No. _____

In the
Supreme Court of the United States

Sean David Pickett,
Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit in case number 20-13149

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Eleventh Circuit have jurisdiction to deny a certificate of appealability based on the Eleventh Circuit's determination that the petitioner cannot prevail on the merits of the underlying substantive claim?
2. This Court's decisions provide that a claim sounding in a miscarriage of justice overrides any non-jurisdictional impediment to a merit's determination. Does Rule 60 (b) permit relief from a § 2255 judgment when no other procedure exists to permit a merits review of a claim of actual innocence?

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Sean David Pickett, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The Eleventh Circuit decision under review is unpublished and is reproduced at the Appendix at pages 1-37.

JURISDICTION

The Eleventh Circuit issued its opinion on August 11, 2021. *Pickett v. United States*, 20-13149, 2021 WL 3521062 (11th Cir. 2021). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section (a) of 28 U.S.C. § 2253 provides, in relevant part:

> "[i]n a habeas corpus proceeding or a proceeding under § 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held."

Section (b) of 28 U.S.C. § 2253 provides, in relevant part:

> "[t]here shall be no right of appeal from a final order in proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings."

Section (a) of 28 U.S.C. § 2255 provides, in relevant part:

> "[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the

> sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

Section (h) of 28 U.S.C § 2255 provides, in relevant part:

> "[a] second or successive motion must be certified as provided in § 2244 by a panel of the appropriate court of appeals to contain –
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that reasonable factfinder would have found the movant guilty of the offense; or
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

STATEMENT OF THE CASE

In October of 2012, a government agent discovered that a computer owned by Mr. Pickett contained child pornography. (App. at 5). The government subsequently indicted Mr. Pickett for possessing the child pornography. (App. at 5). Although Mr. Pickett insisted on his innocence, on December 19, 2013, a jury convicted him. (App. at 6).

On January 4, 2014, based on the guilty verdict being contrary to the weight of the evidence, Mr. Pickett sough a judgment notwithstanding the verdict. (App. at 6). The district court denied the new trial motion. (App. at 13). Mr. Pickett appealed this denial as well as the jury verdict. *Id.* While recognizing the purely circumstantial nature of the government's case, the appeals court affirmed the verdict and the district court's denial of the motion. *United States v. Pickett*, 602 Fed. Appx. 774

(11th Cir. 2015); (App. 9 -11). On May 11, 2015, the Supreme Court denied certiorari. (App. at 9).

In 2016, Mr. Pickett timely sought to vacate the criminal judgment under 28 U.S.C § 2255. (App. at 14). Without conducting an evidentiary hearing, the district court denied the § 2255 motion. (App. at 20-26). Both the district court and the 11th Circuit refused to issue a certificate of appealability. (App. at 11 and 20-26).

Mr. Picket knew that evidence existed which demonstrated both his actual innocence and that trial counsel performed inadequately by failing to obtain the evidence, which showed that the child pornography had been transferred to Mr. Pickett's computer by a third party. The district court's refusal to conduct an evidentiary hearing, however, prevented Mr. Picket from introducing this evidence in the § 2255 proceedings.

Further Mr. Pickett learned that before his conviction had become final, but after the verdict and judgment, the Supreme Court had retroactively narrowed the definition of the *mens rea*, or "knowing." *United States v. Henderson,* 135 S. Ct. 1780 (2015); see also, *Rehaif*, 139 S. Ct. 2191 (2019). If the district court had correctly instructed the jury on the meaning of the knowing element, then the jury should have acquitted Mr. Pickett. Consequentially, Mr. Pickett's § 2255 claim sounds in actual innocence.

In June of 2020, Mr. Pickett filed a Rule 60(b)(4) and (6) motion seeking relief from the § 2255 judgment. (App. at 5). In the Rule 60(b) motion, Mr. Pickett alleged that the original § 2255 proceedings were defective, as the district court failed to

conduct an evidentiary hearing and as an intervening change in the law showed in his actual innocence. *Id.* The district court summarily dismissed the Rule 60(b) motion as an unauthorized "second or successive § 2255." (App. at 7). This appeal ensued.

On August 11, 2021, the 11th Circuit affirmed in part and dismissed in part. It concluded that the district court had erred in construing Pickett's challenge to the district court's decision not to hold an evidentiary hearing as an impermissibly successive § 2255 motion. (App. at 11). The court agreed the challenge was not a new ground for relief, but it was a challenge to a defect in the original § 2255 proceedings. *Id.* As such, Pickett's challenge to the district court's decision not to a hold an evidentiary hearing is permissible under a Rule 60(b) motion. *Id.* Nonetheless, the appeals court found that the underlying claim lacked sufficient merit to warrant further review. *Id.* The court concluded that reasonable jurists would not debate the district court's denial of the evidentiary hearing claim as Pickett was not entitled to an evidentiary hearing on any of his claims in the original § 2255 motion, stating that they were unsupported, speculative, and frivolous. *Id.* As such, the court denied a COA and dismissed for lack of jurisdiction in that respect. *Id.* Finally, the Eleventh Circuit held that the district court lacked jurisdiction as to the actual innocence claim since that involved a merits determination and that required authorization by the Court of Appeals to file a second or successive motion, which Pickett had not obtained. (App. at 8-11).

REASONS FOR GRANTING THE WRIT

1. The Eleventh Circuit has announced a rule of law that departs from this Court's precedent on a federal appellate court's jurisdiction over an appeal. This Court should grant certiorari to correct the conflict and uncertainty between this Court's and the Eleventh Circuit's rule.

The Eleventh Circuit's opinion displays a classic example of the "begging the question" fallacy in denying Pickett's appeal. The Eleventh Circuit uses this fallacy to circumvent this Court's holding in *Buck v. Davis*, 137 S. Ct 759 (2017), and to escape the statutory duty to liberally grant certificates of appealability. See 28 U.S.C. § 2253 (a).

The Eleventh Circuit concluded that Pickett did not deserve a certificate of appealability because "the district court's denial of the [Rule 60(b)] evidentiary hearing claim" was correct since no jurist of reason would debate the district court's original § 2255 ruling ("Pickett was not entitled to an evidentiary hearing on any of his claims in the original § 2255 motion… .") (App. at 11). In other words, the Eleventh Circuit denied not only Pickett's appeal but also a certificate of appealability based on a merit determination of the original § 2255 – rather than the debatability of the district court's Rule 60(b) ruling. *Id.* This Court expressly held that this practice violates the governing statute and constitutes a jurisdictional defect. *Buck,* 137 S. Ct. at 773.

Pickett sought relief from his § 2255 judgment because the district court failed to adhere to the required statutory procedures and governing authority concerning an evidentiary hearing. The Eleventh Circuit recognized one of Pickett's claims as a legitimate Rule 60(b) claim, thus reversed the district court ruling that Pickett's Rule

60(b) motion was controlled by the rules governing second or successive § 2255 motions. (App. at 11). The appeals court, however, denied Pickett a certificate-of-appealability (COA) because it concluded that no jurists of reason would have debated the district court's ruling that Pickett's original § 2255 claims were meritless. *Id.* This amounts to merely an uninformative recitation of the statutory rule.

The 11th Circuit's recitation of the correct COA test obscures the fact that it essentially ignored the statutory procedure and decided Pickett's appeal on the merits. (App. at 8). Further, in the Rule 60(b) motion, Pickett argued that the district court's failure to allow either discovery or an evidentiary hearing prevented Pickett from proving his allegations of ineffective assistance of counsel and government misconduct. (App. 6-7). Further, in the Rule 60(b) Pickett alleged (but did not show, because that would have been a second or successive § 2255) what evidence would have been produced in the § 2255. (Id.). The appeals court, without any further evidence (given the denial of the Rule 60(b) motion), concluded that the original § 2255 merits decision was correct and could not be challenged.

