No.

IN THE SUPREME COURT OF THE UNITED STATES

GLENN RANDALL FERGUSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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November 2, 2022

QUESTION PRESENTED FOR REVIEW

1. When a district court has found a criminal defendant to be incompetent pursuant to 18 U.S.C. § 4241, and the defendant is then sent to a BOP facility for a second evaluation "to determine whether there is a substantial probability that in the foreseeable future [the defendant] will attain the capacity to permit the proceedings to go forward" pursuant to 18 U.S.C. § 4241(d), is it sufficient for the district court to reverse its original finding and find the defendant competent based solely on professional opinions from the second evaluation that there were "discrepancies" in the defendant's behavior?

2. When, in a jury trial on a charge of possession of child pornography, a district court, without first reviewing the proffered evidence, allows introduction and display to the jury of fifteen images and portions of ten videos of child pornography over the Rule 403 objection of the defendant, is that consistent with Rule 403?

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PETITION FOR WRIT OF CERTIORARI

Glenn Randall Ferguson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

PREVIOUS OPINIONS AND ORDERS

In *United States v. Ferguson*, 2022 WL 3348984 (10th Cir.) (unpublished), the United States Court of Appeals for the Tenth Circuit issued an Order and Judgment wherein Glenn Randall Ferguson, the Petitioner herein, was the Appellant/Defendant. See Attachment 1 hereto. This Petition seeks issuance of a writ of certiorari to the Tenth Circuit Court of Appeals in regard to the Order and Judgment.

The Order and Judgment affirmed a Judgment in a Criminal Case filed October 8, 2020 in the United States District Court for the Eastern District of Oklahoma, in United States v. Glenn Randall Ferguson, Case No. CR-17-17-RAW. See Attachment 2 hereto.

JURISDICTION

The Tenth Circuit reviewed the Judgment in a Criminal Case under the authority of 28 U.S.C. § 1291. On August 15, 2022, the Tenth Circuit filed the Order and Judgment now presented for review. Attachment 1. Neither party requested a rehearing.

Jurisdiction for a writ of certiorari lies in this Court pursuant to 28 U.S.C. § 1254(a), applicable in the courts of appeals, which permits a writ of certiorari to be "granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." Mr. Ferguson was the Appellant in the case now submitted for review.

APPLICABLE LEGAL PROVISIONS

Amendment V, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI, United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C. § 4241, Determination of mental competency to stand trial to undergo postrelease proceedings

(a) Motion To Determine Competency of Defendant.-At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(b) Psychiatric or Psychological Examination and Report.-Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) Hearing.-The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and Disposition.-If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility-

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward; and

(2) for an additional reasonable period of time until-

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to go forward; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the proceedings to go forward, the defendant is subject to the provisions of sections 4246 and 4248.

(e) Discharge.-When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial or other proceedings. Upon discharge, the defendant is subject to the provisions of chapters 207 and 227.

(f) Admissibility of Finding of Competency.-A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

STATEMENT OF THE CASE

1. District Court Proceedings

By Indictment filed March 14, 2017, Glenn Randall Ferguson, the Defendant/Appellant, was charged with one count of possession of certain material involving the sexual exploitation of minors pursuant to 18 U.S.C. §§ 2252(a)(4)(B) and 2252(b)(2). On August 11, 2017, defense counsel filed a motion to determine competency pursuant to the Fifth Amendment of the United States Constitution and 18 U.S.C. § 4241.

On March 29, 2018, the district court heard a competency hearing (hereinafter referred to as the "2018 Competency Hearing"), during which the defense called two expert witnesses and the government called one expert witness. By Order filed the next day, March 30, 2018 (hereinafter referred to as the "2018 Competency Order"), the district court found "by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to assist properly in his defense." Pursuant to § 4241(d), the district court ordered Mr. Ferguson to self-report to a federal facility for treatment "to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward."

In a letter dated October 1, 2018, the Acting Warden of FMC Butner wrote that "Mr. Ferguson is now competent to stand trial" and enclosed a report. On February 28, 2019, the district court heard an evidentiary hearing (the "2019 Competency Hearing") with two new government expert witnesses and one defense expert witness who had testified previously at the 2018 Competency Hearing. On March 4, 2019, the district court entered an Order stating that "defendant is hereby found competent to stand trial."

On December 10, 2019, the defense filed a Continuing Objection to Proceeding to Trial Due to Competency Issues (hereinafter referred to as the "Continuing Objection"). On December 18, 2019, the district court held a pretrial conference. At that point, the government had not identified the video and photo images of child pornography that it intended to display to the jury, and the "narrowing down" of the images was discussed. At the pretrial conference, defense counsel explained that the defense was unable to stipulate to anything due to Mr. Ferguson's inability to make decisions regarding his defense.

Jury trial proceeded on January 7-9, 2020. Government's Exhibits 31 through 40 were video depictions of child pornography which were admitted over the defense's objection on Rule 403 grounds. Government's Exhibits 41 through 55 were photographic depictions of child pornography which were admitted over the defense's objection on Rule 403 grounds. All of these images were displayed to the jury.

The defense moved for mistrial on several occasions. Defense counsel also made objections due to Mr. Ferguson's incompetence, including at Mr. Ferguson's colloquy with the district court regarding his right to testify. The jury returned a verdict of guilty.

Mr. Ferguson filed a motion for new trial. By Order dated March 2, 2020, the district court denied the motion for new trial. Mr. Ferguson filed a motion for a non-guidelines sentence. At a sentencing hearing on July 22, 2020, the Court denied the motion for a non-guidelines sentence and sentenced Mr. Ferguson to the statutory maximum of 120 months followed by supervised release of 5 years. Mr. Ferguson filed a notice of appeal timely on August 6, 2020.

