

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

GREGORY JOHN MITCHEL,	)	
	)	
Petitioner,	)	
	)	
v.	)	Criminal Action No. 7:05-cr-00090
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MEMORANDUM IN SUPPORT OF  
PETITION BY GREGORY J. MITCHEL  
FOR RELIEF PURSUANT TO 28 U.S.C. § 2255

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## INTRODUCTION

The greatest dangers to liberty lurk in insidious encroachment  
by men of zeal, well meaning but without understanding.

Justice Brandeis, Olmstead vs. United States, 277  
U.S. 438 (1928).

As a result of Justin Berry providing his story to Department of Justice attorneys and F.B.I. agents on July 25 and 26, 2005, four persons were arrested in connection with an ongoing investigation of child pornography and related offenses. Petitioner Gregory J. Mitchel was the first to be arrested, on September 12, 2005. Petitioner's cooperation began a week after the court appointed counsel for him. Petitioner was sentenced and sent to prison in July 2006.

The second person arrested was Timothy Ryan Richards, in the Middle District of Tennessee. On September 20, 2005, Petitioner contributed critical information to the Affidavit for the Richards arrest ("Richards Affidavit"), including not only the state, but also the city where Richards had been living with a 14-year old boy for two years. The Government had been unable to develop the information in the three months following Justin Berry's July 25-26 proffer. Richards' sentencing, following jury trial, is set for November 7, 2008.

The third person prosecuted was Aaron Campbell Brown. The Government debriefed Petitioner concerning Brown in 2005. On May 24, 2006, the Government obtained an Indictment against Brown in this District. Electronic evidence and other issues were extensively litigated. When Petitioner went to prison the Government's case against Brown was still unresolved.

The Marshals Service returned Petitioner from federal prison as a trial witness for

the United States for the Brown prosecution. An A.U.S.A. and an F.B.I. Special Agent debriefed Petitioner at Roanoke City Jail. They held out Rule 35 inducements. The debriefing occurred before Petitioner's conviction was final and while Petitioner was represented.

After approximately one year of pretrial proceedings, Brown pled guilty and was ordered by this Court to serve ten years in custody. Brown was sentenced, at the Government's recommendation, as if he had already cooperated with the United States. The record does not reveal any specific facts showing Brown was of any value, much less significant value, in the investigation or prosecution of another.

Kenneth Richard Gourlay was the fourth person charged. Following a jury trial in March 2007, a court in the State of Michigan sentenced Gourlay to an indeterminate term of ten to fifteen years in custody.

Of the four defendants, Petitioner was sentenced first, not only because he was charged first, but also because his counsel agreed to whatever the Government put in front of him. Only four months elapsed between the time Petitioner was arrested and pled guilty. Petitioner was sentenced to 1800 months – 150 years – in custody.

This case demonstrates that when Constitutionally ineffective defense counsel neglects fundamental duties, gives prosecutors all they ask for, and hopes for the best, the worst can follow. It is an example of a case processed through the criminal justice system in which Government reports are accepted as true without meaningful adversarial testing, resulting in cascading failures in the process and diminished confidence in the criminal justice system.

The claims documented here do not stop with a showing that ineffective

assistance of counsel prejudiced Petitioner, resulting in an involuntary and unknowing plea and ineffective waivers. They go beyond disregard of demonstrably valuable information by Petitioner at the time of his sentencing and the profound and unwarranted sentencing disparity among defendants arrested in an investigation for similar crimes. They encompass the breached pre- and post-plea duties by Government employees owed to any citizen accused of a crime.

By not taking seriously the rights of the criminal defendant here (perhaps because of the nature of the accusations leveled), the Government sacrificed the following well-established legal principles to Petitioner's profound prejudice: disclosure obligations under Brady v. Maryland, 373 U.S. 83 (1963); fairness obligations under the Due Process Clause; and respect for the grand jury function to serve as a bulwark between the government and its citizens.

Also sacrificed in the drive to "win" were obligations of candor owed to an equal branch of Government.

Petitioner Gregory J. Mitchel seeks all relief to which the evidence shows he is entitled under Title 28 U.S.C. §2255 for: defense counsel's prejudicially ineffective representation; defense counsel's compounding such ineffective representation by urging Petitioner to accept Guideline adjustments flatly belied by the record and contradicted by the meager discovery the Government did provide; Government violations of basic rules of criminal practice and procedure to Petitioner's prejudice; substantial unwarranted sentencing disparity among defendants; and for the other reasons detailed below as well as those which may later be shown.

At a minimum, this relief is: a sentencing consistent with Rule 32, F.R.Cr.P. and

protections guaranteed to every accused by the Constitution of the United States; leave of Court (pursuant to Rule 6 of the Rules Governing Section 2255 Cases in the United States District Court) for discovery necessary to address and cure the Brady, Rule 16, F.R.Cr.P. violations; grand jury abuse, prosecutorial misconduct and other errors described below; and such other relief incident to these proceedings as may be just and proper and as detailed in the final section.

I. PRIOR PROCEEDINGS.

On September 12, 2005, in this District, F.B.I. Special Agents arrested Petitioner and searched his home for violations of 18 U.S.C. §2251, 2252 and 2252A. CR 7.<sup>1</sup>

The Affidavit in support of the criminal complaint stated that, according to Justin Berry,<sup>2</sup> Petitioner “. . . produced videos of Berry [when Berry was 18] and a boy known as [“the minor”] who was 14 years of age at the time.” CR 3:12, ¶32.

On September 13, 2005, Petitioner was brought before Magistrate Judge Urbanski. CR 9. On September 14, 2005, counsel was appointed. CR 13.

On September 20, 2005, Petitioner sat for an interview by the investigating F.B.I. Special Agent, Monique Winkis. Present were Petitioner’s appointed counsel and various Government representatives.

On September 22, 2005, in the Middle District of Tennessee, the Government obtained an arrest warrant for Timothy Ryan Richards. Richards was charged with

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<sup>1</sup> The Clerk’s Record abbreviations used here are: “CR \_\_\_\_” for filings in United States v. Gregory John Mitchel, 7:05-cr-00090 SGW; “CR-ACB \_\_\_\_” for filings in United States v. Aaron Campbell Brown, 7:06-cr-00044-SGW; and “CR-TRR \_\_\_\_” for filings in the Middle District of Tennessee (Nashville Division) relating to United States v. Timothy Ryan Richards, 3:05-0018 AAT.

<sup>2</sup> This Petition names Justin Berry because at the time of most of the events, he was an adult, and because his name has been publicly and repeatedly disclosed in public records including: CR 68 (Change of Plea Transcript) and CR-ABC 163 (Sentencing Transcript). In addition, Mr. Berry has made himself a public figure, testifying in his own name before Congress, appearing on the *Oprah Winfrey Show*, and even creating a website in his own name – [www.justinberry.tv](http://www.justinberry.tv). His story has appeared in his name in the *New York Times*, December 19, 2005, available at <http://www.nytimes.com/2005/12/19/national/19kids.ready.html>, accessed July 28, 2008.

crimes relating to child pornography, in violation of Title 18 U.S.C. §§ 2251(d) and 2252A(a)(1). CR-TRR 5, MD TN, attached as Ex. No. 1.<sup>3</sup>

Of the 19 substantive paragraphs that related to Richards in the Affidavit supporting the Middle District of Tennessee criminal complaint, at least seven paragraphs relied on information from “CW1” (Petitioner). The Affidavit alleged that on September 12, 2005, the F.B.I. arrested CW1 in the Western District of Virginia for the same offenses for which Petitioner was arrested. The Affidavit alleged that on September 20, 2005, F.B.I. S/A Winkis debriefed CW1. CR-TRR 3:¶48. The Affidavit also alleged that on September 20, surveillance was conducted on Richards’ residence and Richards was seen there with a teenage boy. CR-TRR 3:¶65.

CW1 described his knowledge of Richards’ offenses, including: operating child pornography websites for nine years (CR-TRR 3, ¶¶49; 52); living with a 14-year old minor in a sexual relationship from the time the minor was 12 (CR-TRR 3, ¶49); and cross-selling Berry’s website with Richards’ website (CR-TRR 3, ¶52). In the course of arresting Richards, authorities recovered the boy. CR-TRR 3, ¶65, J&S Tr. at 11:9-11.<sup>4</sup>

On October 6, 2005, a grand jury of this District Court returned an Indictment in six criminal counts against Petitioner. The gravamen of Count One was that sometime between May 1, 2003 and September 12, 2005:

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<sup>3</sup> Exhibits and Declarations are filed separately. Certain matters have been redacted in referenced Exhibits. Unredacted Exhibits are filed under seal.

<sup>4</sup> The transcript from Petitioner’s Judgment and Sentencing on July 14, 2006 is abbreviated as “J&S Tr. [page:line(s)].

. . . Gregory John Mitchel and others videotaped John Doe 1 and John Doe 2, both of whom were under the age of 18 engaging in sexually explicit conduct [in violation of Title 18 U.S.C. §§ 2252(d)(1)(A) and (E)].

–CR 24 at 1-2.

On October 13, 2005, Petitioner was arraigned on the Indictment. CR 29.

Counts Two through Five variously alleged related offenses of advertising transporting, receiving, selling and possessing such materials in a 24 to 28-month period beginning May 1, 2004 and variously ending July 12, 2005 (Count Two) or September 12, 2005 (Counts Three, Four, and Five). Count Six alleged the offense that occurred on or about September 12, 2005. Count Seven sought forfeiture of several computers. There were no forfeiture allegations for bank accounts, cash, or high-value assets.

Defense counsel filed no pretrial motions (except for one request to continue the trial, which the Court granted). CR 31.

On January 26, 2006, Petitioner entered pleas of guilty to Counts One, Three, Five, and Six. CR 39. The Plea Agreement, detailed in Section 3, referenced the following:

- A two-minor grouping enhancement, notwithstanding the fact that the F.B.I. Affidavit established that Berry was over 18 when Berry made the video (CR 39, ¶4);
- An enhancement based on a range of \$30,000-\$70,000 described in Count One (CR 39, ¶4), notwithstanding the fact that \$10,818.75 was the amount of money Petitioner received, according to both the criminal complaint's description of Petitioner's Bank of America checking account deposits (CR 3, 14:24-28; 15:2), and Neova.net records provided *after* the change of plea to the defense;<sup>5</sup>

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<sup>5</sup> The Indictment and First Superseding Indictment in USA v. Aaron Campbell Brown alleged amounts relating to Petitioner comparable to \$10,818.75, and substantially less than \$30,000. For example, CR-ACB 112, 8-9: ¶r; 16: Count Seven; 17: Count Eight.

- Other enhancements, below (CR 39, ¶4); and
- Various waivers of rights, which, as addressed below, were not freely, knowingly, voluntarily and intelligently made. CR 39.

At the Change of Plea proceeding, the A.U.S.A. detailed what the Government would prove concerning the “two-minor video.” Its evidence included the fact that Justin Berry was one of the two participants *and that when the video was made, Berry was over 18 years of age*. CR 68; CoP Tr. 25:4-10.<sup>6</sup>

On March 16, 2006, the Probation Officer released the draft PSR. Neither side lodged any objections. PSR Addendum, after page 15. On June 5, 2006, the Probation Officer released his final report.

The defense twice requested and received continuances of the sentencing, on April 10, 2006 and June 6, 2006. CR 42, CR 45. On June 8, 2006, the Court set sentencing for July 14, 2006.

On July 14, 2006, this matter was called for sentencing. CR 48. The record does not establish that Petitioner and his attorney read and discussed the PSR, contrary to the requirement of Rule 32(i)(1)(A). J&S Tr., passim. Likewise, the record does not establish that Petitioner’s counsel received and read 16 pages of discovery the Government faxed to the defense just days before, relating to a 1999 F.B.I. investigation, which the Government relied on at sentencing.<sup>7</sup> J&S Tr. 14:2-11.

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<sup>6</sup> The transcript for Petitioner’s Change of Plea proceeding on January 27, 2006 is abbreviated as “CoP Tr. [page:line(s)] and is filed as CR 68.

<sup>7</sup> Counsel did not review the PSR with Petitioner, Mitchel Dec. If Counsel read the facsimile before sentencing, he did not share it with Petitioner. Mitchel Dec.

Following direct and cross examination of one witness,<sup>8</sup> argument of counsel and the allocution of the Petitioner, the Court sentenced Gregory John Mitchel to 1800 months in custody, no fine, and as required by law, a term of supervised release. The items described in the Plea Agreement were ordered forfeited. On July 24, 2006, Judgment was entered.

On July 31, 2006, defense counsel filed a notice of appeal to the United States Court of Appeals for the Fourth Circuit, and then represented Petitioner on appeal. On January 18, 2007, defense counsel filed his opening brief.

The one argument advanced on appeal was that Petitioner did not receive the benefit of his plea bargain.<sup>9</sup> In a four-page presentation (without reference to Rule 11, F.R.Cr.P.), counsel attempted to explain how the parties' Guideline calculations in the Plea Agreement limit the sentencing discretion of a district court. Counsel advanced no arguments concerning his own ineffectiveness, and did not address whether Petitioner knowingly and intelligently waived his right to appeal, nor any of the matters raised here.

While the appeal was pending, the United States Marshal transported Petitioner from a Bureau of Prisons facility to the Western District of Virginia. On an unknown date between approximately January 8, 2007 and approximately May 14, 2007, A.U.S.A.

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<sup>8</sup> The testimony by F.B.I. S/A Winkis established that it was Petitioner who provided the information that led to the Richards arrest: "When you arrested him, did he advise you there was a situation in Nashville, Tennessee?" "He did. . .He advised that there was another individual involved in his website that had access to a young minor boy of 13 years old." (J&S Tr. 10:22-24; 11:1-3).

<sup>9</sup> "The issue is whether the district court applied [sic] invalidated the contractual agreement between Mitchel and the United States contained in the plea agreement." Appellant's Brief at 10, ¶2.

Joseph Mott and F.B.I. Special Agent Brooke Donahue interviewed Petitioner at the Roanoke City Jail. Petitioner was uncounseled. Mitchel Dec.

On April 30, 2007, in a per curiam unpublished opinion, the Fourth Circuit dismissed the appeal. The Plea Agreement contained a waiver of the right to appeal “any sentence within the advisory Guidelines range of punishment.” The panel noted that Petitioner did not contest whether the *appellate* waiver was entered knowingly and intelligently. The panel found Petitioner did not dispute that the sentence he received was within a properly calculated Guidelines range.

On May 14, 2007, Aaron Campbell Brown pled guilty to conspiracy to sell, transport, reproduce, distribute and receive child pornography, and to money laundering, in violation of Title 18 U.S.C. §§2252A(b)(1) and 1956(a)(1)(A)(i), respectively. CR-ACB 143.

On May 25, 2007, a court of the State of Michigan sentenced Kenneth Gourlay to an indeterminate term of ten to fifteen years. Ex. Nos. 2, 3 (certified copies of judgments in People of the State of Michigan v. Kenneth Richard Gourlay).

On August 14, 2007, this Court sentenced Aaron Campbell Brown to ten years in custody, and ordered Brown to forfeit \$128,300 to the United States, as provided under the Plea Agreement. Under a Revised Order of Forfeiture (CR-ACB 162) entered November 2, 2007, the amount was reduced by \$103,300 to \$25,000. CR-ACB 155, ¶B; CR-ACB 162, 6:17. Brown was sentenced, at the Government’s recommendation, as if he had already cooperated with the United States. CR-ACB 163, 19:15-20.<sup>10</sup> The

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<sup>10</sup> The Court enhanced Brown’s base offense by five (5) levels because it found (as the Plea Agreement provided) that Brown’s offense involved more than \$10,000 and less

Sentencing Transcript does not reveal any specific facts showing Brown was of any value, much less significant value, in the investigation or prosecution of another. CR-ACB 10: 16-21; 15:10-25; 16:1-3. The Clerk's Record does not reveal any filing at or near the date of sentencing suggesting the government provided an in camera assessment of Brown.

Timothy Ryan Richards is set for sentencing on November 7, 2008. CR-TRR 340.

Petitioner is now in the custody of the Warden at the United States Penitentiary at Tucson, Arizona,<sup>11</sup> serving the sentence imposed in this matter. This is the first petition by Gregory John Mitchel for relief under §2255.

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than \$30,000. CR-ACB 144: 3, ¶3 (Plea Agreement); CR-ACB 163 (Sentencing Transcript).

