Agreement were supported. Although the Agreement's stipulations regarding Mitchel's sentence

¹² Mitchel actually possessed 600 or more child pornography images on his computers and thus, application of § 2G2.2(b)(7)(D) would have been appropriate. This is evidenced by even the limited list set forth in the Declaration of James M. Fottrell of computer image and video files on Mitchel's computers that constituted child pornography. Exhibit 3; *see also* USSG § 2G2.2, comment. (n.4(B)(ii)) (stating that "[e]ach video, video-clip, movie, or similar recording shall be considered to have 75 images. If the length of the recording is substantially more than 5 minutes, an upward departure may be warranted.").

under the Guidelines called for life imprisonment if correctly calculated, the Agreement's Guidelines stipulations were not binding on the Court, a Guidelines sentence was advisory only, and the Agreement preserved the possibility of Mitchel's receipt of a lesser sentence based upon the District Court's leniency, the factors set forth in 18 U.S.C. § 3553, or through a substantial assistance motion. Since Mitchel's only available avenue was seeking leniency or credit from the Court or the Government for Mitchel's assistance, Phillips cannot be faulted for making a strategic decision to advise concession on these specific offense characteristics up front, rather than litigating a losing sentencing battle on the unpleasant details of Mitchel's crimes, including his possession of prepubescent, sadistic and/or masochistic images of child pornography.

Exhibit 3.

The Agreement's advisory Guidelines provision contained a base offense level error, which neither Phillips nor the Government caught. A similar, related calculation error was later made by the Probation Office in the PSR. Such an error shared by a number of individuals does not constitute deficient performance by Phillips. "A miscalculation or erroneous sentence estimation by defense counsel is not a constitutionally deficient performance rising to the level of ineffective assistance of counsel." *United States v. Gordon*, 4 F.3d 1567, 1570 (10th Cir. 1993) (citing *United States v. Estrada*, 849 F.2d 1304, 1307 (10th Cir. 1988)); see also *United States v. Martinez*, 169 F.3d 1049, 1053 (7th Cir. 1999) (finding that an attorney's "'mere inaccurate prediction of a sentence' does not demonstrate the deficiency component of an ineffective assistance of counsel claim" (quoting *United States v. Barnes*, 83 F.3d 934, 940 (7th Cir. 1996))). The error also did not result in any prejudice to Mitchel because the Agreement was not entered pursuant to Fed. R. Crim. 11(c)(1)(C), and the Agreement made clear that the Guidelines provisions therein were "advisory in nature and not binding on the court" and that "any

calculation regarding the guidelines by the United States Attorney's Office or by [Phillips]" was "speculative" and "not binding upon the Court." Mitchel Dkt. 39, ¶¶ 3 ("Booker Fan-Fan Acknowledgement; Blakely Waiver"); 20; *see also Gordon*, 4 F.3d at 1571.

Although the Government did not file a substantial assistance motion pursuant to USSG § 5K1.1 or Fed. R. Crim. P. 35 to reduce Mitchel's life sentence, his ultimate sentence is irrelevant to and should not be considered in determining whether Phillips' pre-plea legal representation of Mitchel was deficient. *See Prior*, 107 F.3d at 662. The fact that Mitchel is now unhappy with the sentence he ultimately received does not render his counsel's pre-plea performance deficient or his guilty plea unknowing or unintelligent. The Agreement, which Mitchel read, signed, and on each page initialed, made clear that his sentence could be higher than what he expected, did not contain a guarantee regarding what his sentence would be, and stated that his sentence would be decided by the District Court alone. This was confirmed by the District Court at the change of plea hearing.

Finally, Mitchel's argument that Phillips failed to competently advise him regarding the Agreement and guilty plea is directly contradicted by his expressions of satisfaction with Phillips in both the Agreement and in the change of plea hearing. *See United States v. Lemaster*, 403 F.3d 216, 220 (4th Cir. 2005) (finding defendant's ineffective assistance of counsel claim to be patently frivolous or false in the face of the defendant's Rule 11 colloquy where the Government had not conceded that defendant's counsel was ineffective or that his plea was involuntary). In evaluating ineffective assistance of counsel claims, statements made under oath affirming satisfaction with counsel are binding on the defendant, unless the contrary evidence is clear and convincing. *Fields*, 956 F.2d at 1299. Mitchel "presents no evidence that suggests his

representations during his plea were untruthful or involuntary, and he is therefore rightly bound by his sworn statements.” *Id.*

Mitchel has failed to establish that Phillips’ pre-plea representation was deficient, or that he was prejudiced as a result. Mitchel’s ineffective assistance of counsel claim regarding the pre-plea representation he received from Phillips therefore fails.

II. Pursuant To The Plea Agreement, Which Was Entered Knowingly And Voluntarily, Mitchel Waived Any Right To Collaterally Attack His Judgment And Sentence

Mitchel entered the Agreement and guilty plea voluntarily and intelligently under the advice of competent counsel. Mitchel’s motion should be dismissed without consideration of his additional claims because he knowingly and voluntarily waived his rights in the Agreement to collaterally attack the judgment and sentence in this case. Mitchel Dkt. 39, ¶ 10. In *Lemaster*, the Fourth Circuit held that a waiver of the right to collaterally attack a conviction or sentence is binding on a defendant if the waiver is knowingly and voluntarily made. 403 F.3d at 220. Thus, if Mitchel’s waiver was knowing and voluntary, he cannot challenge his conviction or sentence in a § 2255 motion. *See id.*

A review of the record establishes that Mitchel’s guilty plea and waiver of collateral-attack rights in the Agreement were both knowing and voluntary. The record discloses that the waiver provisions were spelled out in the Agreement, and Mitchel in fact initialed the page on which the waiver appeared. Mitchel Dkt. 39, ¶ 10; *see Braxton*, 358 F.Supp.2d at 500-01 (citing defendant’s initialing of plea agreement page on which § 2255 waiver appeared in support of enforcement of waiver). During the change of plea hearing, Mitchel denied that his guilty plea was the result of any promises made or pressure brought to bear by any person. Mitchel Dkt. 68, 9:16-10:1. He confirmed that representation by signing the guilty plea form. Mitchel Dkt. 40; Mitchel Dkt. 68, 27:8-20. Under oath, Mitchel confirmed that he understood the charges, the

plea, the waiver of rights to collaterally attack the judgment and sentence, and that he was satisfied with the representation of his counsel. Mitchel Dkt. 68, 8:18-25, 10:12-17:20, 18:11-15, 20:6-9.

