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Appendix J

United States v Peel, 595 F.3d 763 (7th Cir. 2010)
(7&th Cir. Case No. 07-3933)

Appendix K

Trial Court judicially noticed fact (with caveat to the jury).

Appendix L

Indictment

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen
United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

August 22, 2024

By the Court:

No. 22-2616	UNITED STATES OF AMERICA, Plaintiff - Appellee v. GARY E. PEEL, Defendant - Appellant
Originating Case Information:	
District Court No: 3:06-cr-30049-SMY-1 Southern District of Illinois District Judge Staci M. Yandle	

In light of this court's May 2, 2023, order denying appellant's petition for rehearing en banc, and this court's July 29, 2024, order denying appellant's motion to recall the mandate,

IT IS ORDERED that appellant's petition for rehearing en banc of the motion to recall the mandate is will be returned unfiled because it is repetitious. 7th Cir. Op. P. 1(a)(2), (c)(8). Further repetitious motions and petitions will also be returned unfiled.

APPENDIX - A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen
United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

July 29, 2024

By the Court:

No. 22-2616	UNITED STATES OF AMERICA, Plaintiff - Appellee v. GARY E. PEEL, Defendant - Appellant
Originating Case Information:	
District Court No: 3:06-cr-30049-SMY-1 Southern District of Illinois District Judge Staci M. Yandle	

Upon consideration of the **MOTION FOR LEAVE TO EXCEED THE WORD LIMIT FOR THE PURPOSES OF FILING A MOTION TO RECALL THE MANDATE**, filed on June 10, 2024, by the pro se appellant,

IT IS ORDERED that the motion to file an oversized motion is **GRANTED.** The clerk of this court shall file instanter the tendered motion to recall the mandate.

IT IS FURTHER ORDERED that the motion to recall the mandate is **DENIED.** Appellant is again warned that he risks monetary sanctions and a filing bar under *Alexander v. United States*, 121 F.3d 312 (7th Cir. 1997), if he files further repetitive or frivolous challenges to the validity of his conviction or sentence.

APPENDIX - B

601 U.S.___

PEEL, GARY E.

v.

UNITED STATES

No. 22-7678

United States Supreme Court

October 2, 2023

The petition for writs of certiorari is denied.

CERTIORARI DENIED

APPENDIX - C

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

May 2, 2023

Before

MICHAEL Y. SCUDDER, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 22-2616

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	Appeal from the District Court for the Southern District of Illinois.
v.	No. 3:06-cr-30049
GARY E. PEEL, *Defendant-Appellant.*	Staci M. Yandle, Judge

ORDER

Appellant filed a petition for rehearing and rehearing en banc on April 10, 2023. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all judges on the original panel have voted to deny the petition for rehearing.

Accordingly, the petition for rehearing and rehearing en banc is **DENIED**.

APPENDIX - D

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted March 22, 2023*
Decided March 23, 2023

Before

MICHAEL Y. SCUDDER, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 22-2616

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	Appeal from the United States District Court for the Southern District of Illinois.
v.	No. 06-cr-30049-SMY
GARY E. PEEL, *Defendant-Appellant.*	Staci M. Yandle, *Judge.*

ORDER

Gary Peel appeals the denial of his petition to vacate his criminal convictions through the esoteric writs of *coram nobis* and *audita querela*. We agree with the district court that Peel is impermissibly attempting to relitigate issues presented in previous collateral attacks, and we therefore affirm.

---

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

In 1974, Peel took sexually explicit photographs of his then-wife's 16-year-old sister. Decades later, Peel and his wife divorced, and he filed for bankruptcy. Peel's ex-wife opposed his efforts to alter a roughly $750,000 obligation to her under their divorce settlement, and she filed an adversarial proceeding in the bankruptcy case. Peel then threatened to make the photos of her sister public if she did not drop her claim. This brought on federal charges.

A jury found Peel guilty of bankruptcy fraud and obstruction of justice for his attempt to extort concessions in the bankruptcy case, *see* 18 U.S.C. §§ 152(6), 1512(c)(2), and two counts of possessing child pornography for retaining the explicit photos, *id.* § 2252A(a)(5)(B). Peel appealed, and we agreed that the conviction for either obstruction of justice or bankruptcy fraud had to be dismissed because dual punishments for the same unlawful threat violated the Double Jeopardy Clause. *United States v. Peel*, 595 F.3d 763, 767 (7th Cir. 2010). But we affirmed Peel's convictions and sentences for possessing child pornography, rejecting his argument that he was innocent because having sexually explicit photos of a minor did not violate federal law when he took them. *Id.* at 769–71.

On remand, the district court dismissed the obstruction-of-justice conviction and imposed the same total prison sentence of 144 months. In his appeal, Peel again insisted that he was not guilty of possessing child pornography because of the absence of federal prohibition at the time he took the photos. We rejected that argument and affirmed. *United States v. Peel*, 668 F.3d 506, 509–10 (7th Cir. 2012).

Beginning in 2011, before the second appeal was final, Peel filed a string of unsuccessful motions to vacate his convictions. In his first proper motion under 28 U.S.C. § 2255, he raised dozens of arguments, including that his convictions were unlawful because (1) possessing child pornography was not federally illegal in 1974; (2) his ex-wife had filed, then later withdrawn, a fraudulent adversarial claim in the bankruptcy case; and (3) his trial and appellate counsel were constitutionally ineffective for failing to raise these arguments. The district court rejected Peel's assertions, explaining that possessing the photographs was illegal no matter when they were taken, his ex-wife never withdrew her bankruptcy objections, and the merits of her claim were irrelevant to Peel's fraud. *Peel v. United States*, No. 06-CR-30049-WDS, 2013 WL 1799040 (S.D. Ill. Apr. 29, 2013). While in federal custody, Peel repeated the same arguments in many other motions, variously styled, and a petition under § 2241 and § 2255(e), all of which were denied on the merits or dismissed for lack of jurisdiction.

Then, after serving his prison sentence and three years of supervised release, Peel returned to federal court seeking the rare writs of *coram nobis* and *audita querela*. A petition for a writ of *coram nobis* is a means to collaterally attack a criminal conviction when a defendant is no longer in federal custody. *United States v. Delhorno*, 915 F.3d 449, 452 (7th Cir. 2019). And a writ of *audita querela* might in rare cases provide relief based on some defense arising after the imposition of the judgment. *United States v. Johnson*, 962 F.2d 579, 582 (7th Cir. 1992). Though he invoked these new procedural vehicles, Peel presented the same arguments he had raised in his direct appeals and prior collateral attacks: he lawfully took explicit photos of a 16-year-old, his ex-wife's actions in the bankruptcy proceeding undermine his fraud conviction, and his lawyers were ineffective for failing to raise these issues before his convictions were final.

The district court denied the petition, rejecting each argument in turn. First, Peel did not have new evidence, and his arguments had already been made, and rebuffed, several times. Second, he possessed child pornography as late as 2006, well after the pertinent statute was passed (1978) and amended to define "minor" as anyone under age 18 (1984). Third, Peel already raised his ineffective assistance of counsel claims numerous times. Peel timely moved for reconsideration, repeating the arguments from his petition, but the court concluded that his assertions of legal error were groundless.

On appeal, Peel argues that the district court erroneously refused to vacate his convictions or at least hold evidentiary hearings. Once again, he repeats his three primary arguments. (They are not specific to the denial of his motion to reconsider, so we do not address that ruling separately. *See White v. United States*, 8 F.4th 547, 552 (7th Cir. 2021).) None of Peel's arguments justifies the relief he seeks.

A writ of *coram nobis* is reserved for "extraordinary cases" when "(1) the error alleged is 'of the most fundamental character' as to render the criminal conviction 'invalid'; (2) there are 'sound reasons' for the defendant's 'failure to seek earlier relief'; and (3) 'the defendant continues to suffer from his conviction even though he is out of custody.'" *Delhorno*, 915 F.3d at 452–53 (citation omitted). But a *coram nobis* petition cannot be used to relitigate issues already raised under § 2255 and rejected. *United States v. Hassebrock*, 21 F.4th 494, 498 (7th Cir. 2021). That is all Peel attempts to do here.

The obscure writ of *audita querela* also has no role here. As we have said before, we question whether, "given the availability of *coram nobis* and § 2255," this writ has any relevance to criminal proceedings. *Johnson*, 962 F.2d at 583. If anything, it might "plug a gap in a system of federal postconviction remedies." *United States v. Kimberlin*,

675 F.2d 866, 869 (7th Cir. 1982). But there is no gap here. Peel could—and did—raise the same arguments in his collateral attacks.

We caution Peel that further attempts to relitigate his convictions could result in sanctions.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 06-cr-30049**
	)	
	)	
GARY E. PEEL,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

YANDLE, District Judge:

This matter comes before the Court on the Defendant Gary E. Peel's Motion to Reconsider (Doc. 287), Motion to Expedite Ruling on the Motion to Reconsider (Doc. 288), and Supplement to the Motion to Reconsider (Doc. 289).

Following guilty verdicts in his 2007 jury trial, Peel was sentenced to 144 months imprisonment – 60 months for bankruptcy fraud, 144 months for obstruction of justice, and 120 months for possession of child pornography, with all sentences to run concurrently (Doc. 183). His first appeal to the Seventh Circuit resulted in vacatur of the obstruction count and resentencing. *United States v. Peel*, 595 F.3d 763 (7th Cir. 2010). On remand, this Court dismissed the obstruction of justice charge, recalculated the amount of intended loss relevant to the bankruptcy fraud conviction, recalculated the applicable Guidelines sentencing range, and resentenced Peel to 144 months, including consecutive sentences of 24 months for bankruptcy fraud and 120 months for the possession of child pornography (Doc. 228). The Seventh Circuit affirmed the resentencing on Peel's second appeal. *United States v. Peel*, 668 F.3d 506 (7th Cir. 2012).

