UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

UNITED STATES OF AMERICA,	**)**	**CRIMINAL ACTION NO.**
	)	
	)	**97-60030**
	)	
v.	**)**	
	)	
XXX,	**)**	
	)	
Movant.	**)**	
	)	

MEMORANDUM OF LAW IN SUPPORT OF MOVANT'S PETITION UNDER 28 U.S.C. § 2255

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I. LEGAL BACKGROUND

XXX entered a guilty plea on November 10, 1997 to a violation of 18 U.S.C. § 2251 that being conspiracy to commit sexual exploitation of children. On May 14, 1998, this Court sentenced Mr. XXX to 235 months imprisonment, three years supervised release and a special assessment of $100. Mr. XXX was represented before this Court by Michael D. Singletary, Esq. Mr. XXX took an appeal from the Court's judgement to the United States Court of Appeals for the Fifth Circuit.

The appellate brief before the Fifth Circuit was filed by Mr. Singletary and raised two issues. First, whether the Court erred in increasing Mr. XXX's sentencing guidelines based on "Minor Male #1" given that Minor Male #1's face was simply superimposed on a picture exhibiting the genitals of one not shown to be a minor. Second, whether the Court erred in increasing Mr. XXX's sentencing guidelines based on a determination that depictions of "Minor Male #3" displayed sexually explicitly contact. No other issues were raised.

On October 15, 1998, this Court allowed Mr. Singletary to withdraw from Mr. XXX's representation based upon a breakdown in the attorney-client relationship and appointed Rebecca Hudsmith, Chief of the Federal Public Defender's Office for the Middle and Western Districts of Louisiana, to represent Mr. XXX. On September 17, 2000, the Fifth Circuit issued its opinion remanding Mr. XXX's case to this Court for resentencing. Although the Fifth Circuit affirmed this Court's ruling in regard to Minor Male #3, it held that the Court erred in increasing Mr. XXX's sentencing guidelines based upon Minor Male #1.

On March 14, 2001, this Court sentenced Mr. XXX to 210 months imprisonment, three years supervised release and a special assessment of $100. Mr. XXX was represented by Ms. Hudsmith at the resentencing.

On March 20, 2001, following the resentencing, Mr. XXX filed a notice of appeal. However, on May 4, 2001, the United States Court of Appeals for the Fifth Circuit granted Mr. XXX's motion to voluntarily dismiss his appeal. Mr. XXX was represented by Ms. Hudsmith during the pendency of the appeal.

Mr. XXX is currently serving his sentence at the Federal Medical Center in Rochester, Minnesota.

II. FACTUAL BACKGROUND

A. Evidence

In Count 1 of the indictment filed against him, Mr. XXX was charged with conspiring to commit the sexual exploitation of children in violation of 18 U.S.C. § 2251(a). Specifically, the indictment charged:

> *Commencing on or about the 15th day of December, 1996,* in the Western District of Louisiana and elsewhere, the defendants and MATTHEW CARROLL, knowingly and willfully did conspire and agree together and with each other and with diverse other persons to the Grand Jury unknown, to employ, use, persuade and induce persons under the age of eighteen (18) years to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct, *knowing that such visual depictions of such conduct will be transported in interstate or foreign commerce or mailed,* in violation of Tile 18, United States Code, Section § 2251. [18 U.S.C. § 2251]. (emphasis added)

Pursuant to his entry of a plea of guilty to Count 1, Mr. XXX signed a document entitled Stipulated Factual Basis for Guilty Plea (the "Stipulation"). The Stipulation makes reference to several visual depictions of minors, however, the Stipulation, does not form a factual basis to support a conviction for conspiring to violate 18 U.S.C. § 2251(a):

- On pages 2-3, the Stipulation makes reference to various "computer generated images." Apparently, the computer generated images contained the faces of various minors, including a minor identified as "Minor Male #1." Nevertheless, such computer generated images do not support a conviction under 18 U.S.C. § 2251. *See United States v. Carroll* 227 F.3d 486, 487-88 (5th Cir. 2001).

- On pages 5-6, the Stipulation makes reference to Mr. XXX asking Minor Male #1's friend to place Mr. XXX's penis on a scanner so that an image could be created. There is no stipulation as to the friend's age. More importantly, there is no stipulation as to whether a visual depiction was actually created and, in any event, it would not have been a picture of a minor engaged in sexually explicit conduct. Finally, even if a picture was created, there is no evidence that it was intended to be transported in interstate or foreign commerce or was intended to be mailed.

- On page 6, the Stipulation makes reference to allegations by two minor males (identified as "Minor Male #1" and "Minor Male #2") allegation that Mr. XXX used a video camera to record a minor while he was "in" the bathroom. There is no stipulation that a videotape was in the video camera and that a videotape was actually created. There is no stipulation that the minor was engaged in "sexually explicit conduct." There is no stipulation that the videotape, assuming that it was in fact created, was intended to be transported in interstate or foreign commerce or was intended to be mailed.

