# APPENDIX

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**APPENDIX A**

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 22-5573

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ERIK HENTZEN,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee

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Appeal from the United States District Court
for the Eastern District of Kentucky

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(December 13, 2023)

Before BOGGS, SUHRHENRICH, and READLER, Circuit Judges.

BOGGS, Circuit Judge.

Erik Hentzen was convicted of receipt and possession of child pornography, in violation of 18 U.S.C. § 2252(a)(2) and 18 U.S.C. § 2252(a)(4)(B), and was sentenced to 20 years in prison. Hentzen then appealed to this court, arguing that the prosecution presented insufficient evidence to convict and that the admission of a "grooming" video was improper. *United States v. Hentzen*, 638 F. App'x 427 (6th Cir. 2015)

("*Hentzen I*"). Finding that the body of evidence showed that Hentzen affirmatively sought out child pornography and the admission of the video was harmless error, this court affirmed the judgment and sentence of the district court. *Id.* at 427-35.

Hentzen filed a timely motion to vacate his conviction and sentence under 28 U.S.C. § 2255, asserting that his trial counsel was ineffective for failing to obtain and prepare qualified expert testimony to expose inaccuracies in, and otherwise contest, the government's computer-forensics evidence. A magistrate judge recommended that Hentzen's 28 U.S.C. § 2255 be denied and the district court adopted the findings. Hentzen filed a timely notice of appeal, asking this court to issue a certificate of appealability (COA). (*Hentzen v. United States*, No. 18-6168 ("*Hentzen II*") Order at 1-2). We granted Hentzen relief as to some of his ineffective-assistance-of-counsel claims, namely (1) his failure to obtain and prepare a competent expert, (2) ineffective assistance of trial counsel at the sentencing hearing, and (3) ineffective assistance of Appellate counsel claims. *Ibid*. The United States then moved to reverse the district court's denial of Hentzen's motion to vacate and to remand the case to the district court, as he was entitled to an evidentiary hearing with respect to the claims allowed by the COA. *Hentzen II*, 2019 U.S. App. LEXIS 14831, at *1 (6th Cir. May 17, 2019). This court vacated the district court's judgment and remanded the matter. *Id.* at *2-3.

In August 2021, a two-day evidentiary hearing was held. The court heard testimony from, among others, Dr. Andrew Cobb, a former University of

Louisville professor, about the computer-forensics examination of Hentzen's computers and computer-related devices. Dr. Cobb opined that the investigators breached universally accepted procedures of computer forensics and analysis at the time Hentzen's equipment was seized and that the court heard inaccurate testimony with respect to how certain features of the Windows XP operating system functioned. Hentzen himself also testified during the evidentiary hearing about his trial counsel's representation of him and the evidence. Additionally, Kentucky Attorney General's Office Cyber Crimes Unit Forensic Examiner and Detective Michael Littrell also testified regarding certain "triage" procedures conducted on Hentzen's equipment at the time of seizure. He opined that the time stamps found on Hentzen's files that post-dated seizure were the result of the triage software used at the time Hentzen's computers and computer devices were seized.

In February 2022, Magistrate Judge Ingram issued a comprehensive Report and Recommendation, recommending denial of Hentzen's motion to vacate on his three remaining grounds: (1) his ineffective-assistance-of-trial-counsel's failure to obtain and prepare a competent expert, (2) his ineffective-assistance-of-trial-counsel at allocution at sentencing, and (3) his ineffective-assistance-of-appellate-counsel at sentencing claims. Magistrate Judge Ingram, however, also recommended the issuance of a COA only as to the first ground—Hentzen's ineffective-assistance-of-trial-counsel counsel claim—finding that reasonable jurists could find that Hentzen was

prejudiced. The district court subsequently entered judgment in favor of the United States.

Hentzen now appeals, asserting that his trial counsel failed to provide him constitutionally adequate assistance of counsel as to the presentation of expert testimony regarding the computer-forensic evidence. Hentzen has failed to establish that his trial counsel's performance was either deficient or prejudicial, and we affirm.

## I. BACKGROUND

### A. Hentzen I

In 2014, a jury convicted Erik Hentzen of knowing receipt and possession of child pornography and he was sentenced to 240 months in prison. At the time, he was a 25-year-old student at the University of Kentucky. *Hentzen I*, 638 F. App'x at 428. Hentzen had a keen interest in computers, possessing seven computers and seventeen other computer-related devices capable of storing a combined seventeen terabytes of digital data. He also avidly downloaded and collected internet files including music, videos, and pornography using peer-to-peer networks like eDonkey. *Ibid.* To access eDonkey, Hentzen used a software client called eMule.

The Kentucky Attorney General's Cyber Crime Unit surveils peer-to-peer networks, including eDonkey, for the distribution of child pornography. To surveil these networks, the Unit uses remote forensics tools, including an automatic software that searches networks for common keywords associated with child pornography. When a computer shares files containing those keywords, the IP address of the computer and the hash values of the files are

documented. A hash value is a unique digital fingerprint for each file that the Unit can use to identify files that match those of known child pornography. Between September and November of 2012, an agent detected many child-pornography files being shared by a single IP address on an unsecured internet router in Hentzen's apartment building. These files were traced to a laptop in Hentzen's apartment.

In March 2013, state law-enforcement officials executed a search warrant at Hentzen's apartment. Among the state law-enforcement officials were also computer-forensics experts with the Kentucky Attorney General's Office Cyber Crimes Branch, including investigator Thomas Bell.

Investigators testified that they found "the largest collection of computer equipment" they had seen in executing over 200 warrants. A total of seven computers, multiple external hard drives, and USB storage devices were seized from Hentzen's home. Investigators examined the devices on the scene and conducted a preliminary review of a laptop. The laptop's IP address matched the IP address that had previously been identified as downloading known child-pornography files prior to the execution of the search warrant. When investigators opened the laptop, it was running and showed all active downloads and uploads at the time. Recent and current downloads visible on Hentzen's computer screen included files with keywords that were clearly associated with child pornography. Hentzen was subsequently arrested.

Hentzen's computers and computer devices were submitted to forensic examination and were found to contain child pornography. Investigators found a total of 1,348 child-pornography images and 4,144 child-pornography videos on Hentzen's laptop. An additional 4,006 images and 2,461 videos, all believed to contain representations of child sexual abuse, were also located in a deleted state or stored within unallocated space, indicating that these files had been deleted or moved to another storage device. Further, investigators discovered a digital catalogue for commercial-grade child pornography and child-sexual-abuse images and videos for sale and multiple videos of animated child pornography depicting children engaging in sexual activity with adult men. Videos relating to exactly how to molest a child and how to "groom" a child into participating in abusive activities, as well as videos and images depicting bondage, torture, sado-masochistic behavior, and bestiality involving children were also contained within Hentzen's devices. All the evidence above was presented at trial.

The only contested issue at trial was whether Hentzen knew that the child-pornography files that had been found on his computer were, in fact, child pornography when he downloaded and possessed them. *Hentzen I*, 638 F. App'x at 429. The government presented a document detailing his last 30 searches on eMule as evidence that Hentzen knew that he was downloading child pornography. This document contained several known keyword terms pertaining to child sexual abuse and pornography, all entered individually. The government also presented evidence that two still images had been opened on an internet

browser and some files had been opened using a view that shows the thumbnails of videos and images. The government introduced into evidence several examples of the files that were found on Hentzen's computer, including the catalogue and nine child-pornography videos, portions of which were played for the jury. These included a video depicting a girl forced to engage in sexual activity with an animal as well as recordings of adult men sexually abusing young girls and, in one video, an infant.

Hentzen testified on his own behalf, asserting that he did not know that the files he was downloading were child pornography. *Hentzen I*, 638 F. App'x at 429-30. He testified that the files were on his computer through two different ways: (1) as a result of his side business of fixing his friends' computers in which he would copy all their media files onto his hard drives, or (2) because of his habit of searching the internet and batch downloading the top searches of the day. Hentzen explained that he developed a text file of all possible pornography keywords and would copy those keywords into the eMule search box and download any files that the program told him he did not already have. Hentzen maintained that he would generally not look at the names of the files, but rather the size of the file and how quickly it could download onto his computer. Using this batch downloading method, Hentzen testified that he downloaded at least 100,000 media files and had not watched most of them. Upon downloading the files, Hentzen would immediately open 25 different files at once to see if the files prompted an alert that they contained a virus or were otherwise corrupted. He testified that he would then move the uncorrupted files into a new labeled folder.

If a folder was automatically created by the downloading software for a group of files, Hentzen would search for other files with that keyword and place them together in that folder.

The government presented rebuttal testimony from William Baker, investigating forensic examiner and investigations manager for the Cyber Crimes Unit at the Kentucky Attorney General's Office, regarding the files that were actively downloading when Hentzen's computer was seized. Baker testified that, for some of the child-pornography files, there was no evidence that any other downloads had begun during the downloading process for those files found actively downloading on Hentzen's computer at the start of the seizure. Additionally, the forensic examiner noted that the still-downloading files had been downloaded individually.

After hearing the evidence, a jury convicted Hentzen. *Hentzen I*, 638 F. App'x at 430-31. He received a below-Guidelines sentence of 240 months of imprisonment. *Ibid*. Hentzen appealed, contesting the sufficiency of the evidence supporting his conviction, but this court affirmed. *Id*. at 431-37.

**B. Hentzen II**

Hentzen then filed a timely motion to vacate his conviction and sentence under 28 U.S.C. § 2255. *Hentzen II*, 2019 U.S. App. LEXIS 14831, at *1. Among other things, Hentzen argued that his counsel was ineffective because his defense attorney failed to obtain and prepare qualified-expert testimony to expose alleged inaccuracies in, and otherwise contest, the government's use of computer evidence. *Id.* at *3. To support his claim, Hentzen submitted an affidavit

from Andrew Cobb, Ph.D., a forensic examiner and partner at One Source Discovery. *Hentzen II*, No. 18-6168 Order at 5. Ultimately, this court vacated and remanded the case to the district court so that an evidentiary hearing may be held. *Hentzen II*, 2019 U.S. App. LEXIS 14831, at *1.

In his affidavit, Dr. Cobb reviewed the evidence and averred that the Kentucky Attorney General's investigators "breached universally accepted procedures" of computer-forensic data collection and analysis. *Hentzen II*, No. 18-6168 Order at 5. He argued that this compromised the integrity of the evidence after Hentzen's hard drives were taken into custody, "call[ing] into question the quality of the evidence, and all findings and opinions based on such evidence." Dr. Cobb also averred that examiner William Baker provided false testimony about certain features of the Windows XP Operating System, namely the creation and existence of "shortcut evidence," such as .lnk and thumbs.db files, on Hentzen's devices. Dr. Cobb contends that the government used this piece of evidence to persuade the jury of Hentzen's guilt. *Ibid.* Hentzen argued that his counsel's failure to mitigate the government's "shortcut evidence" with evidence akin to Dr. Cobb's findings was "fatal" to his case.

Hentzen also argued that trial counsel was ineffective because he failed to obtain a "more reliable, competent, and persuasive" computer-forensics expert. *Hentzen* II, No. 18-6168 Order at 6. Hentzen contends that Brian Ingram, the forensics expert that his counsel retained, was "grossly inadequate" and

compromised his counsel's ability to formulate sound trial strategy.

This court rejected Hentzen's argument that trial counsel was ineffective because of a failure to obtain a "more" competent expert. Explaining that the selection of a trial expert is a "paradigmatic example" of a "virtually unchallengeable" strategic choice, Hentzen had accordingly failed to demonstrate a reasonable probability that the outcome of his trial would have been different had counsel consulted another expert. We noted that counsel's investigation was thorough; he contacted several computer-forensics entities in search of a competent expert for Hentzen's case, a fact Hentzen himself admitted. Further, Hentzen noted that, after determining that Mr. Ingram's expertise was insufficient, counsel sought and retained another expert for the defense, Emmanuel Kressel. We concluded that, apart from mere speculation, Hentzen had failed to demonstrate a reasonable probability that the outcome of his trial would have been different had counsel retained a different, "more competent" expert.

With respect to Hentzen's "shortcut evidence" claim, however, this court remanded the issue for further proceedings. Explaining that this ineffective-assistance-of-counsel claim relied on off-the-record conversations between Hentzen and his counsel, Hentzen should be afforded an evidentiary hearing. *Id.* at 7. The court further noted that Hentzen had already met the burden for an evidentiary hearing through his § 2255 petition and affidavit. Because reasonable jurists could debate whether Hentzen is entitled to an evidentiary hearing, the court explained

that, logically, this would also mean that reasonable jurists could debate having resolved of Hentzen's "shortcut evidence" claim without such an evidentiary hearing.

On remand, the district court considered whether trial counsel was ineffective for failing to obtain and prepare qualified-expert testimony to expose inaccuracies in, and otherwise contest, the government's computer-forensics evidence. Following an evidentiary hearing, a magistrate judge recommended denying the motion to vacate but issuing a certificate of appealability (COA) for only this ground due to the fact-intensive nature of the inquiry. The district court agreed and adopted the magistrate judge's recommendation, denied the motion, and issued a COA. In issuing the COA, the district court noted that the question is very fact-intensive and reasonable jurists could debate whether Hentzen was prejudiced by the failure to introduce evidence as described by Dr. Cobb. Hentzen appeals.

## II. ANALYSIS

A defendant must make two showings to succeed on an ineffective-assistance-of-trial-counsel claim. First, he must show that counsel's performance "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). This means that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

When reviewing counsel's performance, we "indulge a strong presumption" that, "under the circumstances, the challenged action 'might be

considered sound trial strategy.'" *Id.* at 689 (citation omitted). Disagreement over trial strategy is not a basis for ineffective assistance of counsel. *Ibid.* In particular, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690. This standard is extremely deferential, as counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Ibid.* The inquiry involves eliminating "the distorting effects of hindsight . . . to evaluate the conduct from counsel's perspective at the time." *Id.* at 689.

Second, the defendant must establish that counsel's "deficient performance prejudiced the defense." *Id.* at 687. For counsel's error to be prejudicial, "[i]t is not enough… that [it] had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Instead, there must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Ibid.* Counsel must have engaged in errors "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the [ultimate] judgment." *Id.* at 691.

Defendants alleging ineffective assistance of counsel bear "a heavy burden of proof." *Whiting v. Burt*, 395 F.3d 602, 617 (6th Cir. 2005). The "threshold

issue is not whether [counsel] was inadequate; rather, it is whether he was so manifestly ineffective that defeat was snatched from the hands of probable victory." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992). In reviewing ineffective-assistance-of-counsel claims, the goal is not to ensure that a criminal defendant is afforded perfect counsel, but rather "to ensure that the adversarial testing process works to produce a just result under the standards governing decision." *Strickland*, 466 U.S. at 687. The "proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id*. at 688.

This court reviews de novo the denial of a 28 U.S.C. § 2255 motion and will overturn the factual findings of the district court only if they are clearly erroneous. *Hamblen v. United States*, 591 F.3d 471, 473 (6th Cir. 2009). Ineffective-assistance-of-counsel claims present mixed questions of law and fact and are reviewed de novo. *Railey v. Webb*, 540 F.3d 393, 415 (6th Cir. 2008).

**A. Battle of the Experts**

In his 28 U.S.C. § 2255 motion, Hentzen relies heavily upon the affidavit and testimony of his new expert, Dr. Andrew Cobb, at his evidentiary hearing to identify issues that he says his trial counsel should have responded to or raised. Dr. Cobb's affidavit was based on copies of evidence introduced at trial along with spreadsheets and other data files provided in discovery. At the evidentiary hearing, Dr. Cobb alleged that the computers and computer devices that were seized from Hentzen's residence and later admitted into evidence during trial were not properly

handled. The Kentucky Office of Attorney General's Cyber Crimes Branch, according to Dr. Cobb's testimony at the hearing, mishandled Hentzen's items because they did not comply with applicable industry standards in their investigation. To support his claim, Dr. Cobb pointed to several thousand files that contained time stamps and dates after the evidence was taken into custody. Dr. Cobb testified at the evidentiary hearing that this could indicate "a variety of activity," but did not opine as to what caused the post-custody time stamps on those files.

During cross-examination, however, Dr. Cobb contradicted himself. Cobb admitted that the on-scene "triage" that investigators used on Hentzen's computer and computer devices, which involves running a particular program—OS Triage—to examine for suspect activity on devices during the execution of a search warrant, can result in post-custody timestamps. Moreover, Cobb testified that on-scene triage is, in fact, acceptable practice in this precise investigatory situation: when investigators see contraband on the screen and suspect that file encryption may be involved.

This acceptable practice is in line with the testimony of Detective Mike Littrell, a forensic examiner and detective with the Kentucky Attorney General's Office Cyber Crimes Unit, who testified that triage is (1) a part of basic forensic protocol; (2) can be performed on site without a further search warrant; and (3) results in additional post-seizure dates being placed on a file. Further, Detective Littrell noted that the "created" file dates—the only forensic date of importance in a child-pornography case—were not

modified. Dr. Cobb acknowledged that none of Hentzen's child-pornography files in question contained any creation dates that post-dated the search warrant.

Dr. Cobb also contested the testimony of William Baker, the government's forensic examiner, with respect to how certain shortcut files—.lnk and thumbs.db files found on Hentzen's computer—were created. Examiner Baker testified that a .lnk file is created when a file is opened and a thumbs.db file is created by Windows software when a file is either viewed or opened in icon or display view. Cobb argued, however, that .lnk files may also be created using two other methods: right clicking on a file and creating a shortcut link, and moving an already existing .lnk file from one device to another. Notably, however, Dr. Cobb conceded that the .lnk files, as well as the actual child-pornography files, in question matched the existing file paths on Hentzen's computer, noting that there was no evidence that the .lnk files were copied or had traveled from another computer onto Hentzen's computer.

Likewise, Dr. Cobb also disagreed with Examiner Baker's testimony about the creation of thumbs.db files. Cobb testified that a thumbs.db file appears when a file is opened and viewed in icon view or when a file is moved from one computer to another, even if it was never opened. Cobb conceded, however, that there was no evidence that the thumbs.db files in question were copied from another computer to Hentzen's computer; the actual child-pornography files upon which the thumbs.db files were created already existed on Hentzen's computer. Stated simply,

Dr. Cobb concluded that the shortcut files in question, .lnk and thumbs.db files, as well as the actual child-pornography files, both existed, and that they had matching file paths on Hentzen's computer and computer devices; there was no evidence that they were copied onto Hentzen's devices.

Lastly, Dr. Cobb attempted to discredit Examiner Baker's rebuttal testimony with respect to Hentzen's batch-downloading defense. While Hentzen testified that he did not have an awareness of exactly what he was downloading because his practice was to download several files at once, Baker testified in rebuttal that this was untrue because certain downloaded files on Hentzen's computer had different timestamps, rather than a single one indicative of batch downloading. Cobb, however, noted that the creation times of the files revealed a pattern of many files sharing a single timestamp on Hentzen's eMule folder.

The magistrate judge recommended denying Hentzen's motion to vacate, finding that Hentzen's counsel was not deficient or prejudicial. The magistrate judge explained that, had Dr. Cobb testified at trial, the testimony would not have had any meaningful effect to undermine the government's credibility with respect to its data-collection methods.

Similarly, the magistrate judge explained that Dr. Cobb simply presented his own speculation regarding how thumbs.db and .lnk files could have been copied and transferred from another computer onto Hentzen's own computer; there was no real evidence supporting this method of shortcut file creation. Finding that the weight of the evidence clearly pointed

to the fact that the child-pornography files were accessed on Hentzen's computer and computer devices, the magistrate judge found that Dr. Cobb's highlighting of "minor" inconsistencies was ultimately insignificant. The magistrate judge found that, even taking Hentzen's batch-downloading testimony as true against that of Baker's rebuttal, no prejudice resulted, considering the volume and strength of evidence against Hentzen**.** The district court agreed and denied the § 2255 motion.

We agree. Hentzen has failed to show that, had Dr. Cobb's speculative critiques of counsel based on the evidentiary record at trial been presented to the jury at said trial, the result would have been different. In fact, at the evidentiary hearing, Dr. Cobb conceded on several key issues asserted in his affidavit, including the industry standards of acceptable triage practice, the creation and presence of "shortcut evidence," and the time stamps associated with Hentzen's downloading patterns. Thus, Hentzen's argument fails to demonstrate that counsel's performance was deficient or that the trial outcome would have been different. Considering the evidence, he has done quite the opposite.

**B. Preparation of Computer-Forensics Evidence**

On appeal, Hentzen claims that counsel was unprepared to address the government's computer-forensics evidence. He argues that his counsel was deficient because he should have been prepared to show that investigators mishandled seized computer-forensics evidence and that the government's expert provided inaccurate testimony. The jury, he argues,

did not have the opportunity to hear mitigating evidence as to how the computer evidence was seized. Had they had that opportunity, Hentzen claims, the integrity of the government's computer evidence would have been undermined.

Hentzen's failure-to-challenge argument fails. As acknowledged by Dr. Cobb himself, the evidence was handled properly. Dr. Cobb's own testimony noted that an exception to the general industry practice of powering down devices upon seizure applied to this case—when contraband was visible on the screen. Thomas Bell testified at trial that Hentzen's computer was in the process of actively downloading content using eMule software at the time the search warrant was executed and that the names and keywords of those files were indicative of child pornography and immediately visible to the investigators. Thus, the subsequent decision by investigators to triage Hentzen's computers and computer devices was a reasonable one.

Expert testimony, including that of Dr. Cobb, contravenes Hentzen's argument. As mentioned above, Dr. Cobb himself conceded that the post-custody timestamps that he once argued were significant were a result of the triaging on Hentzen's computer at the time the search warrant was executed. Likewise, Detective Littrell testified that changes in the times and dates of files were an "expected outcome" of the process. Both Dr. Cobb and Detective Littrell agreed that the created dates of the child-pornography files were the most significant pieces of evidence and were never modified in this case.

Hentzen's counsel testified at the evidentiary hearing that he consulted not one but two forensic experts, both of whom raised no issues with the forensic methods used by the government. Counsel stated that, had his experts found an issue with the forensics, he would have made the strategic choice to contest the evidence presented by the government. Counsel's strategic choice to forgo countering this evidence, therefore, was sound trial strategy that exercised reasonable professional judgment. As such, counsel cannot be considered deficient or prejudicial for a failure to challenge the computer-forensics evidence.

**C. Importance of Computer-Forensics Evidence Admitted to Trial**

Relying on Dr. Cobb's opinion, Hentzen also challenges counsel's failure to contest the accuracy of the government's expert testimony. He argues that counsel allowed the government expert to testify inaccurately and did not provide appropriate factual context regarding the nature of shortcut files on his devices. Hentzen argues that their existence does not necessarily mean that he opened the original, existing child-pornography files upon which the shortcut files were made, but rather that the files could be on his device through other means, such as transferring the files from another device onto his own. This argument also fails under *Strickland*.

As mentioned, Dr. Cobb presents mere speculation, not evidence, relating to the alternative ways in which .lnk and thumbs.db shortcut files can be created. Regarding the child-pornography videos in question, Dr. Cobb conceded that the .lnk and

thumbs.db shortcuts traced back to and matched file paths with those found on Hentzen's computer. Simply stated, the actual files upon which the shortcut files were based were on Hentzen's computer; there is no evidence that the shortcut files were on Hentzen's computer through other means.