<sup>11</sup> Filed with this Memorandum is a declaration by counsel for deferred filing of Petitioner's Declaration ("the Mitchel Dec."). The declaration of counsel shows that Petitioner was housed at U.S.P. Atwater until sometime before about July 14, 2008. On an unknown date, BoP put Petitioner through a series of one-day moves, resulting in Petitioner now being held in Arizona. Because of these moves, Petitioner and his counsel were completely out of communication until Saturday, July 26, 2008, notwithstanding an April 2008 written request by counsel to BoP to hold Petitioner in California. The Mitchel Declaration will be filed shortly.

## II. FACTS.

### A. Origins Of The Government's Investigation.

Justin Knute Berry was born in July 1986.<sup>12</sup> CR 3: 9, ¶28. In July 2005, Justin Berry had his 19<sup>th</sup> birthday. Federal authorities debriefed him on July 25-26, 2005 pursuant to a limited immunity agreement.

Justin Berry admitted that when he was 13 years old, he put himself in the child pornography business with an Earthlink Internet account, a web camera and the first of his web sites, "Justinscam.com." CR 3: 9, ¶29. Justin Berry then created other sites along the way, developing a subscriber list of "thousands." Initially, subscribers paid Berry through Western Union and Paypal. CR 3: 10, ¶29. On July 17, 2000, when he was just 13 years old, he applied for a Business Tax Certificate from the City of Bakersfield, California. Ex. No. 5.

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<sup>12</sup> Because certain acts are unlawful when a minor is involved but lawful when the person is over 18, it is vital in a criminal proceeding to confirm the status of the alleged minor, as well as when the acts at issue occurred. Berry's birth certificate confirms his date of birth as July "xx", 1986. Ex. 4 (certified copy of informational birth certificate from Office of the Recorder, Kern County, California). The redacted copy in the public record confirms his birth year, but not the birth day.

Examining the unredacted version is important to understand and appreciate the close congruence between Berry's 19<sup>th</sup> birthday and his Government debriefing, and how those dates fit into a timeline of acts involving Berry when he was over 18 (including when the videotape described in Count One is believed to have been made).

In the State of California, an "informational copy" of a "Certificate of Live Birth" may be obtained by anyone without a showing of need from the appropriate county recorder. The informational copy may be certified but it cannot be used to establish identity.

According to Berry, when he was about 15 or 16, he contacted Aaron Campbell Brown and developed a payment agreement with Neova.net, Brown's merchant credit card processing service. CR 3: 10, ¶29.<sup>13</sup> By the age of 16, Berry left his mother and his problems in Bakersfield, California, to live in Mexico with his father, earning substantial sums from the two websites, Justinsfriends.com and Mexicofriends.com. CR 3, ¶31.

Sometime after his 17<sup>th</sup> birthday – with four years experience in filming, marketing, and selling child pornography via his websites, and after heavy narcotics use – Justin Berry first met Petitioner in Mexico.<sup>14</sup> For reasons best known to himself, Berry falsely told Petitioner that he was over 18 years old.<sup>15</sup>

At the Government's debriefing, Berry offered sensational allegations that not only implicated Petitioner, but also attributed to Petitioner a driving and dominant role in Berry's longstanding businesses. Berry's F.B.I. 302 does not reflect that Berry revealed to the F.B.I. many of the essential facts around the video that the basis for Counts One and Three and that portrays him and a minor.<sup>16</sup>

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<sup>13</sup> Independent investigation by counsel for Aaron Brown revealed a different story:

Mr. Damico: "When Justin was about 17 and a half, Neova, which is a company run by Mr. Brown began processing the billing for Mexicofriends."

- David J. Damico, Esq., Counsel for Aaron Campbell Brown, providing factual narrative at Mr. Brown's sentencing, to the Honorable Samuel G. Wilson, U.S.D.J., August 14, 2007, ACB J&S Tr. 25: 5-7.

<sup>14</sup> The PSR indicates Petitioner and Berry first met in Mexico. The PSR also reports, at ¶5, that Berry was 16 years old. This age is incorrect. Mitchel Dec.

<sup>15</sup> In Berry's July 25-26, 2005 F.B.I. debriefing, Berry admitted that he lied about his age to Petitioner.

The Government knew from the interview that Berry was not only a confessed criminal, but also that the information he related made it imperative that his unsworn proffer tendered in hopes for immunity be received with caution and considered with care.

First, in addition to his crimes, the Government actually knew Berry had a long history of *dishonest* acts and that he had extensively used mind-altering illegal drugs. His dishonest acts included: lying about his age to Petitioner; fraudulently using 250 stolen credit card numbers to order goods “all day long;” selling stolen property; paying others to smuggle people into the United States; and at 16 years old; fleeing to Mexico when an insurance fraud scheme involving automobile arson for hire went awry, among other acts.<sup>17</sup> The Executive Branch never disclosed that the only basis for a variety of the

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<sup>16</sup> Counsel is informed and believes that Berry and the minor made the video on or about June 9, 2005 or about six weeks *before* the F.B.I. interviewed Berry. Counsel is further informed and believes that it was not Petitioner but the minor or possibly Berry who held the videocamera. Additionally, Counsel is informed and believes it was Richards who uploaded the video. Finally, the Evan Walters Declaration (“E. Walters Dec.”) establishes reason to believe Berry paid the minor, and that Berry always paid those who appeared in his videos.

Defense counsel for Petitioner did not obtain any of the F.B. I. 302’s for Berry.

<sup>17</sup> Just those acts of dishonesty taken from the F.B.I. interview of a then- 19 year-old, reduced to a 302, and never produced to the defense, made it likely that the Department of Justice would never elect to call Justin Berry as a federal witness in U.S. v. Richards or any other matters. Other potential violations committed by Berry included money laundering and tax offenses.

If the United States Attorney’s Office requested the F.B.I. to conduct at least cursory background check of Berry’s activities (which for prosecutors concerned about witness credibility would be a basic precautionary step given Berry’s background), then the wisdom of never exposing Berry to cross examination as a federal witness would have been confirmed.

sentencing enhancements and its sentencing argument stood on the credibility of a person that Government agents and attorneys knew was dishonest.

The Government's star witness' drug dependency problems were so severe and debilitating that his cooperation agreement (similarly withheld from the defense) required mandatory drug treatment and counseling.<sup>18</sup>

The Government also knew Berry drove through an adult world with a sophistication beyond his years, evidenced by Berry's description of his own activities from the time he was 13 (beginning long before he ever had any contact with Petitioner).

Finally, the Government knew Berry's allegations were explosive, making reliable findings and sound conclusions impossible without a reliable, impartial and detached investigation that could be meaningfully tested by the adversarial process.

#### **B. The Arrest, Search, And Pre-Indictment Cooperation.**

On September 12, 2005, F.B.I. S/A Winkis obtained a search warrant for an address on Dunkard Road, Dublin, Virginia and an arrest warrant for Petitioner. Her Affidavit relied heavily on Berry's statements, although there were some efforts to corroborate them.<sup>19</sup>

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<sup>18</sup> It is not easy, particularly for those in the law enforcement community, to confuse the differences between "drug use" and drug use so extensive that a Cooperation Agreement must contain a drug provision. On September 12, 2005, the Government represented to the Court that "Berry has used drugs including marijuana and cocaine." CR 3: 9, ¶28. The Government put into Berry's September 14, 2005 Cooperation Agreement the drug treatment requirement that "he will take reasonable steps to obtain appropriate drug treatment and/or counseling and to comply with the requirements of such treatment and/or counseling." The Agreement is filed under seal.

<sup>19</sup> The Affidavit contained both misstatements of fact that were not material, and misstatements of fact prejudicial to Petitioner because they were included in the PSR,

The Dunkard Road property belonged to Laura Walters, who had known the Mitchel family for years. Petitioner lived at the Dunkard Road address in a loft.

During and after the search, the cooperation by the Walters' family with the F.B.I. included: agreeing to agents electronically searching computers for which they did not have a warrant; volunteering to agents that they had neglected during the search to interview their minor son (who had information that Petitioner had attempted to stop Berry from doing some inappropriate things); providing information concerning a witness's location; and driving their minor son to the Roanoke F.B.I. office for interview. Laura Walters Dec., ¶¶14, 15.

Laura Walters and her son, now an adult, provided the F.B.I. a very different picture from the story Justin Berry told the F.B.I. concerning Berry's time at the Walters' house. CR 3:15, ¶40. Berry's story was sensational, consistent with a person who used drugs (as Berry did at the Walters' home in June) and whom Government attorneys would meet in July and decide needed a drug rehabilitation and counseling term in his Cooperation Agreement.

To Petitioner's prejudice at sentencing, the Government never shared with the defense the facts as related by the Walters family. Defense counsel did not accept Laura Walters' invitation to help him get to the facts. Laura Walters Dec., ¶ 20.

Laura Walters told the F.B.I. that in the summer of 2005, Justin Berry was a houseguest. Laura Walters Dec., ¶¶ 7, 8. He was over 18. See Birth Certificate, Ex. 4. Berry spent so much time at the home (both when Petitioner was home and at work) that

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used in support of improper Guideline calculations, or otherwise affected the integrity of the sentencing process. The focus here is to identify the false statements that were prejudicial.

Laura Walters thought the guest was overstaying his welcome. Id. Berry was comfortable enough at their home to use their address for receipt of his mail. Id. The day Laura Walters had reason to believe Berry was using narcotics was the same day she told him to leave. Id.

Laura Walters informed the F.B.I. that she had purchased the house from someone other than Petitioner. Laura Walters Dec., ¶4 (attaching certified copy of deed recorded in Pulaski County).

As publicly displayed in the Affidavit, Berry alleged to the Government the provocative claim that “Mitchel sold the residence to the family at a discount with the condition that he be able to share the residence with [the Walters and their three children, two teenage boys and an 18 year old daughter]” (CR 3: 14, ¶37). Despite Laura Walters explicitly informing the F.B.I. that the claim of any sale of land by Petitioner to her was false,<sup>20</sup> the allegation Petitioner sold real property at a “discount” for access to children was brought forward into the PSR at ¶5.

Both Laura Walters and her son informed the F.B.I. that allegations Petitioner had engaged in misconduct with members of the Walters’ family were false. Laura Walters Dec., ¶¶15-19; E. Walters Dec., ¶6. Agents specifically and repeatedly asked the son if Petitioner had engaged in inappropriate touching. He denied any impropriety. Eventually the agents conceded that he was telling the truth. E. Walters Dec., ¶5.

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<sup>20</sup> “I told the agent that claims Gregory Mitchel sold me the house were false. I also told the F.B.I. agent that there were no ‘conditions’ involving Gregory Mitchel for my purchase of the Dunkard Road Property, and that any claims of ‘conditions’ were false. The agent seemed already very familiar with the fact there were no ‘conditions.’ ” Laura Walters Dec., ¶6.

An F.B.I. agent specifically and affirmatively assured Laura Walters that Petitioner had *not* engaged in misconduct with her children. Laura Walters Dec., ¶19. The F.B.I.'s assurance is circumstantially confirmed by other information. Laura Walters Dec., ¶18).

Laura Walters' son told the two interviewing F.B.I. agents about some of Justin Berry's drug use. E. Walters Dec., ¶8.

The son also told the agents about Berry's activities with the minor previously identified in the P.S.R. as "Taylor." First, Justin Berry monopolized his time when he was at the Dunkard Road property. Evan Walters Dec., ¶11. Second, the son learned – from Berry – that it was Berry who made the video with the minor. E. Walters Dec., ¶11. Third, Justin Berry said that he, Berry, paid everyone who appeared in "his" videos. E. Walters Dec., ¶12.

The son also told the F.B.I. about an angry argument he overheard between Petitioner and Berry when Petitioner learned that Berry had been lying to Petitioner. The lies concerned when Berry had turned 18. E. Walters Dec., ¶14.

Laura Walters attempted to share her information with Petitioner's defense counsel. He did not respond. Laura Walters Dec., ¶20. Defense counsel never contacted the son (E. Walters Dec., ¶15) and never obtained facts to substantially mitigate the false picture Berry painted.

Also supporting the search and arrest warrants for Laura Walters' house was the allegation that in 2004, Neova.net made many direct deposits into Petitioner's Bank of America checking account, totaling \$3,475.25; in 2005 the Neova.net direct deposits into

Petitioner's Bank of America account totaled \$7,340.50.<sup>21</sup> CR 3: 14, ¶39. Not included was the fact that Petitioner's same checking account record showed, in the same time period, approximately 11 outbound Western Union transfers.<sup>22</sup>

Also supporting the search and arrest warrants was research by an F.B.I. agent on the second day of Berry's debriefing. Special Agent David Condo had accessed the justinsfriends.com site and was directed to a new site, justinsfriends.net. CR 3, 18, ¶¶54, 55. (According to an Internet search, Timothy Richards took control of that site on July 16, 2005. Ex. No. 6). The Government seemed to have an awareness of the July 16, 2005 change, as Count Two of the Indictment – alleging an advertising count – provides the offense period ending *July 12, 2005*.<sup>23</sup>

Last of significance was a description of a 1999 F.B.I. investigation into allegations that Petitioner was purportedly driving a red Neon in the State of Missouri on

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<sup>21</sup> The Affidavit provided two subtotals for the Neova.Net deposits into the account: \$3,475.25 and \$7,340.50 (deposits from July of 2004 through December 2004, and January 2005 through July 2005, respectively). CR 3:14-15, ¶39. Those two amounts equal \$10,818.75. Petitioner was sentenced as if between \$30,000 and \$70,000 were at issue. PSR ¶35.

<sup>22</sup> With a subpoena authorized by the Court pursuant to Rule 6, Petitioner's counsel expects that the Western Union records will show that Petitioner wire-transferred substantially all the money Petitioner received from Neova.Net to or for the benefit of Justin Berry. Western Union will not release the records without court process, according to telephone conversations on July 3 and July 8, 2008 between Petitioner's counsel and an attorney in the Western Union Legal Department.

<sup>23</sup> Given these dates, it appears likely that when S/A Condo accessed the site, he was investigating a site for which someone else was responsible, and where someone other than Petitioner may have uploaded data.

The fact of the July 12, 2005 date is tendered only because it tends to show the Government's awareness of the July 16, 2005 change. (Petitioner did not plead guilty to Count Two).

January 23, 1999. The alleged Missouri activities near a school led to a probation revocation proceeding in the State of Florida that the F.B.I. affiant considered relevant.

When the 2005 search warrant was executed, F.B.I. Special Agents arrested Petitioner, advised him of his rights, and interrogated him. He provided information that the Government assessed was valuable enough to merit offering limited use immunity for debriefing purposes. Petitioner's immediate post-arrest cooperation was never brought to the attention of the Court.

Agents transported Petitioner to the courthouse. Counsel was appointed.

On September 20, 2005, Petitioner sat for the first of his Government debriefings.

Petitioner provided the information described in Paragraphs 6, and 47 through 55 of the Richards' Affidavit provided as Ex. No. 1.

On October 6, 2005, S/A Winkis interviewed Petitioner at the Roanoke City Jail. Counsel was absent. Petitioner had not been privately counseled about the risks and benefits of being a charged, in-custody defendant sitting unrepresented for an F.B.I. interview. He was not told of the risk he faced if the F.B.I. agent found him cooperative but prosecutors disagreed with the F.B.I. agent's assessment of cooperation, and counsel had to perform the duties of an advocate. Mitchel Dec. The F.B.I. 302 from the October 6 interview was not in the defense counsel's file.

### **C. The Indictment.**

A grand Jury returned an Indictment against Petitioner on October 6, 2005 (the same day that S/A Winkis debriefed Petitioner). CR 24.

Count One alleged that “Gregory John Mitchel and others videotaped John Doe 1 and John Doe 2, both of whom were under the age of 18 engaging in sexually explicit conduct” in violation of Title 18 U.S.C. § 2251(a). As noted, Counts Two through Six variously alleged related offenses of advertising, transporting, receiving, selling and possessing such materials. CR 24.

**D. Events Between The Indictment And The Change of Plea.**

1. Discovery.

Defense counsel did not have in his file any letter or receipt memorializing that either before or after the change of plea in January 2006, he requested or the Government provided discovery. Petitioner’s counsel corresponded with defense counsel in April 2008, to obtain his files, and did. Items one would expect to find were not there. Counsel was asked for various items both specifically and generally. There was no response.

On an unknown date, but almost certainly after Petitioner pled guilty on January 27, 2006, the Government provided defense counsel with various documents bearing, in the lower right hand corner, the date “2/14/06”.<sup>24</sup> Those items appear to be all the discovery provided to defense counsel.

*a. Rule 16, Federal Rules of Criminal Procedure.*

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<sup>24</sup> It appears that on February 14, 2006 someone printed the following documents: IE browsing history in August 2005; about 1200 pages of IE cache records; Neova.net payment information; and various pages of emails and chat. Provided at the same, or a different time and *not* bearing the “2/14/06” date, was the “.txt” file described below.