2. Direct Appeal

Mr. Ferguson timely appealed the Judgment in a Criminal Case to the Tenth Circuit. Regarding the issue of competence, he argued that the lower court erred in relying upon the report

that accompanied the Warden's letter of October 1, 2018 because it was not done in compliance with either the statutory purpose of § 4241(d), or with the standards of the mental health profession. Regarding the introduction into evidence of 10 videos and 15 photographs of child pornography, Mr. Ferguson argued that the lower court violated Fed. R. Evid. 403 by failing to review the images before he ruled on the Rule 403 objection, failing to do an explicit weighing of the probative value of the exhibits versus their unfair prejudice to Mr. Ferguson, and failing to consider the cumulative diminishment of probative value and increase in prejudice with the admission of each consecutive exhibit.

REASONS FOR GRANTING A WRIT

Reason No. 1: The Lower Courts' Interpretation of § 4241 Involves Important Questions of Federal Law Not Previously Considered by this Court

Certiorari is appropriate when a "United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(c). This basis for review is presented here because the lower courts' interpretation and application of 18 U.S.C. § 4241 is an important question of federal law that has not been decided, but should be considered, by this Court.

The entire text of § 4241 is set out in the Applicable Legal Provisions section of this Petition; however, this Petition focuses on subsection (d). The 2018 Competency Order complied with subsection (d) insofar as it ruled that Mr. Ferguson was incompetent and ordered Mr. Ferguson to self-report to a federal facility for treatment "to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward." This language mirrored the language of § 4241(d).

From the moment Mr. Ferguson reported to FMC Butner, however, the government failed to comply with the Congressional mandate of § 4241(d). At the 2019 Competency Hearing, a forensic psychologist from FMC Butner testified that, early on in Mr. Ferguson's stay, the staff made a "strategy" decision not to take a "standard" approach to Mr. Ferguson's case. Instead of looking at the question of whether Mr. Ferguson could be restored to competence, the staff at FMC Butner began looking for "discrepancies." In her testimony, the forensic psychologist gave several examples in her testimony of what she considered to be "discrepancies" in Mr. Ferguson's behavior. At the end of the hearing, the district court stated that he found the psychologist "more persuasive" than the defense expert, and he found by a preponderance of the evidence that Mr. Ferguson was "not suffering from a mental disease or defect rendering him unable to understand the nature and consequences of the proceedings against him, or to properly assist his counsel in his own defense." The district court therefore ordered that the case would proceed to trial.

The psychologist's strategy to find "discrepancies" instead of treating Mr. Ferguson was in complete contradiction to the plain wording of § 4241(d). Additionally, the psychologist explicitly testified that the decision was made not to use the "standard" approach – that is, the approach recognized by the mental health professional community. By finding this non-standard approach to be more credible than other evidence consistent with the applicable professional standards, the district court, and the Tenth Circuit's affirmance of the district court, have interpreted § 4241(d) in a way that no other federal court has done before. The lower courts' rulings are inconsistent with the explicit language that Congress chose in enacting the statute. This Court should grant this Petition in order to consider this case of first impression regarding the important federal question of competency and § 4241(d).

Additionally, this Court has recognized that competence is an issue of Constitutional importance. "[T]he criminal trial of an incompetent defendant violates due process." *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996). Competency provides a foundation upon which other constitutional rights depend:

> Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.

Riggins v. Nevada, 504 U.S. 127, 139-40 (1992), Kennedy, J. concurring in judgment. If a defendant "lacks the ability to communicate effectively with counsel, he may be unable to exercise other 'rights deemed essential to a fair trial.'" *Cooper,* 517 U.S. at 364, *quoting Riggins*, 504 U.S. at 139 (Kennedy, J., concurring in judgment). Because this question of statutory interpretation is one of first impression and that question also implicates Constitutional rights, this Court should grant this Petition.

Reason No. 2: The Lower Courts' Interpretation of Rule 403 Involves Important Questions of Federal Law Not Previously Considered by this Court and a Conflict Among Courts of Appeal

> I do not think you can get a fair child abuse trial before a jury anywhere in the country. I really don't. . . . I don't care how sophisticated or how smart jurors are, when they hear that a child has been abused, a piece of their mind closes up, and this goes for the judge, the juror, and all of us.

Panel One: What Empirical Research Tells Us, and What We Need to Know About Juries and the Quest for Impartiality, 40 Am. U. L. Rev. 547, 564-65 (1991) (quoting the Honorable Abner Mivka, United States Court of Appeals for the District of Columbia).

This quote from Judge Mivka articulates the uphill battle that criminal defendants who are charged with crimes against children face in exercising their Constitutional right to a fair trial. In Mr. Ferguson's jury trial, the trial court assisted in "closing the minds" of the jurors when it

admitted into evidence, without first reviewing them, portions of 10 videos and 15 still images of child pornography. The trial court's handling of the multiple images of child pornography, and the Tenth Circuit's affirmance, involved an important question of federal law involving application of Rule 403 of the Federal Rules of Evidence in the context of multiple images depicting child pornography. The defense counsel at trial timely objected to the government's proffer of 10 videos and 15 still photographs depicting child pornography on the grounds that the probative value of those images was substantially outweighed by the unfair prejudice to Mr. Ferguson. Defense counsel then renewed the objection between the admission of each consecutive image. It was clear from the bench conference held at the time of the original objection that the trial court had not reviewed the images. Nevertheless, without reviewing the individual images themselves before they were admitted into evidence and displayed for the jury, the trial court overruled the defense's original Rule 403 objection and each subsequent objection to the admission of additional exhibits.

There may be times when the trial court can rely upon a proffer in making a preliminary ruling that it will allow exhibits to be admitted; however, child pornography should not be among those times. Many courts have recognized that images of children being sexually abused are in a different category from most other types of evidence. *See, e.g., United States v. Cunningham*, 694 F.3d 372, 387-88 (3d Cir. 2012) (recognizing "deeply disgusting, inflammatory character" of child pornography videos shown at trial); *United States v. Loughry*, 660 F.3d 965, 972-74 (7th Cir. 2011) (videos of child pornography have a "strong tendency to produce intense disgust"); *United States v. Mercer*, 653 F. App'x 622, 629-30 (10th Cir. 2016) (unpublished) (child sex abuse "evidence will almost always have a profound impact on the jury and cause it to feel disgust toward the defendant"); *United States v. Polizzi*, 257 F.R.D. 33, 37 (E.D.N.Y. 2009) (recognizing "prejudicial

impact of unduly repetitive inflammatory evidence" of "images and videos of young children being abused sexually").