The Eleventh Circuit effectively made the same fundamental error this Court has identified and corrected in other circuits. See, e.g., *Buck*, 137 S. Ct. at 773. In *Buck*, this Court recognized some circuits within the Court of Appeals were short cutting the statutorily-required process. *Id.* at 773. This Court thereby found that the circuit (appeals) court was acting without jurisdiction. *Id.* at 773 (*citing Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003)).

This Court held that:

> "[a]t the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed to deserve further."

Id. at 773. Further, this Court directed that "[this] threshold question should be decided without full consideration of the factual or legal bases adduced in support of the claims." *Id.* (*internal marks omitted*). This Court emphasized, "[w]hen a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying the denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." *Id.* (*internal citation and marks omitted*).

The Eleventh Circuit initially overruled the district court's summary ruling that Pickett's Rule 60(b) motion was in substance a second or successive § 2255 motion. (App. at 11). Then without issuing a COA, let alone briefing or argument, the Eleventh Circuit conducted a merits analysis of the § 2255 claim underlying Rule 60(b) claim – whether the § 2255 court should have conducted an evidentiary hearing. Thereafter, the Eleventh Circuit panel decided the § 2255 claim's merits and concluded that the Rule 60(b) claim was meritless. (App. 9-10). Therefrom, the appeals court concluded that no jurist of reason would find debatable the district court's denial of the Rule 60(b) motion, thus no COA would issue, and Pickett would not be heard. (App. 11).

The Eleventh Circuit's decision process here parallels that process which this Court rejected in *Buck* and *Miller*. *See Buck* 137 S. Ct. at 773. This Court should grant the writ and vacate the Eleventh Circuit's order denying Pickett's appeal,

because the Eleventh Circuit lacked the authority and power (jurisdiction) to enter said Order. By doing so, this Court would realign the Eleventh Circuit with this Court's precedent, the COA rules used by the Eleventh's circuit sibling circuits, and most importantly, the governing statute.

2. The federal circuit courts of appeal are in conflict over whether a Rule 60(b) permits relief from a § 2255 judgment when the Rule 60(b) claim rests on a retroactive interpretation of the substantive law that demonstrates a miscarriage of justice occurred.

Pickett argued a retroactive change in the substantive law reveals a miscarriage of justice, thus a Rule 60(b) motion presenting the claim is not governed by "second or successive" § 2255, but instead is meant to correct a defect in the original proceeding. That is, Pickett argued that the district court applied the wrong law.

The panel's miscarriage-of-justice (actual innocence) ruling illuminates the tension between two lines of this Court's authority. On the one hand, an unbroken line of this Court's decisions that hold that the miscarriage-of-justice doctrine elevates a claim of actual innocence above procedural impediment. On the other hand, the Court speaks of the Antiterrorism Effective Penalty Death Act ("AEDPA") being preeminent. Compare *Perkins v. McQuiggin*, 568 U.S. 977 (2012) and *Gonzalez v. Crosby*, 545 U.S. 524 (2005).

To begin, this Court implicitly acknowledged that the Constitution does not allow any branch of the federal government, nor any State government, to deprive an actually innocent individual of their liberty or property. *See generally Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853 (1993); *Murray v. Carrier*, 477 U.S. 478, 496, n.

9 (1986) ("accordingly, we think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."). The Court recognizes the fallibility of both people and the judicial process, thereby adopting and refining the ancient principle that no court may tolerate a miscarriage of justice. *See Montgomery v. Louisiana*, 577 U.S. 190 (2016); *Ex parte Siebold*, 100 U.S. 371 (1879).

The miscarriage of justice doctrine crafted by this Court overrides all non-jurisdictional limitations to a merits hearing. This Court's decisions provide that the procedural bars and statutory defenses are overridden by a properly alleged miscarriage-of-justice claim. *See, e.g. McQuiggin*, 569 U.S. 383 at 392 (2013) (a miscarriage-of-justice claim generates an equitable exception to the statute of limitations); *Bousley v. United States*, 523 U.S. 614 (1998) (a miscarriage of justice overcomes a procedural default); *Calderon v. Thompson*, 523 U.S. 538, 558-59 (1998) (a miscarriage of justice permits recall of the mandate); *Kuhlman v. Wilson*, 477 U.S. 436, 454 (1986) (a miscarriage of justice overrides a collateral estoppel and res judicata). Other circuits have found or indicated that a miscarriage of justice constitutes an extraordinary circumstance which permits exceptional remedial procedures. *See Satterfield v. DA Phila., et. al*, 872 F. 3d 152 (3rd Cir. 2017) (a miscarriage of justice allows for use of Rule 60 (b)); *Reyes-Requena v. United States*, 243 F. 3d 893, 904 (5th Cir. 2001) (a miscarriage of justice is an essential component of animating the savings clause and permitting a § 2241 habeas corpus petition); *see*

also Trenkler v. United States, 536 F. 3d 85 (1st Cir. 2005) (indicating miscarriage of justice permits use of ancient writs).

The Eleventh Circuit, however, holds that innocence does not excuse a defendant's failure to raise a claim even if the claim was "unacceptable to that particular court at that particular time." *McCarthan v. Dir. Of Goodwill Industries-Suncoast, Inc.,* 851 F. 3d 1076, 1087 (11th Cir. 2017). In the same decision, the Eleventh stated that, "[d]espite circuit precedent, *McCarthan* could have tested the legality of his detention by requesting we reconsider our precedent. . . ." *Id.*

Accordingly, out of an abundance of caution, and as suggested by the *McCarthan* opinion, Pickett requested the Eleventh Circuit to reconsider whether the miscarriage-of-justice doctrine creates an equitable exception to the judicial rule prohibiting Rule 60(b) relief predicated upon a subsequent change in the substantive law that shows the defendant is actually innocent. That effort was denied. (App. 1).

Pickett points out the panel relied on *obiter dictum* for its legal premises ascribing primacy to AEDPA restrictions: "[a] Rule 60(b) motion based on a purported change in the substantive law governing the claim is not a reason justifying relief because it circumvents the successive petition process. (App. 8) (quoting *Gonzalez*, 545 U.S. at 531-32 (2005)). Significantly, however, *Gonzalez* dealt with a change in the procedural law, the Court's comment about changes in substantive law were irrelevant to the holding pure *orbiter dictum*.

This Court should address the fundamental question of whether the United States may punish its citizens for innocent conduct.

In the original § 2255, Pickett alleged that his trial counsel failed to investigate or introduce exculpatory evidence. The district court never gave Pickett the opportunity to present evidence of trial counsel error. Circuit law prohibits Pickett from presenting that evidence in a Rule 60(b) motion, or it becomes a second or successive § 2255 motion. *See Gonzalez*, 545 U.S. at 536. Effectively, the Eleventh Circuit condemned a citizen to punishment for life without any court ever considering tangible evidence of innocence Pickett purposely did not discuss.

This Court should expressly find that Rule 60(b)(6) permits a habeas petitioner to obtain relief from a § 2255 judgement when a retroactive change in the law shows the § 2255 court applied the wrong law.

