NONPRECEDENTIAL DISPOSITION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 6, 2024*
Decided March 7, 2024

Before

MICHAEL B. BRENNAN, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

Nos. 22-3311, 23-1003, 23-1735, & 23-2582

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	Appeals from the United States District Court for the Central District of Illinois.
v.	No. 17-CR-40032-001
TIMOTHY B. FREDRICKSON, *Defendant-Appellant.*	Michael M. Mihm, *Judge.*

ORDER

In these consolidated appeals, Timothy Fredrickson challenges the district court's denial of five motions challenging his conviction for sexual exploitation of a child. We lack jurisdiction to review interlocutory rulings on two of his motions because they

* These consolidated appeals are successive to appeal no. 20-2051 and under Operating Procedure 6(b) are decided by the same panel. 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).

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arise from still-ongoing proceedings under 28 U.S.C. § 2255; the district court reasonably denied the remaining motions over which we have jurisdiction. Thus, we dismiss in part and affirm in part.

In 2020, a jury found Fredrickson guilty of sexually exploiting a minor, 18 U.S.C. § 2251(a), (e), and he was sentenced to 200 months' imprisonment. We upheld the conviction and sentence on direct appeal. *United States v. Fredrickson*, 996 F.3d 821, 823 (7th Cir. 2021). We also affirmed the denials of his two motions for compassionate release, where the district court ruled that Fredrickson did not present extraordinary or compelling grounds for release. *See* No. 23-1042, 2023 WL 6859761 at *1 (7th Cir. Oct. 18, 2023); No. 22-1542, 2022 WL 16960322 at *1 (7th Cir. Nov. 16, 2022).

Fredrickson's first three motions pertain to his postconviction challenge under 28 U.S.C. § 2255, which remains pending in the district court. As relevant to this appeal, Fredrickson initially moved for the district judge's recusal in the § 2255 proceeding, asserting that by overseeing both the trial and the collateral proceedings, the judge was biased. Second, he moved for a magistrate judge to oversee the § 2255 motion. Third, he moved for release on bail during the collateral proceedings.

The district court denied these three motions. First, it denied his motion for recusal because Rule 4(a) of the Procedural Rules Governing Section 2255 Proceedings requires that the judge who oversaw the trial also rule on the collateral attack. Second, the court rejected his motion to proceed before a magistrate judge, reasoning that the circumstances did not justify doing so. Third, the court denied his motion for bail by concluding Fredrickson had not shown that his § 2255 attack—consisting of what it described as 80 weak claims—was "exceptional and deserving of special treatment."

Fredrickson's fourth motion was for a new trial under Rule 33 of the Federal Rules of Criminal Procedure. He argued that he had recently discovered that the search yielding incriminating evidence in his criminal case was based on an invalid search warrant; therefore the court should have suppressed the results of that search. The court denied this motion because Fredrickson and his counsel already had access from the government to the evidence supposedly showing that the search was improper. Having no newly discovered evidence, a new trial was not warranted. *See* FED. R. CRIM. P. 33(b)(1).

Fifth and finally, Fredrickson moved under Rule 41(g) of the Federal Rules of Criminal Procedure for the return of seized property. He suggested that the

government no longer needed certain items seized during its investigation; therefore, he asked the district court to order the property's return. The court denied this motion, too, for two reasons. First, if Fredrickson succeeded with any of his ongoing collateral challenges, the government might need the seized evidence for retrial. Second, some of the property remained in the possession of state police, and the court could not compel state police to release the property.

We begin our analysis by focusing on Appeal No. 22-3311, which contests the interlocutory rulings on two motions arising out of Fredrickson's § 2255 case: the denials of his motions for recusal and for a magistrate judge. We lack jurisdiction to review them. Generally, we can review only the final decisions of the district court, 28 U.S.C. § 1291, and (as Fredrickson does not dispute) these two denials are not final decisions in the § 2255 case. *See United States v. Henderson*, 915 F.3d 1127, 1130 (7th Cir. 2019). Further, no exception to that general rule permits us to review these interlocutory orders—a final order in the § 2255 case must issue first. *See id.* at 1131. Indeed, we have already dismissed as premature the appeal of another interlocutory order arising out of those proceedings. *See* No. 23-2124 (7th Cir. Jul. 13, 2023).

We may, however, review the order denying bail, the subject of Appeal No. 23-2582. Under the collateral-order doctrine, denials of bail are appealable while § 2255 proceedings remain pending. *See Henderson*, 915 F.3d at 1130. Further, a certificate of appealability is not required. A defendant must receive a certificate of appealability when appealing an order denying collateral relief. *See* § 2253(c)(1)(B). But the Supreme Court has clarified that a certificate of appealability is not necessary for interlocutory orders such as a motion to appoint counsel because § 2253(c) applies only to final orders in the collateral proceeding. *Harbison v. Bell*, 556 U.S. 180, 183 (2009). The circuits to have considered the matter have extended that logic to motions denying bail, and we agree. *See Illarramendi v. United States*, 906 F.3d 268, 270 (2d Cir. 2018); *Pouncy v. Palmer*, 993 F.3d 461, 464 (6th Cir. 2021). Because a ruling on bail is collateral to the merits of the § 2255 claim, and because the ruling conclusively determines that collateral issue, no certificate of appealability is required. *See Illarramendi*, 906 F.3d at 270.

We now turn to the merits of that motion. District courts have the authority to consider motions for bail pending § 2255 review, *see Cherek v. United States*, 767 F.2d 335, 337 (7th Cir. 1985), and the court did not abuse its authority in denying Fredrickson's motion. We have warned that this is "a power to be exercised very sparingly." *Id.* Although we have not set forth our own standard for when district courts might grant bail pending § 2255 review, other circuits generally require that the petitioner show a

high likelihood of success on the merits and extraordinary circumstances that justify release on bond. *See Illarramendi*, 906 F.3d at 271; *Pouncy*, 993 F.3d at 463. The district court reasonably ruled that neither condition is present. It could not identify a likely winning claim in Fredrickson's petition, a conclusion that Fredrickson does not contest persuasively on appeal. And as the district court previously ruled in denying his two motions for compassionate release—rulings that we upheld on appeal—he identified no extraordinary or exceptional circumstances that justified his release.

That brings us to Federick's motion for a new trial. We review the denial of that motion—a final order—for abuse of discretion, *see United States v. O'Malley*, 833 F.3d 810, 813 (7th Cir. 2016), and the district court reasonably denied the motion here. As relevant on appeal, Fredrickson needed to prove that he discovered new evidence after trial and that he could not have earlier acquired the evidence through the exercise of due diligence. *See id.* But the district court permissibly ruled that his evidence was not new. As it explained, before trial the government gave Fredrickson access to the information upon which he now makes his claim about an improper search. And even if the government did not furnish the information on its own, nothing prevented Fredrickson or his attorney from requesting it. Thus the court reasonably found that Fredrickson could have obtained the evidence through the exercise of due diligence. *See United States v. Coscia*, 4 F.4th 454, 469–70 (7th Cir. 2021).

Fredrickson responds that the district court wrongly denied his motion for a new trial because it did not fulfill what he views as his constitutional right to appointed counsel for his motion for a new trial. But the right to counsel "extends to the first appeal of right, and no further." *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). If during the pendency of a first appeal a defendant moves in the district court for a new trial, the defendant is entitled to counsel. *See United States v. Westmoreland*, 712 F.3d 1066, 1079 (7th Cir. 2013). But Fredrickson filed this motion well after his first appeal concluded. Thus, the district court was not compelled to appoint counsel for him. *See id.*

Next, the district court did not abuse its discretion by denying Fredrickson's motion under Rule 41(g) of the Federal Rules of Criminal Procedure for the return of seized property. *See United States v. Rachuy*, 743 F.3d 205, 211 (7th Cir. 2014). The district court may delay the return of seized property if it may be used in later proceedings, FED. R. CRIM. P. 41(g), and the court reasonably ruled that is so here. Fredrickson has several outstanding challenges to his conviction; if any succeed, the seized evidence may be necessary for a retrial. Further, Fredrickson does not deny that some of the evidence is in the possession of Iowa state police, and Rule 41(g) does not permit a

district court to order state police to return seized property. *See Okoro v. Callaghan*, 324 F.3d 488, 491 (7th Cir. 2003) ("[T]he fact that the government doesn't have [the property] is ordinarily a conclusive ground" to deny a Rule 41(g) motion.).

Finally, we note that Fredrickson has displayed a persistent pattern of filing repetitive, frivolous motions and immediately appealed nearly every ruling with little regard to the finality of the decision or the merits of the appeal. We therefore warn Fredrickson that he risks monetary sanctions and a filing bar under *Alexander v. United States*, 121 F.3d 312, 316 (7th Cir. 1997), if he files further interlocutory appeals with no statutory basis or other frivolous, repetitive, or excessive appeals.

Therefore, we DISMISS Appeal No. 22-3311 for lack of appellate jurisdiction and AFFIRM in Appeal Nos. 23-1003, 23-1735, and 23-2582 in all other respects.

Appendix A – District Court Text Order: Request to Substitute Habeas Corpus Judge

12/15/2022		TEXT ONLY ORDER DENYING 242 and 243 . Defendant has filed a Motion for Recusal of Trial Judge and a Motion to Request Proceedings before Magistrate Judge. Defendant argues that Judge Mihm should not hear the case on collateral review because Defendant is seeking relief, in part, based on decisions that Judge Mihm made during the underlying criminal case. Thus, his suggestion is that the judge that oversaw the criminal proceeding should not decide subsequent habeas motions. Defendant also filed a motion to consent to proceeding before a magistrate judge. Pursuant to 28 U.S.C. § 455(a), a judge must recuse "himself in any proceeding in which his impartiality might reasonably be questioned." Unless there is a clear showing of potential bias, a judge has a duty not to disqualify himself under § 455 if no valid reason exists to do so. See New York City Housing Development Corp. v. Hart, 796 F.2d 976, 980 (7th Cir. 1986) (per curiam). Here, the only assertion is that the same judge deciding his habeas motion is the judge that oversaw his criminal proceedings. However, contrary to Defendant's assertions, Rule 4(a) of the Rules Governing 2255 Proceedings requires that the clerk "forward the motion to the judge who conducted the trial and imposed the sentence." Accordingly, it is appropriate that this case remain before Judge Mihm, and Defendant has not made a showing of potential bias. Moreover, a district judge may refer part of a case to a magistrate judge, but the rules Defendant cites do not give him the authority to demand referral to a magistrate judge. See Rule 8(b), Rules Governing Section 2255 Proceedings. Accordingly, Defendant's Motion for Recusal 242 and Motion to Request Proceeding before a Magistrate Judge 243 are DENIED. Entered by Judge Michael M. Mihm on 12/15/2022. (VH) (Entered: 12/15/2022)

Appendix B – Appeal Opening Brief

No. 22-03311

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

TIMOTHY FREDRICKSON
APPELLANT-DEFENDANT

VS

UNITED STATES OF AMERICA
APPELLEE-RESPONDANT

ON APPEAL FROM THE CENTRAL DISTRICT OF ILLINOIS
HON. SR. JUDGE MICHAEL MIHM PRISIDING
NO. 17-CR-40032

APPELLANT'S OPENING BREIF

The Habeas Corpus Recusal Appeal

Question Presented

Whether public perception of the integrity and appearance of impatiality in the Judiciary is deteriorated when, over the defendant's objection, the same Judge who affirmed a convition later attempts to pass upon it's validity

Statement of the Case

Fredrickson has a pending writ of Habeas Corpus (§2255). Upon the realization that the presiding Judge is the very same Judge who presided over the criminal matter; the defense promptly filed a "motion to recuse trial judge". Appendix @1. Fredrickson also filed a related request that all proceedings be referred to a magistrate judge. Appendix @3.

In his motion to recuse, Fredrickson brought the District Courts attention to the Seventh Circuit's decision in Weddington v Zatecky, 721 F.3d 456 (CA7 2013); relying upon that court's rationale very heavily, Fredrickson asked the District Court to extend the Zatecky court's holding from §2254 to §2255 for identical reasons. Appendix @1, 2.

The District Court denied the request to extend Zatecky from §2254 to §2255 proceedings, in a short Text Order, without adressing the rationale Fredrickson adopted from Zatecky. The District Court also denied the request for referral to a magistrate without stating any particular reason, while acknoledging that it did have authority to "refer part of a case to a magistrate judge". Appendix @4.