Those familiar with the overall investigation have described the electronic evidence as “unbelievable” in its volume.<sup>25</sup>

Defense counsel’s file did not have a copy of any of Petitioner’s statements, such as his post-arrest statement (September 12, 2005); initial debriefing statement (September 20, 2005); or any statements from the subsequent debriefings counsel neglected to attend.<sup>26</sup> Therefore he was unable to independently assess the importance of admissions made by his client in the post-arrest statement. Without the September 20, 2005 statement, counsel had no record of what the government considered as Petitioner’s statement while counsel was present. He did not know what the Government reports said about the information his client provided for the debriefings that he skipped. Those decisions meant he was completely unable to take on the role of an advocate to explain to

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<sup>25</sup> “Order” by U.S. Magistrate Judge Urbanski, November 16, 2006 (describing that the Government was “working” to produce data from Petitioner’s and Justin Berry’s computers to Brown defense team, and that the case involved more than two trillion bytes of information) (CR-ACB 68); “Order,” December 7, 2006 at page 4 (“Because of the sheer volume of the information possessed by the Government in this case, its delays and excuses in meeting its obligations under Rule 16, and the impending trial date, it is incumbent on the Court to more precisely specify the format of the required disclosures in this case) CR-ACB 81.

Further, the sentencing of Aaron Campbell Brown revealed much:

MR. DAMICO: Is this one of the most complicated cases that you’ve ever had anything to deal with?

FBI S/A DONAHUE (CASE AGENT): Yes, it is.

MR. DAMICO: Would you agree this was just an unbelievable amount of material to try to digest and interpret?

FBI S/A DONAHUE: It is the most voluminous case I’ve ever, when you look at digital evidence, that I’ve ever undertaken.

MR. DAMICO: Me too.

–Sentencing of Aaron Campbell Brown, August 14, 2007, ACB J&S Tr. 5:5-12.

<sup>26</sup> Cf., Rule 16, (a)(1)(A) F.R.Cr.P. (defendant’s oral statements).

the Court the nature, value, timeliness, and extent of Petitioner's cooperation. (Couple these decisions with the decision to not prepare for trial (see below) and the result was counsel had to accept whatever Plea Agreement the Government would eventually offer).

Defense counsel did not have a copy of Petitioner's criminal history.<sup>27</sup> He therefore lacked a record to begin to conduct any independent investigation of Petitioner's history, apart from what S/A Winkis described from a National Criminal Information System report. This means that defense counsel had no way of knowing that Petitioner's Florida conviction resulted in an adjudication of guilt being withheld, and could have been challenged as not then qualifying as a previous federal conviction for enhancement purposes, as detailed below.

Defense counsel did not request and/or the Government did not provide *favorable* information material to the defense of the case or to sentencing within the meaning of Brady. Strickler v. Greene, 527 U.S. 263 (1999). Thus, the Government knew – and the defense, Probation Officer and Court did not know – that:

1. The minor operated the video camera,<sup>28</sup> in contrast to the charge Petitioner “produced” the video and the PSR information “Reportedly the video camera was operated by Mitchel,” (PSR at ¶5, line 17);
2. Berry paid the minor for appearing in the video, in contrast to the implication that Petitioner arranged for the video;
3. Richards put the video up on justinsfriends.com,<sup>29</sup> contradicting the charge in Count Three that Petitioner conspired to transport the “two minor” video computer file by posting it on the Justinsfriends site;

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<sup>27</sup> Rule 16(a) (a)(1)(D), F.R.Cr.P. (defendant's prior record).

<sup>28</sup> According to the full version of the minor's interview on September 14, 2005, as detailed below.

<sup>29</sup> According to the F.B.I. interview of Justin Berry on May 4, 2006 that was not produced.

4. Knute Berry, Justin's father, pressured Justin Berry to get money and Berry used Greg Mitchel to send the money;<sup>30</sup>
5. Justin Berry had drug abuse issues so profound that the Government required Berry to obtain drug treatment and comply with program requirements, in contrast to the bland statement in the Winkis affidavit that Berry simply "used" drugs.<sup>31</sup>

Significantly, on an unknown date defense counsel did obtain a two-page version<sup>32</sup> of the F.B.I. interview of the minor. Defense counsel provided the two-page version of what he had to current counsel. The complete 302 (which current counsel was able to obtain from an independent source) is four pages long and dated September 14, 2005. The missing two pages contains the minor's statements that: a) The minor made *one* video at Petitioner's home; b) The minor videotaped himself during that video;<sup>33</sup> and c) The minor made the video with Justin Berry. In addition, when asked about Petitioner having improper relations with two other people, the .txt document did not include

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<sup>30</sup> According to the F.B.I. interview of Justin Berry on May 4, 2006 that was not produced. In the same interview, Berry admitted that he was eighteen years old when he made the video.

<sup>31</sup> The cooperation agreement, withheld by the government, is filed under seal.

<sup>32</sup> The document consists of two pages, numbered "1" and "4" printed on plain bond. It appears consistent in form and style to a 302, but without the preprinted markings or numbers found on an official F.B.I. document. The version the Government provided was consistent with someone possessing a computer file of the complete 302, extracting from it a .txt file, and printing the .txt file on plain paper. A marking pen was then used to obliterate some of the minor's personal information. All the words on the .txt version provided to defense counsel matched the words in the official FD-302a. The document is filed under seal together with the 302.

<sup>33</sup> It was only through the PSR (that is, post-plea) that information was revealed that there was *one* videotaping at Petitioner's home (CR 52, ¶9), establishing the falsity of Berry's claim that there were "videos" of the minor and Berry (CR 52:12, ¶32). The minor also claimed that Petitioner operated a still camera.

minor's reply, which S/A's Kelley and Rees quoted in the official F.B.I. 302: "Greg is not like that." This information was not otherwise in the record or shared with the Court.

Defense counsel did not move the Court for any discovery order, nor for Brady material.

Defense counsel viewed what he was told was the evidence at the F.B.I. office. He took no steps to investigate if there were any legal challenges possible to admission of what he was shown. He did not have any expert (or other way) to determine that the two trillion bytes of evidence, either seized from Petitioner,<sup>34</sup> or later seized by the Government from other sources, was collected and processed in a forensically sound manner. He had no reason to assume procedures were properly followed (indeed, his duty was to determine if proper electronic evidence collection procedures were followed). There was no review of metadata to determine when or how the images were obtained.

Defense counsel did not conduct any investigation concerning the facts and circumstances of the 1999 Florida revocation proceeding as reported in the Affidavit.<sup>35</sup> If defense counsel had conducted any investigation, he would have learned that six years before, other counsel for Petitioner had investigated the Florida charges. That

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<sup>34</sup> Rule 16, (a)(1)(E) F.R.Cr.P. (inspection and copying of documents and objects material to the defense, intended by the government for its case-in-chief, or obtained from or belonging to the defendant).

<sup>35</sup> The Winkis Affidavit alleged Petitioner's Probation was "revoked" and he was "incarcerated," CR 3,16: 12-14. The phrasing in the Affidavit written by (or for) S/A Winkis was phrased cleverly. It left the reader with the impression the charge was sustained and Petitioner incarcerated as a result. That impression, like too many others in the Affidavit, was false and prejudicial.

While the Winkis Affidavit may have accurately described what a 16-year old told F.B.I. agents in Missouri about events on January 23, 1999, the teenager's information was false.

investigation developed no fewer than eight business records that placed Petitioner in Massachusetts at the time he was alleged to have been in Missouri and demonstrated that the red Neon could not have made the trip from the Northeastern U.S., in the dead of winter to Missouri in the time period alleged. Those 1999 records are attached hereto with an authenticating declaration. Athanas Dec. ¶3 and Ex. Nos. “A” through “F”; also probative is the Lesley Mitchel Dec., and Ex. “A”.

*b. U.S. Sentencing Guidelines.*

Counsel did not have any information from the Government to assess whether the Government could prove the Guideline enhancements it demanded, nor was there any evidence in his file that he conducted any independent investigation or legal research to see if the enhancements even applied. The Government’s Plea Agreement presented 11 enhancements. There was no information, evidence or investigation to independently assess whether the Government could prove, to a preponderance of the evidence, what it claimed. The enhancements were carried into the PSR and all were applied by the Court.

2. Contact Between Counsel And His Client.

Counsel’s file had no letters to Petitioner advising him of the charges, elements of proof, defenses, evidence or giving a professional opinion so Petitioner could make a intelligent choice concerning the advantages and disadvantages of proceeding to trial or pleading guilty. Indeed, in the file he provided there were only five letters (four of which concerned matters of scheduling) and one confirmed nothing relevant to the charges or punishment. No such letters were received either. Mitchel Dec.

A request to the Roanoke City Jail yielded no jail visitation sheets showing defense counsel visited Petitioner. In candor, Petitioner reports to the Court that

including the first F.B.I. debriefing, defense counsel visited Petitioner not more than five (and likely fewer) times. Mitchel Dec.

3. Events Leading To Change Of Plea Proceedings.

This matter was set for trial on January 18, 2006. CR 33. On January 11, 2008, the purpose of the January 18, 2006 date was changed to a hearing for entry of plea. CR 34. Petitioner did not know of, or authorize, the change. Mitchel Dec.

On January 12, 2006, defense counsel filed a motion to continue the January 18<sup>th</sup> hearing. On January 13, 2006, the Court entered an Order resetting the Change of Plea hearing to January 27, 2006. CR 35-37. Petitioner did not know that he was going to plead guilty on the 18<sup>th</sup> either. Mitchel Dec.

By a letter mailed Friday, January 20, 2006, the Government offered what was essentially a “take-it-or-leave-it” Plea Agreement to defense counsel. At that point, counsel had filed no substantive motions (CR, passim), and had no records of interviewing any witnesses, conducting any other independent investigation, inspecting any evidence, or obtaining any discovery to which he was entitled under Rule 16, F.R.Cr.P.

The Government’s cover letter to the Plea Agreement specifically informed defense counsel that if a \$30,000-\$70,000 valuation figure were used, Petitioner risked a life sentence under the Guidelines.

The night before the change of plea, defense counsel met with Petitioner and pressured Defendant to take the deal. Mitchel Dec. Counsel did not advise him that the

sentence on the four counts could be ordered to run consecutively and result in a life term.<sup>36</sup> Mitchel Dec.

It is Petitioner's position that if he had known he risked a life sentence, he never would have pled guilty. Mitchel Dec.

**E. The Change of Plea.**

On January 27, 2006, Petitioner entered pleas of guilty to Counts One, Three, Five and Six. CR 39. The Plea Agreement contained waivers of various rights associated with: trial (CR 39, ¶1 (a-k)); appeal (CR 39, ¶9); and collaterally attacking his pleas (CR 39, ¶10).

In connection with Petitioner's right to attack his pleas, the Court asked two questions (CoP Tr. 18-22).<sup>37</sup>

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<sup>36</sup> Petitioner was prosecuted by the State of Florida and was placed on concurrent unsupervised terms of probation for simple possession of child pornography. Adjudication of guilt was withheld pursuant to Florida law. The law of the Eleventh Circuit at the time Petitioner was sentenced was that a prior Florida proceeding for which adjudication of guilt was withheld did not count as a prior felony conviction for federal sentencing purposes. United States v. Willis, 106 F. 3d 996 (11<sup>th</sup> Cir. 1997):

We find Chief Judge Stafford's exhaustive review of Florida law on this issue in *Thompson* to be persuasive. Willis pleaded *nolo contendere* to the felony charges underlying count two of the present indictment, and adjudication of guilt was withheld. According to the cases discussed above, Willis has not been "convicted" of a felony under Florida law. Therefore, we hold that section 922(g)(1) is inapplicable and that the district court erred in denying Willis's motion to dismiss count two of the indictment.

<sup>37</sup> THE COURT: Do you also understand that you're waiving your right to collaterally attack your plea and sentences that has been explained to you as well?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand there is nothing that you need to know about it any further?

THE DEFENDANT: Yes, sir.

The A.U.S.A. produced a general summary of what the Government expected the evidence would prove, basically providing an abbreviated version of the Berry story.

CoP Tr. 20:19-24:20. The Court then asked the A.U.S.A. to describe the evidence on a count-by-count basis. CoP Tr. 24:21-23.

As for Count One, the A.U.S.A. made clear in his general statement that the “two minors” production charge was based the videotaping of Justin Berry, then 18, and a 14 year-old.<sup>38</sup> CoP Tr. 19-22. The A.U.S.A. used a passive construction to describe the proof. He did not allege that Petitioner committed any specific acts, but in a circular fashion simply concluded that Petitioner “produced” the video. CoP Tr. 25:4-10.<sup>39</sup> Under Title 18 U.S.C. §2256 (3), “producing” is a defined term and means “producing, directing, manufacturing, issuing, publishing, or advertising.”

The prosecutor used the passive voice to describe the Government’s evidence for Counts Three<sup>40</sup> and Five, not tying Petitioner to any specific conduct, or alleging any mental state.<sup>41</sup> Count Six alleged simple possession. CoP Tr. 26-28. He did not say

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<sup>38</sup> “There was one in particular Mr. Berry described [that] was of Mr. Berry shortly after he turned 18 and another young man from this area, who was 14-years-old (sic) at the time.” CoP Tr. 19-22.

<sup>39</sup> “Among others, the specific one charged is the video of John Doe 1 and John Doe 2. The evidence would’ve been that there 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.” CoP Tr. 25:4-10.

<sup>40</sup> “Among other things, that would have been the same video that was posted to the website produced in Dublin and posted on the Justin’s Friends website by means of a computer service and traveling in interstate commerce to do so.” CoP Tr. at 25:17-22.

<sup>41</sup> “That involves the sale in the charged time frame of the child pornography on the Justin’s Friends website, charging \$29.95 for an initial membership.” CoP Tr. at 25:14-26-2.

Petitioner *did* anything, except in the general statement referring to the fact that Neova.Net received money and sent it (for an unspecified reason) to Petitioner's bank account, that is, Petitioner passively received money.

Petitioner was not asked what acts he committed that made him think he was guilty. The elements of the offenses were not identified as the charges were read. Instead, the Court asked if Petitioner heard anything with which Petitioner disagreed. He answered no.

**F. The Presentence Report.**

On March 16, 2006, the Probation Officer released his draft PSR. To provide the Court with an offense narrative, the Probation Officer relied on the Affidavit and by necessity, Berry's statements in it, sometimes repeating word for word what Berry claimed.

The Probation Officer likewise relied on the Affidavit and Berry's uncorroborated statements to provide the Court with an independent determination of the Plea Agreement's Guideline calculations. The U.S.P.O., the Court's "eyes and ears", looked, listened to, and trusted what the Government reported Berry said. He did not have reason to doubt the truth of what the Government provided him, as *his* relationship was not adversarial.

Defense counsel did not read and discuss the PSR with the Petitioner. Mitchel Dec. The factual errors, which the Probation Officer unknowingly incorporated from the

Government's narrative, were striking, as identified in the Schedule of Objections to the Presentence Report in Section I, at the end of this Statement of Facts.<sup>42</sup>

Neither side lodged any objections.

At almost 4:30 P.M. on July 11, 2006, the Government provided defense counsel approximately 16 pages of F.B.I. investigative reports, dated seven years previously relating to allegations in the State of Missouri. The same facsimile also informed defense counsel that the Government would not move the Court for a departure under U.S.S.G. §5k1.1. Defense counsel said nothing at sentencing suggesting he received these communications or shared them with the Petitioner.

### **G. Sentencing.**

At the beginning of the sentencing, a scrivener's error was discovered in the PSR (J&S Tr. 3: 11-8: 25). This triggered U.S.S.G. §5G1.2 and increased the custody portion of Petitioner's sentence to a life term from the previously calculated range from 324 to 405 months. J&S Tr. 4-9; CR 52, PSR, ¶70. The Court invited defense counsel to consult with Petitioner and determine how Petitioner wanted to proceed, given Petitioner

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<sup>42</sup> Part One of the Schedule identifies those unmistakable and obvious factual errors that Petitioner no doubt would have identified had his rights under Rule 32, subsections (e) and (i) to review the draft PSR and the final PSR been observed.

Part Two lists those errors or omissions that reasonably competent counsel would have identified at that time. Errors identified in Parts One and Two justify resentencing.

Part Three is a partial list of objections developed to date as a result of this §2255 investigative process. More errors may be identified and the list is likely to be supplemented following a Brady Order, which Petitioner will request on a briefing schedule set by the Court. Because Petitioner's rights were violated and Petitioner should be resentenced consistent with his rights under Rule 32, F.R.Cr.P. and the objections advanced by this Petition, leave of Court is respectfully requested to supplement the Schedule and make those objections necessary under Rule 32 and the orders of this Court to correct errors and omissions and produce an appropriate PSR.

faced a life term and might want to attempt to withdraw his guilty pleas.<sup>43</sup> J&S Tr. 6:22-7:8 and 5:21-6:4. Counsel *declined* to consult with Petitioner, (J&S Tr. 7:3-8) and the Court asked counsel to confirm his decision. He did.