CONCLUSION

In order to provide certainty in all circuits and for all habeas petitioners, this Court should vacate the Eleventh Circuit's opinion and remand the matter to the Eleventh Circuit with direction for the Eleventh to grant a certificate of appealability; or even more forcefully this Court should vacate the opinion and grant the COA itself.

This Court should grant the writ in order to establish once and for all the preeminence of the miscarriage of justice doctrine. This Court should express in no uncertain terms that every court, with proper jurisdiction, must address the merits of a bona fide actual innocence claim: because the Constitution does not tolerate the State (whether local or federal) punishing an innocent individual.

No. _____

IN THE
Supreme Court of the United States

Sean David Pickett,
Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Eleventh Circuit, No. 20-13149

APPENDIX

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August 22, 2022

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Order of the Eleventh Circuit Court of Appeals

Denying Pickett's Petition for Rehearing En Banc

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-13149-DD

SEAN DAVID PICKETT,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

BEFORE: BRANCH, GRANT and DUBINA, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Sean David Pickett is DENIED.

ORD-41

Opinion of Appellate Court's Order to which this Petition is directed

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-13149
Non-Argument Calendar

D.C. Docket Nos. 1:16-cv-24605-WPD,
1:13-cr-20599-WPD-1

SEAN DAVID PICKETT,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(August 11, 2021)

Before BRANCH, GRANT and DUBINA, Circuit Judges.

PER CURIAM:

Appellant Sean David Pickett appeals the district court's order dismissing his Federal Rule of Civil Procedure 60(b) motion to reopen his 28 U.S.C. § 2255

proceedings. Pickett's Rule 60(b) motion raised two claims for relief: a claim of actual innocence and a claim challenging the district court's denial of his initial § 2255 motion to vacate, set aside, or correct his sentence without first conducting an evidentiary hearing. The district court construed the Rule 60(b) motion as an impermissibly filed successive § 2255 motion and dismissed for lack of jurisdiction. Alternatively, the court denied the Rule 60(b) motion on the merits. On appeal, Pickett argues that the district court erred in dismissing his Rule 60(b) motion as a construed successive § 2255 motion. Specifically, Pickett asserts that the district court erred in not considering his actual-innocence claim because it relied on an extraordinary circumstance in a substantive change in the law created by *Rehaif v. United States*, 588 U.S. ___, 139 S. Ct. 2191 (2019), and *United States v. Henderson*, 575 U.S. 622, 135 S. Ct. 1780 (2015). Pickett also argues that the district court erred in dismissing his claim relating to the district court's failure to conduct an evidentiary hearing in his previous § 2255 proceedings. After reviewing the record and reading the parties' briefs, we affirm the district court's order of dismissal.

I.

An indictment charged Pickett with three counts of receiving computer images of child pornography, in violation of 18 U.S.C. § 2252(a)(2), (b)(1), and one count of possessing a computer that contained child pornography, in violation

of 18 U.S.C. § 2252(a)(4)(B), (b)(2). A jury found him guilty of the charged offenses, and the district court sentenced him to a total term of 120 months' imprisonment. On direct appeal, we affirmed Pickett's convictions. *United States v. Pickett*, 602 F. App'x 774 (11th Cir. 2015). In 2016, Pickett filed a § 2255 motion to vacate, raising numerous claims of ineffective assistance of counsel. The government responded that the evidence against Pickett was so overwhelming that he could not demonstrate that any of his counsel's alleged deficiencies affected the outcome of the trial. Thus, the government argued that the district court should deny Pickett's § 2255 motion without an evidentiary hearing.

In January 2017, the district court denied Pickett's § 2255 motion without holding an evidentiary hearing, finding that Pickett could not show prejudice from his trial counsel's alleged deficiencies. The district court also denied Pickett a certificate of appealability ("COA"). Pickett appealed the district court's order denying his § 2255 motion and moved for a COA, which this court denied. In June 2020, Pickett filed the present motion to reopen his § 2255 proceedings under Rule 60(b)(4) and Rule 60(b)(6). Pickett argued that the district court's order denying his § 2255 motion without an evidentiary hearing rendered the proceedings defective and denied him an opportunity to be heard, such that the district court did not address his specific claims. Pickett also claimed that intervening changes in the law established an extraordinary circumstance that justified Rule 60(b)(6) relief

because the changes in the law suggested that he was actually innocent of the charges because the government failed to prove that he knew of the pornography on his computer. Pickett further contended that the § 2255 proceedings did not provide him an opportunity to demonstrate ineffective assistance of counsel and present other evidence to support his claim of actual innocence.

The district court dismissed Pickett's motion after construing it as a successive § 2255 motion. The district court found that Pickett's Rule 60(b) motion did not concern a defect in the original § 2255 proceedings and that, thus, it was an improperly filed successive § 2255 motion. The district court stated that its summary denial of Pickett's previous § 2255 motion was proper because Pickett made no good cause showing for discovery, was not entitled to an evidentiary hearing, and did not have any rights violated. The district court also noted that Pickett should have raised his present challenges to the denial of his §2255 motion on appeal after the district court denied the motion. In addition, the district court found that the new changes in the law did not apply to Pickett's case. Alternatively, the district court denied Pickett's motion on the merits and instructed Pickett to petition this court for permission to file a successive §2255 motion. The district court denied a COA, and Pickett then perfected this appeal.

II.

Although we typically review the denial of a Rule 60(b) motion for abuse of discretion, we review *de novo* a district court's decision to construe such a filing as a second or successive § 2255 motion. *See Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003). Upon a motion under Rule 60(b), "the court may relieve a party . . . from a final judgment, order or proceeding for the following reasons:" (1) mistake; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) the judgment has been satisfied; (6) or any other reason that justifies relief.

Fed. R. Civ. P. 60(b)(1)-(6).

Rule 60(b) cannot be used to circumvent restraints on filing second or successive § 2255 motions. *Farris*, 333 F.3d at 1216. (citation omitted). Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a prisoner seeking to file a "second or successive" § 2255 motion must "first file an application with the appropriate court of appeals for an order authorizing the district court to consider it." *Id.*; 28 U.S.C. § 2255(h). We will treat a Rule 60(b) motion as a successive § 2255 motion when it presents a new ground for relief from a judgment of conviction or attacks the federal court's previous resolution of a claim on the merits. *Gonzalez v. Crosby*, 545 U.S. 524, 531, 125 S. Ct. 2641, 2647 (2005) (addressing a § 2254 habeas petition). "[A] Rule 60(b) motion based on a purported change in the substantive law governing the claim" is not a reason

justifying relief because it circumvents the successive petition process. *Id.* at 531-32, 125 S. Ct. at 2647-48. A prisoner who has filed a previous § 2255 motion that was denied on the merits must apply for and receive permission from us before filing a second or successive § 2255 motion in the district court. 28 U.S.C. §§ 2244(b), 2255(h). Without our authorization, a district court lacks jurisdiction to consider a second or successive § 2255 motion. *Farris*, 333 F.3d at 1216.

However, a Rule 60(b) motion may raise a "defect in the integrity" of a § 2255 proceeding, such as the court's failure to reach the merits of a claim or allege a fraud on the court. *See Gonzalez*, 545 U.S. at 532, 538, 125 S. Ct. at 2648. The Supreme Court in *Gonzalez* gave several examples of a proper Rule 60(b) challenge to a prior ruling that preluded a merits determination, listing "a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *Id.* at 532 n.4, 125 S. Ct. at 2648 n.4.