Hentzen correctly identifies two instances in which Examiner Baker's trial testimony was incorrect: (1) eMule was installed on more than one, not just on one, of Hentzen's computers, and (2) Baker's assertion that Hentzen downloaded some files individually or in small batches of a few files at a time was not supported by Hentzen's eMule history, which in fact favored Hentzen's claim that he mostly batch-downloaded his files in bulk.

For an ineffective-assistance-of-counsel claim to prevail, however, the question is whether counsel's failure to highlight these errors in Baker's testimony fell below professional standards and prejudiced Hentzen's defense. While Hentzen's counsel may have failed to highlight the presence of eMule on multiple devices, Hentzen himself stated this fact to the jury in his own testimony. As such, this point did not require a qualified expert to testify, and Hentzen cannot fault counsel for deficiency on this ground. In addition, it would not seem that this discrepancy is either relevant or harmful.

Likewise, whether counsel contended that some, most, or all of Hentzen's contraband files were downloaded individually or in batches does not render his performance ineffective. Hentzen argues that, had trial counsel been effective, he would have been able to undermine the confidence in the computer-forensics

evidence. This would, in turn, provide the jury with reasonable doubt that Hentzen knew he downloaded child pornography and produce a different result.

There is no doubt, however, that Hentzen had knowledge of what he was doing. Regardless of the downloading method, it is uncontested that thousands of child-pornography files were downloaded onto Hentzen's computer. Accomplishing this necessarily required Hentzen to knowingly search in specific places and for specific terms on the internet. A survey of Hentzen's last 30 searches on eMule alone showed terminology referring to known darknet child-pornography production studios and websites, titles and abbreviations for child pornography known to law enforcement, known terminology added to the ends of file names to disguise child pornography files from the authorities, and the words "toddler" in Dutch and "daughter," "sister," and "brother" in German. Counsel's failure to challenge Baker's testimony was not prejudicial to Hentzen, considering the evidence. Under *Strickland*, Hentzen again fails to prove that counsel's performance was deficient and that the outcome of his proceeding would have been different.

Lastly, Hentzen claims that, had his counsel been constitutionally adequate, he would have been able to keep out of the trial record an allegedly prejudicial animated "grooming video" that he claims was erroneously introduced into evidence. This would, in Hentzen's view, have warranted a reversal for a new trial on his direct appeal. Hentzen also asserts that, had counsel been effective, he would have been able to undermine this piece of "significant circumstantial evidence." *Hentzen I*, 638 F. App'x at 431.

Again, Hentzen's argument fails. As this court previously held, the admission of the video evidence was one of harmless error. *Id*. at 435. Whether the admission of improperly admitted 404(b) evidence "substantially swayed" a jury "generally depends on whether the properly admissible evidence of defendant's guilt was overwhelming." *Id*. at 434. Again, Hentzen fails to show that his counsel was ineffective or prejudicial.

The weight of properly admitted evidence in this case is overwhelming. For Hentzen to acquire thousands of images and videos of minors engaged in sexual abuse and sexual conduct, he intentionally inserted keywords and phrases that he knew related to child pornography into a search box on a peer-to-peer network, directed the program to search for files that matched those known terms, selected the files to download from a screen that revealed the file names, instructed the computer to download those files, and eventually removed them from his incoming folder to other locations. As this court previously held, the admission of an isolated video in light of the evidence is not substantial or prejudicial. There was no undermining of the properly admitted evidence in this case; the "limited" use of single video weighed against the body of "horrifying" evidence presented did not materially affect the outcome of the case. *Hentzen I*, 638 F. App'x at 435.

**AFFIRMED**

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
LEXINGTON

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No. 5:13-CR-94-JMH-HAI

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UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v.

ERIK A. HENTZEN,

Defendant/Movant.

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ORDER

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(June 21, 2022)

This matter is before the Court upon the Report and Recommendation ("Report") of United States Magistrate Judge Hanly A. Ingram [DE 148], wherein he recommends that Defendant Erik A. Hentzen's Motion to Vacate his conviction under 28 U.S.C. § 2255 [DE 68] be denied. Following Judge Ingram's Report, Hentzen filed objections. [DE 149]. For the reasons set forth herein, Defendant's Objections [DE 149] are overruled and the Report [DE 148] is adopted.

**LEGAL STANDARD**

In the absence of an objection to a magistrate judge's report, the district court is not required to

review under any standard. *Thomas v. Arn*, 474 U.S. 140, 152 (1985). In contrast, when a specific objection to the Report has been made, the reviewing court is required to review de novo those objected to portions. *Mira v. Marshall*, 806 F.2d 636, 637 (6th Cir. 1986). Following a de novo review, the district court must "accept, reject, or modify the recommendation, receive further evidence, or resubmit the matter to the magistrate judge with instructions." Fed. R. Crim. P. 59(b)(3). Accordingly, the Court will review de novo the portions of Judge Ingram's Report to which Hentzen objects.

A prisoner may seek habeas relief under § 2255 "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C.S. § 2255(a). When the § 2255 motion alleges constitutional error, to succeed a federal prisoner "must establish an error of constitutional magnitude which had a substantial and injurious effect or influence on the proceedings." *Watson v. United States*, 165 F.3d 486, 488 (6th Cir. 1999)(citing *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993)). The Supreme Court has recognized that there is a constitutional right to not just counsel, but "effective assistance of counsel," which a defendant can be deprived of by counsel failing to render "adequate legal assistance." U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984)(citation omitted). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

For Ineffective Assistance of Counsel (IAC) claims, the defendant must demonstrate that counsel's performance was deficient and that the counsel's deficient performance resulted in prejudice to the defendant. *Strickland*, 466 U.S. at 687. Regarding the first prong, the court must consider all the circumstances and ask whether "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The Supreme Court is clear that "[j]udicial scrutiny of counsel's performance must be highly deferential" because "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* at 689. Thus, in an effort to eliminate the "distorting effects of hindsight," the reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

Even if the court finds counsel's performance to be deficient, the movant must still demonstrate prejudice to succeed on an IAC claim under § 2255. In proving prejudice, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 695. The Supreme Court notes that counsel's inadequate performance has different impacts depending on the specific case, the totality of evidence, and the adequacy of the record. "Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect." *Id.* at 695-96.

## DISCUSSION

**OBJECTION NO. 1**

Hentzen argues that the Report erred in its interpretation of the scope of the remand. While the Report holds that only three issues were remanded, Hentzen asserts that all six issues were remanded.

**a. BACKGROUND**

Hentzen filed his § 2255 motion in February of 2017. [DE 68]. The Court adopted the magistrate judge's report [DE 94] denying Hentzen's motion in October of 2018. [DE 97]. When Hentzen appealed the denial of his § 2255 motion, the Sixth Circuit granted in part his application for a Certificate of Appealability ("COA"). *Hentzen v. United States* ("*Hentzen* I"), No. 18-6168, DE 8-2 (March 7, 2019). Specifically, a COA was granted for three issues and denied for three issues. Following the issuance of the COA, the government filed a motion to reverse "and remand the case to the district court for further proceedings consistent with the Court's order." *Hentzen* I, No. 18-6168, DE 11 (March 12, 2019). The Sixth Circuit granted the government's motion to remand. *Hentzen* I, No. 18-6168, DE 15 (May 17, 2019).

The remand order explains that the Sixth Circuit granted Hentzen a COA with respect to three claims, but "denied Hentzen a COA with respect to his remaining claims." *Hentzen* I, No. 18-6168, DE 15-2 at 2 (May 17, 2019). The Sixth Circuit then describes the government's motion for remand: "the government acknowledges that the district court should further consider each of Hentzen's surviving claims in light of this court's order granting Hentzen's COA application

in part." *Hentzen* I, No. 18-6168, DE 15-2 at 3 (May 17, 2019). The Sixth Circuit goes on to order: "We VACATE the district court's judgment, GRANT the government's motion to remand, and REMAND this case to the district court for further proceedings consistent with this order." *Id*. Following the remand, the case was referred to the magistrate judge for an evidentiary hearing.

One preliminary issue was the scope of the hearing. Hentzen argued that all six issues raised in his § 2255 motion required review because the Sixth Circuit's May 17 order vacated the district court's judgment in its entirety. [DE 111 at 1]. After reviewing the language of the Sixth Circuit's May 17 order as well as this Court's referral order [DE 104], Judge Ingram held that the scope of the hearing should be limited to the three issues that garnered a COA. [DE 116 at 2-5]. Hentzen filed a Motion to Reconsider [DE 118], but this Court denied the Motion and affirmed Judge Ingram's determination that the remand was limited to the three issues. [DE 121].

In the Report, Judge Ingram again addresses the scope of the issues to be considered. The Report states the history of the matter before upholding the previous decision about the scope, that only the three issues that were granted a COA are to be considered in the Court's analysis of the remanded § 2255 motion.

**b. LEGAL STANDARDS**

First, regarding the COA, upon concluding that a § 2255 motion must be denied, the court may issue a COA "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This occurs when the defendant makes "a

substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)(citing *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). A COA may also be granted when defendant shows "that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Brown v. United States*, No. 21-2647, 2022 U.S. App. LEXIS 1594, at *5 (6th Cir. Jan. 19, 2022)(citing *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)).

When the district court denies a § 2255 motion and declines to issue a COA, the circuit court lacks jurisdiction to rule on the merits. *Miller-El*, 537 U.S. at 336. However, circuit courts have the ability to grant a COA and may issue such certificates limited to specific issues. *See Peterson v. Douma*, 751 F.3d 524, 528–530 (7th Cir. 2014)(confirming that only one issue was certified for appeal and thus addressable by the court even though the petitioner read the certificate to encompass all four issues raised).

Second, regarding the remand, the district court is limited by the parameters set forth by the Sixth Circuit in its mandate. The law of the case doctrine and the mandate rule require the district court to only reconsider issues that the superior court has not decided, whether the superior court's decision was express or implied. *Sunshine Heifers, LLC v. Citizens First Bank (In re Purdy),* 870 F.3d 436, 443 (6th Cir. 2017). In determining the scope of issues following a mandate, "an appellate court's disposition of an appeal

must be read against the backdrop of prior proceedings in the case." *U.S. v. Mendez*, 498 F.3d 423, 426 (6th Cir. 2007). "The trial court must 'implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.'" *Moore v. WesBanco Bank, Inc.*, 612 F. App'x 816, 820 (6th Cir. 2015)(citing *United States v.* Moored, 38 F.3d 1419, 1421 (6th Cir. 1994)).

**c. ANALYSIS**

Taking into account "the letter and the spirit of the mandate" and "the appellate court's opinion and the circumstances it embraces," the Sixth Circuit only remanded the three issues that were granted a COA. First, the limited nature of the remand is clear by looking to the literal language utilized by the Sixth Circuit in the mandate. The Sixth Circuit summarizes the government's motion to remand saying that "the district court should further consider each of Hentzen's surviving claims in light of this court's order granting Hentzen's application in part" before the Sixth Circuit goes on to grant the government's motion. The Sixth Circuit is granting the limited remand, applying only to the "surviving claims" as defined by the COA.

Second, logic requires this Court to interpret the remand as limited to the three issues granted a COA. It is important to interpret the mandate in conjunction with the COA as district courts are required to read the mandate "against the backdrop of prior proceedings in the case" to determine its scope. A COA is only granted when reasonable minds could differ regarding the outcome or when the arguments merit

further consideration. The Sixth Circuit has already determined that reasonable minds could *not* have come to a different conclusion regarding the outcome for the three non-surviving issues. Why then would the Sixth Circuit order the district court to reevaluate an issue that they have already determined is undebatable?

In its order partially granting the COA, the Sixth Circuit cites *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) and explains that a COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." [DE 8-2]. Finding that no "substantial showing" had been made, the Court denied the COA for the non-surviving three issues. It is beyond this Court's authority to readdress issues that the Sixth Circuit has not vacated nor remanded. Therefore, Hentzen's first objection is overruled. The Court's analysis is limited to the three surviving issues that were granted a COA.

**OBJECTION NO. 2**

Hentzen argues that the Report erred by declining to grant a COA regarding the scope of the Sixth Circuit's remand. Because a reasonable jurist could not dispute the literal language of the Sixth Circuit's remand, no COA can be granted for this issue.

Additionally, the logic that the Sixth Circuit would not remand issues where it already found that the applicant did not make a substantial showing of the denial of a constitutional right similarly prevents a COA from being granted. The Sixth Circuit already found that for the three non-surviving issues reasonable minds could not differ and that the arguments did not merit further consideration. It

would make no sense then for this Court to now say that reasonable minds could differ about whether or not the Sixth Circuit directed this Court to reconsider those claims for which it already determined that reasonable minds could *not* differ. Therefore, Hentzen's second objection is overruled.

**OBJECTION NO. 3**

Hentzen's final objection finds issue with the Report's holding that Hentzen is not entitled to relief under § 2255 for Ground One. Ground One argues that trial counsel, Steven Pence, was ineffective for failing to adequately investigate and understand the government's digital-computer-forensic evidence, depriving Hentzen of the ability "to mount a meaningful challenge" to the government's computer evidence. [DE 68-15 at 20]. Hentzen breaks down his third objection into five subparts.

**OBJECTION 3A**

Hentzen argues that because the Report erred in concluding that the remand was limited, that the Report's finding that § 2255 relief is foreclosed by the law is also erroneous.

**a. BACKGROUND**

In Hentzen's application for a COA, he breaks Ground One into numerous subclaims. *Hentzen* I, No. 18-6168, DE 4 at 14-16 (November 7, 2018). In the Sixth Circuit's order granting a partial COA, the appellate court addressed five subclaims related to Ground One's IAC claim, subclaims 1(a) through 1(e). *Hentzen* I, No. 18-6168, DE 8-2 at 3 (March 7, 2019). However, the Sixth Circuit only granted a COA with respect to subclaim 1(d).

The Sixth Circuit breaks subclaim 1(d) into two arguments. First, the COA phrases argument 1 of subclaim 1(d) as Hentzen arguing that "trial counsel was ineffective for failing to obtain and prepare qualified expert testimony to expose inaccuracies in, and otherwise contest, the government's digital-computer-forensics evidence." *Hentzen* I, No. 18-6168, DE 8-2 at 5 (March 7, 2019). Second, the Sixth Circuit defines argument 2 of subclaim 1(d) as counsel failing "to obtain a more reliable, competent, and persuasive digital-computer-forensics expert" because the retained forensic expert, Brian Ingram, was inadequate resulting in the defense being unable to properly formulate trial strategy. *Hentzen* I, No. 18-6168, DE 8-2 at 6 (March 7, 2019). For argument 1, the Sixth Circuit granted a COA. However, for argument 2, there was no explicit grant of a COA.

In the COA order, when argument 2 of subclaim 1(d) was addressed, the Sixth Circuit began by stating the law, "[t]he selection of an expert is a paradigmatic example of the type of strategic choice that, when made after thorough investigation of the law and facts, is virtually unchallengeable." *Hentzen* I, No. 18-6168, DE 8-2 at 6 (March 7, 2019). The Sixth Circuit goes on to apply the law to the facts and conclude that "reasonable jurists would not debate the district court's resolution of this claim." *Id*. The Sixth Circuit emphasized that Hentzen "failed to show that counsel's investigation was not thorough" as Hentzen admitted counsel contacted several potential experts and counsel eventually retained another expert when Ingram proved insufficient. *Id.*

The Report argues that the COA's rejection of argument 2 of subclaim 1(d) "logically preclude a finding of either deficient performance or prejudice on Ground One" because "the Sixth Circuit's finding of reasonable performance in hiring Ingram and Kressel appears to logically exclude a finding of deficient performance in failing to hire Cobb or a Cobb-analogue" and the "court is not at liberty to revisit these findings, which the appellate court characterized as undebatable." [DE 148 at 41-42].

In response, Hentzen reasserts his previous argument that the Sixth Circuit issued a total remand, which would deflate the Report's argument. Second, Hentzen objects to the Report's reasoning, stating that the "law-of-the-case conclusion would interrupt the Sixth Circuit's May 17, 2019 *Order* as entirely illogical." [DE 149 at 4].

**b. ANALYSIS**

It is clear from the language in the COA order that argument 2 of subclaim 1(d) is not up for reconsideration. The COA order uses terminology like "reasonable jurists would not debate" and Hentzen "failed to show" to express the finality of the issue. Especially when contrasted to the Sixth Circuit's language regarding argument 1 of subclaim 1(d), it is apparent that the COA was only granted for argument 1. The Sixth Circuit explains all of argument 1 of subclaim 1(d), then concludes "Accordingly, Hentzen's COA application is granted with respect to *this* argument." *Hentzen* I, No. 18-6168, DE 8-2 at 5 (March 7, 2019)(emphasis added). Then the Sixth Circuit goes into explaining argument 2 of subclaim 1(d), "Hentzen *also* argues that. . . " concluding that "reasonable

jurists would not debate the district court's resolution of this claim." *Id.* (emphasis added). As determined previously in this Order, only those issues which were granted a COA were ultimately remanded to this Court. Because the Sixth Circuit explicitly refused to grant a COA for the argument that counsel failed to obtain a more reliable expert, this Court is deprived of the ability to consider the sub-issue on remand.

Even if the Sixth Circuit had granted a COA for argument 2 of subclaim 1(d), this Court now finds that Hentzen has not proven IAC on the matter. As the Sixth Circuit points out "[t]he selection of an expert witness is a paradigmatic example of the type of strategic choice that, when made after thorough investigation of the law and facts, is virtually unchallengeable." *Hinton v. Alabama*, 571 U.S. 263, 274-75 (2014)(holding that the judgment must be vacated because trial counsel's performance was deficient for not attempting to understand the state resources available to obtain an expert and the prior courts had not properly conducted a prejudice-prong analysis).

Unlike the attorney in *Hinton* who admitted to using an inadequate expert witness at trial because the attorney did not perform basic research regarding public funds available to his client, trial counsel here diligently searched for a proper expert, retained an expert, realized an alternative expert was needed, searched for a different expert, and retained a new expert. Pence's actions are indicative of a thorough investigation, making the selection of Ingram as an expert a strategic choice which this court will not challenge further.

Next, Hentzen's objection that the Report's reasoning equates to the Sixth Circuit's Order being illogical is not fruitful. Specifically, Hentzen finds issue with the Report's reasoning that the rejection of argument 2 of ground 1(d) now logically precludes the Court from granting § 2255 relief based on argument 1 of ground 1(d). In addressing and rejecting argument 1 of subclaim 1(d), Judge Ingram noted the paradoxical relationship between the two arguments of ground 1(d). The Report explains how the Sixth Circuit's opinion rejecting argument 2 of subclaim 1(d) forecloses the lower court's authority to revisit the findings of argument 1 of subclaim 1(d): "How can this Court find that Pence was ineffective in failing to hire another expert (Cobb or a Cobb analogue) when the Sixth Circuit has already determined Pence was not ineffective in failing to hire another expert-and that no reasonable jurist could hold otherwise?" [DE 148 at 42]. Hentzen argues that Judge Ingram's rationale implies that the Sixth Circuit opinion is irrational and that there must be some viability to the claim for the Sixth Circuit to have granted a COA.

The Sixth Circuit's opinion is not contradictory, nor does Judge Ingram suggest that it is. First, in granting the COA for argument 1 of subclaim 1(d), the Sixth Circuit says that "the magistrate judge, and the district court by extension, failed to address this precise argument." *Hentzen* I, No. 18-6168, DE 8-2 at 5 (March 7, 2019). The Sixth Circuit's COA issuance did not hold that the original order was wrong, only that the issue was overlooked. Second, it follows logic that if reasonable jurists would not debate that Pence was not ineffective for hiring Ingram as a digital-computer-forensic expert, that would mean that

reasonable jurist would also not debate that Pence was not ineffective for failing to hire an expert like Cobb. Therefore, Objection No. 3A, is overruled.

**OBJECTION 3B**

Objection No. 3B states that Judge Ingram erred in holding that Hentzen was not prejudiced by the lack of qualified expert testimony attacking the digital-computer-forensic evidence because the government's keyword evidence was the driving force in leading the jury to find Hentzen guilty.

**a. BACKGROUND**

Hentzen's main gripe is that the "keyword" proof was not the powerful linchpin evidence Judge Ingram made it out to be because Hentzen has repeatedly pointed to flaws in the keyword evidence, which Hentzen claims that Judge Ingram refused to consider. Judge Ingram's report places significant emphasis on the keyword evidence:

> The overarching question of how severely Dr. Cobb's testimony could have undermined the government's credibility must take into account that the most powerful—and most emphasized—evidence at trial concerned the child-porn keywords found on Hentzen's computer. The government emphasized the keywords in opening statements and closing arguments. Both Bell and Baker testified about them at length. A key piece of evidence was the file of Hentzen's last-thirty eMule searches. Of those thirty searches, eleven were child pornography keywords. Whether he

typed or copy-pasted them, Hentzen entered those terms into eMule's search bar. Hentzen testified he did not know those terms were child-porn-related, but the jury apparently was not buying it. Further, Hentzen's computer system contained many images and videos with multiple child-pornography keywords in their names (along with system files linked to these images and videos). Hentzen testified he understood that terms like "11yo" in file names were a red flag of child pornography. D.E. 51 at 17-18, 78-79. And he acknowledged that multiple child-porn keywords, including terms like "pedo," "10yo," "12yo," and "14yo" were visible on his computer screen as active downloads when agents arrived. *Id*. at 79-80. Given all this, the jury quite understandably disbelieved his purported ignorance of the child pornography on his devices. Even accumulated with the other purported errors flagged by Dr. Cobb, this evidence was unlikely to tip the scales. To find prejudice, "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). Here, the likelihood is conceivable, but far from substantial. . . While the issues raised by Dr. Cobb might nip at the toes of the government's case, they fail to strike at its heart. Given the overall strength of the evidence

> against him (which was also noted by the Court of Appeals), Hentzen does not meet his burden of proving prejudice on Ground One."

[DE 148 at 53]. Hentzen's objection focuses on the Report ignoring Hentzen's protests to the keyword evidence, saying that the blind acceptance of the evidence "without even acknowledging Mr. Hentzen's contrary arguments is a monumental mistake that calls into question the entirety of its prejudice analysis." [DE 149 at 8].

**b. ANALYSIS**

While the Report says that "Hentzen does not challenge the keyword evidence adduced at trial," Hentzen assures the Court that he "has consistently and repeatedly challenged the keywords," and he points to three incidents where he criticized the keyword evidence – on cross examination, his affidavit, and in his § 2255 motion. The Court does not deny Hentzen's disapproval of the keyword evidence but supports Judge Ingram's findings that expert testimony akin to Cobb's would not have overshadowed the strength of the keyword evidence.

First, keyword evidence is not up for this Court to reconsider on remand. As stated *ad nauseam*, this Court is only at liberty to address those issues for which the Sixth Circuit remanded. The Court will not now reevaluate the strength of evidence which the Sixth Circuit has chosen not to overturn. Hentzen's repeated attempts to finagle the narrative by re-discussing issues that have already been definitively decided find no merit in this Court.

Second, assuming arguendo that the Court reviewed the supposed flaws in the keyword evidence, this Court still finds that due to the overall strength of keyword evidence, Defendant is unable to show there is a reasonable probability that the trial outcome would have been different. The Court addresses each criticism Defendant espouses to show why the prejudice prong cannot be met.