It is well established that a defendant's solemn declarations in open court affirming a plea agreement "carry a strong presumption of verity." *Lemaster*, 403 F.3d at 221 (quoting *United States v. White*, 366 F.3d 291, 295 (4th Cir. 2004) (citations omitted)). Thus, "in the absence of extraordinary circumstances (citations omitted), allegations 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.'" *Id.* at 221 (quoting *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).

Mitchel's ineffective assistance of counsel claim regarding pre-plea representation, which is unmeritorious for all of the reasons set forth in Section I, *supra*, is also palpably incredible and patently frivolous or false in view of his express statement of satisfaction with his attorney at the Rule 11 hearing. *Id.* at 222-23. Since such claim is patently frivolous and unmeritorious, Mitchel's waiver of rights in the Agreement to collaterally attack the judgment and sentence should be enforced. The record does not contain any claims of "extraordinary circumstances," such as the Government's concession that Phillips was ineffective or that Mitchel's plea was involuntary, which could negate Mitchel's waiver, and therefore, his motion should be dismissed without a hearing. *Id.* at 221-22 (stating that "in the absence of extraordinary circumstances, the truth of sworn statements made during a Rule 11 colloquy is conclusively established, and a district court should, without holding an evidentiary hearing, dismiss any § 2255 motion that necessarily relies on allegations that contradict the sworn statements"). Finally, the fact that Mitchel was surprised at sentencing and received a higher sentence than he expected does not

invalidate his § 2255 waiver. *Braxton*, 358 F.Supp.2d at 504 (finding that “alleged ‘surprise’ at sentencing” which increased defendant’s sentence beyond what he was expecting did “not invalidate petitioner’s § 2255 waiver”).

III. Mitchel Has Waived His Right To Collaterally Attack His Sentence On The Basis Of Ineffective Assistance Of Counsel And He Has Not Established His Counsel’s Ineffective Assistance At Sentencing

Mitchel’s knowing and intelligent waiver of the right to collaterally attack his sentence applies to his instant claim that following the knowing and voluntary entry of his guilty plea, Phillips provided ineffective assistance of counsel at sentencing. Mitchel Dkt. 39, ¶ 19; *Braxton*, 358 F.Supp.2d at 502 (finding that “[w]aiving one’s right to file a § 2255 motion alleging ineffective assistance cannot be distinguished in any way from other fundamental constitutional rights that defendants are permitted to waive”); *see also United States v. White*, 307 F.3d 336, 343-44 (5th Cir. 2002) (stating that “[i]f all ineffective assistance of counsel claims were immune from waiver, any complaint about the process could be brought in a collateral attack by merely challenging the attorney's failure to achieve the desired result”); *United States v. Cockerham*, 237 F.3d 1179, 1191 (10th Cir. 2001) (holding that “Defendant's ineffective representation claims concerning his sentencing on drug convictions do not attack the validity of the plea and are therefore waived” pursuant to § 2255 waiver in plea agreement, which was knowingly and voluntarily made); *Davila v. United States*, 258 F.3d 448, 451 (6th Cir. 2001); *Mason v. United States*, 211 F.3d 1065, 1069 (7th Cir. 2000). Accordingly, Mitchel’s waiver should be enforced and his sentencing ineffective assistance claim should be denied. Should the Court not enforce Mitchel’s waiver of this claim, the claim also should be denied because he has failed to establish pursuant to *Strickland* that he was actually prejudiced by Phillips’ alleged errors in the sentencing process or that Phillips’ performance was objectively unreasonable.

A. Mitchel Has Not Established That He Was Prejudiced By Allegations And Sentencing Enhancements In The PSR, To Which Phillips Did Not Object

Mitchel claims that Phillips was ineffective for failing to make objections to the PSR. However, other than providing a “schedule” of PSR allegations or Guidelines sentencing enhancements to which objections allegedly should or could have been made and stating that many are “wrong,” Mitchel provides little evidence, explanation, or argument supporting such objections, why the PSR is wrong, how the failure to make the objections prejudiced him, or why Phillips’ performance was deficient for not objecting. Mitchel also does not address the possible application of additional Guidelines enhancements that were not included in the PSR, including USSG § 4B1.5(b) (“Repeat and Dangerous Sex Offender Against Minors”), which would have resulted in an additional five (5) level increase of his combined offense level. The Government only addresses herein those PSR allegations and Guidelines sentencing enhancements that Mitchel in fact addresses within his Motion. None of the alleged PSR issues actually addressed by Mitchel have any merit.

(1) The “Two Minor” Grouping Enhancement

Mitchel pleaded guilty to Count One of the Indictment, a copy of which Mitchel undisputedly had, and the charge alleged that Mitchel produced child pornography of two, different minors: John Doe 1 and John Doe 2 (Berry). Mitchel pleaded guilty to this charge. In both the Agreement and PSR calculations of the possible Guidelines sentencing range, the grouping rules in Chapter Three of the Guidelines were applied to the single child pornography production conviction on Count One in order to reflect that Mitchel sexually exploited two minors, which resulted in an increase in his sentence. Mitchel Dkt. 39, ¶ 3; Mitchel Dkt. 52, ¶ 14; *see also* USSG § 2G2.1(d)(1) (stating that “[i]f the offense involved the exploitation of more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the exploitation of

each minor had been contained in a separate count of conviction”). Based upon the forensic evidence obtained from Mitchel’s computers, his participation in the production of child pornography of three, different minors cannot be fairly disputed. Exhibit 3. Phillips therefore had no factual basis to object to a two minor grouping enhancement, and thus it is axiomatic that his failure to object was objectively reasonable. Mitchel cannot demonstrate any prejudice for the lack of objection because if an objection had been made, it actually may have resulted in making the District Court aware of Mitchel’s sexual exploitation of the third minor (John Doe 3) and thus a further increase in his sentencing exposure.