We conclude from the record that the district court properly construed Pickett's actual-innocence claim due to a substantive change in the law as an impermissibly filed successive § 2255 motion. Pickett's claim, predicated on *Rehaif* and *Henderson*, does not address a defect in the original proceedings and only serves to present a new ground for relief. Allowing Pickett to raise this claim would circumvent the statutory requirement to file an application with us before filing a successive habeas petition on a new rule of law. Accordingly, the district

court correctly concluded that it lacked jurisdiction over the claim, and we affirm in that respect.

III.

"[A] certificate of appealability is required for the appeal of any denial of a Rule 60(b) motion for relief from a judgment in a 28 U.S.C. § 2254 or 28 U.S.C. § 2255 proceeding." *Jackson v. Crosby*, 437 F.3d 1290, 1294 (11th Cir. 2006) (quotation marks and brackets removed). We lack jurisdiction to consider an appeal when the petitioner is not entitled to a COA. *Id.* "[I]n cases involving denials of Rule 60(b) motions on procedural grounds without reaching the merits of any constitutional claims, . . . a petitioner will be granted a [COA] only if he makes *both* a substantial showing that he had a valid claim of a denial of a constitutional right, *and* a substantial showing that the procedural ruling is wrong." *Id.* at 1295 (quotation marks and brackets omitted). This requires that the issue "must be debatable among reasonable jurists." *Id.* (quotation marks omitted).

In a § 2255 proceeding, "[a] petitioner is entitled to an evidentiary hearing if he alleges facts that, if true, would entitle him to relief." *Winthrop-Redin v. United States*, 767 F.3d 1210, 1216 (11th Cir. 2014) (quotation marks omitted); *see also* 28 U.S.C. § 2255(b). But "a district court need not hold a[n evidentiary] hearing if the allegations are patently frivolous, based upon unsupported generalizations, or

affirmatively contradicted by the record." *Winthrop-Redin*, 767 F.3d at 1216 (quotation marks omitted).

We conclude from the record that the district court erred in construing Pickett's challenge to the district court's decision not to hold an evidentiary hearing as an impermissibly successive § 2255 motion. This challenge is not a new ground for relief but is a challenge to a defect in the original § 2255 proceedings. Thus, it can permissibly be brought in a Rule 60(b) motion.

Nevertheless, because the district court alternatively denied Pickett's evidentiary-hearing claim on the merits, we lack jurisdiction over the appeal as to this portion of the Rule 60(b) motion unless we determine that Pickett is entitled to a COA on the issue. *See Jackson*, 437 F.3d at 1294. We conclude that reasonable jurists would not debate the district court's denial of the evidentiary-hearing claim because Pickett was not entitled to an evidentiary hearing on any of his claims in the original § 2255 motion, as the claims were unsupported, speculative, and frivolous. *See Winthrop-Redin*, 767 F.3d at 1216. Accordingly, for the aforementioned reasons, we deny a COA, and dismiss for lack of jurisdiction in that respect.

AFFIRMED IN PART, DISMISSED IN PART.

District Court's Amended Order Denying Rule 60 (b) Motion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

SEAN DAVID PICKETT,

Movant,

Vs.

UNITED STATES OF AMERICA,

Respondent
_____/

CASE NO. 16-24605-CV-DIMITROOLEAS
(13-20599-CR-DIMITROULEAS)

AMENDED[1] ORDER DENYING MOTION

THIS CAUSE is before the Court on Defendant Pickett's June 19, 2020 Motion to Re-open [CR-DE-149]. The Court has considered the Court file and Pre-Sentence Investigation Report (PSIR) and having presided over the trial of this cause, finds as follows:

1. On August 13, 2013, Pickett was indicted and charged with three counts of Receipt of Child Pornography and one count of Possession of Child Pornography [CR-DE-26].

2. Trial commenced on December 16, 2013. [CR-DE-69]. The Government called six (6) witnesses in its case in chief; Pickett called seven (7) witnesses, and the Government called David Castro as a rebuttal witness. The Government introduced thirty-three (33) exhibits; the defense introduced twenty-one (21) exhibits [CR-DE-73].

3. On December 19, 2013, Pickett was found guilty on all four counts. [CR-DE-86].

4. On January 15, 2014, this Court denied a Motion for New Trial. [CR-DE-94].

5. On February 27, 2014, Pickett was sentenced to 120 months in prison. [CR-DE-112]. It was a slight downward variance [CR-DE-129, p. 75].

[1] This order amends the style of the case and adds the prosecutor's name to the copied list.

6. On March 16, 2015, the Eleventh Circuit Court of Appeal affirmed. [CR-DE-136]. *U.S. v. Pickett*, 602 Fed. Appx. 774 (11th Cir. 2015). Mandate issued on May 11, 2015. On November 2, 2015, the United States Supreme Court denied certiorari. [CR-DE-137]. *Pickett v. U.S.*, 136 S. Ct. 428 (2015).

7. In a timely collateral attack, Pickett contended that his trial counsel was ineffective in:

A. Failing to adduce expert testimony about hacking with a virus.

B. Failure to use Team Viewer as a demonstrative aid.

C. Poor presentation of expert witness Robert Moody.

D. Failing to present defense that outsiders can hack a computer.

E. Failed to impeach government witnesses with Defense Exhibit 2; which would have allegedly showed the government used an edited exhibit.

F. Failed to object to prosecutor's denigration of the defense closing argument.

G. Failed to object to prosecutor's comment during closing on Defendant's right to remain silent.

H. Rendered an ineffective closing argument.

I. Failed to object to the Government's expert testimony.

The Court denied relief on January 6, 2017 [CR-DE-142]. On December 20, 2017, the Eleventh Circuit denied a certificate of appealability [DE-23 in 16-24605cv].

8. Recently, Picket sought a compassionate release. The Court denied relief on June 11, 2020. [CR-DE-147].

9. In this latest collateral attack, three years later, Pickett seeks to re-open his previous motion to vacate, utilizing Rules 60(b)(4) and (6).

10. First, he complains about the summary denial of his previous motion to vacate and the absence of discovery or an evidentiary hearing. Pickett alleges that his due process rights were violated. However, in some situations, a summary denial is contemplated by the rules. Rule 4(d), Section 2255

Proceedings. Discovery is an exception to the rule. Here, no good cause was shown. *See, Williams v. Beard,* 637 F. 3d 195 (3rd Cir. 2011). There is no right to an evidentiary hearing. *See, Kuenzel v. Allen,* 488 F. 3d 1341 (11th Cir. 2007). No due process rights violation has been shown. Moreover, the time to have complained about those perceived slights was on his appeal.

11. Second, he complains that *Rehaif v. U.S.,* 139 S. Ct. 2191 (2019) is a basis for relief. *Rehaif* concerned a different statute. *See, U.S. v. Gray,* 2020 WL 2308443 (N.D. Ohio 2020).

12. Third, Pickett complains about ineffective assistance of counsel and government misconduct. Specifically, Pickett contends that by using the word "play', trial counsel conceded Pickett's guilt. He also complains that trial counsel failed to investigate the case. According to Pickett, the government failed to pursue or preserve exculpatory evidence. Those matters were or could have been raised in Pickett's previous motion to vacate and should not be heard now. *See, Young v. FCI Miami Warden, 805 Fed Appx. 829 (2020).*

13. Fourth, Pickett complains that the Court's instructions on constructive possession were defective. The Court's instructions were correct. [DE-78, pp. 9, 13, 17, 18].

14. In effect, this is a successive motion to vacate; the Court lacks jurisdiction over this motion. *Gonzalez v. Crosby,* 545 U.S. 524 (2005). Pickett's complaints do not concern a defect in the integrity of the original motion to vacate.