APPENDIX - F

In 2011, Peel moved to vacate the judgment under 28 U.S.C. §2255. *See Peel v. United States*, 11-cv-660-WDS, at Doc. 1. He argued that insufficient evidence existed to support his bankruptcy fraud conviction and the sixteen-level loss enhancement assessed under the sentencing guidelines, and asserted that his defense team was ineffective for failing to offer critical testimony and evidence to contradict the prosecution's "blackmail" motivation theory. *Id.* This Court denied Peel's claims for relief (*Id.* at Doc. 6).

Peel then filed a second habeas petition pursuant to 28 U.S.C. §2255 in March 2012, seeking to protect the minor's First Amendment right to pose for sexually explicit photographs at age sixteen and reasserting his claim that his defense attorneys were ineffective in failing to offer critical testimony and evidence to contradict the prosecution's "blackmail" motivation theory. *See Peel v. United States*, 12-cv-275-WDS, at Docs. 1, 1-1. The Court found each of these claims to be groundless (*Id.* at Doc. 36). On appeal, the Seventh Circuit combined Peel's claims and denied his motions to recall the mandate filed in appellate cases 07-3933, 11-2776, and 13-2124. *Peel v. United States*, 13-2124, Doc. 14. Peel's request for hearing en banc was also denied. *Peel v. United States*, 13-2124, Doc. 16. In February 2014, the United States Supreme Court denied Peel's Petition for Writ of Certiorari. *Peel v. United States*, 13-2124, Doc. 19.

Peel then filed a habeas corpus petition in the United States District Court for the Eastern District of Kentucky. *Peel v. Sepanek*, Case No. 14-cv-77, 2014 WL 3611151 (E.D. Ky. July 21, 2014). He argued that the child pornography statute (18 U.S.C. §2252A(a)(5)(B)) violates the Equal Protection Clause, the Due Process Clause, the Ex Post Facto Clause, and the Eighth Amendment; and, he also argued that he should have been sentenced under a lower guidelines range based on newly discovered evidence that established a lower value for the photographs he had possessed. *Peel*, 2014 WL 3611151, at *2. The Court denied Peel's request for habeas relief,

finding that because his claims could have been brought on direct appeal on in his initial §2255 challenge, they did not trigger 28 U.S.C. §2255(e)'s "savings clause" and therefore, could not be pursued under §2241. *Peel*, 2014 WL 3611151, at *3.

Next, in October 2015, Peel filed an emergency motion in the Seventh Circuit seeking immediate release from custody, or in the alternative, permission to file a successive §2255 petition to challenge the calculation of his intended loss. *Peel v. United States*, 15-3269, Doc. 1 at p. 1 (7th Cir. 2015). The Seventh Circuit denied Peel's request and his request for rehearing, noting that he had previously challenged the intended loss calculation – both on direct appeal and in his first §2255 petition. *Peel v. United States*, 15-3269, Docs. 2, 3 (7th Cir. 2015).

In April 2016, the Seventh Circuit considered and denied Peel's Application filed pursuant to 28 U.S.C. §2244(b)(3). *Peel v. United States*, 16-1665 (7th Cir. 2016). The Court rejected his arguments challenging his 2007 conviction for possession of child pornography as the same arguments rejected on his direct appeal. *Id.* With respect to Peel's argument that the "bankruptcy court's rejection of his ex-wife's claim undermines his fraud conviction," the Seventh Circuit held that "the bankruptcy court's decision does not implicate Peel's innocence as required by §2255(h)(1)." *Id.* Rather, "the conviction is based on Peel's blackmailing of his ex-wife to get her to drop the bankruptcy claim before the bankruptcy court's ruling." *Id.*

Throughout the years, Peel has also filed several miscellaneous motions in this closed criminal case making the same or substantially similar arguments; all of which were denied. He also sought habeas relief from the Supreme Court (denied in *In re Peel*, 137 S. Ct. 1835 (2017)), additional relief pursuant to 28 U.S.C. §§2241 and 2255(e) (denied in *Peel v. Zarrick*, --WL--, 18-2731 (7th Cir. 2021)), and another Petition for Writ of Certiorari (denied in *Peel v. Zarrick*, --WL--,18-2731 (7th Cir. 2021).

Most recently, Peel filed a motion seeking exoneration under the common law writs of coram nobis and audita querela. He argued that he was not guilty of bankruptcy fraud because his conviction was predicated upon "false" information; that he is not guilty of possessing child pornography because the minor was an adult; that his counsel was ineffective; and, various *Brady* violations (Docs. 272). His motion was denied in its entirety (Doc. 286). Peel subsequently filed a Motion to Reconsider (Doc. 287), Motion to Expedite Ruling on the Motion to Reconsider (Doc. 288), and Supplement to the Motion to Reconsider (Doc. 289), which are now before the Court.

Generally, a motion filed within ten (10) days of judgment or ruling is treated as a motion to alter or amend under *F.R.C.P.* 59(e). To prevail on a motion for reconsideration under Rule 59(e), the moving party must present either newly discovered evidence or establish a manifest error of law or fact. *LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263, 1267 (7th Cir. 1995). However, a Rule 59 motion may not be employed to simply rehash previously rejected arguments (*see Musch v. Domtar Industries, Inc.*, 587 F.3d 857, 861 (7th Cir. 2009); *see also Neal v. Newspaper Holdings, Inc.*, 349 F.3d 363, 368 (7th Cir. 2003); *Caisee Nationale de Credit Agricole v. CBI Industries, Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996)), which is what Peel attempts here.

A "manifest error is not demonstrated by the disappointment of the losing party..." *Sedrak v. Callahan*, 987 F.Supp. 1063, 1069 (N.D. Ill. 1997). While Peel takes umbrage with various aspects of the Court's ruling, he fails to demonstrate that the Court actually disregarded, misapplied, or failed to recognize controlling precedent.

Conclusion

For the foregoing reasons, Gary E. Peel's Motion to Reconsider and Supplement (Docs. 287, 289) are **DENIED**. The Motion to Expedite Ruling on the Motion to Reconsider (Doc. 288) is **TERMINATED** as **MOOT**.

IT IS SO ORDERED.

DATED: September 7, 2022

STACI M. YANDLE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 06-cr-30049-SMY**
	)	
GARY PEEL,	)	
	)	
Defendant.	)	

ORDER

YANDLE, District Judge:

Defendant Gary Peel served a 12-year prison sentenced followed by a 3-year term of supervised release for bankruptcy fraud and possession of child pornography. This matter is now before the Court for consideration of Peel's "Motion for Writ of Error under the All Writs Act" (Doc. 272). Peel seeks complete exoneration and to have his convictions vacated. For the following reasons, the Motion is **DENIED**[1].

Procedural Background

Following a jury trial and guilty verdicts in 2007, Peel was sentenced to 144 months imprisonment – 60 months for bankruptcy fraud, 144 months for obstruction of justice, and 120 months for possession of child pornography, with all sentences to run concurrently. A first direct appeal led to vacatur of the obstruction count and resentencing. *United States v. Peel*, 595 F.3d 763 (7th Cir. 2010). On remand after direct appeal, this Court dismissed the conviction for obstruction of justice, recalculated the amount of the intended loss relevant to the bankruptcy fraud, recalculated the applicable guidelines sentencing range, and resentenced Peel to 144 months

[1] Peel filed a Motion for Dispositive Ruling on May 2, 2022, requesting a ruling on his pending Motion for Writ of Error (Doc. 277). The Motion is **TERMINATED** as **MOOT**.

APPENDIX - G

(which included consecutive sentences of 24 months for bankruptcy fraud and 102 months for possession of child pornography). The Seventh Circuit affirmed in a second direct appeal. *United States v. Peel*, 668 F.3d 506 (7th Cir. 2012).

In both his first and second appeals, Peel contested the criminality of his possession of the nude photographs of the then 16-year-old minor. The Seventh Circuit rejected his contention that the photos should not be characterized as child pornography in 2005-2006 because at the time he took them in 1974, the statute under which he was convicted had not yet been enacted and the photos were not illegal when they were taken. The child pornography statute was amended in 1984 to provide that a minor under age 18 was a "child," thus criminalizing Peel's possession of the photos when he was charged and convicted. Noting that Peel had forfeited this argument because he did not raise it at trial, the Seventh Circuit nevertheless addressed the merits and rejected Peel's argument that his possession of the originally legal pictures should be "grandfathered" and that he should not be subject to prosecution under the amended version of the statute. *Peel*, 668 F.3d at 509 (citing *Peel*, 595 F.3d at 770).

In the second appeal, Peel also argued that his punishment for illegally possessing child pornography that was legal when he created it violated the First Amendment's free speech clause and the *Ex Post Facto* clause of Article I of the Constitution. *Peel*, 668 F.3d at 510. The Seventh Circuit found both arguments frivolous and noted that Peel forfeited the arguments because he failed to raise them in his first appeal.

In August 2011 Peel moved to vacate the judgment under 28 U.S.C. § 2255. Among his claims, Peel argued that insufficient evidence existed to support his bankruptcy fraud conviction and the sixteen-level loss enhancement assessed under the sentencing guidelines. *See Peel v. United States*, 11-cv-660-WDS, at Doc. 1. He also asserted that his defense team was ineffective

for failing to offer critical testimony and evidence to contradict the prosecution's "blackmail" motivation theory. *Id.* This Court denied Peel's claims for relief.