(2) The Pecuniary Gain Enhancement

Pursuant to USSG § 2G2.2(b)(3)(A), the specific offense characteristic of “distribution for pecuniary gain” was applied in both the Agreement and the PSR. Mitchel Dkt. 39, ¶ 3 (“Offense Characteristics”); Mitchel Dkt. 52, ¶ 35. In the PSR, this resulted in a six (6) level increase in Mitchel’s base offense level for the group applicable to the convictions on Counts Three, Five, and Six (i.e., the transportation, sale, and possession of child pornography) because the pecuniary gain was more than \$30,000.¹³ In arguing the inaccuracy or impropriety of this enhancement, Mitchel relies on ¶ 8 of the PSR, in which it is stated that Mitchel received approximately \$10,800 in proceeds from the “justinsfriends” child pornography website. Mitchel Dkt. 52.

Mitchel cannot demonstrate prejudice from, or Phillips’ deficient performance for, not objecting to this enhancement because the proceeds personally received by Mitchel are only part of the calculus. Specific offense characteristics, including distribution for pecuniary gain, are

¹³ As stated in the Statement of Facts, *supra*, the Agreement and the PSR grouped the offenses of conviction differently. Therefore, in the Agreement, the base offense level of the group applicable to Mitchel’s convictions on Counts Five and Six (i.e., sale and possession of child pornography) was increased by six (6) levels because the pecuniary gain was more than \$30,000. Mitchel Dkt. 39, ¶ 3 (“Offense Characteristics”).

determined by all “relevant conduct,” which in the case of a “jointly undertaken criminal activity” includes the reasonably foreseeable acts of others in furtherance of that activity. USSG § 1B1.3. Thus, in this case, the pecuniary gain of Berry, Brown, Richards, and others that was reasonably foreseeable to Mitchel as part of their jointly undertaken child pornography website activity and conspiracy constituted “relevant conduct” and the enhancement was therefore properly applied. *See, e.g., United States v. Newsome*, 322 F.3d 328, 338 (4th Cir. 2003); *United States v. Colello*, 16 F.3d 193, 197 (7th Cir. 1994) (finding in fraud case that “relevant loss” was “not limited to a defendant's personal gain” and “the district court's decision to look beyond [the defendant’s] profit was a correct application of the law” pursuant to USSG § 1B1.3).

In addition, USSG § 2G2.2(b)(3)(A) requires an increase of “not less than 5 levels” regardless of the amount of actual pecuniary gain. Thus, even if Mitchel’s argument regarding the amount of actual pecuniary gain had any merit, his offense level for the group would be increased by five (5) levels rather than six (6) – a difference of only one level. Mitchel cannot establish any prejudice from Phillips’ decision to not object on this basis because his combined adjusted offense level of 47 under the Guidelines would have been the same.¹⁴

(3) Specific Offense Characteristic Pursuant to USSG § 2G2.1(b)(6)(i)

In both the Agreement and PSR, the specific offense characteristic set forth in USSG § 2G2.1(b)(6)(B)(i) was applied in the advisory Guidelines calculation. In his argument regarding why this sentencing enhancement was erroneously applied, Mitchel deliberately ignores the

¹⁴ Based upon the corrected calculation of Mitchel’s advisory Guidelines sentence in the PSR, the adjusted offense level for Count Group Three would be 44, rather than 45, if the distribution for pecuniary gain enhancement was limited to only a five (5) level increase. Mitchel Dkt. 52, ¶¶ 35, 43. The adjusted offense levels for Count Group One and Count Group Two were both 40. *Id.*, ¶¶ 23, 40. Thus, pursuant to USSG § 3D1.4, Count Group One, Count Group Two, and Count Group Three would each count as one Unit, resulting in a total number of three (3) Units. The addition of three (3) Units to the group with the highest offense level (Count Group Three - 44) would result in a combined adjusted offense level of 47.

disjunctive language contained in USSG § 2G2.1(b)(6)(B)(i), which applies “[i]f for the purpose of producing sexually explicit material, the offense involved ... (B) the use of a computer or an interactive computer service to (i) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually conduct, **or to otherwise solicit participation by a minor in such conduct**” (emphasis added). Mitchel’s claim that Phillips should have objected to this enhancement because the exploited minor was “local” and thus did not need to “travel” is patently absurd. An objection to this enhancement on the “travel” basis that Mitchel now advances would have been in vain because the plain language of the provision does not require a minor’s travel for the enhancement to apply. Mitchel, therefore, cannot show any prejudice and Phillips’ performance was objectively reasonable for not objecting on that basis.

(4) **Use and Operation of Videocamera and/or Recording Equipment**

Mitchel takes issue with certain PSR allegations, which did not support specific sentencing enhancements, that he either used or operated a videocamera or recording equipment in the production of child pornography. Mitchel Dkt. 52, ¶¶ 5, 7. In regard to the “justinpreview2[1].wmv” video featuring Berry as an adult and John Doe 1, the PSR states that “[r]eportedly the video camera was operated by Mitchel.” Mitchel Dkt. 52, ¶ 5. The PSR also states that “Mitchel owned and used two forms of recording equipment. A webcam and a digital video camera, both which were used to record and produce images of minors engaged in sexually explicit conduct, including Berry when he was a minor and [John Doe 1], who was also a minor.” Mitchel Dkt. 52, ¶ 7.

Without citing to any legal precedent, Mitchel mistakenly assumes that there is some relevance to his guilt or punishment in whether he or a minor operated or used either camera¹⁵ in

¹⁵ Mitchel does not dispute that he owned such equipment and in fact, he agreed to their forfeiture in the Agreement. Agreement, ¶ 15.

the child pornography videos at issue, including “justinpreview2[1].wmv,” which undisputedly was produced in Mitchel’s bedroom. On its face, 18 U.S.C. § 2251(a) (“Sexual exploitation of children”) does not require the defendant’s physical operation or use of a camera in order to establish criminal liability under the statute. In fact, § 2251(a) does not even require the actual production of an image or video because the crime prohibited is the use of a child and not the production of any image. *See, e.g., United States v. Buculei*, 262 F.3d 322, 325 (4th Cir. 2001). Case law regarding § 2251(a) also makes clear that a defendant can be liable for the sexual exploitation of children in circumstances where the minor physically operates the camera. *See, e.g., United States v. Starr*, 533 F.3d 985, 990-92, 998 (8th Cir. 2008). Regardless, as previously discussed, Mitchel is also charged in Count One with conspiracy, and pursuant to 18 U.S.C. § 2, Mitchel’s criminal liability also could be established through proof that he aided and abetted Berry in the production of child pornography of John Doe 1. *See id.* at 997; *United States v. Duke*, 409 F.2d 669, 671 (4th Cir. 1969) (stating that “we have consistently held that under 18 U.S.C.A. § 2 one may be convicted of aiding and abetting under an indictment which charges only the principal offense.”).