In addition to the decisions of the lower courts involving an important federal question of how Rule 403 should be applied to repetitive video and still images in a possession of child pornography case, the Tenth Circuit decision in Mr. Ferguson's appeal has created a split of the circuits. Certiorari is appropriate when a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals." S. Ct. R. 10(a). The Tenth Circuit decision, affirming the trial court's admission of portions of 10 videos and 15 still images of child pornography, even though the trial court had not reviewed those exhibits prior to its ruling, directly conflicts with decisions of the Seventh and Third Circuits.

In 2011, the Seventh Circuit ruled that a trial court could only make a Rule 403 determination involving multiple proffered child pornography images if the trial court had actually viewed them before making its ruling.

> The challenged videos include the kind of highly reprehensible and offensive content that might lead a jury to convict because it thinks that the defendant is a bad person and deserves punishment, regardless of whether the defendant committed the charged crime. Given the inflammatory nature of the evidence, the district court needed to know what was in the photographs and videos in order for it to properly exercise its discretion under Rule 403. Without looking at the videos for itself, the court could not have fully assessed the potential prejudice to Loughry and weighed it against the evidence's probative value.

Loughry, 660 F.3d at 972. In 2012, the Third Circuit joined the Seventh Circuit's reasoning in *Loughry*, stating that it was arbitrary and unreasonable to refuse "to view the video excerpts to assess their prejudicial impact." *Cunningham*, 694 F.3d at 387. *See also United States v. Curtin*, 489 F.3d 935, 957 (9th Cir. 2006) (en banc) ("The inflammatory nature and reprehensible nature of these abhorrent stories [depicting explicitly sexual acts of prepubescent girls with adult men],

although generally relevant, is such that a district court making a Rule 403 decision must know precisely what is in the stories in order for its weighing discretion to be properly exercised and entitled to deference on appeal.").

The Tenth Circuit's decision below considered important questions of federal law, regarding the application of Rule 403 to multiple consecutive images of child pornography. Those important federal questions include whether a trial court must review the images before ruling on a Rule 403 objection by a criminal defendant and whether the trial court must consider the diminishing probative value and the increasing prejudice to the defendant of each consecutive image. Additionally, the Tenth Circuit's decision creates a clear split of the circuits. This Court should grant this petition.

CONCLUSION

Certiorari review is appropriate This Court should reverse the Order and Judgment and remand to the Tenth Circuit with directions to remand to the district court due to the issues of misapplication of 18 U.S.C. § 4241(d) in Mr. Ferguson's case. Regarding the Rule 403 issue, this Court should reverse the Order and Judgment and remand to the Tenth Circuit with directions to remand to the district court for a new trial due to the errors involving the admission of multiple child pornography images without sufficient review and consideration of probative value and unfair prejudice. Granting certiorari would allow this Court to give all federal courts guidance on these important issues of federal law and would allow this Court to address the split of the Circuits caused by the Tenth Circuit's decision in Mr. Ferguson's appeal.

Respectfully submitted,

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Before BACHARACH, MORITZ, and EID, Circuit Judges.

ORDER AND JUDGMENT *

Allison H. Eid, Circuit Judge

***1** Defendant-Appellant Glenn Randall Ferguson was convicted after a jury trial of possession of child pornography. On appeal, he maintains that he was not competent to stand trial. He also argues that the district court violated Federal Rule of Evidence 403 when it permitted the government to show the jury some of the images and videos of child pornography that were found on Ferguson's computer. Further, he contends that the government committed prosecutorial misconduct by failing to inform defense counsel before trial that a government expert witness had changed his opinion about whether certain images constitute child pornography. Lastly, Ferguson says that even if none of the aforementioned errors requires vacatur of his conviction, the cumulative impact of the errors should still result in that outcome.

We affirm the district court's decision in its entirety. We uphold the competency finding because the district court did not clearly err in finding Ferguson competent to stand trial. We affirm the district court's admission of the images and videos because the court did not abuse its discretion on this matter. We hold that any prosecutorial misconduct, assuming there was misconduct, was harmless. And finally, Ferguson's cumulative-error argument fails because Ferguson was not able to successfully identify at least two errors made by the district court below.

I.

In January, March, and April 2014, FBI agents used a peer-to-peer program to download hundreds of images of child pornography from an IP address associated with Ferguson. Months later, law enforcement executed a search warrant for Ferguson's home, which was listed as the billing and service address for the IP address. The FBI seized three laptop computers from the home—one from the living room that Ferguson and his wife shared, one used by Ferguson's son and found in the son's bedroom, and one used by Ferguson's daughter and found in the daughter's bedroom.

During the search, Ferguson agreed to speak with FBI Special Agent Michael Rivers. According to Agent Rivers, Ferguson told him that he was "addicted to pornography" and admitted to looking at child pornography on the laptop he shared with his wife. R. Vol. II at 255. He also admitted to searching for child pornography using Google and Bing, and to downloading the aforementioned peer-to-peer program to search for and download child pornography.

FBI forensic technicians retrieved over 1,900 images and 50 videos that Agent Rivers identified as child pornography from the computer that Ferguson shared with his wife. The FBI also marked two files of interest on the son's laptop and one file on the daughter's. Forensic examiners prepared a report that discussed all three computers, which the defense received in discovery. Based on the evidence, the government initiated this criminal proceeding against Ferguson, charging him with one count of possession of certain material involving the sexual exploitation of minors pursuant to 18 U.S.C. § 2252(a)(4)(B), (b)(2).