Summary of Argument

It is a matter of simple common sense, that no judge should be able to hear an appeal of his own rulings; Such an appeal is in actuality no appeal at all.

Caselaw has already firmly established that when a district court judge is promoted to an appellate judge, that that same judge cannot hear any appeals of any rulings that were decided in his capacity as a district judge.

The Seventh Circuit in Zatecky, extended this holding to the situation where a state court judge later becomes a federal judge, preventing that judge from hearing any issues over which that judge presided in his former capacity as a state court judge.

The Supreme Court Justices also regularly recuse from cases they heard in thier former capacity as a circuit judge.

Fredrickson merely asks that this court reverse Judge Mihm's break with tradition. It is important to a litigant and to the fairness and public reputation of judicial proceedings that review of a case be conducted by a judge other than the judge who presided over the case at trial. There is no reason why the rules governing independance, conflict of interest, or appearance of partiality should not apply in Fredrickson's case.

It is especially concerning that Judge Mihm even resisted meeting Fredrickson half-way, declining Fredrickson's invitation to refer the case (or at least parts of it) to a magistrate judge under any of the three grants of authority Fredrickson cited.

It shocks the conscience to hear that a judge can try to hear an appeal of his own decision. If for no other reason than to promote a public appearance of impartiality, the circuit should hold that a judge may not rule upon a §2255 petition of a defendant raising any issue concerning the trial or conviction over which the judge presided in any meaningful way.

This court should hold that recusal is appropriate, before the district judge rules.

Argument

In ruling upon Fredrickson's §2255 petition, Judge Mihm is "being asked to find that he had affirmed an unconstitutional conviction, and, implicitly, that by doing so he had become complicit in sending [petitioner] to prison in violation of [petitioner]'s constitutional rights". Clemmons v Wolfe, 377 F.3d 322 @326 (CA3 2004). Many courts have found that "a reasonable person might doubt the impartiality of a judge in such a position". Clemmons @326.

The Seventh Circuit in Weddington v Zatecky, 721 F.3d 456 (CA7 2013) faced the same problem. There, the Seventh Circuit delt with a district judge who had previously ruled in the defendant's case in his former capacity as a state-court judge. In the Zatecky decision, the Seventh Circuit found large parts of the Third Circuit's Clemmons decision persuasive, noting that:

> The court found that the district judge's failure to recuse 'has created an appearance of impropriety that runs the risk of undermining the public's confidence in the judicial process'. cite. Clemmons **established a broad rule** requiring that each federal district judge 'recuse himself or herself from participating in a 28 §2254 habeas corpus petition of a defendant raising any issue concerning the trial or conviction over which the judge presided in his or her former capacity as a state court judge'. cite.

Zatecky @ . The Seventh Circuit went on to state that "[s]imilarly, in Russell [v Lane, 890 F.2d 947 (CA7 1989)], we concluded that the petitioner 'was entitled to have his habeas corpus petition heard by a judge who had not participated in his conviction'". ID.

Fredrickson seeks this same entitlement, for all of the reasons that both circuits found persuasive. Fredrickson merely wants "to have his habeas corpus petition heard by a judge who had not participated in his conviction". In Zatecky, this Circuit observed:

> It is important to a litigant and to the fairness and public reputation of judicial proceedings that review of a case be conducted by 'a judge other than the judge who presided over the case at trial'. cite. Indeed, 28 § USC §47 provides: 'No judge shall hear or determine an appeal from the decision of a case or issue tried by him'. This statute is not strictly applicable here because it applies to appeals, not federal habeas petitions. But the habeas petition is similar to appellate review. In a federal habeas action, the petitioner has 'the opportunity to have a federal court review the state proceedings for constitutional infirmities. In this respect, **there is no reason why the same rules governing indepenance, conflict of interest, or appearance or partiality should not apply'.**

Like in Clemmon and Zatecky, this circuit should again find that "[t]he absence of a directly applicable statute in no way diminishes the importance to a litigant of review by a judge other than the judge who presided over the case at trial". Clemmons @325. As the Seventh Circuit stated before in a functionally equivilent habeas corpus proceeding, "there is no reason why the same rules governing independance, conflict of interest, or apperance of partiality should not apply". Zatecky @461.

In Fredrickson's case below, Sr Judge Mihm denied the request, simply stating that Fredrickson's "only assertion is that the same judge deciding his habeas motion is the judge that oversaw his criminal proceedings". Appendix @4. The district court broke his claim down into two aspects.

First, Judge Mihm held that "contrary to [Fredrickson]'s assertions, Rule 4(a) of the Rules Governing 2255 Proceedings **requires** that the clerk 'forward the motion to the judge who conducted the trial and imposed the sentence'". Appendix @4. First, a judicial conference's rule-making should never trump a Congressionally enacted statute, and especially not the Constitution. Second, As the Firct Circuit has observed:

> It is true that section 2255 speaks of moving 'the court which imposed the sentence ...'. We find **nothing**, however, to indicate that 'court' was used in the restrictive sense of a specific judge. Rather, it appears that section 2255 was intended to supplant habeas corpus proceedings, which could be brought only where the defendant was incarcerated, and to transfer collateral attack to a forum where the record, and most of the relevant witnesses, would be availible.

at section 2255

Halliday v US, 380 F.2d 270 @273 (CA1 1967). The Supreme Court stated something similar. See US v Hayman, 342 us 205 @220-221 (1952) ("The very purpose of §2255 is to hold any required hearing in the sentencing court **because of the inconvenience of transporting** court officials and other necessary witness to the district of confinement").

Second, Judge Mihm stated that Fredrickson "has not made a showing of potential bias". Appendix @4. This misconcives Fredrickson's argument entirely. The lack of bias "is not dispositive because actual bias is not a requisite element for a valid claim", Clemmons @327, rather "there mere **appearance** of bias could still diminish the stature of the judiciary". ID.

As a second basis for recusal, Fredrickson points to Russell v Lane for the proposition that 28 §455(b)(3) required that the trial judge recuse himself. See ID @ 948. (spiing that "certainly voting to affirm a person's conviction is an expression of an opinion concerning the merits of the person's case" is a qualifying reason to disqualify under §455(b)(3). Though Fredrickson's case was a trial by jury, the district judge nonetheless cast his vote as the "eleventh juror" when the defense moved for an aquittal.

Conclusion

Because the reputation of the judiciary depends on a judge other than the one who participated in the conviction hearing the petition, and because the district court both missunderstood Fredrickson's argument and allowed judicial committee rules to trump a Congressionally enacted statute, the court should remand with instructions not inconsistent with this appeal.

/S/ Tim Pg

3/15/2023

Short Appendix

Key

#242 Defendant's Motion to Recuse Trial Judge --Appendix 1-2

#243 Defendant's Consent to proceedings by Magistrate --Appendix 3

12/15/2022 Text Order denying #242 and 243 --Appendix 4

United States District Court
Central District of Illinois

Timothy Fredrickson,
Petitioner
v

Warden Rivers,
Respondant

No. 22-cv-04154

MOTION TO RECUSE TRIAL JUDGE

Now comes the petitioner, Fredrickson, respectfully requesting that ~~the~~ the Honorable Judge Michael Mihm recuse for all proceedings relating to this collateral motion under 28 §2255 to vacate or set aside the conviction of which he presided, and in support states as follows:

1) The underlying action includes an overbreadth challenge, upon which the currently assigned judge has already ruled.

2) The underlying action includes a challenge to the currently assigned judge's findings under the speedy trial act, as well as the motion to dismiss based upon the same.

3) Numerous rulings, both pre-trial, and at trial, are challenged in this action.

4) Circuit precedent dictates that a petitioner is entitled to have his Habeas Corpus petition heard by a judge who has not participated in his conviction.

Argument

The Seventh Circuit has already held that defendants have a per se right not to have thier petition heard by a federal judge who was on a prior occasion at the state-level the judge who prosided over the state trial. It is also well established that an appeals judge cannot hear the appeal of the case over which he presided in the district court. If this circuit has not already so held, Fredrickson asks that this court extend the holding in Weddington v Zatecky, 721 F.3d 456 (CA7 2013) from §2254 to §2255. In Zatecky the court stated as follows:

> It is important to a litigant and to the fairness and public reputation of judicial proceedings that review of a case be conducted by 'a judge other than the judge who presided over the sase at trial'. cite. Indeed, 28 usc §47 provides: 'No judge shall hear or determine an appeal from the decision of a case or issue tried by him'. This statute is not strictly applicable here because it applies to appeals, not federal habeas petitions. But the habeas petition is similar to appellate review. In a federal habeas action, the petitioner has 'the opportunity to have a federal court review the state proceedings for constitutional infirmities. In this respect, there is no reason why the same rules governing independance, conflict of interest, or appearance of partiality should not apply'.

Zatecky @461. Whether direct appeal, federal review of a state-court (28§2254) or federal review of a federal trial-court (28§2255); the concept is identical. The court should not try to split hairs depending on what is on collateral review, and cannot do so without undermining a long line of wise precedent. For example, this circuit went on to state:

> [In Clemmons t]he court found that the district judge's failure to recuse 'has created an appearance of impropriety that runs the risk of undermining the public's confidence in the judicial process'. cite. Clemmons established a broad rule requiring that each federal district judge 'recuse himself or herself from participating in a 28 §2254 habeas corpus petition of a defendant raising any issue concerning the trial or conviction over which the judge presided in his or her former capacity as a state court judge'. cite. Similarly, in Russell [v Lane, 890 F.2d 947 (CA7 1989)], we concluded that the petitioner 'was entitled to have his habeas corpus petition heard by a judge who hasd not participated in his conviction'.

ID. Fredrickson respectfully requests that this motion be reffered to another judge for disposition.

Conclusion

Because the Honorable Michael Mihm presided over the very case now on collateral review, a voluntary recusal is appropriate, and in the alternative the above line of precedent should be extended to all forms of collateral review if such is not already current law.

Respectfully Submitted,

/s/ Tim Frw

October 24 2022

United States District Court
Central District of Illinois

Tim Fredrickson
v
Warden Rivers

No. 22-cv-04154
(Consent to proceedings by Majistrate)

Now comes the petitioner, Fredrickson who hereby gives his consent for all proceedings before a magistrate judge, and in support states as follows:

1) Rule 8(b) of the "Rules Governing Section 2255 Proceedings" authorize the same.

2) Rule 10 of the "Rules Governing Section 2255 Proceedings" authorize the same.

3) Title 28 §636(b) authorizes the same.

Respectfully Submitted,

/s/ Tim Fred

10/29/2022

Certificate of Service and Declaration of Inmate Filing

I, Tim Fredrickson, a non-attorney and inmate, state under penalty of perjury that I am an inmate confined at Federal Correctional Institution Seagoville. 2113 North Highway 175 Seagoville, TX 75159 and that on this 15th day of March 2023, I served the foregoing Opening Brief

Upon:

[X] Appellate Clerk of Court, Room 2722
219 South Dearborn Street
Chicago, IL. 60604

[ ] District Clerk of Court, Northern District of Illinois
219 South Dearborn Street
Chicago, IL. 60604

[ ] District Clerk of Court, Central District of Illinois
100 Northeast Monroe, Room 309
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111 South 10th Street Room 24.329
St. Louis, MO. 63102

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Davenport, IA. 52801
Division
[ ] 8th Circuit, Iowa Davenport Division
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[ ] Clerk of Court
The Supreme Court of the United States
One First Street N.E.
Washington, D.C. 20543

[X] All attorneys of record via the CM/ECF through the Clerk of Court, whereon it is scanned:

By depositing the same in the institution's internal mail system with first-class postage prepaid, after the hours of 5:00 pm.

/s/ Tim Fredrickson
Executed on: 3/16/2023

Appendix C – Appeal Brief (Response)

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Rec 6/28/2023

Habes recuse Rule 33
Nos. 22-3311 (L), 23-1003

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Pg 17 Summary

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TIMOTHY FREDRICKSON,

Defendant-Appellant.

On Appeal from the United States District Court
for the Central District of Illinois, No. 17-cr-40032
The Honorable Michael M. Mihm

(I)(A)(2)(a)(1)

BRIEF FOR THE UNITED STATES

GREGORY K. HARRIS
United States Attorney

KATHERINE V. BOYLE
Assistant United States Attorney
Office of the United States Attorney
201 South Vine Street, Suite 226
Urbana, Illinois 61802
(217) 373-5875

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JURISDICTIONAL STATEMENT[1]

The jurisdictional summary in the defendant's brief is not complete and correct.