It is legally and factually irrelevant whether Berry or John Doe 1 in fact operated or used the camera in the video (i.e., “justinpreview2[1].wmv”) produced in Mitchel’s bedroom, or in any other video. Thus, Mitchel was not prejudiced by Phillips’ failure to object to the PSR allegation that Mitchel operated or used any videocamera. Such fact, even if not true, had no relevance to Mitchel’s guilt or sentence and thus, Phillips’ performance was not deficient for not objecting to a legally irrelevant statement. Regardless, in his confession during the execution of the search warrant, Mitchel admitted to his participation in the production of such videos in his

bedroom and at the sentencing hearing, Mitchel admitted to taking pictures of Berry and John Doe 1 when they were both masturbating. Mitchel Dkt. 61, 27:25 – 28:5.

B. Mitchel Has Not Established That He Was Prejudiced By Phillips' Alleged Failure To Review And Discuss The PSR With Him

Mitchel alleges that he never had the opportunity to review the draft PSR, and only reviewed the final PSR on the day of his sentencing hearing. Mitchel also alleges that Phillips never discussed either version of the PSR with him. Assuming such allegations are true, Mitchel has utterly failed to demonstrate any resulting prejudice. As discussed in the preceding section, even with ample opportunity to now review the PSR with his attorney, Mitchel has not substantively raised a single allegation or sentencing enhancement contained in the PSR to which an objection could have resulted in a change in his advisory Guidelines sentence. Accordingly, Mitchel cannot establish ineffective assistance of counsel by Phillips in allegedly failing to review and discuss the PSR with him. *See Hagins v. United States*, 267 F.3d 1202, 1207 (11th Cir. 2001) (holding claim of ineffective assistance of counsel at sentencing not established because counsel's failure to review presentence report with defendant prior to sentencing did not result in any prejudice to defendant).

C. Mitchel Has Not Established That The Standard Of Objectively Reasonable Performance Required Phillips To Either Renegotiate The Agreement, Or Move To Withdraw Mitchel's Guilty Plea On The Basis Of Ineffective Assistance Of Counsel

Mitchel argues that in order to have provided effective assistance of counsel, Phillips should have renegotiated the Agreement because it contained sentencing enhancements to which Mitchel should not have agreed. Mitchel has not established that such an effort would have constituted objectively reasonable performance given the Agreement's benefits as set forth in Section I.C, *supra*. As discussed in Section III.A, *supra*, Mitchel also cannot establish prejudice

because the three specific enhancements in the Agreement cited by Mitchel for this argument are legally and factually supported and were not binding on the Court. Further, Mitchel has not cited any reason why the Government would have agreed to renegotiate a different plea agreement.

Mitchel also argues that following the release of the draft PSR, Phillips should have moved to withdraw Mitchel's guilty plea on the basis of ineffective assistance of counsel. Mitchel's argument is without merit because no "fair and just reason" existed for withdrawing his guilty plea and thus, he was not prejudiced by Phillips' allegedly deficient performance in not moving for withdrawal. Fed. R. Crim. P. 11(d)(2)(B). As set forth in Section I, *supra*, Mitchel has failed to establish Phillips' ineffective assistance of counsel in pre-plea representation under *Strickland*. See *United States v. Bowman*, 348 F.3d 408, 416 (4th Cir. 2003) (applying *Strickland* standard to motion to withdraw guilty plea allegation that defendant lacked close assistance of competent counsel). Mitchel has not alleged that he could or would have asserted his actual innocence in seeking to withdraw his guilty plea, and it is evident that such a claim would not have been credible. See *Bowman*, 348 F.3d at 414-15; *United States v. Moore*, 931 F.2d 245, 248 (4th Cir. 1991). The plea colloquy between Mitchel and the District Court firmly demonstrates that Mitchel's change of plea was voluntary and intelligent. See *Bowman*, 348 F.3d at 414, 417 (stating that "[t]he most important consideration in resolving a motion to withdraw a guilty plea is an evaluation of the Rule 11 colloquy at which the guilty plea was accepted" (citing *United States v. Wilson*, 81 F.3d 1300, 1307 (4th Cir. 1996))). Further, the unexpected contents of a PSR do not constitute "fair and just reason" to withdraw a guilty plea. See, e.g., *United States v. Battle*, 499 F.3d 315, 318, 322 (4th Cir. 2007); *United States v. Ramirez-Hernandez*, 449 F.3d 824, 826 (8th Cir. 2006); see also Mitchel Dkt. 39, ¶ 20 ("I understand that if the sentence is more severe than I expected, I will have no right to withdraw

my guilty plea.”). Since Mitchel has not established that he had a “fair and just reason,” any attempt to withdraw his guilty plea following the release of the PSR likely would have failed and accordingly, he cannot establish prejudice. Fed. R. Crim. P. 11(d)(2)(B).

D. Mitchel Has Failed To Establish That Phillips Provided Ineffective Assistance Of Counsel At The Sentencing Hearing In Advising The Court Of Mitchel’s Cooperation

Mitchel alleges that Phillips provided ineffective assistance of counsel during the sentencing hearing by allegedly failing to provide the District Court with sufficient information regarding Mitchel’s cooperation. The record does not support Mitchel’s claim. As set forth in the Statement of Facts, *supra*, Phillips called the case agent to testify and elicited that (1) Mitchel had provided law enforcement with helpful information regarding the Nashville, Tennessee location of a child who Mitchel knew to be in danger from one of his business associates from the “justinsfriends” website; (2) as a result of that information, law enforcement was able to locate and remove the child; (3) Mitchel was cooperative and had proffered several times; (4) Mitchel appeared to be remorseful; and (4) law enforcement hoped that Mitchel would continue to cooperate. Mitchel Dkt. 61, 10:19-11:20.