Defendant fist [sic] argues that the keywords have "crossover application" meaning that the keywords the government focused on at trial do not *just* apply to illicit material and that Hentzen's use of the keywords was only for the non-illicit purposes. That Hentzen was just using the term's innocent application is a difficult strategy to successfully employ when some of the keywords the government emphasized included "kidcam", "10yo", "11yo", 12yo, "14yo", and "pedo." At trial, Hentzen even testified that he understood "11yo" was a red flag for child pornography. [DE 51 at 17-18, 78-79]. While Hentzen made the argument at trial that he was unaware certain terms were associated with child pornography, the jury still found Hentzen to have possessed the requisite knowledge for conviction.

Defendant's second argument focuses on trial counsel's failure to point out the flaws in the government's keyword evidence that could have been used to bolster his lack-of-knowledge defense. Specifically, Hentzen asserts that keywords were not in the titles of *some* files, but instead existed in the file's metadata and that *some* of the files the keywords were associated with did not contain imagery or videos. However, Hentzen does not refute that there

actually were files associated with the keywords that *did* contain the illicit imagery nor does he dispute that there were files that did contain keywords in the title, opposed to just in the metadata. Assuming trial counsel had raised these objections at trial, the government would still be able to point to contraband images and videos on Hentzen's computer that have keywords in the file's name. Therefore, even if the Court were to take into account Hentzen's criticisms of the keyword evidence, this Court agrees with Judge Ingram that the prejudice prong cannot be met because given the overall strength of the keyword evidence, there is no *substantial* likelihood that an expert's testimony would have created a different result.

**OBJECTION 3C**

Hentzen's third objection asserts that the Report did not address his posited alternative prejudice theory.

**a. BACKGROUND**

When the Sixth Circuit decided against reversing the original judgment of conviction in 2015, the Sixth Circuit discussed the grooming video and ultimately held that while admitting the video was error, the error was harmless "in light of the entire record" because the government had presented other convincing and overwhelming evidence:

> When the government presents other convincing or overwhelming evidence, we may deem the admission of 404(b) evidence mere harmless error." *United States v. Layne*, 192 F.3d 556, 573 (6th Cir. 1999). . . In light of the entire record,

> the government sufficiently established that the error was harmless. The jury saw the animated video after seeing nine properly admitted videos—videos that showed actual children being abused by adult men in horrifying ways—and a catalogue of child pornography. The government reminded the jury of the videos and catalogue in closing. The government also relied on evidence that Hentzen knew of the child pornography, including the evidence from his browser history and his search terms. As for the animated video, it was never referenced after its introduction into evidence nor was there any further insinuation that Hentzen was preparing or had the inclination to molest a child. The limited use of the animated video illustrates its lack of legitimate evidentiary value, but it also weighs against any conclusion that the jury would have decided the case differently absent the introduction of the animated video. We ultimately conclude that the erroneous admission of the video did not materially affect the jury's verdict.

*Hentzen v. United States* ("*Hentzen* 2014"), No. 14-6153, DE 26-1 (August 17, 2015).

Hentzen now argues that if trial counsel had obtained and prepared qualified expert testimony to expose and contest inaccuracies in the government's digital-computer-forensic testimony that the

admittance of the grooming video would no longer have been harmless because the "other" evidence would not have been so "overwhelming." If the grooming video admittance was not a harmless error, it *may* have warranted the Sixth Circuit reversing the original judgment – which would meet the prejudice *Strickland* prong because "but for" counsel's error a different result would have occurred.

**b. ANALYSIS**

Addressing the alternative theory, this Court finds that the *Strickland* prejudice prong still cannot be met. The Sixth Circuit's opinion does not specify that *the* "overwhelming" evidence that made the error harmless was only the government's uncontested digital-computer-forensic evidence. Instead, the opinion declares that "in light of the entire record" the evidence presented was so "convincing" that even an error in admittance was harmless. The Sixth Circuit mentions multiple factors that influenced its decision including the government's "limited use" of the animated video, the jury viewing nine properly admitted videos depicting child abuse, and the government presenting knowledge-related evidence like Hentzen's browser history and search terms. Thus, the digital-computer-forensic evidence was only a minor factor in the Sixth Circuit's holding that the error was harmless. The appellate court came to this conclusion after considering "the entire record." It is not reasonably probable that the appellate court would have decided differently had the defense provided an expert to contest the government's digital-computer-evidence.

**OBJECTION 3D**

Hentzen next objects to the Report's multiple findings that Pence's performance was not deficient. Hentzen groups this objection into three categories: (a) ineffectiveness for failing to employ an expert like Cobb to rebut the government's digital- computer-forensics evidence, (b)ineffectiveness for not contesting the government's inaccurate statements about "batch downloading," and (c) ineffectiveness for not introducing evidence to reveal that the government was wrong about the number of Hentzen's computers that had eMule installed. Hentzen's objections differ based upon the subsection at issue.

**a. OBJECTION 3D(a)**

Objection No.3D(a) deals with four criticisms found in Cobb's testimony: breach of universally accepted evidence-collection protocols, thumbnail files, .lnk files, and browser-activity. Hentzen asserts that the Report's analysis of these issues only focuses on the evidence being weak, conflating the two *Strickland* prongs and failing to contain a separate prejudice analysis. Hentzen's objections do not argue that the Report erred in holding that the evidence carried "little weight" and had "limited value." The Report's logic is sound because if evidence is weak then it is more difficult to prove that counsel was ineffective for not putting it forward.

Even if the Report did not contain a separate performance analysis for these issues, such an absence would not be detrimental. This Court reminds Hentzen that both prongs of *Strickland* must be met. A court is not required to engage in analysis about the performance prong if the Court has already shown that no prejudice exists.

> The movant must satisfy both prongs of the *Strickland* analysis, but courts need "not address both components of the deficient performance and prejudice inquiry if the defendant makes an insufficient showing on one." *Campbell v. United States*, 364 F.3d 727, 730 (6th Cir. 2004) (internal quotation marks omitted). The Court may address the prongs in either order. *Strickland*, 466 U.S. at 697.

*United States v. Bellamy*, No. 2:17-cr-001-DLB-MAS-2, 2021 U.S. Dist. LEXIS 64825, at *11 (E.D. Ky. Jan. 8, 2021). A court is not required to analyze counsel's competence if the claim can be disposed of easier by addressing the lack of prejudice. *Baze v. Parker*, 371 F.3d 310, 321 (6th Cir. 2004)(citing *Strickland*, 466 U.S. at 697)("We do not need to address the question of competence, however: 'if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.'"). As described in the Report and next section, Hentzen has not shown a "reasonable probability that, but for counsel's errors, the judicial outcome would have been different," therefore, the Court is not required to detail how Hentzen's performance also was not deficient. *Strickland*, 466 U.S. at 694-95.

**b. OBJECTION 3D(b)**

Objection No.3D(b) finds issue with the batch-downloading segment of the Report. At trial, Hentzen testified that he downloaded massive quantities of files at a time, meaning that he was unaware of everything he was downloading. In rebuttal,

Examiner Baker testified that log files on Hentzen's computer showed timestamps inconsistent with batch downloading. At the hearing Cobb testified that after viewing the evidence, he considers Hentzen's description to be correct.

Hentzen now asserts that Judge Ingram "essentially gives Mr. Hentzen's trial counsel a pass for not anticipating it." [DE 149 at 10-11]. In his supplemental brief in support of his § 2255 motion, Hentzen cites several cases and ABA standards that require an attorney to conduct a reasonable investigation before the attorney is to be given the presumption of performing adequately based on employing trial strategy. [DE 145 at 17].

A reviewing court must be "highly deferential" of trial counsel's performance, and there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. In turn, the movant defendant "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id*. The defendant must show that the alleged deficient performance was an "error[] so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687. "Defendants alleging the ineffective assistance of counsel bear 'a heavy burden of proof.'" *Pough v. United States*, 442 F.3d 959, 966 (6th Cir. 2006)(citing *Whiting v Burt*, 395 F.3d 602, 617 (6th Cir. 2005)). Reviewing courts must overcome the tendency to fall prey to hindsight bias. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects

of hindsight." *Strickland*, 466 U.S. at 689. "A perfect performance is not required." *Peters v. Chandler*, No. 3:03CV-P138-S, 2006 U.S. Dist. LEXIS 114918, at *53 (W.D. Ky. Apr. 13, 2006).

In *Resnick v. United States*, the defendant contended that his counsel was ineffective for failing "to counter the Government's computer forensics expert with a rebuttal expert." *Resnick v. United States*, 7 F.4th 611, 621 (7th Cir. 2021). Defense counsel missed the deadline to notice witnesses, and the court denied his late request to add a computer defense expert. The court found that defendant did not prove there was deficient performance because the defendant had not identified a capable expert and counsel's cross-examination of the government's computer forensic expert "was strong and highlighted the points [the defendant] now argues the expert could have made." *Id.* at *622. The court also emphasized that "*Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense." *Harrington v. Richter*, 562 U.S. 86, 111 L.Ed.2d 624 (2011).

The lack of expert testimony to combat opposing testimony does not automatically mean that Hentzen's trial counsel performed deficiently. This is especially true when the attorney is able to utilize other strategies to argue the same points. Similar to the counsel in *Resnick,* Pence was able to contest the government's witnesses in other ways. Counsel had Hentzen testify that he regularly engaged in the process of downloading mass quantities of files at the same time and not checking the names of individual

files. [DE 51 at 28, 33-34]. Counsel also had Hentzen's friend testify that Hentzen was a serial downloader [DE 51 at 113-114], suggesting that he likely unknowingly downloaded the contraband while using technology that allowed him to bulk-download files. While a defense expert contradicting the government's expert may have been helpful, the lack of an expert does not equate to deficient performance as *Strickland* warns courts to not fall trap to hindsight bias, noting that performance does not have to be perfect. Pence attempted to show through Hentzen's testimony as well as Hentzen's peer that he often batch downloaded material. More, as described by Judge Ingram, the government's expert rebuttal "evidence was only produced at the last minute, in the heat of trial," and "defense lawyers cannot be expected to anticipate or catch every inaccuracy, particularly in expert testimony."

In *U.S. v. Bird*, the defendant argued "that counsel should have called a computer forensics expert." No. 04-10184-JTM, 2006 WL 1675708, at *3 (D. Kan. June 13, 2006). The court found that the counsel was not constitutionally deficient because counsel employed alternative strategy which included "permitting defendant to testify and attempting to distinguish defendant's style of writing e-mail messages." Plus, counsel had a computer forensics expert attend a meeting, but decided against using the expert "because he believed such experts were 'hedgy.'" *Id*. at *6. The Court found that this meeting suggested "that counsel conducted some level of investigation into employing an expert" but ultimately made the "objectively reasonable" decision to instead

have "defendant explain these issues at trial." *Id.* at *3.

Similar to U.S. v. *Bird*, trial counsel here searched for, retained, and met with a computer expert. Ultimately, however, counsel made the informed decision to not utilize the expert at trial and instead to have Hentzen explain his computer set up and have a peer corroborate Hentzen's mass-downloading tendencies. This is exactly the kind of informed decision that requires great deference.

**c. OBJECTION 3D(c)**

Lastly, Objection No. 3D(c) asserts that the Report was clearly erroneous for holding that Hentzen's trial counsel was not ineffective for failing to introduce evidence contradicting the government's representations that eMule was only installed on the Sony VAIO laptop. Hentzen points to Cobb's finding that "even a lay person should have caught" this "objectively false" assertion. [DE 149 at 11]. Hentzen further argues that trial counsel did not even need an expert to rebut this assertion but could have been put on notice by reading the government's Final Forensics Report and asked about the contradiction on cross-examination. [*Id.*]. In essence, Hentzen asserts that the Report's characterization of counsel's performance as "not deficient" ignores the bar attorneys are required to meet and improperly lowers the performance standards in order to hold that counsel was not deficient.

First, Judge Ingram's analysis of *Strickland*'s performance prong adequately states the law, which requires reviewing courts to be appropriately deferential to counsel's performance, not relying on

hindsight. The Report emphasizes that attorneys are not required to anticipate everything or hire a perfect expert. [DE 148 at 55-56]. Judge Ingram also correctly defines the importance of the evidence. Hentzen does not dispute that the Sony VAIO laptop had eMule installed, so whether two additional computers had eMule installed "is not terribly relevant to the questions of whether Hentzen had ever knowingly received or possessed child pornography." [DE 148 at 55]. When the discrepancy that counsel failed to dispute is not "terribly relevant" to the main question in the case, it weighs against finding that counsel's performance was deficient.

While the Court agrees with Judge Ingram's conclusions, the Court also acknowledges the difficulty in showing how an attorney's actions were not deficient when the attorney is unable to explain why he chose to engage in a certain trial strategy. Recognizing that Hentzen's trial was more than five years ago, Pence testified that he is unable to recall many details about the events leading up to trial. [DE 148 at 30]. Nonetheless, defendants have a heavy burden to overcome the "strong presumption" that their attorney's performance was reasonable. Pence attempted to secure an expert, spoke with an expert about preparing a report verifying or contradicting the government's forensic findings, and allowed Hentzen to testify on the matters. Even so, whether Hentzen has met this high burden is nonessential as the Court reminds Hentzen that the prejudice prong must also be met, and the Court finds that no prejudice occurred as outlined below.

**OBJECTION 3E**

Hentzen's final objection asserts that the Report was clearly erroneous in finding that Hentzen was not prejudiced by trial counsel's performance. Hentzen similarly breaks this objection into three categories like Objection 3D.

**a. OBJECTION 3E(a)**

First, Hentzen focuses on Cobb's evidence-collection criticisms, which assert that the government breached universally accepted computer forensic collection protocols, which is evidenced by thousands of files having timestamps after the computers were taken into custody. Hentzen argues that the Report contains several inaccurate statements about the condition of the Sony VAIO laptop at the time investigators located the computer that resulted in an erroneous finding that the prejudice *Strickland* prong had not been met. The Report says that Hentzen's Sony VAIO laptop was found "running with the screen active and evidence of currently [sic] downloads appearing the screen" and, again, that "the VAIO was found running with potential criminal evidence on the screen." [DE 148 at 44-45]. Hentzen now argues that evidence, including photographs, indicate that the investigators "could not possibly have seen" potential criminal evidence on the screen at the time of the apartment search and could not have seen anything "running on the screen" until after Hentzen provided the password. [DE 149 at 14].

According to Hentzen's logic, if the screen did not have visible criminal evidence, then the government did not act appropriately by employing a program called "OS Triage" at the time of the apartment search instead of turning the computer off. The Report

emphasizes that due to the state of the computer at the time of the search, OS Triage was justified and not a breach of universally accepted procedures of digital forensic data collection. Hentzen argues that if the Sony VAIO laptop did not actually have evidence of downloads on the screen visible to investigators at the time they entered the apartment, then Cobb's testimony would not be as significantly deflated as the Report declares. This in turn means that a defense expert, like Cobb, attacking the government's forensic-data-collection methods at trial may have impacted the outcome of the jury. [DE 149 at 13-14].

Hentzen does not dispute that the Sony VAIO laptop was found on and operating at the time of the search. Thomas Ford Bell's testimony at trial indicates that the laptop was found on the keyboard tray that "was pushed up underneath the desk," and the lid was down. [DE 50 at 90]. However, when investigators "opened the computer and got into it, [they] found that eMule client was running on that Sony VAIO," and that it was "actively downloading files." [*Id*.]

Law enforcement tools utilized during the investigation also indicate that the computer was actively downloading at the time of the apartment search. Investigators were able to locate the Sony VAIO laptop because of the "shadow," a tracking device, and the "gatekeeper," a monitoring device. [DE 50 at 73]. Investigators use the device to monitor traffic related to the wireless access point and obtain notifications any time a keyword travels through it. Investigators knew the sought-after device was active at the time of the search warrant because they were

"still receiving alerts that gatekeeper was detecting packet traffic with keywords actively going back and forth across the wireless network." [DE 50 at 89]. The signal brought investigators to the bedroom, "the signal got the strongest as [the investigator] got down by this keyboard tray," investigators located the Sony VAIO laptop, and after laying the device against the computer confirmed that this was the sought-after computer. [*Id*. at 90].

Even if it was not true that investigators found Hentzen's VAIO "with the screen active and evidence of currently [sic] downloads appearing on the screen," as indicated by the Report, Defendant has not shown that the prejudice prong has been met. Investigators knew that the laptop was powered on and actively downloading contraband items without having to see the unlocked screen due to the utilization of the shadow and gatekeeper devices. Detective Mike Littrell, a forensic examiner that the government called at the evidentiary hearing, never said that OS Triage is only appropriate when the computer is found on with contraband evidence on display. Instead, Littrell emphasized that it is proper to use OS Triage in executing search warrants for pornography on computers. At the hearing, Cobb acknowledged that there are exceptions when triage is appropriate but was unable to clarify whether a computer "actively downloading" material met the exception. [DE 139 at 64-66].

If an expert like Cobb had testified at trial, the government could have deflated the impact of his testimony by having an expert like Littrell testify about the importance of running triage on computers

suspected to have contraband and that changed time-stamps are expected with the triage approach. The government also could have cross-examined the defense expert as they did Cobb at the evidentiary hearing. Cobb acknowledged that the timestamps could have been caused by the triage. The government's reasoning for utilizing OS Triage does have merit and, therefore, is not the "grand slam" evidence Hentzen posits it to be.

Second, Hentzen argues that Cobb's testimony about the thumbnail, .lnk, and browser-access evidence, "although admittedly less game-changing evidence," would nonetheless impact the government's credibility, especially when combined with expert testimony contradicting the government's other "digital-forensic-falsehoods," statements on batch downloading, and inaccuracies about the number of computers with eMule installations. First, this Court agrees with the Report's sound reasoning that expert testimony about the thumbnail, .lnk, and browser-access evidence would not have resulted in a different outcome for Hentzen. Second, this court has already discounted the prejudicial effects that Hentzen asserts occurred due to the confusion over whether the Sony VAIO laptop was found with an active screen at the time of the search. Third, this Court also discounts any prejudicial effect from the government's testimony about the number of eMule installations on Hentzen's computers, as later explained. Because the Court has not found that Hentzen has put forward any evidence that would result in a different outcome, it is logical that that the combination of this evidence would also not serve as the basis for finding prejudice.

Third, Hentzen finds fault with the Report's prejudicial prong conclusions related to how many of Hentzen's computers had eMule installed. At trial, Hentzen claimed that eMule was installed on multiple computers. Examiner Baker testified that the Sony VAIO laptop "was the only computer that had an eMule installation" [DE 50 at 252] and the government's opening and closing arguments also emphasized that the Sony VAIO laptop was the only of Hentzen's computers that had eMule installed. [DE 145 at 5]. Hentzen points to the government's forensic report, which indicates that eMule *was* installed on other computers in the apartment. Hentzen argues that his credibility at trial was diminished by the lack of expert testimony to affirm his declarations about eMule and that an expert's testimony exposing the government's untruth would have hurt the government's credibility and prevented Hentzen's credibility diminishment.

The Report found that the absence of expert testimony did not equate to IAC because the fact that two other computers had eMule installed "is not terribly relevant to the question of whether Hentzen had ever knowingly received or possessed child pornography" and because it is a "minor issue" the "conflict in testimony is not likely to have weighed heavily with the jury." [DE 148 at 55]. Hentzen counters that the number of eMule installation was not a minor issue "because the Government chose to make it a big deal" by emphasizing it "five different times." [DE 159 at 16].

While a defense expert would have been able to refute the government's inaccurate declarations, the

defense expert would not have been able to contest the fact that the Sony VAIO laptop, which was the computer that contained the contraband child pornography for which Hentzen was convicted, did have eMule installed. Whether or not two other computers that did not contain child pornography had eMule installed does not change the fact the Sony VAIO laptop did have eMule installed and also contained child pornography, an issue not contested by Defendant. Therefore, that the results of the proceeding would have been different had the jury been given information that two irrelevant computers also had eMule installed is not reasonably probable.

Even if Hentzen's credibility would have been bolstered by an expert agreeing that eMule was on other computers, it is not reasonably probable that an expert's corroborating testimony on this issue would have completely strengthened Hentzen's credibility so that the results of the proceeding would have been different. The jury was able to listen to Hentzen's testimony as well as the government's witnesses and come to a supportable conclusion. This Court finds that there is sufficient evidence in the record to support Hentzen's conviction, meaning any harms caused by Pence's failure to call an expert witness to corroborate Hentzen's testimony that he had multiple computers with eMule installations would not have changed the outcome of the trial.

**CERTIFICATE OF APPEALABILITY**

The Report recommends issuing a COA for Ground One because, as it is very fact-intensive, "a reasonable jurist could conceivably find that Hentzen was prejudiced by failure to introduce the evidence

described by Dr. Cobb." [DE 148 at 70]. Hentzen does not object to the issuance, and this Court finds the Report's reasoning to be sound.

**CONCLUSION**

Accordingly, for the reasons stated herein and the Court being sufficiently advised, **IT IS ORDERED**:

(1) Magistrate Judge's Report and Recommendation [DE 148] is **ACCEPTED AND ADOPTED**; and

(2) Erik A. Hentzen's objections [DE 149] to Magistrate Judge Ingram's Report and Recommendation are **OVERRULED**;

(3) Erik A. Hentzen's § 2255 motion [DE 68] is **DENIED**.

(4) A Certificate of Appealability shall issue with respect to Ground One.

This the 21st day of June, 2022.

Signed By:

/s/ Joseph M. Hood JMH

Senior U.S. District Judge

**APPENDIX C**

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
LEXINGTON

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No. 5:13-CR-94-JMH-HAI

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UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v.

ERIK A. HENTZEN,

Defendant/Movant.

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JUDGMENT

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(June 21, 2022)

Consistent with the Court's Order entered today, **IT IS HEREBY ORDERED, ADJUDGED, AND DECLARED** as follows:

(1) Defendant Hentzen's Motion to Vacate, Amend, or Correct Sentence pursuant to 28 U.S.C. § 2255 [DE 68] be, and is, hereby **DENIED**.

(2) Judgment is hereby **ENTERED** in favor of the United States.

(3) The Clerk of Court shall **STRIKE** this matter from the Court's active docket.

This the 21st day of June, 2022.

Signed By:
/s/ Joseph M. Hood JMH
Senior U.S. District Judge

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
LEXINGTON

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No. 5:13-CR-94-JMH-HAI

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UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v.

ERIK A. HENTZEN,

Defendant/Movant.

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REPORT AND RECOMMENDATION

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(February 15, 2022)

The undersigned was assigned to this case following remand from the Sixth Circuit. Having conducted an evidentiary hearing and received post-hearing briefing, the undersigned now recommends that federal prisoner Erik Hentzen's motion to vacate his conviction under 28 U.S.C. § 2255 be DENIED.

### I. Procedural Background

In June 2014, a federal jury convicted Hentzen of knowing receipt and possession of child pornography. D.E. 39. He received a below-Guidelines (but statutory

maximum) sentence of 240 months of imprisonment, to be followed by lifetime supervision. D.E. 56. Hentzen appealed, and his conviction and sentence were affirmed. D.E. 64; *United States v. Hentzen*, 638 F. App'x 427 (6th Cir. 2015).