The district court had subject matter jurisdiction under 18 U.S.C. § 3231 and 28 U.S.C. § 1331. *See Harris v. Warden*, 425 F.3d 386, 388 (7th Cir. 2005).

In March 2017, a grand jury sitting in the Central District of Illinois returned a single-count indictment charging the defendant with sexual exploitation of a child, in violation of 18 U.S.C. § 2251(a), (e).

The defendant was convicted following a jury trial on January 22, 2020. On June 4, 2020, the district court imposed a sentence of 200 months' imprisonment, to be followed by a ten-year term of supervised release. The court entered final judgment the following day. The defendant timely appealed, and this Court affirmed the judgment of the district court. *United States v. Fredrickson*, 996 F.3d 821, 823 (7th Cir. 2021).

Amid other post-sentencing litigation, on January 24, 2022, the defendant requested that the district court appoint counsel, but did not specify any particular

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[1] We use the following abbreviations for record citations: "R." followed by a number refers to a document in the district court record; "CA7 R." followed by a number refers to a document in this Court's record in the lead appeal, No. 22-3311; "D.E." followed by a date refers to a docket entry in the district court record; "PSR" refers to the revised presentence report (R. 172); "Trial Tr." refers to the transcripts of the jury trial held on January 21 and 22, 2020 (R. 192, 193); "Sent. Tr." refers to the transcript of the sentencing hearing held on June 4, 2020 (R. 194); and "Def. Br." refers to the defendant's consolidated opening brief in this appeal.

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motion with which he needed assistance. The request came shortly after the defendant had filed a pro se motion for compassionate release. On January 25, 2022, the district court denied the request for counsel, interpreting it as relating to the motion for compassionate release and stating the request was moot, given that the Federal Public Defender's Office had already been appointed and had declined to file an amended compassionate release motion.[2]

Almost a year later, the defendant filed a motion for new trial under Rule 33 of the Federal Rules of Criminal Procedure, which also included a request for counsel. The district court denied the motion on December 15, 2022. The defendant filed a timely notice of appeal on January 3, 2023.[3]

The defendant also filed a motion to vacate under 28 U.S.C. § 2255. Related to that motion, he subsequently filed a motion for the recusal of the trial judge and a motion to request proceedings before the magistrate judge, both of which were

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[2] In another appeal – *United States v. Fredrickson*, No. 23-1042, ECF 5 at 8 (7th Cir. April 24, 2023) – the defendant appeared to concede that the request for counsel related to compassionate release litigation.

[3] Although January 3, 2023, was just outside the fourteen-day window for filing the notice, *see* Fed. R. App. P. 4(b)(1)(A), the defendant appears to have filed a timely notice of appeal under the prison-mailbox rule, Fed. R. App. P. 4(c)(1)(A).

It is worth noting that within the notice of appeal, the defendant claimed to be appealing the request for counsel filed and denied in January 2022. While that request for counsel appeared to relate to his compassionate release litigation, *see infra*, p. 2, n.2, the defendant again requested counsel within his motion for a new trial, so the issue is properly before this Court on that basis.

also denied on December 15, 2022. The defendant filed a timely notice of appeal on December 30, 2022.[4] However, for reasons further described within, this Court does not have jurisdiction over that appeal because the denials do not constitute final orders nor do they fall under the exception outlined in the collateral order doctrine. *See infra*, pp. 31-34.

This Court consolidated the appeals on January 5, 2023. CA7 R. 2. The Court has jurisdiction over the appeal of the new trial motion under 28 U.S.C. § 1291.

[4] Similarly, while December 30, 2022, was just outside the fourteen-day window for filing the notice, *see* Fed. R. App. P. 4(b)(1)(A), the defendant appears to have filed a timely notice of appeal under the prison-mailbox rule, Fed. R. App. P. 4(c)(1)(A).

ISSUES PRESENTED FOR REVIEW

I. Did the district court act within its discretion in (1) denying the defendant's motion for a new trial, and (2) declining to appoint counsel in connection with that motion.

II. Does this Court lack jurisdiction over the defendant's appeal of the denials of his motion for the recusal of his trial judge from presiding over his 28 U.S.C. § 2255 motion and his motion for referral of the proceedings to a magistrate judge.

III. Did the district court correctly deny the defendant's motion for the recusal of the trial judge from presiding over his 28 U.S.C. § 2255 motion, and did the court abuse its discretion in denying the related request for referral of the proceedings to a magistrate judge.

STATEMENT OF THE CASE

The defendant, Timothy Fredrickson, is a convicted sex offender who pursued two minors in the span of a month and convinced one – a sixteen-year-old Illinois girl – to send him explicit videos. Fredrickson has filed a number of post-trial motions and now appeals the district court's denials of several of his requests. Specifically, he appeals (1) the denial of his motion for a new trial and related request for counsel, and (2) the denials of his motion for the recusal of the trial judge from handling his 28 U.S.C. § 2255 motion and his related request for the referral of the proceedings to a magistrate judge. Def. Br. 2-9, 17-22.[5] For the reasons described within, Fredrickson's claims lack merit.

I. Factual Background

A. Pursuit of Fifteen-Year-Old Girl

In December 2016, Fredrickson engaged in sexually explicit discussions with not one but two minors. PSR ¶¶ 14-22. These communications first came to law enforcement's attention when they discovered Fredrickson, who was twenty-seven at the time, sitting alone in his car during a nighttime vehicle check at a park in Rapid City, Illinois. PSR ¶ 14. Fredrickson falsely told law enforcement agents

[5] Fredrickson's consolidated brief (CA7 R. 8) does not include page numbers. For ease of reference – even though the document contains multiple cover pages, briefs, and appendices – the government's cites to "Def. Br. _" refer to the corresponding page number for that entire document.

that he was waiting for an individual whom he believed to be nineteen years old. PSR ¶¶ 14-15. The officers were familiar with a minor of the same name and suspected Fredrickson planned to meet her. PSR ¶ 14. Fredrickson claimed he met the individual via an online dating application, but once the officers asked to see her profile, he said that she had deleted it. *Id.* He provided the officers with the individual's phone number, and they permitted him to leave, warning him that he was not allowed to be in the park, which closed after dark. *Id.* The individual was later confirmed to be a fifteen-year-old girl. *Id.*

Further investigation – including an interview of the minor and examination of her cell phone – revealed that Fredrickson had previously sent her a "Sexual Question Survey." PSR ¶ 15. In responding to that survey, the minor had informed Fredrickson that she was fifteen. *Id.*

B. Offense Conduct

Less than two weeks later, apparently undeterred by his encounter with law enforcement, Fredrickson began chatting with a second minor, a sixteen-year-old Illinois girl, via the phone application Whisper and later through social media. PSR ¶ 16; *see also United States v. Fredrickson*, 996 F.3d 821, 823 (7th Cir. 2021). Though Fredrickson was aware of the girl's age, the conversation turned sexually explicit. PSR ¶¶ 16-22. Fredrickson requested and received videos of the girl's genitals and

encouraged her to masturbate during these recordings, which he saved to his cell phone. PSR ¶¶ 19-22.

In February 2017, the girl's mother learned that Fredrickson sent flowers to the girl's high school. PSR ¶ 17. That prompted the mother's discovery of Fredrickson's exploitative, online relationship with her daughter and a subsequent law enforcement investigation. PSR ¶¶ 17, 19-22; Trial Tr. 44. The mother provided her daughter's iPod and cell phone to the Moline, Illinois, Police Department and gave consent for law enforcement to search those devices, which she said her child had used to communicate with Fredrickson. Trial Tr. 44-45, 50. The officers recovered data helpful to their investigation. Trial Tr. 50. Additionally, in a Child Advocacy Center interview, the minor victim provided Fredrickson's name and other identifying information, including the fact that he lived in Davenport, Iowa. Trial Tr. 49. She also stated that Fredrickson knew she was underage. R. 1 at 2.

The Davenport, Iowa, police were subsequently able to provide Illinois investigators with a Davenport address for Fredrickson and eventually obtained a state search warrant for his residence. Trial Tr. 49, 54. During the ensuing search, law enforcement agents discovered multiple electronic devices belonging to Fredrickson, including his cell phone, the home screen of which contained a photo of the minor victim, who was apparently topless, though partially covered by a pillow. PSR ¶ 18; Trial Tr. 71-73, 79. Fredrickson also signed a *Miranda* waiver and

agreed to be interviewed by law enforcement; he then admitted requesting certain sexual images and videos from the minor victim. Trial Tr. 59-70; Gov. Exs. 9, 9A, 9B; R. 1 at 4.

A few days later, investigators obtained a federal search warrant that permitted them to search Fredrickson's electronic devices. R. 1 at 6. Agents discovered the sexually explicit videos from the minor victim on Fredrickson's cell phone. *Id.* at 6-7; PSR ¶¶ 17, 19-22. Fredrickson's arrest followed. PSR ¶¶ 23-24.

II. Court Proceedings

A. Underlying Criminal Case

A federal grand jury in the Central District of Illinois returned a single-count indictment charging Fredrickson with sexual exploitation of a child, in violation of 18 U.S.C. § 2251(a), (e). R. 1, 13. Substantial pretrial litigation ensued, including the district court's denial of Fredrickson's motion to dismiss the indictment because his statute of conviction, 18 U.S.C. § 2251(a), purportedly violated the First Amendment and was thus unconstitutionally overbroad. R. 142, 142-1; D.E. 1/17/2020. The case proceeded to trial in January 2020, and the jury returned a verdict of guilty on January 22, 2020. D.E. 1/21/2020, 1/22/2020; R. 142, 142-1, 154.

Prior to the sentencing hearing, the minor victim submitted a victim impact statement detailing the "unimaginable" trauma she had suffered due to

Fredrickson's exploitation. PSR ¶ 26; *see also* Sent. Tr. 21, 33. She explained that she lost her dignity, her mental health declined, and she lost her trust in people. *Id.* She stated that there were some days she could not even look at herself in the mirror "without feeling disgusted and ashamed." PSR ¶ 26. Everyone around her felt guilty for what happened to her except Fredrickson, "the one person who never once accepted blame for it." *Id.* He put her, her family, and his own family "through hell," and she believed she would never "fully recover." *Id.*

At the sentencing hearing in June 2022, the district court determined that Fredrickson faced an advisory Guidelines range of 235 to 293 months' imprisonment, based on his total offense level of 38 and criminal history category of I. Sent. Tr. 40; *see also* PSR ¶ 79. The statutory mandatory minimum sentence for Fredrickson's offense was fifteen years' imprisonment and the maximum sentence was thirty years' imprisonment. PSR ¶ 79.

The district court imposed a below-Guidelines sentence of 200 months' imprisonment, to be followed by a ten-year term of supervised release. Sent. Tr. 58; D.E. 6/4/2020; R. 183.

The court entered final judgment the next day, and Fredrickson timely filed a notice of appeal. R. 183, 188.

B. Direct Appeal

Fredrickson's appeal reprised his argument that his statute of conviction, 18 U.S.C. § 2251(a), was unconstitutionally overbroad. *United States v. Fredrickson*, 996 F.3d 821, 823 (7th Cir. 2021). He claimed that "because he could have lawfully watched the minor where she recorded the videos (Illinois) and where he received them (Iowa), the First Amendment shields him from prosecution" under § 2251(a). *Id.* at 822-23. This Court held that Supreme Court precedent prohibited his challenge. While the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, the Supreme Court had held that "child pornography was categorically unprotected under the First Amendment." *Id.* at 824 (citing *New York v. Ferber*, 458 U.S. 747, 763 (1982)). Section 2251 was thus constitutionally valid. The mandate issued on June 24, 2021. *United States v. Fredrickson*, No. 20-2051, ECF 48 (7th Cir. June 24, 2021). The Supreme Court denied Fredrickson's petition for writ of certiorari on October 12, 2021, and denied his petition for rehearing on January 10, 2022. *Fredrickson*, No. 20-2051, ECF 52 (7th Cir. Oct. 12, 2021); *Fredrickson*, No. 20-2051, ECF 53 (7th Cir. Jan. 10, 2022).