Wherefore, Pickett's Motion to Re-open {DE-149] is Dismissed. Alternatively, it is Denied.

Pickett may now petition the Eleventh Circuit for permission to file a successive motion to vacate. The Court denies a certificate of appealability.

The Clerk shall mail a copy of this order to Pickett

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 26th day of June, 2020.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Manolo Reboso, AUSA

Sean Pickett #01495-104

FCC_Low

P.O. Box 1031

Coleman, FL. 33521-1031

District Court Final Judgment and Order Denying § 2555 Motion to Vacate

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

SEAN DAVID PICKETT,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

CASE NO. 16-24605-CIV-DIMITROULEAS
(13-20599-CR-DIMITROULEAS)

FINAL JUDGMENT AND ORDER DENYING MOTION TO VACATE

THIS CAUSE is before the Court on Movant Pickett's November 2, 2016 Motion to Vacate [DE-1]. The Court has considered the Government's December 5, 2016 Response [DE-4] and Pickett's December 30, 2016 Reply [DE-9], and having reviewed the Court file and Pre-Sentence Investigation Report (PSIR) and having presided over the trial of this cause, finds as follows:

1. On August 13, 2013, Pickett was indicted and charged with three counts of Receipt of Child Pornography and one count of Possession of Child Pornography [CR-DE-26].

2. Trial commenced on December 16, 2013. [CR-DE-69]. The Government called six (6) witnesses in its case in chief; Pickett called seven (7) witnesses, and the Government called David Castro as a rebuttal witness. The Government introduced thirty-three (33) exhibits; the defense introduced twenty-one (21) exhibits [CR-DE-73].

3. On December 19, 2013, Pickett was found guilty on all four counts. [CR-DE-86].

4. On January 15, 2014, this Court denied a Motion for New Trial. [CR-DE-94].

5. On February 27, 2014, Pickett was sentenced to 120 months in prison. [CR-DE-112].

6. On March 16, 2015, the Eleventh Circuit Court of Appeal affirmed. [CR-DE-136]. *U.S. v. Pickett*, 602 Fed. Appx. 774 (11th Cir. 2015). Contrary to Pickett's assertion that the Eleventh Circuit only found the evidence to be minimally sufficient, the appellate court found that the circumstantial

evidence was strong, rendering any evidentiary rulings as harmless. *Id.*at 778. Mandate issued on May 11, 2015. On November 2, 2015, the United States Supreme Court denied certiorari. [CR-DE-137]. *Pickett v. U.S.*, 130 S. Ct. 428 (2015).

7. In this timely collateral attack, Pickett contends that his trial counsel was ineffective in:

A. Failing to adduce expert testimony about hacking with a virus.

B. Failure to use Team Viewer as a demonstrative aid.

C. Poor presentation of expert witness Robert Moody.

D. Failing to present defense that outsiders can hack a computer.

E. Failed to impeach government witnesses with Defense Exhibit 2; which would have allegedly showed the government used an edited exhibit.

F. Failed to object to prosecutor's denigration of the defense closing argument.

G. Failed to object to prosecutor's comment during closing on Defendant's right to remain silent.

H. Rendered an ineffective closing argument.

I. Failed to object to the Government's expert testimony.

However, Pickett concedes that trial counsel had a difficult road to hoe, [DE-1, p. 26], but was able to:

A. Highlight the unprotected nature of Pickett's network and computer.

B. Highlight the inadequacy of Pickett's anti-virus software.

C. Highlight that Pickett's computer operated 24/7 as it hosted several websites.

D. Emphasize that the shared folder in which the child pornography was found was unprotected and hidden; the folder was not visible on the desktop screen.

E. Show that some child pornography files had never been played.

F. Show that the wiping program had never been run.

G. Underscore that vital forensic evidence was lost when agents seized the computer.

H. Show that other evidence was possibly lost when agents failed to seize the modem. [DE-1, p. 7].

Pickett contends that trial counsel should have both pinpointed the real perpetrator and also built a strong case for someone else's guilt. [DE-1, p. 28]. Yet, Pickett has failed to pinpoint the identity of that fictitious person.

8. First, Pickett complains that trial counsel should have introduced expert testimony and anecdotal literature about how outsiders could have hacked his computer or installed a virus. However, trial counsel did call two experts; it is not clear that another expert would have been allowed to testify, given a probability that such a witness's testimony would have been excluded as cumulative. Additionally, Pickett does not explain how a 2009 CBS News article, 2016[1] articles in *Security* magazine, a 2013 post on dottech, a 2013 article in techweekEurope , a 2013 Annual Report in Internet Watch Foundation, a July 2, 2014 article in *Network World* (after the trial) or a June 2014 article in *The Hacker* News (after the trial) would have been admissible at trial. It is highly doubtful that such articles would have been admissible under Rule 703, Fed. R. of Evid[2]. *Glowczenski v. Taser, Int'l,* 928 F. Supp 2d 564, 576 (E.D.N.Y. 2013) *aff'd, in part,* 594 Fed. Appx. 923 (2nd Cir. 2014). Nevertheless, defense expert Robert Moody testified about anecdotal cases that he had been involved in. [CR-DE-127, pp. 36-38]. Moody testified about his investigation concerning owners of a company being unaware of their computers being used for storing child pornography. Moody also related an instance where a CPA firm in New Jersey experienced someone from the outside pumping child pornography into their computers. So, the jury was informed about outside hackers infiltrating computers with child pornography. Additional anecdotal literature, if admissible, would have been cumulative and would not have affected

[1] Over two years after the trial.

[2] *Allen v. Safeco Ins. Co.*,, 782 F. 2d 1517, 1519-20 (11th Cir. 1986) is distinguishable in that it held that the trial court did not err in permitting cross-examination of the insurance company's expert by reading from an arson magazine where the expert acknowledged that the magazine was somewhat authoritative and that the author directed a university department that enjoyed a good reputation. It is highly unlikely that this court would have allowed Pickett's expert to bolster his testimony with the proffered "learned treatises".

the outcome of the case. Moody was also able to testify that the agents' pulling the plug on the computer would have destroyed evidence of intrusion. [CR-DE-127, p. 79]. No prejudice has been shown, as the hacker defense was presented and rejected by the jury. .

9. Second, Pickett complains that trial counsel should have used a computer program, like Team Viewer, to demonstrate how hackers can invade a computer and control it remotely. However, there is no showing that such a demonstration was possible or that it would have affected the outcome of the case. First, there is no showing that the Court would have found a substantial similarity of conditions so as to allow such a demonstration. *See, U.S. v. Gaskell,* 985 F. 2d 1056, 1060, n.1 (11th Cir. 1993). Second, there is no non-speculative showing that such a demonstration would have affected the outcome of the case. There was never an argument that hacking could not occur, only whether it was reasonable to believe it might have occurred in this case. Here, given the strong circumstantial evidence, no demonstration would have affected the outcome of the case. Moreover, the Government had listed Sebastian Gogola as a witness and Team Viewer log files as evidence in this case [CR-DE 57, 61], so that such a demonstration may have proven to be counter-productive to the defense. No prejudice has been shown by the strategy used.