In February 2017, Hentzen moved to vacate his sentence under 28 U.S.C. § 2255. D.E. 68. He alleged several grounds of ineffective assistance of trial and appellate counsel. A report and recommendation issued by Magistrate Judge Atkins in September 2017 rejected all Hentzen's claims. D.E. 94. Over Hentzen's objection (D.E. 96), the District Judge adopted the recommendation (D.E. 97). Hentzen appealed. On March 7, 2019, the Sixth Circuit granted a Certificate of Appealability ("COA") on three of Hentzen's claims. D.E. 117. On May 17, 2019, the Sixth Circuit remanded the matter for the district court to "further consider each of Hentzen's surviving claims" in light of its March 7 Order. D.E. 102. Upon remand from the Sixth Circuit, District Judge Hood referred the matter to Magistrate Judge Atkins for an evidentiary hearing. D.E. 104. On July 11, 2019, Hentzen filed a motion for discovery. D.E. 105. The government responded in opposition (D.E. 107), and Hentzen replied (D.E. 115). Both parties filed status reports. D.E. 110, 111. On August 5, 2019, Magistrate Judge Atkins recused himself and this matter was referred to the undersigned. D.E. 113. Pandemic-related delays followed. The Court conducted an evidentiary hearing on August 26-27, 2021. D.E. 134, 136. The parties submitted post-hearing briefing. D.E. 145, 146, 147. affirmed. D.E. 64; *United States v. Hentzen*, 638 F. App'x 427 (6th Cir. 2015).

**A. Scope of the Issues**

On September 19, 2019, the undersigned issued an order identifying the issues to be considered and the scope of the evidentiary hearing. D.E. 116. Hentzen was arguing at the time (and indeed continues to assert) that *all* the issues he raised in his § 2255 motion are ripe for reappraisal. D.E. 111. According to Hentzen, the appellate court's May 17 order "vacated" the district court's judgment "without any qualification and thus in its entirety." *Id*. at 1. Hentzen intended to pursue six issues at the hearing—the three that were granted a COA and three that were not. *Id*. at 3.[1] However, the Court found that only three of Hentzen's grounds for relief had been remanded for further proceedings.

As this Court explained, the Court of Appeals in its March 2019 order considered each of Hentzen's claims but issued a certificate of appealability to only three. D.E. 117. First, the Court of Appeals granted a Certificate of Appealability on Hentzen's claim that trial counsel was ineffective for failing to retain an expert who could expose certain problems with the government's forensic case. *Id*. at 5. The appellate court considered the affidavit of digital forensics expert Andy Cobb, Ph.D., which Hentzen submitted along with his § 2255 motion. *See* D.E. 68-14. The appellate court found that the district court "failed to address" a "precise argument" based on this affidavit. D.E. 117 at 5. The argument was that Hentzen was

[1] Page number references are to the blue page numbers generated by ECF, which may differ from each document's original pagination.

prejudiced when defense counsel failed to undermine the government's forensic evidence by drawing attention to irregularities in the collection and analysis of that evidence—irregularities which Dr. Cobb identified in his affidavit. *Id*. The Court of Appeals later restated the issue as whether "trial counsel was ineffective for failing to obtain and prepare qualified expert testimony to expose inaccuracies in, and otherwise contest, the government's digital-computer-forensics evidence." *Id*. at 9; D.E. 102 at 2.

Second, the Court of Appeals granted a Certificate of Appealability on Hentzen's claim that he was prejudiced by trial counsel's failure to appear at his sentencing hearing due to a scheduling error. D.E. 117 at 7. Although one of Hentzen's retained lawyers was present, the other was not. According to Hentzen, the absent lawyer had promised to bring a prepared statement for Hentzen to read in allocution. *Id*. The appellate court found that this claim "depends on the content of alleged off-the-record conversations between Hentzen and his attorney. In such circumstances, an evidentiary hearing is generally required to resolve the petitioner's claim." *Id*. The Court of Appeals later restated the issue as whether "trial counsel rendered ineffective assistance by failing to appear at his sentencing hearing, thus depriving [Hentzen] of his opportunity to allocute." *Id*. at 9; D.E. 102 at 2.

Third, the Court of Appeals granted a Certificate of Appealability on Hentzen's claim that appellate counsel failed to challenge his sentencing enhancement under USSG § 3C1.1 for obstruction of

justice (perjury). D.E. 117 at 8. The problem was that the District Court disposed of this claim on the basis of lack of prejudice. The District Court reasoned that Hentzen's actual sentence (which was below his Guidelines Range) fell within the Guidelines Range he *would have received* if the enhancement had not applied. *Id*. The appellate court, in contrast, reasoned that the trial court at sentencing could have "applied an equivalent variance, resulting in a lower sentence, if the USSG § 3C1.1 enhancement was not applied." *Id*. The Court of Appeals later restated the issue as whether "appellate counsel rendered ineffective assistance by failing to challenge the district court's application of a two-level enhancement under USSG § 3C1.1." *Id*. at 9; D.E. 102 at 2. As to Hentzen's remaining claims of ineffective assistance, the Court of Appeals either found them meritless or abandoned.

The Court interpreted the appellate court's May 17 Order as remanding only the three claims for which a Certificate of Appealability was issued. Notably, the Court of Appeals ordered this Court to "further consider each of Hentzen's **surviving** claims[.]" D.E. 102 at 3 (emphasis added). Only the claims that were granted a COA survived. Hentzen's other claims were either abandoned or the Court of Appeals found that no reasonable jurist could disagree with their denial. D.E. 117. Thus, these three surviving claims are the only ones properly before the Court "in light of [the Sixth Circuit's] order granting Hentzen's COA application in part." D.E. 102 at 3. Further, when District Judge Hood referred the matter to the magistrate judge for further proceedings, he described the proceedings as including:

> an evidentiary hearing on Hentzen's claims that: trial counsel was ineffective for failing to obtain and prepare qualified expert testimony to expose inaccuracies in, and otherwise contest, the government's digital-computer-forensics evidence (Claim I(d)); trial counsel rendered ineffective assistance by failing to appear at his sentencing hearing, thus depriving him of his opportunity to allocute (Claim II); and appellate counsel rendered ineffective assistance by failing to challenge the district court's application of a two-level enhancement under USSG § 3C1.1 (Claim III(b))[.]

D.E. 104 at 2-3.

Hentzen filed objections (D.E. 118) to the undersigned's order setting the scope of the hearing (D.E. 116). The government responded in opposition. D.E. 119. Hentzen replied. D.E. 120. Judge Hood overruled the objections. D.E. 121. The hearing proceeded as defined in Docket Entry 116.

**B. Pre-Hearing Evidentiary Issues**

The order setting the scope of the hearing also resolved Hentzen's motion for discovery. D.E. 116. Back in June 2017, Hentzen made two distinct discovery requests. He asked the Court to:

> order the United States to (1) permit and/or facilitate a limited forensic examination of the images of each of the computer hard drives and other stored-media devices seized from his apartment by a defense-retained Certified Forensic

> Examiner who would review and duplicate non-contraband data from (a) the Remote Desktop Protocol ("RDP") files and activity logs and (b) any eMule files that can be found inside or outside of eMule directories on those imaged drives, and (2) produce for inspection the report generated by the National Center for Missing and Exploited Children (NCMEC) regarding images and/or videos found on Mr. Hentzen's hard drives.

D.E. 85 at 1. The government opposed the motion (D.E. 87), and Hentzen replied (D.E. 89). The motion was initially denied as part of Judge Atkins's Report and Recommendation. D.E. 94. After the remand from the Sixth Circuit, Hentzen renewed his motion. D.E. 105. The government responded in opposition (D.E. 107), and Hentzen replied (D.E. 115). This Court granted in part the motion and denied in part. D.E. 116.

**1. Forensic Copies**

Hentzen first asked that his expert be able to access the forensic copies of his seized devices in order to review and duplicate certain non-contraband data. D.E. 85 at 1. His new expert, Dr. Cobb, did not previously have access to these materials; rather, Dr. Cobb's affidavit was based on evidence introduced at trial along with spreadsheets and other data files provided in discovery. *Id*. at 2. Hentzen wanted access to only "a narrowly defined scope of files." *Id*. at 5. These are "non-contraband data from (a) the Remote Desktop Protocol ('RDP') files and activity logs and (b)

any eMule files that can be found inside or outside of eMule directories on those imaged drives." *Id.* at 1.

The Court granted this request. D.E. 116 at 6-9, 11. The undersigned authorized Dr. Cobb to examine the images of Hentzen's data storage devices so he could "review and duplicate non-contraband data from (a) the Remote Desktop Protocol ('RDP') files and activity logs and (b) any eMule files that can be found inside or outside of eMule directories on those imaged drives." *Id.* at 8 (quoting D.E. 85 at 1).

Hentzen also discussed evidence of "a logon to the 'Guest' user account" on the morning before the day of his arrest—a logon that "was not accomplished by Mr. Hentzen or any individual authorized by him." D.E. 85 at 5. He argued that giving him access to the requested files would enable him to identify the IP address of whoever logged on that morning. *Id.* at 6.

The Court granted this related request as well. D.E. 116 at 9. Importantly, the only disputed charge-element at trial was whether Hentzen *knew* there was child pornography on his computers. He stipulated that, among other things, the computers were his, he had exclusive access to the computers, and the computers contained images of child pornography. Hentzen argued that review of the requested materials could reveal that someone else accessed his computer network, without his knowledge, prior to its seizure by law enforcement, or that files were changed by law enforcement. These scenarios could raise the possibility that Hentzen was unaware of the images. D.E. 85 at 5-6. Thus, because the pivotal issue at trial was whether the contraband videos/images could have appeared on Hentzen's computer without his

knowledge, good cause existed to disclose evidence relevant to this issue of the unidentified "Guest" login.

Unfortunately, Dr. Cobb was not able examine all the seized devices (or forensic copies thereof). As he explained at the 2021 evidentiary hearing, the devices that did not contain contraband had been destroyed. And only three of the four remaining devices were operational. D.E. 139 at 34-37. The "Guest" login issue did not come up in the evidentiary hearing or post-hearing briefing.

**2. NCMEC Report**

Second, Hentzen sought discovery of the NCMEC report. D.E. 85 at 1, 11. The function of this report was to confirm that some of the pornographic images found on Hentzen's devices were images of minors. Hentzen argued that review of the report "will establish that only a miniscule fraction of the files that the Government contends contained child pornography actually contained images confirmed by NCMEC." *Id.* at 11.

The Court found two sufficient reasons for denying this request. First, the NCMEC report was not relevant or material. D.E. 116 at 10. In closing arguments, the government did not argue for a finding of knowledge based on the *quantity* of child pornography videos found on Hentzen's devices. Instead, what the prosecutor referenced in closing arguments were the "thousands of keyword hits" (D.E. 47 at 16) and the search terms that Hentzen used (*id.* at 8-9). "[W]ho is searching for this stuff," the prosecutor asked the jury, "unless they are looking for child pornography?" *Id.* at 9. The government thus argued that the keywords and search terms (that

Hentzen typed or pasted) were circumstantial evidence of Hentzen's *knowledge* that he was downloading child pornography.

Second, the Court found that the NCMEC report did not sufficiently relate to the issue granted a COA as framed by the Sixth Circuit. D.E. 116 at 11. As previously explained, the COA was granted in relation to Hentzen's "precise argument" concerning the integrity of the computer forensic data and purported false testimony about features of Windows XP, as noted in Dr. Cobb's affidavit. D.E. 117 at 5. Dr. Cobb's affidavit makes no mention of the NCMEC report; nor does the NCMEC report (as described by Hentzen) have any bearing on the integrity of the data files.

Hentzen objected to the denial of the production of the NCMEC report. D.E. 118. But those objections were overruled by Judge Hood. D.E. 121.

### C. Evidentiary Hearing

An evidentiary hearing was initially set for May 14, 2020. D.E. 125. But, due to the COVID pandemic, the hearing was continued generally. D.E. 126. After determining that a hearing by video would not be adequate, the hearing was ultimately conducted on August 26 and 27, 2021, in Frankfort. D.E. 129, 131, 134, 136. The four witnesses for the defense were Hentzen's post-trial expert, Dr. Cobb, Hentzen's attorney on direct appeal, Michael Mazzoli, Hentzen's trial counsel, Steven Pence, and Hentzen himself. The government called its own expert witness, Michael Littrell. D.E. 135. After the hearing transcripts were filed in the record (D.E. 139, 140), Hentzen filed his post-hearing memorandum on November 18, 2021. D.E. 145. This brief exclusively addresses Ground

One—the expert-witness issue. *Id.* at 1 n.3. The government filed its memorandum on December 17. D.E. 146. Hentzen filed a reply brief (again addressing only Ground One) on December 31. D.E. 147.

## II. General Legal Standards

Under § 2255, a federal prisoner may seek habeas relief because his sentence violates the Constitution or federal law, the federal court lacked jurisdiction to impose such a sentence, or the sentence exceeds the maximum authorized by law. 28 U.S.C. § 2255. To prevail on a § 2255 motion alleging constitutional error, a defendant must establish that the error had a "substantial and injurious effect or influence on the proceedings." *Watson v. United States*, 165 F.3d 486, 488 (6th Cir. 1999) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). A § 2255 movant bears the burden of proving his or her allegations by a preponderance of the evidence. *McQueen v. United States*, 58 F. App'x 73, 76 (6th Cir. 2003) (per curiam).

An ineffective-assistance-of-counsel ("IAC") claim presents a mixed question of law and fact. *Mitchell v. Mason*, 325 F.3d 732, 738 (6th Cir. 2003). To successfully assert an IAC claim, a defendant must prove both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Pough v. United States*, 442 F.3d 959, 964 (6th Cir. 2006).

To prove deficient performance, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. A defendant meets this burden by showing "that counsel's representation fell below an

objective standard of reasonableness" as measured under "prevailing professional norms" and evaluated "considering all the circumstances." *Id.* at 688. However, a reviewing court may not second-guess trial counsel's strategic decisions. *Moss v. Hofbauer*, 286 F.3d 851, 859 (6th Cir. 2002). Thus, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (internal quotations omitted). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.*

To prove prejudice under the second prong of *Strickland*, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Thus, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. When evaluating prejudice, courts generally must consider the "totality of the evidence." *Id*. at 695.

> *Strickland* asks whether it is reasonably likely the result would have been different. This does not require a showing that counsel's actions more

> likely than not altered the outcome, but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case. The likelihood of a different result must be substantial, not just conceivable.

*Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quotation marks and citations omitted).

Courts may approach the *Strickland* analysis in any order, and an insufficient showing on either prong ends the inquiry. *Strickland*, 466 U.S. at 697.

## III. Ground One – Trial Counsel and Expert Witnesses

Drawing on the entire record, the Court will now discuss the relevant facts underlying Hentzen's claim that trial counsel rendered ineffective assistance by failing to utilize an expert who could have challenged certain aspects of the government's forensic case at trial. The Court will rely in particular upon the trial transcripts (D.E. 47, 49, 50, 51), the evidentiary hearing transcripts (D.E. 139, 140), and the affidavits of Hentzen (D.E. 68-2) and Dr. Cobb (D.E. 68-14).

### A. Defining the Question

The Court reiterates that, as to Ground One, it limits its review to the "precise argument" for which the Court of Appeals granted a certificate of appealability. The appellate court framed that argument as follows:

> Hentzen claimed that trial counsel was ineffective for inadequately preparing to introduce evidence during the defense's

> case-in-chief. Specifically, he argued that counsel failed to obtain and prepare qualified expert testimony to expose inaccuracies in, and otherwise contest, the government's digital-computer-forensics evidence. In support of this claim, Hentzen submitted an affidavit from Andy Cobb, Ph.D., a partner at a full-service eDiscovery firm, who averred that his review of the evidence revealed that the Kentucky Attorney General's investigators "breached universally accepted procedures of digital forensic data collection and analysis," thus "alter[ing] the integrity of the evidence after taking custody of [his] hard drives[.]" Dr. Cobb averred that the investigators' improper handling of the digital evidence "calls into question the quality of the evidence, and all findings and opinions based on such evidence." Dr. Cobb also averred that Investigator William Baker provided false testimony regarding how features of the Windows XP Operating System work, which was evidence that the government used to persuade the jury of Hentzen's guilt. Hentzen argued that counsel's non-rebuttal to the government's "shortcut evidence" with evidence akin to Dr. Cobb's findings "was fatal to his case."

D.E. 117 at 5.

Dr. Cobb's affidavit, in turn, identifies two discrete issues, the second of which has sub-parts. First, he claims, "My review of the Case Materials revealed that the investigators breached universally accepted procedures of digital forensic data collection and analysis." D.E. 68-14 ¶ 4. He claims that, in breaching these norms, investigators "altered the integrity of the evidence," which "calls into question any conclusions made after custodial transfer." *Id* ¶¶ 4-14. Second, Dr. Cobb asserts the government's witness, Examiner Baker, "misstated certain facts relating to the Windows XP Operating System" during his trial testimony, and Cobb could have rebutted these claims if he had been hired as an expert witness. *Id*. ¶¶ 15-22. Hentzen argues in the brief accompanying his § 2255 motion that these issues could have affected the trial outcome. D.E. 68-15 at 2-3.

To be clear, the appellate court declined to give a certificate of appealability for Hentzen's seemingly related claim that counsel had been ineffective for hiring Brian Ingram and Emmanuel Kressel rather than "a more reliable, competent, and persuasive digital-computer-forensics expert." D.E. 117 at 6. This Court will not re-analyze that decision.

**B. The Investigation**

Around 9:15 a.m. on March 22, 2013, state law enforcement officers executed a search warrant at Hentzen's apartment. D.E. 50 at 78. Thomas Bell, an investigator and computer forensics examiner for the Kentucky Attorney General's Office, testified about his involvement in the search during Hentzen's federal detention hearing on July 19, 2013. D.E. 17.

And he testified at trial. D.E. 50. According to Bell, officers obtained a key from Hentzen's apartment manager and entered Hentzen's apartment after their knocks on the door elicited no response. D.E. 17 at 13; D.E. 50 at 78-79. Investigator Bell found Hentzen asleep in bed and woke him. D.E. 17 at 14. They found "all kinds of computer equipment" in Hentzen's bedroom; Investigator Bell testified Hentzen's apartment contained "the largest collection of computer equipment" he had seen in executing over 200 warrants. *Id*. at 15.

Using remote forensics tools, investigators had (prior to the search) identified a particular computer as having downloaded child pornography. D.E. 50 at 85. They found that computer, a Sony VAIO, laptop, slid under Hentzen's computer desk. Although it was "closed," the laptop was "on and operational at the time." D.E. 17 at 17-18; *see also* D.E. 50 at 90-91. Investigator Bell opened the laptop and asked Hentzen for the password, which Hentzen provided. D.E. 17 at 37. Upon gaining access, Investigator Bell saw that the file sharing program eMule was active and running on the laptop. This was the peer-to-peer file-sharing program that Bell's investigation had identified as downloading child pornography. *Id*. at 19.

As described at trial, eMule is "a kind of peer-to-peer software that allows computers to talk to each other and actually download files from one computer to another. You don't really have to go to a website to make that kind of program work." D.E. 49 at 7. Investigator Bell provided a detailed description of how the eMule program facilitates searches across computers around the world that are connected to the

eDonkey network. An eMule user can enter search terms into eMule. And eMule will then search other computers on the eDonkey network for files whose names contain the search terms. Thus, a person can use eMule to search by name for songs, movies, television shows, pictures of certain performers, and so on. D.E. 50 at 44-46.

When Investigator Bell opened the VAIO laptop in Hentzen's bedroom, the eMule program "was on, active, and running, and it was showing all of the active downloads and uploads that were going on at that particular moment." D.E. 17 at 19; *see also* D.E. 50 at 93-94. Among the files listed as recently downloaded was one named "Snowl Vichatter little Miracle girl 14-year-old nn 2011 pthc," with "pthc" indicating "preteen hardcore." D.E. 17 at 20; D.E. 50 at 94-98. Other immediately visible file names included "PTSC . . . 14-year-old" and "12-year-old pussy." D.E. 17 at 20. Hentzen's equipment was seized and child pornography was found on several devices.

After the search of his apartment, Hentzen faced a criminal complaint in state court, and he hired Stephen B. Pence to represent him. Hentzen explains in his affidavit,

> I was familiar with Mr. Pence from a prior case in which I served as a witness called by both the defense and the prosecution due to my relationship with both the defendant and the complaining witness. Pence represented that defendant in a similarly horrid – though substantively different – allegation and

> earned a judgment of acquittal after the defendant's first trial led to a hung jury.

D.E. 68-2 ¶ 28.

Hentzen says that from the second he read the search warrant, he "knew that digital forensics were going to be the key issue." D.E. 140 at 13. He told Pence that the case was "going to have a lot of computer issues," and he needed a lawyer who was comfortable with technology, which Pence told him he was. *Id*.

Hentzen was federally indicted on two counts in June 2013. D.E. 1. Count One alleged that, from May 2012 to about March 22, 2013, Hentzen "did knowingly receive" child pornography "by computer over the internet" in violation of 18 U.S.C. § 2252(a)(2). Count Two alleged that, on or about March 22, 2013, Hentzen "did knowingly possess" visual depictions involving "a minor under 12 years old engaging in sexually explicit conduct" in violation of 18 U.S.C. § 2252(a)(4)(B). *Id*.

After Hentzen surrendered on the federal warrant, he was released on restrictive conditions pending trial. D.E. 13; D.E. 68-2 ¶ 36. These conditions forbad him from using the internet or any type of computer without leave of Court. D.E. 13 at 11-12. Hentzen says that during this period, he "sought to collect evidence that would refute accusations contained in the indictment and the claims I heard testified to by the law enforcement officers at the state-court preliminary hearing and at the federal-court detention hearing, and the statements expressed in the Forensics Report itself." D.E. 68-2 ¶ 37. This research was difficult due to the restrictions on his use

of computers or the internet; he only had permission to use Mr. Pence's computer at Mr. Pence's office. *Id*. ¶ 49.

From the beginning, Hentzen never challenged the fact that child pornography was found on his computer. Instead, his position was that he was unaware of the pornography because he had a habit of downloading vast amounts of images and videos at a time. Hentzen argued he had never sought out child pornography. Instead, he says his computer programs (which he calibrated to download multiple images and videos automatically) must have harvested child pornography without his awareness. *See* D.E. 68-2 ¶¶ 10-17. Alternatively, the presence of the contraband could be explained by other people using his computers or by Hentzen backing up the files of other peoples' computers he was repairing. *Id*. ¶¶ 19-20.

Hentzen explains that prior to trial he was coaching Pence on different avenues of investigation that could demonstrate how his computer setup was capable of downloading child pornography without his being aware of the contraband's presence on his devices. D.E. 68-2 at 17-19. Hentzen says he knew the defense would need an expert to "corroborate" his theories of the case. He says Pence agreed the case would be a battle of experts. *Id*. ¶ 43.

According to Hentzen, prior to the state-court preliminary hearing, Pence hired a Texas consultant named Brian Ingram to review the search warrant affidavit and prepare a memo on potential suppression issues. D.E. 68-2 ¶ 42. Following the federal indictment, the defense hired Brian Ingram again. This time, Ingram was hired "to travel to Frankfort,

analyze all of the seized equipment[,] verify or contradict the forensic findings reached by law enforcement's examination, and prepare a full report of his findings." *Id.* ¶ 44. Hentzen also expected Ingram "to stand by to be called as a defense expert at trial." *Id.* Hentzen says he prepared a six-page list of questions and theories for Ingram to investigate when he studied the computer equipment. But, "In the single telephone call with Brian Ingram on which I was permitted to participate, he dismissed the document and all of its contents as mere 'smoke and mirrors that the prosecution would be able to cut right through.'" *Id.* ¶ 45. Ingram "communicated several things that [Hentzen] knew to be untrue and/or impossible." Based on his knowledge of his own equipment, Hentzen perceived that Ingram "was incorrect on simple matters." *Id.* ¶ 51. Hentzen determined Ingram was inexperienced, his involvement was counterproductive, and Ingram was unable to provide useful information. *Id.* ¶ 48-49. Having given up on Ingram, Hentzen began working as his own expert, "producing exhibits alone in Mr. Pence's conference room [on Pence's computer] while Mr. Pence was in his office." *Id.* ¶ 49.