***2** After he was indicted, Ferguson moved without opposition to determine whether he was competent to stand trial, and the district court granted the motion. Ferguson claimed that as a young man he was involved in two

accidents that caused him to suffer traumatic brain injuries. Ferguson was evaluated at Federal Medical Center ("FMC") Fort Worth. The staff psychologist, Dr. Samuel Browning, concluded that Ferguson was competent to stand trial, but diagnosed him with "Major Depressive Disorder" and "Personality Change due to Traumatic Brain Injury." R. Vol. III at 34–35.

Unsatisfied with these conclusions, the defense retained Dr. Terese Hall to evaluate Ferguson. After approximately four hours of testing and interviews with Ferguson, Dr. Hall found that Ferguson had a "basic but generally accurate understanding of the charges against him" and was "intelligent and rational, able to comprehend and reason in the present moment." *Id.* at 48. She concluded, however, that Ferguson was not competent to proceed because his "memory deficits render[ed] him unable to assist in his defense." *Id.*

On March 29, 2018, the district court held a competency hearing at which both Dr. Hall and Dr. Browning testified. The court found by a preponderance of the evidence that Ferguson was "not able to assist properly in his own defense," and thus remanded him to the custody of the Attorney General for treatment "to determine whether there [was] a substantial probability that in the foreseeable future he [would] attain the capacity to permit the proceedings to go forward" pursuant to 18 U.S.C. § 4241(d). R. Vol. I at 189.

Ferguson received treatment at FMC Butner from Dr. Allissa Marquez and Dr. Tracy O'Connor Pennuto. After four months of treatment, Dr. Marquez and Dr. O'Connor Pennuto ultimately concluded that Ferguson was "malingering." R. Vol. III at 112. They determined he was "feigning" or "exaggerating" his memory problems and that his memory impairment seemed "selectively focused on his legal case." *Id.* at 110, 112. Therefore, the acting warden of FMC Butner certified that Ferguson was competent to stand trial.

At the second competency hearing, Drs. Marquez and O'Connor Pennuto testified for the government, and Dr. Hall again testified for Ferguson. Dr. O'Connor Pennuto was "the only neuropsychologist" to evaluate Ferguson, and thus was the only witness who "attempted to fully assess [Ferguson's] learning and memory ability" instead of employing only brief screening measures. R. Vol. I at 232–33. Based on "the cognitive interview, the behavioral observation, as well as [other] tests," Dr. O'Connor Pennuto concluded that Ferguson was malingering; she believed that "he could function at a much higher level than he was presenting." *Id.* at 212, 223. At the end of the second competency hearing, the district court found Ferguson competent to stand trial. It acknowledged that the issue was "important" and merited taking "the time to listen to four hours of testimony." *Id.* at 357. Though the court did not explicitly mention Dr. O'Connor Pennuto in its ruling, it incorporated her perspective when it found "Dr. Marquez was simply more persuasive than Dr. Hall." *Id.* at 357–58.

Eventually, Ferguson's case proceeded to trial, which included two events relevant to this appeal. First, the district court permitted the government, over Ferguson's objection, to show the jury some of the pornography found on Ferguson's laptop during the direct examination of Agent Rivers. Agent Rivers told the jury that the FBI had found more than 50 videos and 1,900 photographs on Ferguson's computer depicting "real children" under the age of eighteen "engaged in adult sexual activity." R. Vol. II at 279–80. The government then played ten of the videos that were representative of the fifty videos the government had found, all with the sound turned off. The government showed five of the clips in their entirety, each lasting approximately one minute. The other five were longer, so the government played just enough of each to permit Agent Rivers to identify them. In total, the jury was shown approximately sixteen minutes of video. The prosecution also showed the jury 15 photographs that were representative of the 1,900 images the government had found.

***3** The second event relevant to this appeal occurred during the cross-examination of Agent Rivers, when defense counsel asked Agent Rivers about the two laptops found in the bedrooms of Ferguson's son and daughter. Before trial, on July 19, 2019, defense counsel requested the return of those laptops, but Agent Rivers said he could not hand them over because they contained three images of child pornography or "something close enough to be." *Id.* at 304. Agent Rivers testified that he "think[s] one of the images was" child pornography, but the two images from the son's laptop he "would not say w[ere] child pornography." *Id.* at 232, 305, 350.

The government moved to introduce the images from the son's laptop (two of the three images at issue), and Ferguson moved for a mistrial. Ferguson maintained that the government had switched positions about whether the images were child pornography, and in doing so, the government had committed prosecutorial misconduct. The district court denied the motion. It reasoned that there was no "surprise" and that Ferguson could cross-examine Agent Rivers about any "conflicting thoughts [about] whether the ... two images

qualify as child pornography or not." *Id.* at 372. Explaining that the issue "will be brought out in cross examination," the court saw no "obligation to declare a mistrial." *Id.* The district court thus admitted the images into evidence.

The jury ultimately convicted Ferguson. After the guilty verdict, Ferguson moved for a new trial based on three of the grounds raised in this appeal. The district court denied the motion. This appeal followed.

II.

Ferguson raises four arguments on appeal. First, he argues that he was denied a fair trial because his memory loss prevented him from assisting in his own defense. Second, he contends that the district court abused its discretion under Federal Rule of Evidence 403 by permitting the government to show the jury some of the images and videos of child pornography that were found on his computer. Third, he maintains that the government's failure to inform defense counsel that its witness had changed his position as to whether two pictures constituted child pornography amounts to prosecutorial misconduct. Fourth, he says that even if each of these errors standing alone is harmless, their cumulative impact requires vacatur of his conviction. We address each of these arguments in turn.

a.

The first issue on appeal is whether the district court erred in finding Ferguson competent to stand trial. "Competency to stand trial is a factual question." *Bryson v. Ward*, 187 F.3d 1193, 1201 (10th Cir. 1999). As with all factual questions, "[w]e review the district court's competency determination for clear error and will reverse only if we are 'left with the definite and firm conviction that a mistake has been committed.' " *United States v. DeShazer*, 554 F.3d 1281, 1286 (10th Cir. 2009) (quoting *United States v. Mackovich*, 209 F.3d 1227, 1232 (10th Cir. 2000)). "The district court 'need not be correct,' but its finding 'must be permissible in light of the evidence.' " *Mackovich*, 209 F.3d at 1232 (quoting *United States v. Verduzco-Martinez*, 186 F.3d 1208, 1211 (10th Cir. 1999)).