C. Denials of First Compassionate Release Motion and Motion to Reconsider

On January 18, 2022, Fredrickson filed a document that the district court construed as a pro se motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A). R. 203; D.E. 1/19/2022.

That same day, the district court appointed the Federal Public Defender's Office to represent Fredrickson. D.E. 1/18/2022. A few days later, an Assistant Federal Public Defender filed a notice of intent not to amend Fredrickson's pro se motion, which he described as thorough. R. 205. Around the same time, Fredrickson filed a motion to request counsel through the Federal Public Defender's Office, without specifying the nature of the assistance required. R. 207. The district court – sensibly viewing the request for counsel as pertaining to the compassionate release issue – denied the motion as moot, noting that the Assistant Federal Public Defender had entered his appearance and deemed it unnecessary to file an amended motion. D.E. 1/25/2022.

The government opposed the motion for compassionate release. R. 208. The district court denied it, along with Fredrickson's subsequent motion to reconsider. R. 214, 215; D.E. 3/21/2022.

Fredrickson appealed the denials of both the motion for compassionate release and the motion to reconsider. *United States v. Fredrickson*, No. 22-1542, 2022 WL 16960322 (7th Cir. Nov. 16, 2022). This Court affirmed the judgment of the district court. *Id.*

D. Denials of Second Compassionate Release Motion and Motion to Reconsider

Meanwhile, in June 2022, Fredrickson filed a second pro se compassionate release motion raising several claims. R. 224. The government opposed the motion.

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Recuse Start

R. 227. The district court denied the motion without prejudice on September 15, 2022, citing Fredrickson's failure to exhaust his administrative remedies. R. 232. Fredrickson subsequently filed a motion for reconsideration of the denial, which the court denied in a text order. R. 241; D.E. 12/15/2022. Fredrickson's appeal of both denials remains pending. *See United States v. Fredrickson*, No. 23-1042 (7th Cir.).

E. Section 2255 Motion and Related Requests for Recusal and Referral to Magistrate Judge

Amid a flurry of litigation,[6] in October 2022, Fredrickson filed a motion under 28 U.S.C. 2255 raising, by his count, approximately eighty claims regarding a host of issues regarding investigation of his offense, his prosecution and trial, his attorney's performance, and the constitutionality of the statute under which he was convicted, among others. R. 239.

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[6] Around this same time, Fredrickson filed additional post-trial motions. He filed a motion for property status, and the district court declined to order the government to return the property given pending post-conviction matters; Fredrickson subsequently appealed. R. 236; D.E. 3/30/2023; *United States v. Fredrickson*, No. 23-1735 (7th Cir.).

Fredrickson also belatedly filed an appeal of the district court's January 2022 text order denying his motion for counsel from the Federal Public Defender's Office as moot. R. 207; D.E. 1/25/2022; *United States v. Fredrickson*, No. 23-1003 (7th Cir.). Additionally, Fredrickson filed an appeal of the district's order granting the government additional time to submit a response on the merits to his § 2255 motion after denying its motion to dismiss. R. 267; *United States v. Fredrickson*, No. 23-2124 (7th Cir.).

Each of these appeals remains pending.

In November 2022, Fredrickson subsequently filed a motion for recusal of the trial judge – Senior U.S. District Judge Michael M. Mihm – from presiding over his 2255 motion. R. 242. In support of the motion, he noted that the judge had already ruled against him on a number of the issues raised, including his challenge to the constitutionality of his statute of conviction, his Speedy Trial Act claims, and various other pre-trial and trial rulings. *Id.* at 1. He argued that "Circuit precedent dictates that a petitioner is entitled to have his Habeas Corpus petition heard by a judge who has not participated in his conviction." *Id.*

Fredrickson filed a related motion giving "consent for all proceedings before a magistrate judge," which the district court construed as a request for the proceedings to occur before a magistrate. R. 243.

On December 15, 2022, the district court (Mihm, J.) denied the motion for recusal and the motion requesting proceedings before a magistrate judge. D.E. 12/15/2022. The court first noted that under "28 U.S.C. § 455(a), a judge must recuse 'himself in any proceeding in which his impartiality might reasonably be questioned.'" *Id.* However, unless there is "a clear showing of potential bias, a judge has a duty not to disqualify himself under § 455(a) if no valid reason exists to do so." *Id.* (citing *New York City Housing Development Corp. v. Hart*, 796 F.2d 976, 980 (7th Cir. 1986) (per curiam)).

recuse

In Fredrickson's case, the court explained, "the only assertion [was] that the same judge deciding his habeas motion [was] the judge that oversaw his criminal proceedings." D.E. 12/15/2022. The court noted that "Rule 4(a) of the Rules Governing 2255 Proceedings requires that the clerk 'forward the motion to the judge who conducted the trial and imposed the sentence.'" *Id.* The court concluded that it was therefore appropriate that the 2255 motion remain before Judge Mihm and stated that Fredrickson had not made a showing of potential bias. *Id.* Furthermore, although "a district judge may refer part of a case to a magistrate judge," the rules Fredrickson cited did not give Fredrickson the authority "to demand referral to a magistrate judge." *Id.* (citing Rule 8(b), Rules Governing Section 2255 Proceedings).

Fredrickson filed a timely notice of appeal. R. 250; *see also supra*, pp. 2-3.

F. Motion for New Trial

Rule 33

On November 18, 2022, Fredrickson filed a motion for new trial under Rule 33 of the Federal Rules of Criminal Procedure. R. 245. Within the motion, he requested that the Federal Public Defender's Office be appointed to assist. *Id.* at 1. Fredrickson asserted that he had acquired "new evidence" – specifically, the time of day when the Iowa state court judge authorized the search warrant for his residence – and claimed that the evidence showed the officers had conducted a

warrantless search. *Id.* He claimed that if he had obtained that evidence before trial, he could have filed a successful motion to suppress regarding the fruits of the search. *Id.* In the alternative, Fredrickson said that he had recently discovered his counsel's ineffectiveness because his attorney should have sought that document and filed a related motion to suppress. *Id.*

The district court likewise denied the motion for new trial. D.E. 12/15/2022. The court noted that a motion for a new trial may be filed within three years if there is newly discovered evidence. *Id.* (citing Fed. R. Crim. P. 33(b)(1)). Fredrickson's claim that he had "just 'discovered'" that his attorney was ineffective was unsupported, though. *Id.* First, Fredrickson provided no support for his allegations that (1) the search warrant was not authorized until after the search was completed, (2) the evidence should have been suppressed on that basis, and (3) if the fruits of the search had been suppressed, there would have been "no evidence" for his criminal trial. *Id.* Moreover, it was not clear how Fredrickson came into possession of the search warrant, he did not provide the search warrant, and he did not provide "support or explanation for his assertion that the search happened before the warrant was issued." *Id.* Further, Fredrickson's suggestion that his attorney had information about search warrants in his case before trial and failed to follow up on it was unfounded. *Id.*

Concluding, the court stated that Fredrickson's assertions were "wholly unsupported," and Fredrickson did not "otherwise connect the dots between their being a time discrepancy on the warrant and there being 'no evidence' at his trial." D.E. 12/15/2022. And the court observed that it had ordered that Fredrickson "have access to discovery while in the presence of counsel during his incarceration and that his access to discovery was repeatedly a topic of conversation, undermining his assertion that he did not have access to this document prior to trial." *Id.*

Fredrickson filed a timely notice of appeal. R. 252; *see also supra*, pp. 2-3. This Court consolidated the appeals on January 5, 2023. CA7 R. 2.

SUMMARY OF THE ARGUMENT

First, the district court acted within its discretion in denying Fredrickson's motion for a new trial under Federal Rule of Criminal Procedure 33 and his related request for counsel. Fredrickson cannot show that the interest of justice require a new trial given his failure to establish that "additional evidence" regarding the timing of the search warrant and the execution of the search "(1) was discovered after trial, (2) could not have been discovered sooner through the exercise of due diligence, (3) is material and not merely impeaching or cumulative, and (4) probably would have led to acquittal." *United States v. O'Malley*, 833 F.3d 810, 813 (7th Cir. 2016). Furthermore, Fredrickson did not have Sixth Amendment right to counsel in connection with the new trial motion, and the court acted within its discretion in declining to appoint an attorney.

This Court lacks jurisdiction over Fredrickson's appeal of the denials of his motion for recusal of his trial judge from presiding over his 28 U.S.C. § 2255 motion and related motion for referral to a magistrate judge. Neither denial constitutes a final judgment within the meaning of 28 U.S.C. § 1291 nor do they fall under the collateral order doctrine. *Flanagan v. United States*, 465 U.S. 259, 265 (1984).

Alternatively, the district court correctly denied the motion for recusal and acted within its discretion in declining to refer the proceedings to a magistrate.

ARGUMENT

I. The District Court Acted Within Its Discretion In Denying Fredrickson's Motion For A New Trial And His Related Request For Counsel

The district court acted within its discretion in denying Fredrickson's motion for a new trial and his related request for counsel, for the reasons described below.

A. Legal Framework and Standard of Review

Federal Rule of Criminal Procedure 33 permits a district court to "vacate any judgment and grant a new trial if the interest of justice so requires" upon the defendant's motion. Fed. R. Crim. P. 33(a). The time limit for filing such a motion depends on the claims made within. "Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(1). Motions for a new trial "grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(2).

Importantly, "the exercise of power conferred by Rule 33 is reserved for only the most extreme cases." *United States v. Conley*, 875 F.3d 391, 399 (7th Cir. 2017) (quoting *United States v. Peterson*, 823 F.3d 1113, 1122 (7th Cir. 2016)). Because the district judge is best positioned to make this determination, appellate review of the denial of a motion for a new trial is for an abuse of discretion and is "highly deferential." *United States v. Rivera*, 901 F.3d 896, 903 (7th Cir. 2018). The district

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court's factual findings are reviewed for clear error: *United States v. Ballard*, 885 F.3d 500, 504 (7th Cir. 2018). The Court also reviews for abuse of discretion a court's refusal to appoint counsel in connection with such a motion. *Cf. Taylor v. Knight*, 223 F. App'x 503, 504 (7th Cir. 2007). VS legal questions de novo

B. Analysis

1. The district court acted within its discretion in denying Fredrickson's motion for a new trial

The district court did not abuse its discretion in denying Fredrickson's Rule 33 motion. To "carry his burden of showing that the interest of justice requires a new trial, a defendant must establish" that the "additional evidence (1) was discovered after trial, (2) could not have been discovered sooner through the exercise of due diligence, (3) is material and not merely impeaching or cumulative, and (4) probably would have led to acquittal." *United States v. O'Malley*, 833 F.3d 810, 813 (7th Cir. 2016); *United States v. McGee*, 408 F.3d 966, 979 (7th Cir. 2005). The court correctly determined that Fredrickson's motion failed multiple prongs of this test.

a. Fredrickson failed to establish that the evidence at issue was "discovered after trial"

First, Fredrickson did not show that the evidence at issue was "discovered after trial." *O'Malley*, 833 F.3d at 813. To the contrary, the court explained that it had ordered that Fredrickson "have access to discovery while in the presence of

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counsel during his incarceration and that his access to discovery was repeatedly a topic of conversation, undermining his assertion that he did not have access to this document prior to trial." D.E. 12/15/2022; *see also* D.E. 7/23/2019, 8/5/2019, 8/26/2019, 8/27/2019. That finding did not amount to clear error on the part of the court. *Ballard,* 885 F.3d at 504. Notably, Fredrickson's attorney explicitly told the court that he would ensure that Fredrickson had discovery access. R. 141 at 29-31. And when Fredrickson raised his desire to see warrant documents in a Freedom of Information Act request, the district court appropriately told him to ask his attorney to show him those items. R. 119; D.E. 10/7/2019. Fredrickson's attorney did not allege lack of access to those documents, nor did Fredrickson again complain prior to his trial that he had not been able to view them. Fredrickson's post-trial, self-serving assertion that he never viewed the warrant does not undermine the court's reasoned conclusion and his counsel's representations. Def. Br. 8.

b. Fredrickson failed to show that the evidence "could not have been discovered sooner through the exercise of due diligence"

For similar reasons, Fredrickson did not establish that the evidence "could not have been discovered sooner through the exercise of due diligence." *O'Malley,* 833 F.3d at 813. Simply put, it could have been. Fredrickson and his attorney were well aware that law enforcement had obtained and executed a search warrant for

Fredrickson's residence. *See, e.g.*, R. 1 at 3. Even assuming for the sake of argument that Fredrickson never saw the warrant,[7] he merely needed to complain – or have his attorney complain – to the district court regarding that alleged omission (more than once, if needed, to alert the court that the issue had not been satisfactorily resolved). Fredrickson's argument that he attempted to obtain the warrant circuitously via other lawsuits and requests is unconvincing, and those actions do not qualify as due diligence. Def. Br. 7 (citing R. 245 at 1).[8]

c. Fredrickson failed to show the evidence was "material" and "probably would have led to acquittal"

i. Fredrickson failed to support his claim regarding the alleged inconsistency

Finally, Fredrickson's arguments that the evidence was "material" and "probably would have led to acquittal" were uncompelling. *O'Malley*, 833 F.3d at 813. Initially, as the district court noted, Fredrickson failed to shore up his claim that the search warrant was not authorized until after the search was completed.