Mitchel alleges that he also provided other assistance to the Government, regarding which Phillips allegedly should have informed the Court at his sentencing hearing. Mitchel alleges that he provided substantial assistance in the Richards, Brown, and Gourlay criminal cases. Although Richards, Brown, and Gourlay all have been convicted of child exploitation crimes since Mitchel’s initial confession and subsequent proffers of information, Mitchel did not testify at the federal trial of Richards in the Middle District of Tennessee or at the state trial of Gourlay in Michigan. On May 14, 2007, Brown pleaded guilty pursuant to a plea agreement. Brown Dkt. 143. Although Mitchel was interviewed by law enforcement and a Government

attorney in 2007 to evaluate his possible testimony against Brown, Brown's guilty plea obviated any need to determine whether Mitchel actually could provide credible and useful testimony against Brown at trial.¹⁶ In his motion, Mitchel also provides a sundry list of other information that he provided to the Government regarding which Phillips did not advise the Court.

Phillips' performance at the sentencing hearing was objectively reasonable. The fact that Phillips did not provide an itemized list to the District Court of each piece of information provided by Mitchel without regard to the information's actual usefulness to the Government demonstrates that Phillips used his judgment and only highlighted the assistance that could be shown to have been useful as of the date of the sentencing hearing. The cases of Gourlay, Richards, and Brown all were resolved well after the July 14, 2006 sentencing hearing. Further, Phillips elicited testimony from the case agent that Mitchel had proffered several times and that his continued cooperation was desired.

The District Court was given a complete picture of the actual, helpful assistance provided by Mitchel as of the sentencing hearing, and the Court noted Mitchel's assistance before imposing the sentence. The fact that the District Court may not have been swayed favorably by this assistance, as evidenced by Mitchel's lengthy sentence, does not render Phillips' performance deficient on this issue. Moreover, Mitchel cannot show actual prejudice from Phillips' alleged failure to disclose other information provided by Mitchel, the usefulness of which was either speculative or in doubt at the time.

¹⁶ Despite Mitchel's assertions to the contrary, no Rule 35 promises or "inducements" were made to Mitchel during this meeting.

E. Mitchel Was Not Prejudiced By Phillips' Decision To Not Speak With Mitchel During The Sentencing Hearing Regarding Seeking A Third Continuance

Mitchel argues that Phillips breached a duty to confer by not speaking with Mitchel during the sentencing hearing. In the hearing, Phillips initially asked for a third continuance of the sentencing hearing after the PSR calculation error was discovered. Mitchel Dkt. 61, 5:21-23, 6:10-14. In a colloquy with the District Court, it was made clear that another continuance would be to no avail because (1) there was no disagreement regarding the accuracy of the Probation Department's corrected calculation of Mitchel's advisory Guidelines sentence and (2) the Agreement had made clear that the Court was not bound by the parties' Guidelines calculation therein. *Id.*, 4:19-5:15, 6:15-23. The Court then stated that Phillips could have additional time to speak further with Mitchel, which Phillips declined. *Id.*, 6:24-7:8. The transcript of the hearing does not reflect that Mitchel asked to speak with Phillips, or that Phillips "refused" to speak with Mitchel as he now claims.

Mitchel has not established any prejudice from Phillips' decision to not speak with Mitchel at that moment in the hearing. The District Court already had indicated that a request for a third continuance would not be granted. *Id.* Even if Mitchel would have wanted to move to withdraw his guilty plea based upon learning the correct calculation of his advisory Guidelines sentence, such a motion could not have succeeded for the reasons set forth in Section III.C, *supra*. Phillips' decision to not speak with Mitchel and to proceed with sentencing was objectively reasonable given the lack of legal alternatives.

IV. Mitchel's Remaining Claims Of Error Are Not Cognizable On Collateral Review

Mitchel alleges generally that the Government violated Mitchel's constitutional rights but in a notably underdeveloped argument, Mitchel only loosely raises the issue of his counsel's

ineffective assistance on appeal to excuse his failure to raise these arguments on direct appeal. Mitchel also has not alleged that he is actually innocent in order to excuse this procedural default. Even assuming that Mitchel has presented sufficient “cause” to excuse his procedural default, he either has not demonstrated an actual error or prejudice in each of his remaining claims and thus they must be denied. Mitchel has not identified any non-frivolous grounds for appeal that Phillips could have raised and thus, he also has not established cause for his procedural default of his remaining claims.

Under *Strickland*, Phillips was ineffective on appeal only if his failure to raise certain issues fell below an objective standard of reasonableness and, but for that failure, Mitchel “would have prevailed in his appeal.” *Lawrence v. Branker*, 517 F.3d 700, 709 (4th Cir. 2008), *cert. denied* 129 S.Ct. 162 (Oct. 6, 2008), (rejecting claim of ineffective assistance of counsel on appeal because alleged error was not an obvious error). “Counsel’s failure to pursue a basis for appeal by reason of a mere miscalculation of the likelihood of success does not constitute constitutionally ineffective representation.” *Mikalajunas*, 186 F.3d at 493, *citing Smith v. Murray*, 477 U.S. 527, 534-35 (1986). “Attorney ignorance or inadvertence is not ‘cause’ because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must ‘bear the risk of attorney error.’” *Coleman*, 501 U.S. at 753 (*quoting Carrier*, 477 U.S. at 488). “Effective assistance of appellate counsel does not require the presentation of all issues on appeal that may have merit ... and we ‘must accord [] counsel the presumption that he decided which issues were most likely to afford relief on appeal.’” *Lawrence*, 517 F.3d at 709 (*quoting Bell v. Jarvis*, 236 F.3d 149, 164 (4th Cir. 2000) (en banc)).

A. **Mitchel's *Brady* Violation Claim Regarding Berry Impeachment Material Is Without Merit And Procedurally Defaulted**

Mitchel claims without any legal authority that the Government committed a *Brady* violation by failing to disclose impeachment material regarding Berry's drug use before the Agreement was entered. Mitchel's claim is not cognizable on collateral review because "[i]t is well-established that a voluntary and intelligent guilty plea forecloses federal collateral review of allegations of antecedent constitutional deprivations." *Fields v. Attorney General*, 956 F.2d 1290, 1294 (4th Cir. 1992) (citing *Tollett v. Henderson*, 411 U.S. 258, 266-67 (1973)). Further, even if such a claim could be considered, the Government did not violate *Brady* if such impeachment material was not provided to Mitchel because the Constitution does not require the Government's disclosure of impeachment material relating to any informants or other witnesses before the parties enter a plea agreement. *United States v. Ruiz*, 536 U.S. 622, 625, 629, 633 (2002) (noting that "impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary*" and stating that "the Constitution does not require the prosecutor to share all useful information with the defendant" (citing *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977))); *see also United States v. Le*, 306 F.Supp.2d 589, 591 (E.D. Va. 2004) (stating that "a defendant's *Brady* rights do not exist in the abstract, but rather find expression in connection with a defendant's right to a fair trial").