10. Third, Pickett complains that trial counsel ineffectively presented expert forensic computer examiner Robert Moody. However, Moody did testify that agents lost important information for determining whether some remote hacker or virus infiltrated Pickett's computer: both when they unplugged it and when they failed to seize the modem. [CR-DE-127, pp. 29, 31-35, 63, 69-70, 75-76]. Moody explained that Pickett had an unsecured wireless network. [CR-DE-127, p. 21]. Moody criticized the case agent's testimony as being inaccurate. [CR-DE-127, p. 23]. Moody was critical of the agents' failure to capture the time/date stamp, which could have assisted in verifying the accuracy of the dates. [CR-DE-127, p. 28]. Moody explained that an open modem would have allowed easy access from the outside, and that if the modem had been seized, that outsider could have been identified. [CR-DE-127,

p. 30-31]. Moody also explained how Advanced Volatile Threats[3] can allow remote access. [CR-DE-127, p. 35]. Moody also found it unusual for the child pornography not to have been found on other devices in Pickett's home. [CR-DE-127, p. 41]. Indeed Moody was able to state that he found no evidence that Pickett had any knowledge that there was child pornography on his computer. [CR-DE-127, p. 42]. He testified one would be less likely to download child pornography while sharing a room. [CR-DE-127, p. 80]. Moody also explained that Pickett's anti-virus software would not have prevented such compromises. [CR-DE-127, pp. 36, 69]. Moody also explained that eMule was hidden and could not be seen on Pickett's computer. [CR-DE-127, p. 39]. Moreover, Moody's explanation that a Mac IP address was like a fingerprint was not confusing. [CR-DE-127, p. 31]. Finally, Moody explained how someone from the outside could execute a program through RAM even with an antivirus program in place. [CR-DE-172, pp. 35-36]. Moody's testimony was consistent with trying to establish a "hacker" defense, but the strong evidence against Pickett was more compelling to the jury than a mere possibility.

11. Fourth, Pickett complains that trial counsel failed to adequately articulate his hacking defense. A hacking defense was presented, but as part of a larger defense of reasonable doubt as to the Government's satisfying its burden to establish the element of knowledge. In his opening statement, defense counsel criticized shoddy police work, preventing the discovery of the real person who committed this crime. [CR-DE-125, p. 199]. Counsel went on to argue that the investigation would have been relevant as to "who could have hacked a computer." [CR-DE-125, p. 200]. Trial counsel concluded his opening statement by stating that they had the wrong guy. Again, a hacking defense was part of Pickett's reasonable doubt defense. Trial counsel did argue in his closing argument that anyone could have accessed this network without security, whether you lived inside the home or outside. [CR-DE-127, p. 216]. Even the prosecutor referred to "a mysterious hacker" in his closing argument. [CR-DE-127, p. 200]. There was a hacking defense presented. Pickett argues he was prejudiced by how the hacking

[3] Moody testified that such evidence would have been destroyed when the agents pulled the plug on the computer. [CR-DE-127, p. 78].

defense was presented. Moreover, *U.S. v. Lowe,* 795 F. 3d 519 (6th Cir. 2015) is distinguishable from Pickett's case and not binding on this court. No prejudice has been shown.

12. Fifth, Pickett complains that trial counsel failed to impeach the Government's forensic computer analyst Flores with Defense Exhibit 2, which allegedly would have shown that two child pornography videos were not viewed and that the Government exhibits had been edited. Flores testified on December 17, 2013, but Defense Exhibit Two was not introduced into evidence until the next day. [CR-DE-73, pp. 1, 5; CR-DE-127, p. 134]. Therefore, an attempted impeachment during cross examination may have been difficult. Additionally, Flores may not have accepted the exhibit as valid. Flores was not receptive to trial counsel's cross-examination regarding "play counts". [CR-DE-126, pp. 152, 157]. When Defense Exhibit Two was introduced through defense expert Richard Connor, trial counsel took that opportunity to highlight the perceived discrepancy. [CR-DE-127, pp. 136-137]. Trial counsel's apparent strategy was to save the issue for closing argument. [CR-DE-127, p. 228]. No error in the strategy has been shown. Moreover, Pickett has not shown how using Defense Exhibit #2 during the cross-examination of Flores would have effectively impeached Flores or affected the outcome of the case.

13. Sixth, Pickett complains that trial counsel failed to object to the prosecutor's denigration of the defense during closing argument. Pickett complains that trial counsel failed to object to the word: ridiculous. However, the prosecutor's argument was fair and partially in response to defense counsel's reference to smokescreens. [CR-DE-127, p. 227]. Any objection would have been overruled.

14. Seventh, Pickett complains that trial counsel failed to object to the prosecutor's closing argument, which arguably highlighted Pickett's exercise of his right to remain silent. Here, the prosecutor argued that there were two people living in the house and it did not make sense that the wife would download child pornography. Eliminating her, leaves Pickett as the culprit, which was not an improper comment. The prosecutor did not say that Pickett, unlike his wife, did not testify and deny

culpability. [CR-DE-127, pp. 230-231]. *U.S. v. Zitron*, 810 F. 3d 1253, 1259 (11th Cir. 2016). The prosecutor's comment was a fair comment both on the evidence in the case and on defense counsel's argument. *U.S. v. Bonventre*, 646 Fed. Appx. 73, 88 (2d Cir. 2016). Any objection would have been overruled. A mistrial would not have been granted. No prejudice has been shown.

15. Eighth, Pickett complains that trial counsel undermined his own credibility by arguing in closing that the computer was not primarily used by Pickett and contending that Pamela Knowles, Pickett's wife, did not testify that Pickett played computer games into the night.

A. First, there was testimony that Pickett's main computer was a laptop. [CR-DE-12, pp. 98-99]. Pickett's being the primary user of the gray desktop computer does not change the fact that Pickett's main computer was a laptop, and as argued by trial counsel, no child pornography was found on the laptop. The argument was appropriate. No error has been shown.

B. Second, as to Pamela Knowles' statement about playing computer games at night, trial counsel qualified that argument by saying that he never heard it. [CR-DE-127, p. 215]. Co-counsel, Ms. Loftin, questioned Ms. Knowles, not trial counsel, who later made the closing argument. This Court does not allow double-teaming. So, whatever lawyer does the direct examination of a particular witness is also responsible for objecting to cross-examination. Mrs. Loftin would have had the primary responsibility for responding to Ms. Knowles' testimony. Consequently, it may not be surprising if trial counsel did not hear her say that Pickett played video games into the night.[4] Moreover, even the prosecutor conceded that what the lawyers say is not evidence[5] [CR-DE-127, p. 229]. No prejudice has been shown.

16. Ninth, Pickett complains that trial counsel should have objected to Flores, the government's computer forensic expert, testifying that one of Pickett's hard drives may have had remnants of what

[4] Nowhere in Ms. Knowles testimony does it appear that she admitted to saying Pickett played video games "into" the night. [CR-DE-127, p. 7-14]. She said he played video games "at" night. [CR-DE-127, p. 10]. Trial counsel's argument was correct.

[5] So did the Court. [CR-DE-127, p. 198].

could have been child pornography. Trial counsel was able to establish through Robert Moody that the first mention of any remnant files in the case was during cross-examination of Agent Flores in trial. [CR-DE-127, P. 77]. Trial counsel saved the point for his closing argument. No error has been shown by this strategy. Moreover, the best evidence rule is not applicable to what might have been on a computer, but later wiped clean. The Eleventh Circuit viewed this testimony as equivocal and not affecting the outcome of the case. This court agrees. No prejudice has been shown.