The Court then determined Petitioner had a criminal history category of I and an adjusted offense level of 44. J&S Tr. 9:3-6.

Defense counsel attempted to bring the Richards matter to the Court's attention through about ten foundational and substantive questions to S/A Winkis. She testified that on receipt of Petitioner's information, the F.B.I. "immediately" dispatched agents. J&S Tr. 11:9-11.

Government counsel dismissed the value of Petitioner's cooperation concerning the Richards case, claiming that they already had their investigation underway.<sup>44</sup> S/A Winkis testified both that Petitioner's information "wasn't new" and, in the same breath,

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<sup>43</sup> Petitioner's first words during his allocution were: "One, if I had known the pleas was going to be this, I would have taken it to trial, because I did sign the Plea after seeing it for all of about ten minutes". J&S Tr. 21:16-19. Had counsel agreed to consult with his client, events might have unfolded very differently.

<sup>44</sup> While it is true that the Government certainly had *some* investigation underway, it was so undeveloped that federal authorities were ignorant that the Massachusetts Attorney General's Office investigated Richards for child pornography offenses in the year 2000. The Richards' Affidavit states Petitioner's information concerning the earlier investigation was not developed by the F.B.I., but "confirmed" by S/A Tuddly. CR-TRR 3, ¶55. The Government's argument blurred the difference between investigating Richards and knowing specific facts.

Critically, Petitioner's information is the *only* information in the Richards' Affidavit that: a) describes the relationship between Richards and the minor; b) identifies the minor; and c) identifies not only the state, but specifies the city where the two lived. CR-TRR 3, ¶¶49, 50, 51. If the F.B.I. had probable cause without Petitioner's information to find Richards, arrest Richards and rescue the minor, then it is a mystery (if not a scandal) why the F.B.I. didn't act sooner.

“[t]here was a little more information he provided that we did *not* have.” J&S Tr. 12;7 (emphasis added). Counsel conducted no follow-up examination.

Counsel did not inform the Court that the only reason authorities were able to allege the facts in Paragraph Nos. 49, 50, 51, 52, 53, 54 and 55 of the Richards’ Affidavit (Ex. 1) was because of Petitioner’s cooperation.

Despite the documented value of Petitioner’s assistance, the Government stood silent concerning the nature, value, timeliness and extent of Petitioner’s cooperation in United States v. Richards and his other assistance to the United States. The Government had not bothered to file the promised motion (Plea Agreement, ¶4) that would recommend the Court award the third point for acceptance of responsibility, nor did the Government make an oral motion. The Court awarded the point anyway.

The Court did not ask if defense counsel and defendant had reviewed the PSR. Before that day, Petitioner had never seen the draft or the final PSR. Mitchel Dec.

The Government’s short and devastating sentencing argument relied heavily on two “facts” to show that Petitioner had a sexual interest in touching children. First, that Petitioner went to Missouri for the encounter described in the dismissed probation violation<sup>45</sup> and second, that Petitioner “victimized” Berry.

The Government did not disclose its F.B.I. interviews revealing “Greg is not like that” (unredacted minor interview of September 14, 2005) nor Evan Walters’ denials to the F.B.I. (E. Walters Dec., ¶5). Also absent from the Government’s presentation was the fact that an F.B.I. agent explicitly assured Laura Walters that Petitioner had not taken any liberties with her children.

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<sup>45</sup> The PSR, because of a scrivener’s error, reported the violation occurred on January 13, 1999. The violation report from Florida alleges on or about January 23, 1999.

In his allocution, Petitioner tried his best to develop the matters addressed here.<sup>46</sup> Petitioner attempted to explain that he did not know he was at risk for consecutive sentences and a life sentence (J&S Tr. 21:16-19); that the Neova.net deposits to Petitioner's Bank of America account were forwarded via Western Union transfers to Berry (J&S Tr. 23:12-25; 27:4-7); that it was Berry's money (J&S Tr. 29:9-12); that he took no improprieties with the Walters children (J&S Tr. 25:18-23); that he never went to Missouri (J&S Tr. 26:6-20); that Berry paid the minor for the video (J&S Tr. 27:14-24); and related matters. The Court expressed concern that Petitioner's statements were not sworn evidence. J&S Tr. 29:19-21. Counsel did not respond.

There were other substantial irregularities, detailed below.

#### **H. Post-Sentencing.**

On or about January 8, 2007, the Marshals Service removed Petitioner from the institution where he was held and caused him to be transported to the Western District of Virginia. A.U.S.A. Mott and F.B.I. S/A Brook Donahue interviewed Petitioner at the Roanoke City Jail.

Petitioner had no advice from Counsel concerning the advantages or disadvantages of meeting the prosecutor and F.B.I. agent and counsel was absent. Mitchel Dec.

The Government representatives held out Rule 35 inducements to Petitioner. Petitioner was interviewed concerning Aaron Campbell Brown, then pending trial.

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<sup>46</sup> The PSR (CR 52, ¶66), revealed Petitioner graduated high school ranked 126 of 127 students.

The Government has not filed a Rule 35 motion.

**I. Schedule Of Objections To The Presentence Report**

1. Part One (Obvious Errors That Petitioner Personally Would Have Noted Had His Rule 32 Rights To Review The Draft PSR And Final PSR Been Respected).
  - a. Circumstances of first Petitioner/Berry meeting (PSR, ¶5);
  - b. Allegations concerning nature of Petitioner/Berry relationship and travels before Berry was 18 (PSR, ¶5);
  - c. Allegation that a “large” number of videos depicted on Berry’s website were filmed in Mitchel’s bedroom (PSR, ¶5);
  - d. Allegation that Mitchel sold the Dunkard Road property, at a discount, to the family occupying Dunkard Road (PSR, ¶5);
  - e. Allegation that Mitchel “operated” the video camera, and nature of Berry’s relationship with the minor (PSR, ¶5);
  - f. Allegation that Berry and Mitchel conspired to produce and distribute content through various websites (PSR, ¶5);
  - g. Use of recording equipment (¶7);
  - h. Substance abuse with the “eldest” “minor” victim, PSR, ¶65; and
  - i. At least nine paragraphs of adjustments for “two minors” and \$30,000-\$70,000 (PSR, ¶¶ 24-32 and 35), and likely others as well.
2. Part Two (Errors And Omissions That Reasonably Competent Counsel Would Likely Have Identified During The 2006 P.S.R. Process, In Addition To Part One Errors).
  - a. Videos of the minor were produced at “hotels” in the Roanoke area (PSR, ¶5);
  - b. Allegations that “two minors” appeared in the video (PSR, ¶5);
  - c. Characterization of Mitchel/minor relationship (PSR, ¶9);

- d. Guideline enhancements and adjustments:
  - i. Interstate travel (PSR ¶19; minor was “local” per A.U.S.A. information at change of plea);
  - ii. “Two minor” grouping adjustment (PSR, ¶¶24-32);
  - iii. \$30,000-\$70,000 adjustment for retail value (PSR, ¶35)
  - iv. Description of Florida prosecution and reference to dismissed probation violation (PSR ¶56);
  - v. Sexual act or contact (PSR ¶17);
  - vi. Prepubescent minor under 12 (PSR, ¶34);
  - vii. Violence/sado-masochistic conduct (PSR, ¶36);
  - viii. Pattern of activity (PSR ¶37).
- e. Circumstances of Petitioner/Berry’s first meeting
  - i. PSR, ¶5 (who met whom; delete “molestation” claim; description of Berry’s role in the minor’s videos).
- f. Circumstances of use of videocamera
  - i. PSR, ¶7 (who used the video camera vrs. “The web cam and digital videocamera were used”; and when video was made).
- c. Part Three (Partial List Of Objections Developed As A Result Of This §2255 Investigative Process, In Addition To Items In Part One And Two).
  - a. Description of sentences for Aaron Campbell Brown, Kenneth Richard Gourlay, and Timothy Ryan Richards;
  - b. Disposition of funds from Neova.net sent to Petitioner;
  - c. Petitioner’s role in the offenses;

- d. Government's use of information provided by Petitioner.
- e. Other matters raised in this Memorandum.

### III. ARGUMENT

The unending search for symmetry in the law can cause judges to forget about justice . . . . Habeas corpus is, and has for centuries been, a ‘bulwark against convictions that violate fundamental fairness.’

Dretke v. Haley, 541 U.S. 386, 396, 398 (2004) (Stevens, J., dissenting).

Part A of the Argument addresses jurisdiction, timeliness, and applicable legal standards. It explains that this petition is timely because it is filed within one year of when the judgment became final. The judgment became final at the expiration of the 90-day period during which Petitioner could have sought a writ of certiorari.

Part B demonstrates that these claims, raising ineffective assistance of counsel, Brady, and related claims, are properly brought under §2255.

Part C illustrates the law that the ineffective assistance of counsel (“IAC”) provided to the Petitioner in connection with plea proceedings vitiated his giving knowing and voluntary waivers, or making other decisions requiring sound legal advice, in connection with events up to the moment of plea. Further, the legal inquiry to determine IAC looks to the totality of the circumstances, not just a bare reference to the plea colloquy or other parts of the cold record.

As to matters arising after the change of plea, Part C also provides the law that Petitioner’s Sixth Amendment right to effective counsel persisted beyond any “waiver” at the change of plea proceeding, because waivers are not prospective and the law assumes the right to effective counsel in connection with sentencing or other later proceedings. Evidence and argument demonstrating the actual ineffectiveness of counsel are deferred to Parts D and E.

Parts D and E address, respectively, ineffective pre-plea representation and

ineffective post-plea representation in connection with sentencing.

Part F addresses Brady and other claims based on the Government's actions and

**Comment [KM1]:** Part F relates to Ineffective Direct Appeal but is not mentioned

failures to act. Part IV identifies the relief sought, including discovery.

**A. Jurisdiction, Timeliness, Applicable Procedures And Standards, And Related Matters.**

1. Jurisdiction Arises Under Title 28 U.S.C. Section 2255.

A prisoner in federal custody may move to set aside his conviction on the grounds that it “was imposed in violation of the Constitution or laws of the United States . . . or is otherwise subject to collateral attack.” 28 U.S.C. § 2255 (a).

“Unless the [§ 2255] motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.” § 2255(b).

Thus, when a prisoner files a motion pursuant to § 2255, the court must “order the United States attorney to file an answer, motion, or other response within a fixed time, or to take action the judge may order,” unless “it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief”. Rule 4(b), Rules Governing Section 2255 Cases in the United States District Courts (“Section 2255 Rules”).

Furthermore, “[a] judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Criminal Procedure or Civil Procedure, or in accordance with the practices and principles of law”. Rule 6(a), Section 2255 Rules. And, “[i]f the motion is not dismissed, the judge must review the answer, any transcripts

and records of prior proceedings, and any [other] materials submitted . . . to determine whether an evidentiary hearing is warranted". Rule 8(a), Section 2255 Rules.

2. Timeliness.

This Petition is timely within the limits established by § 2255 (f), which provides in pertinent part that:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

(1) the date on which the judgment of conviction becomes final; [or]

\* \* \*

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

The Fourth Circuit handed down its decision on April 30, 2007. Petitioner had the right to seek a writ of certiorari from the Supreme Court. A petition for a writ of certiorari is timely if filed within 90 days of when the decision of the Court of Appeals is final. Rule 13.1, Rules of the Supreme Court of the United States (2005). If, as here, the movant does not petition for a writ of certiorari, then there is still a 90-day period of time following the court of appeals decision before the Court of Appeals decision is final and the one-year period begins to run.

Clay v. United States, 537 U.S. 522, 524-25 (2003) ("[W]hen a defendant in a federal prosecution takes an unsuccessful direct appeal from a judgment of conviction, but does not petition for a writ of certiorari from this Court, . . . the judgment become[s] 'final' for . . . the purpose of starting the clock on the §2255's one-year limitation period . . . when the time expires for filing a petition for certiorari contesting the appellate court's

affirmance of the conviction."); Kaufmann v United States, 282 F.3d 1336, 1338-1339 (11th Cir.), cert. denied 537 U.S. 875 (2002) ("join[ing] the Third, Fifth, Ninth and Tenth Circuits in holding that even when a prisoner does not petition for certiorari, his conviction does not become 'final' for purposes of §2255(1) until the expiration of the 90-day period for seeking certiorari"; ..."); Robinson v. U.S., 416 F.3d 645, 647 (7th Cir. 2005), cert. denied 546 U.S. 1176 (2006) ("finality attaches for purposes of the one-year statute of limitations period of §2255, ¶6(1) when the Supreme Court affirms on the merits on direct review or denies certiorari, or the time for filing a certiorari petition expires, not the later date . . . ).

This Petition is timely.

### 3. Procedures and Standards Under Section 2255.

These proceedings are presumptively civil in nature. Mayle v. Felix, 545 U.S. 644, 655 at n.4 (2005); O'Neal v. McAninch, 513 U.S. 432, 440 (1995) ("habeas corpus, technically speaking, is a civil proceeding"); Fed. R. Civ. P. 81(a)(2) ("These rules are applicable to proceedings for . . . habeas corpus, . . . to the extent that such practice in such proceedings is not set forth in statutes of the United States . . . or the Rules Governing Section 2255 Proceedings . . . and has heretofore conformed to the practice in civil actions."). This Petition demonstrates that discovery on a schedule set by the Court is appropriate and reasonably necessary.<sup>47</sup>

The burden of proof, unless a statute or law provides otherwise, is the usual civil preponderance of the evidence standard allocated to the moving party. Sumner v. Mata, 449 U.S. 539, 551 (1981) (§ 2254 proceeding).

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<sup>47</sup> A proposed Order for setting a discovery schedule is separately filed herewith.

When good cause is shown, then upon request, the court may grant leave to conduct discovery necessary for prehearing and evidentiary hearings. Rule 6 and Rule 11, Section 2255 Rules; 1976 Advisory Committee Notes to Rule 6, Section 2255 Rules (incorporating advisory committee notes to Rule 6 of §2254); Rule 6, Rules Governing Section 2254 Proceedings in the United States District Courts (“Section 2254 Rules”), and referencing Harris v. Nelson, 394 U.S. 286 (1969) for the proposition that “where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, *it is the duty of the court to provide the necessary facilities and procedures for adequate inquiry*” (emphasis added); Jones v. Wood, 114 F.3d. 1002, 1008-1009 (9<sup>th</sup> Cir. 1997) (“discovery is available to habeas petitioners at the discretion of the district court for good cause shown regardless of whether there is to be a hearing.”).

Evidentiary hearings under § 2255 are appropriate to resolve disputed factual issues. United States v. Tse, 290 F.3d 462, 464 (1st Cir. 2002) (per curiam) [on IAC] allegation that counsel gave erroneous advice concerning maximum exposure, evidentiary hearing required (“We conclude that the district court erred in dismissing Tse's claim without holding an evidentiary hearing to determine what advice counsel gave. We need not definitively decide at this juncture what advice would amount to ineffective assistance of counsel and what would not.”); Pham v. United States, 317 F.3d 178, 184 (2d Cir. 2003) (on IAC allegation, district court exceeded discretion by summarily dismissing without evidentiary hearing a petition presenting facially valid claims and off-the-record interactions with trial counsel; evidentiary hearing required

because record not sufficiently developed); United States v. Booth, 432 F.3d 542, 545-46 (3d Cir. 2005) (“Thus, the district court abuses its discretion if it fails to hold an evidentiary hearing when the files and records of the case are inconclusive as to whether the movant is entitled to relief. *Id.* at 131, 134 [‘If [the] petition allege[s] any facts warranting relief under § 2255 that are not clearly resolved by the record, the District Court [is] obligated to follow the statutory mandate to hold an evidentiary hearing.’]”).

#### 4. Strickland Standards.

The Supreme Court laid down the test for ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984). The Strickland standard consists of two parts: a convicted defendant claiming IAC “must show that counsel's representation fell below an objective standard of reasonableness,” *id.* at 687-88, and “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,” *id.* at 694.

A § 2255 petitioner raising an IAC issue following a guilty plea must additionally establish that, but for the advice of counsel, the petitioner would have proceeded to trial instead of pleading guilty. Hill v. Lockhart, 474 U.S. 52, 56 (1985); Hooper v. Garraghty, 845 F.2d 471, 475 (4th Cir. 1988). Petitioner satisfies that requirement. He takes the same position in his Declaration as he took on the day of sentencing—had he known he risked a life custody term, he would have proceeded to trial. Mitchel Dec.; J&S Tr. 21:16-19 and 22:11-15.