Again, the Court of Appeals has already determined that Pence was not ineffective in his decision to hire Ingram, and no certificate of appealability was issued as to this issue. D.E. 117 at 6. The question before this Court concerns Pence's alleged failure to provide the jury with certain information that would contradict some of the government's technical claims.

Ingram did not testify at trial. However, Pence obtained another expert, Emmanuel Kressel, who testified to the availability of an alternative computer-forensics tool. D.E. 68-2 ¶ 53. Hentzen says Pence refused his request to have Kressel present in the courtroom throughout trial. *Id*. Thus, Hentzen had no expert at trial who heard the government's evidence. And the government's technical evidence—some of which Hentzen asserts was flatly wrong—went unrebutted by any defense expert. *Id*. ¶ 54.

### C. The Trial

#### 1. Opening Statements

At trial, the government's opening statement began with the words, "Ladies and gentlemen, folks, this is a case about deception." D.E. 49 at 4. The prosecutor explained that "this is a case about outward appearances versus what's really going on underneath." *Id*. Although Hentzen might look like "a normal college student interested in computers," the prosecutor said, Hentzen had a "massive" and "really impressive" computer system. *Id*. But it was "one little laptop," that was connected to a neighbor's unsecured internet, that attracted investigators' attention. *Id*. at 5-6.

The prosecutor explained that child pornography is "contraband," like cocaine. "Child pornography doesn't seek a person out. A person has to seek child pornography out." D.E. 49 at 12. The prosecutor explained that there are unusual "keywords" that people use when they search for child pornography over peer-to-peer networks, and provided several examples of such keywords. D.E. 49 at 8-9. The prosecutor said forensics examiner Baker found

"thousands of videos, thousands of videos, of . . . child pornography, thousands of videos" on Hentzen's equipment. *Id.* at 9. The prosecutor said the peer-to-peer downloading program eMule "was only installed on the one little laptop that was closed, connected to the stolen Wi-Fi signal, pushed up underneath the keyboard. That's the only one with eMule installed on it." *Id.* at 10. The prosecutor further stated that "although eMule was only installed on that one little laptop," investigators found "a virtual treasure trove" of child pornography across multiple devices. *Id.* at 12. Further, according to the prosecutor, the eMule program saves the user's thirty most recent searches, and these searches contained "multiple keywords for child pornography." *Id.* at 10-11.

The *defense*'s opening stressed the importance of the knowledge element:

> So the question becomes . . . is he intentionally downloading child pornography? [There is no question that] Erik routinely downloaded videos, and he downloaded as many as he can get. It's like someone that goes and wants to buy a box full of books. He says, I'll buy all those books. I don't know what's in them. I'm going to take them all. And they take them home, and they put them in the garage, and they sit forever.
>
> He routinely downloaded videos, and he routinely downloaded pornography, legal pornography. It's all over the Internet. . . . And, yes, he knows a lot about computers. . . . He was a computer major

> for a while . . . . And he's going to testify [that he was] a hoarder of videos . . . . He's going to testify, I went to Porn Hub. I used to download all the videos on Porn Hub. . . . I would routinely go to those [legal pornography websites], and I'd download whatever they had. But he downloaded them in mass quantities. . . . His downloading was not a movie at a time. His system was capable of downloading hundreds of videos at a time, and that's what he would do. And they were not on the screen. He wasn't seeing what was downloading. He was just [downloading] what's available.
>
> Erik never downloaded intentionally child porn. [The government will show you child pornography videos that are] disgusting. . . . It will make you angry. But you will see that it's not his fault. He . . . didn't intentionally download it.

D.E. 49 at 18-20, 25.

**2. Keywords**

Hentzen's Ground One does not challenge the evidence related to keywords, but keywords are critical to assessing the weight of the evidence for Hentzen's knowledge of the child porn on his computer. Keyword-search evidence formed the heart of the government's case that Hentzen knowingly possessed and received child pornography. Hentzen's expert, Dr. Cobb, testified that he was not asked to investigate the keyword issue and he is not familiar

with the keywords that child porn investigators associate with child pornography. D.E. 139 at 89.

The two expert witnesses for the government were Investigator Bell, who was involved in the investigation leading up to the search warrant, and William Baker, forensic examiner for the Kentucky Attorney General's Office, who also participated in the search warrant execution and analyzed Hentzen's equipment after the search and seizure.

Investigator Bell told the jury that a person using a peer-to-peer program "can type in phrases or keywords or titles into a search box and tell the program to go out and search . . . for images, you can search for videos, documents, software, pretty much anything that you can imagine." D.E. 50 at 44. He explained that, in child porn investigations, investigators will search the suspect's equipment and file names for certain keywords they have found to be indicative of child pornography. *Id*. at 57. Examples of child-porn-associated keywords include such things as Hussyfan, 1st Studio, Vladmodels, R@ygold, Mafia Sex, LSmagazine, pthc (preteen hardcore), ptsc (preteen softcore), and age identifiers such as 10yo, 8yo, and so on. *Id*. 19 at 57-58. Investigators in this field have "a list of probably a couple of hundred different keywords that we search for in our examinations." *Id*. at 58.

Investigator Bell testified that he traced large numbers of downloads of files containing child-pornography keywords to the internet router which was eventually discovered to be the router downstairs from Hentzen to which Hentzen's VAIO laptop was wirelessly connected. Investigator Bell attached a

tracing device to that downstairs neighbor's router, and collected evidence of files containing child-porn keywords being sent across the router. D.E. 50 at 74-75. Investigators then pinpointed a VAIO computer registered to Hentzen as being connected to the router. They used this information to secure the warrant for Henzen's apartment. *Id*. at 77.

As previously noted, Investigator Bell found eMule running on Hentzen's VAIO laptop. The recent and current downloads visible on the client screen included files with child-porn keywords in the name. These visible keywords included pthc, ptsc, Vladmodels, Vichatter, Hussyfan, 14yo, 12yo, 10yo, 7yo, preteen, kiddy, and more. D.E. 50 at 94-98. According to Examiner Baker's trial testimony, this VAIO laptop was the only device that had been connected to the neighbor's wifi router, and it was the only device with eMule installed. *Id*. at 252-53.

Examiner Baker also testified at length about keywords that were found on Hentzen's devices. This included child-porn keywords in the file names of contraband videos played at trial that were found in the "My Documents" eMule download folder on the VAIO laptop (D.E. 50 at 149-159) and on other seized devices (*id*. at 197-202, 221-22, 246-47). Examiner Baker also testified that Hentzen had a three-terrabyte external drive that contained "a specific folder structure where the folders were named after specific CSA keywords." *Id*. at 230. In all, investigators "found hundreds of thousands of these keywords hits spread across all of [Hentzen's seized] devices." *Id*. at 249.

Examiner Baker also testified that eMule records the user's last thirty searches. D.E. 50 at 161. He testified that the file with this search history on Hentzen's laptop "revealed a number of commonly found child sexual abuse keyword terms." *Id*. He testified that the user of eMule has to "actually put those words in a search," and "[t]hat's the only way that file is populated." *Id*. at 164. "The search terms have to be entered individually." *Id*. at 259.

Hentzen's last-thirty-searches-file contained the keywords "Siberian mouse," "1st Studio" (twice), "Vladmodels," "Masha Babko," "Stickcam," "smotri," "Kidcam1st studio," "Kidcam," "Vichatter," and "Omegle."[2] D.E. 50 at 164-68. All of these terms are on the list that child pornography investigators use. And Examiner Baker repeated that "the fact [these keywords] appear in the AC_searchstrings.dat file means that someone entered them as a search term within eMule to retrieve files that had these words in the file name." *Id*. at 168. This file contains "actual search terms the user put in to search for files." *Id*. at 175. Looking beyond that last-thirty-searches file and into Hentzen's laptop as a whole, Examiner Baker testified he found "thousands of [child-pornography] keywords that had at some point been on the hard drive." *Id*. at 169. For example, the known.net file, which records historical downloads on eMule "had over 11,000 entries in it with a large number of them being files containing child sexual abuse keywords." *Id*. at 170.

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[2] The data from this file, AC_Searchstrings.dat, can be found on Defense Exhibit 3, a CD-Rom, in the folder eMule/Comp2/eMule.

**3. Thumbnail Files**

Hentzen's expert Dr. Cobb says some of Examiner Baker's testimony about thumbnail files was misleading. D.E. 68-14 ¶¶ 19-21.

Examiner Baker testified there was evidence Hentzen had "interacted with" some of the child-pornography files. D.E. 50 at 202. He explained that, on Hentzen's large desktop computer, investigators "found a number of thumbnail caches from Windows Explorer indicating that at some point images were opened within Windows Explorer and then viewed in thumbnail view." D.E. 50 at 202-03. He said, "we found quite a few thumbnails of what we consider to be child sexual abuse images." *Id*. at 205. Examiner Baker explained the existence of these thumbnails "means at some point someone opened that folder and viewed all of those images in display view or icon view." *Id*.

In explaining how "thumbnail" files work, Examiner Baker explained,

> Thumbnail images are created in the Windows operating system. If you open Windows Explorer into -- into a photo directory and you say you want to view it by icon or in display view, then Windows automatically creates thumbnails of every image within that folder. However, the operating system doesn't create them unless someone actually interacts and changes the display to -- or changes the display of the folder to display view or icon view.

*Id.* at 203. Examiner Baker clarified that thumbnails are created by

> [t]he action of viewing the files in display view, not necessarily double clicking and opening them. Just telling Windows Explorer, you know, you have certain options. You can look at the detail view, which gives you a file name and the size and the date and all of that information, or you can . . . view it in small icons, medium icons, large icons. Any time you look at the icon view, the thumbs.db file is created. It is not created any other way.

*Id.* at 207.

Dr. Cobb took issue with this testimony. His affidavit states,

> 19. Baker testified that thumbs.db files are created by Windows when a folder is opened in "display view," and when the user "view(s) something in display mode," but Windows XP does not have folder view options titled "display view" or "display mode".
>
> 20. Eventually, Baker correctly states that thumbs.db files are created when the files are displayed in "*thumbnail view*" in Windows Explorer. The following observations, however, are not addressed: (i) The created thumbnails, especially of photos, are very small and difficult to see, (ii) other scenarios can result in a thumbs.db file without the

> user having displayed the files in "thumbnail view". For example, a thumbs.db file can be created on one computer, then zipped into a zip archive, transferred to a second computer, then unzipped. Even if the files are displayed in other view types, the thumbs.db files would still exist, since they were copied over.
>
> 21. In the context of thumbnail creation, the action "view" refers simply to the fact a file was present in a folder that was opened in "thumbnail view" -- not that file contents were actually seen by the user or even opened.

D.E. 68-14 at 7-8.

**4. Link (.LNK) Files**

Hentzen's expert Dr. Cobb states that Examiner Baker gave "erroneous" testimony about .lnk or "link" files. D.E. 68-14 ¶ 16.

Examiner Baker testified about .lnk files:

> A Link file is a shortcut that Windows creates. If you open a file . . . Windows creates a small file . . . that has a .lnk file type. All that does it tells Windows where that file is. It then puts that file in what's called recent folder. If you look on your -- under your Windows tool bar when you open up your start button, just on the right of that bar you'll see recently opened files or recent files. If you open that, then you'll see all the files that you

> have opened recently. . . . What's contained in that link file is a pathway to the actual file, where the actual file is.

D.E. 50 at 233-34. When asked "what is the user doing that causes" Windows to create a .lnk file, Baker said, "[the] user opens the file." *Id*. at 234.

Speaking of one of Hentzen's external hard drives, Examiner Baker testified they found "a number of" .lnk files that "pointed to suspected" child pornography. D.E. 50 at 235. He said this meant the images with .lnk files "were actually opened," causing Windows to generate a .lnk file. *Id*.

Examiner Baker also testified that Windows automatically creates a "recent" folder which contains nothing but "link files to the [last few] files that you've opened." D.E. 50 at 238. When asked whether "something [can] come to reside . . . in the recent folder without the user interacting with it," he answered "no." *Id*. Examiner Baker had a list of items from the "recent" folder of Hentzen's desktop computer that pointed to files on his external hard drive. He said most of the .lnk files pointed to images of minors in sexually explicit conduct. *Id*. at 240.

Dr. Cobb's affidavit is critical of this testimony:

> Baker testified that Windows only creates a shortcut (.lnk or link file) to a file when it is opened by a user. This is erroneous because shortcut files can also be created without opening the file at all by right-clicking on a file and selecting "Create Shortcut" from the context menu. Additionally, these shortcut files could have existed on another person's

> computer and been copied to Hentzen's hard drive (via download or copy).

D.E. 68-14 ¶ 16.

**5. Browser Activity**

Examiner Baker testified about two entries in Hentzen's "browser history that contained child sexual abuse keywords." D.E. 50 at 182. He showed in an exhibit a file that had been opened, not viewed from the internet, using Internet Explorer. *Id*. at 183.

> So in this case the path would be on the C drive, Documents and Settings, Erik Hentzen, slash, My Documents, slash, eMule, Downloads, Incoming. And the file name itself is 1st, space, Studio, space, custom, and then in brackets pthc, stands for preteen hard core; new daughters sexy; and then in parentheses, by Diekmann, it looks like; and then in brackets pthc with a dash; new daughters sexy; by Diekmann again; and then finally the file name is DSC05076.jpg, meaning it's a JPEG image file.

*Id*. Baker testified that "the actual file itself" on Hetzen's computer had been opened and viewed within Internet Explorer. *Id*. at 184.

Baker provided a second example:

> We found one other entry also in the Internet Explorer history. This is a file opened. This is a digital video file, in this case on the G drive. The pathway is zero, keep, slash -- I think it's Oliona, O-L-I-O-

> N-A -- and mylola again. And then an ampersand, uri, incest love, teenfuns, Oliona, mylola again, and 2018.34.avi.

*Id.* at 184-85. Baker testified "the file was viewed using Internet Explorer." *Id.* at 185.

On this point, Dr. Cobb's affidavit posits that opening AVI files in Internet Explorer was "unlikely" because opening media files in Internet Explorer was not a default action on Hentzen's computer. D.E. 68-14 ¶ 17.

**6. The Defense Case and Rebuttal**

Hentzen testified in his own defense. In his affidavit, he recounts his preparation for that testimony. Hentzen says that all along he planned to explain to the jury

> (1) how the offensive files may have come to exist on my network, (2) how the government's forensic results were inconsistent with the records available from the network devices, and (3) the manner in which I manipulated all of my various pieces of hardware and software in pursuit of downloading files and managing my digital library.

D.E. 68-2 ¶ 63. Hentzen's expectation, based on his conversations with Pence, was that during his testimony he would be able to use the many demonstrative exhibits he had developed. *Id.* ¶¶ 63-65. Hentzen says he was ready to deliver to the jury "a seminar on how to download massive amounts of data." Alternatively, Hentzen was prepared to "to set up a live demonstration during trial on how I was

adding these downloads and links." *Id.* ¶ 65. Hentzen says he also provided Pence with precisely worded questions for witnesses that could summon evidence in support of his theory. *Id.* ¶ 67.

According to Hentzen, "At trial, Mr. Pence did none of the things I expected:"

> On the stand, I answered the questions Mr. Pence posed to me, but nearly none of those inquires addressed the same topics or evidence that we'd discussed and that he had promised to inquire about. He exhibited a staggering ignorance of the exhibits. Mr. Pence did not show me or the jury any of the exhibits he promised me that I would testify about except a single pair of screenshots that he introduced during his opening statements. . . . It is my understanding that he . . . had lost or misplaced the list of questions that I had provided him.

D.E. 68-2 ¶ 69. And Pence did not ask Hentzen redirect questions. *Id.* ¶ 70; D.E. 51 at 101. The government's expert witness, Examiner Baker, then testified in rebuttal. D.E. 68-2 ¶ 72-75.

In his trial testimony, Hentzen explained his background with computers and described his home "setup" at the time of the search. D.E. 51 at 3-5. Hentzen testified that he was a compulsive collector of videos; he had downloaded more than he could ever watch in his lifetime. *Id.* at 33-34.

Hentzen acknowledged he liked to download adult pornography and that child pornography had been

found on his devices, but he said he did not know there were child porn images and videos on his computer and he never intentionally downloaded child pornography. D.E. 51 at 6. When asked about the child-porn videos that were played at trial, he testified he had never seen them. And if he had known about them he "would have physically destroyed the drives they were on." *Id*. He had never seen anything like that on his computer screen. *Id*. at 32.

Hentzen testified he could have unknowingly downloaded the contraband using eMule, BitTorrent (both of which are peer-to-peer), or JDownloader, which downloads everything downloadable on any given website. D.E. 51 at 6-7. Henzen would also copy other people's files if he was working on one of their devices. *Id*. at 7.

Concerning keywords, Hentzen testified his practice was to copy popular search terms off adult pornography websites and paste them into one of his programs' search bars. D.E. 51 at 9-10. Concerning the child-porn keywords described by Bell and Baker, Hentzen denied he knew these terms were associated with child pornography. *Id*. Hentzen acknowledged that terms such as "11yo" were red flags for contraband. *Id*. at 17-18; 78-80. But he testified that he generally paid no attention to file names or titles as he was bulk-downloading, so he never noticed such red flags. *Id*. at 17, 81, 84, 86-87. He said he "never paid attention to the [file] titles;" he said, "I didn't care what the downloads were because I was just going to get all of them." *Id*. at 86-87.

Further testimony for the defense came from Hentzen's former girlfriend and his friend, both of

whom testified to how Hentzen collected massive quantities of movies and television shows that he had downloaded. They had seen no evidence of child pornography, and Henzen did not act secretive or restrict his computer from them. Forensic examiner Emanuel Kressel also testified concerning a device called Spector that law enforcement agencies use to monitor computers.

The government then recalled Examiner Baker as a rebuttal expert. Although Hentzen had testified that he had eMule on more than one of his seized devices (D.E. 51 at 100), Baker reiterated his understanding that eMule was only installed on the one VAIO laptop (*id*. at 129). Baker used an exhibit derived from an eMule file on the VAIO laptop which listed temporary files created by the act of downloading files. He testified that "these files have to have the exact same time down to the second in order for us to say they were downloaded simultaneously." *Id*. at 134. However, according to Baker, many of the files "were downloaded individually" or "downloaded singly" based on the files not having the exact same time stamp. *Id*. at 134-36.

**7. Closing Arguments**

The government in closing arguments restated its thesis that "this is a case about deception." D.E. 47 at 3. After reading the charges in the indictment, the government argued that the keywords from Hentzen's last-thirty-searches file indicated knowing receipt of child pornography. "If you're not looking for child pornography, folks, why are you putting in 'Siberian Mouse?'" *Id*. at 9. As the evidence demonstrated, Hentzen's computer also had a .pdf catalog of

"Siberian Mouse" videos from Russian organized crime, and the catalog referred to the exploited children as mice. *Id*. "That's why you enter that search term," the prosecutor argued. "You enter 'Siberian Mouse' to find child pornography. And this defendant didn't just enter it on his computer. He had a catalog showing children in sexual poses calling them 'mice.' That's pretty good evidence of this defendant's knowledge." *Id*. at 9-10. The government also talked about "1st Studio," Vladmodels," "Masha Babko," "Stick Cam," "Kid Cam," "Smotri," and "Vichatter" as child-porn keywords included in Hentzen's last thirty eMule searches. *Id*. at 10-11. "Folks, this tells you that you can find beyond a reasonable doubt that first, the defendant knowingly received a visual depiction. Of course, he did. He was searching it out. You don't use these search terms unless you're searching them out." *Id*. at 11. The government also argued that the fact that various devices across Hentzen's extensive computer system were "filled to the brim with child pornography" was circumstantial evidence of knowledge, like how a person wearing a wet raincoat is circumstantial evidence that it is raining outside. *Id*. at 15.

Mr. Pence in closing arguments stressed that Hentzen did not necessarily type the keywords into the eMule search bar because Hentzen testified he had simply copied and pasted search terms he found on regular pornography sites. D.E. 47 at 18. Pence argued that the child-porn keywords are not common knowledge, and a college student like Hentzen should not be expected to know these words are red flags for contraband. *Id*. at 20. Pence finished by stressing the government's burden of proof.

In rebuttal argument, the government stressed Examiner Baker's rebuttal testimony that eMule records show that Hentzen individually selected for download many of the files containing child-porn keywords because the temporary files associated with them have different time stamps. D.E. 47 at 31-32.

> That's what the rebuttal evidence was for. Select, download, select, download, select, download. He was choosing the ones that he wanted. And [Hentzen] told you when he was on the stand this morning that he considered the size of the file, how fast he could get it, which are all columns in the way [eMule] works. But when I asked him, "Well, you didn't look at the title of the file?" "No, no, no." Well, why did he testify that he didn't look at the title of the file? Because it's filed with child pornography keywords. . . . [T]welve-year-old, eight-year-old, six-year-old, because it's filled with child pornography keywords. Anybody who read those file titles would know that they were child pornography-related terms.
>
> . . . . What did he do with it after he downloaded it? He told us. He saved all these files, categorized them on his other equipment, on the external hard drive. And it wasn't just like one big dump, one big let me put all the data over there at once. He told us he sorted them. He made his own folders. . . . Select, download,

> save, store in a special folder that I have made myself. Folks, proof doesn't get any better than that.

*Id.* at 32-33.

**D. The Appeal**

Some aspects of Hentzen's direct appeal are relevant to his current claims. Hentzen's appeal challenged the procedural and substantive reasonableness of his sentence. He also argued that the evidence was insufficient to convict and that a non-contraband video was improperly played at trial. D.E. 64 at 1. The appellate court found that admitting the non-contraband video was error, but harmless under the circumstances. *Id*.

The Court of Appeals noted that "The only contested issue at trial was whether Hentzen knew that the files were child pornography when he downloaded and possessed them." D.E. 64 at 3. The Court explained:

> As evidence that Hentzen knew that he was downloading child pornography, the government presented a document representing his last 30 searches on eMule. The search terms included "a number of commonly found child sexual abuse keyword terms," and each term had been entered individually. The government also presented evidence that two of the still images had been opened in Internet Explorer (or Windows Explorer) and that a folder containing some of the files had been opened using a

> view that would show thumbnails of the videos and images.

*Id*. In addition to nine child-pornography videos, the government also presented an animated video from Hentzen's computer as "other act evidence" relevant to Hentzen's knowledge that he possessed child pornography. The trial judge at a pretrial conference had overruled Hentzen's objection to the admission of the video. The Court gave a limiting instruction after the video was played and as part of the final jury instructions. *Id*. at 3-4.

As to sufficiency of the evidence the Sixth Circuit observed that proof of knowledge "is rarely established by direct evidence." Knowledge of the contents of material "may be proven by circumstantial evidence." D.E. 64 at 7. The appellate court agreed with Hentzen that his batch-downloading explanation was "consistent with the circumstantial evidence; thus, a rational jury could have believed him and decided to acquit." *Id*. at 8. However, the jury did not believe Henzen and the appellate court found adequate evidence to support the verdict. *Id*.