"The Constitution forbids the trial of a defendant who lacks mental capacity." *DeShazer*, 554 F.3d at 1285. Here, Ferguson puts forth a substantive competency claim—*i.e.*, he claims he "was tried and convicted while, in fact, incompetent." *Grant v. Royal*, 886 F.3d 874, 892 (10th Cir. 2018) (quoting *Allen v. Mullin*, 368 F.3d 1220, 1239 (10th Cir. 2004)). "A petitioner alleging a substantive claim must demonstrate that he actually lacked a 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding [and] a rational as well as a factual understanding of the proceedings against him.' " *Id.* at 893 (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)). "A substantive competency claim ... requires proof of incompetency by a preponderance of the evidence." *Id.* (emphasis omitted) (quoting *Allen*, 368 F.3d at 1220, 1239).

***4** "When assessing a defendant's competence, the district court may rely on a number of factors, including medical opinion and the court's observation of the defendant's comportment." *DeShazer*, 554 F.3d at 1286 (quoting *Mackovich*, 209 F.3d at 1232). "That a defendant suffers from some degree of mental illness or disorder does not necessarily mean that he is incompetent to assist in his own defense." *Id.*

Ferguson does not contest that he is able to understand the nature and consequences of the proceedings against him. Thus, the sole question is whether Ferguson "actually lacked a 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.' " *Grant*, 886 F.3d at 893 (quoting *Dusky*, 362 U.S. at 402).

As discussed above, Dr. Marquez and Dr. O'Connor Pennuto concluded that, on several psychological tests, Ferguson was "feigning/exaggerating memory deficits." R. Vol. III at 110. They also found that the severity of his claimed memory impairment was "inconsistent with his overall level of functioning" and that "much of his memory lapses appeared selectively focused on his legal case." *Id.* at 112. At the second competency hearing, after hearing testimony from Drs. Marquez, O'Connor Pennuto, and Hall, the district court found Ferguson competent to stand trial. While the court acknowledged that the competency issue merited taking "the time to listen to four hours of testimony," it found "that Dr.

Marquez was simply more persuasive than Dr. Hall." *Id.* at 357–58.

This court has held on numerous occasions that "it is not clearly erroneous for a district judge to declare a defendant competent by adopting the findings of one expert and discounting the contrary findings of another." *Mackovich*, 209 F.3d at 1232; *see also DeShazer*, 554 F.3d at 1287 (upholding a competency determination where "the district court stated that it found [the] evaluation and opinion [of one of the experts] more persuasive, and expressly adopted her conclusion"); *United States v. Pompey*, 264 F.3d 1176, 1179 (10th Cir. 2001) (explaining that in assessing the defendant's competence, "[i]t was within the district court's province to assess the credibility of the witnesses, including the forensic psychologist," who testified that the defendant "was malingering and was actually competent to stand trial").

Here, the district court heard the expert testimony from both sides and was persuaded by the government's witnesses that Ferguson was fit to stand trial. We cannot conclude this decision was clearly erroneous.

Ferguson's primary contention is that his memory problems were what rendered him incompetent to stand trial. *See, e.g.*, Aplt. Br. at 13, 16 (maintaining that Ferguson was incompetent because he could not remember his conversation with Agent Rivers); *id.* at 20 (claiming that Ferguson could not assist with plea negotiations because he could not plead guilty to something of which he had no memory). However, failure to remember is not "a per se deprivation of due process." *United States v. Borum*, 464 F.2d 896, 898–900 (10th Cir. 1972) (finding that a due process violation requires more than a defendant's "mental block on [relevant] events, ... [rendering him] unable to communicate the facts from his standpoint to his counsel"). A defendant claiming memory loss must show "[p]rejudice" such as "facts available which could not be obtained from the file of the prosecution or from investigation by the defense." *Id.*

***5** Here, Dr. Hall's testimony does not cast doubt on the conclusion that Ferguson was "capable of instructing [his lawyers] as to what submission [they were] to put forward with regard to the commission of the crime." *Id.* at 899 (quoting *Regina v. Podola*, 3 All ER 418, 433 (1959)). Additionally, "all demonstrable facts and inferences therefrom point inexorably to [Ferguson's] guilt ...; there is no basis for believing that [Ferguson] is in possession of facts which would be exculpatory if only he could remember them." *Id.* at 900 n.2. Thus, the district court did not commit clear error when it concluded that Ferguson's inability to recall events related to his offense did not render him incompetent to stand trial.

For the foregoing reasons, we uphold the competency finding.

b.

Ferguson next contends that the district court violated Rule 403 when it permitted the government to show the jury images and videos of child pornography found on his computer. However, "[w]e review evidentiary decisions for abuse of discretion" and we find that the district court did not abuse its discretion in allowing these images and videos to be shown. *United States v. Silva*, 889 F.3d 704, 709 (10th Cir. 2018).

"In particular, '[w]e will disturb a trial court's decision to admit evidence under Rule 403 only for an abuse of discretion.' " *Id.* (alteration in original) (quoting *United States v. Charley*, 189 F.3d 1251, 1260 (10th Cir. 1999)). "A district court abuses its discretion when it renders an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Id.* (quotations omitted). "A district court's decision will be reversed 'only if the court exceeded the bounds of permissible choice, given the facts and the applicable law in the case at hand.' " *Id.* (quoting *United States v. McComb*, 519 F.3d 1049, 1053 (10th Cir. 2007)).

Under Rule 403, relevant evidence "may be excluded ... 'if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.' " *United States v. Otuonye*, 995 F.3d 1191, 1206 (10th Cir. 2021) (quoting Fed. R. Evid. 403). "The exclusion of relevant evidence under Rule 403 is an extraordinary remedy to be used sparingly." *Id.*

Ferguson takes issue with the district court's decision to admit ten videos and fifteen images of child pornography that were found on the computer he shared with his wife. He maintains that the admission of that evidence violated Rule 403 because "the images had low probative value, and the[ir] unfair prejudice ... to [him] outweighed that probative value." Reply Br. at 10.