- On Page 6, the Stipulation makes reference to an allegation by Minor Male #2 that Mr. XXX had a picture on his computer of one of Minor Male #2's friend "posing nude." Even assuming that such a "nude" pictures *ipso facto* constitute "sexually explicit conduct,"[1] there is no stipulation that the picture was intended to be transported in interstate or foreign commerce or was intended to be mailed.

- On pages 6-7, the Stipulation makes reference to a videotape made by Mr. XXX and Mr. Carroll of a "pre-pubescence boy [changing] into tight fitting clothing," The minor male is identified in the Presentence Report (the "PSR") as "Minor Male #3." *See* PSR at ¶ 31. There is no stipulation that the videotape was intended to be transported in interstate or foreign commerce or was intended to be mailed.

- On page 7, the Stipulation makes reference to a videotape of Mr. Carroll "engaging in oral and anal sexual intercourse with two minor males" (identified as "Minor Male #2" and "Minor Male #4" *see* PSR at ¶ 33). Mr. XXX stipulates that Mr. Carroll took the videotape to an individual who resides in Texas and that this individual maintained a copy of the videotape. There is no stipulation that Mr. XXX had anything to do with the creation of this videotape nor that it was made or transported while Mr. XXX was part of the alleged conspiracy. Indeed, Mr. XXX alleged in his objections to the presentence report that the videotape was created by Mr. Carroll in June 1996, six months prior the time the conspiracy was alleged to have commenced, and there was no evidence adduced to the contrary.

- On pages 7-8, the Stipulation makes reference to photographs of Mr. Carroll and Mr. XXX and "young boys" at Astroworld in Houston where the boys are "partially clothed." There is no stipulation that photographs contained

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[1] Congress appears to have distinguished between depictions of nude children and depictions of children involved in sexually explicitly conduct. *Compare* 18 U.S.C.§ 2252 and 18 U.S.C.§ 2252A.

"sexually explicit" conduct or that the photographs were intended to be transported in interstate or foreign commerce or were intended to be mailed.

- On page 8, the Stipulation makes reference to a written chronology of a trip to Astroworld on June 26-30, 1997 (it is not clear whether this is the same trip noted in the preceding paragraph) stating that "MATT and his friend were involved in taking nude pictures of boys ages 7, 9, and 13. Again, even assuming that such "nude pictures" *ipso facto* constitute "sexually explicit conduct,"[2] there is no stipulation that the pictures were intended to be transported in interstate or foreign commerce or were intended to be mailed.[3]

Significantly, it does not appear that the government had any additional evidence, not recited in the Stipulation, to support a conviction in this case under 18 U.S.C. § 2251. In short, it does not appear that the government could show that Mr. XXX conspired to transport in interstate commerce or mail depictions of minors involved in sexually explicit conduct.

B. Plea Was Not Knowing And Voluntary

In addition to the plea in this case not being supported by a factual basis, it was made based upon incorrect advise that Mr. XXX received from his trial counsel. Prior to trial, Mr. XXX was advised by counsel that, if he persisted in his plea of not guilty and exercised his right to trial on the twelve substantive counts of the indictment, the Court could, and would, impose consecutive sentences on each of the twelve counts and he would be sentenced to 190 years in prison. *See* Declaration of ("XXX Dec.") (attached hereto as Attachment A) at ¶ 4. Had Mr. XXX been properly advised by his counsel, he would not have entered his guilty plea to Count 1 of the indictment. *Id*. at ¶ 6.

C. Sentencing Guideline Calculations

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2 *See supra.* note 1.

3 The Stipulation also makes reference to other visual depictions of minors involved in sexual activity that were shown to various minors referenced in the Stipulation, however, most of these depictions were described as "computer images." As to the various tapes, magazines and computer downloaded images and images contained on computer hard drives found during a search of the mobile home shared by Mr. XXX and Mr. Carroll and while searching Mr. XXX's computer seized from his employer, there are no allegations nor admissions that such depictions were created by Mr. XXX or any alleged co-conspirator.

At sentencing, Mr. XXX's trial counsel, Michael Singletary, filed various objections to the Presentence Report prepared by the Probation Department for the Western District of Louisiana. Two of the objections are relevant to this Petition.

First, trial counsel objected to Minor Male #2 and Minor Male #4 being included as victims for purposes of determining relevant conduct under U.S.S.G. §1B1.3 arguing that the videotape depictions of Mr. Carroll "engaging in oral and anal sexual intercourse with [these] two minor males" was created prior to Mr. XXX becoming a member of the conspiracy:

> XXX vehemently objects to the inclusion of minor white males #2 and #4 as victims attributable to him. There is no evidence that XXX ([sic.] employed, used, persuaded, induced, enticed or coerced Minor white males #2 and #4 to perform in the videotape produced by Carroll. XXX maintains that the videotape was made in June 1996, before he ever met Carroll. These boys were not sexually exploited for the purposes of producing a visual depiction of this conduct by XXX, only Carroll. Therefore they should be excluded as victims for guideline sentence calculation purposes.

Objection to ¶¶ 54-61, 70-77 of the Presentence Report.[4] The Addendum to the Presentence Report (the "Addendum") responded as follows:

> The defendant was not involved in the production of the video tape. However, prior to the defendant relocating to Lafayette in December, 1996, he was communicating over the Internet with Matthew Carroll. Carroll used a Snappy video capture mechanism to capture images of the video and transfer them to XXX over the Internet. According to U.S.S.G. § 1B1.3, the defendant is accountable for all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured or willfully caused by the defendant, and in the case of a jointly undertaken criminal activity, all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity. The defendant is responsible for all acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of convictions. Therefore, it is believed that the defendant was correctly assessed pursuant to the sentencing guidelines.

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[4] Indeed, Mr. XXX never met Mr. Carroll until late August or early September 1996. *See* XXX Dec. at ¶ 8.

Addendum at pg. 5. This Court essentially adopted the Addendum's rationale while ruling on the objection at the sentencing. Transcript of Sentencing (May 11, 1998) at pg. 9. Significantly, neither the Addendum nor the Court suggested that the alleged conspiracy was formed at the time the videotape was made or that, in any event, the production of the videotape was foreseeable to Mr. XXX at the time Mr. Carroll created the videotape. Indeed, there was also no showing as to when the images of the videotape were transferred over the Internet using the Snappy video capture mechanism.

Second, trial counsel objected to an increase in Mr. XXX's sentencing guidelines in connection with each victim pursuant to U.S.S.G. § 2G2.1(b)(3) because a computer was not used to "solicit participation by or with a minor in sexually explicit conduct...." Objection to ¶¶ 49, 57, 65, 73 of the Presentence Report. The Addendum responded by noting: "The offense conduct reflects the extent to which the defendant utilized a computer in relation to the minors involved. Therefore, it is believed that this two point enhancement was correctly applied." Addendum at pg. 4. This Court, in ruling on the objection made the following ruling: "The court finds the defendant did utilize the computer as part of the offense conduct, and will apply the two point enhancement recommended by the presentence report." Transcript of Sentencing (May 11, 1998) at pg. 8. Notably, the Court did not find that the computer was used to "solicit" the participation of Minor Male #2, Minor Male #3, or Minor Male #4 in sexually explicit conduct.

Mr. Singletary, who also prepared Mr. XXX's opening brief for his appeal to the United States Court of Appeals for the Fifth Circuit, did not pursue either of these objections on appeal.

III. DISCUSSION

A. The Government Did Not And Cannot Establish That Mr. XXX Conspired To Violate 18 U.S.C. § 2251

To support the allegation of a conspiracy on Mr. XXX's part to violate 18 U.S.C. § 2251 as charged in the indictment, the government was required to show Mr. XXX conspired to: (1) knowingly use or persuade a minor to engage in sexually explicit conduct for the purpose of

producing a visual depiction of that conduct; (2) knowing that the minor was under the age of eighteen years; and (3) knowing or having reason to know that such visual depiction would be transported in interstate commerce or mailed. *Cf. United States v. Carroll*, 105 F.3d 740, 741-42 (1st Cir.), *cert. denied*, 520 U.S. 1255 (1997). The United States Court of Appeals for the Fifth Circuit takes the interstate commerce element of the child pornography laws seriously and has recently invalidated a conviction for possession of child pornography because the government did not show that the pornography in question traveled in interstate commerce. *United States v. Henriques*, 234 F.3d 263 (5th Cir. 2000).

As explained below, the Stipulated Factual Basis for the Guilty Plea filed in this case does not establish that any of the visual depictions of minors that Mr. XXX allegedly conspired to produce with Mr. Carroll were intended to be transported in interstate or foreign commerce or were intended to be mailed. Moreover, there is no evidence outside the Stipulation which establishes that any of the visual depictions of minors that Mr. XXX allegedly conspired to produce with Mr. Carroll were intended to be transported in interstate or foreign commerce or were intended to be mailed. In short, Mr. XXX did not violate 18 U.S.C. § 2251.

1. The Stipulated Factual Basis For Guilty Plea Is Factually Insufficient To Support A Violation of 18 U.S.C. § 2251(a) As Charged In The Indictment

As noted above, the Stipulated Factual Basis for the Guilty Plea, contain several references to visual depictions of minors possessed by Mr. XXX and/or Mr. Carroll, but the Stipulation does not contain a factual recitation sufficient to support a conviction for a conspiracy to violate of 18 U.S.C. § 2251.

First, the United States Court of Appeals for the Fifth Circuit has held that the computer generated images possessed by Mr. XXX and/or Mr. Carroll, including one containing the face of Minor Male #1, do not support a conviction under 18 U.S.C. § 2251 (*see United States v. Carroll* 227 F.3d 486, 487-88 (5th Cir. 2001)) and, likewise, such computer generated images would not support a conviction for conspiracy to violate that statute.

Second, there is no stipulation that the videotape made by Mr. XXX and Mr. Carroll of Minor Male #3 changing into tight fitting clothing was intended to be transported in interstate or foreign commerce or was intended to be mailed or that Mr. XXX and Mr. Carroll conspired to transport the videotape in interstate commerce or mail the videotape.

Third, the videotape of Mr. Carroll engaging in oral and anal sexual intercourse with Minor Male #2 and Minor Male #4 was created by Mr. Carroll, without the assistance of Mr. XXX in June 1996. The indictment alleges that the alleged conspiracy to violate 18 U.S.C. § 2251 began in December 1996 and, therefore, the stipulation regarding this videotape would not support a conviction for conspiracy to violate 18 U.S.C. § 2251.

Likewise, the stipulations as to various other depictions do not support the guilty plea in this case. The Stipulation makes reference to Mr. XXX using his scanner to take a picture of his penis with the assistance of a minor's friend. Such a depiction, even if it had been created, would not have contained sexually explicit conduct by the friend. Moreover, there is no stipulation as to the friend's age nor is there a stipulation as to whether the visual depiction, even if created, was intended to be transported in interstate or foreign commerce or was intended to be mailed. The Stipulation makes reference to a minor male's (identified as "Minor Male #2") allegation that Mr. XXX used a video camera to record a minor while he was "in" the bathroom, but there is no stipulation that a videotape was in that video camera and a videotape was actually created, nor is there a stipulation that the minor was engaged in "sexually explicit conduct" nor is there a stipulation that the videotape, assuming that it was in fact created, was intended to be transported in interstate or foreign commerce or was intended to be mailed. The Stipulation makes reference to pictures created during a trip to Astroworld in Texas, however, there is no stipulation that the pictures depicted "sexually explicit conduct," nor is there stipulation that the pictures were intended to be transported in interstate or foreign commerce or was intended to be mailed. Finally, while the Stipulation makes reference to a plethora of other "computer images" and child pornography possessed by Mr. XXX and Mr. Carroll, there is absolutely no showing that Mr. XXX or other co-conspirators persuaded a minor to engage in sexually explicit

conduct in order to create the depictions. In short, the stipulations regarding these depictions do not factually support a conviction for conspiracy to violate 18 U.S.C. § 2251.

It appears that the Stipulated Factual Basis for the Guilty Plea does make out a violation of 18 U.S.C. § 2252A (prohibiting the sending or receiving child pornography mailed or transported in interstate or foreign commerce), yet Mr. XXX was never charged with violating 18 U.S.C. § 2252A. On the other hand, the only visual depiction of sexually explicit conduct that was created in this case that was shown to have been transported in interstate commerce or by mail was the videotape of Mr. Carroll engaging in oral and anal sexual intercourse with Minor Male #2 and Minor Male #4. Nevertheless, as discussed above, this videotape was created by Mr. Carroll, without the assistance of Mr. XXX in June 1996, several months prior to the formation of the alleged conspiracy and several months prior to Mr. XXX knowing Mr. Carroll. Quite simply, if a person is given or purchases depictions of minors engaged in sexually explicit conduct after such depictions are made and the person receiving the depictions did not conspire in the making of the depictions at the time they were made, the transfer of the end product might support a conviction for receipt of such material but would not support a conviction for a conspiracy to violate 18 U.S.C. § 2251.

Given that the Stipulated Factual Basis for the Guilty Plea fails to make out a violation of conspiring to violate 18 U.S.C. § 2251, this Court must grant Mr. XXX's Petition Under 28 U.S.C. § 2255 and vacate Mr. XXX's conviction.

2. Mr. XXX Is Not Guilty Of Conspiring To Violate 18 U.S.C. § 2251

The Stipulated Factual Basis for the Guilty Plea filed in this case was extensive and is ten pages long. Still, neither the Stipulation, the case agent's affidavit attached to the government's criminal complaint, the government's Memorandum of Law in Support of Motion for Pretrial Detention, Matthew Carroll's Stipulated Factual Basis for the Guilty Plea nor the Presentence Report prepared in this case indicate that the government can show that any of the visual depictions of minors that Mr. XXX allegedly conspired to produce with Mr. Carroll were intended to be transported in interstate or foreign commerce or were intended to be mailed. That

being the case, although Mr. XXX might have committed other federal and state offenses, Mr. XXX is simply not guilty of conspiring to violate 18 U.S.C. § 2251.

Given that Mr. XXX was not guilty (*i.e.* "actually innocent") of conspiring to violate 18 U.S.C. § 2251, this Court must grant Mr. XXX's Petition Under 28 U.S.C. § 2255 and vacate Mr. XXX's conviction. *Bousley v. United States*, 523 U.S. 614, 633 (1998).

B. Mr. XXX's Plea Was Not Knowing And Voluntary

As set forth above, Mr. XXX was told by Michael Singletary that, if he persisted in his plea of not guilty to the twelve substantive counts in the indictment, this Court would impose consecutive sentences totaling 190 years imprisonment because of the nature of the charges. In fact, the government's dismissal of the remaining counts in exchange for Mr. XXX's guilty plea to Count 1 had absolutely *no* effect on Mr. XXX's sentence whatsoever. *See* PSR at ¶ 114.

It is axiomatic that for a plea to be valid it must be knowingly and intentionally made. In this case, Mr. XXX was persuaded by Mr. Singletary that, if he went to trial, this Court would impose a sentence of 190 years imprisonment whereas, if he entered into the proposed plea agreement, his maximum sentence would be twenty years imprisonment and his actual sentence could be considerably less than twenty years imprisonment.

The United States District Court for the Southern District of New York faced a similar situation many years ago in *United States v. Tateo*, 214 F.Supp. 560 (S.D.N.Y. 1963). In that case, midway through trial, the trial judge informed Tateo's counsel that, if Tateo was convicted of all the counts against him, he would impose a life sentence on the kidnapping charge and maximum consecutive sentence on the remaining four charges which, in essence, meant Tateo would never get out of prison. *Id*. at 563. In reality, the Court was without power to impose consecutive sentences. *Id*. **Tateo, however, was never told of this fact by his attorney**. *Id*. Based upon the trial court's comments and the advice he received from his attorney, Tateo pleaded guilty to all the counts pursuant to a plea agreement, save the kidnapping count, and was sentenced to twenty-two and one-half years imprisonment. *Id*. at 562. Later, Tateo filed a

motion under 28 U.S.C. § 2255 alleging that his plea was not knowingly and voluntarily made. The Court granted the motion:

> The choice open to this defendant when apprised during the trial of the Court's statement was rather severely limited. If, as was his constitutional right, he continued with the trial and were found guilty, he faced, in the light of the Court's announced attitude, the imposition of a life sentence upon the kidnapping charge, plus additional time upon the other counts, a sentence which his lawyer informed him and which he believed, not without reason, meant life imprisonment. On the other hand, if he withdrew his plea of not guilty, there was the likelihood, although no claim is made of any specific promise, of a substantially lower sentence, since it had been indicated that the kidnapping charge would be dismissed, as it was eventually.
>
> It is not claimed†--† and it is immaterial†--† that the Trial Judge's statement was designed either to mislead the defendant or to induce his plea of guilty. The question is whether it did have that impact.
>
> The statement by the Court itself had overbearing force. That it had a subtle but nonetheless powerful influence upon the defendant can hardly be questioned. *But adding even greater weight to it was the fact, not challenged by the Government, that under the Federal Bank Robbery Act the Court lacked power to impose consecutive sentences to follow that imposed under the kidnapping count.* Moreover, this circumstance itself, apart from any question of its coercive nature, raises a substantial question as to whether the plea was understandably made.

Id. at 565-66 (footnotes omitted) (emphasis added).

In the instant case, the suggestion of consecutive sentences came from Mr. Singletary rather than the Court, however, the result is the same. Just as Tateo pleaded guilty because he was led to believe that the court could sentence him to consecutive sentences resulting in his never leaving prison even though the law precluded such a consecutive sentences, Mr. XXX pleaded guilty because he was lead to believe that the Court would sentence him to consecutive sentences resulting in his never leaving prison even though the United States Sentencing Guidelines would have precluded such consecutive sentences. Had he been given correct advice, he would not have entered his guilty plea. *See* XXX Dec. at ¶ 6. Given that Mr. XXX's plea was not knowing and voluntary as a result of incorrect advise given by Mr. Singletary, Mr.

XXX's Petition Under 28 U.S.C. § 2255 should be granted and he should be give a chance to plead anew.

C. Michael Singletary, Rendered Mr. XXX Ineffective Assistance Of Counsel.

1. Mr. Singletary Rendered Mr. XXX Ineffective Assistance Of Counsel By Advising Mr. XXX To Plead Guilty To An Offense Which The Government Could Not Prove And Which Mr. XXX Did Not Commit.

"A guilty plea is open to attack on the ground that counsel did not provide the defendant with 'reasonably competent advice.'" *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980) (citation omitted).

As discussed above, neither the Stipulated Factual Basis for the Guilty Plea filed in this case, the case agent's affidavit attached to the government's criminal complaint, the government's Memorandum of Law in Support of Motion for Pretrial Detention, Matthew Carroll's Stipulated Factual Basis for the Guilty Plea nor the Presentence Report indicate that the government could show that any of the visual depictions of minors that Mr. XXX allegedly conspired to produce with Mr. Carroll were intended to be transported in interstate or foreign commerce or were intended to be mailed. Nevertheless, despite the fact that the government would apparently have been unable to establish a violation of conspiring to violate 18 U.S.C. § 2251 had this case preceded to trial, Michael Singletary advised Mr. XXX to enter a guilty plea to conspiring to violate 18 U.S.C. § 2251. *See* XXX Dec. at ¶ 5.

Certainly advising a client to plead guilty to a charge that cannot be proven from the evidence does not rise to the level of reasonably competent advice. Indeed, such advice establishes a *prima facie* claim of ineffective assistance of counsel. As a result of Mr. Singletary's incorrect advice, this Court must grant Mr. XXX's Petition Under 28 U.S.C. § 2255 and vacate Mr. XXX's conviction.

2. Mr. Singletary Rendered Mr. XXX Ineffective Assistance Of Counsel By Misadvising Mr. XXX Regarding The Consequences In The Event He Was Convicted Following A Trial.

As explained above, prior to trial, Mr. XXX was also advised by Michael Singletary that, if he persisted in his plea of not guilty and exercised his right to trial on the twelve substantive counts of the indictment, the Court could, and would, impose consecutive sentences on each of the twelve counts and he would be sentenced to 190 years in prison. *See* XXX Dec. at ¶ 2. In reality, the government's dismissal of the remaining counts in exchange for Mr. XXX's guilty plea to Count 1 had absolutely *no* effect on Mr. XXX's sentence whatsoever. *See* PSR at ¶ 114. Had Mr. XXX been properly advised by his counsel that the sentencing guidelines would have made the possibility of consecutive sentences extremely unrealistic if not impossible, he would not have entered his guilty plea to Count 1 of the indictment. *See* XXX Dec. ¶ 6.

In *Cooks v. United States*, 461 F.2d 530, 531-32 (5th Cir. 1972), the United States Court of Appeals for the Fifth Circuit, was faced with a defendant who was advised by his trial counsel that, should he go to trial on the indictment, he would face a maximum sentence of up to sixty years imprisonment. As a result of this advice, Cooks "quite understandably" accepted a deal that limited his prison exposure to ten years. *Id*. at 532 . In fact, Cooks could not have been sentenced to sixty years imprisonment even if he had gone to trial. *Id*. The Fifth Circuit held that Cooks' trial counsel was ineffective, granted Cooks' motion under 28 U.S.C. § 2255 and noted, "[w]here counsel has induced defendant to plead guilty on the *patently erroneous* advice that if he does not do so he may be subject to a sentence six times more severe than that which the law would really allow, the proceeding surely fits the mold we describe as a 'farce and a mockery of justice.'" *Id*.

As a result of Mr. Singletary's incorrect advise, this Court must grant Mr. XXX's Petition Under 28 U.S.C. § 2255, vacate Mr. XXX's conviction and allow him to plead anew.

3. Mr. Singletary Rendered Mr. XXX Ineffective Assistance Of Counsel On Appeal For Failing To Appeal This Court's Overruling Of Mr. XXX's Objection To The Inclusion Of Minor Male #2 And Minor Male #4 As Victims In This Case And For Failing To Appeal This Court's Overruling Of Mr. XXX's Objection To The Application Of U.S.S.G. § 2G2.1(b)(3)

As noted above, prior to the initial sentencing in this case, Mr. Singletary objected to the recommendation contained in the Presentence Report that Mr. XXX's sentencing guidelines be increased based upon the victimization of Minor Male #2 and Minor Male #3 and to the recommendation that Mr. XXX's sentencing guidelines be increased pursuant to U.S.S.G. § 2G2.1(b)(3) based upon the theory that Mr. XXX and/or his alleged co-conspirator used a computer to solicit Minor Male #2, Minor Male #3 and Minor Male #4 to engage in sexually explicit conduct for the purpose of making visual depictions of such conduct. Although both of these objections were overruled at the sentencing, as explained below, both of these objections were meritorious and should have been sustained. Nevertheless, Mr. Singletary failed to raise either of these objections on appeal.

An appellate attorney provides ineffective assistance of counsel on appeal by failing to raise a claim that "would have had a reasonable probability of success on appeal." *Duhamel v. Collins*, 955 F.2d 962 (5th Cir. 1992). *See also, United States v. Phillips*, 210 F.3d 345 (5th Cir. 2000) (Appellate counsel was found ineffective for failure to raise a meritorious sentencing guideline issue).

a. Minor Male #2 And Minor Male #3 As Victims

As noted above with regard to the sufficiency of the Stipulated Factual Basis for the Guilty Plea, the videotape of Minor Male #2 and Minor Male # 4 was created by Mr. Carroll in June 1996. The Addendum to the Presentence Report acknowledges that "[t]he defendant was not involved in the production of the video tape." Addendum at pg. 5. Application Note 2 to U.S.S.G § 1B1.3 clearly provides that "[a] defendant's relevant conduct does not include conduct of a member of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct...." *See also, United States v. Carreon*, 11 F.3d 1225, 1234-35 (5th Cir. 1994).

It is difficult to understand the Probation Officer's response to Mr. XXX's objection. Although the Addendum makes reference to the fact that Mr. XXX and Mr. Carroll communicated with each other prior to December 1996, it does not appear that the Addendum is

alleging that, contrary to the indictment, the alleged conspiracy actually started prior to December 1996. Absent proof that the alleged conspiracy was in existence in June 1996, Application Note 2 to U.S.S.G § 1B1.3 as well as *Carreon* clearly prohibit the increasing of Mr. XXX's sentencing guidelines for conduct that occurred prior to his joining of a conspiracy with Carroll.

Even assuming, *arguendo*, that the Addendum was alleging, and this Court found without so stating, that a conspiracy actually began on or before June 1996, it would be necessary to show that the making of the videotape with Minor Male #2 and Minor Male #4 was foreseeable to Mr. XXX *at the time it was made* by Mr. Carroll. *See* U.S.S.G § 1B1.3(a)(1)(B). There is absolutely no showing of such foreseeability. The Addendum alleges that Mr. Carroll "used a Snappy video capture mechanism to capture images of the video and transfer them to XXX over the Internet." Addendum at pg. 5. There is no allegation when Mr. Carroll transferred the images to Mr. XXX or that he transferred "sexually explicit" images. Moreover, the Addendum's allegation is a far cry from an allegation that the making of the videotape was foreseeable to Mr. XXX *at the time it was made* by Mr. Carroll. Therefore, even if a conspiracy was formed on or before June 1996 (an impossibility since Mr. XXX did not know Mr. Carroll at the time *see* XXX Dec. at ¶ 8), the government failed to carry the burden of showing that the videotaping of Minor Male #2 and Minor Male #4 was foreseeable to Mr. XXX and, consequently, failed to carry the burden of showing that the victimization of Minor Male #2 and Minor Male #4 could be considered relevant conduct under U.S.S.G § 1B1.3 for the purpose of increasing Mr. XXX's sentencing guidelines.[5]

Given the clear likelihood that Mr. XXX would have prevailed on appeal based upon his objection to the inclusion of the victimization of Minor Male #2 and Minor Male #4 as relevant conduct in his case, Michael Singletary was ineffective for failing to raise this issue on appeal.

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[5] "[T]he party seeking an adjustment in the sentence level must establish the factual predicate justifying the adjustment." *United States v. Alfaro*, 919 F.2d 962, 965 (5th Cir. 1990).

Moreover, Mr. XXX was prejudiced by his counsel's failure because it resulted in an increase of three offense levels and an increase of his guideline imprisonment range from 121-151 months to 168-210 months. *Glover v. United States*, 121 S.Ct. 696, 700-01 (2001). Mr. XXX should be allowed to pursue an out-of-time appeal in order to pursue this issue. *Page v. United States*, 884 F.2d 300, 301 (D.C. Cir. 1989) ("Relief does not require the district court to issue orders to the court of appeals. District courts may grant relief. Ineffective assistance may justify vacating and reentering the judgment of conviction, allowing a fresh appeal."). *See also, e.g., Caludio v. Scully*, 982 F.2d 798, 806 (2d Cir. 1992), *cert. denied,* 508 U.S. (1993); *Matire v. Wainwright,* 811 F.2d 1430, 1439 (11th Cir. 1987)[6]

b. Application of U.S.S.G. § 2G2.1(b)(3)

As noted above, Mr. Singletary objected to an increase in Mr. XXX's sentencing guidelines in connection with each victim pursuant to U.S.S.G. § 2G2.1(b)(3) and argued that a

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[6] Mr. XXX notes that the reply brief on appeal was written by Rebecca Hudsmith. Given that Ms. Hudsmith's hands were tied by Mr. Singletary failure to raise this issue in the opening brief and that the Fifth Circuit will not consider issues raised for the first time in a reply brief (*United States v. Green*, 46 F.3d 461, 465 n.3 (5th Cir.), *cert. denied,* 515 U.S. 1167 (1995)), Mr. XXX is loathe to claim that Ms. Hudsmith rendered ineffective assistance of counsel on appeal. Nevertheless, in the unlikely event that this Court finds that Ms. Hudsmith could have raised this issue for the first time in a reply brief, Ms. Hudsmith would have rendered ineffective assistance of counsel as a result of her failure to do so.