Peel filed a second habeas petition pursuant to 28 U.S.C. § 2255 in March 2012, in which he asserted that he sought to protect the minor's First Amendment right to pose for sexually explicit photographs at age sixteen. *Peel v. United States*, 12-cv-275-WDS, at Doc. 1, 1-1. He also reasserted his claim that his defense attorneys were ineffective in failing to offer critical testimony and evidence to contradict the prosecution's "blackmail" motivation theory. *Id.* Each of Peel's claims were considered by this Court and found to be groundless; his request for habeas relief was denied, and the Court declined to issue a certificate of appealability. On appeal, the Seventh Circuit combined Peel's claims and denied his motions to recall the mandate filed in appellate cases 07-3933, 11-2776, and 13-2124. *Peel v. United States*, 13-2124, Doc. 14. Peel's request for hearing en banc was also denied. *Peel v. United States*, 13-2124, Doc. 16. In February 2014, the United States Supreme Court denied Peel's Petition for Writ of Certiorari. *Peel v. United States*, 13-2124, Doc. 19.

In 2014, while incarcerated in Kentucky, Peel filed a habeas corpus petition in the United States District Court for the Eastern District of Kentucky. *Peel v. Sepanek*, Case No. 14-cv-77, 2014 WL 3611151 (E.D. Ky. July 21, 2014). He argued that the child pornography statute (18 U.S.C. § 2252A(a)(5)(B)) violates the Equal Protection Clause, the Due Process Clause, the *Ex Post Facto* Clause, and the Eighth Amendment, and that he should have been sentenced under a lower guidelines range based on newly discovered evidence that established a lower value for the photographs he had possessed. *Peel,* 2014 WL 3611151, at *2. That court denied Peel's request for habeas relief, finding that his claims could have been brought on direct appeal or in his initial § 2255 challenge, and as such, they did not fall within the narrow scope of the "savings clause"

found at 28 U.S.C. § 2255(e) and could not be brought under § 2241. *Peel,* 2014 WL 3611151, at *3.

Next, in October 2015, Peel filed an emergency motion in the Seventh Circuit seeking immediate release from custody, or in the alternative, permission to file a successive § 2255 petition to challenge the calculation of his intended loss. *Peel v. United States*, 15-3269, Doc. 1, p. 1, (7th Cir. 2015). Peel argued that the facts relied upon by the sentencing court were "premised on erroneous information and [goes] to the heart of whether said sentence falls outside the range recommended by the 2007 United States Sentencing Guidelines." *Peel v. United States*,15-3269, Doc. 1, p. 4, (7th Cir. 2015). The Seventh Circuit denied Peel's request and his request for rehearing, noting that he had previously challenged the intended loss calculation – both on direct appeal and in his first § 2255 petition. *Peel v. United States*, 15-3269, Docs. 2, 3 (7th Cir. 2015).

In April 2016, the Seventh Circuit considered and denied Peel's Application filed pursuant to 28 U.S.C. 2244(b)(3). *Peel v. United States*, 16-1665 (7th Cir. 2016). The Seventh Circuit found, "Peel proposes challenging his 2007 convictions for bankruptcy fraud and possession of child pornography. But the arguments Peel makes concerning his conviction for possession of child pornography are the same arguments that were rejected in his direct appeal." With respect to his bankruptcy fraud conviction, Peel argued that the "bankruptcy court's rejection of his ex-wife's claim undermines his fraud conviction." *Id.* However, the Seventh Circuit held that "the bankruptcy court's decision does not implicate Peel's innocence as required by § 2255(h)(1). Rather, the conviction is based on Peel's blackmailing of his ex-wife to get her to drop the bankruptcy claim before the bankruptcy court's ruling." *Id.*

Over the years, Peel has also filed several miscellaneous motions in this closed criminal case making the same or substantial similar arguments; all of which were denied. He also sought

habeas relief from the Supreme Court, again to no avail. *In re Peel*, 137 S. Ct. 1835 (2017). Most recently, he requested relief pursuant to 28 USC 2241 and 2255(e). *Peel v. Zarrick*, --WL--, 18-2731 (7th Cir. 2021). His appeal was again denied (*Peel v. Zarrick*, --WL--, 18-2731, Doc. 29, October 4, 2021), as was his Petition for Writ of Certiorari. *Peel v. Zarrick*, --WL--, 18-2731, Doc. 34, (7th Cir. 2021).

One month following the Supreme Court's latest denial, Peel filed the instant motion seeking exoneration under the common law writs coram nobis and audita querela. He argues that he is not guilty of bankruptcy fraud because his conviction was predicated upon "false" information; that he is not guilty of possessing child pornography because the minor was an adult; that his counsel were ineffective; and various *Brady* violations.

Discussion

The writ of audita querela is a remedy for judgment debtors, *United States v. Kimberlin*, 675 F. 2d 866, 869 (7th Cir. 1982), and "has no apparent relevance to criminal sentences." *Melton v. United States*, 359 F. 3d 855, 856 (7th Cir. 2004). The writ cannot be used in place of a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. *United States v. Johnson*, 962 F. 2d 579, 582 (7th Cir. 1992).

Peel argues that he is entitled to a writ of audita querela because false evidence was utilized to procure his bankruptcy conviction and maintains that he has been procedurally barred from challenging this conviction on the merits by this Court, the appellate court, and the Supreme Court. This alleged false evidence – the revalued amount of his ex-wife's claim – has been presented and considered on the merits and rejected on several occasions; the most recent in *Peel v. Zarrick*, No. 18-2732, 2021 WL 3059765, at *1 (7th Cir. June 4, 2021), *cert. denied,* 142 S. Ct. 262, 211 L. Ed. 2d 121 (2021). This Court rejects Peel's latest repackaging of this exhausted argument.

A writ of coram nobis is a means to collaterally attack a criminal conviction based on alleged errors of law or fact that affect the fundamental character of the conviction, including inadequate counsel. *Chaidez v. United States*, 568 U.S. 342 (2013). A petition requesting such a writ is similar to a habeas corpus petition. It seeks the same type of relief, *United States v. Bonansinga*, 855 F.2d 476, 478 (7th Cir. 1988), but is available only when a defendant is no longer in custody and thus can no longer take advantage of habeas corpus relief. *Stanbridge v. Scott*, 791 F.3d 715, 720 n.3 (7th Cir. 2015). The writ of coram nobis is to be used only in "extraordinary cases presenting circumstances compelling its use to achieve justice," where alternative remedies are not available. *United States v. Denedo*, 556 U.S. 904, 911 (2009), citing *United States v. Morgan*, 346 U.S. 502, 511 (1954) (internal quotation marks omitted). A successful coram nobis petition must satisfy three prongs: (1) the error alleged is "of the most fundamental character" as to render the criminal conviction "invalid"; (2) there are "sound reasons" for the defendant's "failure to seek earlier relief"; and (3) "the defendant continues to suffer from his conviction even though he is out of custody." *United States v. Wilkozek*, 822 F.3d 364, 368 (7th Cir. 2016).

Peel contends that he is entitled to a writ of coram nobis on his conviction for possession of child pornography because "there was no child" when the photographs were taken in 1974 ... the victim was a "16-year-old adult". But as the Seventh Circuit noted a decade ago:

> A 16–year–old is not an adult; and in the first appeal the defendant rightly did not argue that because the photos of his sister-in-law were not criminal when he took them they could not constitute sexual abuse of a minor. In fact under Illinois law in 1976 the sister-in-law was a child and in having sex with her the defendant was guilty of contributing to the sexual delinquency of a minor...a misdemeanor form of statutory rape. The law has since been amended to make the kind of conduct in which he engaged a felony.

United States v. Peel, 668 F.3d 506, 510 (7th Cir. 2012). Simply put, Peel has not and cannot raise a fundamental error in his conviction for possession of child pornography because he is, in fact,

guilty of the crime. *United States v. Wilkozek*, 822 F.3d 364, 368 (7th Cir. 2016) (a "fundamental error that invalidates a criminal proceeding is one that undermines our confidence that the defendant is actually guilty"). His request for coram nobis is denied.

Like his assertions of innocence, Peel has argued his ineffective assistance of counsel and *Brady* violation claims on numerous occasions. And once again, he cannot establish errors of "the most fundamental character" which would have justified habeas corpus relief when habeas corpus relief on these specific issues were sought and denied.

Conclusion

For the foregoing reasons, Defendant Gary Peel's Motion for Writ of Error Under the All Writs Act (Doc. 272) is **DENIED**.

IT IS SO ORDERED.

DATED: June 13, 2022

STACI M. YANDLE
United States District Judge

In the
United States Court of Appeals
For the Seventh Circuit

No. 11-2776

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GARY E. PEEL,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 3:06-cr-30049-WDS-1—**William D. Stiehl**, *Judge.*

SUBMITTED JANUARY 10, 2012—DECIDED FEBRUARY 6, 2012

Before POSNER, MANION, and HAMILTON, *Circuit Judges.*

POSNER, *Circuit Judge.* A jury convicted the defendant of bankruptcy fraud, obstruction of justice, and possession of child pornography, and the judge sentenced him to a total of 144 months in prison (60 months for bankruptcy fraud, 144 months for obstruction of justice, and 120 months for possession of child pornography, with all the sentences to run concurrently). He appealed, challenging both the conviction and the sentence. In

APPENDIX - H

our opinion deciding that appeal, 595 F.3d 763 (7th Cir. 2010), we affirmed in part and reversed in part, and remanded the case with directions that the district judge vacate either the bankruptcy fraud conviction or the obstruction of justice conviction, recalculate the intended loss, redetermine the guidelines sentencing range, and resentence the defendant in accordance with 18 U.S.C. § 3553(a). On remand the district judge followed our directions and imposed the same total prison sentence but reduced the special assessment by $100. The defendant again appeals.