> The government presented significant circumstantial evidence that Hentzen affirmatively sought out child pornography files and viewed them once they were on his computer. He had entered as search terms the names of child pornography studios and the name of a child pornography series. His internet history showed that two still images of child pornography had been opened in the Internet Explorer browser

> (or its analogue, Windows Explorer). Further evidence from the computer's "link files" suggested that child pornography files had been opened from his external hard drive. From this evidence, a rational juror could infer that Hentzen knew that he was receiving child pornography—because he was searching for the names of child pornography studios—and knew that he possessed child pornography—because he had viewed it.

*Id.* at 7-8.

The Court of Appeals found that the animated video was erroneously admitted, and thus analyzed whether the error was harmless in that it did not affect Hentzen's "substantial rights." D.E. 64 at 13. A non-constitutional error is "harmless unless it is more probable than not that the error materially affected the verdict." *Id*. The question "generally depends on whether the properly admissible evidence of the defendant's guilt was overwhelming." *Id*. The Court of Appeals reasoned that the jury had previously seen nine actual child-pornography videos from Hentzen's computer, plus a catalog from his computer for ordering child pornography. *Id*. "The government also relied on evidence that Hentzen knew of the child pornography, including the evidence from his browser history and his search terms." *Id*. The Court found the government's use of the animated video was limited, and its limited use and evidentiary value "weighs against any conclusion that the jury would have decided the case differently absent the introduction of

the animated video." *Id.* at 14. Thus, "the erroneous admission of the video did not materially affect the jury's verdict." *Id.*

In his current Ground Three, Henzen argues his appellate attorney was ineffective for failing to challenge Hentzen's two-level sentencing enhancement for obstruction of justice (perjury). USSG § 3C1.1.

The Sixth Circuit's opinion on direct appeal includes a footnote that mentions Hentzen's two-level enhancement for obstruction of justice. D.E. 64 at 6 n.1. The Court found that "Because Hentzen did not raise the issue again on appeal, we do not determine whether the court's findings were adequate to merit the enhancement." *Id.* The footnote includes an *obiter dictum* discussion of whether a 1993 Supreme Court case had been abrogated by a 1997 Supreme Court case. *Id.*

**E. The 2021 Evidentiary Hearing**

The Court conducted a post-remand hearing on Hentzen's § 2255 motion in Frankfort on August 26 and 27, 2021. D.E. 134, 136. The transcript is in the record. D.E. 139, 140. The parties submitted post-hearing briefing. D.E. 145, 147, 146.

Hentzen, Mr. Pence, Hentzen's expert Dr. Cobb, and an expert for the government testified concerning Ground One. Again, Ground One is limited to the specific argument that Pence should have obtained an expert witness who could testify regarding the alleged problems identified in Dr. Cobb's affidavit. Mr. Pence did not remember much about the events leading up to trial, and the Court does not rely on his testimony.

Dr. Andrew Thomas Cobb testified first. His CV is attached to his affidavit at Docket Entry 68-14. Cobb testified that, since 2006 he, through his company OneSource Discovery, has worked primarily in digital evidence for legal matters. He has done research for thousands of legal matters, mostly business litigation and criminal cases. His work consists mainly in tracking past activity on digital devices. He uses data such as timestamps to patch together the device's usage history. This work begins by making a "forensic image," which means a verified exact copy of the data on a device.

Dr. Cobb testified he was hired in this case in February 2017. He reviewed trial documents, including the Kentucky Attorney General's digital forensic report. At the time of his affidavit, Dr. Cobb did not have access to the actual forensic images of Hentzen's seized devices, which he testified was unusual. Prior to the hearing, Dr. Cobb was able to study forensic copies of three of the four devices from Hentzen's system that contained contraband. The devices that were not found with contraband had been destroyed.

**1. Investigatory Protocols**

The first issue in Dr. Cobb's affidavit is his assertion that the investigators in this case "breached universally accepted procedures of digital forensic data collection and analysis." D.E. 68-14 ¶ 4. The affidavit explains that Cobb found "several thousand files" with timestamps post-dating the seizure of Hentzen's equipment at 9:15 a.m. on March 22, 2013. *Id.* ¶ 11. This circumstance suggests "a variety of activity on the system after the systems were taken

into custody by the investigators" and before the forensic images were made. *Id*. This activity "cause[d] modifications to the very evidence meant to be preserved and examined, and is outside of universally accepted digital forensics practice." *Id*. ¶ 12.

Had the defense understood these breaches of protocol, Cobb suggests, the defense could have attacked the credibility of the investigation. The prosecution, he says, used "evidence which, by virtue of their interaction with it, was altered and partially created by them." And this "[i]mproper digital evidence handling calls into question any conclusion made after custodial transfer." D.E. 68-14 ¶¶ 13-14. The defense could have argued that other norms-breached could have occurred, calling into question the quality of the evidence "and all findings and opinions based on such evidence." *Id*. ¶ 14. Dr. Cobb also explained in his evidentiary-hearing testimony that the timestamp changes had overwritten (erased and replaced) any evidence (inculpatory or exculpatory) as to when these files may have been viewed between their download and the seizure of Hentzen's equipment. D.E. 139 at 80.

Dr. Cobb testified he applies standard industry tools and techniques in his forensic work. He explained that various standards have been developed, including ones issued by the National Institute of Standards and Technology ("NIST") and the Department of Justice ("DOJ"). Portions of the NIST "Guide for Law Enforcement" and the DOJ "Electronic Crime Scene Investigation, 2d Ed." were entered into evidence and discussed. D.E. 139 at 18-22. These documents provide guidelines for "evidence

acquisition" for "first responders" to help maintain the integrity of digital evidence in light of such evidence's inherent "fragility."

Dr. Cobb testified that evidence-collection standards must have been breached because Hentzen's VAIO laptop contained 3,628 files with timestamps post-dating the recorded time of the devices' seizure. Included among these 3,628 files are the four videos from the VAIO laptop that were played at trial. D.E. 139 at 22-23.[3]

Dr. Cobb testified that in 2019 he was able to examine three of the four devices that contained contraband (one of the external hard drives was "dead"). He testified his review confirmed the opinions in his affidavit. D.E. 139 at 34-37.

On cross-examination, Dr. Cobb acknowledged it appeared the investigators had performed an on-scene "triage" of the VAIO laptop. When asked if triages of this sort were routine, Cobb testified that, per DOJ protocols, on-scene triage should be an exception. He said that, under standard protocols, on-scene triage is appropriate in two scenarios: "One is if you actually see contraband on the screen, and two is if you suspect there may be encryption involved." D.E. 139 at 64.

Defense Exhibit #5, which Dr. Cobb discussed during his testimony, is a portion of the April 2008

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[3] Trial exhibits 1A, 1B, 1C, and 1D are the four videos from the VAIO played at trial. D.E. 43. Their names are described in the trial transcript. D.E. 50 at 148-53. Defense Exhibit #7 from the evidentiary hearing shows these four files' creation dates and their last-accessed dates that post-date the entry into Hentzen's apartment.

DOJ National Institute of Justice Special Report, "Electronic Crime Scene Investigation: A Guide to First Responders, Second Edition." This Guide provides guidance for when investigators find that a targeted computer is powered on. On page 25-26, it states:

> [R]emoving the power supply when you seize a computer is generally the safest option. If evidence of a crime is visible on the computer display, however, you may need to request assistance from personnel who have experience in volatile data capture and preservation. . . . In the following situations, immediate disconnection of power is NOT recommended: data of apparent evidentiary value is in plain view onscreen[.]

Cobb was asked whether the first exception he listed was met in this case because the VAIO "was actively downloading" when the search occurred. Cobb did not recall the testimony of Investigator Bell and Examiner Baker that this was indeed the case. D.E. 139 at 64-66. Cobb said that in general the "safest option" is to "unplug the computer," not to triage. *Id.* at 65. Cobb acknowledged that the post-seizure timestamp changes could have been caused by the triage. *Id* at 67. Nevertheless, he said it was "concerning" that so many files—3,628—had "time stamps post-custody." *Id.* Cobb said he had no way of knowing whether the 3,628 post-seizure time stamps were created by on-scene triage or whether the investigators "were in there clicking around on files."

*Id.* at 70. Turning specifically to the four videos from the VAIO laptop that were played at trial, Cobb agreed that the videos' "created dates" preceded the seizure, although they also had post-seizure timestamps. *Id.*

The government later called Detective Michael Littrell, a forensic examiner for the Kentucky Attorney General's Office. D.E. 140 at 85. He testified that he was in the same unit with Baker and Bell, who have since retired, but was not involved in the investigation of Hentzen. *Id.* In preparation for this hearing, Det. Littrell had "reviewed the forensics that were done on the devices that were seized from Mr. Hentzen's apartment." *Id.*

Det. Littrell testified that his unit used triage to determine (1) whether they were at the right location, (2) whether they had found the right computers, and (3) whether contraband is present that could support an arrest for probable cause. D.E. 140 at 86. He says they look for the "main computer" they suspect of harboring contraband and they "run a program on it" called OS Triage. *Id.* at 87. That program, created by a retired FBI agent, is designed to "quickly evaluate the weight of multiple computers on a scene and to establish probable cause for an arrest of a suspect by running this program on various pieces of media that are encountered during a search warrant." *Id.*

Det. Littrell testified that Bell and Baker ran OS Triage on Hentzen's Sony VAIO during the execution of the search warrant. D.E. 140 at 87. This was confirmed by the existence on the VAIO of particular LINK files that are generated by OS Triage. *Id.*

Det. Littrell disagreed with Cobb that the post-seizure last-accessed dates on over 3,000 files

constituted a red flag. D.E. 140 at 88. He testified that OS Triage "scans the contents" of the files on the target computer looking for "verified hash values," "registry entries" that show any user's information, "internet history," "program files," and so on. *Id*. at 88-89. He acknowledged that this scanning activity affects last-accessed dates of files on older versions of Windows, such as Windows XP. *Id*. at 89.

> Most forensic examiners -- in fact, we teach new examiners not to even use those last accessed times because there are other programs and things that can change those; virus scanners, programs that scan for malware, things like that, Windows indexing. Those programs touch those files, and they modify their accessed times, particularly in Windows XP. So we don't even use those when trying to build a case because they may not be reliable because there is so many variables that can touch and change that last access time, including, in this case, OS Triage or any other programs that I mentioned.
>
> . . . .
>
> And, in fact, when OS Triage is run, it's an expected outcome for those access times to be changed.

*Id*. at 89-90.

When asked on cross-examination whether he believed all the 3,000-plus timestamp changes in this case could have been caused by OS Triage, Det. Littrell testified,

> I can't say that for certain. Again, there's other processes that run on a computer when it's running that would change the access times. I will say that a majority of those probably are, but there's no way to know for certain what changed the last accessed date on those.
>
> [Nevertheless, those timestamps are not a red flag because] I think it's an expected outcome from running OS Triage. And so if those files were changed during the execution of the search warrant, then I would say that's an expected outcome. If they had changed once back in the lab, that's a different situation. But I don't -- I don't understand how that's a red flag. I think it's an expected outcome [of running OS Triage at the scene].

D.E. 140 at 91-92. Det. Littrell clarified again that the use of OS Triage would change the last-accessed date of files it "touch[ed]." But he also explained, "I've never used the date of the last access ever in a case, ever." *Id*. at 94-95.

To summarize, there is no disagreement that 3,628 files on Hentzen's VAIO laptop had last-accessed timestamps indicating times after which officers entered his apartment to execute the search warrant. Both sides' experts agree that the investigators' use of the OS Triage program *could have* generated all those changed timestamps. But neither expert could be certain that *all* the altered times stamps were caused by OS Triage. The defense expert

considered the sheer *number* of changed time stamps to be a "red flag." The government's expert did not find the number concerning (because altered last-accessed dates is an expected outcome of running OS Triage) and did not consider the timestamps important anyway because he has never used last-accessed dates as inculpatory evidence. Hentzen argues that the significance of this evidence goes to the credibility of the government's case. Given that the only dispute at trial was Hentzen's knowledge of the child pornography, he argues any proven impropriety by the government could have led the jury to find Hentzen more credible. Had the jury known the investigators had breached evidence-collection protocols, Hentzen argues, then the jurors might have found reasonable doubt as to whether Hentzen was telling the truth. *See* D.E. 140 at 110.

**2. Thumbnail files**

Another issue from Dr. Cobb's affidavit concerns the government's trial testimony about thumbnail files, discussed above in Section III.C.3. Dr. Cobb's affidavit states,

> 19. Baker testified that thumbs.db files are created by Windows when a folder is opened in "display view," and when the user "view(s) something in display mode," but Windows XP does not have folder view options titled "display view" or "display mode".
>
> 20. Eventually, Baker correctly states that thumbs.db files are created when the files are displayed in "*thumbnail view*" in Windows Explorer. The

> following observations, however, are not addressed: (i) The created thumbnails, especially of photos, are very small and difficult to see, (ii) other scenarios can result in a thumbs.db file without the user having displayed the files in "thumbnail view". For example, a thumbs.db file can be created on one computer, then zipped into a zip archive, transferred to a second computer, then unzipped. Even if the files are displayed in other view types, the thumbs.db files would still exist, since they were copied over.
>
> 21. In the context of thumbnail creation, the action "view" refers simply to the fact a file was present in a folder that was opened in "thumbnail view" -- not that file contents were actually seen by the user or even opened.

D.E. 68-14 at 7-8.

Dr. Cobb explained at the evidentiary hearing that the issue is that any thumbnail (thumb.db) files found on Hentzen's computer *could have* been copied from another computer (such as by eMule file sharing) rather than *generated* by Hentzen's computer. D.E. 139 at 45-47. Dr. Cobb also explained that thumbnail files are hidden system files, so a computer's user is unlikely to know they even exist. *Id*. at 46. So, a thumbnail file could be moved from a first computer to a second computer. "And it would look like -- on the second computer it was copied to, it would look like they opened those, opened the files, in icon view, even

though the files themselves may not even exist on the other computer." *Id*.

On cross-examination, Dr. Cobb acknowledged he did not look for evidence that the thumb.db files discussed at trial had been copied from another computer onto Hentzen's. D.E. 139 at 77. Dr. Cobb also acknowledged that the actual files pointed to by the thumbnail files were also on Hentzen's computer, not just the thumbnail files. *Id*. Having reviewed the trial transcripts, Cobb could not recall the government offering any forensic evidence that Hentzen had ever actually opened or viewed the four contraband videos from the VAIO laptop that were played at trial. *Id*. at 84-85.

**3. Link (.LNK) files**

As with thumbnails, under the topic of the government's experts misstating facts about Windows XP, Dr. Cobb's affidavit alleges Examiner Baker's testimony on link files was inaccurate:

> 16. .LNK files / Shortcuts. Baker testified that Windows only creates a shortcut .lnk or link file) to a file when it is opened by a user. This is erroneous because shortcut files can also be created without opening the file at all by right-clicking on a file and selecting "Create Shortcut" from the context menu. Additionally, these shortcut files could have existed on another person's computer and been copied to Hentzen's hard drive (via download or copy).

D.E. 68-14 at 6.

At the hearing, Dr. Cobb explained, "A link file is a pointer to a file. It's a very small file that Windows uses for efficiency so that I can take a file that's in one folder and I don't have to dig into a file that's buried in a bunch of folders." D.E. 139 at 40. He explained that a user opening the file is not the *only* way that link files are created. *Id*. at 41. And, as with thumbnail files, link files can be moved from one computer to another without the user even knowing the files exist. *Id*. Dr. Cobb performed a demonstration of this: "I created the link file on one computer and then moved it to another computer. So the evidence of the file being opened on computer 1 is now on computer 2, but the conclusion that it was opened on computer 2 is erroneous. That's the point." *Id*. at 43-44.

On cross-examination, Dr. Cobb acknowledged that Examiner Baker did not testify that opening a file is the *only* way to create an associated link file. D.E. 139 at 70-71. Baker "didn't mention the other way" in his testimony, but Cobb was "mentioning both [ways]." *Id*. at 71. While Baker did not say opening the file was the only way to create a link file, "he didn't say there was another way either, which is what the defense should have done." *Id*. at 72. As with the thumbnail files, Dr. Cobb did not look for evidence that the link files on Hentzen's computer were actually copied from another computer. *Id*. at 72-77. And Cobb acknowledged that, with the four videos from the VAIO that were played at trial, both the link files and the actual files with matching file paths existed on Hentzen's computer. *Id*. at 73-74.

**4. Browser Activity.**

As noted in Section III.C.5, Examiner Baker discussed at trial two image files with child-porn keywords in their titles which he said had been opened and viewed on Hentzen's VAIO laptop using the Internet Explorer web browser. D.E. 50 at 182-85. Dr. Cobb's affidavit asserts:

> Investigator Baker testified that the .AVI files were opened in IE, however, the registry indicates this was unlikely. The available "Open With" options for .AVI files on the system identified as "Comp2" in the Case Materials were Windows Media Player, DivX Plus Player, and VLC. Therefore, opening an .AVI file in Internet Explorer would not be the default action on the system. Further, the available "Open With" options for .JPG files on the system identified as "Comp2" in the Case Materials were Windows Picture and Fax Viewer, Microsoft Paint, and Firefox. Therefore, opening a .JPG file in Internet Explorer would not be the default action on the system.

D.E. 68-14 ¶ 17.

Having inspected the VAIO laptop, Dr. Cobb offered additional testimony at the hearing. He said the VAIO's registry's MTuser.dat file shows that if Hentzen had clicked on either of the image files, they would have naturally opened in one of the default programs, none of which was Internet Explorer. D.E. 139 at 48-51. He clarified that Hentzen could have opened an image file in Internet Explorer. But to do

so, "He would have had to search for it and manually picked it." *Id.* at 51.

Dr. Cobb testified that Baker's conclusions that the files were opened in Internet Explorer was not sound:

> There is a library file called WinINet, W-i-n-I-N-e-t, that is shared by Internet Explorer and a lot of other applications on Windows. So that because they share that library, they also feed into the same log files and history files. So if you were to look at Internet Explorer, you would see files -- in Internet Explorer history, you would see files that have not been opened in Internet Explorer. It could have been opened in other applications that share that library, that WinINet library. So that's the key point that he's missing here.

D.E. 139 at 53.

**5. Batch Downloading**

Hentzen's counsel also elicited testimony from Cobb about Examiner Baker's rebuttal testimony at trial that contradicted Hentzen's account of his own "batch downloading" practices. D.E. 139 at 53-56. But Dr. Cobb did not mention this issue in his affidavit. So it was not part of the "precise argument" for which the Court of Appeals issued a certificate of appealability and accompanying remand. Nevertheless, the Court will address this issue in the interest of completeness of the record.

As noted, Hentzen has maintained (and testified at trial) that he was not aware of everything he had downloaded because his practice was to download many files at once using automated peer-to-peer and website-based programs. Examiner Baker testified in rebuttal that certain files Hentzen had downloaded onto his VAIO laptop using eMule were not batch-downloaded because they had different timestamps.

As described in section III.C.6 above, Examiner Baker presented an exhibit depicting an eMule file from the VAIO laptop which showed temporary files created by the act of downloading files. He testified that "these files have to have the exact same time down to the second in order for us to say they were downloaded simultaneously." D.E. 51 at 134. However, according to Baker, many of the files "were downloaded individually" or "downloaded singly" because the files did not bear the exact same time stamp. *Id*. at 134-36. At the hearing, Dr. Cobb testified that the data in Examiner Baker's exhibit was actually consistent with batch downloading. D.E. 139 at 55.

**IV. Analysis of Ground One**

Ground One, as defined by the certificate of appealability, asserts that, had Dr. Cobb (or another expert) testified at trial to the information contained in Dr. Cobb's affidavit, this testimony would have undercut the government's credibility. Hentzen argues, "if the defense had been prepared at the June 2014 trial to expose the untruth that was woven throughout the Government's entire presentation, the credibility hit for the Government, both witness and advocate, would have been cataclysmic." D.E. 145 at

24. The jury then could have found Hentzen more credible by comparison and ruled in his favor. The Court reiterates that the Sixth Circuit's remand on Ground One is limited to consideration of this "precise argument." D.E. 117 at 5.

As the Court of Appeals noted in its order issuing a certificate of appealability, "[t]he selection of an expert witness is a paradigmatic example of the type of strategic choice that, when made after thorough investigation of the law and facts, is virtually unchallengeable." D.E. 117 at 6 (quoting *Hinton v. Alabama*, 571 U.S. 263, 274-75 (2014) (per curiam)). Federal courts are not in the business of examining "the relative qualifications of experts hired and experts that might have been hired." *Hinton*, 571 U.S. at 275.

**A. Relief Foreclosed by Law of the Case**

The Court of Appeals' prior rulings logically preclude a finding of either deficient performance or prejudice on Ground One. The Sixth Circuit decisively rejected Hentzen's argument that Mr. Pence was ineffective for failing "to obtain a more reliable, competent, and persuasive digital-computer-forensics expert." D.E. 117 at 6. That Court found that Henzen had established neither deficient performance nor prejudice. It reasoned as follows:

> In support of this claim, Hentzen alleged that Brian Ingram, the forensics expert that counsel did retain in this matter, was grossly inadequate and that his inadequacies compromised the defense's ability to formulate a viable trial strategy. But the Supreme Court has

> made clear that "[t]he selection of an expert witness is a paradigmatic example of the type of strategic choice that, when made after thorough investigation of the law and facts, is virtually unchallengeable." *Hinton v. Alabama*, 571 U.S. 263, 274-75 (2014) (per curiam). Although Hentzen asserted that counsel lacked a sufficient background in computer technology to vet properly the technical knowledge and qualifications of prospective experts, he failed to show that counsel's investigation was not thorough. To the contrary, Hentzen admitted that prior to retaining Mr. Ingram, counsel contacted several computer-forensics entities in Louisville and Cincinnati in search of an expert who was willing to work on this case, but to no avail. Hentzen further admitted that, after it had become apparent that Mr. Ingram was an insufficient expert, counsel retained Emmanuel Kressel as an expert for the defense. Moreover, apart from conclusory and speculative assertions, Hentzen failed to demonstrate a reasonable probability that the outcome of his trial would have been different had counsel consulted another expert. *See Strickland*, 466 U.S. at 694. Reasonable jurists would not debate the district court's resolution of this claim.

*Id.*

This Court is not at liberty to revisit these findings, which the appellate court characterized as undebatable. Thus, it is not clear how this Court could craft a logically consistent finding that both (1)—as the Court of Appeals found—Pence was reasonable in hiring Ingram and Kressel (as opposed to other possible experts) but—as Hentzen now argues—(2) Pence was unreasonable in failing to hire Cobb (or some other expert who would testify consistently with Cobb's affidavit). The Sixth Circuit's finding of reasonable performance in hiring Ingram and Kressel appears to logically exclude a finding of deficient performance in failing to hire Cobb or a Cobb-analogue. And, as for prejudice, the Sixth Circuit's finding of no "reasonable probability" that the outcome would have been different "had counsel consulted another expert" appears to logically exclude any finding that the outcome would have been different had Pence consulted Cobb, who is "another expert."

How can this Court find that Pence was ineffective in failing to hire another expert (Cobb or a Cobb analogue) when the Sixth Circuit has already determined Pence was *not* ineffective in failing to hire another expert—and that no reasonable jurist could hold otherwise? D.E. 117 at 6. The Sixth Circuit has already conclusively found that Pence rendered effective assistance in his hiring of expert witnesses. As found by the Court of Appeals, "reasonable jurists would not debate" that there was no deficient performance or prejudice. *Id*. Accordingly, the undersigned **RECOMMENDS** that Ground One be denied on both *Strickland* prongs. The Sixth Circuit's March 2019 opinion logically forecloses any finding to the contrary.