In his opening brief, Ferguson seems to suggest that Rule 403 completely prohibits the admission of videos and images of child pornography found on a defendant's computer whenever uncontested testimony that the defendant's computer contained that material is available as a substitute. Our court, however, has roundly rejected such claims. *See* *United States v. Schene*, 543 F.3d 627, 643 (10th Cir. 2008); *United States v. Campos*, 221 F.3d 1143, 1149 (10th Cir. 2000); *see also* *United States v. Cunningham*, 694 F.3d 372, 391 (3d Cir. 2012) ("[C]ourts are in near-uniform agreement that the admission of child pornography images or videos is appropriate, even where the defendant has stipulated, or offered to stipulate, that those images or videos contained child pornography."). And in his reply brief, Ferguson acknowledges that the prosecution was not "limited to testimony." Reply Br. at 9.

Putting aside, then, any argument that the government was categorically prohibited from admitting the evidence at issue, Ferguson's appeal with respect to this issue breaks down into two main contentions. First, even if admission of the videos and images could have been a proper exercise of the district court's discretion, such admission was improper here because the district court failed to "explicitly consider the value of the images versus the tendency of such images to" produce unfair prejudice—that is, the district court did not actually engage in the balancing that was required of it. *Id.* at 13. Second, the unfair prejudice of the videos and images in fact outweighed their probative value in this specific case.

***6** First, we begin with Ferguson's argument that the district court failed to conduct the balancing that Rule 403 requires. Ferguson illustrates his desired outcome with a case from the Ninth Circuit—*United States v. Curtin*, 489 F.3d 935 (9th Cir. 2007) (en banc)—which reversed a district court's Rule 403 decision permitting the introduction of stories depicting explicitly sexual acts involving prepubescent girls because the district court did not review the admitted materials before admitting them. The Ninth Circuit explained that although the materials were "generally relevant, ... a district court making a Rule 403 decision must know precisely what is in the stories in order for its weighing discretion to be properly exercised and entitled to deference on appeal." *Id.* at 957.

Ferguson says that, like in *Curtin*, the district court here failed to ever review the materials that were presented to the jury, and as a result the district court never conducted an explicit Rule 403 weighing, violating Rule 403. *Curtin* is not binding on this court, but even if it were, Ferguson's argument would fail. He never contends that the district court in issuing its post-trial ruling failed (1) to examine the relevant materials before denying his motion for new trial or (2) to explain why the images and videos were admissible. Instead, he says that the district court's characterization of the images and videos as "short" was inaccurate. But that is an argument that goes to whether the district court properly weighed the probative value of the evidence against the risk of unfair prejudice (an argument that, for the reasons stated below, fails). It is not an argument that has any relation to the Ninth Circuit's decision in *Curtin*; *Curtin* was a case in which the district court never reviewed the relevant evidence in its entirety. *See* *id.* at 956–57. In short, after the trial the district court knew what evidence had been presented to the jury, and it conducted the Rule 403 balancing with that specific evidence in mind. The district court thus properly reviewed the evidence before the jury.

Ferguson's second argument—that Rule 403 prohibited the introduction of the evidence, and thus the district court erred in admitting it—fails also. We have recognized that in a case such as this where the charge is possession of child pornography, "the images ... [are] the gist of the government's ... case." *Schene*, 543 F.3d at 643. "The government [is] entitled to prove its case," and thus such images (and here, videos) are generally "not unfairly prejudicial under Rule 403." *Id.*

Reinforcing the conclusion that the district court properly exercised its discretion is the fact that the government took significant measures to limit the jury's exposure to the images and videos at issue. The government introduced only fifteen images and ten videos. For the videos, it played only short excerpts, without sound. These measures significantly reduced the risk of unfair prejudice otherwise presented by the evidence.

Ferguson's argument does not overcome the substantial deference we accord to the district court's Rule 403 determination. The government needed to prove not only that the images and videos were of children, it also needed to show that Ferguson *knew* the images and videos were of children. And that issue was not open and shut. To the contrary, in his confession—which the jury heard during the trial—Ferguson questioned whether some of the girls pictured were over eighteen. All the more reason, then, that introduction

of the images and videos was justified. *See id.* (permitting introduction of images of child pornography "to show intent and knowledge"); *see also* *United States v. Dudley*, 804 F.3d 506, 517 (1st Cir. 2015).

***7** We affirm the district court's admission of the images and videos, holding the court did not abuse its discretion on this matter.

c.

Third, Ferguson argues that we should reverse his conviction because the prosecution committed misconduct by not informing Ferguson when Agent Rivers changed his mind regarding whether the two pictures found on Ferguson's son's computer constituted child pornography. We disagree. [1]

"Prosecutorial misconduct violates a defendant's due process rights if it infects a trial with unfairness and denies the defendant the right to a fair trial." *United States v. Currie*, 911 F.3d 1047, 1055 (10th Cir. 2018). "Generally, there are two ways in which prosecutorial misconduct ... can result in constitutional error." *Underwood v. Royal*, 894 F.3d 1154, 1167 (10th Cir. 2018) (omission in original) (quoting *Littlejohn v. Trammell*, 704 F.3d 817, 837 (10th Cir. 2013)). "First, it can prejudice a specific right as to amount to a denial of that right." *Littlejohn*, 704 F.3d at 837 (quotations omitted). Second, "a prosecutor's misconduct may in some instances render a habeas petitioner's trial so fundamentally unfair as to deny him due process." *Id.* (quotations omitted).