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[7] Though not reflected in the record, the government was required to produce the warrant in discovery. And Fredrickson has not explicitly made – and thus waives – any *Brady* claim. Def. Br. 7-8.

[8] Even his Freedom of Information Act requests for warrant documents do not suggest that he never viewed them. R. 119. Instead, those requests likely related to his apparent desire to retain copies of these documents himself. Further, the district court appropriately denied the motion and instructed Fredrickson to obtain these documents from his attorney, after which Fredrickson did not again complain of lack of access prior to his trial. D.E. 10/7/2019.

D.E. 12/15/2022. In an attempt to counter that conclusion, Fredrickson belatedly asserts on appeal that his motion for a new trial cited to a copy of the search warrant and that the district court should have found it, suggesting it had been produced in connection with a civil-rights lawsuit he filed: *Fredrickson v. McAwful*,[9] CDIL No. 19-cv-4041. Def. Br. 7. First, the district court could not have been expected to glean that information from Fredrickson's motion, which merely stated that Fredrickson "diligently sought" a copy of the search warrant, including but not limited to various legal maneuvers including the filing of a "strategic lawsuit drafted in such a way that the only way for the defendants to [prevail] was to include the requested documents, where such defendants delayed until after the criminal trial. [19-04041]" R. 245 at 1. Fredrickson's claim appeared to pertain to his purportedly diligent efforts to obtain the document rather than alleging he had succeeded obtaining it via that civil suit. Nor did he provide any detail regarding the alleged time discrepancy. Like their appellate counterparts, district court judges "are not like pigs, hunting for truffles buried in" defendant's motions. *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991). While certainly pro se

govt found it, why not Judge Shadid?

[9] In his lawsuit, Fredrickson refers to the lead defendant as "Jermy McAwful." *Fredrickson v. McAwful*, CDIL No. 19-cv-4041, ECF 1 (C.D. Ill. Feb. 26. 2019). The government surmises that is a flippant reference to "Jeremy McAuliffe," an officer with the Moline, Illinois, Police Department and Special Federal Officer with the United States Secret Service, who investigated Fredrickson's case and testified at his trial. Trial Tr. 42-44; PSR ¶ 19.

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filings are more liberally construed, even a pro se defendant may not leave out crucial facts – such as where he obtained the "new evidence" – from a Rule 33 motion.

Furthermore, an examination of the docket in *Fredrickson v. McAwful*, CDIL No. 19-cv-4041, reveals no document containing a copy of the search warrant. Thus, even if the district court had looked, there was nothing to be found. The case was eventually transferred to the Southern District of Iowa, at Fredrickson's request, where it was more properly titled *Fredrickson v. McAuliffe*, SDIA No. 19-cv-00121. *See Fredrickson v. McAwful*, CDIL No. 19-cv-4041, ECF 5 (C.D. Ill. March 6, 2019). While Fredrickson did not cite the Southern District of Iowa case, that docket does include a motion to dismiss that included as exhibits copies of the federal criminal complaint and state search warrant. *Fredrickson v. McAuliffe*, SDIA No. 19-cv-00121, ECF 24 (S.D. Iowa July 13, 2020). But this is too far afield to have asked the district court to look, particularly in light of the vagueness of the allegations in Fredrickson's motion for a new trial.

ii. Fredrickson failed to establish that a motion to suppress would have been successful

Moreover, the district court noted that Fredrickson had failed to show that the fruits of the search warrant should have been suppressed based on any purported discrepancy. D.E. 12/15/2022. An examination of the alleged inconsistency

validates that conclusion. The state court judge included a notation that the warrant for Fredrickson's residence was signed at 11:19 a.m. on February 10, 2017, and the federal complaint stated that the warrant was executed at "*approximately* 1114 hours" on that same date. *Fredrickson*, SDIA No. 19-cv-00121, ECF 24, Exs. 1, 2 (emphasis added); *see also* R. 1 at 3. This minimal difference was unlikely to provide any substantive fodder for the suppression of evidence.

First, given the complaint affiant's use of "approximately" it is not clear that there is any discrepancy at all between the listed times; suppression therefore would not have been appropriate. Alternatively, any minor difference might be attributable to a variance between, say, the judge's clock and the agent's watch. The weight of any discrepancy is even further diminished in light of these considerations and given that the officers may have executed the warrant immediately after it was signed and before they had a physical copy of it in their hands. *See, e.g., Katz v. United States*, 389 U.S. 347, 356 n. 16 (1967) ("Rule 41(d) does require federal officers to serve upon the person searched a copy of the warrant and a receipt describing the material obtained, but it does not invariably require that this be done before the search takes place."). Tellingly, courts across the country have repeatedly rejected arguments that such ministerial inconsistencies, likely resulting from a clerical error, support the suppression of the fruits of a

search.[10] Fredrickson has not established that a motion to suppress on these grounds would have reached a different result. Show likely not have to show success

Furthermore, even assuming, for the sake of argument, that any police misconduct occurred *and* the search took place before the warrant issued, the inevitable discovery exception to the exclusionary rule would have defeated any related suppression motion. "Under the inevitable discovery doctrine, the exclusionary rule is inapplicable where the government establishes by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." *United States v. Rosario*, 5 F.4th 706, 713 (7th Cir. 2021) (cleaned up).

"To establish that officers inevitably would have discovered the challenged evidence by lawful means," the government must demonstrate that two criteria have been met. *Rosario*, 5 F.4th at 713. First, the government "must show that it

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[10] *See, e.g., United States v. Hall*, 654 F. App'x 653, 658–59 (5th Cir. 2016) (affirming denial of motion to suppress where district court applied good-faith exception and there was "no evidence in the record indicating that the police entered the home before the Warrant was signed and that the discrepancy in timing was anything more than a typographical error"); *United States v. Felder*, 457 F. App'x 316, 323 (4th Cir. 2011) (holding there was no plain error in denial of motion to suppress where discrepancy in time notations for issuance of warrant and search itself "could very well have been clerical in nature"); *United States v. McNabb*, No. 218CR00538KOBJHE1, 2019 WL 2720344, at *4 (N.D. Ala. Apr. 23, 2019), *report and recommendation adopted*, No. 2:18-CR-538 KOB JHE, 2019 WL 2716440 (N.D. Ala. June 28, 2019), *aff'd*, 825 F. App'x 636 (11th Cir. 2020) (in the absence of testimony or evidence that the search actually preceded the issuance of the warrant, inconsistent times on each appeared to be the result of clerical error, and suppression was not warranted).

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had, or would have obtained, an independent, legal justification for conducting a search that would have led to the discovery of the evidence[.]" *Id.* Second, the government "must demonstrate that it would have conducted a lawful search absent the challenged conduct." *Id.* Those criteria are clearly met here, given the government's efforts in obtaining the search warrant and its intent to search Fredrickson's dwelling.

The independent source doctrine also would have precluded suppression, even if a Fourth Amendment violation had occurred. It is true that as "a general matter, the exclusionary rule prohibits introduction of evidence that the police obtained illegally." *United States v. Huskisson*, 926 F.3d 369, 374 (7th Cir. 2019) (citing *Mapp v. Ohio*, 367 U.S. 643, 655 (1961)). The rule, however, has exceptions, including the independent source doctrine. *Id.*

That doctrine "holds that illegally obtained evidence is admissible if the government also obtains that evidence via an independent legal source, like a warrant." *Huskisson*, 926 F.3d at 374. "The independent source doctrine recognizes that the goal of the exclusionary rule is to put the police in the same, not a worse, position than they would have been in if no police error had occurred." *Id.* (internal quotations omitted).

Even assuming for the sake of argument that the evidence gained from law enforcement officers' search of Fredrickson's residence was illegally obtained

because officers entered prior to the signing of the search warrant, that warrant was still "an independent legal source" for the evidence obtained.[11]

iii. Fredrickson failed to show that he probably would have been acquitted if a motion to suppress had succeeded

Lastly, the district court correctly concluded that even if the fruits of the search had been suppressed, Fredrickson had not established that he "probably" would have been acquitted (and arguably has waived this argument). D.E. 12/15/2022; *see also O'Malley*, 833 F.3d at 813. Fredrickson fails address the other significant evidence against him, including the evidence recovered from the minor victim's phone and her potential testimony against him, which included his name, address, age, and knowledge of her underage status. *See supra*, p. 7. That evidence undermines any argument that even a successful suppression motion would "probably" have resulted in his acquittal.

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[11] Fredrickson's alternative claim that he had newly discovered evidence of his counsel's ineffectiveness based on his attorney's failure to file a suppression motion based on the warrant documents also does not hold water. Def. Br. 8. As described *infra*, pp. 23-27, any such suppression motion would have been unsuccessful. While defendants are ordinarily advised to bring an ineffectiveness claim in a 28 U.S.C. § 2255 motion, they may raise the issue in a new trial motion if they can show they meet the standard outlined in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *United States v. Berg*, 714 F.3d 490, 494 (7th Cir. 2013). Such defendants therefore must demonstrate that (1) their counsel "was objectively unreasonable," and (2) they were prejudiced as a result. *Id.* Given the dim prospects for success on the suppression issue, Fredrickson can demonstrate neither here.

iv. No evidentiary hearing was warranted

Nor did Fredrickson present a compelling case for an evidentiary hearing. Def. Br. 9. "It is within the sound discretion of the district court to decide whether or not a hearing is necessary to a determination on a request for a new trial." *United States v. Hedman*, 655 F.2d 813, 814 (7th Cir. 1981). Given Fredrickson's flimsy assertions, the district court acted well within its discretion in determining that such a hearing was not warranted.[12]

2. The court acted within its discretion in declining to appoint counsel

Fredrickson argues that his right to counsel *should* attach to the new trial motion he filed after the conclusion of his direct appeal but acknowledges countervailing case law. Def. Br. 2-9. That case law is against Fredrickson, and squarely so. As this Court has explained, a "criminal defendant has the right to counsel through his first appeal of right, but once that appeal has been decided, the right no longer applies." *United States v. Westmoreland*, 712 F.3d 1066, 1079 (7th Cir. 2013). This Court's decision in *Kitchen v. United States* likewise suggests that there is no

[12] Though this Court need not reach the issue, it appears that the district court would have been within its right in recharacterizing the Rule 33 motion as a successive § 2255 motion given that the Rule 33 motion raised a constitutional claim and that Fredrickson filed the Rule 33 motion after filing an initial § 2255 motion, suggesting he might have been attempting to avoid the bar on successive motions. R. 239, 245. However, Fredrickson also briefly raised the search warrant issue in his initial § 2255 motion. R. 239 at 1.

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constitutional right to counsel for Rule 33 motions filed and decided after direct appeal, and Fredrickson's reliance on it is thus misplaced. 227 F.3d 1014, 1019 (7th Cir. 2000) (tacitly approving other circuits' holdings that no right to counsel existed for Rule 33 motions "filed and decided *after* the first appeal of right" because "they were characterized as collateral attacks, and it is well established that there is no constitutional right to counsel in collateral proceedings"); *see also United States v. Woods*, 169 F.3d 1077, 1078 (7th Cir. 1999) ("When made following the outcome of a direct appeal, a Rule 33 motion plainly is collateral . . ."). Fredrickson offers no convincing reason for this Court to depart from that well-reasoned precedent here. W/O addressing any of my reasons, govt simply concludes that:

Other courts have explicitly held that a defendant does not have a constitutional right to counsel for a post-conviction, post-appeal Rule 33 motion. *See, e.g., United States v. Williamson*, 706 F.3d 405, 416 (4th Cir. 2013) (collecting cases and explaining that a defendant has no Sixth Amendment right to counsel to mount a collateral challenge to his conviction, including a Rule 33 motion filed after the defendant's appeal); *United States v. Harrington*, 410 F.3d 598, 600 (9th Cir. 2005) (same); *United States v. Berger*, 375 F.3d 1223, 1226-27 (11th Cir. 2004) (same); *Trenkler v. United States*, 268 F.3d 16, 20 (1st Cir. 2001) (same).