**B. Analysis of the Merits in the Alternative**

Nevertheless, the Court now provides an analysis on the merits in the alternative. Although the Court of Appeals decisively rejected Hentzen's claim that Mr. Pence was ineffective for failing "to obtain a more reliable, competent, and persuasive digital-computer-forensics expert" (D.E. 117 at 6), the Court will now proceed as if this holding could logically coexist with a finding in Hentzen's favor on the current Ground One. Disregarding the logical inconsistency described above, has Hentzen shown ineffective assistance on the "precise argument" remanded for further consideration?

Hentzen argues that the defects in the government's case described in Cobb's affidavit would have significantly undermined the government experts' credibility before the jury. Thus, he argues, counsel was ineffective for failing employ an expert who could identify and raise these issues. The evidence presented at the evidentiary hearing shows this is not the case.

**1. Breach of Universally Accepted Protocols**

Dr. Cobb's affidavit accused the investigators in this case of breaching "universally accepted procedures of digital forensic data collection and analysis." D.E. 68-14 ¶ 4. The evidence of this breach was that "analysis of the files in the File Reports provided by investigators reveals several thousand files with timestamps after 9:15am on 3/22/2013, suggesting a variety of activity on the system after the systems were taken into custody by the investigators." *Id*. ¶ 11. Dr. Cobb alleged that, by interacting with the computers instead of immediately powering them off,

investigators effectively "tamper[ed]" with the evidence. And the prosecution improperly relied on "evidence which, by virtue of their interaction with it, was altered and partially created by them." *Id.* ¶ 13. Dr. Cobb testified consistently with his affidavit and explained how 3,628 files on Hentzen's Sony VAIO computer contained timestamps post-dating the investigators' entry into his apartment.

The weight of Dr. Cobb's testimony on this point was deflated on cross-examination and by the government's expert-witness testimony. Dr. Cobb's own exhibit, the 2008 DOJ Report (Exhibit #5) explained that, while unplugging a computer is generally the safest option, an exception exists when evidence of a crime is visible on a computer display. Dr. Cobb explained on cross-examination, that in such cases, investigators often utilize a "triage program." D.E. 139 at 64. Dr. Cobb was not aware that investigators found Hentzen's VAIO running with the screen active and evidence of currently downloads appearing on the screen. *Id.* at 64-66. He agreed that the altered timestamps on the 3,628 files could have resulted from triage. *Id.* at 67. But he still found the number of files affected concerning. *Id.* Thus, cross-examination revealed that, under the standards cited by Dr. Cobb, on-scene triage was appropriate in Hentzen's case and triage could have generated the disputed time stamps.

Detective Littrell later testified for the government and further defanged Dr. Cobb's accusations of investigatory impropriety. Although Littrell did not work on Hentzen's case, he was a colleague of Investigator Bell and Examiner Baker,

who were involved executing the search warrant and who testified at trial. Littrell confirmed his colleagues had used OS Triage on Henzen's VAIO laptop. D.E. 140 at 87. He testified that the 3,000-plus changed files were not a red flag. *Id.* at 88-89. "And, in fact, when OS Triage is run, it's an expected outcome for those access times [on certain types of files] to be changed." *Id.* at 90. "And so if those files were changed during the execution of the search warrant, then I would say that's an expected outcome [of triage]." *Id.* at 92.

So, if Dr. Cobb had presented this testimony about universal protocols at trial, his testimony could have been similarly undermined in cross-examination and rebutted by a government witness. Recall that Examiner Baker did testify in rebuttal at trial. Just like Littrell at the evidentiary hearing, Baker could have explained to the jury that the 3,000-plus altered time stamps were not a red flag, as the investigator's proper use of OS Triage provides a benign explanation for the timestamps.

In light of the full testimony and documentary evidence at the evidentiary hearing, the Court finds no basis for holding that Dr. Cobb's testimony would have undermined the government's credibility concerning the data collection in the case in any meaningful way. Dr. Cobb critically missed the fact that the VAIO was found running with potential criminal evidence on the screen. Under Cobb's own authorities, running a triage program was thus an acceptable protocol under the circumstances. And the known use of OS Triage on Hentzen's VAIO adequately explains the disputed time stamps.

Because this first issue from Dr. Cobb's affidavit was unlikely to undermine the government's credibility, there was no substantial likelihood of a different verdict. Given the weakness of this evidence, there is no basis for a finding of deficient performance or prejudice.

**2. Thumbnail Files**

Dr. Cobb, in his affidavit, claimed that Examiner Baker's testimony about thumbnail files was in some respects inaccurate and incomplete. D.E. 68-14 ¶¶ 19-21. Dr. Cobb's first issue is a technical nitpick that Cobb acknowledges Baker eventually corrected. Cobb says Baker inaccurately said thumbs.db files are created in "display view" or "display mode," but Baker then accurately clarified "that thumbs.db files are created when the files are displayed in '*thumbnail view*' in Windows Explorer." *Id*. ¶¶ 19-20; *see also* D.E. 139 at 44. Here the Court finds that a technical misstatement, corrected in later testimony, would not undermine Baker's credibility to any meaningful extent.

Dr. Cobb also testified that any particular thumbs.db file found on Hentzen's computer might not have necessarily been *created* on Hentzen's computer. Such files can be transferred from one computer to another, such as via eMule download or via thumb drive. D.E. 68-14 ¶ 20; D.E. 139 at 45-46. Dr. Cobb admitted on cross-examination there was no evidence the thumbs.db files in this case had been transferred to Hentzen's computer rather than created on Hentzen's computer. D.E. 139 at 77. He did not contradict the government's assertion that, for the relevant thumbs.db files, Hentzen's computer system

contained both the thumbs.db files and *the actual image and video files themselves* to which the thumbs.db files pointed. *Id.* Had Dr. Cobb provided this testimony at trial, it was unlikely to have harmed Examiner Baker's credibility to any meaningful extent. Baker could have testified in rebuttal to clarify his statements about display modes. And he could have likewise testified that the relevant thumbs.db files were unlikely to have come from another computer because the corresponding image and video files were also on Hentzen's computer. In light of the full evidence from the trial and hearing, this issue does not move the needle in Hentzen's favor. All Cobb offers is speculation—that any given thumbs.db file *could have* been copied from another computer. But no evidence suggests this was actually the case.[4] Given how little weight this potential evidence would have carried, there was no deficient performance or prejudice.

**3. Link (.LNK) Files**

Cobb's affidavit also states that the incriminating link (.LNK) files, like thumbs.db files, could have been transferred onto Hentzen's computer from elsewhere rather than created by his computer. D.E. 68-14 ¶ 16.

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[4] Examiner Baker testified that thumbs.db files may be created by either "double clicking and opening" the substantive file or by "viewing the files in display view," by which he meant icon view. D.E. 50 at 206-07. He testified a thumbs.db file "is not created any other way." *Id.* Hentzen suggests this last statement is false in light of Dr. Cobb's testimony that a thumbs.db file can be transferred from one computer to another. D.E. 145 at 4. But this activity would be file *transfer*, not creation. So the testimony is not false.

Cobb also says "Baker testified that Windows only creates a shortcut .lnk or link file to a file when it is opened by a user. This is erroneous because shortcut files can also be created without opening the file at all by right-clicking on a file and selecting 'Create Shortcut' from the context menu." *Id.*

Cobb is not perfectly accurate here. Baker did not testify opening a file was the "only" way to create a .lnk shortcut. D.E. 50 at 233. First, Baker responded to the question, "what is a link file," and his answer included an example of a link file being created from opening a Word document. *Id*. He then said that a user creates a link file when "[the] user opens the file." *Id*. at 234. Baker then went on to testify about forensic tools that show "the pathway to the original file." *Id*. at 235. Running these tools on Hentzen's external drive showed that "a number of the link files pointed to suspected CSA files or CSA images." *Id*. He testified the link files were created "when the images were actually opened." *Id*. Examiner Baker then utilized an exhibit that showed how link files on the external hard drive were "pathed directly" to photos on the drive. *Id*. at 236.

Dr. Cobb explained at the hearing that the jury was never told there were other ways of creating link files aside from opening and viewing a file. D.E. 139 at 83-84. But he admitted he had no evidence the relevant .lnk files had come from another computer or had been created by some method other than opening the image or video files; he had not looked for such evidence. *Id*. at 72-73, 85-86.

So, the Court must imagine a scenario in which Dr. Cobb testified after Examiner Baker's testimony

and pointed out that link files can be created by methods besides opening/viewing a file and can be copied from another device. Again, Baker would have likely acknowledged in rebuttal that other ways of obtaining link files exist. But he would have also likely testified that the link files on Hentzen's devices corresponded to actual images found on the devices (which appears to be the import of his trial testimony). Given the limited value of this information concerning .lnk files, there is no basis for finding deficient performance or prejudice.

**4. Browser Activity**

According to Dr. Cobb's affidavit, it was "unlikely" that Hentzen had viewed child-porn images in the Internet Explorer browser, as Examiner Baker's testimony indicated. The issue is that Internet Explorer is not one of the default applications for opening image files on Hentzen's system. D.E. 68-14 ¶ 17. "[O]pening an .AVI file in Internet Explorer would not be the default action on the system." *Id*. A person would have to manually select the option for opening an image file in Internet Explorer. *Id*. Dr. Cobb appears to be correct on this issue. Baker's testimony was a bit sloppy here, and Hentzen himself corrected it at trial.

Examiner Baker testified to evidence a "preteen hardcore" video had been opened in Hentzen's web browser:

> So this was Internet Explorer. And what it shows is that the actual file itself -- you can view files within your Internet browser. You can just point the browser to almost any file, and if there's a -- if it's

> a file with the browser can display, it will display. [This exhibit] indicates that the file was opened in Internet Explorer.

D.E. 50 at 183-84. Baker then testified to a second, "teenfuns" file, also opened in "Internet Explorer," as evidenced by its presence in Hentzen's "Internet Explorer history." *Id*. at 184-85.

When Hentzen testified, he was asked on cross-examination about some personal (non-porn) photos on his computer. D.E. 51 at 63-64. When asked about viewing those non- contraband pictures on Internet Explorer, Hentzen explained that, as far as browsers go, he uses Firefox "almost exclusively." He suggested that the evidence was incorrectly indicating "Internet Explorer when it should be showing the Windows Explorer." *Id*. at 64.

Later, when being asked about a picture of an actress, Hentzen again suggested the evidence was being slightly misinterpreted:

> A. I still don't think that it was Internet Explorer as the browser. I think it's talking about the Windows browser.
>
> Q. But you would agree that this exhibit as introduced and admitted through Examiner Baker does say Internet Explorer here?
>
> A. It does. But Internet Explorer generally isn't used to browse local files.
>
> Q. But it certainly can be, can't it?
>
> A. I haven't tried it.

*Id*. at 67. Later, he was asked about opening ZIP files in Internet Explorer. He testified that "Internet Explorer can't unpack zip archives, nor can it look inside them." *Id*. at 71.

At the evidentiary hearing, Dr. Cobb explained how Examiner Baker likely got this wrong. Internet Explorer and other programs *share* a library file called WinINet. So, if you look into Internet Explorer's history you may see files that were opened in other programs that share the WinINet library file. D.E. 139 at 53.

The appellate panel on direct appeal seemed to have understood that Baker's references to images in the Internet Explorer history may be more properly tagged as Windows Explorer history: "The government also presented evidence that two of the still images had been opened in Internet Explorer (or Windows Explorer) and that a folder containing some of the files had been opened using a view that would show thumbnails of the videos and images." D.E. 117 at 3. "His internet history showed that two still images of child pornography had been opened in the Internet Explorer browser (or its analogue, Windows Explorer). Further evidence from the computer's 'link files' suggested that child pornography files had been opened from his external hard drive." *Id*. at 7-8.

Hentzen argues this evidence is important because the government's trial theme was "deception." According to Hentzen, any disagreement between himself and the government expert could have been interpreted by the jury as Hentzen being characteristically deceptive. The case turned on his believability, and Hentzen possibly suffered a

credibility hit by disagreeing with Baker as to whether "Internet Explorer" versus "Windows Explorer" had been used to view images.

The inconsistency here is minor. Regardless of whether the files were opened in Windows Explorer or Internet Explorer, the ultimate evidence that the files were accessed on Hentzen's device is the same. The Court accepts Cobb's testimony here that various programs share a history file and the images were probably not opened on the internet browser. But this issue was not so obvious going into trial that a reasonable attorney would have spotted it. Nor, in light of the whole evidence, was there any likelihood the jury's verdict would have been changed had they understood the likely program was Windows Explorer, not Internet Explorer. Again, the whole point of the evidence was that the files had been accessed or opened. Hentzen's testimony only disagreed as to which program had been used. There is no basis for a finding of deficient performance or prejudice on this issue.

**5. Batch Downloading**

Although not mentioned in his affidavit, Dr. Cobb also addressed Examiner Baker's rebuttal testimony. D.E. 139 at 53-56. Hentzen testified at trial to his practice of batch-downloading multiple files simultaneously without checking the names of individual files. Examiner Baker was then called in rebuttal. He focused on the "known.net file," which is "is a log file of all the downloads for that particular eMule installation." D.E. 51 at 129. He testified that "[w]hen a download is started within eMule, the program itself creates a temporary file within a

temporary directory under the eMule file structure." Baker said that if ten or twenty files were selected for download simultaneously, "you would see 10 or 20 temporary files, all with the exact same time stamp down to the second." *Id*. at 130. "[These .part files] have to have the exact same time down to the second in order for us to say they were downloaded simultaneously." *Id*. at 134. Baker testified he looked at half of the 6,000 or so such files on Hentzen's VAIO. Among these, "the most files that were downloaded at one time I think were four files." *Id*. at 136.

At the hearing, Dr. Cobb testified he also looked at the .part files in known.net, and he considered them consistent with the kind of "batch downloading" Hentzen described in his testimony. D.E. 139 at 53-55. Relying on an exhibit, Dr. Cobb said if you focus on the files' "creation time, . . . you can see a pattern of many of the files having the same time stamp." *Id*. at 55. And Hentzen's permanent eMule folder confirmed these observations from his temporary eMule folder. *Id*. at 55-56.

The Court assumes Dr. Cobb is correct here. Examiner Baker's rebuttal testimony (which he testified he scrambled to produce at the last minute) was likely erroneous. Detective Littrell did not address this issue in his hearing testimony, but he did stress that "created dates" are the key dates for forensic purposes.

It is not clear that this issue is properly before the Court under the scope of the remand and referral because this issue is not flagged in Cobb's affidavit. *See* D.E. 102; D.E. 117 at 5 (remanding because the Court failed to address the "precise argument" that

defense counsel should have obtained and used "evidence akin to Dr. Cobb's findings").

Setting aside the potential scope issue, this issue packs more of a punch than the others just discussed. Here, we have Hentzen testifying to one thing and Examiner Baker flatly contradicting him while pointing to evidence from his computer files. And the government leaned on this rebuttal evidence in its closing rebuttal argument. In that rebuttal argument, after emphasizing once again the keywords from Hentzen's last-thirty eMule searches, the prosecutor explained that

> putting in the search terms is only the first part of the transaction. The second part of the transaction is getting the files you want back. And how do you do that? Select the file, download, select the file, download. Or as the defendant wants you to believe, let me select five, ten, files at a time. But remember from Bill Baker's rebuttal testimony today, he showed you that no, that's not what happened in this case. If [Hentzen] had selected everything on the screen at once, everything would have the same time stamp. It didn't. That's what the rebuttal evidence was for. Select, download, select, download, select, download. He was choosing the ones that he wanted.

D.E. 47 at 31-32.

The question here is whether, to provide reasonable assistance, trial counsel should have been prepared to rebut this testimony from Examiner

Baker. This issue is not being raised on direct appeal. It is an IAC claim, which means the Court cannot rely on hindsight and must begin with the presumption of effective assistance. Given that defense lawyers cannot be expected to be perfect, there is no deficient performance here. Perhaps a lawyer, working with the defendant and an expert, could have anticipated this evidence and been prepared to rebut it. But this evidence was only produced at the last minute, in the heat of a trial. Examiner Baker's testimony may have been inaccurate, but defense lawyers cannot be expected to anticipate or catch every inaccuracy, particularly in expert testimony. Hentzen has not met his burden of showing deficient performance.

Nor is there sufficient prejudice here. The overarching question of how severely Dr. Cobb's testimony could have undermined the government's credibility must take into account that the most powerful—and most emphasized—evidence at trial concerned the child-porn *keywords* found on Hentzen's computer. The government emphasized the keywords in opening statements and closing arguments. Both Bell and Baker testified about them at length. A key piece of evidence was the file of Hentzen's last-thirty eMule searches. Of those thirty searches, eleven were child pornography keywords.[5] Whether he typed or copy-pasted them, Hentzen entered those terms into eMule's search bar. Hentzen testified he did not know those terms were child-porn-related, but the jury apparently was not buying it. Further, Hentzen's

[5] The words were: Siberian mouse, 1st studio, vladmodels, masha babko, 1st studio (again), stickcam, smotri, kidcam1st studio, kidcam, vichatter, omegle.

computer system contained many images and videos with multiple child-pornography keywords in their names (along with system files linked to these images and videos). Hentzen testified he understood that terms like "11yo" in file names were a red flag of child pornography. D.E. 51 at 17-18, 78-79. And he acknowledged that multiple child-porn keywords, including terms like "pedo," "10yo," "12yo," and "14yo" were visible on his computer screen as active downloads when agents arrived. *Id*. at 79-80. Given all this, the jury quite understandably disbelieved his purported ignorance of the child pornography on his devices. Even accumulated with the other purported errors flagged by Dr. Cobb, this evidence was unlikely to tip the scales. To find prejudice, "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). Here, the likelihood is conceivable, but far from substantial.

Hentzen does not challenge the keyword evidence adduced at trial, and the keyword evidence was the most persuasive evidence against him. While the issues raised by Dr. Cobb might nip at the toes of the government's case, they fail to strike at its heart. Given the overall strength of the evidence against him (which was also noted by the Court of Appeals), Hentzen does not meet his burden of proving prejudice on Ground One. Now, it is conceivable that another judge could reach a different conclusion. The Court will recommend a certificate of appealability on Ground One so the Sixth Circuit can take a swing at it.

**6. eMule on Multiple Devices**

Hentzen raises one other issue. At trial, Examiner Baker testified that the VAIO laptop "was the only computer that had an eMule installation." D.E. 50 at 252. This was incorrect, as the government's own forensic report notes that eMule was also installed on Computer 2 and Computer 4—devices that were ultimately destroyed because they did not contain contraband. D.E. 139 at 57-59. In his trial testimony, Hentzen described the VAIO as "the laptop I used for eMule and only eMule." D.E. 51 at 4. He described that unit as "the eMule laptop underneath the keyboard tray" (*id.* at 43) and "the eMule computer" (*id.* at 46). But then, on cross-examination, Hentzen was asked:

> Q. Okay. And eMule was only installed, of all this equipment, only installed on the one laptop computer, Government Exhibit 1; correct?
>
> A. It was actually also installed on the gray computer in the Antec case on one of the two Windows installations.
>
> Q. And do you recall the forensic examiner's testimony that he reviewed -- forensically examined all of the items of evidence and found that eMule installation artifacts only on Government Exhibit 1. Do you recall that?
>
> A. Yes. But I remember absolutely using eMule on that computer . . . .

D.E. 51 at 100. As Hentzen points out, the government emphasized in its opening statement that eMule was only installed on one device, and in closing arguments referred to the VAIO as "the one" and "the computer"

that had eMule installed. D.E. 145 at 5. Hentzen argues this clash of facts damaged his credibility. And counsel was ineffective for not rebutting it with other testimony in addition to Hentzen's.

Discounting hindsight bias and providing appropriate deference to defense counsel's performance, this issue does not equate to IAC. There is no dispute that the VAIO laptop ran eMule and that eMule's files contained child-porn keywords. The keywords were the key evidence. The fact that two other computers (which did not contain child pornography) also had eMule installed is not terribly relevant to the question of whether Hentzen had ever knowingly received or possessed child pornography. Given that it was a minor issue, the conflict in testimony is not likely to have weighed heavily with the jury. Given Hentzen's expertise on his own system, the jury may well have believed him as to Computer 2 and Computer 4.

In any event, a reasonable attorney would not necessarily have foreseen this minor factual dispute and would not necessarily have arranged for expert testimony on it. Nor has Hentzen provided anything besides rank speculation as to whether this disagreement could have prejudiced him. The Court does not find that any potential prejudice would be "substantial" so as to undermine confidence in the verdict.

Hentzen points to *Couch v. Booker* (D.E. 147 at 7 n.33), which says:

> While the point of the Sixth Amendment is not to allow Monday-morning quarterbacking of defense counsel's

> strategic decisions, a lawyer cannot make a protected strategic decision without investigating the potential bases for it. It is particularly unreasonable to fail to track down readily available and likely useful evidence that a client himself asks his counsel to obtain.

*Couch v. Booker*, 632 F.3d 241, 246 (6th Cir. 2011). The issue in *Couch* was that the defendant had asked counsel to utilize an existing report to show that an alleged murder victim could have died of natural causes. Here, in contrast, Mr. Pence did hire an expert, Mr. Ingram, who studied the government's forensic report and found little grist for the defense. *See* D.E. 68-2 at 22-23. Mr. Pence did not render deficient performance akin to the lawyer in *Couch*. This is also not a case where expert testimony was required, but no expert was hired. *See* D.E. 147 at 7 (citing *Caesar v. Ocwieja*, 655 F. App'x 263, 282-86 (6th Cir. 2016)).

Hentzen argues that *Hinton* presents a "close parallel." D.E. 147 at 8 n.39. The problem in *Hinton* was that defense counsel made a mistake of law. He was not aware that Alabama law made available the funding he needed to obtain an expert. *Hinton v. Alabama*, 571 U.S. 263, 274 (2014). In finding deficient performance, the Court in *Hinton* cautioned:

> We wish to be clear that the inadequate assistance of counsel we find in this case does not consist of the hiring of an expert who, though qualified, was not qualified enough. The selection of an expert witness is a paradigmatic

> example of the type of strategic choice that, when made after thorough investigation of the law and facts, is virtually unchallengeable. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052. We do not today launch federal courts into examination of the relative qualifications of experts hired and experts that might have been hired. The only inadequate assistance of counsel here was the inexcusable mistake of law—the unreasonable failure to understand the resources that state law made available to him—that caused counsel to employ an expert that *he himself* deemed inadequate.

*Id*. at 274–75. Although at one point Mr. Pence told Hentzen it was too late to hire a second expert after Ingram, Mr. Pence did in fact later hire Mr. Kressel. D.E. 68-2 ¶¶ 45, 53. This case does not present deficient performance based on a mistake of law like *Hinton*.

In conclusion, even aggregating all the evidentiary issues discussed in Ground One, taken together they do not support a finding of deficient performance or prejudice. Reasonable attorneys are not required to have precognition of all technical disputes that can arise in a trial, nor are they required to hire the perfect expert witness. The Court agrees the case hinged on Hentzen's credibility. But, considering the evidence in total, had the Ground One issues been handled by the defense as described by Dr. Cobb, they still do not present a substantial likelihood

that the verdict would have been different.[6] As the Sixth Circuit held, Mr. Pence made a thorough search for his expert witnesses and there is no "reasonable probability that the outcome of his trial would have been different had counsel consulted another expert." D.E. 117 at 6. The issues discussed related to Ground One, even aggregated, do not warrant a different outcome.