The defendant's briefs either reargue issues decided in the first appeal or present arguments that could have been but were not made in that appeal. The new appeal is thus an untimely petition to rehear our previous decision (as well as a successive petition to rehear—he had filed a timely petition to rehear that had been denied). When a case is remanded, an appeal taken from the judgment entered on remand is limited to issues that could not have been raised in the prior appeal. A defendant "cannot use the accident of a remand to raise in a second appeal an issue that he could just as well have raised in the first appeal." *United States v. Parker*, 101 F.3d 527, 528 (7th Cir. 1996). The defendant's counsel offers no excuse for filing such an improper appeal, and indeed seems oblivious to its impropriety.

Vacating the defendant's conviction for obstructing justice (which we ordered for double jeopardy reasons) did not provide a compelling reason for a shorter sentence; the defendant did obstruct justice, and that was

a proper consideration in sentencing him. Nor does the defendant argue otherwise.

We instructed the district judge to knock $611,000 off his estimate of the intended loss from the bankruptcy fraud. He did so, and as a result reduced that sentence from 60 to 24 months. The new sentence was actually below the guidelines range for that count (51 to 63 months, although the statutory maximum was 60 months), and even though it was made consecutive to the child pornography sentence, the defendant's overall sentence was within the adjusted combined guidelines range (135 to 168 months) for when there are multiple counts of conviction. U.S.S.G. §§ 3D1.4, 5G1.2(d) and Application Note 1. The defendant does not challenge the new sentence for bankruptcy fraud.

The judge vacated the sentence for obstruction of justice (to which of course the defendant does not object), and reimposed the 10-year sentence for the child pornography counts (there were two, one for images placed in his ex-wife's mailbox and one for images found in his office garbage can), the maximum sentence for the offense. See 18 U.S.C. §§ 2252A(a)(5), (b)(2). Wanting to give the defendant the same total prison time as previously, this time the judge, as we have noted, made the sentence for bankruptcy fraud run consecutively to the sentence for child pornography, so that the total prison sentence was again 144 months. The appeal does not challenge the judge's action in making the new, lower sentence for bankruptcy fraud consecutive.

The defendant's briefs ignore the actual grounds for the remand and the adjustments the judge made in

resentencing the defendant (vacating the conviction and therefore the sentence for obstructing justice, reducing the sentence for bankruptcy fraud, and making the new sentence run consecutively to rather than concurrently with the reimposed sentence for possession of child pornography). The appeal challenges only the conviction and sentence on the child pornography counts.

We upheld both that conviction and the identical sentence in the first round. Nothing has happened to justify revisiting either ruling. The only challenge the defendant made in his first appeal to the sentence as distinct from the conviction was to an enhancement for "distribution [of child pornography] for pecuniary gain," U.S.S.G. § 2G2.2(b)(3)(A), and we rejected the challenge. All that has changed since is the statement that the defendant made before being sentenced (his "allocution," as it is called); it was less remorseful on the second round than on the first, and that is putting it mildly—the second statement was bumptious, defiant, and devoid of acknowledgment of wrongdoing. It would have justified a longer sentence on the child-pornography counts had that been possible. (It was not, because, as we said, he received the maximum sentence.) And the judge could easily have given him a longer total sentence by giving him a longer consecutive sentence for bankruptcy fraud; he gave him 24 months on remand—the statutory maximum is 60. The only changed circumstance—the defiant allocution—undermines rather than supports the defendant's challenge to the sentence reimposed on remand.

We could stop here, but will address the defendant's remaining arguments regarding the child pornography counts briefly.

In 1974 the defendant began having sex with his 16-year-old sister-in-law. In the course of the affair, which lasted several months, he took nude photographs of her that the jury in the present case (he had not been prosecuted earlier with respect to the sex or the photographs) found were sexually explicit within the meaning of the child pornography statute.

Many years after the affair he and his wife divorced, and made a marital settlement over which they later quarreled. In the course of negotiations to resolve their differences the defendant tried to blackmail her with the nude photographs of her sister, many of which he had retained. He hoped by doing so to induce her to agree to a modification of the marital agreement that would have reduced his long-term obligations to her by some three-quarters of a million dollars. Instead of knuckling under to his demands she complained to the police, and an investigation ensued that led to his prosecution and conviction.

As we explained in our first opinion, at the time the defendant took the photographs the federal statute under which he now stands convicted had not been enacted. When it was enacted, in 1978, it defined "child" as a minor under the age of 16, and the sister-in-law was 16 when she was photographed. But the defendant was convicted of possessing child pornography during 2005 and 2006, and the statute had been amended in

1984 to raise the cut-off age to 18. In the first round we rejected his argument (made for the first time in that appeal rather than at his trial, see 595 F.3d at 770, and therefore forfeited) that the statute grandfathers the possession of pornography that was legal when it was created. If accepted the argument would have the ridiculous consequence of allowing a person who happened to possess pornographic photographs of 16- and 17-year-olds taken before 1984 to market them, giving him a market that being shielded from new competition would offer substantial profit opportunities because after 1984 there could be no further legal production or possession of such pornography. He would enjoy the same kind of quasi-monopoly as someone who possesses paintings by a successful artist when the artist dies prematurely, which by freezing his output pushes up the price. Or as someone who possesses "pre-ban" elephant ivory (meaning ivory acquired before the Convention on International Trade in Endangered Species barred the importing and exporting of ivory). It's no longer legal to sell ivory domestically unless it was imported before the ban—and there's no such "unless" exception in the child-pornography statute.

The defendant argues that to use the money he hoped to save by blackmailing his ex-wife as a measure of "pecuniary gain" from the photos was improper because that money was not a measure of their "retail value," which is how the guidelines tell the sentencing judge to calculate pecuniary gain. U.S.S.G. § 2G2.2(b)(3)(A). That is another argument that we rejected in the first

appeal, noting that the defendant had been offering to sell the pornographic photographs to his ex-wife in exchange for forgiveness of part of his debt to her under their marital settlement agreement, and that while the primary aim of the enhancement for pecuniary gain is to discourage trafficking in pornography, which increases the incentive to create pornography and thus the amount of child pornography and the number of abused children (the "models" for the photographs), the use of pornography for blackmail was not obviously less evil than its sale in the open market, or indeed materially different from such a sale. It is hard to see why selling one pornographic photo to each of (say) five people deserves a heavier punishment than selling five photos to one person, especially given the underlying concern with the harm to the minor depicted in the photographs.

Anyway, all that "retail value" means is price obtained from a sale to the ultimate purchaser, as distinct from a sale made higher in the chain of distribution, as by a wholesaler to a retailer (necessarily at a lower price than the retailer will resell the product for, to cover his cost). The defendant's ex-wife would have been the ultimate purchaser of the photos had she submitted to his attempt at blackmail. She would have been their retail purchaser for a price of some $750,000 in forgone future income under the marital settlement. That she would have destroyed the photos does not mean she hadn't bought them; she had acquired them for money. A publisher of a book found to contain plagiarized material might decide as a public relations gesture to

buy back copies from the persons who had bought them, and having done so destroy the copies; still the publisher would have bought them at retail.

The current appeal, besides repeating arguments made in the previous one, argues that to punish the defendant for the illegal possession of child pornography legal when he created it violates both the free-speech clause of the First Amendment and the ex post facto clause of Article I. Those are frivolous arguments, as well as arguments that he forfeited by failing to raise them in the first appeal.

His final argument, and the one he presses with the greatest vehemence, though it was also forfeited by not having been raised in the previous appeal, is that this is so atypical a child pornography case that the sentence is unreasonably severe. For all he had done, he argues, was to have sex with an "adult," take some risqué pictures, and retain them. He had never distributed them, even after his blackmail attempt failed.

A 16-year-old is not an adult; and in the first appeal the defendant rightly did not argue that because the photos of his sister-in-law were not criminal when he took them they could not constitute sexual abuse of a minor. In fact under Illinois law in 1976 the sister-in-law was a child and in having sex with her the defendant was guilty of contributing to the sexual delinquency of a minor, Ill. Rev. Stat. 1967, ch. 38, ¶ 11-5; *People v. Keegan*, 286 N.E.2d 345, 346 (Ill. 1971), a misdemeanor form of statutory rape. The law has since been amended to make the kind of conduct in which he

engaged a felony. See 720 ILCS 5/11-1.60(d), (g). When one considers the ugliness of the defendant's criminal affair with his 16-year-old sister-in-law, the gross impropriety of his making and retaining (for decades) nude photographs of her, his use of those photographs to blackmail the girl's sister (his ex-wife), the very large financial gain that he anticipated from the blackmail, the fact that he is a lawyer, the effrontery of his allocution, and the fact that we had already upheld his 10-year sentence for possession and distribution of child pornography, we can find no basis for criticizing the sentence that the judge reimposed, let alone for vacating it.

AFFIRMED.