This Court should follow that approach here. The Court affirmed the judgment of the district court following Fredrickson's direct appeal on May 12, 2021. *United*

States v. Fredrickson, 996 F.3d 821, 823 (7th Cir. 2021). The mandate issued on June 24, 2021. *United States v. Fredrickson*, No. 20-2051, ECF 48 (7th Cir. June 24, 2021). The Supreme Court denied Fredrickson's petition for writ of certiorari on October 12, 2021, and denied his petition for rehearing on January 10, 2022. *Fredrickson*, No. 20-2051, ECF 52 (7th Cir. Oct. 12, 2021); *Fredrickson*, No. 20-2051, ECF 53 (7th Cir. Jan. 10, 2022).

Fredrickson filed his motion for a new trial and accompanying request for counsel on November 18, 2022, well after his direct appeal had concluded (by any measure of finality). R. 245.[13] He therefore was not entitled to counsel in connection with that motion. Moreover, the district court did not abuse its discretion in declining to appoint counsel, given the insubstantiality of Fredrickson's claims. *Taylor*, 223 F. App'x at 504; *see also supra*, pp. 23-27.

[13] While Fredrickson had also requested counsel on January 24, 2022 (R. 207) (or, at the earliest, on January 16, 2022, based the signature date he included), for the reasons explained above, this request appeared to relate to his motion for compassionate release. *See supra*, p. 2, n.2. And, in any case, this request, too, was issued after Fredrickson's direct appeal had concluded, so even if this Court should disagree, the same analysis applies.

II. This Court Lacks Jurisdiction Over Fredrickson's Appeal Of The Denials Of His Motion For Recusal And Motion For Referral To A Magistrate Judge

A. Legal Framework

This Court has appellate jurisdiction over "all final decisions of the district courts of the United States[.]" 28 U.S.C. § 1291." "For purposes of § 1291, a final judgment is generally regarded as a decision by the district court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 497 (1989) (cleaned up). The rule "that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits[] serves a number of important purposes." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). First, it "emphasizes the deference that appellate courts owe" to the district court judge. *Id.* Second, "[p]ermitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system." *Id.* Third, "the rule is in accordance with the sensible policy of 'avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment.'" *Id.* (citing *Cobbledick v. United States*, 309 U.S. 323, 325 (1940)); *see also DiBella v. United States*, 369 U.S. 121, 124 (1962). The rule also serves the important purpose of promoting

efficient judicial administration. "As a general matter, the final judgment rule is strictly applied." *United States v. Lapi*, 458 F.3d 555, 560 (7th Cir. 2006).

This Court also has jurisdiction over certain interlocutory and collateral orders. 28 U.S.C. § 1292(a) (discussing appealable interlocutory orders). Relevant here, the collateral order doctrine permits appeals from "non-final orders that are too important to be denied review and which are so disconnected from the merits that appellate consideration is required before final adjudication." *Flanagan v. United States*, 465 U.S. 259, 263 (1984) (quoting *United States v. Rinaldi*, 351 F.3d 285, 288 (7th Cir. 2003)). To fall within that exception, an order "must, at a minimum, meet three conditions." *Flanagan*, 465 U.S. at 265. First, the order "must conclusively determine the disputed question"; second, it must "resolve an important issue completely separate from the merits of the action"; and third, it must "be effectively unreviewable on appeal from a final judgment." *Id.* (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). "Because of the compelling interest in prompt trials, the Court has interpreted the requirements of the collateral-order exception to the final judgment rule with the utmost strictness in criminal cases." *Id.*

B. Analysis

This Court lacks jurisdiction over Fredrickson's appeal of the denials of his motion for the trial judge's recusal and motion for referral to a magistrate judge.

First, neither order constitutes a final judgment within the meaning of § 1291. The district court has not yet ruled on Fredrickson's § 2255 motion. These denials neither ended the litigation on the merits nor left anything "for the district court to do but execute the judgment." *Lauro Lines S.R.L.*, 490 U.S. at 497. On that basis, the courts have repeatedly agreed that the denial of a motion for recusal is not a final order, and the same logic applies to a denial of a motion to transfer proceedings. *See, e.g., United States v. Brunson*, No. 22-6156, 2022 WL 1641896, at *1 (4th Cir. May 24, 2022) (denial of motion for recusal is not a final order); *United States v. Weicksel*, 517 F. App'x 67 (3d Cir. 2013) (same); *Nie v. Virginia*, 803 F. App'x 709 (4th Cir. 2020) (referral order is not a final judgment); *cf. Hampton v. City of Chicago*, 643 F.2d 478, 480 (7th Cir. 1981) ("grant of a motion to recuse is not a final and appealable order to confer jurisdiction in this court under 28 U.S.C. § 1291").

Furthermore, neither order falls under the collateral order doctrine. The denial of a motion to recuse the trial judge or a motion to transfer the proceedings do not meet the third required condition: namely, they are not "effectively unreviewable on appeal from a final judgment." *Flanagan*, 465 U.S. at 265 (quoting *Coopers & Lybrand*, 437 U.S. at 468).[14] *Cf. In re Moens*, 800 F.2d 173, 176 (7th Cir. 1986) (stating

[14] Certain courts have noted a possible exception, stating that "a non-final order denying recusal *may* be reviewed in a mandamus proceeding." *Mischler*, 887 F.3d at 271-272 (emphasis in original). But those courts have explained that "consistent with Supreme Court precedent, the exception applies only when a petitioner alleges that delay will cause irreparable harm." *Id.* at 272 (citing *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S.

may reply because govt opened door + govt would not be prejudiced because it was aware of briefly briefed the issue

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that motions to recuse the trial judge would "rarely, if ever, fall within the ambit of the collateral order doctrine"); *see also Brunson*, 2022 WL 1641896, at *1 (denial of motion for recusal is not appealable interlocutory or collateral order); *Lynn v. Wilkerson-Rodriguez*, No. 20-3178, 2020 WL 8677610, at *1 (10th Cir. Oct. 22, 2020) (same); *Mischler v. Bevin*, 887 F.3d 271, 271 (6th Cir. 2018) (same); *Weicksel*, 517 F. App'x 67 (same); *Wyatt By & Through Rawlins v. Rogers*, 92 F.3d 1074, 1080 (11th Cir. 1996) (same); *Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82, 86 (5th Cir. 1992) (same); *Nie*, 803 F. App'x 709 (referral order is not appealable interlocutory or collateral order).

III. The District Court Properly Denied Fredrickson's Motion For Recusal And Request For Referral To A Magistrate Judge

Though this Court lacks jurisdiction to reach the issue, the district court correctly denied Fredrickson's motion for recusal and related request for referral to a magistrate judge.

A. Legal Framework and Standard of Review

A district judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," 28 U.S.C. § 455(a), or where "he has a personal bias or prejudice concerning a party," 28 U.S.C. § 455(b)(1). However,

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368, 373-75 (1981)). "Otherwise, a party could always circumvent the final judgment rule by petitioning for a writ of mandamus." *Id.*

as the district judge here noted, unless there is "a clear showing of potential bias, a judge as a duty not to disqualify himself under § 455(a) if no valid reason exists to do so." D.E. 12/15/2022 (citing *New York City Housing Development Corp. v. Hart*, 796 F.2d 976, 980 (7th Cir. 1986) (per curiam)). Rulings adverse to a party "alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994).

This Court reviews a recusal decision de novo, and any related factual findings for clear error. *United States v. Walsh*, 47 F.4th 491, 498 (7th Cir. 2022). Since referral of a matter to a magistrate judge for report and recommendation is within a district judge's discretion, *see* 28 U.S.C. § 636(b)(1), this Court should review a related decision for abuse of discretion.

B. Analysis

Under this framework, Fredrickson cannot demonstrate that recusal or transfer were warranted. As the district court explained, Fredrickson's "only assertion [was] that the same judge deciding his habeas motion [was] the judge that oversaw his criminal proceedings." D.E. 12/15/2022. Yet "Rule 4(a) of the Rules Governing 2255 Proceedings requires that the clerk 'forward the motion to the judge who conducted the trial and imposed the sentence.'" *Id.*; *see also Eaton v. United States*, 458 F.2d 704, 707 (7th Cir. 1972) ("the normal and appropriate procedure is to assign a § 2255 motion to the sentencing judge"); *David v. Att'y Gen.*

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of U.S., 699 F.2d 411, 416 (7th Cir. 1983) (judge may preside over collateral attack against decision made by him or her). Indeed, "the trial and sentencing judge's familiarity with the facts and circumstances surrounding the trial make it desirable for him to deal with such petitions." *Burris v. United States*, 430 F.2d 399, 402 (7th Cir. 1970).

The clerk appropriately forwarded the motion to the trial judge here. And the trial judge correctly declined to recuse himself given Fredrickson's failure to adequately allege even an appearance of bias, much less a "clear inability to render a fair judgment" based on prior rulings. D.E. 12/15/2022; *Liteky*, 510 U.S. at 551. Fredrickson's general allegation that the trial judge should not preside over the § 2255 proceeding simply does not past muster, and the cases he cites in support of that ~~contention~~ do not relate to § 2255 motions. Def. Br. 17-22.

Additionally, it was well within the district court's discretion to refuse to refer the § 2255 motion to a magistrate judge given his own familiarity with the case and the absence of any other valid impetus to do so. D.E. 12/15/2022 (citing Rule 8(b), Rules Governing Section 2255 Proceedings).

merely stating it is discretionary and subsequently making a choice w/o giving a reason, is ~~a decision~~ indistinguishable from making the choice on a whim -- which is forbiden.

All reasons for keeping ~~same~~ trial Judge are drawn into question in ~~given~~ light of existense (and presumably ~~disuse~~ use) of the mad provisons.

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CONCLUSION

For the reasons discussed above, this Court should affirm the judgment of the district court as to Fredrickson's new trial motion and dismiss his appeal of the denials of the motion for recusal and motion for referral for lack of jurisdiction. Alternatively, the Court should affirm the denials of those motions as well.

Respectfully submitted,

GREGORY K. HARRIS
United States Attorney

By: /s/ KATHERINE V. BOYLE
Assistant United States Attorney
Office of the United States Attorney
201 South Vine Street, Suite 226
Urbana, Illinois 61802-3369
(217) 373-5875

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and (a)(6), as modified by Cir. R. 32(b), because I have prepared this brief in proportionally spaced typeface using Microsoft Word for Office 365 in 13-point (body) and 12-point (footnotes) Book Antiqua font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified by Cir. R. 32(c), in that it contains 8,593 words.