Mitchel is also not entitled to such disclosure under *Brady* because the allegedly withheld information regarding Berry was either personally known by Mitchel or reasonably available to him. *See Allen v. Lee*, 366 F.3d 319, 324-25 (4th Cir. 2004) (rejecting *Brady* claim where defendant had personal knowledge of the allegedly undisclosed evidence); *United States v. Faris*, 388 F.3d 452, 461-62 (4th Cir. 2004), *vacated on other grounds*, 544 U.S. 916 (2005), (finding Government's failure to disclose FBI 302 report of defendant's statements before plea agreement

did not violate *Brady* because the report's contents already were known to defendant); *Barnes v. Thompson*, 58 F. 3d 971, 975-76 (4th Cir. 1995) (stating that “*Brady* requires that the government disclose only evidence that is not available to the defense from other sources, either directly or through diligent investigation” (citing *Stockton v. Murray*, 41 F.3d 920, 927 (4th Cir. 1994))). Mitchel had personal knowledge of Berry's drug problem, as he admitted at the sentencing hearing. Mitchel Dkt. 61, 24:18-20 (“In January of 2005 [Berry] was back in Mexico, and he was back on some cocaine and some marijuana and everything else ...”); *see also* Exhibit 3, Attachment 23. Since Mitchel had direct, personal knowledge of Berry's drug problems, he cannot claim that the Government withheld such information in violation of *Brady*.

Mitchel has not even established that a *Brady* violation occurred; thus, he has not established a constitutional error and he cannot have been prejudiced by Phillips' failure to raise the issue on appeal. Even if Mitchel had raised this issue on appeal, for the foregoing reasons, he could not have prevailed. Mitchel therefore also cannot demonstrate cause for his procedural default because Phillips' performance was objectively reasonable in not raising a completely unmeritorious appeal issue.

B. Mitchel's *Brady* Violation Claim Regarding Information from Laura and Evan Walters Is Without Merit And Procedurally Defaulted

Mitchel alleges without any legal authority that he was entitled to information allegedly provided by the Walters to the FBI that would “impeach Berry.” Mitchel did not raise this issue on appeal, and because the claim has no merit, he cannot establish prejudice or deficient performance by Phillips for not raising the issue. As set forth in the preceding section, Mitchel was not entitled to such information because the Constitution does not require the Government's disclosure of impeachment material relating to any informants or other witnesses before the parties enter a plea agreement. *Ruiz*, 536 U.S. at 625, 629, 633. Mitchel also cites to

information allegedly provided by the Walters regarding their purchase of the house in which Mitchel also lived. If Mitchel did not sell the house to the Walters at a discount (the truth or falsity of which is immaterial to either Mitchel's guilt or sentencing), then Mitchel would have personal knowledge of such information and thus there can be no *Brady* violation as set forth in the preceding section. *Allen*, 366 F.3d at 324-25.

Mitchel has not even established that a *Brady* violation occurred in relation to the information provided by the Walters, and thus, he has not established a constitutional error and he cannot have been prejudiced by Phillips' failure to raise the issue on appeal. Even if Mitchel had raised this issue on appeal, for the foregoing reasons, he could not have prevailed. Mitchel therefore also cannot demonstrate cause for his procedural default because Phillips' performance was objectively reasonable in not raising a completely unmeritorious appeal issue.

C. Mitchel's *Brady* Violation Claim Regarding A "Redacted" 302 Is Without Merit And Procedurally Defaulted

Mitchel alleges that the Government suppressed exculpatory evidence, material to Mitchel's guilt or punishment, by allegedly only disclosing a "redacted" version of an FBI 302 report regarding an interview of John Doe 1. *See* Exhibit 7B to Motion. Mitchel's argument is baseless.

Exhibit 7B, which consists of two pages, is plainly missing two full additional pages. The two pages that comprise Exhibit 7B are numbered "Page 1" and "Page 4." Rather than reaching the logical conclusion that "Page 2" and "Page 3" are somehow lost, misplaced, or were misfiled by Phillips, without any evidentiary support Mitchel chooses to jump to the illogical and outrageous conclusion that the Government must have "redacted" the missing information or created an "incomplete" document for "a 'show' production to defense counsel." Motion, pp.73-74. A side-by-side comparison of the complete 302 report document (Exhibit 7A to

Motion) and the incomplete document (Exhibit 7B) reveals that two pages are simply missing. As admitted by Mitchel, “[a]ll the words on the .txt version [Exhibit 7B] provided to defense counsel matched the words in the official FD-302a [Exhibit 7A].” Motion, p.24 n.32.

Even if Mitchel’s ludicrous argument is accepted and one assumes that the Government deliberately did not disclose the full 302 report, there is no exculpatory evidence material to either Mitchel’s guilt or sentence contained in the portions of the report that were allegedly withheld. *See* Exhibit 7A. From the portion of Exhibit 7A (the full 302 report) that is not in Exhibit 7B, Mitchel cites to John Doe 1’s statement that John Doe 1 videotaped himself when he masturbated and then provided the videos to Mitchel. *See* Exhibit 7A, p. 2. As discussed in Section III.A(4), *supra*, the identity of the person actually holding or operating the camera is legally irrelevant. Furthermore, although John Doe 1 states that Mitchel was not operating the videocamera during the filming of “justinpreview2[1].wmv,” John Doe 1 states that Mitchel was there and taking still photographs of he and Berry while they were masturbating. *See* Exhibit 7A, pp. 2, 3-4. In addition, John Doe 1 stated that on another occasion, he and Mitchel checked into a Roanoke hotel, Mitchel set up his laptop’s web camera to film, and Mitchel then left the room so that John Doe 1 could masturbate on camera alone. *See id.* at 4.