Because Petitioner’s challenges on grounds of IAC follow a guilty plea, the court must consider if the defendant expressed satisfaction with counsel during the change of

plea. A bald answer<sup>48</sup> of satisfaction, as here, is hardly dispositive. While the “satisfaction with counsel” question has a role in the Rule 11 procedure, its utility is limited to identifying those cases where *at the time of the change of plea* a defendant knows that something is amiss. For the defendant who “doesn’t know what he doesn’t know” about the quality of the representation, the importance of the “satisfaction with counsel” question loses most of its meaning.

As the Supreme Court observed in assessing Sixth Amendment IAC claims in the § 2254 context:

A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance, cf. *Powell v. Alabama*, *supra*, at 69; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case. Indeed, an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings, particularly if he retained trial counsel on direct appeal.

Kimmelman v. Morrison, 477 U.S. 365 (1986).

Given that the same counsel represented Petitioner in the district court and on appeal, it is wholly predictable that he did not previously realize he had an ineffectiveness claim.

Instead, the defendant is entitled to present evidence (and there is abundant evidence here). See Blackledge v. Allison, 431 U.S. 63, 72, 74-75 (1977).

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<sup>48</sup> Had Petitioner been asked questions to support a conclusion why pleading guilty was a voluntary and intelligent choice among alternative courses of action (or *why* he was satisfied with counsel), then the outcome of the change of plea proceeding would have been very different, as his answers would have revealed ineffective assistance of counsel. Petitioner would have answered “no” to any question calculated to determine why he thought he was making an intelligent choice, such as: as if counsel reviewed any evidence with him; explained how the law applied to the facts; explained possible defenses; or if counsel had described alternatives to pleading guilty so Petitioner could make a knowing and intelligent choice. Cf., Boykin, 395 U. S., at 242; Mitchel Dec.

**B. These Claims Are Properly Raised By Petition Under Section 2255.**

This Petition raises three types of claims: ineffective assistance of counsel; government suppression of evidence favorable to the accused and material to guilt or punishment (“Brady” claims); and prosecutorial misconduct claims. This is the proper proceeding to advance the claims and this is the first proceeding in which the claims could have been advanced.

1. Ineffective Assistance of Counsel.

Massaro v. United States, 538 U.S. 500, (2003) teaches that ineffective assistance of counsel claims are properly brought in a collateral proceeding under 28 U.S.C. § 2255, “whether or not the petitioner could have raised the claim on direct appeal.”

The Fourth Circuit actually prefers that petitioners advance IAC claims by collateral attack than on direct appeal. United States v. DeFusco, 949 F.2d 114 (4th Cir.) (“the issue [of ineffective assistance of counsel] is more properly raised in a §2255 habeas motion for collateral relief, where the petitioner will be able to “establish an adequate record for resolution of the question,” and counsel will be “afforded adequate opportunity to explain the reasons surrounding the action or inaction to which [petitioner] takes exception.”); United States v. Richardson, 195 F.3d 192, 198 (4<sup>th</sup> Cir. 1999) (“A claim of ineffective assistance of counsel should be raised by “[a habeas corpus] motion under 28 U.S.C. § 2255 in the district court and not on direct appeal, unless it ‘conclusively appears’ from the record that defense counsel did not provide effective representation”). United States v. Lurz, 666 F.2d 69, 78 (4th Cir.), cert. den, 459 U.S. 843, (1982).

2. Brady and Prosecutorial Misconduct.

Claims arise under Brady v. Maryland because the Government suppressed evidence favorable to the accused and material to guilt or punishment. The very fact the evidence was suppressed is the “cause” why these claims were not advanced earlier – they were unknown, as developed below. The same counsel who did not know of the evidence in the district court represented Petitioner on the appeal, and did not learn of it during the appeal process. Claims about suppressed evidence cannot be raised unless and until the evidence is discovered.

To the extent these claims should have been advanced earlier, they were not because counsel was ineffective. Indeed, the fact none of these claims *were* advanced earlier is additional proof, within the totality of the circumstances, of his ineffectiveness.

In Part F below, Petitioner demonstrates the substantial prejudice suffered from the Brady violations. Summarized here is just part of the substantial body of evidence withheld by the Government, material to guilt and punishment, that it should have produced, even in the absence of a specific request:

- Evidence Known To The Government Impeaching Justin Berry Was Material Both To Guilt And to Punishment: Contrary to the foundation of the Government’s case that Justin Berry was a victim witness who could reliably perceive, recollect and recall events (but might have used drugs from time to time), in fact he was such a substantial drug abuser that his cooperation agreement, entered after Petitioner’s arrest, provided a drug treatment and counseling term; he had substantial issues with honesty, and the Government had been unable to corroborate certain of his claims. *Using Berry in any uncorroborated manner either for liability or punishment required disclosure of impeaching information re: his drug use and his dishonesty.*
- Evidence Known To The Government That Mitigated Petitioner’s Role In The “Two Minor” Videotape Was Material To Guilt On Counts One And Three, And, If There Were Punishment To Appropriate Grouping “Role In The Offense” And Adjustments: Contrary to the Government’s central theory that Petitioner violated §2251(a) of Title 18 by producing a pornographic video with “two minors”, the

Government actually knew there was one minor. It was not until the PSR was released that the defense learned that the Government's investigation showed *Berry solicited the minor* to appear in the video. Also, Berry paid the minor to appear in the video; and Richards uploaded the video.

- Evidence Undercutting The Government's Central Sentencing Argument That Petitioner Was A Lifelong Pedophile Who Touched Children, As It Was Material To Punishment And Had To Be Disclosed: The Government actually knew and did not share that the F.B.I. investigation developed: "Greg was not like that" (interview of minor, Ex. 7a. at p. 3); innuendos of improprieties at the Walters home were false (Evan Walters interview; Laura Walters interview); Laura Walters impeached Berry's statement that Petitioner gave a "discount" on the sale of the Dunkard Road property in exchange for access to the Walters' children (Walters Declaration); and an assigned F.B.I. agent believed that Petitioner had not taken liberties with the Walters children.
- Evidence Demonstrating That Guideline Adjustments Were Inappropriate Had To Be Disclosed To Fairly Assess Punishment: Seeking guideline enhancements with actual knowledge that the adjustments are factually unsupported is a plain and towering violation of law enforcement's basic responsibilities. Whether defense counsel were ineffective or not, the government improperly sought and obtained adjustments at least for the grouping and other consequences of the "two minor video"; the \$30,000-\$70,000 adjustment when the evidence was about \$10,818.75; the "travel" enhancement when there was no proof of travel by a minor; and possibly others.
- Evidence Contained In The Richards Affidavit Was Material To Informing Defense Counsel And The Court Of The Value Of Petitioner's Cooperation And Had To Be Disclosed: Contrary to the Government's position at sentencing that its investigation was far enough along to identify Richards, the Government knew from the affidavit sworn in the Middle District of Tennessee on September 22, 2005 that it had to rely on Petitioner's information. It should have provided the Affidavit and/or told Petitioner's counsel where to get it.

**C. Petitioner's Claims Survive His Change Of Pleas.**

The legal analysis for reviewing the purported § 2255 waiver in the Plea Agreement and Plea colloquy conveniently divides into two parts: claims that existed at the time of the change of plea ("historical claims"), and claims that arose later ("prospective claims").

As to the historical claims, under totality of the circumstances analysis, the

ineffective assistance of counsel provided to Petitioner, coupled with Petitioner's lack of actual understanding, prevented Petitioner from making an informed choice among possible alternatives. It is the purpose of this section simply to establish that IAC forecloses a knowing waiver of historical claims. Part D provides evidence and argument to demonstrate that counsel was ineffective. As for claims arising after the change of plea, no decision (particularly one based on advice from ineffective counsel) could as either a factual or legal matter be effective prospectively, knowing and intelligent.

1. Advice From Ineffective Counsel Does Not Result In A Constitutionally Knowing And Intelligent Waiver Of Past Claims

*Assuming* a knowing and intelligent waiver, defendants may intentionally relinquish the known legal right to pursue direct appeal and collateral attack. United States v. Mezzanatto, 115 S.Ct. 797, 801 (1995); United States v. Brown, 232 F.3d 399, 403 (4th Cir. 2000) (“a defendant may not appeal his sentence if his plea agreement contains an express and unqualified waiver of the right to appeal, *unless that waiver was unknowing or involuntary.*”) (emphasis added).

This case illustrates the converse: a waiver is ineffective if it is made unknowingly or involuntarily. United States v. Wessells, 936 F.2d 165, 167 (4th Cir.1991) (waiver ineffective where no specific discussion with defendant during Rule 11 proceeding); United States v. Wiggins, 905 F.2d 51, 53 (4th Cir.1990); United States v. Marin, 961 F.2d 493, 496 (4th Cir.1992) and United States v. Bowden, 975 F.2d 1080 (4th Cir.1992).

The totality of the circumstances determines if a defendant has given a knowing and intelligent waiver (that is, intentionally relinquished a known legal right). As the

Fourth Circuit observed in United States v. Blick, 408 F.3d 162, 169 (4<sup>th</sup> Cir. 2005)

(denying relief from appeal waiver):

Although this determination [of an appeal waiver] is often made based on the adequacy of the plea colloquy -- specifically, whether the district court questioned the defendant about the appeal waiver -- the issue ultimately is "evaluated by reference to the totality of the circumstances." *General*, 278 F.3d at 400. Thus, the determination "must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Davis*, 954 F.2d at 186 (internal quotation marks and citation omitted).

The rule in this Circuit is that a petitioner who shows IAC is entitled to §2255 relief even if he pled guilty based on the advice of counsel, provided responsive sworn answers in a procedurally proper Rule 11 proceeding, and had a written plea agreement. In United States v. White, 366 F.3d 291 (4<sup>th</sup> Cir. 2004), the Fourth Circuit explained that the road to justice provided under §2255 is not shut down because, during the change of plea proceeding, there may have been technical compliance with Rule 11:

Yet the Supreme Court expressly held in *Blackledge* that "a prisoner in custody after pleading guilty, no less than one tried and convicted by a jury, is entitled to avail himself of the writ [of habeas corpus] in challenging the constitutionality of his custody." *Id.* at 72. The Court explained that "no procedural device for the taking of guilty pleas is so perfect in design and exercise as to warrant a *per se* rule rendering it 'uniformly invulnerable to subsequent challenge.'" *Id.* at 73 (emphasis added) (quoting Fontaine v. United States, 411 U.S. 213, 215, 36 L. Ed. 2d 169, 93 S. Ct. 1461 (1973)). Indeed, contrary to the dissent's intimations, the Supreme Court has held that not even *Rule 11*'s procedural safeguards immunize a guilty plea from collateral attack or render an evidentiary hearing on a petitioner's contentions unnecessary. This is so because although "the objective of *Fed. Rule Crim. Proc. 11*, of course, is to flush out and resolve all such issues, ...like any procedural mechanism, its exercise is [not] always perfect ..." Fontaine, 411 U.S. at 215 (remanding for an evidentiary hearing); see also United States v. Goodman, 590 F.2d 705, 710 (8<sup>th</sup> Cir. 1979) (noting that "it is well established that compliance with *Rule 11* does not act as an absolute bar to subsequent collateral attack upon the voluntariness of a guilty plea"); United States v. Marzgliano, 588 F.2d 395, 399-400 (3<sup>d</sup> Cir. 1978) (same).

Comment [KM2]: do you mean for this to be included in the block?

Ineffective counsel leaves an irrevocable stain on decisions a criminal defendant must make to knowingly and intelligently intentionally relinquish known legal rights. United States v. Craig, 985 F.2d 175, 178 (4th Cir.1993). “[A] decision to enter into a plea agreement cannot be knowing and voluntary when the plea agreement itself is the result of advice outside ‘the range of competence demanded of attorneys in criminal cases.’” DeRoo v. United States, 223 F.3d 919, 923-24 (8th Cir.2000) (quoting Hill v. Lockhart, 474 U.S. 52, 56 (1985)).

2. The Plea Agreement Did Not Prospectively Waive The Constitutional Right To Effective Counsel At Future Stages Of The Proceedings.

. . . [T]he logic of words should yield to the logic of realities.  
Justice Brandeis, DiSanto v. Pennsylvania, 273 U.S. 34,  
43 (1927)

Waivers of rights in criminal cases proceed on the unspoken assumption that post-plea proceedings will honor *all* constitutional limitations. United States v. Attar, 38 F.3d 727, 732 (4th Cir.1994):

[A defendant cannot] fairly be said to have waived his right to appeal his sentence on the ground that the proceedings following entry of the guilty plea were conducted in violation of his Sixth Amendment right to counsel, for a defendant's agreement to waive appellate review of his sentence is implicitly conditioned on the assumption that the proceedings following entry of the plea will be conducted in accordance with constitutional limitations.

Attar is not alone. United States v. Brown, 232 F.3d 399, 403 (4th Cir.2000).

It is true that neither the Plea Agreement nor the Rule 11 hearing carved out IAC claims so they could be collaterally attacked. In light of Attar and Brown, this is unimportant. To argue that the lack of a carve-out means otherwise is to argue that a long list of Constitutional protections can be shortened by the “procedures” employed in the

change of plea process.

As has been said in another context, justice dictates that a claim of ineffective assistance of counsel in connection with the negotiation of an agreement cannot be barred by the agreement itself--the very product of the alleged ineffectiveness. To hold otherwise would deprive a defendant of an opportunity to assert his Sixth Amendment right to counsel where he had accepted the waiver in reliance on delinquent representation.

**D. In Pre-Plea Representation And Plea Counseling, Petitioner's Counsel Was Ineffective.**

Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered.

Von Moltke v. Gillies, 332 U.S. 708 at 721 (1948) (Mr. Justice Black for the Court, *granting* habeas relief to petitioner, who, having not understood the importance of effective counsel and therefore waived the right to counsel, pled guilty to a charge of conspiracy to commit espionage in wartime).

While legal standards have developed over time, the jurisprudence of the United States has long stood for the principle that no matter how heinous the accusation or how unpopular the accused, habeas corpus relief has always been available to safeguard Sixth Amendment rights. Whether it is an espionage case in wartime or a child pornography case in peacetime, the same principles control.

1. The Duties Counsel Performs In Connection With Guilty Pleas, and The Standards of Reasonable Performance.

To prevail on IAC grounds, Petitioner must establish two elements. First, the performance prong: “that counsel's performance fell below an objective standard of reasonableness,” that is, “counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. Second is the prejudice prong: “that the deficient performance prejudiced the defense” and “the result of the proceeding would have been different.”

In the context of a guilty plea, the second prong of *Strickland* is slightly modified and satisfied when the petitioner shows that “the result of the proceeding would have been different” because there is a reasonable probability that were it not for counsel’s errors, he would not have pleaded guilty but instead proceeded to trial. *Hill v. Lockhart*, 474 U.S. 52 (1985).

*a. Duty To Investigate.*

In determining whether counsel has performed reasonably, “the court ‘should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.’” *Kimmelman* at 384.

Moreover,

Because that testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies, we noted that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*, at 691. But, we observed, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Ibid.*

Id.

In Kimmelman, the Supreme Court affirmed that counsel was Constitutionally ineffective. He had conducted no pretrial discovery, mistakenly believing the State would turn over all of its exculpatory evidence, and engaged in a “complete lack of pre-trial preparation [that] puts at risk both the defendant’s right to an ‘ample opportunity to meet the case of the prosecution’ [citations omitted], and the reliability of the adversarial testing process. [citation omitted]”. Here, what defense counsel elected *not* to do is appallingly similar to what counsel elected *not* to do in Kimmelman, -- that is, he did *no* pretrial preparation.

In particular, counsel made the decision for Petitioner to be debriefed within a week of his appointment, without seeing any evidence, doing any research, conducting any meaningful client interview, or conducting any investigation. *He also made the decision to forego trial preparation (meaning he assumed any plea agreement the government put in front of him would necessarily be acceptable). Worse, he made the decision not to take any steps to prepare for sentencing. In other words, after being in the case less than a week, counsel decided to cooperate Petitioner, then did nothing in the way of preparation (except perhaps spend time at a government office one day viewing unspecified “evidence”), and then hoped for the best.* Greg Mitchel was placed between a hammer wielded by defense counsel telling him to cooperate, and the anvil of a hard Government Plea Agreement. He stood no chance. As the Supreme Court said in Kimmelman:

Viewing counsel's failure to conduct any discovery from his perspective at the time he decided to forgo that stage of pretrial preparation and applying a "heavy measure of deference," *ibid.*, to his judgment, we find counsel's decision unreasonable, that is, contrary to prevailing professional norms.