UNITED STATES DISTRICT COURT

Southern District of Illinois

UNITED STATES OF AMERICA
V.
GARY E. PEEL

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 3:06-CR-30049-001-WDS
USM Number: 07215-025
Jessie Kong Liu
Defendant's Attorney

Date of Original Judgment: 11/19/2007
(Or Date of Last Amended Judgment)

Reason for Amendment:

- ☒ ~~Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))~~
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)
- ☐ ~~Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))~~
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or to ☐ ~~18 U.S.C. § 3559(c)(7)~~
- ☐ Modification of Restitution Order (18 U.S.C. § 3664)

FILED
AUG - 1 2011
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS OFFICE

THE DEFENDANT:

- ☐ pleaded guilty to count(s)
- ☐ pleaded nolo contendere to count(s) which was accepted by the court.
- was found guilty on count(s) 1, 2, 3, and 4 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
~~18 USC § 152(6)~~	~~Bankruptcy Fraud~~	~~1/31/2006~~	~~1~~
18 USC §2252A(a)(5)(B)	Possession of Child Pornography	1/31/2006	3 & 4

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

☒ Count(s) 2 ☒ is ☐ are dismissed.*

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

~~August 1, 2011~~
Date of Imposition of Judgment

[signature]
Signature of Judge

HON. WILLIAM D. STIEHL, U.S. DISTRICT JUDGE
~~Name and Title of Judge~~

1 August 2011
Date

APPENDIX - I

DEFENDANT: GARY E. PEEL
CASE NUMBER: 3:06-CR-30049-001-WDS

IMPRISONMENT

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

144 MONTHS. THIS SENTENCE CONSISTS OF A TERM OF 24 MONTHS ON COUNT 1 AND 120 MONTHS ON EACH OF COUNTS 3 AND 4, SAID TERMS TO RUN CONCURRENTLY WITH EACH OTHER, BUT CONSECUTIVELY TO THE TERM IMPOSED ON COUNT 1.*

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

To the extent the defendant is qualified and space is available, it is recommended that the defendant be placed at a work camp facility.*

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

a _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245C (Rev. 06/05) Amended Judgment in a Criminal Case
Sheet 3 — Supervised Release (NOTE: Identify Changes with Asterisks (*))

DEFENDANT: GARY E. PEEL
CASE NUMBER: 3:06-CR-30049-001-WDS

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

3 YEARS ON EACH OF COUNTS 1, 3 AND 4, ALL SAID TERMS TO RUN CONCURRENTLY.*

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☒ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☒ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

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

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record, personal history, or characteristics and shall permit the probation officer to make such notifications and confirm the defendant's

DEFENDANT: GARY E. PEEL
CASE NUMBER: 3:06-CR-30049-001-WDS

ADDITIONAL SUPERVISED RELEASE TERMS

The defendant shall provide to the probation officer and the Financial Litigation Unit of the United States Attorney's Office with access to any requested financial information. The defendant is advised that the probation office may share financial information with the Financial Litigation Unit.

Since the defendant has been convicted of a sexual offense, he shall comply with all sexual offender registration requirements.

DEFENDANT: GARY E. PEEL
CASE NUMBER: 3:06-CR-30049-001-WDS

CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution
TOTALS	$ 300.00*	$ 1,000.00	$

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

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

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

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$_____	$ _____

☐ Restitution amount ordered pursuant to plea agreement $ _____

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

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

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

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

*dings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after mber 13, 1994, but before April 23, 1996.

AO (Rev. 06/05) Amended Judgment in a Criminal Case
Sheet 6 — Schedule of Payments (NOTE: Identify Changes with Asterisks

DEFENDANT: GARY E. PEEL
CASE NUMBER: 3:06-CR-30049-001-WDS

SCHEDULE OF PAYMENTS

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

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

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

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

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

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

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

Payments are due immediately through the Clerk of the Court. If the defendant is unable to pay immediately, then payments shall be required while the defendant is incarcerated in the U.S. Bureau of Prisons, in compliance with the Inmate Financial Responsibility Program. While incarcerated, the defendant shall make monthly payments consisting of one-half of the amount of monthly deposits into the defendant's inmate trust account; however, if the account balance is less than $20.00, no payment shall be required. Any financial penalties that remain unpaid at the commencement of the term of supervised release shall be paid at the rate of $25 per month, or 10% of defendant's monthly gross earnings, whichever is greater.

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

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

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

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

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

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

595 F.3d 763 (2010)

UNITED STATES of America, Plaintiff-Appellee,
v.
Gary E. PEEL, Defendant-Appellant.

No. 07-3933.
United States Court of Appeals, Seventh Circuit.

Argued December 10, 2009.
Decided February 12, 2010.

*765 Jennifer Hudson (argued), Office of the United States Attorney, Fairview Heights, IL, for Plaintiff-Appellee.

Jerold S. Solovy, Jessie K. Liu (argued), Jenner & Block LLP, Chicago, IL, for Defendant-Appellant.

Before POSNER, MANION, and HAMILTON, Circuit Judges.

POSNER, Circuit Judge.

The defendant was convicted by a jury of bankruptcy fraud, obstruction of justice, and possession of child pornography, and was sentenced to 144 months in prison. His appeal challenges both the convictions and the sentence.

The events giving rise to this case go back a long way. In 1967 the defendant married. Seven years later he began an affair with his wife's 16-year-old sister. In the course of the affair, which lasted several months, he took nude photographs of her that the jury found were sexually explicit within the meaning of the child-pornography statute; he does not contest that finding. In response to her later request for the pictures, he gave her some of them (which she then destroyed) and, without telling her, retained others in a file in his office.

In June 2003 the Peels divorced, and agreed to a marital settlement. The following year Peel filed suit in an Illinois *766 state court to vacate the settlement. The year after that he filed for bankruptcy and asked the bankruptcy court to discharge the financial obligations to his ex-wife that the settlement agreement had imposed. She opposed the discharge and filed a claim for the money that he owed her under the settlement. "Discharge" may not be the right word for what he was seeking "abandonment" probably is better because his debt to her under the settlement probably was not dischargeable in bankruptcy under the Bankruptcy Code as it then read. 11 U.S.C. §§ 523(a)(5), (15)(A), (B) (2005); *In re Crosswhite*, 148 F.3d 879, 881-82 (7th Cir.1998); *In re Reines*, 142 F.3d 970, 972-73 (7th Cir. 1998); *In re Daulton*, 139 B.R. 708, 710 (Bankr.C.D.Ill.1992). (Under the current Code, it almost certainly would not be dischargeable. See 11 U.S.C. §§ 101(14A), 523(a)(5), (15).) So he had to persuade her to drop the claim.

Negotiations looking to compromise it were predictably acrimonious and in the course of them the defendant told her about the nude photographs of her sister and said that "these would be ... an item that would likely get out into the public if we didn't stop this escalating battle of putting things in the newspaper." He backed up his threat by placing photocopies of the photographs in her mailbox. She complained to the police and later to federal authorities, and at their direction made recorded phone calls to the defendant.

The conversations confirmed that he was blackmailing her with the photographs. He faxed her a draft of a settlement agreement that she had previously rejected, adding a provision requiring him to return certain unidentified photographs to her. They met and he showed her the originals. The meeting was recorded, and included an exchange in which she said: "So you resort to blackmailing me?" He replied: "There's nothing left. I'm down to: no kids; no grand-kids; no money." "And, so," she responded, "blackmailing me with photographs.... Okay, but as long as I go ahead and sign these settlement agreements...." He replied: "Right then you have...." And she: "... you'll give me the photographs...." And he: "On the spot."

He was convicted as we said of both bankruptcy fraud and obstruction of justice. He argues that to convict him of both violated the double jeopardy clause of the Fifth Amendment, because one offense is included in the other. It might seem that there would be no issue of double jeopardy in a case in which multiple convictions occurred in the same trial, *Williams v. United States,* 150 F.3d 639, 641 (7th Cir.1998); *United States v. Masters,* 978 F.2d 281, 285 (7th Cir.1992), since the purpose of the clause is "`to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.'" *Missouri v. Hunter,* 459 U.S. 359, 365-68, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983), quoting *Burks v. United States,* 437 U.S. 1, 11, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). But the Supreme Court has held that "with respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause ... prevent[s] ... the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter, supra,* 459 U.S. at 366, 103 S.Ct. 673; *see also Ohio v. Johnson,* 467 U.S. 493, 499, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984) ("the final component of double jeopardy protection against cumulative punishments is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature"); *United States v. Konopka,* 409 F.3d 837, 838-39 (7th Cir.2005); *United States v. Fischer,* 205 F.3d 967, 969 (7th Cir.2000); *United States v. Hector,* 577 F.3d 1099, *767 1100-01 (9th Cir.2009); *United States v. Miller,* 527 F.3d 54, 70-73 (3d Cir.2008). Some of the Justices disagree with this extension of the double jeopardy clause see the discussion of their views in *White v. Howes,* 586 F.3d 1025, 1032-35 (6th Cir.2009) but for now, at least, it is the law and binds us.

So are bankruptcy fraud and obstruction of justice committed in a bankruptcy proceeding the same offense for purposes of double jeopardy? Bankruptcy fraud requires, so far as relates to this case, that the defendant "knowingly and fraudulently ... offers compensation ... for ... forbearing to act in any case under" the Bankruptcy Code. 18 U.S.C. § 152(6). ("[F]orbearing to act" in this case would mean his ex-wife's abandoning her bankruptcy claim.) Obstruction of justice requires that the defendant "corruptly obstructs, influences, or impedes any official proceeding, or attempts to do so." 18 U.S.C. § 1512(c)(2). So the elements of the offenses are different, as the government points out. But since a bankruptcy proceeding is an "official proceeding," within the meaning of the obstruction of justice statute, 18 U.S.C. § 1515(a)(1)(A) ("the term `official proceeding' means ... a proceeding before ... a bankruptcy judge"), the defendant's conviction for having attempted fraudulently to influence the bankruptcy proceeding by blackmailing his ex-wife into agreeing to drop her claim convicted him of obstruction of justice as well.

The test for "whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Missouri v. Hunter, supra,* 459 U.S. at 366, 103 S.Ct. 673, quoting *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The test was flunked here because convicting Peel of

obstruction of justice did not require proof of any fact that didn't have to be proved to convict him of bankruptcy fraud. It was thus a lesser-included offense of bankruptcy fraud and the *Blockburger* test makes clear, and many cases hold, that to punish a person for a lesser-included offense as well as the "including" offense is double jeopardy unless Congress intended the double punishment. *Rutledge v. United States,* 517 U.S. 292, 297-98 and n. 6, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996); *United States v. Fischer, supra,* 205 F.3d at 969; *United States v. Xavier,* 2 F.3d 1281, 1291 (3d Cir.1993). The government does not argue that Congress intended that.

This is like a case in which a person is tried for both murder and attempted murder. The elements are different, but since conviction for murder automatically convicts the defendant of attempted murder (for there can be no murder without attempting the deed), the defendant cannot be convicted of both crimes. See, e.g., *People v. Davidson,* 159 Cal.App.4th 205, 70 Cal.Rptr.3d 913, 917-18 (2008). There is an exception for cases in which the defendant was convicted of the lesser-included offense before he could have been prosecuted for the greater one, as when the defendant is convicted of attempted murder and later his victim dies. In such a case he can be tried for murder. *People v. Carrillo,* 164 Ill.2d 144, 207 Ill.Dec. 16, 646 N.E.2d 582, 584-85 (1995). The exception has no application to this case, which must therefore be remanded with directions that the judge vacate one of the two convictions.

The defendant argues that his conviction for obstruction of justice is the one that should be vacated, even though it carries the higher statutory maximum sentence, because it is a lesser-included offense of bankruptcy fraud. It is lesser in *768 the sense of having fewer elements, see *United States v. Smith,* 34 F.3d 514, 517-18 (7th Cir.1994); *United States v. Harley,* 990 F.2d 1340, 1343-44 (D.C.Cir.1993), because one can commit obstruction of justice without committing bankruptcy fraud but not bankruptcy fraud without committing obstruction of justice. That is the only sense of "lesser" that matters under the *Blockburger* test: that offense *A* has elements *a, b, c,* and offense *B* has elements *a, b, c,* and *d,* so that conviction of *B* automatically convicts the defendant of *A* as well. The remedy is to eliminate the doubleness. But which conviction must be vacated is not dictated by the Constitution. It is a matter committed to the trial judge's discretion because functionally it is a decision concerning the length of the defendant's sentence. *Ball v. United States,* 470 U.S. 856, 864, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985); *Lanier v. United States,* 220 F.3d 833, 841-42 (7th Cir.2000); *United States v. Fischer, supra,* 205 F.3d at 970 n. 2; *United States v. Hector, supra,* 577 F.3d at 1103-04; *United States v. Miller, supra,* 527 F.3d at 74. But usually it's the conviction carrying the lesser penalty that is vacated. As we noted in *Lanier,* it would be paradoxical to give the defendant a shorter sentence than he would have received had the government not also charged him with the less serious offense. 220 F.3d at 842.

What is true is that in a case in which the lesser-included offense has fewer elements *and* is the less serious offense, vacating the sentence for the graver offense would be an abuse of discretion: imagine convicting a person of attempted murder and of murder and punishing him only for the attempt. This is not such a case; the lesser-included offense of obstruction of justice is the graver offense.

The defendant argues that it was not proved beyond a reasonable doubt that he had committed either bankruptcy fraud or obstruction of justice. Regarding the obstruction charge, he argues that he did not act "corruptly" because he was prepared to disclose the photographs to the bankruptcy court. That is a distortion of the deal he tried to make

with his ex-wife. The deal was that she would abandon her claim and in exchange would get the photographs. He expected her to keep them secret from the world, including the bankruptcy court, not only because they were an embarrassment but also because if the bankruptcy judge discovered that his ex-wife had been blackmailed into dropping her claim he would be certain to notify the authorities and the deal would collapse. Peel's expectation of secrecy was disappointed because his ex-wife went to the police. So there was no actual obstruction of justice, merely an attempt, but the statute punishes the attempt equally with the achieved obstruction.

His main argument against the conviction for bankruptcy fraud is that his object was to get his ex-wife to drop her opposition to his state-court suit to dissolve the marital agreement. That was one object but he also wanted her claim in the bankruptcy proceeding dismissed because in all likelihood it was not dischargeable in bankruptcy.

He further argues that bankruptcy fraud does not extend to fraud committed in an "adversary proceeding" in bankruptcy. The term refers to proceedings to resolve claims within the overall bankruptcy case; a proceeding to object to the discharge of a debt or to determine its dischargeability is a typical adversary proceeding. Fed. R. Bankr.P. 7001(4), (6); see *Zedan v. Habash,* 529 F.3d 398, 402-03 (7th Cir.2008); *In re Marchiando,* 13 F.3d 1111, 1113-14 (7th Cir.1994); *In re Duncan,* 448 F.3d 725, 726 (4th Cir.2006). An adversary proceeding is thus part of the *769 bankruptcy but it is not the bankruptcy case itself, as illustrated by the fact that the dismissal of an adversary proceeding is an appealable final order even though the bankruptcy case continues. *In re Marchiando, supra,* 13 F.3d at 1113-14.

Bankruptcy fraud is fraud committed "in any case under title 11" of the U.S.Code, 18 U.S.C. § 152(6), that is, under the bankruptcy code; and we cannot find any authority on whether *all* adversary proceedings in bankruptcy are "case[s] under title 11" within the meaning of the section. The fact that some adversary proceedings can be heard in state court, 28 U.S.C. §§ 1334(a), (b); 1 *Collier on Bankruptcy* ¶ 3.01[1] (15th ed.2009), and that in many such proceedings no issue of bankruptcy law is presented (often an adversary proceeding is a tort or contract suit governed by state law, see, e.g., *In re Teknek, LLC,* 512 F.3d 342, 345 (7th Cir.2007); *Alliance to End Repression v. City of Chicago,* 356 F.3d 767, 771 (7th Cir.2004); *SNA Nut Co. v. Haagen-Dazs Co.,* 302 F.3d 725, 729 (7th Cir.2002); *In re Caldor Corp.,* 303 F.3d 161, 163-64 (2d Cir.2002)), suggests a negative answer. But a number of cases suggest (none to the contrary) that at least fraud in an adversary proceeding involving dischargeability is bankruptcy fraud. *In re Kallstrom,* 298 B.R. 753, 758-59 and n. 25 (10th Cir.BAP2003); *In re Parker,* 2003 WL 21703528, at *3 (Bankr.N.D.Ga. July 18, 2003); *In re Taylor,* 190 B.R. 413, 416 n. 3 (Bankr.D.Colo.1995); *In re Nicolosi,* 86 B.R. 882, 887-88 (Bankr.W.D.La.1988); 10 *Collier on Bankruptcy, supra,* ¶ 7041.01. If the debtor succeeds in obtaining a discharge, a creditor or class of creditors particularly favored by Congress is hurt; hence Bankruptcy Rule 7041 forbids dismissal of a complaint objecting to a debtor's discharge except on notice to the trustee in bankruptcy (as well as to the U.S. Trustee and anyone else that the bankruptcy court directs to be notified). In any event, since the ex-wife's claim in this case was the biggest claim in the bankruptcy proceeding, had the defendant succeeded in knocking it out by his fraud his action would have been fraud in the proceeding itself rather than in an adversary proceeding that had only a tangential effect on the overall bankruptcy case.

We move to the defendant's conviction under 18 U.S.C. § 2252A for possession of child pornography, defined as sexually explicit images of a minor. 18 U.S.C. § 2256(8). The first federal child pornography statute, enacted in 1978 (four years after the defendant took the photographs of his 16-year-old sister-in-law), defined a "minor" to mean anyone under 16. Protection of Children Against Sexual Exploitation Act, Pub.L. No. 95-225, § 2253(1), 92 Stat. 7 (1978). An amendment in 1984 redefined "minor" as anyone under 18. Pub.L. 98-292, § 253(1), 98 Stat. 204 (1984). The defendant was charged with possession of child pornography in 2005 and 2006, long after the statute had been amended to raise the age of majority. But he argues that since the photographs were not illegal when made, the amended statute is inapplicable to him.

He does not argue that Congress can't criminalize the continued possession of pornography that was legal when created. *United States v. Bateman,* 805 F.Supp. 1053, 1055 (D.N.H.1992); *United States v. Porter,* 709 F.Supp. 770, 774 (E.D.Mich. 1989), *aff'd,* 895 F.2d 1415 (6th Cir.1990). But he contends that unless his interpretation is adopted, the statute will be incoherent because it creates an "affirmative defense" for cases in which either the "minor" depicted in the pornography possessed by the defendant was actually an adult or the pornography was not produced "using any actual minor." 18 *770 U.S.C. § 2252A(c). (The two clauses are redundant the second includes the first but the second is broader because it includes the case in which no person was used in the creation of the pornographic depiction; it might be a painting of an imaginary person or a computer simulation.) One function of the affirmative defense, he argues, is to grandfather the possession of pornography that was legal when it was created. Peel did not raise the issue in the district court, but it is the heart of his challenge to his conviction for child pornography.

At argument the government's lawyer conceded that to prove a violation of the statute the government has to prove that a real-life minor, not a computer simulation or an adult looking like a minor, was used in the creation of the pornography. The effect of an affirmative defense that entitled the defendant to prove the contrary would thus be that the government would have to prove that a child was used and the defendant would have to prove that a child wasn't used. The statute is confused, but not that confused; and the least plausible interpretation is that it grandfathers a category of what the law now deems to be child pornography.

The affirmative defense came into the statute in 1996, when Congress in the Child Pornography Prevention Act, Pub.L. No. 104-208, § 121, 110 Stat. 3009-26 (1996), for the first time outlawed virtual child pornography pornography involving a computer simulation of a child rather than an actual child: an image "that ... appears to be ... of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2256(8)(B) (1996). This language could have been thought to reach a case in which an adult who looked like a child was used in the production of pornography rather than an actual child. But that was not Congress's intent; its concern was with computer simulations. Hence the affirmative defense, explained in the Senate committee report as follows:

[The bill] ... does not, and is not intended to, apply to a depiction produced using adults engaging in sexually explicit conduct, even where a depicted individual may appear to be a minor. Accordingly, the bill includes ... an affirmative defense provision for material produced using adults. Under that provision, it is an affirmative defense to a charge under section 2252A that the material in question was produced using an actual person or persons engaging in sexually explicit conduct, each of whom was an adult at the time

the material was produced, provided the defendant did not intentionally pander the material as being child pornography.

S.Rep. No. 358, 104th Cong., 2d Sess. 21 (Aug. 27, 1996).

Within a few years, however, the defense was overtaken by the Supreme Court's decision holding that the production of non-obscene pornography in which no child was involved cannot constitutionally be prohibited, because there is no sexual abuse in such a case, *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 250-51, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002), and only the presence of that abuse, the Court ruled, justifies the suppression of pornography that does not cross the line to obscenity. The government must therefore prove that a child was used unless the pornography is considered obscenity, which only a subset of pornography is, see, e.g., *United States v. Schales,* 546 F.3d 965, 971-72 (9th Cir.2008); 18 U.S.C. § 1466A, and the statute under which Peel was convicted is not an obscenity statute. *United States v. Irving,* 452 F.3d 110, 120 (2d Cir.2006); *United States v. Hilton,* 386 F.3d 13, 16 (1st Cir.2004) (per curiam). (He does not argue that because the photos *771 of his sister-in-law were not illegal when he took them, they could not constitute sexual abuse of a minor.)

With the government thus required to prove beyond a reasonable doubt that the apparent child in the pornographic image is a real child, the only work left for the provision creating the affirmative defense is to require (in a part of the provision that we did not quote) that the defendant notify the government of his intention to challenge the government's proof that a child was used.

The history makes clear that the affirmative defense was not added to the statute in order to grandfather pornography created before the definition of a child was changed from younger than 16 to younger than 18. It was added to exculpate child pornography made with adult rather than child models, at a time when the Supreme Court had not yet ruled that the making of such pornography could not constitutionally be punished, and therefore at a time when Congress thought it could place the burden of proof concerning the age of the model used in producing the pornography on the defendant rather than on the government. There isn't the slightest indication of a congressional purpose to grandfather a category of child pornography, so that anyone who happened to have pornographic photographs of 16- and 17-year-olds taken before 1984 would be free to market them. Such a person would have a market that was shielded from new competition and thus offered him substantial profit opportunities because after 1984 there could be no further legal production of such pornography in which an actual child had been used. The possessor would enjoy the same kind of quasi-monopoly as someone who possesses paintings by an artist when he dies prematurely, freezing the quantity of his output and thus pushing up the price.

Possession of a photograph of an underage girl or boy must be knowing, however, and the defendant, besides invoking the affirmative defense, argues that the government failed to prove that he knew in 2005 and 2006 that his sister-in-law had been under 18 when he took the photographs. Actually the evidence of his knowledge was extensive. He had known her since she was in fourth grade, had spent a great deal of time with her at the time of his marriage to her sister, when she was in high school, and years later had represented her (the defendant is a lawyer) in her divorce proceeding.

We turn to the sentencing issues. In calculating intended loss for purposes of determining the guideline range for the defendant's offenses of bankruptcy fraud and obstruction of

justice, the judge began with the amount that the defendant owed his ex-wife under the terms of the marital settlement $230,000 and the amount that the settlement required him to pay her in the future $2500 per month for the rest of Peel's life. His life expectancy was 17.5 years, so the estimated total payout over that time would be $525,000. So far, so good, for Peel hoped by his blackmail to get her to drop both claims. But Peel argues that the estimated $525,000 in future monthly payments that he owed his ex-wife should be discounted to present value, since a smaller sum received today and conservatively invested would yield $525,000 over a period of 17.5 years. In civil cases in which the loss for which damages are sought will be incurred in the future (as where the plaintiff in an accident case is disabled from earning future income), courts reduce the future loss to a sum that the plaintiff could invest safely at an interest rate at which the sum would grow to an amount that would compensate him fully for his future loss. See, e.g., *Transcraft, Inc. v. Galvin, Stalmack, Kirschner* *772 *& Clark,* 39 F.3d 812, 819 (7th Cir.1994).

Courts do this because civil damages (excluding punitive damages) seek to put the plaintiff in the financial position that he would have occupied had he not been wronged by the defendant. *Illinois School Dist. Agency v. Pacific Ins. Co.,* 571 F.3d 611, 617 (7th Cir.2009). Because the aim of criminal sanctions is to punish, we find provisions in the sentencing guidelines that would strike a discordant note in a civil case such as the direction to sentencing judges to include even those losses that "would have been impossible or unlikely to occur," U.S.S.G. § 2B1.1, Advisory Note 3(A)(ii), and the further direction that "loss shall not include the following: Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs," U.S.S.G. § 2B1.1, Advisory Note 3(D)(i), so that the offense level for a financial crime is not increased if the prosecution is delayed, even though the delay increases the cost of the crime.

The question whether to discount future losses (actual or intended) to present value seems to have arisen rarely in criminal cases. A few cases, however, have discounted a future intended loss to present value, such as *United States v. Broderson,* 67 F.3d 452, 457 (2d Cir.1995), where just as in a civil case the court required discounting to present value an expected stream of monthly payments of which the defendant had defrauded the government. See also *United States v. Edgar,* 971 F.2d 89, 93-94 and n. 5 (8th Cir.1992); *United States v. Brown,* 338 F.Supp.2d 552, 559 (M.D.Pa.2004). We have found no cases that refused to discount a future loss to present value if asked to do so. Almost everyone would rather lose $2 in 20 years than $1 today, and this implies that the loss inflicted by appropriating a $2 benefit that the victim would have to wait 20 years to receive is less than taking $1 from him now.

So if a defendant presents credible evidence for discounting a stream of future payments to present value, the district court must consider it. And in this case the defense presented expert evidence that the present value of the stream of future monthly payments that Peel owed his ex-wife was $314,000. This amount, if adopted as the measure of intended future loss and added to the intended present loss of $270,000, would, after subtraction of the $158,000 in cash that the ex-wife would have received under the agreement that Peel tried to force on her, have produced an offense level two levels below the one applied by the district court. The court, however, rejected the effort to prove present value on the ground that U.S.S.G. § 2B1.1, Application Note 3(E), entitled "Credits Against Loss," does not include, among the credits listed, discounting to present value; credits are such things as "the fair market value of the property returned"

to the victim by the criminal before the offense was detected. But credits presuppose that the loss or intended loss has been determined and afterward part of it was restored, as in a case where an embezzler gambles successfully with the embezzled funds and so is able to (and does) return those funds. The amount of the embezzlement is the loss, *United States v. Lauer,* 148 F.3d 766, 767-68 (7th Cir.1998); *United States v. Mount,* 966 F.2d 262, 266-67 (7th Cir.1992), but the harm caused by the loss is lessened by the criminal's voluntary act. That has nothing to do with calculating the loss; the calculation precedes consideration of any credits to which the defendant is entitled; and so the application note has no relevance to whether loss is *773 measured by its discounted or an undiscounted value.

We are reluctant to make federal sentencing more complicated than it is, but requiring a calculation of the present value of a future loss, if the defendant presents credible evidence, need not burden the judge, let alone put him in a straitjacket. "The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference." U.S.S.G. § 2B1.1, Application Note 3(C). Since the guidelines are no longer binding, *Gall v. United States,* 552 U.S. 38, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007); *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), the judge need not give controlling weight to the present-value calculation.

Of particular relevance to the present case, the nature and circumstances of the defendant's crime may make discounting to present value of only limited utility in assessing loss. Peel's attempted blackmail of his ex-wife is a case in point. A blackmailer is apt not to stick to his deal with his victim but instead to come back for more later, as in *Commonwealth v. Beauchamp,* 49 Mass.App.Ct. 591, 732 N.E.2d 311, 316-17 (2000), and *United States v. Veltmann,* 6 F.3d 1483, 1488-89 (11th Cir. 1993), so that the initially intended loss is apt to understate the loss to the victim had the blackmail succeeded. True, if Peel were to give all the photos back to his ex-wife, as he promised to do, he could not have blackmailed her further. But there would have been no assurance that he would do that, since she didn't know how many of the photos he had. And even if the blackmailer doesn't return for more, the victim is apt to be in constant fear of such a return, adding to the cost of the crime. Ronald H. Coase, "The 1987 McCorkle Lecture: Blackmail," 74 *Va. L.Rev.* 655, 674-75 (1988).

This case has to be remanded for other reasons, and we leave to the discretion of the district judge whether to discount the monetary loss inflicted by a blackmail attempt (in this case an intended such loss) to its present value and how best to weigh that determination in deciding on an appropriate sentence.

Besides not discounting the future loss intended by Peel, the judge added a further intended loss the $611,000 in other claims that had been filed in the bankruptcy proceeding. By bringing the total intended loss above $1 million (it would have fallen just short of that amount had he done the present-value calculation of the ex-wife's future loss suggested above), the addition further increased Peel's guidelines sentencing range. That addition was error. None of the other creditors (or anyone else) would have been hurt had the blackmail attempt succeeded; nor was it any part of the defendant's intention to hurt them. Intended losses are intended losses, not bookkeeping entries. See *United States v. Arthur,* 582 F.3d 713, 720-21 (7th Cir.2009); *United States v. Bussell,* 504 F.3d 956, 960-63 (9th Cir. 2007); *United States v. Holthaus,* 486 F.3d 451, 455 (8th Cir.2007); *United*

States v. Wheeldon, 313 F.3d 1070, 1073 (8th Cir. 2002). The creditors would actually have been better off had the blackmail attempt succeeded because there would then have been one less creditor with whom to divide the defendant's meager assets. The bankruptcy court would not have been hurt merely because one creditor had dropped out. In fact it would have saved time by not having to adjudicate that creditor's claim.

*774 The remaining sentencing issue is whether the judge was right to apply section 2G2.2(b)(3)(A) of the sentencing guidelines, which increases the guidelines sentencing range for child pornography if the pornography was "distribut[ed] for pecuniary gain." The pecuniary gain, the judge determined, was the amount of money that the defendant had hoped to gain from his blackmail attempt. The defendant was offering to sell the pornographic photographs to his ex-wife for forgiveness of part of his debt to her under their marital settlement agreement.

The primary aim of the pecuniary-gain enhancement is to discourage trafficking in pornography, which increases the incentive to create pornography and thus the amount and so the number of abused children, the "models" for the photographs. *New York v. Ferber*, 458 U.S. 747, 761-62 and n. 13, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982); see also *United States v. Goldberg*, 491 F.3d 668, 672 (7th Cir.2007); *United States v. Richardson*, 238 F.3d 837, 839 (7th Cir.2001). But the use of pornography for blackmail is not obviously less bad conduct than the sale of pornography in the market. The defendant used pornography to avoid a debt and thus for pecuniary gain, and we think that brings him within the scope of the guidelines provision.

It's true that in ordinary language "distribution" suggests sale to more than one person. But in the guidelines it means "*any act*, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor," U.S.S.G. § 2G2.2, Application Note 1 (emphasis added). That must include a single sale. Moreover, the defendant was offering to sell to his ex-wife a number of photos, and it is hard to see why selling one pornographic photo to each of (say) five people deserves a heavier punishment than selling five photos to one person, especially given the underlying concern with the harm to the child model used in the photographs.

To conclude, the judgment is affirmed in part and reversed in part, and the case remanded with directions that the judge vacate either the bankruptcy fraud conviction or the obstruction of justice conviction, recalculate the intended loss, redetermine the guidelines sentencing range, and resentence the defendant in accordance with 18 U.S.C. § 3553(a).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	06-30049-WDS
vs.	)	East St. Louis, Illinois
	)	March 22, 2007
GARY E. PEEL,	)	
	)	
Defendant.	)	

JURY TRIAL - VOLUME VII
BEFORE THE HONORABLE WILLIAM D. STIEHL
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by mechanical stenography; transcript produced by computer.

APPENDIX - K

MR. WILLIAMS: That's fine.

THE COURT: And I will overrule the objection to 33, and will give it.

(Sidebar ends.)

(Open court, jury present.)

THE COURT: Ladies and gentlemen, I'm very sorry about the delay and the time of starting. We've had a few problems that had to be worked out, and after the case is over, I can explain all of this to you, but I won't do it at this point.

Now the parties have requested the Court, I believe, to take judicial notice.

MR. WILLIAMS: Yes, Your Honor.

MR. BURKE: That's correct, Your Honor.

THE COURT: And the Court does take judicial notice of the fact that in 1973 and 1974, the age of consent for sexual activity was 16. This is not an issue in this case.

Ladies and gentlemen, you have seen and heard all the evidence in the case, and I will now instruct you on the law applicable to it. You have two duties as a jury: Your first duty is to decide the facts from the evidence in the case. And this is your job and your job alone. Your second duty is to apply the law that I give you to the facts.

You must follow these instructions even if you disagree with them. Each of the instructions is important, and you must follow all of them. Perform these duties fairly and

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CRIMINAL NO. 06-30049-DRH
	)	
vs.	)	Title 18
	)	United States Code,
GARY E. PEEL,	)	Sections 152(6), 1512(c)(2),
	)	and 2252A(a)(5)(B).
Defendant.	)	

INDICTMENT

THE GRAND JURY CHARGES:

1. In 1974, **GARY PEEL**, took sexually explicit photographs of his then-wife's 16 year old sister, D.R. **GARY PEEL** retained these pictures until 2006.

2. In November of 2003, **GARY PEEL** and his wife divorced and a state court settlement was entered in which **GARY PEEL** was required to meet certain financial obligations to his ex-wife.

3. In July of 2005, **GARY PEEL** filed for bankruptcy in United States Bankruptcy Court, Southern District of Illinois (East Saint Louis), Bankruptcy Petition #: 05-33238. Such filing caused state court proceedings to be stayed pending resolution of the Federal Bankruptcy proceedings. In the bankruptcy action, **GARY PEEL** sought discharge of financial obligations to his ex-wife, whom he listed as a creditor. **GARY PEEL's** ex-wife opposed the discharge. Both **GARY PEEL** and his ex-wife were represented by respective counsel in the bankruptcy action. The bankruptcy action was brought under Title 11 of the United States Code.

4. On January 20, 2006, **GARY PEEL** telephoned his ex-wife and informed her that he had a sexual relationship with his ex-wife's sister, D.R., during the marriage. **GARY PEEL**

further informed his ex-wife that he had taken pictures of D.R. that he referred to as "sexually explicit." **GARY PEEL** informed his ex-wife that a copy of the pictures would be found in her mailbox at her residence. **GARY PEEL** informed his ex-wife that if she did not abandon the bankruptcy challenge, cease in her attempts to depose **GARY PEEL's** current wife, and agree to a new financial settlement, he would mail the pictures of D.R. to his ex-wife's parents.

5. On January 20, 2006, **GARY PEEL's** ex-wife retrieved from her mailbox a one-sheet color copy of four color photographs. Such photographs depicted D.R. naked and in various poses, including a lascivious display of the genitals and pubic area of D.R.

6. In cooperation with law enforcement, **GARY PEEL's** ex-wife placed telephone calls to **GARY PEEL**. In said telephone calls and in cooperation with law enforcement, **GARY PEEL's** ex-wife appeared to succumb to **GARY PEEL's** demand to forego the bankruptcy challenge and to consider a new settlement agreement. In said telephone calls **GARY PEEL's** ex-wife repeatedly told **GARY PEEL** that she would not be discussing a settlement with **GARY PEEL** if it were not for the photographs of her sister and **GARY PEEL's** threats to mail the photographs to her parents. In said telephone calls, **GARY PEEL's** ex-wife told **GARY PEEL** that she did not want her attorneys to see the pictures. **GARY PEEL** counseled his ex-wife that if the existence of the pictures were disclosed to her attorneys that they would request copies, that there would be court orders for production and that "it begins to get more visible."

7. In cooperation with law enforcement, **GARY PEEL's** ex-wife told **GARY PEEL** that she wanted assurances that the originals would be turned over to her if she signed a new settlement agreement. **GARY PEEL** agreed to meet his ex-wife on January 31, 2006, and at such meeting did show his ex-wife original photographs of D.R. Such photographs were then placed in

a sealed envelope and **GARY PEEL** and his ex-wife signed across the sealed portion. **GARY PEEL** explained that he would provide his ex-wife with the envelope containing the photographs after his ex-wife signed a new settlement agreement. At the conclusion of the meeting, agents of Federal Bureau of Investigation retrieved the envelope and original photographs from the person of **GARY PEEL.** Such photographs depicted D.R. naked and in various poses, including a lascivious display of the genitals and pubic area of D.R.

8. On January 31, 2006, agents of the Federal Bureau of Investigation retrieved from the waste basket in **GARY PEEL's** office at his place of employment, two additional one-page color copies of color photographs of D.R. Each of the two copies contained the same four pictures of D.R. as contained in the color copy that **GARY PEEL** had placed in his ex-wife's mailbox. These two copies had been torn into a number of pieces.

9. On January 31, 2006, agents of the Federal Bureau of Investigation retrieved a Hewlett Packard multi-function, color printer/scanner/copier from the residence of **GARY PEEL.** Agents of the Federal Bureau of Investigation learned that this Hewlett Packard printer was manufactured outside of the State of Illinois. Agents of the Federal Bureau of Investigation learned that the paper copies of the photographs of D.R. were produced on paper that was manufactured outside of the State of Illinois. Agents of the Federal Bureau of Investigation learned that the original photographs of D.R. were produced on materials that had been manufactured outside of the State of Illinois.

COUNT 1

Bankruptcy Fraud

Paragraphs 1 through 9 are incorporated and re-alleged as part of Count 1.

Between on or about January 20, 2006, and on or about January 31, 2006, within St. Clair County, within the Southern District of Illinois,

GARY PEEL,

defendant herein, did knowingly and fraudulently give, offer, receive, and attempt to obtain money and property, remuneration, compensation, reward, advantage, and promise thereof for acting and forbearing to act in a case under Title 11; all in violation of Title 18, United States Code, Section 152(6).

COUNT 2

Obstruction of Justice

Paragraphs 1 through 9 are incorporated and re-alleged as part of Count 2.

Between on or about January 20, 2006, and on or about January 31, 2006, within St. Clair County, within the Southern District of Illinois,

GARY PEEL,

defendant herein, did knowingly and corruptly attempt to obstruct, influence, and impede an official proceeding; all in violation of Title 18, United States Code, Section 1512(c)(2).

COUNT 3

Possession of Child Pornography

Paragraphs 1 through 9 are incorporated and re-alleged as part of Count 3.

On or about January 20, 2006, within St. Clair County, within the Southern District of Illinois,

GARY PEEL,

defendant herein, did knowingly possess material that contains an image of child pornography that was produced using materials that have been mailed and shipped and transported in interstate and

foreign commerce, namely a color paper copy containing images of D.R. that was placed in the mailbox of Gary Peel's ex-wife; all in violation of Title 18, United States Code, Section 2252A(a)(5)(B).

COUNT 4

Possession of Child Pornography

Paragraphs 1 through 9 are incorporated and re-alleged as part of Count 4.

On or about January 31, 2006, within St. Clair County, within the Southern District of Illinois,

GARY PEEL,

defendant herein, did knowingly possess material that contains an image of child pornography that was produced using materials that have been mailed and shipped and transported in interstate and foreign commerce, namely a color photograph of D.R. that was located on the person of Gary Peel; all in violation of Title 18, United States Code, Section 2252A(a)(5)(B).

A TRUE BILL

FOREPERSON

KEVIN F. BURKE
Assistant United States Attorney

RANDY G. MASSEY
Acting United States Attorney

Recommended Bond: *$10,000.00*