/s/ KATHERINE V. BOYLE
Assistant United States Attorney

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CERTIFICATE OF SERVICE

I certify that on June 22, 2023, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, and I hereby certify that within three days of this same date I caused a true and correct copy to be sent via United States Mail, first class and postage prepaid, addressed to the Defendant-Appellant:

Timothy B. Fredrickson, Reg. No. 22005-026
FCI Seagoville
Federal Correctional Institution
P.O. Box 9000
Seagoville, TX 75159

/s/ KATHERINE V. BOYLE
Assistant United States Attorney

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Appendix D – Appeal Brief (Reply)

Appendix E – District Court Text Order: Request for Release Pending Habeas Corpus

07/18/23		TEXT ORDER: DENYING Petitioner's 279 Request for Bail Pending Disposition of § 2255 Petition. This power is to be exercised very sparingly, and only when the Petitioner has shown both a substantial claim of law based on the facts surrounding his petition and circumstances making the motion for bail exceptional and deserving of special treatment in the interests of justice. See Cherek v. United States, 767 F.2d 335, 337 (7th Cir. 1985); see also Fonseca v. United States, 129 F.Supp.2d 1096, 1099 (E.D. Mich. 2001). While the Court has not yet addressed Petitioner's § 2255 Motion on the merits, it is clear from a cursory review of his submissions that he has not met this strict standard. Entered by Judge Michael M. Mihm on 7/18/2023. (VH) (Entered: 07/18/2023)

Appendix F – Appeal Opening Brief

No. 23-02582

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Timothy Fredrickson
Appellant

vs

United States
Appellee

On Appeal From The United States District Court
Central District of Illinois
Hon. Judge Mihm
17-cr-40032

OPENING BREIF

The habeas bail appeal

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Certificate of Service and Declaration of Inmate Filing

I, Tim Fredrickson, a non-attorney and inmate, state under penalty of perjury that I am an inmate confined at FCI Seagoville, and that on this 10th day of July 2024, I served the foregoing writ of certiorari

Upon:

[ ] Appellate Clerk of Court, Room 2722
219 South Dearborn Street
Chicago, IL. 60604

[ ] District Clerk of Court, Northern District of Illinois
219 South Dearborn Street
Chicago, IL. 60604

[ ] District Clerk of Court, Central District of Illinois
100 Northeast Monroe, Room 309
Peoria, IL. 61602
[ ] Peoria Division
[ ] In care of Rock Island Division

[ ] Eighth Circuit Court of Appeals Clerk
111 South 10th Street Room 24.329
St. Louis, MO. 63102

[ ] District Clerk of Court
131 East 4th Street
Davenport, IA. 52801
[ ] 8th Circuit, Iowa Davenport Division
[ ] In care of 7th Circuit, Rock Island Division

[ ] District Clerk of Court, Southern District of Iowa
123 East Walnut Street
Des Moines, IA. 50309

[X] Clerk of Court
The Supreme Court of the United States
One First Street N.E.
Washington, D.C. 20543

[X] All attorneys of record via the CM/ECF through the Clerk of Court, whereon it is scanned:

By depositing the same in the institution's internal mail system with first-class postage prepaid, after the hours of 5:00 pm.

and again September 24th 2024

/s/ Tim Fredrickson
Executed on: 7/10/2024
Sept/24/2024

Statement Of The Case

Statement of the Facts

The investigation leading to the instant charge began when police learned that Fredrickson had received photos and video from a sixteen year old young woman who lived in Moline Illinois. The investigation began in February of 2017. Fredrickson was 27 at that time. The police discovered several videos in Defendant's possession wherein the woman had engaged in sexually explicit conduct while alone. The girl had produced these videos for Fredrickson and transmitted them via her cell phone. The videos included images of her displaying her genitalia and the act of masturbation, both of which are within the definition of "sexually explicit conduct" under 18 usc §2256(2)(A). A city of Moline police officer described for the jury how Fredrickson was able to keep the recordings that the young woman had sent to him. Through the officer, the government provided extensive testimony describing the video evidence that was recovered from Fredrickson pursuant to a search warrant. The prosecutor, Jennifer Matthews, also placed into evidence the actual videos, and a few still photos that the officer had created from the videos in order to assist the prosecutor. (Trial Trans pp170-178).

The defense did not challenge the authenticity of the videos and did not object to their admission into evidence. On cross-examination of the officer, the defense established that there was no evidence Fredrickson and the woman had ever met in person. The two had first made contact through an application called Whisper. The Whisper app is an anonymous platform where users do not create an account, and can keep his or her identity unknown. The young woman created all of the videos on her own using her cell phone camera. Fredrickson did not provide a phone or any other type of equipment to her. There is no evidence Fredrickson ever shared any of the images with anyone, or intended to. There is no evidence that anyone conveyed any threats to coerce the young woman into producing or sending the videos. The evidence recovered also included texts and photos exchanged between the two that were not of a sexual nature. On redirect, the government pointed out that while Fredrickson did not give any physical items to the young woman, he appeared to provide remote direction as to the content of the videos --in that he asked for something and promptly received it. (Tr. 237-244).

Proceedings and Ruling - Trial Court

The indictment was filed in the underlying action on March 21, 2017. In a single count indictment, the government charged Fredrickson with violating 18 usc §2251(a). In pertinent part, the statute states under subsection (a):

> "Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, ··· with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct"

Counsel for the defense filed two pretrial motions to dismiss. The first motion pointed out that, for Fredrickson and the young woman, it was the fact of photography, and not the sexual conduct itself, which was illegal. The statute reaches a significant amount of speech that is not predicated on either physical or mental harm, and that here it had reached the consensual self-photography and private transmission by the young woman. Counsel also argued that the photography of legal sex acts by a person over the federal age of consent cannot be properly characterized as child pornography. Relatedly, counsel noted that the statute uses the term "minor" instead of "child", which means that the statute is not limited to just "child" porn. The district court denied the motion from the bench and without opinion. It did not attempt to explain how legal sexual activity suddenly becomes child porn upon photography.

The other motion to dismiss observed that over 70 days had elapsed on the Speedy Trial Act clock, and that dismissal of the indictment was mandatory. Most, but not all, of the excess time was due to the legal deficiency of EOJ findings --which lacked any reference to the public's interest. The judge did not accept that the public's interest was relevant, contrary to statute and precedent. Even so, the judge still did not tally how many days had ticked on the 70-day clock over the span of three years. The government similarly failed to count the number of days, and when asked off the record had declined to share it's calculation of days elapsed.

Fredrickson also filed many prose motions, some with and without authorization. This included a request for special verdict, and to present facts to the jury bearing on the element "coerces", as consent is the opposite of coerce.

Proceedings and Ruling - Direct Appeal

On direct appeal counsel doubled down on the First Amendment challenge, first noting that the Supreme Court has not clearly defind what would be considered as **child** porn. (DA Open Br @14); See also Ferber plurality @778 (noting the court "defined that category in an abstract setting"); See also Bose @505 (warning that "A general description of the type of communication whose content is unworthy of protection has **not**, in and of itself, served to sufficiently to narrow the category"). The definition is unwieldy, defies precisic and does not resemble a "well-defined and narrowly limited class[] of speech". Ferber @752. Counsel repeatedly invited the government to define or explain the requirements to be considered a "child" under the constitution, but the government avoided doing so at all costs

Counsel took several approaches, noting that a definition for "child" should not include those who may legally consent to the underlying sexual conduct; To hold otherwise would mean that the constitution suddenly considers a legal participant in sex acts to be a "child" the instant an image is produced, rendering the word a chameleon. Instead, counsel argued that the Supreme Court drew a better line in the sand: the image must be "intrinsically related" to physical harm or criminal conduct. Ferber @759. As often happens, the Supreme Court clarified its holding in later cases; most recently in Stevens. In that case the court clarified that "Ferber [] grounded its analysis **in a previously recognized**, long established category of unprotected speech, and our subsequent decisions have shared this understanding", ID, that category was "speech integral to criminal conduct". Here, if the image is the "speech", where is the "criminal conduct"? Counsel emphasized that there was no criminal conduct here. See also Free Speech Coalition @250-254 ("**Ferber**'s judgement about child pornography was based on **how** it was made ··· The objective is to prohibit illegal conduct ··· here, there is no underlying crime"). Alternatively, counsel noted that the court made it explicit that Ferber "reaffirmed that where speech is ··· **no[t]** the product of sexual abuse, it does **not** fall outside of the protection of the First Amendment". ID@251. Ironically the panel found that "For Fredrickson, S.B.'s videos did **not** depict child abuse", later concluding by text order that "it was unnecessary ··· to apply any standard of review". Everyone including the court overlooked the required Bose standard of review, and Fredrickson filed a timely Rule 60(b) motion to correct this error which was returned by the clerk unfiled.

The Seventh Circuit has held that "where the respondant is guilty of long and inadequately explained delays, it may be presumed that the petitioner is being illegally confined". Ruiz v Cady, 660 F.2d 337 @340 (CA7 1981).

The court went on to note that a district court may get creative with the "sanction" for the government's delay. Fredrickson suggests the posibility of bail pending disposition, as a remedy for delay, which seems especially appropriate as a remedy for delay, that is also particularly appropriate when "it may be presumed that the petitioner is being illegally confined" by reason of government delay.

Here, the government intentionally delayed for more than 6 months in ordering transcripts it knew it needed. Rather than order the transcripts, it opted for an easy way out via motion to dismiss [#244]. It did not order any transcripts during the six month pendency of it's motion. After its motion was denied, it recived a (resisted) accompanying 21-day extention during which it **still** did not order the transcript. #267. Instead, it asked for a further 60-day extension specifically to order transcripts [#268]. It was granted until 7/18/2023. When it finally filed it's second response [#283], over a week later on 7/27/2023, it did not include those transcripts, causing further delay while Fredrickson obtains them for a proper reply. The request is still pending at the time of this brief. [ ].

Fredrickson also has sufficient likelihood of success in at least one claim. In claim 1, Fredrickson pointed out that the days were never tallied for the Speedy Trial Act claim, and dismissal of indictment is mandatory. In claim 2, Fredrickson pointed out that he did not have an unobstructed shot at a full round of review of at least one of his claims because no court has applied the Bose standard of review or examined the particular instance of speech at issue for unprotected characteristics. Finially, for the greater petition, the government has pointedly responded to only sixteen of approximately ninety claims, and did not develope it's procedural default defense, making it even more likely Fredrickson will prevail. Relatedly, Fredrickson will show cause several times over in the forthcoming reply below.

I. Release pending disposition is an appropriate sanction

In Ruiz, this court specifically affirmed that "a default judgement, without full inquiry into the merits" should remain an available sanction, though rejecting it for a 5-day delay, favoring a variety of other remedies commensurate with the delay. ID@344-41. The court went on to note that a district court may get creative with the "sanction" for a respondant's delay.

(I)(a). The government in this case intentionally delayed for more than 6 months in ordering transcripts it knew it needed

The government knew early on about the need for transcripts because it voluntarily filed a motion to dismiss [#244], which means it knew about --and read-- the petition.

The first few pages of Fredrickson's petition is a simple numbered list of the claims brought, which put the government on notice that transcripts were needed, especially since two of the claims explicitly mentioned transcripts. The government's motion had been pending for 6 months, during which time it made no attempt to order any transcripts.

The government's conscious choice not to order the transcripts, is further reflected in it's preemptive request for more time in the event it's motion was denied, which it was.

After its motion was denied, it received the (resisted) accompanying 21-day extention during which it **still** did not order transcripts [#267]. Instead, it then asked for a further 60-day extension specifically to order transcripts [#268].

It was granted until 7/13/2023. When it finally filed it's second responsive pleading [#283] over a week later on 7/27/2023, it did not include any of the 3 transcripts it had ordered, this inaction caused further delay while Fredrickson obtains them for a proper reply to the government's second responsive pleading. at the time of this brief, Fredrickson does not have the transcripts.

(I)(b). This court should also consider other sources of delay

Since it is common that a respondant's delay is redressed by a range of remedies, Fredrickson respectfully suggests that this court also consider the often overlooked delays inspired by bureacratic paralysis, such as a court's own congested calander or busy schedule, which while understandable and typical, even unintentional and unavoidable --is still just delay by another name. It is no secret that §2255 habeas petitions languish on the nation's dockets for years, as perhaps the most neglected class of proceeding.

Fredrickson suggests that the reason this source of delay has never been adressed, is because it is (wrongly) assumed that it is the court's fault. Most deem it unwise to tell a judge they did something wrong and that the proceedings should be altered because of it. Luckily, it is not the judiciary's fault, and most judges are just as disapointed as litigants by delay.

The question of who to sanction when the delay is the result of bureacratic paralysis --eg, too few judges, overburdened judges, a packed calendar, mail delivery issues-- is not a quandary. The public is responsible for maintaining a working government, and when the machinery of law needs oiled[2], the public is to blame for it's failure. Unique problems require unique solutions, making bail a modest and perhaps the most appropriate remedial action. Bail as a sanction is also uniquely temporary, with no permanent effect, making it arguably more appropriate than the frequent sanction of waiving the government's procedural default defense for all claims.

The remedy for the delay should be tailored to the cause of the delay when possible. Just as censoring all or part of a respondant's answer is appropriate when delays are respondant's fault; and when petitioners are at fault the delay itself is the "sanction"; so too should delays which are neither the direct result of petitioner nor respondant, be remedied. The question is what that remedy can be and what it should be here.

Footnotes

2) Most obviously by doubling the number of judges, less obvously by electronic drafting and delivery i.e. bringing PACER to the inmate owned tablets now sold to all federal inmates.