17. Tenth, in his reply, Pickett complains about trial counsel's opening the door[6] to what Pamela Knowles told the agents during the search warrant. Initially, Agent Flores stated that Knowles had stated that guests rarely used the grey computer. [CR-DE-126, p. 166]. Upon refreshing his recollection, Flores said that Knowles had said that they didn't have friends over that used the computer. [CR-DE-12t6, p. 167]. During opening statement, trial counsel had told the jury that they would hear from witnesses who had used the computer, but he did not mention Knowles. [CR-DE-125, p. 201]. Indeed, trial counsel did later call such witnesses, including Pamela Knowles. Knowles testified that the agents' reports of what she had said during the search warrant were misstatements. Knowles went on to testify that lots of friends and visitors had used the computer. [CR-DE-127, pp. 8-13]. During the preliminary instructions to the jury, the court had explained how to consider a limiting instruction. [CR-DE-125, pp. 182-183]. When Agent Flores testified about Knowles's statements during the search warrant, the Court gave limiting instructions. [CR-DE-126, pp. 161, 165, 167]. The testimony was offered not for the truth of the matter asserted, but for whether it was said. If believed, it only would have affected the credibility of Flores or later Knowles. No error has been shown.

[6] Trial counsel did not believe that his questions to the agent about any evidence of Pickett's viewing the videos had opened the door. [CR-DE-126, pp. 163-164]. Pickett concedes that trial counsel was able to elicit from some government witnesses that they could not opine that Pickett had any knowledge of child pornography on his computer. [DE-9, p. 4]. It was this precise strategy that was being attempted by trial counsel when he opened the door to Knowles' prior alleged statement to the agents during the search warrant.

18. Eleventh, a defendant is entitled to a fair trial, not a perfect trial. *U.S. v. Wilson,* 788 F. 3d 1298, 1315 (11th Cir.) *cert. denied,* 136 S. Ct. 518 (2015). Here, Pickett received a fair trial. "The Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective counsel". *Burt v. Titlow,* 134 S. Ct. 10, 18 (2013). Counsel need not be perfect, or even very good, to be constitutionally adequate. *McAfee v. Thurmer,* 589 F. 3d 353, 355-56 (7th Cir. 2009). Effective assistance of counsel does not mean that a defendant is entitled to a trial free of mistakes. *Darden v. U.S.,* 708 F. 3d 1225, 1228 (11th Cir.) *cert. denied,* 133 S. Ct. 2871 (2013). Indeed, it is not this court's job to "Monday Morning Quarterback" trial counsel's performance in this case. *Hittson v. Warden,* 759 F. 3d 1210, 1248 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 2126 (2015). He did the best he could, while facing difficult, incriminating evidence.

Wherefore, Pickett's Motion to Vacate [DE-1] is Denied.

The Clerk shall close this case and deny any pending motions as Moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 5th day of January, 2017.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of Record

Opinion of the Appellate Court in the Direct Appeal of Criminal Judgment

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-11004
Non-Argument Calendar

D.C. Docket No. 1:13-cr-20599-WPD-1

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

SEAN DAVID PICKETT,

Defendant–Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(March 16, 2015)

Before HULL and DUBINA, Circuit Judges, and BOWEN,* District Judge.

* Honorable Dudley H. Bowen, Jr., United States District Judge for the Southern District of Georgia, sitting by designation.

PER CURIAM:

After a jury trial, Defendant Sean David Pickett was convicted of three counts of receiving child pornography and one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(2) and (a)(4)(B). For his crimes, Pickett was sentenced to120 months' imprisonment. He now appeals arguing that (1) the evidence adduced at trial failed to prove beyond a reasonable doubt that he knowingly received or possessed child pornography; (2) the district court abused its discretion in allowing a government witness to disclose to the jury an incriminating double hearsay statement allegedly made by his wife; (3) the district court committed plain error by failing to strike the testimony of a government witness that he found a small remnant of what could have been child pornography on an external hard drive; and (4) the district court abused its discretion by allowing into evidence one 59-second video and ten screenshots from the more than seventy child-pornography videos that were found on Pickett's computer. After reviewing the record and reading the parties' briefs, we affirm Pickett's convictions.[1]

I.

A.

At the close of the government's case, Pickett moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29, arguing that the

[1] Though originally scheduled for oral argument, this appeal was removed from the oral argument calendar by unanimous agreement of the panel. *See* 11th Cir. R. 34-3(f).

government had failed to marshal sufficient evidence to establish scienter—that he knowingly received or possessed child pornography. The district court denied his motion.

We review de novo the district court's denial of a motion for judgment of acquittal challenging the sufficiency of the evidence presented at trial. *United States v. Smith*, 459 F.3d 1276, 1286 (11th Cir. 2006). To determine whether the government adduced sufficient evidence, we review "the evidence in the light most favorable to the government and draw all reasonable factual inferences in favor of the jury's verdict." *United States v. Dulicio*, 441 F.3d 1269, 1276 (11th Cir. 2006). And so long as "a reasonable fact-finder could have determined that the evidence provided the defendant's guilt beyond a reasonable doubt," we must affirm. *Smith*, 459 F.3d at 1286.

We have held that a person "knowingly receives" child pornography in violation of § 2252(a)(2) by intentionally viewing, acquiring, or accepting child pornography on a computer from an external source. *United States v. Pruitt*, 638 F.3d 763, 766 (11th Cir. 2011). Evidence that a person searched the Internet for child pornography and has images of child pornography on a computer can constitute circumstantial evidence that he knowingly received child pornography. *Id.*

We have also held that a person "knowingly possesses" child pornography in violation of § 2252(a)(4)(B) if he knows that the images in his possession show minors engaging in sexually explicit conduct within the meaning of 18 U.S.C. § 2256(2). *United States v. Alfaro-Moncada*, 607 F.3d 720, 733 (11th Cir. 2010).

At the same time, our precedent has long made clear that "the term 'knowingly' means that the act was performed voluntarily and intentionally, and not because of a mistake or accident." *United States v. Woodruff*, 296 F.3d 1041, 1047 (11th Cir. 2002).

Based on our review of the record, we conclude that the evidence introduced by the government, though circumstantial, was sufficient to permit a reasonable juror to find beyond a reasonable doubt that Pickett knowingly received and possessed child pornography.

First, the hard drive of the computer seized at Pickett's house contained evidence from which a reasonable juror could have concluded that Pickett was the computer's primary user. This evidence included the computer's name "Nordsguy PC" and the user name on the computer's login screen "Nordsguy"; an email account named Nordsguy @hotmail.com, which contained emails addressed to Pickett, emails from Pickett, and Pickett's résumé; information about Pickett's employer; as well as the multiplayer Internet video fantasy game Everquest II with which a user named "Nordsguy" and an email address of Nordsguy@hotmail.com had an account.

Second, there was evidence from which a reasonable juror could have concluded that Pickett knowingly downloaded, moved, and viewed child-pornography videos on the computer. For starters, on the dates when the child-pornography videos were downloaded as well as when those files were moved to a hidden folder on the computer's hard drive, the "Nordsguy" account logged into Everquest II's online servers from that computer. Next, in January 2013, Pickett

began working 9:00 a.m. to 6:00 p.m. Monday through Friday. Once he did, the downloading of child pornography occurred either after his workday ended during the week or on the weekend—even though before he began this job, child pornography was frequently downloaded during the day, including during the midafternoon. Finally, the "open recent" information for a video player on the computer showed that two child-pornography videos had been played, including one that had been moved to the hidden folder on the computer's hard drive.

Accordingly, we hold that the district court's denial of Pickett's motion for judgment of acquittal was not error and is due to be affirmed.

B.

Pickett contends that the district court erred by allowing the government's computer-forensic expert to disclose on redirect examination an incriminating double hearsay statement attributed to his wife: namely, that she told an agent executing the search warrant at his house that "they don't have any friends over that use that computer," meaning the one seized pursuant to the search warrant containing more than 70 child-pornography videos and evidence that more than 700 such videos had been downloaded—all with graphically descriptive names, such as "Frifam 1YO" and "Bibcam Blue Orchid, 95, 10YO and 12 suck each other, very cute kids boys."

Here, however, we need not decide whether the district court erred by admitting this testimony or whether the court's two instructions to the jury that they could not consider this hearsay evidence to prove that Pickett, but not his

friends, used the seized computer were sufficiently curative. This is because even if we assume that the district court abused its discretion by admitting this hearsay testimony, any such error was harmless.

An erroneous evidentiary ruling warrants reversal only if the resulting error was not harmless. *United States v. Augustin*, 661 F.3d 1105, 1123 (11th Cir. 2011). An error is harmless absent a "reasonable likelihood that [it] affected the defendant's substantial rights." *United States v. Bradley*, 644 F.3d 1213, 1270 (11th Cir. 2011) (alteration in original) (quoting *United States v. Hawkins*, 905 F.2d 1489, 1493 (11th Cir. 1993)) (internal quotation mark omitted). Put differently, an erroneous evidentiary ruling is harmless so long as the entire record reflects that the error did not substantially affect the jury's verdict. *Augustin*, 661 F.3d at 1123.

Having reviewed the record, we conclude that the district court's admission of the hearsay statement could not have substantially affected the outcome of this case. Setting this statement aside, the government's circumstantial case connecting Pickett to the seized computer as well as to the downloading and moving of the graphically named child-pornography videos was sufficiently strong. Thus, we hold that any error the district court may have made in admitting the hearsay testimony was harmless.

C.

Pickett contends, for the first time on appeal, that the district court erred by not striking the testimony of the government's computer-forensic expert that one of

the external hard drives in Pickett's house "may have had—or had remnants of what could have been child pornography, although it wasn't—it wasn't anything that was playable." Although Pickett did not object to this testimony at trial, he now contends that the expert's testimony violates the best-evidence rule and the district court's failure to strike this inadmissible testimony was plain error. We disagree.

To prevail under plain error review, the defendant must show that (1) an error occurred; (2) the error was plain; (3) it affected his substantial rights; and (4) it seriously affected the fairness of the judicial proceedings. *United States v. Flanders*, 752 F.3d 1317, 1333 (11th Cir. 2014), *cert. denied,* No. 14-7642, 2015 WL 303326 (Jan. 26, 2015).

Here, even if we assume that the district court's failure to strike this testimony sua sponte was error and that this error was plain, Pickett still cannot prevail under plain error review. Simply put, he has not shown that the admission of this testimony affected his substantial rights. "The inquiry as to a defendant's substantial rights invokes the 'same language employed in [Federal Rule of Criminal Procedure] 52(a), and in most cases it means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings.'" *United States v. Arbolaez*, 450 F.3d 1283, 1291 (11th Cir. 2006) (alteration in original) (quoting *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1778 (1993)). Because we conclude that the computer-forensic expert's equivocal testimony could not have affected the outcome of this case, we hold that the district court did not plainly error by not striking this testimony sua sponte.

D.

Finally, Pickett contends that the district court committed reversible error by admitting into evidence one video and ten screenshots from the more than seventy child-pornography videos on his computer. In his view, the video and screenshots were not only highly prejudicial but also unnecessary because he had stipulated that his computer contained images of minors, including prepubescent minors as well as minors who had not reached the age of twelve, engaged in sexually explicit conduct; he also stipulated that the charged offenses had a sufficient interstate-commerce nexus.

We review the district court's evidentiary rulings for an abuse of discretion and will reverse those rulings "only if the resulting error affected the defendant's substantial rights." *United States v. Dodds*, 347 F.3d 893, 897 (11th Cir. 2003). The district court's discretion concerning relevancy determinations is wide. *Flanders*, 752 F.3d at 1334–35. Although Federal Rule of Evidence 403 allows for the exclusion of otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice," our precedent recognizes that Rule 403 is an "extraordinary remedy" that should be "invoked sparingly" with "the balance . . . struck in favor of admissibility." *United States v. Elkins*, 855 F.2d 775, 784 (11th Cir. 1989), *quoted in Dodds*, 347 F.3d at 897. As a result, we review issues under Rule 403 by viewing "the evidence in a light most favorable to its admission, maximizing its probative value and minimizing its undue prejudicial impact." *Id.* And we do so cognizant that "limits do exist regarding the quality and quantity of evidence that may be induced" because "Rule 403 demands a

balancing approach between the degrees of probative value that a piece of evidence has and its prejudicial effect." *Dodds*, 347 F.3d at 897.

Here, our review of the record persuades us that the district court did not abuse its discretion in striking a balance under Rule 403 and admitting some of the child-pornography videos (or screenshots therefrom) at trial. *See, e.g.*, *Alfaro-Moncada*, 607 at 734; *Dodds*, 347 F.3d at 897. We thus conclude that the district court did not abuse its discretion by admitting into evidence the video and ten screenshots of child pornography.

II.

After a thorough review of the record and careful consideration of the parties' briefs, we conclude that all of Pickett's allegations of error are meritless. Accordingly, we affirm his convictions for receiving and possessing child pornography.

AFFIRMED.

Motion for Extension of Time

No_____

IN THE

Supreme Court of the United States

Sean David Pickett,
Petitioner,

v.

United States of America,
Respondent.

On Petition for a Writ of Certiorari to theUnited States Court of Appeals for the Eleventh Circuit

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI

APPLICATION TO THE HONORABLE JUSTICE CLARENCE THOMAS

Executed this 13th Day of June, 2022

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APPLICATION FOR AN EXTENSION OF TIME

Pursuant to Rule 13.5 of the Rules of this Court, Applicant Sean David Pickett hereby requests a 60-day extension of time within which to file a petition for a writ of certiorari up to and including August 22, 2022.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The opinion for which review is sought is *Sean David Pickett v. United States of America, Case* No. 20-13149 (August 11, 2021) (**attached as Exhibit 1**). The United States Court of Appeals for the 11th Circuit denied Applicant's motion for rehearing or modification on March 24, 2022 (**attached as Exhibit 2**).

JURISDICTION

This Court will have jurisdiction over any timely filed petition for certiorari in this case pursuant to 28 U.S.C. § 1254(1). In accordance with Rule 13.5, this application is being filed 10 days in advance of the filing date for the petition for a writ of certiorari.

REASONS JUSTIFYING AN EXTENSION OF TIME

Applicant respectfully requests a 60-day extension of time within which to file a petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the 11th Circuit in this case, up to and including August 22, 2022.

The extension of time is necessary because of the press of the representation of other clients in various ongoing matters, as well as given the difficulties inherent in corresponding with the incarcerated petitioner. The extension of time is also necessary in order to provide effective assistance of counsel on this matter and counsel is in need of the additional time to thoroughly review the voluminous documentation, pleadings and orders in case No. 20-13149.

A 60-day extension for the Applicant would allow counsel the necessary amount of time to effectively contribute to all open matters including Applicant's petition as well as other client business abroad.

Counsel for Petitioner intends to ask this Court to grant review on the question of whether the miscarriage of justice exception permits a rule 60b motion after the one-year limit specified in the rule.

CONCLUSION

For the foregoing reasons, Applicant respectfully requests that this Court grant an extension of 60 days, up to and including August 22, 2022, within which to file a petition for a writ of certiorari in this Court.

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