"The misconduct analysis proceeds in two steps." *Currie*, 911 F.3d at 1055. "We must first examine whether the prosecutor's conduct was in fact improper." *United States v. Pulido-Jacobo*, 377 F.3d 1124, 1134 (10th Cir. 2004). If it was, we "then determine whether ... [the error was] ... harmless beyond a reasonable doubt." *Id.* (alteration and omissions in original) (quoting *United States v. Martinez-Nava*, 838 F.2d 411, 416 (10th Cir. 1988)). "To determine whether prosecutorial misconduct is harmless, 'we must look to the curative acts of the district court, the extent of the misconduct, and the role of the misconduct within the case as a whole.' " *Id.* (quoting *Martinez-Nava*, 838 F.2d at 416). "In order to view any prosecutorial misconduct in context, 'we look first at the strength of the evidence against the defendant and decide whether the prosecutor's [conduct] plausibly could have tipped the scales in favor of the prosecution.... Ultimately, we must consider the probable effect the prosecutor's [conduct] would have on the jury's ability to judge the evidence fairly.' " *Duckett v. Mullin*, 306 F.3d 982, 988–89 (10th Cir. 2002) (omission in original) (quoting *Fero v. Kerby*, 39 F.3d 1462, 1474 (10th Cir. 1994)).

Ferguson maintains that the district court should have ordered a mistrial or a new trial because Agent Rivers changed his opinion about whether images found on Ferguson's son's computer constituted child pornography, and this change of opinion was not revealed until the middle of trial. Because Agent Rivers was a government witness and not a prosecutor, it is unclear that a prosecutorial misconduct claim can be brought on the basis of Agent Rivers's conduct alone. In his reply brief, however, Ferguson clarifies his position: He says that the government attorneys knew before trial that Agent Rivers had changed his opinion about the images found on the computer that belonged to Ferguson's son. Reply Br. at 15–16. And he maintains that the prosecutors' failure to inform the defense attorneys of this change violated Federal Rule of Criminal Procedure 16, which provides that (1) "[a]t the defendant's request, the government must give to the defendant a written summary of any [expert] testimony that the government intends to use ... during its case-in-chief at trial," Fed. R. Crim. P. 16(a)(1)(G), and (2) "[a] party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if ... the evidence or material is subject to discovery or inspection under this rule[ ] and the other party previously requested ... its production," *id.* 16(c). This violation of Rule 16, in Ferguson's view, was an act of prosecutorial misconduct.

***8** In denying Ferguson's motion for a new trial, the district court agreed with Ferguson that the government engaged in misconduct by violating Rule 16, but ultimately denied Ferguson's motion on the grounds that the misconduct was harmless.

Our decision in *United States v. Bishop*, 469 F.3d 896 (10th Cir. 2006), *overruled in part on other grounds by* *Gall v. United States*, 552 U.S. 38 (2007), is instructive. There, the defendant complained that the government's failure to promptly disclose an email to the defense (1) was a violation of Rule 16 that should have led to exclusion of the evidence and (2), in turn, was prosecutorial misconduct that should

have resulted in a mistrial. *Id.* at 904. Assuming without deciding that the government violated Rule 16, *see id.* at 905, we rejected the prosecutorial misconduct argument because we "[did] not believe any misconduct that occurred was egregious or extensive, or played a significant role in the case." *Id.* at 906. The same logic applies here. This single instance of delayed disclosure was certainly not "extensive." Nor was it "egregious." Clearly, Agent Rivers went back and forth as to how to classify the material at issue. That he changed his view about these two images a second time and that the government neglected to tell the defense was not egregious, given the insignificance of the two images compared to the 1,900 images and 50 videos that the government found on Ferguson's computer.

Ultimately, " '[w]e need not decide whether [the allegations] represent prosecutorial misconduct, [when] we are satisfied that' any error was harmless," *Pulido-Jacobo*, 377 F.3d at 1134 (third alteration in original), which is the case here. Ferguson's theory of harm is that "the government created the possible defense that the 18-year-old son in the household was the person responsible for the child pornography on the computer when Agent Rivers said in July 2019 that there was child porn found on the son's computer," Reply Br. at 14, and due process is violated when "the prosecution proves guilt by creating and then destroying its own creations," Aplt. Br. at 37 (quoting *United States v. Gomez-Gallardo*, 915 F.2d 553, 556 (9th Cir. 1990)). But the Ninth Circuit case that Ferguson relies on for this argument is one where the defendant "chose to provide no defense theory or witnesses," and "the government ... created a defense theory and alibi for him to prove his guilt by refuting it." *Gomez-Gallardo,* 915 F.2d at 556. This case is completely different. Here, Ferguson himself created and chose to pursue the theory that the presence of child pornography on the other computers called into doubt that Ferguson was responsible for the child pornography found on the laptop in the living room. Agent Rivers's opinion may have inspired the theory, but Ferguson did not have to employ it, and there is no indication that the government itself would have presented the theory as a strawman to be knocked down. Indeed, Agent Rivers's changed opinion did not actually deprive Ferguson of his defense theory. It certainly weakened Ferguson's case. But Ferguson had the opportunity to cross-examine Agent Rivers about his changed testimony. Two of the relevant photos were admitted into evidence, so Ferguson had ample opportunity to try to persuade the jury that the images before them constituted child pornography. Ferguson, therefore, cannot be said to have been harmed by Agent Rivers's changed view.

***9** Assuming without deciding that there was a Rule 16(c) violation, we hold any error was harmless and reject Ferguson's prosecutorial misconduct claim.

d.

Lastly, Ferguson argues that even if all three of the claims discussed above fail individually, his conviction should still be reversed due to the demonstrated cumulative effect of the errors committed by the district court. We reject this argument.

The cumulative-error doctrine "recognizes that '[t]he cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error.' " *United States v. Perrault*, 995 F.3d 748, 779 (10th Cir. 2021) (quoting *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990) (en banc)). "To assess that possibility, we 'aggregate[ ] all errors found to be harmless and analyze[ ] whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless.' " *Id.* (alterations in original) (quoting *Grant*, 886 F.3d at 954).