The justifications Morrison's attorney offered for his omission betray a startling ignorance of the law -- or a weak attempt to shift blame for inadequate preparation. "[Counsel] has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Ibid.* Respondent's lawyer neither investigated, nor made a reasonable decision not to investigate, the State's case through discovery. Such a complete lack of pre-trial preparation puts at risk both the defendant's right to an "ample opportunity to meet the case of the prosecution," *id.*, at 685 (quoting *Adams, supra*, at 275), and the reliability of the adversarial testing process. See 466 U.S., at 688.

This Circuit summarized the duty to investigate in United States v. Mooney, 497

F.3d 397 (4th Cir. 2007):

Counsel in criminal cases are charged with the responsibility of conducting 'appropriate investigations, both factual and legal, to determine if matters of defense can be developed.' Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968) (emphasis added); see also Strickland, 466 U.S. at 691 ('[C]ounsel has a duty to make reasonable investigations'.

In Mooney, the Circuit found both the performance and prejudice prongs of Strickland satisfied. Counsel had breached the duty to perform an investigation, thereby neglecting to develop what was a fairly simple factual and legal defense of justification in a felon-in-possession of a firearm prosecution,<sup>49</sup> and instead urged his client to plead

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<sup>49</sup> Because the Mooney error was the failure to investigate and advise of a specific defense, the Circuit went on to consider in the prejudice prong of its analysis the likelihood of the defense succeeding, and found the likelihood sufficiently adequate to grant relief. In Mooney, there was no evidence in the record to suggest that he would have pleaded guilty but for counsel's unprofessional performance. *Id.* at 405. This case is different because this Petitioner would not have pled guilty but for the advice of counsel. Mitchel Dec.

This case is more extreme than Mooney, however, in *how* counsel breached his duty to act for his client. At the change of plea proceeding, Mooney attempted to explain the circumstances of his possession of the firearm. Defense counsel cut him off but then at least conferred with his client. At the sentencing here, counsel refused the Court's invitation to confer with Greg Mitchel about going forward, thereby compounding the prejudice from an improvidently entered guilty plea and denying Greg Mitchel the chance to inform counsel how he wanted to proceed. J&S Tr. 7:3-8.

guilty, resulting in a 180-month custody term. Counsel's failures led to a counseled plea of guilty, to which no procedural objections in the taking of the plea are mentioned by the Circuit in its opinion.

Under American Bar Association standards, defense counsel has a professional obligation to conduct a prompt investigation into the circumstances of the case, regardless of his client's admissions of guilt or desire to plead guilty. *ABA Standards for Criminal Justice*, 4-4.1(a) (3<sup>rd</sup> ed., 1993).<sup>50</sup> This specifically includes obtaining information in the possession of the prosecution.

The investigation has to be meaningful. If an attorney has not spent enough time to learn from his client the facts of the case, and how those facts relate to the offense charged, then the attorney is too poorly prepared to perform the duty of effectively assisting the client's decision how to plead. Herring v. Estelle, 491 F.2d 125, 129 (5<sup>th</sup> Cir. 1974).

Finally, there is nothing strategic about failing to investigate. Gerten v. Senkowski, 426 F.3d 588, 610 (2<sup>nd</sup> Cir.), cert. denied, Artus v. Gersten, 547 U.S. 1191, (2006) (nothing strategic about conceding the physical evidence without an educated basis to do so; when defense counsel lacks sufficient information to determine that further investigation is unnecessary, and without having made any attempt to investigate the evidence, deciding it would be futile to challenge evidence is unreasonable).

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<sup>50</sup> "(a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty."

*b. Duty To Advise.*

The defense counsel's duty to advise is intertwined with the duty to investigate, for competent advice cannot be based on anything except appropriate investigation. When counsel breaches the duty to perform an appropriate investigation, counsel ensures his performance of the duty to advise competently concerning a guilty plea is similarly inadequate. Mooney at 409 ("In short, we conclude that Mooney was denied effective assistance of counsel in entering a guilty plea and that he was prejudiced by that ineffective assistance."); Herring at 128, 129 (counsel who has not made a "minimal effort to prepare himself" makes certain that "his client's plea of guilty could not be knowingly and voluntarily entered").

At bottom, a guilty plea must be both knowing and voluntary, that is, a voluntary and *intelligent* choice between the alternatives of plea or trial. Parke v. Raley, 506 U.S. 20 at 28-29 (1992):

It is beyond dispute that a guilty plea must be both knowing and voluntary. See, e.g., Boykin, 395 U.S. at 242; McCarthy v. United States, 394 U.S. 459, 466, 22 L. Ed. 2d 418, 89 S. Ct. 1166 (1969). "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Alford, 400 U.S. 25, 31, 27 L. Ed. 2d 162, 91 S. Ct. 160 (1970).

Defense counsel has a constitutional duty to provide professional advice on the crucial decision of whether to accept a plea offer from the government. Boria v. Keane, 99 F.3d 492, 498 (2d Cir.), *cert. den.* Keane v. Boria, 521 U.S. 111 (1997). Ineffective assistance of counsel results from failing to advise the client as to the wisdom of the plea.

Neglecting to inform a defendant about the risk of consecutive custody sentences produces a counseled involuntary guilty plea that will be set aside in later proceedings.

United States v. Neely, 38 F.3d 458 (9<sup>th</sup> Cir. 1994) (guilty plea involuntary where petitioner was not informed that federal sentence could run consecutively to state sentence); Fowler-Cornwall v. United States, 159 F. Supp. 2<sup>nd</sup> 291, 294 (N.D. W.Va. 2001) (failure to advise that custody term on firearms offense could not be made to run totally concurrent with distribution offense, and failure to explain concept of total punishment under U.S.S.G. § 5G1.2).

The American Bar Association's *Model Code of Professional Responsibility*, *Ethical Consideration 7-7* (1992) sets the standard in these words: "A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable."

Comment [KM3] : should this be italicized?

Professor Amsterdam's *Trial Manual 5 for the Defense of Criminal Cases* § 201, provides at 339:

The decision whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in any criminal case. This decision must ultimately be left to the client's wishes. Counsel cannot plead a client guilty, or not guilty, against the client's will. [citation omitted] But counsel may and must give the client the benefit of counsel's professional advice on this crucial decision.

## 2. Prejudice.

As noted, in the IAC context, Hill v. Lockhart requires that Petitioner show a reasonable probability that were it not for counsel's errors, he would not have pleaded guilty but instead proceeded to trial. Petitioner's comments at sentencing and his Declaration alone establish that reasonable probability. When, however, counsel's advice and errors are considered under the totality of the circumstances, the evidence leads inexorably to the conclusion that counsel was well motivated to press Petitioner (as

Petitioner asserts in his Declaration) that Petitioner had to plead guilty. Counsel was Constitutionally ineffective.

a. *The Complete Failure To Investigate Prejudiced Petitioner.*

In the run-up to receipt of the plea agreement tendered by a Government transmittal letter dated January 20, 2006 (a Friday),<sup>51</sup> defense counsel had not conducted sufficient investigation to determine if further investigation were unwarranted, much less actually conducted a meaningful investigation. He was in no position to recommend that Petitioner reject the plea agreement, rather than take the course that he actually pressed Petitioner to take – plead guilty to four felonies, stipulate to 11 Guideline enhancements, and risk a lifetime in federal prison. Counsel was unprepared, despite appointment the previous September, to conduct a trial, which had been continued repeatedly and was most recently set for January 18, 2006. By not conducting any appropriate investigation or research, he had put himself in the position where whatever plea bargain the government offered looked infinitely better than a public trial, on a public record, for which he was utterly unprepared, and which would have resulted in a humiliating public revelation of his lack of preparation.

The Clerk's docket sheet and defense counsel's file<sup>52</sup> reveal that as of January 20,

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<sup>51</sup> Presumably the letter was mailed, as it bears no indication it was either faxed or emailed.

<sup>52</sup> On April 14, 2008, defense counsel sent the last part of his file to Petitioner's counsel. On April 15, 2008, Petitioner's counsel faxed him a letter that specifically requested a variety of documents that one would expect to exist (but which had not been produced), and well as a general request. The letter also inventoried what had been produced (no inventory or listing had been provided).

There was no reply to the April 15, 2008 letter that requested: FBI 302's of client and/or others; government scientific or other reports providing the results of forensic

2006, counsel had not filed any motion or made any informal written request to the prosecutor for:

1. Any discovery under subsections (A), (B), (D), (E), and (F) of Rule 16(a)(1), F.R.Cr.P., which he was entitled to obtain as a matter of law (counsel did not have in his file Petitioner’s own oral or written statements; FBI 302’s; Petitioner’s criminal history; any “information material to the defense”, “government trial evidence” or copies of any “items belonging to defendant”;<sup>53</sup> and he did not have the results of any reports or examinations or tests —such as government examinations of computer evidence that would be “material to the defense”);
2. Inspection of any computer evidence (apart from any physical evidence available under Rule 16) to confirm or identify, or that he could use to determine, whether the images the Government contended were contraband in fact were contraband, as well as the number and kind of images;<sup>54</sup>
3. Any Brady material, such as information concerning the honesty or veracity of the Government’s star witness; Petitioner’s role in the offense; and/or the role of others in the offense (which would provide evidence favorable to the accused for sentencing in terms of possible minor role adjustment even if Petitioner were going to plead guilty);
4. A bill of particulars or other information to narrow the time frame of the May 1, 2003 to September 12, 2005 period when the acts described in Counts One, and Three through Five, were allegedly committed; to describe how the “production” in Count One was allegedly committed; or to identify the “Does” referenced in the Indictment for investigation to determine relative culpability and credibly;

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Comment [KM4]: Parallel structure issues here – maybe say: inspection of any computer evidence (. . .) in order for the Petitioner to confirm, identify and verify that the images . . .

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examinations or inventories of the images recovered from the seized computers; letters to petitioner providing legal advice, including the elements of the offenses, letters to Petitioner transmitting or discussing discovery; letters providing the benefits and risks of pleading guilty versus going to trial; responses to questions Petitioner had asked; any drafts of the plea agreement; any letters or other negotiations with the government; any legal research; any notes of any conversations with anyone in the case; any submissions to the U.S. Probation Office in mitigation of the charged conduct; any consultations with experts; and any Criminal Justice Act vouchers or requests to retain an expert.

<sup>53</sup> Except for the limited materials described in footnote 23, provided after the change of plea.

<sup>54</sup> Defense counsel states that he went to a government office and looked at some images. While that may be true, Petitioner was not told by counsel of such a viewing. Mitchel Dec. There is no letter or notes in counsel’s file of what he might have been shown, its source, evidentiary chain, metadata, description or number, type or kind of images or reason to believe, at most, that this was anymore than a pro forma cursory review.

5. Any documents or things to provide a basis for counsel to have a reasonable belief, grounded in an independent investigation, that the Government could in fact prove *any* of the 11 Guideline enhancements that were sought and to which he recommended Petitioner agree under the plea agreement; and
6. Any information concerning the location of the courthouse where the Government charged Richards, or a copy of the complaint and/or Indictment.

In terms of independent investigation (apart from utilizing formal court process or informal contact with the prosecutor), nothing in counsel's file showed that he:

1. Spent any meaningful time with Petitioner to understand Petitioner's version of the events so he could meaningfully test the Government's charges and description of the offenses and surrounding events;<sup>55</sup>
2. Interviewed personally (or through an investigator) any third party witnesses to corroborate what his client told him, challenge what the Government reported the witnesses said, or develop a well-formed basis to believe the Government could prove the charges beyond a reasonable doubt;
3. Sought any professional advice concerning computer forensics (to determine the predicates for counsel to have a reasonable belief that the Government seized computer evidence and reviewed in a forensically sound manner and/or that the Government could lay an adequate foundation for its admission);<sup>56</sup>

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<sup>55</sup> Petitioner's Declaration describes the few meetings he had with defense counsel. Mitchel Dec. Simply put, there was never anything other than cursory time devoted to learning Petitioner's description of who were the principle players, their roles, their interactions with Petitioner, how each may have benefited, what each did, and why. There was no chronology of events, description of events, or attempt made to find out what defenses could be made to defeat liability or mitigate punishment. There was no attempt to gather the most basic evidence necessary for the most superficial investigation such as: bank activity statements to show receipts and disbursements; Western Union records (same); travel records to show when Berry and Petitioner first met; §2257 records; chats and emails from Berry to show the false claims he made about his age to Petitioner, or anything else. This was a tabula rasa investigation.

<sup>56</sup> "Here, no facts known to defense counsel at the time that he adopted a trial strategy that involved conceding the medical evidence could testify that concession." Gerten at 600 (holding trial counsel ineffective for not consulting an expert and noting that in the appropriate case, the failure to consult with counsel is often indicative of ineffective assistance of counsel).

4. Conducted any background research of the individuals described in the Winkis Affidavit;
5. Determined who solicited “John Doe One” to appear in the charged video, who paid John Doe One, and who uploaded the video.

There is nothing strategic about failing to investigate.<sup>57</sup>

b. Counsel’s Failure To Render Competent Plea Advice Prejudiced Petitioner.

Minimally effective counseling would have urged Petitioner to proceed to trial rather than accept the proffered plea agreement. A plea bargain that consists of a defendant admitting to four felony violations, putting oneself at risk for a life term, stipulating to 11 Guideline enhancements, and receiving nothing in return<sup>58</sup> is not a

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<sup>57</sup> The focus of this Petition is to provide the evidence and authority to conclude relief is warranted under Strickland. However, Petitioner does not waive his right to relief under United States v. Cronin, 466 U.S. 648, 659 (1984) (prejudice presumed when counsel entirely failed to subject the prosecution’s case to meaningful adversarial testing), as modified by Bell v. Cone, 535 U.S. 685 (2002) (the presumption of prejudice under Cronin does not apply unless the attorney’s failure to contest the government’s case is “complete”). Petitioner’s position is that through the change of plea the record is completely bereft of any adversarial testing; through sentencing the arguments made and ten questions asked of S/A Winkis do not show “meaningful” adversarial testing and it is fair to characterize the failure as “complete.” These facts satisfy the tests of both Strickland and Cronin.

<sup>58</sup> Any “benefits” the plea bargain provided were illusory, not genuine consideration. Dismissing Count Two was of academic value only; a custody term for four felony counts could (and did) result in a sentence longer than the human lifespan.

As for acceptance of responsibility, the Government’s promised support for a two-point reduction meant nothing. Petitioner had cooperated repeatedly with S/A Winkis and agreed to the plea agreement within a week of when the government mailed it to defense counsel. The notion of this defendant – particularly given his cooperation – being denied credit for acceptance of responsibility promptly after the tender of this plea agreement is, frankly, ludicrous.

With respect to the third acceptance point under U.S.S.G. § 3E1.1(b), the Government broke its promise to file the motion (Plea Agreement at ¶4), and did not make an appropriate oral motion at sentencing either. If the promise of a recommendation for the

“bargain” at all. Unless a possible death sentence is on the table, there is no reason to risk by plea a life custody term.

*If* Petitioner had nevertheless been bound and determined to accept this “bargain,” then minimally effective counseling would have explicitly advised Petitioner of the risk of consecutive sentences so that Petitioner could make an intelligent and informed decision that he wanted to run that risk. Petitioner’s need for such information was particularly keen because his previous prosecution resulted in his having an understanding that sentences run concurrently, not consecutively. Mitchel Dec. As Judge Broadwater wrote in Fowler-Cornwall, *supra* at 294, “However, when counsel advises a defendant to plead to more than one criminal count and does not familiarize himself with the guideline section dealing with multiple counts, this conduct falls below any objective standard of reasonableness.”

In the same vein, for Petitioner to have made a voluntary and intelligent choice whether to plead guilty, minimally effective counseling would have involved a full explanation of each and every term in the proposed agreement, how the Government’s evidence lined up against the elements of the offenses, what were the likely defenses, and the likelihood that those defenses would prevail.

That explanatory conversation was impossible without adequate investigation. Because counsel in fact had not conducted an appropriate investigation, that conversation did not occur. Counsel did not know the government’s evidence or his possible defenses.

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third point wasn’t important enough for the Government to perform, then it makes no sense to give it any weight in deciding if the Plea Agreement provided Petitioner genuine consideration. The breach was harmless as a practical matter because the Court followed the PSR recommendation and awarded the third point anyway.

He did not know the facts supporting 11 Guideline adjustments.<sup>59</sup> He could not provide meaningful assistance.

And, for that explanatory conversation to occur in anything except an auctioneer's blur of words, it is certainly necessary to devote more time than a single jailhouse conversation on the night before entry of a plea to adequately explain – particularly to a non-attorney – approximately 50 paragraphs of a plea agreement concerning: waivers of 11 trial-related rights; rights to pursue direct appeal and collateral attacks; 11 Guideline adjustments; concepts of concurrent and consecutive custody terms (*which was not explained*) and a host of other legal matters. One conversation regarding the freshly proffered plea agreement could not possibly result in a “voluntary and intelligent choice among the alternative courses of action open to the defendant.” Indeed, one might wonder how much time a reasonably competent defense attorney would need to put himself or herself in a position to counsel a client, or to read, review, research and

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<sup>59</sup> As to some of the adjustments, the Winkis Affidavit put counsel on notice of facts *contrary* to the Plea Agreement and at least some of the enumerated enhancements. He should have known the problem presented by Count One's allegation of “two minors” (and sentencing enhancement for two minors) because the Winkis affidavit described one of the “minors” as over 18 years old. He should have known that the amount of money deposited into Petitioner's bank account was \$10,818.75, not a range of between \$30,000 and \$70,000. With knowledge that the government sought adjustments belied by the Winkis affidavit, why counsel – particularly without discovery – could neglect to put the other adjustments to meaningful adversarial testing is deeply troubling.

As to other adjustments, counsel should have conducted at least cursory legal research to determine whether applicable law applied to the facts (assuming counsel's investigation demonstrated a basis for believing certain facts existed). Then, counsel should have had a detailed discussion with Petitioner whether to stipulate to the adjustment. For example, Petitioner was entitled to know and make an intelligent choice (with the guiding hand of counsel to assist) whether to agree to application of U.S.S.G. §2G2.1(b)(5) in light of United States v. Neilssen, 136 F.3d 965 (4<sup>th</sup> Cir. 1998), United States v. Ketcham, 80 F.3d 789, 794 (1996) and United States v. Kemmish, 120 F.3d. 937 at 941 (9<sup>th</sup>. Cir. 1997) (five-point adjustment, Plea Agreement at ¶3, p. 4).

appreciate the consequences of such a document.

**E. Counsel Was Ineffective In The Sentencing Process.**

The two prongs of Strickland, *supra*, control the analysis for determining the ineffectiveness of counsel in the sentencing process. Counsel's Constitutionally deficient performance is conveniently divided into two time periods: the presentencing process and sentencing. Separately and together, these errors prejudiced Petitioner in the totality of these circumstances. A §2255 petitioner establishes Strickland prejudice when the petitioner shows an increased prison term from counsel's error. Glover v. United States, 531 U.S. 198 (2001). The deficient performances and ensuing prejudice are described in the order that they occurred.

**1. Failure To Provide Effective Assistance of Counsel In the Presentencing Process.**

Rule 32, F.R.Cr.P. imposes the following duties on defense counsel: 1) To review and discuss the draft PSR with the defendant; 2) To lodge with the Probation Officer any objections in a timely manner; 3) To review and discuss the final PSR with defendant.

The disclosure and discussion duties that Rule 32 imposes on counsel in the sentencing process generally, and in subsection (i)(1)(B) in particular, are strict, mandatory, and in the words of the Supreme Court, the basis of a procedure that "provides for focused, adversarial development of the factual and legal issues relevant to determining the appropriate Guidelines sentence." Burns v. United States, 501 U.S. 129, 134 (1991).

Counsel did not meet with Petitioner to discuss the draft and final PSR. Mitchel Dec. The PSR establishes that defense counsel filed no objections. PSR Addendum, foll.

p. 15. The Objections that should have been filed are described in Parts One and Two of the Schedule.

Petitioner suffered prejudice in several ways because counsel breached Rule 32 duties owed to Petitioner.

First, the failure to review and discuss the final PSR is a per se violation of Rule 32(i), F.R.Cr.P. By itself, his breach warrants resentencing.<sup>60</sup> The consequence of counsel not discussing the PSR with Petitioner meant counsel was flying blind in terms of what factual matters to put through “focused, adversarial development” and the testing process contemplated by Rule 32. The blindness was all the more dangerous to Petitioner because counsel had neglected to obtain any meaningful discovery. He was not only flying blind, but was disoriented.

Second, without Petitioner’s input and counsel’s objections, the Court was entitled to – and did – consider the uncontradicted PSR as an accurate and reliable sentencing tool (Rule 32 (i)(3)(A)),<sup>61</sup> even though the PSR’s errors were prejudicial. The Court could not have known that: the offender and offense characteristics were wrong; that in the PSR process Petitioner would have identified many of the statements as wrong (Schedule, Part One); and that reasonably competent counsel could have challenged at least some of the Guideline adjustments if the case had been adequately prepared (Schedule, Parts Two and Three).

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<sup>60</sup> Petitioner’s position is that the Court also breached its duty to inquire whether counsel performed his duty. That argument is presented in Section G below, and incorporates the argument and authority here.

<sup>61</sup> Rule 32 (i)(3)(A) provides the Court “may accept any undisputed portion of the presentence report as a finding of fact.”

(Without even discounting the excess Guideline points, and considering the totality of the circumstances – including Petitioner’s cooperation and the errors and omissions described herein – it cannot be fairly said that the same sentencing result would have followed had Rule 32 been followed).

Third, the plea agreement contained enhancements that should never have been agreed upon. Defense counsel actually knew (and the reasonably competent counsel that Petitioner was entitled to have would have known) that the following enhancements were improper: 1) The “two minor” enhancement and “Second Minor Victim” Count Group (PSR at ¶¶ 24-36 and 42); 2) The \$30,000-\$70,000 adjustment for approximately \$10,818.75 in Neova funds (notwithstanding that the PSR, at ¶8, second to final sentence, shows \$10,818.75); and 3) The fact no minor was known to have traveled in interstate commerce [PSR at ¶ 28 and CoP Tr. at 25:8 (government identification of the minor as “local” to the area.)<sup>62</sup>

Having recommended a bad bargain, counsel was duty bound to correct the effects of a mistaken professional judgment and set things right. Informing Petitioner was a basic professional duty. That did not happen. Mitchel Dec. Informing the Probation Officer was one way effective counsel could have attempted to remedy an error; alerting the U.S.P.O. would have breathed life into the promise that the PSR provides an independent factual review for the Court. CoP Tr. at 16:25.

A different remedial step to turn the case toward effective assistance would have been to attempt to renegotiate the Plea Agreement with the government, then, if

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<sup>62</sup> While the precise number of excess Guideline points requiring adjustment will not be known until the close of discovery and possibly an evidentiary hearing, these excess enhancements alone demonstrate Glover error for which some relief is likely to be forthcoming.

successful present the problem and revised terms to the Court. That would both put counsel in the position of doing the right thing, and allow the Court to decide how to proceed fairly.

If those steps failed, then counsel was under a duty to protect Petitioner's Sixth Amendment right to the effective assistance of counsel – and a professional duty to his client – to reveal his own IAC to the Court as a “fair and just” reason within the meaning of Rule 11(d)(2)(B), F.R.Cr.P., for withdrawal of the guilty plea. The disclosure should have been done promptly following the release of the draft PSR and certainly not later than review of the final PSR on or shortly after June 5, 2006. There was nothing strategic about delay. There was nothing strategic about keeping it a secret. And there was no one else who should have known of the IAC except counsel.

In the Fourth Circuit, allowing plea withdrawal is committed to the sound discretion of the district court, employing a six-part test.<sup>63</sup> United States v. Ceniseros, 252 Fed. Appx. 559, 2007 U.S. App. LEXIS 25374 (4<sup>th</sup> Cir. 2007). Key facts under Ceniseros and Moore plainly evident here are: 1) credible evidence that the plea was not knowing and voluntary is overwhelming and 2) the requirement more than the “assistance of counsel” - the *close assistance of competent counsel* - was absent. While inconvenience to the government and the Court are certainly legitimate public interests,

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<sup>63</sup> The district court is to evaluate: (1) whether the defendant has offered credible evidence that the plea was not knowing and voluntary; (2) whether the defendant has credibly asserted her legal innocence; (3) whether there has been a delay between the entry of the plea and the filing of the motion; (4) whether the defendant had close assistance of competent counsel; (5) whether withdrawal will cause prejudice to the government; and (6) whether withdrawal will inconvenience the court and waste judicial resources. United States v. Moore, 931 F.2d 245, 248 (4th Cir. 1991). Although all of these factors are to be given appropriate weight, the most important consideration is whether the Rule 11 colloquy was properly conducted and the plea was both counseled and voluntary.

they are substantially outweighed in this case by the inconvenience suffered by an accused sentenced to prison for life because he had the bad luck to be represented by ineffective counsel.

Had disclosures been made, then Petitioner – and the Court –would have been on notice of the need for the appointment of new counsel. The breaches described here (and potentially others), could have been discovered, and the Court would have conserved precious public resources by avoiding the needless sentencing, appeal, and this proceeding. When counsel grossly mischaracterizes a likely sentence, it is a fair and just reason to withdraw the plea in at least one circuit. United States v. Davis, 428 F.2d 802 (9<sup>th</sup> Cir. 2005).

This Rule 32 violation does not exist in a vacuum. It is part and parcel of the overall prejudice demonstration for Strickland that compounds every bit of damage from the overall ineffective representation.

Had Petitioner read and discussed the PSR with reasonably competent counsel who had properly investigated the case and obtained Brady materials (as he was Constitutionally entitled under the Sixth Amendment for his Due Process rights to have meaning) rather than with the individual appointed for him, then multiple Guideline adjustments in Part Two of the Schedule of Objections would have fallen. Further, the offense description would have differed.<sup>64</sup> And if the Court believes that reasonably competent counsel should have discovered the scrivener's error before sentencing, then the failure of defense counsel to notice it is another fact in the calculus of prejudice. If he

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<sup>64</sup> The error in Glover was counsel's failure to advance a grouping issue either to the district court at sentencing or on appeal; the grouping error here is at least equally profound.

had noticed it from whenever it crept into the PSR, counsel should have notified Petitioner and for an independent reason started the remedial steps described above.

The prejudice described in this section also satisfies any prejudice requirement that might exist under United States v. Lockhart, 58 F.3d 86 (4<sup>th</sup> Cir. 1995).<sup>65</sup>

## 2. Failure To Provide Effective Assistance Of Counsel At Sentencing.

### *a. Advocacy Regarding Cooperation.*

There is nothing strategic about counsel and client deciding to cooperate, then counsel not providing effective assistance to the client by giving the Court a fair appreciation of the client's cooperation. This is particularly true given that in the post-Booker era, the Executive Branch has lost the role of exclusive arbiter of cooperation, and there is no limit to the reliable information a judicial officer may consider at sentencing.

There was no reason not to provide and describe for the Court: the fact that on the day of arrest Petitioner cooperated and provided leads; that those leads led to his first debriefing within a week of the appointment of counsel; that it was Petitioner's information that led the FBI to Richards, the minor, and the previous Massachusetts investigation; that Petitioner's information was of substantial assistance to the United States not only in the Richards matter, but (as subsequent events confirmed) the Aaron Campbell Brown/Neova.net credit card processing investigation; that Petitioner provided information about other federal and state cases and targets including Ken Gourlay and an

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<sup>65</sup> Lockhart was a direct appeal with a clear Rule 32 violation. Unlike this petitioner, Lockhart did not claim Glover prejudice, nor did he present the other kinds of prejudice described here. Throughout this Memorandum, and in the Schedule at Section I, the PSR's enhancements and statements are both identified and demonstrated as prejudicial.

Petitioner does not concede, however, that Lockhart even applies to §2255 proceedings.

underage relationship Gourlay had in Michigan; that Petitioner provided significant leads and information concerning an associate of Justin Berry's in Mexico; that Petitioner provided information about the person who sent Berry thousands of dollars in a money order and that person's screen name; that Petitioner provided identifiers for a male in Oregon abusing underage boys and other credit card processing companies like Neova; and that the case agent assessed his information as valuable enough to consider moving Petitioner around the United States for other investigations.<sup>66</sup>

The extent of Petitioner's cooperation was recorded in F.B.I. 302's, which counsel did not obtain, and occurred in debriefings that he neglected to attend. The preceding list of assistance is but a partial list of what Petitioner told the Government. This showing substantially exceeds the Rule 4 standard of the Government having to respond unless it "plainly appears" Petitioner is not entitled to relief. Rule 4, Section 2255 Rules.

*b. Refusing To Confer With Petitioner.*

At sentencing, counsel breached his duty to confer with his client to determine how Petitioner wished to proceed, despite an explicit offer followed by a confirming question by the Court. J&S Tr., 7:3-8. There is nothing strategic about putting an accused between the hammer of defense counsel and the anvil of the Government. This lack of willingness to confer in open court speaks volumes about counsel's willingness to confer and spend appropriate time with Petitioner developing information outside of court.

*c. Revealing The Flawed Plea Process.*

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<sup>66</sup> These are examples provided in a summary fashion. The actual "value presentation" would involve more detail.

As discussed above, counsel should have attempted to remedy the errors and omissions before sentencing. Failing that, partly effective representation would have been disclosure to the Court at sentencing.

**F. The Government Violated Petitioner’s Constitutional Rights**

The U.S. Attorney’s ethical and professional obligations extend far beyond those of other members of the bar:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

—Berger v. United States, 295 U.S. 78, 88 (1935).

In violating the most basic notions of fundamental fairness, the Government obtained convictions and sentences here by a rolled-up pair of practices: withholding information it was obligated to produce under Brady, and engaging in charging and sentencing conduct that went beyond the pale of hard or even harsh blows to a “win at any cost” mindset.

1. Brady Violations: Evidence Favorable To The Accused And Material To Guilt Or Punishment.

*a. The “Redacted” 302.*

Under seal Petitioner has filed both the complete and the incomplete report of the interview of the minor in the “two minor” videotape. Because a minor was apparently

involved, this discussion is necessarily limited and the Court is requested to examine the two documents.

What is painfully evident, however, is that by the “redacted” .txt 302, the government produced an incomplete document, withheld material information, and did not indicate that material had been withheld.<sup>67</sup> In fact, the act of obliterating some markings is a statement that, with those exceptions, the entire document is being produced.

The withheld material information included: 1) That the minor only videotaped himself; 2) Petitioner never videotaped the minor;<sup>68</sup> 3) There was one video of the minor and Berry, impeaching Berry’s statement to the F.B.I. (CR3, ¶32); 4) “Greg is not like that” and Petitioner had no inappropriate contact with others (undercutting the government’s sentencing argument); and 5) That information on a biography described in the 302 “look[s] like Justin’s answers.”

Individually these pieces of information do not impeach the pleas, nor does the full version of the minor’s F.B.I. 302 paint Petitioner in a particularly flattering light. That is not the point, however. The first point is that collectively, the suppressed information was precisely the kind of exculpatory evidence, material to guilt or punishment, that the government was obligated to turn over. Moreover, there was at least some recognition by someone – with access to the complete F.B.I. computer file – who

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<sup>67</sup> When asked both in a letter and in a telephone conversation about the missing pages of the “redacted” document, counsel from the criminal case had no explanation of the circumstances surrounding the production of a .txt file, nor any explanation concerning the missing pages.

<sup>68</sup> Contrary to Count One’s claim that Petitioner and others videotaped the minor, and the damning PSR statement that “Reportedly the video camera was operated by Mitchel” PSR, ¶5, line 17.

decided that it would be better to go through the exercise of creating an incomplete .txt file for a “show” production to defense counsel, rather than make an “on the record” decision to deny access to the information.

Additional proof of materiality is in what was withheld; information that made the Government’s case as charged substantially more difficult to prove had the case gone to trial, and less attractive if there were a sentencing from verdict or plea.

Both documents show the Government was willing to reveal that as a potential trial witness the minor carried the burdensome baggage of his own dishonesty (Para. 2). The suppressed statement also shows the government was unwilling to reveal that the minor provided a potential benefit to the defense – exculpatory information concerning the case as charged. By suppression, the government intentionally and knowingly avoided the risk of a very messy trial, with uncertain results on the question of *who* did the videotaping, *why* and a double-barrelled focus on the *veracity* of the government’s witnesses. That is, Berry (with all his problems) solicited the minor and paid the minor; and it was the minor who held the camera. That trial certainly would be far different from the “two minor” story told in Counts One and Three.

The second point is that reasonably competent counsel could have used the withheld information to Petitioner’s benefit at sentencing. The withheld evidence impeached Berry, undercut the government’s argument about Petitioner, and implicated Berry even more deeply as the true driving force in his own business.

*b. The Walters’ Information.*

Laura Walters and her son both affirm they provided the F.B.I. a host of information tending to impeach Berry, including his drug use; Petitioner’s “discounted”

sale to the Walters in exchange for access to the children; the nature of Berry's relationship with "the minor"; that it was Berry's video; that Berry paid people who appeared in his videos; and Berry's lie to Petitioner about being over 18.