From the portion of Exhibit 7A (the full 302 report) that is not in Exhibit 7B, Mitchel cites to John Doe 1’s statement that the information contained in a biography of John Doe 1 on the “justinsfriends” website appeared to be written by Berry. Mitchel fails to explain how such information, if true, is exculpatory. The Government does not deny that as both an adult and a minor, Berry had an active role in both the “mexicofriends” and “justinsfriends” websites. The Government has never alleged that Mitchel acted alone and in the PSR, Mitchel’s sentence was not adjusted for an organizer, leader, manager, or supervisor role in the offense. Mitchel Dkt. 52,

¶ 30. Further, to the extent that Mitchel alleges that this information is impeachment material, as set forth in Section IV.A, *supra*, Mitchel was not entitled to such information.

Mitchel has failed to credibly establish that the Government withheld the full 302 report regarding John Doe 1 or that information contained within the portions to which he did not already have access constituted exculpatory *Brady* material to which he was entitled. Since Mitchel has not even established that a constitutional error occurred, he cannot have been prejudiced by Phillips' failure to raise this issue on appeal. Therefore, Mitchel also cannot demonstrate cause for his procedural default because Phillips' performance was objectively reasonable in not raising a completely unmeritorious appeal issue.

D. Mitchel's Claim Of Grand Jury Abuse Is Without Merit And Procedurally Defaulted

In regard to Count One of the Indictment, which charged the production of child pornography, Mitchel absurdly claims that "the evidence is unquestionable that prosecutorial misconduct substantially influenced the Grand Jury." Motion, p. 76. Mitchel again relies on false, unsupported, and legally irrelevant claims that he sexually exploited only one minor (John Doe 1) and he could not have produced child pornography because he did not videotape or hold a camera. As set forth in the Statement of Facts and in Section III.A(1) and (4), *supra*, these claims are patently false. Undisputedly, the video of Berry and John Doe 1 (i.e., "justinpreview2[1].wmv") is still child pornography even if Berry is an adult in the video. Mitchel admitted to participating in the production of such child pornography with Berry. John Doe 1 stated that Mitchel took still photographs of him while he masturbated during the production of this video. As set forth in Exhibit 3, the evidence is clear that Mitchel also participated in the production of child pornography of at least two other minors (Berry and John Doe 3) because Mitchel himself is actually depicted in the videos (i.e., "Justin and Greg.mpg")

and “greg.wmv”). Mitchel’s guilt on Count One has been established by incontrovertible evidence.

Mitchel’s attempts to also tie this grand jury abuse claim to Count Three (transportation of child pornography) defy comprehension. Even if it were true that Mitchel had not participated in the production of child pornography of Berry (John Doe 2), it does not logically follow or necessarily mean that Mitchel could not or did not transport images or videos of child pornography of John Doe 1 (as alleged in Count 3). Further, the proof necessary to establish Mitchel’s criminal liability for the transportation of child pornography could have been satisfied by evidence wholly unrelated to child pornography images of John Doe 1 or Berry. As set forth in Exhibit 3, Mitchel’s guilt on Count Three also has been established.

Mitchel has failed to establish any credible claim that the Government engaged in grand jury abuse regarding either Count One or Count Three. Therefore, Mitchel cannot have been prejudiced by Phillips’ failure to raise this issue on appeal and he cannot demonstrate cause for his procedural default because Phillips’ performance was objectively reasonable in not raising a completely unmeritorious appeal issue.

E. Mitchel’s Claim Of Inadequate Notice Of Uncharged Conduct Is Not Cognizable On Collateral Review

Mitchel claims that before his sentencing hearing, the Government provided him with inadequate notice of FBI reports regarding conduct by Mitchel in 1999. In his Motion, Mitchel admits that such reports were disclosed three days before his sentencing hearing, consisted of only 16 pages, and that the substance of the reports was included in the initial Complaint against Mitchel. Mitchel provides no legal support as to why such notice was legally insufficient. Although the Government mentioned the conduct in argument at the sentencing hearing, Phillips effectively argued and pointed out that the Government actually had presented no evidence of

such conduct. Mitchel Dkt. 61, 16:15-24. Critically, the District Court confirmed that it was not considering the conduct since the Government presented no evidence of it. *Id.*, 25:20-26:1.

Mitchel has not established any error but assuming he has, the error is plainly non-constitutional and has not resulted in a complete miscarriage of justice. *Hill*, 368 U.S. at 428. As such, Mitchel has not established an error that is cognizable on collateral review. Further, Mitchel's claims of prejudice as a result of such alleged error are speculative and contradicted by the District Court's express statements.

F. Mitchel's Claim Of Fundamental Unfairness Concerning Cooperation And Assistance Is Without Merit And Is Not Cognizable On Collateral Review

Without legal support, Mitchel claims that the Government did not fairly assess the assistance he provided in the Richards investigation, in which law enforcement removed a minor that was living with Richards. Mitchel's claim is without merit. Absent evidence of bad faith or unconstitutional motive, the decision to move for a reduced sentence based upon a defendant's substantial assistance pursuant to either USSG § 5K1.1 or Fed. R. Crim. P. 35 is within the Government's discretion. *See United States v. Hartwell*, 448 F.3d 707, 719-20 (4th Cir. 2006); *United States v. Snow*, 234 F.3d 187, 190 (4th Cir. 2000) (finding that a waiver of prosecutorial discretion in a plea agreement regarding the filing of a motion pursuant to USSG § 5K1.1 must be explicit).

The Government has acted in good faith and Mitchel does not claim that the Government has been unconstitutionally motivated in its decision to not move for a sentence reduction. As set forth in the Statement of Facts and Section III.D, *supra*, the full extent of Mitchel's assistance was presented to the District Court through the testimony of the case agent. On cross-examination, the Government did not elicit testimony disputing this assistance. Rather, the Government clarified that Mitchel was not the only source of information regarding the minor

living with Richards and that prior to Mitchel's proffer, law enforcement already had been investigating the location of the minor. Mitchel Dkt. 61, 12:1-15. In its limited use immunity agreement with Mitchel, the Government made clear that a cooperation agreement had not been reached and that any information to be provided by Mitchel at the proffer was voluntary:

Mitchel has agreed to do this voluntarily recognizing the government has made no promises or representations that he will be provided with any benefit at all for doing so. While no agreement as to your client's cooperation have been made, the government hereby agrees to interview your client and to assess the information he provides at said interview and whether his further cooperation with the government is appropriate.

Exhibit 7.