Ferguson's cumulative-error argument fails. Unless a defendant is able to "identif[y] at least two harmless errors, we will decline to undertake a cumulative-error analysis." *Id.*; *see also Ellis v. Raemisch*, 872 F.3d 1064, 1090 (10th Cir. 2017) ("[T]here must be more than one error to conduct cumulative-error analysis."). For the reasons set forth above, Ferguson has not shown at least two errors, and we reject his cumulative-error claim.

III.

For the foregoing reasons, we AFFIRM the judgment of the district court.

All Citations

Not Reported in Fed. Rptr., 2022 WL 3348984

Footnotes

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

1 The government and Ferguson disagree as to which standard of review we apply to this issue. Ferguson argues we apply de novo review to allegations of prosecutorial misconduct. The government argues we review allegations of prosecutorial misconduct for abuse of discretion where there was a contemporaneous motion for a new trial. We do not decide here which standard applies because the result is the same under either one.

UNITED STATES DISTRICT COURT

Eastern District of Oklahoma

UNITED STATES OF AMERICA
v.
GLENN RANDALL FERGUSON

JUDGMENT IN A CRIMINAL CASE

Case Number: CR-17-00017-001-RAW

USM Number: 08163-063

Robert S. Williams, AFPD & Robert Ridenour, AFPD
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18:2252(a)(4)(B) & 2252(b)(2)	Possession of Certain Material Involving the Sexual Exploitation of Minors	April 16, 2014	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

July 22, 2020
Date of Imposition of Judgment

Ronald A. White
United States District Judge
Eastern District of Oklahoma

July 28, 2020
Date

DEFENDANT: Glenn Randall Ferguson
CASE NUMBER: CR-17-00017-001-RAW

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

120 months on Count 1 of the Indictment.

☒ The court makes the following recommendations to the Bureau of Prisons:

That the defendant be placed in a federal facility as close as possible to Muskogee, OK, to facilitate family contact.

The Court shall be informed in writing as soon as possible if the Bureau of Prisons is unable to follow the Court's recommendations, along with the reasons for not following such recommendations made by the Court.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .
☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Glenn Randall Ferguson
CASE NUMBER: CR-17-00017-001-RAW

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :
5 years on Count 1 of the Indictment.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☒ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☒ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Glenn Randall Ferguson
CASE NUMBER: CR-17-00017-001-RAW

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer, after obtaining Court approval, may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Glenn Randall Ferguson
CASE NUMBER: CR-17-00017-001-RAW

1. The defendant shall register pursuant to the provisions of the Sex Offender Registration and Notification Act, or any applicable state registration law.

2. The defendant shall attend and participate in a mental health treatment program and/or sex offender treatment program as approved and directed by the Probation Officer. The defendant shall abide by all program rules, requirements, and conditions of the sex offender treatment program, including submission to polygraph testing to determine if you are in compliance with the conditions of release. The defendant may be required to contribute to the cost of services rendered in an amount to be determined by the probation officer, based on his ability to pay. Any refusal to submit to assessment or tests as scheduled is a violation of the conditions of supervision.

3. The defendant shall not possess or use a computer with access to any on-line computer service at any location (including place of employment) without the prior written approval of the probation officer. This includes any Internet Service provider, bulletin board system or any other public or private network or e-mail system.

4. The defendant shall not view, purchase, possess, or distribute any form of pornography depicting sexually explicit conduct as defined in 18 U.S.C. §2256(2), unless approved for treatment purposes, or frequent any place where such material is the primary product for sale or entertainment is available.

5. The defendant shall submit to a search conducted by a United States Probation Officer of his person, residence, vehicle, electronic communication, data storage device, media, office and/or business at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of probation/supervised release. Failure to submit to a search may be grounds for revocation.

6. The defendant shall consent to the United States Probation Officer conducting periodic unannounced examinations, without individual showing of reasonable suspicion, on any computer equipment, other electronic communication or data storage devices or media used by the defendant. The examination may include assistance of other law enforcement agencies. This may include retrieval and copying of all data from the computer and any internal or external peripherals to ensure compliance with conditions and/or removal of such equipment for the purposes of conducting a more thorough inspection, and allow at the direction of the probation officer, installation on your computer, at your expense per co-payment policy, any hardware or software systems to monitor your computer use. The defendant shall comply with a Computer Monitoring and Acceptable Use Contract, which includes a requirement that the defendant use a computer compatible with available monitoring systems. The defendant shall have no expectation of privacy regarding computer use or information stored on the computer. The defendant shall warn any other significant third parties that the computer(s) may be subject to monitoring. Any attempt to circumvent monitoring and examination may be grounds for revocation.

DEFENDANT: Glenn Randall Ferguson
CASE NUMBER: CR-17-00017-001-RAW

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 100.00	$ 5,800.00	$ 0.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
Ms. Sherri Jackson (for RH) Re: "Tara" Series P O Box 1890 Lafayette, GA 30728-1890	$3,000.00	$3,000.00	
Mr. Thomas M. Watson, Esq (MH) Cusack, Gilfilland & O'Day, LLC Re: "Cindy" Series 415 Hamilton Blvd Peoria, Illinois 61602-1102	$2,800.00	$2,800.00	

TOTALS	$ $5,800.00	$ $5,800.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for ☐ fine ☒ restitution.

☐ the interest requirement for ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: Glenn Randall Ferguson
CASE NUMBER: CR-17-00017-001-RAW

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due
☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Said special assessment of $100 is due immediately. Said restitution of $5,800 is due and payable immediately.

Said special assessment and restitution shall be paid through the United States Court Clerk for the Eastern District of Oklahoma, P.O. Box 607, Muskogee, OK 74402.

If the defendant's financial condition does not allow for immediate payment of the restitution, the defendant shall make monthly installments of not less than $200 beginning sixty days from the defendant's release from custody. Notwithstanding establishment of a payment schedule, nothing shall prohibit the United States from executing or levying upon non-exempt property of the defendant discovered before or after the date of this judgment. In the event the defendant receives any federal or state income tax refund during the period of supervision, the defendant shall pay 100% of the total refund toward said restitution.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.