Likewise, it appears to be settled law that Ms. Hudsmith could not raise this issue at the resentencing. *††See United States of America v. Hass*, 199 F.3d 749 (5th Cir. 1999) (Holding that a defendant is not entitled to a *de novo* sentencing hearing upon remand), *cert. denied,* 121 S.Ct. 39 (2000). Again, in the unlikely event that this Court finds that Ms. Hudsmith could have raised this issue for the first time at the resentencing, Ms. Hudsmith would have rendered ineffective assistance of counsel as a result of her failure to do so.

computer was not used to "solicit" participation by or with a minor in sexually explicit conduct. This Court, in ruling on the objection, simply commented that is had found that Mr. XXX the defendant *did* utilize the computer as part of the offense conduct.

There was no question that a computer was used in this case to transfer pictures and images, however, that did not answer Mr. XXX's objection. The question was whether Mr. XXX used a computer to "solicit" the participation of Minor Male #2, Minor Male #3, and Minor Male #4 in sexually explicit conduct. This Court never made a finding on this issue.

It is undisputed in this case that Mr. XXX and Mr. Carroll met Minor Male #2, Minor Male #3, and Minor Male #4 through Mr. Carroll's connection with the Boy Scouts. *See, e.g.*, PSR at ¶¶ 56, 64, 72. On the other hand, there is *no* evidence that Mr. XXX or Mr. Carroll solicited Minor Male #2, Minor Male #3, and Minor Male #4 using a computer.

Given this total lack of evidence that Mr. XXX or Mr. Carroll solicited Minor Male #2, Minor Male #3, and Minor Male #4 using a computer, there is a clear likelihood that Mr. XXX would have won his objection to this Court's application of U.S.S.G. § 2G2.1(b)(3) if it had been appealed to the Fifth Circuit. Therefore, Mr. XXX was prejudiced by his counsel's failure because it resulted in an increase of two offense levels and an increase of his guideline imprisonment range from 135-168 months to 168-210 months. *Glover*, 121 S.Ct. at 700-01. Mr. XXX should be allowed to pursue an out-of-time appeal in order to pursue this issue. *See Page* 884 F.2d at 301 (D.C. Cir. 1989). *See also, e.g., Caludio,* 982 F.2d at 806 (2d Cir. 1992); *Matire,* 811 F.2d at 1439 (11th Cir. 1987)[7]

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[7] Mr. XXX notes that the reply brief on appeal was written by Rebecca Hudsmith. Given that Ms. Hudsmith's hands were tied by Mr. Singletary failure to raise this issue in the opening brief and that the Fifth Circuit will not consider issues raised for the first time in a reply brief (*Green,* 46 F.3d at 465 n.3.), Mr. XXX is loathe to claim that Ms. Hudsmith rendered ineffective assistance of counsel on appeal. Nevertheless, in the unlikely event that this Court finds that

IV. CONCLUSION

For the foregoing reasons, this Court should grant Mr. XXX's Petition Under 28 U.S.C. § 2255. Mr. XXX submits that this Court should vacate his conviction or, in the alternative, it should allow him an out-of-time appeal on the issues of whether this Court erred in the inclusion of the victimization of Minor Male #2 and Minor Male #4 as relevant conduct in his case and whether this Court erred in its application of U.S.S.G. § 2G2.1(b)(3) to the facts of this case.

Respectfully submitted,

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Ms. Hudsmith could have raised this issue for the first time in a reply brief, Ms. Hudsmith would have rendered ineffective assistance of counsel as a result of her failure to do so.

Likewise, it appears to be settled law that Ms. Hudsmith could not raise this issue at the resentencing. ††*See Hass*, 199 F.3d at 749. Again, in the unlikely event that this Court finds that Ms. Hudsmith could have raised this issue for the first time at the resentencing, Ms. Hudsmith would have rendered ineffective assistance of counsel as a result of her failure to do so.

214-720-9594 (facsimile)

Attorney for Movant

CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on August 3, 2001, I caused the foregoing document as well as the accompanying Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody to be served by first class mail, postage prepaid, on Luke Walker, 600 Jefferson Street, Suite 1000, Lafayette, Louisiana 70501.

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F. Clinton Broden