Although the Plea Agreement left open the possibility of a substantial assistance motion, the Agreement did not require the Government to file such a motion. As of the sentencing hearing, the Government in good faith did not believe that Mitchel's assistance was "substantial" yet, and Mitchel's prior criminal history also weighed against seeking a reduction of his sentence pursuant to USSG § 5K1.1. The possibility of a later Rule 35 motion remained due to the pending federal criminal cases in Richards and Brown. However, the Government has not moved to reduce Mitchel's sentence pursuant to Rule 35 because his further assistance has not proved to be necessary: Richards was convicted at trial without Mitchel's testimony and Brown pleaded guilty pursuant to a plea agreement. Further, Mitchel's cooperation was sought in a remaining, open investigation related to the "justinsfriends" and "mexicofriends" websites, but Mitchel actually declined to meet with the Government. Exhibit 11.

The Government has acted in good faith and has not abused its discretion in evaluating the cooperation and assistance provided by Mitchel to date. Further, the District Court was aware of the cooperation and assistance as of sentencing, and yet also declined to give Mitchel

credit for it pursuant to the Court's authority under 18 U.S.C. § 3553(a). Mitchel's claim of non-constitutional error is unfounded and he has not established that the Government's assessment of his cooperation is "inconsistent with the rudimentary demands of fair procedure" or has resulted in "a complete miscarriage of justice." *Hill*, 368 U.S. at 428. Mitchel's claim is therefore not cognizable on collateral review.

G. Mitchel's Claim Regarding The District Court's Rule 32 Error Is Not Cognizable On Collateral Review

Mitchel alleges that the District Court failed to comply with Fed. R. Crim. P. 32(i)(1)(A) by not verifying that Mitchel and Phillips read and discussed the PSR.¹⁷ A district court's failure to follow the formal requirements of Fed. R. Crim. P. 32 "is not of itself an error that can be raised by collateral attack." *Hill*, 368 U.S. at 426, 428 (holding that "[t]he failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus" and stating that "[i]t is an error which is neither jurisdictional nor constitutional" and "not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure."); *see also Timmreck*, 441 U.S. at 783-84. Accordingly, Mitchel's claim is without merit.

H. Mitchel's Claim Regarding Sentencing Disparities Is Without Merit And Not Cognizable On Collateral Review

Finally, Mitchel raises the issue of alleged sentencing disparities between his sentence and the sentences received by Brown, Gourlay, and Richards. Although 18 U.S.C. § 3553(a)(6) requires sentencing courts to consider "unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," Mitchel cites to no legal authority allowing for the consideration of alleged sentencing disparities on collateral review.

¹⁷ In his Motion, Mitchel mistakenly cites to Fed. R. Crim. P. 32(i)(1)(B).

See United States v. Bokun, 73 F.3d 8, 12-13 (2d Cir. 1995) (vacating district court's judgment finding relief under § 2255 inappropriate when based upon sentencing disparities). If defendants were permitted to raise the issue of sentencing disparities on collateral review, endless post-conviction collateral attacks would be raised with the sentencing of each new defendant who had a similar record and was found guilty of similar conduct.

Further, Mitchel did not have a "similar record" to that of Brown or Richards. At sentencing, Mitchel's record was that of a recidivist sex offender against children, having been previously convicted on 27 counts of child pornography offenses, and he was subject to statutory sentencing enhancements because of those prior convictions. *See* Section I.C, *supra*. Brown and Richards had no prior criminal record for sexual offenses when they were sentenced.¹⁸

Even if Mitchel had a criminal history similar to Brown, Richards, or Gourlay, or committed similar conduct, he had no constitutional right to receive the same sentence as others who were later convicted of the same or similar offenses. *See Williams v. Illinois*, 399 U.S. 235, 243 (1970). "The Constitution permits qualitative differences in meting out punishment and there is no requirement that two persons convicted of the same offense receive identical sentences." *Id.* Since Mitchel has not alleged a constitutional error, the sentencing disparity he alleges must represent "a complete miscarriage of justice." *Hill*, 368 U.S. at 428. Mitchel's claim plainly does not rise to that level based upon the number of minors he sexually exploited

¹⁸ Neither can Mitchel be said to have been found guilty of conduct similar to that of Brown or Gourlay. Among other things, Mitchel was found guilty of producing child pornography in violation of federal law, whereas Brown did not participate directly in any such conduct and was not convicted of producing child pornography. *See* Brown Dkt. 144, 156. Gourlay was not convicted of any federal child exploitation offenses, having been convicted and sentenced in Michigan's state court system of violating Michigan law. Gourlay's prior criminal record is unknown. With respect to Richards, it should be noted that the Government has filed a notice of appeal of the sentence imposed in the Middle District of Tennessee (though again, Richards notably lacked the recidivist sex offender criminal record that Mitchel possessed). *See United States v. Timothy Ryan Richards*, M.D. Tenn. No. 3:05-cr-00185, Docket Nos. 392, 397.

and his prior criminal history. Further, the sentence he received was within both the advisory Guidelines sentencing range and the applicable statutory sentencing range. Accordingly, Mitchel's claim of non-constitutional error is without merit.

V. **An Evidentiary Hearing On Mitchel's Unmeritorious And Frivolous Motion Is Unnecessary**

Summary dismissal of Mitchel's motion is warranted and an evidentiary hearing is unnecessary to resolve his claims because for the foregoing reasons, his allegations are "palpably incredible" and "patently frivolous." *Lemaster*, 403 F.3d at 220 (*quoting White*, 366 F.3d at 296) (holding that district courts "should, without holding an evidentiary hearing, dismiss any § 2255 motion that necessarily relies on allegations that contradict the sworn statements" of a defendant in a Rule 11 colloquy); *see also Lagrone*, 727 F.2d at 1038 (finding no abuse of discretion in district court's refusal to hold evidentiary hearing and stating that "[i]n cases where the files and records make manifest the lack of merit of a Section 2255 claim, the trial court is not required to hold an evidentiary hearing (*citing United States v. Hughes*, 635 F.2d, 449, 451 (5th Cir. 1981))).

CONCLUSION

Each of the grounds relied upon by Mitchel in his Motion is without merit and the evidence facing Mitchel was exceptionally strong. His Motion should be dismissed in its entirety without an evidentiary hearing.

Respectfully submitted,

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Dated: December 31, 2008

CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2008, I caused the attached document to be electronically transmitted to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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