**V. Ground Two – Allocution at Sentencing**

Hentzen argues in Ground Two that Mr. Pence failed to appear at sentencing "after inaccurately calendaring the scheduled time for the proceeding, which . . . deprived Mr. Hentzen of the opportunity to . . . address[] the court on his own behalf." D.E. 68 at 37. Hentzen's arguments are found in his § 2255 motion (D.E. 68 at 37-39) and accompanying memo (D.E. 68-15 at 21). Hentzen described what happened in his affidavit (D.E. 68-2 ¶¶ 82-87) and hearing testimony (D.E. 140 at 5-10; 63-69). Mr. Pence also testified about what happened at sentencing. D.E. 139 at 202-11. Hentzen confines his post-hearing briefing solely to Ground One. D.E. 145 at 1 n.3.

The Court of Appeals described the issue as follows:

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[6] Hentzen suggests the Court should presume prejudice on Ground One because Mr. Pence's representation was so deficient that he failed to subject the prosecution's case to meaningful adversarial testing. D.E. 145 at 20 n.92. The Court cannot find Mr. Pence so egregiously deficient, particularly when he hired two experts, and when the Sixth Circuit already found that the hiring was accomplished through thorough investigation. D.E. 117 at 6.

> In his second ground for relief, Hentzen claimed that trial counsel rendered ineffective assistance by failing to appear at his sentencing hearing due to a scheduling error. To that end, Hentzen averred that trial counsel promised to draft a statement for him to deliver at the hearing and assured him that the statement "would very likely allow [him] to receive a reduction in his Guidelines' offense level for acceptance of responsibility." Hentzen claimed that counsel explicitly instructed him not to prepare his own statement. He further claimed that when counsel failed to appear at the hearing, he followed counsel's advice and declined to speak when the district court provided him with an opportunity to allocute. Hentzen alleged that there is a reasonable probability that the district court would have imposed a shorter sentence had he "been able to exercise his entitlement to [allocute] at his sentencing," as evidenced by the district court noting his apparent lack of contrition when assessing the 18 U.S.C. § 3553(a) sentencing factors.

D.E. 117 at 7.

The government argues, with support from Sixth Circuit cases, that "claims based on a failure to afford allocution" are not cognizable in § 2255 proceedings. D.E. 146 at 5. The authorities cited by the government

are rather persuasive. And the Court under normal circumstances might stop the analysis right here.

However, *in this very case*, the Sixth Circuit *did* grant a COA on *this very issue* and remanded the issue for further consideration. If this issue was truly non-cognizable on a post-conviction motion, why would the Court of Appeals have *revived* it? Under the terms of the remand, this Court must address the merits.

The Court of appeals remanded this issue because the District Court's decision involved an adverse credibility finding (concerning Hentzen's affidavit) without an evidentiary hearing. D.E. 117 at 7 (granting a certificate of appealability); D.E. 102 (remanding the claims for which a certificate of appealability was granted). Having received testimony from Hentzen, Pence, and Mazzoli about the events of Hentzen's sentencing, the Court finds Hentzen has not met his burden of showing prejudice.

To show prejudice in the sentencing context, a movant must establish that his "sentence was increased by the deficient performance of his attorney." *Powell v. United States*, No. 20-1782, 2021 WL 613416, at *3 (6th Cir. Jan. 4, 2021); *Spencer v. Booker*, 254 F. App'x 520, 525 (6th Cir. 2007) (citing *Glover v. United States*, 531 U.S. 198, 200 (2001)).

The material facts on Ground Two are not really at issue. Mr. Pence mistakenly thought the sentencing was set to begin at 1:00 p.m. But, from the beginning, it was set for 10:00 a.m.[7] Mr. Pence agreed "It was a

[7] There are statements in the record from Mr. Pence to the effect he believed the sentencing was originally set for 1:00 p.m.,

complete error on my part. I should have been there. It was on my calendar at 1. It had been scheduled at 10." D.E. 139 at 228-29. When Mr. Pence learned of this error on the morning of sentencing, he was too distant from the courthouse to arrive on time. And the District Judge denied the defense's request to delay the hearing until Pence could arrive. D.E. 139 at 128, 183-84, 209. Hentzen was not without counsel, however, as he was accompanied by Mr. Mazzoli, who had been hired to assist with sentencing and appeal.

Mr. Pence testified at the evidentiary hearing that he expected allocution for Hentzen to be tricky because Hentzen maintained his innocence despite the jury verdict. This posture made it difficult for Hentzen to make any statement accepting responsibility, and Pence was also concerned that accepting responsibility could undercut Hentzen's arguments on appeal. D.E. 139 at 203-05. Mr. Mazzoli agreed: "if you're going to appeal but you have the defendant at sentencing admitting liability, that's a big complication for the appeal where you're still trying to argue that he didn't do it when he said at sentencing that he did and that he's sorry." *Id*. at 128.

This danger led Pence to counsel Hentzen, prior to sentencing, to not make any allocution statement

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but the hearing time was changed to 10:00 or 10:30. The record reflects no such change, and the Court finds the sentencing was always set for 10:00 a.m. and Mr. Pence was simply mistaken about the time until the morning of sentencing, September 15, 2014. *See* D.E. 37 (trial minutes); D.E. 47 at 44 (trial transcript). Aside from this issue, the Court finds the testimony of Pence, Mazzoli, and Hentzen on this issue to be credible and essentially consistent.

without the benefit of Pence's prepared remarks. D.E. 68-2 ¶¶ 84, 87; D.E. 139 at 205-07; D.E. 140 at 66. So, when Pence failed to appear, Hentzen found himself without Pence to counsel him and without the written allocution statement Pence had prepared.

Although Hentzen initially argued he had "lost his right to allocate," which he says is a structural error (D.E. 68-15 at 21), the record makes clear Judge Hood did give Hentzen an opportunity to allocate at sentencing. Hentzen declined, however, to make any statement.

Here is how the opportunity for allocution went, according to the transcript. After the government made its sentencing argument, the Court asked defense counsel, "Anything else?"

> MR. MAZZOLI: No, Your Honor.
>
> THE COURT: -- Mr. Mazzoli?
>
> MR. MAZZOLI: Thank you.
>
> THE COURT: Mr. Hentzen?
>
> DEFENDANT HENTZEN: No, not at this time.

D.E. 60 at 19. Shortly thereafter, the Court remarked, "I have not heard yet from Mr. Hentzen that he's sorry for what he did, even though it's clear that he was doing it." *Id.*

Later, after announcing the sentence, the Court addressed Hentzen again:

> THE COURT: Any questions or objections regarding that sentence, Mr. Hentzen?

> DEFENDANT HENTZEN: Not at this time.
>
> THE COURT: Well, if you're going to make them, you better do them now.
>
> DEFENDANT HENTZEN: I can't. Sorry.
>
> THE COURT: Okay. Well, I mean, this is the time that you have to make them. I guess your attorney has made them, but don't complain about me not giving you the chance.

D.E. 60 at 27.

During Hentzen's testimony at the evidentiary hearing, he was shown Mr. Pence's prepared remarks, Defense Exhibit #29. The document states in full:

> Judge Hood –
>
> I apologize to you, the court and my family for what I have done, and for what I have put everyone through. Words cannot express how deeply I regret what has happened.
>
> I also apologize to the child victims that we witnessed during this trial. I would never harm a child and if my conduct has done so, I apologize and will do my best to make amends.
>
> The court can be assured that I have learned a serious lesson. There is no chance of my ever repeating this or similar conduct.
>
> I realize I will be incarcerated for a number of years and will forever be

> labeled a felon and sex offender. This is not how I envisioned my life. I know my family expected more. I expected more.
>
> I deeply regret and apologize for what has happened and ask the court to please show mercy to me.

Hentzen testified he would not have read the statement prepared by Pence:

> I might have used it as a framework, but . . . it doesn't sound like me. It doesn't address any of the issues I thought were important. It seems kind of like a boilerplate apology rather than a chance to provide my final words before the rest of my life was determined.

D.E. 140 at 11. Hentzen testified he "would have said things other than what were on that paper." *Id.* at 66.

However, Hentzen testified he "absolutely" would have liked to have said *something* at final sentencing. He wished he had been able to review the prepared statement with Pence and Mazzoli. D.E. 140 at 12. Hentzen testified his "concentration" and "main focus" at the time was "challenging . . . issues with the way trial went, and sentencing really wasn't my top priority." *Id.* at 10. He was asked about this on cross-examination:

> Q. And you testified that at that point, sentencing wasn't even your top priority. You were concerned about what you thought were still factual issues that were unresolved in your mind post-trial, right?

A. Yes.

Q. And so you were never going to, at sentencing, admit or accept responsibility for the crimes you had been convicted of, right?

A. I absolutely would not have.

D.E. 140 at 64-65. Mr. Mazzoli testified he believed Hentzen did well by maintaining his innocence. D.E. 139 at 128. Mazzoli also said he had "never seen the allocution change the outcome of a sentencing." *Id*. at 129. Mazzoli had no expectation that Hentzen would admit responsibility. *Id*. at 184.

On Ground Two, the Court makes no finding on deficient performance because Hentzen has clearly not met his burden of showing prejudice. Mr. Pence's absence was unfortunate, but the record does not suggest that Hentzen would have received a lighter sentence if Pence had appeared at sentencing with his prepared allocution statement. This is because, as Hentzen testified, he would never have admitted the crimes.

Pence and Mazzoli both testified about the Catch-22 Hentzen faced. Admitting responsibility could hurt his appeal. But failing to admit responsibility could harm his chances of a lower sentence.

The issue before the Court on Ground Two is whether Hentzen could have received a lower sentence absent Pence's alleged errors. Hentzen testified at the hearing that he "absolutely would not have" accepted responsibility. D.E. 140 at 65. Hentzen said he would have liked to have made some kind of statement, but what he wanted to talk about were alleged trial errors.

He testified he would not have read Mr. Pence's prepared statement. Given that Hentzen would not have accepted responsibility, nothing in the record suggests Hentzen would have received a sentence below his sub-Guidelines sentence if Pence had been there. There is nothing before the Court aside from speculation that Pence, as a superior orator, could have obtained a better result (D.E. 139 at 113) and speculation that Hentzen could have adapted Pence's prepared statement in some way that nevertheless avoided admitting the crimes.

Hentzen argued in his § 2255 motion that Pence's errors caused him to lose the benefit of "a reduction in his Guidelines' offense level for acceptance of responsibility." D.E. 68 at 37 ¶ 6. Henzen has now made clear he would not have accepted responsibility, and his lawyers confirm they did not expect him to do so. The facts do not establish that Hentzen received an increased sentence due to the deficient performance of his attorney.

## VI. Ground Three – Appeal

In his Ground Three, Hentzen argues his appellate counsel was ineffective for failing to challenge the District Court's application at sentencing of a two-level increase for obstruction of justice under USSG § 3C1.1. D.E. 68 at 40-41; D.E. 68-15 at 23.

### A. Legal Standards

There is specific caselaw governing claims that appellate counsel was ineffective for failing to raise a certain issue. The petitioner must demonstrate his appellate counsel was "objectively deficient for failing to raise" the argument. The petitioner must then

demonstrate that but for that unreasonable failure, he would have prevailed on his appeal. *Richardson v. Palmer*, 941 F.3d 838, 858 (6th Cir. 2019). Appellate counsel does not have an obligation to raise every possible claim that a client may have, and counsel's performance is presumed to be effective. This presumption is only overcome when the ignored issues are *clearly stronger* than those presented. *Dufresne v. Palmer*, 876 F.3d 248, 257 (6th Cir. 2017).

The obstruction-of-justice enhancement challenged in Ground Three is defined at USSG § 3C1.1:

> If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by **2** levels.

**B. Background**

Hentzen's original PSR did not include this enhancement. Instead, the government lobbied for it via objection to the PSR. D.E. 59 at 83. According to the government, the Guidelines' application notes identify perjury as an example of obstruction of justice. The government contended that Hentzen committed perjury when he testified at trial "and denied under oath having viewed child pornography on his computers, having searched for child

pornography and knowing child pornography was present on his computer hard drives." *Id*. Given this posture, the enhancement was not addressed in the sentencing memoranda. At sentencing, Mr. Mazzoli argued against the enhancement, but the Court accepted the government's argument that Hentzen's testimony contained material falsehoods. D.E. 60 at 10-13.

Even though Hentzen did not rase this 3C1.1 issue on appeal, the appellate panel included a lengthy footnote of dicta on this issue:

> Hentzen also objected during sentencing to the application of a two-level increase for obstruction of justice, grounded in his decision to exercise his right to testify at trial and his testimony that he had not knowingly received or possessed child pornography. Before applying this enhancement for a defendant's trial testimony, the sentencing court must "make[ ] a finding of an obstruction of, or impediment to, justice that encompasses all of the factual predicates for a finding of perjury." *United States v. Dunnigan*, 507 U.S. 87, (1993); *see also* U.S.S.G. § 3C1.1 comment. (n. 2) ("This testimony is not intended to punish a defendant for the exercise of a constitutional right."). Because Hentzen did not raise the issue again on appeal, we do not determine whether the court's findings were adequate to merit the enhancement.

> We note that citations to *Dunnigan* are often accompanied by a statement that the case was abrogated on other grounds by *United States v. Wells*, 519 U.S. 482 (1997). As best we can determine, nothing in *Dunnigan* is abrogated by *Wells*. The error may have arisen as follows. After *Dunnigan*, the leading case in our circuit on the § 3C1.1 enhancement was *United States v. Spears*, 49 F.3d 1136, 1143 (6th Cir. 1995) in which the underlying crime was a violation of 18 U.S.C. § 1014, making false statements to a federally insured bank. *Wells* concerned the elements of § 1014 and abrogated those aspects of *Spears*. After *Wells*, we continued to cite *Spears* on the sentencing issue. *See, e.g. United States v. Gregory*, 124 F.3d 200 (6th Cir. 1997) (Table) ("*United States v. Spears*, 49 F.3d 1136, 1143 (6th Cir. 1995) (quoting *United States v. Dunnigan*, 507 U.S. 87, 95 (1993)), *abrogated on other grounds, United States v. Wells*, 117 S. Ct. 921 (1997)."). These explanatory clauses may have been read incorrectly to say that *Dunnigan* was partially abrogated by *Wells* when in fact only *Spears* was.

*United States v. Hentzen*, 638 F. App'x 427, 431 n.1 (6th Cir. 2015); D.E. 64 at 6. According to Hentzen's § 2255 memo, "The Sixth Circuit panel dropped a 300+-word footnote that all but says 'there was a real problem with this enhancement, but it is not raised on

appeal,'" thereby demonstrating that appellate counsel had been constitutionally ineffective. D.E. 68-15 at 24.

As explained in the Sixth Circuit's opinion granting a certificate of appealability on this issue, the previous Report and Recommendation from Judge Atkins found a lack of prejudice. Hentzen's ultimate sentence, 240 months, was a downward variance from the Guidelines Range of 262-327 months. D.E. 117 at 8. Had the Court not applied the § 3C1.1 enhancement, Hentzen's range would have been 210-262 months. Because 240 months fits inside this range, Judge Atkins found no prejudice. *Id*. The appellate court, on the other hand, reasoned that "these facts, standing alone, do not provide a sufficient basis to conclude that the court would not have applied an equivalent variance, resulting in a lower sentence, if the USSG § 3C1.1 enhancement was not applied." *Id*.

Having heard testimony on Ground Three at the evidentiary hearing, the Court will address this Ground without taking into account this Guidelines issues discussed and rejected by the Court of Appeals.

**C. Hearing Testimony**

Mr. Mazzoli testified at the evidentiary hearing as to why he did not include a challenge to the § 3C1.1 enhancement on appeal, despite having objected to the enhancement at sentencing. Concerning his qualifications, Mr. Mazzoli testified that he had been a law clerk to Judge Heyburn and then a federal prosecutor for five years. He has spent the last 20-21 years in a law firm doing mostly criminal work. In all, he had litigated 20-24 criminal appeals before the

Sixth Circuit. D.E. 139 at 110-11. He testified that Hentzen's family had hired him, through Mr. Pence, to work on sentencing and appeal. *Id*. at 112.

Mr. Mazzoli explained why he had not challenged the obstruction enhancement, although he had room in the brief to do so. He testified he was thinking of the logical pattern the appellate judges would take in addressing the issues:

> Well, my thought was if the Court of Appeals steps through the directed verdict question, they would have had to just impliedly say there was sufficient evidence that Erik knew that he had child porn. And then . . . if the Court of Appeals stepped through the 404(b) question, then they're basically saying there's too much evidence against Erik even to reverse for this kind of harmful evidence.
>
> They've already said at least once in that kind of logical progression that they don't believe Erik's testimony, but he says he didn't know. And the Court of Appeals, if they somehow or another took that at face value, they would have found a way -- this is my thinking. They would have found a way, possibly on the 404(b) question, to reverse.
>
> If they would have been saying to themselves, I think he was telling the truth about he never knew about these files and this case needs to be vacated and tried over again because this 404(b)

> might have tipped the scale in a very close case, assuming that or thinking that if we lost both those two arguments, in sentencing they are not -- in my view, they are not going to say, well, as far as obstruction of justice goes, we think Erik was telling the truth; and, therefore, that two points should not be applied. That was the only way I thought the obstruction of justice argument could be won, just to say that the Court lacked evidence that Erik lied.
>
> I don't think Erik lied, but the jury did. And so I thought the chance of getting the Court of Appeals to do anything on the obstruction of justice was hopeless.

D.E. 139 at 160-61.

Mr. Mazzoli also testified he feared diluting his appellate brief by raising additional issues:

> [I am concerned that] by diluting the arguments that you hope are good arguments with an argument that you are pretty sure is not going to win, that you are causing the Court of Appeals to lose confidence in you, in your presentation of the rest of the case. . . . I get the sense [that when appellate judges] are reading through a brief and they say, man, this is not a good argument; I do not know why he's making this argument, that it could cause them to, well, take a sour look at everything else that you've said. . . .

> [T]hat's my thinking about when is it right not to raise an argument that seems weak.

D.E. 139 at 163-64.

Mr. Mazzoli made clear that he thought the strongest argument was his Rule 404(b) argument—that the "grooming video" should not have been admitted as other-act evidence. D.E. 139 at 164-65. The Court of Appeals ultimately agreed that admitting the video was error, but it found the error harmless in light of the strength of the other evidence.[8] Mazzoli had hoped the Court would find the error reversible because the sufficiency of the evidence was close. *Id*. at 167-68.

On cross-examination, Mr. Mazzoli explained again that, at trial, Hentzen had answered "no" when asked if he had knowingly received and knowingly possessed child pornography.

> [H]is answers to those questions were irreconcilable with the jury verdict, and I supposed that it was hopeless. If that

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[8] The Court explained,

> Because the animated video is not probative of any material issue, it was error for the district court to admit it. . . . however . . . . When the government presents other convincing or overwhelming evidence, we may deem the admission of 404(b) evidence mere harmless error. . . . In light of the entire record, the government sufficiently established that the error was harmless.

*United States v. Hentzen*, 638 F. App'x 427, 434-35 (6th Cir. 2015).

> jury verdict was going to stand, I did not see a way clear to convincing the Court of Appeals that there was something unjust about the two points for obstruction.
>
> . . . . The law is not favorable for a defendant who has testified and denies, basically, the elements of the conviction. So there was a legal concern I had. And then the facts were not so good either. And therefore, I thought [challenging the perjury enhancement] was not an argument that we should make.

D.E. 139 at 177-79. Mr. Mazzoli clarified that, even if Judge Hood had not made adequate factual findings in the record in support of the § 3C1.1 enhancement, there was adequate evidence in the record upon which Judge Hood could have made a proper finding to support the obstruction enhancement. *Id*. at 185. It was a strategic decision to not pursue this argument on appeal. *Id*. at 178-79.

**D. Analysis of Ground Three**

Given this evidence, the Court now concludes Mr. Mazzoli made a reasonable strategic decision to forego arguing against the obstruction enhancement.

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that

is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

*Strickland v. Washington*, 466 U.S. 668, 689 (1984) (citations and quotation marks omitted).

Mr. Mazzoli clearly explained his strategic thinking at the time. Given the presumption of effectiveness and the Court's duty to avoid relying on hindsight, Mr. Mazzoli's decision to omit the obstruction argument was reasonable. He explained he considered the argument against the enhancement weak. And he ran a risk of losing credibility with the Court by including a weak argument. He explained he thought the Rule 404(b) argument was his best argument and that if this argument did not result in a reversal, the Court of Appeals would be disinclined to find Hentzen had testified truthfully.

Although the Court of Appeals ultimately flagged the obstruction-enhancement issue on its own in a footnote, Mr. Mazzoli could not have foreseen that the panel would be interested in discussing the enhancement. Further, the appellate court's footnote does not interact with the facts of this case. It merely addresses a citation issue concerning some precedents on the matter. Nothing in the Sixth Circuit's opinion suggests the court would have overturned Hentzen's obstruction enhancement.

Finally, the 404(b) issue that Mr. Mazzoli considered his best argument actually did produce a finding that the district court had erred. Given these facts, Hentzen has not met his burden of showing that, at the time of the appeal, the obstruction-enhancement issue was *clearly stronger* than the

issues presented on appeal. *Dufresne v. Palmer*, 876 F.3d 248, 257 (6th Cir. 2017). Mr. Mazzoli was not "objectively deficient" in his choice of appeal issues. *Richardson v. Palmer*, 941 F.3d 838, 858 (6th Cir. 2019).

## VII. Conclusion

For these reasons, the undersigned **RECOMMENDS** that Hentzen's § 2255 motion be **DENIED.**

The undersigned further **RECOMMENDS** that a Certificate of Appealability issue for Ground One. Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." *See also* Rule 11 of the Rules Governing Section 2255 proceedings. This standard is met if the defendant can show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate todeserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). Here, Ground One is very fact-intensive. A reasonable jurist could conceivably find that Hentzen was prejudiced by failure to introduce the evidence described by Dr. Cobb, so a certificate of appealability on that Ground is appropriate. As for Grounds Two and Three, the Court does not find that reasonable jurists could debate the resolution recommended herein, and therefore a certificate of appealability should not issue on those Grounds.

Finally, the parties are notified that any objection to, or argument against, denial of this motion must be asserted properly and in response to this Report and Recommendation. The Court directs the parties to 28 U.S.C. § 636(b)(1) for appeal rights and mechanics concerning this Report and Recommendation, issued under subsection (B) of the statute. *See also* Rules Governing Section 2255 Proceedings, Rule 8(b). Within **fourteen days** after being served with a copy of this decision, any party may serve and file specific written objections to any or all findings or recommendations for determination, *de novo*, by the District Judge. Failure to make a timely objection consistent with the statute and rule may, and normally will, result in waiver of further appeal to or review by the District Judge and Court of Appeals. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Wandahsega*, 924 F.3d 868, 878 (6th Cir. 2019).

This the 15th day of February, 2022.

Signed By:

/s/ Hanly A. Ingram HAI

United States Magistrate Judge

**APPENDIX E**

[Filed February 1, 2024]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 22-5573

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ERIK HENTZEN,

Petitioner-Appellant

v.

UNITED STATES OF AMERICA,

Respondent-Appellee

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Appeal from the United States District Court
for the Eastern District of Kentucky

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Before BOGGS, SUHRHEINRICH, AND READLER, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk