ORIGINAL

No. 24-5709

IN THE SUPREME COURT OF THE UNITED STATES

GREGORY BARTUNEK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

GREGORY BARTUNEK
29948-047
Federal Correctional Institution
P.O. Box 9000
Seagoville, TX 75159

QUESTIONS PRESENTED

I. If the § 2255 pleadings raised issues of fact, should those have been resolved by an evidentiary hearing?

II. Was the lack of an evidentiary hearing grounds for relief under Rule 60(b)(1)?

III. Did the pleadings raise material issues of fact which, if true, would entitle Bartunek to habeas relief?

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PETITION FOR A WRIT OF CERTIORARI

Gregory Bartunek respectfully petitions the Court for a writ of certiorari to review the opinion entered by the United States Court of Appeals for the Eighth Circuit on May 31, 2024.

OPINIONS BELOW

The decision of the United States Court of Appeals affirming the denial of Bartunek's Rule 60(b) Motion is attached to this Petition. (App. 1). The District Court's Memorandum and Order denyong Bartunek's Rule 60(b) Motion is also attached to this Petition. (App. 2).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on May 31, 2024. Bartunek filed a Petition for Rehearing by the panel and en banc, which was denied on August 12, 2024. A copy of this Order is attached. (App. 3). This Petition has been timely filed within 90 days of that Order.

Jurisdiction is proper under 28 U.S.C. § 1254.

THE CONSTITUTIONAL PROVISIONS, STATUTES, AND GUIDELINES

Amendments Four, Five, and Six of the U.S. Constitution

18 U.S.C. §§ 2252, 2252A, 2256, 3161, and 3553

28 U.S.C. §§ 1254 and 2255

Fed. R. Civ. P. 60

Fed. R. Crim. P. 11 and 41

Fed. R. Evid. 401, 403, 404, and 414

U.S. Sentencing Guidelines §§ 2G2.2 and 6A1.3

STATEMENT OF THE CASE

Bartunek filed a 28 U.S.C. § 2255 Motion to vacate his conviction and sentence based on violations of the Constitution and Laws of the United States. The court dismissed all of his claims as either procedurally defaulted or because the motion, files, and records of the case conclusively showed that Bartunek was not entitled to relief. However, it made its findings on controverted issues without notice to Bartunek and without a hearing. Therefore, Bartunek filed a Rule 60(b) Motion claiming this was an error, and including new evidence to support his actual innocence claim. But the court denied this motion, too.

These controverted issues included: 1) counsel's unjustified delay of trial; 2) complete breakdown of communication between Bartunek and his counsel; 3) Bartunek's alibi defense based on actual innocense; 4) prosecutor's wrongly admitted evidence at trial; and 5) court's mistaken sentencing beliefs.

A. Unjustified Delay of Trial

Prior to trial, counsel was appointed to Bartunek from the Public Defender's Office. But, after Bartunek found out that the court granted a 168-day delay of the trial because his counsel was too busy with other cases, he asked for alternate counsel. Therefore, the court appointed Panel Attorney Andrew Wilson. Bartunek asked Wilson to get an earlier trial date, but Wilson refused to do so, without explination.

A few days after Wilson was appointed, he received the government's discovery, which included computer forensic reports based on the data and files stored on the computer and external

drives seized from Bartunek's residence. During the next four months, Wilson told Bartunek he did little to move the case forward, but to hire a computer forensic specialist, several months before the trial date. The specialist performed the same analysis previously completed by the government and Bartunek, himself. The specialist completed a report based on his analysis and emailed it to Wilson at least a month before the trial.

And yet, Wilson later filed a motion to delay the trial for another 60 days, claiming that the case involved a significant amount of computer forensic investigation, and additional time was required to complete the work. Wilson also told the court that his motion was unopposed. However, Bartunek was vehemently opposed to any further delays, and informed the court of his opposition.

Bartunek claimed that Wilson's reason for the delay was untrue, and he was using this reason as an excuse to hide the fact that he failed to diligently prepare for the trial. Further evidence that such a lengthly delay was not needed to complete the forensic investigaiton was based on the government's forensic expert's opinion, who had already completed the same analysis, that it would take another forensic expert only a couple days or less to complete the analysis.

Never-the-less, without a hearing, the court granted the delay. Thereafter, Bartunek attempted to file a pro se motion based on ineffective assistance of counsel and for violation of his speedy trial rights. But the court refused to accept the motion. Bartunek also included these claims in his § 2255

Motion. But the court dismissed these claims as well as several other claims stating that there was no colorable basis for the claims; either they were inexcusably procedurally defaulted and/or it had already considered the claims and rejected them.

B. Complete Breakdown of Communication

From the very beginning and continuing throughout the entire case, the attorney/client relationship was on rocky grounds. When Wilson first met with Bartunek, he made it very clear to Bartunek that he was in charge of the case, and that he would be making all decisions going forward without Bartunek's input. He compared himself to a driver in a car, and Bartunek was just a passenger, along for the ride. Wilson only met with Bartunek twice during the first month of his appointment. And thereafter, he refused to communicate with Bartunek until Bartunek told Wilson that he would report him to the court.

Wilson finally met with Bartunek a little over a month before the original trial date to inform him that he was going to delay the trial. The meeting became very heated when Bartunek questioned why the additional time was needed. And when Bartunek asked Wilson for an accounting of his time, Wilson got very defensive and told Bartunek that he could fire him if he felt that he wasn't doing his job. But this was not possible, because when the court appointed Wilson it told Bartunek that there would be no other appointments. Wilson then terminated the meeting without discussing anything further.

About a week before trial, Wilson met with Bartunek to discuss the government's plea offer. After hearing details of the offer,

Bartunek declined the offer. At that point, Wilson asked him to discuss any trial strategies he would use to prove his innocence. However, whenever Bartunek started to discuss an issue, Wilson would interrupt him and tell him it was irrelevant or proved nothing, but failed to explain why, or carry on a civil conversation about it. Therefore, Bartunek suggested they get the computer forensic specialist, Dan Meinke, in on the conversation. Via speakerphone, Meinke and Bartunek went over some of the same issues, but unlike Wilson, he agreed that some of them had merit. But Wilson would interrupt and dismiss whatever Meinke and Bartunek were discussing. After this kept happening, Bartunek got upset, telling Wilson that he needed to listen to him. Wilson said he was finished and ended the meeting.

Wilson contacted the court and asked that he be allowed to withdraw as counsel because the attorney/client relationship was broken beyond repair. According to Wilson he told the court that "I've had difficulty with Mr. Bartunek as far as discussing his case with him." Filing No. 407, p. 6. And that he "could not adequately represent [Bartunek] because there's not going to be any way [he] can communicate with [Bartunek] to -- to -- to effectively present the best defense possible for him at trial." Id., p. 7. And, it was the "tone of our prior meetings" as the basis of his motion. Id., p. 25. However, the court denied Wilson's motion, and Wilson continued to represent Bartunek during the trial, sentencing, and on appeal. But, the communication problems persisted during the rest of the case.

During Bartunek's trial, instead of sitting at the defense table with Bartunek, during most of the trial he sat at a table behind Bartunek with Meinke. This prevented Bartunek from confurring with either Wilson or Meinke. And since the jury was not told who Meinke was, they had to speculate as to why Wilson abandoned his client.

According to Bartunek, Wilson's behavior was due to the communication problems and the fact that Wilson was forced to represent him against his will and professional judgment. But the government claimed that "Trial counsel clearly availed himself of a qualified expert and had the expert available for consultation and use at trial." Filing No. 474, p. 24. And, it appeared that the court had the opinion that Bartunek believed Wilson's conduct was unreasonable, simply because Bartunek was more qualified than his expert. However, Bartunek argued that, although he was more qualified than the expert, this was not the reason that he believed Wilson was ineffective for preventing communicating with him and Meinke during the entire trial. It was because Bartunek believed his assistant had a constitutional duty to stand by his side. And without any input from Wilson or Meinke, and without a hearing, the court dismissed this claim.

C. Bartunek's Alibi Evidence of Actual Innocense

According the government, on March 26, 2016, a tower computer in Bartunek's residence was used to distribute child pornography during a video chat session using Omegle.com's website. However, Bartunek spent the afternoon and evening with a friend at the

Amerstar Casino, several miles away from Bartunek's residence. The primary evidence of this fact is a signed VISA and receipt from the Ameristar Sportsbar. The receipt shows that on March 26, 2016 at 7:07 PM, two guests were served, Bartunek and his friend.

But, Bartunek was not able to locate this alibi witness due to the fact that almost a year elapsed before he was made aware of the details of the alleged distribution. And, when he was made aware, he was incarcerated without bail, without access to resources needed to locate this individual, or the ability to visit the places he frequented to make inquiries regarding this matter.

But even without this witness, the VISA and receipt, together with computer records from the tower computer, show that someone other than Bartunek was using his computer on the 26th. Because the time needed to drive from Bartunek's residence to the Casino, park the car, go to the casino, then the Sportsbar, and to be waited upon, was 32 minutes, Bartunek would have had to leave his residence at 6:35 PM that day. (6:35 PM = 7:07 PM - 32 minutes). However, the tower computer's records show that the comptuer was logged off at 6:39:38 PM, five minutes after Bartunek would have left. And, since Bartunek can't be in two places at the same time, this shows that someone other than Bartunek was using his computer.

When Bartunek asked Wilson to use this alibi in his defense, Wilson refused to do so. According to Wilson, the government would attempt to dispute it, possibly saying that Bartunek

simply loaned his VISA to someone else.

When Bartunek filed his § 2255 Motion he included this evidence in support of his claim that Wilson was ineffective for failure to investigate this matter further to find this alibi witness or use this alibi in his defense. But the government disputed Bartunek's claim stating that the court had to speculate there was an alibi witness; that Bartunek's son's sworn affidavit regarding the time it took to go to the casino from Bartunek's home and get waited upon at the sportsbar was untue; and that there was overwhelming evidence of Bartunek's guilt. However, there was no evidence presented to show that Bartunek was in his residence at the time of the distribution. Furthermore, the tower computer could not have been used to distribute child pornography via a chat session on Omegle.com's website, because the software needed to do so was not found on the tower computer.

Without a hearing, the court dismissed any claim regarding the alibi evidence. According to the court, the evidence was far from overwhelming, and the evidence against [Bartunek] was strong." Filing No. 470, p. 3; "[Bartunek] has yet to identify his 'friend' or give any details as to what evidence they could give if called to testify." Filing No. 482, p. 17; and that the "purported alibi hinges on a dubious timeline that only applies to Count II." Id., p. 16-17. (The court meant Count I which is the distribution charge.)

Bartunek filed a timely Rule 60 motion which included newly discovered evidence, which he learned about while investigating his § 2255 Motion. But without a hearing, he was unable to

present this evidence to the court. Bartunek did try to file this newly discovered evidence with the district and appellate courts prior to completion of his appeal of his § 2255 Motion, but both courts refused to allow it. Therefore, he included it as part of his Rule 60 Motion.

This newly discovered evidence was from Bartunek's brother and sister-in-law, who Bartunek had previously identified as potential witnesses to Wilson. However, he didn't discuss his case with them at that time, because he counted on Wilson to interview them. Wilson assured Bartunek that he would be doing further investigations to uncover evidence that someone else committed the crimes, and that he would contact these witnesses, as well as others Bartunek identified.

But much to Bartunek's suprise, as he was preparing his § 2255 Motion, he found out that Wilson failed to contact either his brother or sister-in-law. Had Wilson interviewed them, he would have found out that Bartunek's brother stopped by his residence, twice, at or near the time of the alleged distribution on March 26th, to find Bartunek's car gone, and only Bartunek's housemate and dog were home.

The government disputed Bartunek's claim that this was newly discovered evidence of his innocense because Bartunek had identified them as witnesses in his § 2255 Motion. And, the court agreed with the government. The court also ruled that even if this were newly discovered evidence, Bartunek failed to exercise due dilligence to discover the evidence in time to move for a new trial.

D. Prosecutor's Misconduct at Trial

During the trial, the prosecutor made several egregeous errors in introducing evidence which violated the rules of evidence as well as Bartunek's right to a fair trial. The first error was to introduce NCMEC Reports, which were testimonial hearsay. While the reports were computer-generated, the human involvement in creating these reports clearly made them hearsay, not subject to the business records exemption. The prosecutor knew or should have known this based on previous case law in this circuit.

The remaining errors were evidentiary errors in admitting evidence extrinsic to the crime for which Bartunek was on trial. The prosecutor convinced the court to allow admittance of pictures of dolls, children's underwear, adult pornography, child erotica, and a messy house, obtained from a search of Bartunek's residence. However, these items were not listed in the warrant, were legal, not criminal in nature, and not used to commit a crime. In addition to this, the dolls were moved, undressed, and posed for pictures, which was not part of the search. And, they were not admitted under Rule 404(b) as extrinsic evidence, which allowed the prosecutor to avoid limiting instructions, and kept the court from doing a proper balancing test under Rule 403.

After the search of Bartunek's residence, the two police officers interrogated Bartunek. Within the first minute of the interrogation, Bartunek stated that he wasn't going to say anything and that he needed a lawyer. But the police continued to question him. Bartunek repeated his request for a lawer after approximately 5 minutes, and again 10 minutes later, before they

ended their interrogation.

Norris solicited testimony from officers Stigge and Pecha, and emphasized Bartunek's refusal to incriminate himself in his closing statements. According to Stigge, whenever they asked Bartunek a question, his common refrain was "I don't know what to say," and that he refused to answer their questions directly. Filing No. 410, p. 242. And During a Sidebar, Norris even admitted, "It still looks like we have violated [Bartunek's] rights," referring to improperly using Bartunek's statements against him. Id., p. 249.

The prosecutor was also able to get the court to admit false testimony from Shane Patton (S.P.) that Patton's victim whom he sexually assaulted in 2002 was Bartunek's victim, also. But, this was inadmissible propensity evidence under Rule 404, and not admissilbe under Rule 414 because of Patton's and his victim's ages at the time. According to Patton, he was 16 years old and his victim was 13, at the time. This was also untrue. According to police reports, both Patton and his victim were 17 years old. And, the prosecutor knew this, because he is the person who obtained the police reports. And yet, the prosecutor failed to correct this information he knew to be false. Furthermore, Bartunek was never found guilty of any crime, whatsoever, regarding any of Patton's false allegations.

The prosecutor also convicnced the court to allow inadmissible evidence of a 2013 Police Knock and Talk based on an anonymous tip that Bartunek possessed child porngraphy. According to the prosecutor this evidence was required to show why Pecha was

assigned to investigate the current case, and that Bartunek was being evasive when he refused to allow the officers to search his home in 2013 without a warrant. However, Pecha was a member of the FBI cyber task force, and he was normally assigned to investigate child pornography cases in Omaha. Furthermore, the reliability of the evidence was too low to obtain a warrant, let alone to be admitted at trial.

The prosecutor's § 2255 answer stated that any claims of prosecutorial misconduct were procedurally defaulted. And even if they weren't, Bartunek's claims were frivolous and had no basis in fact. And he continued to propogate the lie regarding the ages of Patton and his victim. And the court, without a hearing, also ruled that any trial errors were procedurally defaulted, and no misconduct occurred.

E. Court's Mistaken Sentencing Beliefs

The court held several mistaken beliefs, not based on facts, but on the prosecutor's erroneous claims about Bartunek's alleged conduct, misleading the court into believing that his behavior distinguished him from the "run-of-the-mill" offender; and therefore, Bartunek deserved the maximum statutory sentence possible. Filing No. 416, p. 46-56.

According to the Sentencing Commission, the actual facts show that: 1) four of the six enhancements-accounting for a combined 13 offense levels-cover conduct that has become so ubiquitous that they now apply in the vast majority of cases, resulting in and offense level of 37 for those convicted of distribution; 2) 95% of the offenders received enhancements for use of a computer;

3) the median number of images involved was 4,265; 4) 99% of the offenses included images of prepubescent victims; 5) 52.5% included images or videos of infants or toddlers; 6) 43.7% of the offenders participated in an online child pornography community; 7) 48.0% engaged in aggrivating sexual conduct prior to or concurrently with the instant child pornography offense; 8) 75.9% had a criminal history of I, the lowest category; 9) the average age of offenders was 41 years; and 10) 55.7% of the offenders were college educated. See U.S.S.C., Federal Sentencing of Child Pornography Non-Production Offenses (2021) ("The 2021 Report"). These were based on offenders sentenced in 2019, the same year Bartunek was sentenced. However, the court simply ignored these facts. (Compare to the PSR, Filing No. 374)

Other disputed facts included: 1) the § 2G2.2 Sentencing Guidelines were reasonable; 2) Bartunek's offense level was 42; 3) the five-level enhancement under § 2G2.2(b)(5) based on Patton's allegations was supported by sufficient indicia of reliability; 4) believing that Bartunek was using his computer expertise to view, store, and remove egregous images; and 5) Bartunek was severly punished for exercising his constitutional right to trial.

Evidence that the court presumed the sentencing guidelines for child pornography offenders was reasonable can be shown by the fact that it rejected a variance based on United States v. Abraham, 944 F. Supp. 2d. 723 (D. Neb. 2013) clearly showing that they overstate the offense level and resulting guidelines sentence, consistently. And that the court believed it was

giving Bartunek a 15% downard variance, not based on a disagreement with the guidelines, but rather on Bartunek's personal characteristics.

The next disputed fact was that the offense level was properly calculated. According to the Probation Officer's PSR, Bartunek's offense level was 37, prior to accepting responsibility, But, the government was able to convince the Probation Office to add the § 2G2.2(b)(5) enhancement resulting in a total level of 42.

But according to Bartunek, there were two erroneous enhancements which increased his offense level by 8 levels. These were § 2G2.2(b)(7), number of images, and § 2G2.2(b)(5), defendant engated in a pattern of activity involving the sexual abuse or exploitation of a minor. These two errors increased Bartunek's guidelines sentencinn range from 151-188 months to 360 months to life.

According to the PSR, Bartunek possessed 623 images of child pornography. However, this total included 350 images of child erotica, not child pornography, which cannot be counted. And, two images from Omegle.com were incorrectly counted as videos, even though no video was found. And therefore, they should have only counted as 2 images, not 150, as indicated in the PSR. Therefore the image count should have been at most 125 images, resulting in an increase in the offense level of 2, not 5. (125 = 623 - 350 - 150 + 2).

The § 2G2.2(b)(5) enhancement was based on the government's version of the crime on the PSR, obtained from uncorroborated out-of-court statements from previous police reports, not on

any facts or testimony given during the trial or sentencing. It is true that Patton did testify in Bartunek's trial, but not at sentencing. However, his statments were materially inconsistent with his previous statements in the police reports. And, while he testified that he viewed child pornography in Bartunek's apartment, police and court records show that no child pornography was found at the time. And, after Bartunek's computer and digital camera were seized by the police, they were returned intact, becausee they didn't contain any child pornography.

During Patton's trial testimony, he did not accuse Bartunek of sexually assaulting him. Patton did testify that he was found guilty of sexually assaulting one of his friends. And during cross-examination, he blurted out that his victim was also Bartunek's victim. But police records show that Patton's victim did not know who Bartunek was and could not identify him, either. Patton's credibility was so weak, that the charges resulting from his false allegations were dismissed by two courts, without any conviction, whatsoever. And this enhancment increased Bartunek's offense by 5 levels.

Without these two enhancements, Bartunek's offense level should have been at most 34. (34 = 42 - 5 + 2 - 5). This is the same level for the vast majority of child pornography distributors after they received a 3 level decrease for acceptance of responsibity. Had Bartunek accepted a plea instead of going to trial, his offense level would have been 31, resulting in a guidelines sentencing range of 108-135 months. This is a far cry from the governments 240 month sentencing recommendation.

Another disputed fact was the prosecutor's claim that Bartunek was using his computer skills to view, delete, and restore child pornography files to hide evidence of his crime, based soley on some omegle images found in a computer backup, also called a restore point. But this is unsupported by the facts. It takes no specialized skills to view, store, or delete files. And, it doesn't require any specialized skills to create restore points because the can be easily created through the Windows Control Pannel. They are also created automatically by the Windows operating system. Furthremore, a person cannot restore specific selected files using a restore point. In fact the government's FBI computer expert stated that he could not draw any conclusion from the restore points. And, while it is possible to restore some deleted files, this would require specialzed software, which the government admitted was not found.

The prosecutor also attempted to convince the cour that using Omegle.com's video chat website was an aggrivating factor in support of a harsher sentence, But he admitted that there was no evidence that Bartunek participated in any chats. This lack of evidence, together with the fact the Omegle.com is not a one-to-one chat forum devoted to child pornography, shows by definition, that Bartunek was not a member of an online child pornography community. See The 2021 Report, p. 38. And even it it were true, it is not that unusual to merit such a long sentence, as 43.7% of offenders do belong to a community. Id.

Another factor the prosecutor tried to use to differentiate Bartunek from a run-of-the-mill offender was the dolls and

childrens underwear. However, this claim is contradicted by the prosecutor's previous claim in his trial brief, when he told the court that child pornography offenders often possess legal material such as dolls and children's underwear.

Finally, the facts show that Bartunek was severly punished by not taking a plea, and exercising his constitutional right to trial, instead. About a week before trial, the prosecutor offered Bartunek an 11(c)(1)(C) plea agreement for a sentence of 4-7 years for possession, dismissing the distribution charge. And yet, after the trial, the prosecutor recommended the maximum statutory sentence of 20 years for distribution and 10 years for possession. However, there were no new facts or evidence presentend at trial which were not known by the prosecutor, well before trial, when the plea was on the table. Clearly, a post-trial sentencing recommendation that was 3 to 5 times greater than the pre-trial plea sentencing recommendation is objective evidence that Bartunek was being severly punished for going to trial.

Further evidence of this fact can be shown based on the prosecutor's own words at sentencing, when he was arguing for an unduly long sentence. According to the prosecutor, one of the reasons for his sentencing recommendation was that "average defendants [] end up confessing and admitting their conduct", but Bartunek did not; and "[v]ery few end up pushing this to trial." Filing No. 416, p. 50. While the prosecutor may claim he was jsut stating facts, such a large sentencing disparity cannot be justified by looking at the facts.

Additional evidence that the prosecutor was punishing Bartunek for going to trial can be shown using the Sentencing Commission's guidelines as follows. The Guideline offense level for a sentence of 4-7 years (the plea offer sentence) is 22 to 27. Adding 3 levels for not taking the plea yields and offence level of 25 to 30, resulting in a guidelines sentencing range of 57-121 months, not the 240 months the prosecutor recommended, or the 204 month sentence that Bartunek actually received.

Like the other controverted issues, these sentenicng issues were summarily dismissed without a hearing on the facts which were in dispute. Furthermore, Bartunek's claims were not frivolous, and therefore the court erred dismissing Bartunek's claims without a hearing, which is a major defect in the § 2255 proceedings, cognizable in a Rule 60 Motion.

REASONS FOR GRANTING THE WRIT

I. Under This Court's Case Law The District Court Must Hold A Hearing If There Are Controverted Issues Of Fact In A § 2255 Proceeding

In Bartunek's case, there were several claims in his § 2255 Motion which could not be resolved on their merits, because there were factual matters in dispute which could not be resolved without a hearing. But the district court refused to hold a hearing in violation of the law. See e.g., Machibroda v. United States, 368 US 487, 494 (1962) ("[T]he District Court did not proceed in conformity with the provisions of 28 U.S.C. § 2255, when it made findings on controverted issues of fact without notice to the petitioner and without a hearing"); United States v. Hayman, 342 US 205, 220 (1952) (same).

This court observed in another case that since the appellant's assertions were denied by the government, "the denials only serve to make the issue which must be resolved by evidence taken in the usual way. They can have no other office." Walker v. Johnston, 312 US 275, 286-87 (1941).

Neither the motion nor the files and records "conclusively show that [Bartunek] is entitled to no relief." 28 U.S.C. § 2255. And, this is not the kind of case which the district judge "could completely resolve by drawing upon his personal knowledge or recollection." Machibroda at 494. And, the contention that the "allegations are improbable and unbelievable, cannot serve to deny him an opportunity to support them by evidence." Walker at 287.

Therefore, this calls for an excercise of this Court's supervisory powers, because the appellate court sanctioned the district court's extreme departure from the accepted and usual course of § 2255 judicial proceedings by refusing to have a hearing on controverted issues of fact.

II. The Lack Of A § 2255 Evidentiary Hearing Are Grounds For Relief Under Rule 60(b)(1)

The appellate court erred in affirming the district court's opinion that Bartunek's Rule 60(b) Motion was "an attack on the merits" of claims previously "adjucated in a prior petition." Filing No. 533, p.7. While Bartunek did include claims that were previously denied in his § 2255 Motion, these claims were not decided on their merits, because there were issues of disputed facts, which could not be resolved without a hearing.

A claim is decided on its merits if it is decided on the "factual substance" of the claim. Webster's II College Dictionary, 3rd ed. (2005), p. 702. It follows that if the facts presented to the court were unknown, false, disputed, or unsupported by the record, then the claim was not decided on its merits.

And, when a district court denies a § 2255 motion without an evidentiary hearing, the court is obligated "to look behind that discretionary decision to the court's rejection of the claim on its merits, which is a legal conclusion that [the courts] review denovo." Noe v. United States, 601 F.3d 784, 792 (8th Cir. 2010).

Bartunek's Rule 60(b)(1) claim was that the district court failed to hold a hearing on theses claims, which was was a legal error, and therefore, it was a "mistake" which could be adjucated in a Rule 60(b)(1) motion. Kemp v. United States, 142 S. Ct. 1856, 1862 (2022). The § 2255 claims were included in his Rule 60(b) motion, to allow the appellate court perform a denovo review of these claims, to show that the claims set forth "specific and detailed factual assertions" that if true, would entitle the petitioner to relief. Machibroda at 496.

III. Bartunek's § 2255 Claims Are Not Frivolus And Deserve Further Consideration

As previously discussed, there were five claims that were not decided on their merits. And there is case law which shows that these claims merit habeas relief.

A. Bartunek's Right To A Speedy Trial Was Violated

This court identified four factors relevant to show that a defendant's constitutional right to a speedy trial was violated:

1) length of delay; 2) reason for delay; 3) the defendant's assertion of his right; and 4) prejudice to the defendant. See Barker v. Wingo, 407 US 514, 530 (1972). In Bartunek's case, all of these factors weigh in Bartunek's favor.

Bartunek's 20 month delay (February 17, 2017 until October 29, 2018) shows that the first Barker factor weighs heavily in favor of Bartunek. See Doggett v. United States, 505 US 647, 652 n. 1 (1992) (A delay approaching a year meets this factor).

The majority of the delays were not due to the defendant, but to the prosecutor, ineffective counsel, incarceration, and the court itself. The following table shows the delays in this case and the underlying cause of the delays.

Delay	Dates	DCD	Cause
11	02/17-02/28	12, 24, 38	Prosecutor/Detention
35	03/09-04/13	31, 34	Counsel/Overburdened
15	04/13-04/28	45	Jail/Resouce Limits
11	05/04-05/15	87, 89	Prosecutor/ Overburdened
35	08/21-09/25	191, 196	Jail/Resouce Limits
35	12/04-01/08	232, 237	Prosecutor/Discorery Delay
49	01/22-03/12	265, 269	Prosecutor/Discovery Delay
168	03/12-08/27	303, 304	Counsel/Overburdened
63	08/27-10/29	320, 322	Counsel/Lack of Diligence

422 Days Total. (DCD = District Court Docket Number)

Because the prosecutor went to extraordinary efforts to keep Bartunek in jail, he is directly responsible for any delays caused by Bartunek's incarceration. He was also responsible for several discovery delays in producing exact copies of the data and files contained on the electronic devices seized from Bartunek's residence. Therefore, these delays weigh against the government. "A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the

government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered ..." Barker at 531.

Normally, the delays by the defendant's counsel weigh against the defendant. But in Bartunek's case, the delays were due to overburdened Public Defender Attorneys with other cases. And therefore, these delays do not weigh against Bartunek. See Barker at 538 ("unreasonable delay in run-of-the-mill criminal cases cannot be justified by simply asserting that the public resources provided by the State's criminal-justice system are limited and that each case must await its turn").

The last delay was due to counsel's failure to exercise due dilligence to prepare for trial, and using an unjustified reason for the delay, unsupported by the facts. But, a "lack of diligent preparation" is no excuse to grant a continuance. 18 U.S.C. § 3161(h)(7)(C). And, "it is unprofessional conduct for a lawyer to intentionally misrepresent matters of fact or law to the Court." ABA Standards Relating to the Defense Funciton. See also, United States v. Williams 511 F.3d 1044, 1058 (10th Cir. 2007) ("Simply identifying an event, and adding a conclusionary statement that the event requires more time is not enough [to delay a trial]").

The total time Bartunek was incarcerated pending trial was 619 days. And based on the facts and law, Bartunek was only responsible for 197 days, or about 1/3 of the total time. (1/3 = (619-422)/619). Therefore, it is clear that the Second Barker factor weighs in favor of Bartunek.

There is no question that Bartunek asserted his speedy trial rights early and continuously throughout the court proceedings. He first expressed his concerns on March 14, 2017, when he asked for new counsel, because his current counsel was to busy with other cases to meet with him. And every time the court granted a continuance, Bartunek objected to it. Finally, on February 23, 2018, he filed a motion to dismiss his case or bring him to trial, claiming his speedy trial rights were violated. And again, when he found out the court granted a 168 day delay of trial because, once again, his counsel was too busy with other cases to expidite his case. Clearly, these actions show that Bartunek satisfies the third Barker factor.

Bartunek meets the fourth Barker factor because he suffered both personal prejudice and legal prejudice. He was incarcerated for almost 2 years, lost his job, home, dog, and personal contact with his family and friends. He was unable to find his alibi witness, and was forced to be represented by counsel which he couldn't communicate with, and did not provide him effective assistance during the trial, sentencing, or on appeal.

B. Bartunek Was Denied Effective Assistance Of Counsel

There were three instances, in particular, which show that Bartunek was denied effective assistance of counsel: counsel's refusal to investigate and present an alibi defense; a total breakdown of communication between Bartunek and counsel; and the inability of Bartunek to confur with counsel during trial.

This court has ruled that counsel is ineffective for failing to investigate and present an alibi defense. See, Schlup v.

Delo, 513 US 298 (1995). The factual evidence used to support their alibi defense were very similar: there was no physical evidence tying them directly to the crime; they both had physical evidence showing that they were not at the secene of the crime, Schlup had a video, and Bartunek had a signed VISA, Receipt, computer records, and his son's sworn affidavit; and there were alibi witnesses corroborating their claims, which were not interviewed. In both cases, the district court denied their habeas claims of ineffective assistance of counsel, claiming that there was overwhelming evidence of their guilt, without holding a hearing on their claims. And Bartunek's ineffective assistance claim is even stronger; because unlike Schlup's counsel, Bartunek's counsel refused to present an alibi defense.

In addition to this, there are cases in the Eight Circuit in which the courts found that counsel was ineffective for not investigating and presenting an alibi defense. See, e.g., Grooms v. Solem, 923 F.2d 88 (8th Cir. 1991) (the appellate court affirmed the grant of the habeas petition, stating that it was unreasonable not to make an effort to contact alibi witnesses); Wade v. Armontrout, 798 F.2d 304 (8th Cir. 1986) (the court ruled that counsel's failure to investigate an alibi defense was unreasonable, and made the adversarial testing process unreliable. And if his claim were true, defendant was entitled to relief); Tosh v. Lockhart, 879 F.2d 412 (8th Cir. 1989) (The district court found that couns's failure to make any effort to obtain alibi witnesses violated his 6th Amendment right to counsel).

Well before trial, Bartunek made the court aware that there were problems with the attorney/client relationship through letters to the court, a motion to dismiss the case, siting problems with his counsel, and his objection to continuances requested by his counsel. (See also, Nebraska District Court Case No. 8:18CV440). And during the hearing on Wilson's motion to withdraw, prior to the trial, it was made clear that the attorney'client relationship was broken beyond repair and that there was a total breakdown of communication between Wilson and Bartunek.

At the hearing, Bartunek was given a Hobson's Choice of: 1) keeping counsel who couldn't communicate with him and was not prepared for trial; 2) giving up his right to counsel and instead representing himself; or 3) asking for another attorney and forgoing his right to a speedy trial. But no matter what choice Bartunke made, it violated his right to effective assistance of counsel. See Gilbert v. Lockhart, 930 F. 2d 1356, 1360 (8th Cir. 1991) (defendant's right to counsel was violated when he was offered the "Hobson's Choice" of preoceeding to trial with an unprepared counsel or no counsel at all, requiring reversal of his conviction).

There can be no doubt that forcing Wilson to continue to represent Bartunek, in light of this conflict between the two of them, deprived Bartunek of his right to effective assistance of counsel. See, e.g., Holloway v. Arkansas, 435 US 475, 488-91 (1978) (A court is required to appoint alternate counsel if there is a "conflict of interest," and "irreconcilable conflict," or a

"complete breakdown in communication" between the attorney and the defendant). And therefore, reversal of Bartunek's convictions is mandated, without having to show any prejudice. Id.

The third time Bartunek was deprived the effective assistance of counsel was during his trial when Wilson sat behind Bartunek, denying Bartunek his constitutional right to confur with his counsel during the trial. Although the court believed this was good trial strategy for Wilson to consult with his computer forensic specialist, there was no reason that the three of them could not have been seated at the same table. Furthermore, Bartunek's absolute right to confur with his counsel during the trial cannot be taken away, without violating his Sixth Amendment Right to Counsel. See, e.g., United States v. Cronic, 466 US 648, 659 (1984) (abandonment amounted to a "complete denial of counsel at a critical stage of trial," requiring reversal without the showing of any prejudice.)

> "As part of the right to effective assistance of counsel, the Sixth Amendment guarantees a defendant the right to confur with counsel in the courtroom about the broad array of unfolding matters, often requiring immediate responses, that are relevant to the defendant's stake in his defense and the outcome of his trial." Morre v. Purkett, 275 F.3d 685, 688 (8th Cir. 2001).

See also, Genders v. United States, 425 US 80 (1976) (the appellate court ruled that defendants have the right to unrestricted access to their lawyer for advice on a variety of matters, and any order barring communication between a defendant and his attorney, other than a brief routine recess during the day, violates the defendant's Sixth Amendment right to counsel). And the court's order denying Wilson to withdraw, effectively did just that.

C. Prosecutor's Misconduct During The Trial Violated Bartunek's Due Process Rights To A Fair Trial

"An accused is entitled to a fair trial that is on properly employing the rules of evidence." United States v. Langley, 549 F.3d 726, 731 (8th Cir. 2008). However, the prosecutor repeatedly introduced evidence that he knew, or should have known, violated the rules of evidence. In addition to this, he used evidence which also violated Bartunek's constitutional rights: right to privacy; right against self-incrimination; presumption of innocence; confrontation rights; and due process.

The first evidentiary rule violation was when the prosecutor introduced the NCMEC Reports, without objection. These Reports were "out-of-court statements offered for the truth of the matter" that child pornogrtaphy was distributed using Omegle.com. United States v. Juhic, 954 F.3d 1084, 1088-89 (8th Cir. 2020). While the Reports may have been computer-generated, "human involvement in this otherwise qutomated process make the [Reports] hearsay." Id. See also United Stqtes v. Morrissey, 895 F.3d 541, 554 (8th Cir. 2018) (this case was decided well before Bartunek's trial.

Even if the NCMEC Reports were permissible under a hearsay exception, using them still violated the confrontation clause under the Sixth Amendment, because they were testimonaial, meaning they were "made under circumstances which would lead an objective witness to believe that the statement[s] would be available for use at a later trial." Melendez-Diaz v. Massachusetts, 557 US 305, 310, 334 (2009). And without these Reports, Bartunek would not have been convicted of distribution. However, the court

didn't even address this error in its 2255 Memorandum.

The remaining evidentiary errors were errors in admitting extrinsic evidence, all which violated Bartunek's constitutional rights. The first set of these errors involved admitting evidence which was obtained in violation of Bartunek's protection against an illegal search under the Fourth Amendment. This evidence included admitting pictures of the dolls, underwear, adult pornography, messy house, and child erotica. These items were not listed in the warrant, were legal, not criminal in nature, and not used to commmit a crime. Therefore, they were not subject to search and seizure. See Rule 41(c).

And these items were not subject to the plain sight exception because they were not in the proximity of other items listed in the warrant, and the police did not believe they were associated with any criminal activity. See Coolidge v. New Hampshire, 403 US 443, 456-471 (1971). And, during the search, the police moved the dolls, undressed them, and posed them on the bed to take their pictures. They were not looking for contraban when they did this. Clearly, these actions constituted an illegal search. See Arizona v. Hicks, 490 US 321 (1987) (where moving a piece of stereo equipment constituted an illegal search).

These items were also admitted under the wrong rule of evidence, under Rule 401, as direct evidence, instead of Rule 404, as extrinsic evidence. Therefore, no limiting instructions were given, and any balancing test was done against the wrong rule of evidence. See, e.g., United States v. Sumner, 119 F.3d 658 (8th Cir. 1997) (remand was necessary because the court

performed the 403 balancing test against the wrong rule of evidence).

The most egregious error was made in admittion prior "bad act" evidence was the testimony from Shane Patton (S.P.) regarding allegations that Bartunek sexually assaulted the same person which Patton was found guilty of sexually assaulting in 2002. However, Bartunek was never convicted of any crime regarding these or any other allegations of prior bad acts made by Patton.

Clearly, this evidence was propensity evidence, forbidden by Rule 404(b). And because both Patton and his victim were 17 years old at the time, it was not admissible under Rule 414. The prosecutor was able to mislead the court into admitting this evidence because Patton claimed he was 16 at the time and his victim was 13. But this was not true. And the prosecutor knew, or should have known this, because the ages of Patton and his victim were included in the prosecutor's Exhibit 1, admitted to the court during Bartunek's detention hearing on February 23, 2017. (See also Filing No. 481, Attachment H).

Clearly, the use of this evidence was a gross violation of Bartunek's due process rights, mandating reversal. "A conviction obtained through the use of false evidence known to be such by representatives of the [government] must fall under the [Fifth] Amendment." Napue v. Illinois, 360 US 264, 269 (1959). "The same result obtains when the [government], although not soliciting false evidence, allows it to go uncorrected when it appears." Id. But the court failed to address this claim or any other trial errors, stating that they were procedurally defaulted.

While Bartunek was not on trial for sexual assault, since this evidence was admitted, there can be no doubt that it lead the jurors to believe that Bartunek was a bad person, deserving to be punished, regardless of whether he was guilty of the crimes charged.

> "Rape is a more serious-and more prejudicial-offense than child pornography" and thus "inflamed the jury" and ran "the risk of confusing the issues" in the trial and "Waisted valuable time." United States v. Johnson, 239 F.3d 138, 156 (3rd Cir. 2002).

> "Improper admissions of prior crime or conviction, even in the face of other evidence supporting the verdict, constitutes plain error impinging on the fundamental fairness of the trial itself." United States v. Biswell, 700 F.3d 1210, 1310 (10th Cir. 1983).

Other evidence wrongly admitted was testimony solicited by the prosecutor regarding a Police Knock and Talk in 2013 based on an anonymous Crime Stoppers Tip that Bartunek possessed child pornography. According to the prosecutor it was needed to show why Officer Pecha was assigned to the case and that Bartunek was evasive because he refused to allow the officers to search his house without a warrant. Again, this was forbidden propensity evidence. And its admission violated Bartunek right to a fair trial under the Fifth Amendment, and his confrontation rights under the Sixth Amendment.

It was irrelevant why Pecha was assigned to the case. The offense was committed in Omaha, and Pecha was a member of the FBI cyber task force, normally assigned to investigate child ponrography cases in Omaha. And since the allegations was insufficient to get a search warrant at the time, clearly it lacked the indicia of reliability to be admitted at trial.

"Without this testimony, the jury was in no danger of not receiving 'a coherent picture of the facts' of the charged crime." United States v. Heidebur, 122 F.3d 577, 580 (8th Cir. 1997). And, in this case, allegations of a past crime violated Bartunke's right to confrontation: See, e.g.,

> United States v. Silva, 380 F.3d 1010, 1020 (7th Cir. 2004) ("Allowing agents to narriate the course of their investigation, and thus spread before jurrors daming information that is not subject to cross-examination, would go far toward abrogating the defendant's right under the sixth amendment and the hearsay rule.")

Furthermore, Bartunek was not being evaisive, but only exercising his Fourth Amendment Constitutional privacy rights. And claiming that Bartunek was evaisive for doing so, shows how vindictive the prosecuto was. See, e.g.,

> United States v. Goodwin, 457 US 368, 373 (1982) (Vindictive Prosecution occurs when a prosecutor seeks to punish a defendant for exercising a legal or constitutional right).

Another instance where the prosecutor used inadmissable evidence in violation of Bartunek's constitutional rights was when he solicited evidence from Stigge regarding Bartunek's answers to their questions when interrogating him after the officers searched his residence in 2016. Witin the first minute, Bartunke stated that he wasn't going to say anything and then indicated that he wanted a lawyer. But the officers kept questioning him and then used his statements at trial. This violated Bartunek's Presumption of Innocence and Right to Silence.

> "If an individual indicated in any manner at any time prior to or during questioning that he wishes to remain silent or if he states that he wants an attorney, the interrogation must cease." Davis v. United States, 412 US 452, 471 (1994).

And during a sidebar regarding the admissability of this evidence, the prosecutor admitted, "it still looks like we have violated [Bartunek's] rights." And even though Bartunek's counsel objected to this testimony, the court let it stand ruling that the objection was untimely.

The prosecutor also used Bartunek's statements in his closing argument to notify the jury that Bartunek did not tell his story promptly. And even though Bartunek did not remain silent, the use of this testimony had the same effect, that the jury is likely to draw a strong inference of his guilt from the fact that he did not admit any guilt or blame anyone else. See, e.g., Dole v. Ohio, 426 US 610 (1976).

Even if the court doesn't find that any one of these errors sufficient to merit reversal of Bartunek's convictions, "where the case as a whole presents an image of unfairness resulting in the deprivation of defendant's constitutional rights, even though none of the claimed erros is sufficient to require reversal," reversal is mandated. United States v. Oliver, 987 F.3d 795, 799 (8th Cir. 2020) (describing when evidentiary errors are not harmless, requiring reversal). See also, Chapman v. California, 386 US 18, 24 (1967) ("If the error is of constitutional magmitude, then the government is required to prove the error was harmless beyond a reasonable doubt"); United States v. Green, 648 F.2d 587 (9th Cir. 1981) (evidentiary errors, considered cumulatively, require reversal). Clearly, the prosecutor's misconduct deprived Bartunek to the right to a fair trial, violating Bartunek's due process rights.

D. The Court's Mistaken Sentencing Beliefs

Bartunek's sentence was not based on facts, but rather mistaken beliefs held by the court, based on erroneous facts and claims propogated by the prosecutor. The first mistaken belief was that the court presumed that the § 2G2.2 guidelines were reasonable. According to this court, the district court may not presume the guidelines are reasonable. See Gall v. United States, 552 US 38, 50 (2007). Although the court was made aware that there were problems with these guidelines via case law, i.e., United States v. Abraham, 944 F. Supp. 2d 723 (2013), it rejected this information, stating it was dated and only appluied to run-of-the-mill offenders. However, as shown by The 2021 Report, these guidelines grossly overstate the offense level, and resulting sentencing range, in virtually all cases.

The second mistaken belief was that Bartunek's alleged conduct was more egregious than the run-of-the-mill offender. The prosecutor was able to convince the court of this false belief by miscalculating the offense level, using claims unsupported by the facts, and convincing the court to give significant weight to improper and irrelevant factors, including Bartunek's refusal to accept a plea. And therefore, Bartunek's sentence was both procedurally and substantively unreasonable.

> "Procedural error includes failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as manditory, failing to consider the § 3553(a) foactors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence-including an explination for any deviation from the Guidelines range." United States v. Feemster, 572 F.3d 455, 461 (8th Cir. 2009).

> A sentence is substantively unreasonable if the court "fails to consider a relevant factor that should have received significant weight; gives significant weight to an improper or irrelevant factor, or considers only the appropriate factors but in weighing those factors commits a clear error of judgnment." Id.

A court must begin any sentencing procedure by correctly calculating the guidelines range. See Gall at 53. This range is based on the offense level. But in Bartunek's case, the offense level was miscalculated because it was based on two erroneous enhancements.

Clearly, the number of images was grossly overstated using child erotica, which is not allowed. See, e.g., United States v. Vosburg, 602 F.3d 505, 507 n.7 (3rd Cir. 2010). And, although the prosecutor argued that the names of files must be counted, since a file name alone cannot be used to create a video or image, by definition it cannot be counted.

> "visual depiction" includes undeveloped film and videotape, data stored on a computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format." 18 U.S.C. § 2256.

The second error made in the offense level calculation was the use of Patton's uncorroborated out-of-court statements from previous police reports to support the § 2G2.2(b)(5) enhancement, without a "sufficient indicia of reliability to support its probable accuracy." U.S.S.G., § 6A1.3 Resolution of Disputed Factors (Policy Statement. See also:

> United States v. Bailey, 547 F.2d 68, 71 (8th Cir. 1976) ("A sentencing judge [] must not equate arrests as evidence of prior wrongdoing."); Shepard v. United States, 544 US 13, 16 (2005) (Police reports cannot be used to support sentencing enhancements).

Another erroneous fact was the prosecutor's claim that Bartunek used his technical expertise to hide evidence of his crimes. This was mere speculation, without any evidence to support his claim. The prosecutor also claimed that because Bartunek used Omegle.com he was more culpable than other offenders without any evideence that Bartunek participated in any chats. And the Prosecutor also claimed the dolls and underwear distinguished Bartunek from other offenders, contradicting his own trial brief, as well as well as case law showing that this would not be atypical. And therefore, the court committed a substantive error because it gave these factors significant weight in its sentencing decision,

Finally, Bartunek was severly punished because he refused to take a plea. First of all, the sentence in a plea agreement is an "appropriate disposition of the case." Fed. R. Crim. P. 11(c)(1)(C). See also United States v. Booker, 543 US 220, 226 (2005) ("[P]lea bargaining enevitably reflects estimates of what would happen at trial."). Clearly a sentencing recommendation 3-5 times greater than the plea recommendation is objective proof that the prosecutor was trying to severly punish Bartunek for exercising his constitutional right to tial. See, e.g., United States v. Goodwin, 457 US 368, 372 (1982) ("To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'").

Furthermore, Bartunek's unduly long sentnece created unwarranted sentencing disparities in violation of 18 U.S.C. § 3553(a)(6). This can be demonstrated by comparing Bartunek's

sentence to other offenders sentenced in 2019. Bartunek was sentenced to 17 years (204 months) for distribution, and 10 years for possession, run concurrently. The average and median sentences for Nebraska child pornography offenders was 90 and 78 months, respectfully. See U.S.S.C., Statistical Information Packet, Fiscal Year 2019, District of Nebraska (2019). And, the Nationwide average and median sentences was 103 and 84 months. Id. Bartunek's sentence was:

* over 2 times greater than the sentnece of Nebraska child pornography offenders, and almost 2 times greater than Nationwide child pornography offenders (Id.);

* greater than 98% of the average and median sentences of any crime. Only murder was greater (Id.); and

* greater than 99% of most child pornography offenders (The 2021 Report, p. 54-58).

And even though Bartunek was given a 15% downward variance from the statutory maximum sentence of 20 years, this is a far cry from the average downward variance of 62% which other Nebraska child pornography offenders typically receive. See Stattistical Study of Child Pornography Cases in Nebraska (2013), Filing No. 508, Exhibit 5).

Clearly, Bartunek's unduly long sentence cannot be justified, no matter how you look at it. And there can be no doubt that the prosecutors vindictive misconduct was the cause of Bartunek's unfair sentence.

There can be no coubt that the court's mistaken beliefs resulted in both procedural and substantive errors. Therefore, Bartunek's sentence must be vacated.

CONCLUSION

Failure to hold a hearing on controverted issues of fact in Bartunek's § 2255 proceedings was an error of law that is cognizable in a Rule 60(b)(1) motion. And because of this error, the district court unjustly denied Bartunek's Constitutional claims which had merit to grant him habeas relief.

And, the appellate court's sanction of the district court's departure from the accepted and unusual court of proceedings, calls for an exercise of this Court's supervisory power.

Therefore, the Court should grant this Petition for a Writ of Certiorari.

Respectfully Submitted,

Gregory P. Bartunek 9/23/24

Gregory Bartunek
29948-047
Federal Correctional Institution
P.O. Box 9000
Seagoville, TX 75159