Because the Government withheld this information, the government could attractively cast Justin Berry as a sympathetic victim. By suppressing the Walters' information, the government avoided the inconvenience of having to deal in adversary proceeding with the inconvenient fact that –whatever he may or may not have done from the time he was 13 (and while he was an adult) – Justin Berry was also a liar.

*c. The Extent of Berry's Drug Abuse And Dishonesty.*

If Berry were just a recreational drug user, then his ability to perceive, recall and describe might or might not be relevant but would likely be admissible "for what it's worth" on cross-examination. Berry, however, had a substance abuse problem that the government considered both serious enough that he had to have it in his cooperation agreement, and serious enough for the Government to conceal. It was also the reason he was banned from the Walters' property.

The "Origins of the Government's Investigation" section describes Berry's acts of dishonesty from Berry's F.B.I. 302 of July 25-26, 2005. Few if any of those facts were revealed in the Winkis Affidavit or otherwise.

In short, the Government relied heavily on Berry's story from the beginning of the investigation. Indeed, the A.U.S.A. attempted to provide the Court the "Berry Version" of the facts as the factual basis for Rule 11 purposes, and when asked instead for a count-by-count description had little to say.

Yet despite that substantial and sometimes exclusive reliance on Berry,

particularly for sentencing, the Government never revealed, either for guilt or punishment purposes, his problems as a witness. And given the lack of investigation by counsel, the government could hold on to the information, confident Berry's perfidy would never come to light.

## 2. Grand Jury Abuse.

The Court may dismiss the Indictment when there is prosecutorial misconduct and "it is established that the violation substantially influenced the grand jury's decision to indict," or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations. Bank of Nova Scotia, 487 U.S. at 256.

The evidence is unquestionable that prosecutorial misconduct substantially influenced the Grand Jury. The Grand Jury indicted Petitioner in the mistaken belief that there was probable cause to believe Petitioner produced child pornography by videotaping two minors, when the government actually knew that the "producing" occurred because others solicited the minor, held the camera, and paid the minor—leaving nothing Petitioner to do.

More importantly, the fact there was a "two minor" allegation of "John Doe 1" and "John Doe 2" means the Grand Jury was led through a charade that there were "two minor" victims, when at the time of the Indictment, the Government actually knew Berry was an adult and there were not two minors.

When there is actual prejudice to the accused, the right for relief increases. U.S. v. Hastings, 461 U.S. 499, 504-507 (1983). Prejudice flows here from the fact of indictment on Count One (production) and Count Three (transportation); other counts;

sentence; and custody since arrest, through plea, judgment and service of sentence through this writing.

The gravity of the “two minor” allegation in Counts One and Three cannot be underestimated. The allegation of “two minors” is false; the government *actually knew* the allegation was false when it sought the indictment,<sup>69</sup> and the falsity of the charge that a second minor was involved could not have prejudiced Petitioner more. Petitioner’s guideline range increased through a grouping adjustment and specific offense characteristics for two minors. A citizen has been cast into various United States penitentiaries for the rest of his natural life as a result of this charge and the guideline enhancements that follow for “two minors.” Charging and taking a plea with the second minor allegation is classic Glover prejudice.

Counts One and Three should be dismissed with prejudice because prosecutorial misconduct “substantially influenced” the Grand Jury’s decision to indict and caused terrible prejudice to Petitioner. Moreover, the “grave doubt” standard is satisfied and the prejudice to Petitioner is just as real.

If the Court declines to take the drastic step of dismissal without more information, and without satisfying itself that any lesser “tailored relief” is appropriate, Hasting, supra then disclosure of all grand jury transcripts and minutes leading to Petitioner’s indictment should be ordered to develop the additional evidence necessary for meaningful relief. The showing here is more than adequate for a finding of

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<sup>69</sup> See Winkis Affidavit, CR 3, repeatedly establishing Government knowledge that Berry was over 18 years of age when the video was made.

“particularized need” within the meaning of Rule 6(e)(3)(E)(i) and (ii), F.R.Cr.P. <sup>70</sup>

### 3. Due Process And Other Fundamental Fairness Violations

#### *a. Inadequate Notice Of Uncharged Conduct.*

On July 11, 2005, at almost 4:30 in the afternoon, the Government faxed approximately 16 pages of F.B.I. reports to Petitioner’s counsel. The reports dated from 1999. The reports related to alleged events in Missouri that the Winkis Affidavit described the previous September. The timing was adroit; even if Petitioner’s counsel had immediately received, read, and raced to the Roanoke City Jail to get Petitioner’s version, there was simply not enough time to meet the allegations in time for the July 14, 2006 sentencing. No attorney could reasonably be expected to conduct the necessary investigation for events more than five years old in a different state.

Having sandbagged defense counsel at the 11<sup>th</sup> hour, 59<sup>th</sup> minute, the attorney for the Government proceeded to argue the Missouri incident at sentencing.<sup>71</sup> The argument

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<sup>70</sup> Rule 6(e)(3)(F), F.R.Cr.P., describes the process to petition for disclosure of grand jury materials. When the Court orders the United States Attorney to respond to this §2255 Petition, we will seek leave to submit a brief (not more than six pages) to address matters necessary for meeting Rule (e)(3)(F) standards.

<sup>71</sup> The sandbagging is not minimized by the fact defense counsel had some notice of the Missouri allegations from the Winkis complaint. First, the July 11 information put defense counsel in a position, through a host of details, that might have finally positioned him to run down leads and try to prove or disprove the allegations – if he had more time than July 12 and 13.

Second, to the extent defense counsel had not consulted Petitioner earlier about the Missouri allegations – and conducted his own investigation as the Athanas Dec. demonstrates could be done – defense counsel’s failures to consult and investigate are further evidence of his IAC. That is, defense counsel was on actual knowledge from the Winkis affidavit of an alleged act central to a judicial sentencing inquiry of his client’s background and characteristics in a very serious case, and had done nothing. There is nothing strategic about this failure to investigate.

was intended to cross-collaborate the Berry Version of the “facts” and paint Petitioner as someone who had to be locked up because he had uncontrollable impulses. If the Court had any inclination to depart, grant a variance, or otherwise give Petitioner show any mercy, the timing of the production and ensuing argument was successful.

*b. Fundamental Unfairness Concerning Cooperation.*

1. Unfairly Assessing Undisputed Cooperation.

Attached to this Memorandum as Ex. 1 is the Richards Affidavit. The Court is invited to read it, and in particular the paragraphs relating to “CW 1”. The Court is invited to add to the calculus S/A Winkis’s testimony that agents were immediately deployed in the Middle District of Tennessee the same day. The conclusion is inescapable that the government counsel was not representing the United States in the spirit of Berger. Had Petitioner been given just a small fraction of credit for what he did then his sentence might have been comparable to that of Aaron Campbell Brown.

2. Other Assistance.

Petitioner has yet to see any Rule 35 or other benefit for the repeated debriefings with S/A Winkis, or his transport in custody to meet with an A.U.S.A. and a different F.B.I. S/A. Petitioner does not contend he is entitled to relief under § 2255 just because he cooperated. He does respectfully contend the government must reveal the nature, value, timeliness and extent of his cooperation so the Court can exercise its independent Constitutional functions.

**G. Other Violations.**

1. Rule 32 F. R. Cr. P.

Because the Court did not determine pursuant to Rule 32 (i)(1)(B)<sup>72</sup> that Petitioner read and discussed the PSR with his former counsel (and in fact Petitioner did not), Petitioner is entitled to resentencing on grounds separate and apart from the IAC/Rule 32 issue. Whether or not counsel were ineffective, Petitioner respectfully submits that the Court had an independent duty to satisfy itself that Petitioner and counsel had read and discussed the PSR.

The Constitutional and Rule 32 error here is substantial and the prejudice palpable. These errors adversely impacted any judicial determination of the nature and circumstances of the offense conduct and sentencing limitations under §3553(a)(1) and §3553(b)(2) [subsequently declared unconstitutional by the Fourth Circuit on December 4, 2006 in United States v. Hecht, 470 F.3d 177 (4<sup>th</sup> Cir. 2006).]<sup>73</sup> Particularly when custody sentences are lifelong and the burden of full judicial compliance modest, confidence in the reliability and accuracy of the PSR processes, and confidence in the fairness of the criminal justice system makes honoring Rule 32 critical, even if that means resentencing.

Rule 32's words, phrases, and establishment of various time limitations – and subsection (1)(1)(A) in particular – point unmistakably to the conclusion that the PSR process is designed and intended to provide the accused with the opportunity for

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<sup>72</sup> Rule 32(i)(1)(B), Fed.R.Cr.P., provides: “At sentencing, the court must verify that the defendant and the defendant’s attorney have read and discussed the presentence report and any addendum to the report.”.

<sup>73</sup> “In reaching this conclusion, we agree with every other circuit court that has held that the sentencing scheme set forth in section 3553(b)(2) does not comport with the rationale of *Booker* and that the proper remedy is to excise and sever section 3553(b)(2) and to replace it with an advisory guidelines regime under which sentences are reviewed for reasonableness.”

meaningful participation. The words and phrases include: the use of the word “must” in the complete Rule more than 30 times; “Minimum Required Notice” (Rule 32(e)(2)); “unless the defendant waives this minimum period” (*id.*); and disclosure periods of 35-days for the final PSR [Rule 32(e)(1)] and seven-days for an addendum.

Moreover, as the Supreme Court observed in Burns, for successful “full adversary testing of the issues” *id.* at 135, “*both* notice and a meaningful opportunity to be heard” *id.* are essential. *Both* have long been hallmarks of Supreme Court jurisprudence, *id.* at 137, and plainly *both* are necessary to protect individual rights when the government seeks to deprive a citizen of liberty. Without adequate notice, the right to be heard has little meaning, even though this Court honored Petitioner’s right of allocution. J&S Tr. 21-29. As the Supreme Court said in Burns at 132, referring to Mullane v. Central Hanover Bank & Trust Co. 339 U.S. 306 (1950): “ ‘The right to be heard has little reality or worth unless one is fully informed’ that a decision is contemplated.”

## 2. Sentencing Disparities.

Of the four defendants charged in this matter, three have already been sentenced.

### *a. Aaron Brown (1/15<sup>th</sup> Petitioner’s custody term).*

Petitioner’s cooperation began when he was first questioned by S/A Winkis on September 12, 2005, continued through his September 20, 2005 debriefing, and extended to uncounseled pre-sentencing debriefings. That Petitioner provided demonstrably valuable information is actually evidenced by the Richard Affidavit (Ex. 1), continued F.B.I. debriefings, and the fact that the Government thought Petitioner valuable enough, after the pre-sentencing debriefings, to return him to Roanoke before the Brown trial.

Brown’s cooperation, nebulous and unspecified, began likely at least a year after

he was charged.

Petitioner contested nothing; Brown was represented by zealous and effective advocates who made the Government work hard, expand resources, and turn square corners for likely an entire year.

At most, Petitioner received \$10,818.75. The 11 outgoing Western Union transfers, coupled with Petitioner's Declaration, provides reason to believe he kept substantially less, if anything.

Aaron Campbell Brown agreed to forfeit \$103,300 after running a credit card processing business. The government later gave Brown another benefit by reducing the forfeited amount to \$25,000, or more than double what the available evidence showed Petitioner received. That is, Aaron Campbell Brown received, banked and forfeited more than twice the \$10,818.75 Petitioner received, and of the money Petitioner received, he sent a substantial but as yet undetermined portion to Berry. Last but certainly not least on the financial side, the Government gave Brown – the “money man” who ran Neova and was convicted of money laundering – a plea agreement with an enhancement range of gain lower than Petitioner's \$30,000-\$70,000.

As for improper touching, there was in fact no reliable evidence that Petitioner acted out any thoughts, and much evidence tending to show “he was not like that.” There was no evidence Brown engaged in touching. ACB J&S Tr., passim.

The difference between Petitioner and Brown is that Petitioner had prior involvement with the criminal justice system. It is Petitioner's position that through increased penalties for a second child pornography offense, Congress has shown that up to double an enhanced sentence might be appropriate.

Given the timeliness and value of Petitioner's cooperation, and his lack of gain, Petitioner's custody term should have been some fraction of Aaron Campbell Brown's ten-year term, If the Court considered Petitioner a recidivist, then under the most aggravating circumstances up to double of that fraction might be appropriate. Fifteen times is simply excessive.

*b. Kenneth Richard Gourlay (1/10th to 1/15<sup>th</sup> Petitioner's custody term).*

Gourlay's offenses are before this Court by way of the certified copies of felony convictions in two different courts. In Wayne County, Gourlay was convicted, following jury trial, of felony violations of the Michigan Criminal Sexual Conduct ("CSC" Act), to wit, 13 counts of Criminal Sexual Conduct in the 3<sup>rd</sup> degree ("penetration" offenses). Ex. 2. In Washtenaw County, he was convicted of four felony violations of various offenses involving Internet communications with children. Ex. 3.

Petitioner well recognizes that federal and state criminal interests may diverge. Different sovereigns need not sentence in lockstep. However, it is highly probable that in the sound exercise of prosecutorial discretion, federal authorities anticipated what a probable Michigan custody sentence would be for Gourlay's offenses, and decided that Gourlay's conduct could be adequately punished by state authorities.

Gourlay received an indeterminate term of ten to 15 years for 13 penetration offenses involving some form of sustained touching. Petitioner did not engage in the unlawful touching of children.

*c. Timothy Ryan Richard (unsentenced).*

As noted above, Richards's sentencing is set for November 7, 2008. The role of Justin Berry may figure prominently in that matter.

*d. Comparison of Sentences Is A Permissible Factor In Sentencing.*

It is fair, just, and now allowed under the law of this Circuit to compare sentences as “a permissible part of the overall sentencing determination.” United States v. Montes-Pineda, 445 F3. 375, 380 (4<sup>th</sup> Cir. 2006); United States v. Simpson, 209 Fed. Appx. 279, 283 (4<sup>th</sup> Cir. 2006) (affirming downward variance because of lower sentences imposed on co-defendants); United States v. Doan, 498 F.Supp.2d 816, 819-820 (E.D. VA 2007) (comparison of similarly situated co-defendants proper in pursuit of achieving proportionality of punishment).

IV. RELIEF.

a. That the Court order the United States Attorney to file an answer within a time period fixed by the Court that responds to the allegations of the motion, pursuant to Rules 4 and 5 of the Rules of Governing Section 2255 Proceedings;

b. That the Court grant Petitioner leave to invoke to process of discovery available under the Federal Rules of Criminal Procedure and the Federal Rules of Civil Procedure and elsewhere in the usages and principles of law, pursuant to Rule 6 of the Rules of Governing Section 2255 Proceedings, as follows:

1. That at the time the Court orders the U.S. Attorney to file an answer, it also issues an order, in the form annexed, directing that within 21 days Petitioner describe, file and serve his request for the discovery processes the wishes the Court to authorize, with proposed orders;

2. That the Court, on a showing of good cause, grant leave for Petitioner to describe, file and serve Supplemental Discovery Requests as may later appear reasonably necessary;

3. That at the time the Court orders the U.S. Attorney to file and answer, it also grants Petitioner the opportunity to submit within ten days, a Memorandum pursuant to Rule 6 (e)(3)(F), F.R.Cr.P. in support of a petition for release of Grand Jury transcripts and minutes because of the "two minor" issue. The brief shall not exceed six pages and shall be served on the U.S. Attorney, who shall, if he opposes relief, demonstrate in the Answer, good cause for continued secrecy;

c. That the Court direct that the record be expanded by inclusion of additional material relevant to the determination of the merits of the motion, including the exhibits and declarations filed with the motion and additional material obtained through discovery on the motion, pursuant to Rule 7 of the Rules of Governing Section 2255 Proceedings;

d. That the Court grant Gregory John Mitchel an evidentiary hearing, pursuant to Rule 8 of the Rules of Governing Section 2255 Proceedings;

e. That, as set forth above, the Court vacate and set the judgment aside and discharge or, in the alternative, resentence him or grant a new trial or correct the sentence as the appropriate, pursuant to 28 U.S.C. §2255;

f. That the Court grant all relief to which he may be entitled.

Gregory Mitchel respectfully requests a hearing with evidence taken on the issues raised herein. The violation of the fundamental rights requires that the Court vacate Mitchel's pleas and convictions, restoring him to his pre-plea position.

V. CONCLUSION.

For all of the foregoing reasons, to ensure fairness and justice, Gregory J. Mitchel's convictions must be set aside.

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\* Pro hac vice application pending.