Fredrickson avers that **either** (or both) sources of delay could potentially be the sole basis of granting bail in an appropriate case; All that matters is that the delay(s) be short but inadequately explained, or long despite good reason; and that the length or poor reason be to such a degree as to make bail an appropriate remedy. Here, Fredrickson asks this court to remedy both sources of delay, considering them together with the same remedy in mind --bail pending disposition of the proceedings.

Having discussed bail as an appropriate **remedy** for delay suffered by petitioners; bail is also an ideal **sanction** in response to the public's systemic failure to ensure that the local district court had the resources it needed to handle a particular petition with the required speed. See §2255 (useing terms "prompt" and "expiditious"); See also Fay v Noia, 372 us 391 @400 (1963) (historically Habeas Corpus is a "swift and imperitive remedy" and "its function has been to provide a prompt and efficacious remedy").

A sanction should serve as a deterrant, to prevent reoccurance. Does the public even know there is a systemic problem of delay in §2255 petitions? How else does the judiciary expect change? Bail as a sanction will spur the public to ensure that a court has the resources it needs to swiftly decide cases in the future. Multi-year cumulative delays in §2255 petitions scream for public sanctions, and they should begin with this case.

II. Alternatively, Fredrickson has a high likelihood of success on the merits

In the event that this court declines to order bail on the independant grounds of bail as a dual remedy/sanction for delay; Fredrickson relies on a more traditional ground of high likelihood of success in two claims, with the delay instead serving as the "extra" reason why bail is appropriate.

Because Fredrickson preemptively argued prejudice but not cause, Fredrickson now makes a limited preview of some of the ways he will show cause in the reply below, in order to persuade this court of the likelihood of success in the petition.

(II)(a). Limited preview of cause and merit for two claims

(II)(a)(i). There is no default for the statutory right to mandatory dismissal required by the Speedy Trial Act, because this statutory right effectuates a Constitutional Interest

There is no default for statutory rights which safeguard a constitutional interest. See Krilich v US, 502 F.2d 680 @682 (CA7 1974) ("Non-compliance with a statute which has one of its purposes the effectuation of a constitutional right presents an issue of sufficient constitutional dimension to warrant consideration under 28 USC §2255").

The Speedy Trial Act (STA) safeguards the Constitutional right to a speedy trial. See US v Torres, 995 F.3d 698 @698 (CA7 2021) ("To effectuate the Sixth Amendment right to a speedy trial, Congress enacted the Speedy Trial Act of 1974"); US v Gastelum, 273 Fed.Appx. 524 @527 (CA7 2008) ("The purpose of the Speedy Trial Act is to implement a defendant's Sixth Amendment right to a speedy trial"); US v Janik, 723 F.2d 537 @542 (CA7 1983) (same, citing S.Rep. No. 1021 93rd Cong, 2nd Sess. 1 (1974)).

Were STA claims treated as typical statutory violations, if raised on DA, habeas relief would be impossible because there can never be a changed circumstance in regards to the STA after trial. Conversely, if **not** raised on DA, an STA claim's unavailibility

unavailibility would conflict with Krilich which states that this class of claim **is** cognizable on it's own, without being viewed through the lens of ineffective assistance of counsel. Either way, Fredrickson brought this claim as both a freestanding claim, **and** as one of IAC which would independantly pass as cause.

Furthermore, the STA is not a typical statute to which a default could apply for another reason: Congress has overtode the judicial creation of procedural default by specifying very particular conditions under which the Act's **mandatory** sanction may be put aside --when no motion is made **before trial**. See §3162(a)(2) ("Failure of the defendant to move for dismissal prior to trial ··· shall constitute a waiver of the right to dismissal under this section"); See also Zedner v US, 547 us 489 @508-09 (2006) (noting "the Act's categorical terms" of mandatory dismissal, and "procedural strictness") See also Walter v US, 969 F.2d 814 @817 (CA9 1992) (finding "manifest injustice" if STA claim is not considered in §2255).

The Supreme Court clarified that "In ruling on a defendant's motion to dismiss, the court **must** tally the unexcluded days". Zedner @507. Here, Judge Mihm did not count the days at all, indicating that the issue was not fully and fairly considered. See also Cody v Morris, 623 F.2d 101 @103 (CA9 1980) (remanded because days elapsed is a disputed fact and were not tallied). How else would a court know if the Act was violated or not?

Equally as startling, is that the district court refused to acknowledge that the clear text of the statute requires that the public's interest must be considered, and outweighed. See §3161(h)(7)(A) (delay excluded only "if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public ···"). A requirement important enough that Congres stated it **twice**. See ID ("No such period of delay ··· shall be excludable [] unless the court sets forth, in the record of the case, [] its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public ···").

When Judge Mihm was told about this requirement, he stated that "[Counsel] suggests that ··· where the defendant is asking for the [continuance] that the court has a duty to balance the defendant's need for additional time against the interest of the public. I don't accept that ···". #191 (Trans) 17:14-19. However the Supreme Court **emphasized** this very requirement in Zedner ("to exclude delay resulting from a continuance **--even one 'granted ··· at the request of the defense'--** the district court **must** find 'that the ends of justice served ··· outweigh the best interest of the **public** and the defendant in a speedy trial"). ID @501 (emphasis in original). In failing to accept that a finding regarding the public interest was **required**, even when the defense asks for a continuance, the trial court did not address the legal deficiency, and the claim was not fully considered.

Judge Mihm also seems to have relied in part on the faulty premise that every "text order, I belive, always included this magic language of 'in the interest of justice'" #191 (Trans) 17:7-8. This was wrong for two reasons. First, the statute "is not satisfied by ··· passing reference". Zedner @507. Second, even if a passing reference were enough, it was not clear that the magic words were cast by a judge, as opposed to a clerk. See #191 (trans) 19:16-20:6 (Judge Mihm stating his practice is to approve the clerk's text, but doesn't know if that is what Judge Darrow did here).

In short, we don't know how many days elapsed on the clock; there is no indication the public's interest was outweighed (much less considered); the word "public" does not appear anywhere in the record; the reviewing judge did not belive the public's interest was relevant; passing referance to the Act replaced a weighing of interests; and it is unresolved whether any "magic words" were the magician's.

In light of the conclusive record and the STA's mandatory sanction of dismissal of the indictment, this court would be justified in finding a high likelihood of success on this claim alone, without analysing the success of the next limited claim presented.

(II)(a)(ii). No court applied the Bose standard of Constitutional review, and no court identified what unprotected characteristics exist in the particular instance of speech here

When a citizen's speech is statutorily proscribed, and it is further assumed that thier speech additionally falls within one of the very few categories of speech that is not shielded by the Free Speech Clause --a citizen may challenge the assertion that thei particular instance of speech in fact falls within that category. This is the Bose standard of review.

When a citizen challenges the assertion that their speech is unprotected by the Constitution, a court is obligated to determine if "the speech in question actually falls within the unprotected category". Bose Corp. vs Consumers Union, 466 us 485 @505 (1984).

Any given category is defined by "special facts that have been deemed to have constitutional significance". Bose @505. Thus, it is a prerequisite that a court know what these "special facts" are, otherwise it cannot know what "the unprotected character of particular communications" actually is. Bose @505. A general idea does not permit accurate review, and infact blurs the distinction in fringe cases like this.

Even so, generally speaking, the "special facts" here are mental and physical harm. While more nuanced than that[3], no court has taken the Constitutionally required next step of performing a comparitive analysis. Rather than examine the images here for the existence of these "special facts", the courts chose to look at labels --which actually favors Fredrickson when examined closely. On the Constitution's side of the equasion, counsel noted that the Supreme Court did not purport to define "child" in terms of age. On the statutory side, §2251 does not even use the term "child", referring more broadly to "minors" instead. Surely the contemporary meaning of "minor" is more broad than "child", such that a 16-year-old could be a minor but not a child. It logically follows that a statute using the more broad term of "minor" could reach just a little bit further than "child porn". It is also relevant that §2251 was expanded to reach sexual conduct that is legal under federal law --a fact which evidences a lack of harm and implies adulthood, not childhood. Furthermore, other federal sex statutes recognize a difference between "child" and "minor".

(II)(a)(ii)(A). **The Federal statutes pertaining to sexual conduct provides guiding principles for every approach**

The Bose standard of Constitutional review requires that a court examine the circumstances of the image's creation for the "special fact[]" of physical harm. §2243(a has obvious relevance because it is the authority on physical sexual abuse. The statute's heading and substance also conclusively decide **as a matter of law** that sexual activity involving a sixteen-year-old is not "sexual abuse of a minor", which makes application of Supreme Court precedent fairly straight forward, as "[Ferber] reaffirmed that where speech is neither obscene nor the product of sexual abuse, it does **not** fall outside the protection of the First Amendment". Ashcroft v Free Speech Coal., 535 us 234 @251 (2002). If a court insists on labels, the Federal sexual conduct statutes also distinguish between "child" and "minor", which is relevant to the phrase "child pornography".

Statutory Authority

18 §2243. **Sexual abuse of a minor "(a) Of a Minor.**
Whoever, in the special maritime and territorial jurisdiction of the United States ··· knowingly engages in a sexual act with another person who (1) **has** attained the age of **12** years but **has not** attained the age of **16** years".
"(d) Defenses. - (1) In a prosecution under subsection (a) of this section, it **is** a defense ··· that the defendant reasonably belived that the other person **had attained** the age of **16** years".

18 §2241. **Aggravated sexual abuse "(c) With Children-.**
Whoever crosses a state line with intent to engage in a sexual act with a person who **has not** attained the age of **12** ··· or knowingly engages in a sexual act under the [aggravated] circumstances described in subsections (a) and (b) with another person who **has** attained the age of **12** but **has not** attained the age of **16** years ···".

18 §2246. **Definitions for chapter [109A]**
"As used in this chapter- ··· (2) the term 'sexual act' means- ··· (D) the intentional touching, not through the clothing, of the genitalia of another person who **has not** attained the age of **16** years ···"

18 §2256. **Definitions for Chapter [110]**
"For the purposes of this chapter, the term- (1) '**minor**' means any person under the age of eighteen years"

18 §1470. **Transfer of obscene material to minors**
"Whoever, using the mail or any facility or means of interstate commerce, knowingly transfers obscene matter to another individual who **has not** attained the age of **16** years, knowing that such other individual **has not** attained the age of **16** years···".

\11)\a)\11)\B). Legislative history also recognizes the distinction between the terms "child" & "minor", and at a more fundamental level with a different harm.

US v Freeman, 808 F.2d 1290 @1293 (CA8 1986)
"Prior to the 1984 amendments Congress defined minor as any person under the age of sixteen years. This definition, however, **created enforcement problems** because in many cases the child was not available to testify at trial as to his or her age at the time the photographs were taken, Consequently, unless the child had not yet entered puberty, and was therefore definitely under the age of sixteen, an offense could not be proven using the photographs or videotapes alone. Raising the age to eighteen **enables enforcement of the Act** whenever the child depicted does not appear to be an adult. See H.R.Rep. No. 98-536, 98th Cong., 2d Sess. 7, 8, reprinted in 1984 US Code Cong & Admin. News 492, 498-99. Because the age of eighteen **is rationally related to enforcement of the Act**, defendant's equal protection argument fails"

US v Costanzo, No. 10-cr-00425 (D.Neb Nov-23-2011)
"That change was made in order to 'facilitate prosecution and conviction in cases in which the age of the child depicted cannot be proven by positive identification of the child'" 1884 U.S.C.C.A.N. 492 @499

US v Bach, 400 F.3d 622 @629 (CA8 2004)
"[Congress] found that the previous ceiling of **sixteen had hampered enforcement** of child pornography laws. With that ceiling there was sometimes confusion about whether a subject was a minor since children enter puberty at differing ages. H.R. Rep. No. 98-536, @7-8 (1983); Reprinted in 1984 U.S.C.C.A.N. 492, 498-99. We conclude that the Congressional choice to regulate child pornography by defining a minor as an individual under eighteen is **rationally related to the government's legitimate interest in enforceing child pornography laws**".

Cochran v Thomas, No. 12-cv-01054 (M.D.Ala Feb-26-2015)
"Proscribing the possession of such visual images of persons up to the age of 18, **even though the age of 'consent' for sexual activity may be 16**, is a reasonable means of accomplishing this purpose **because it aids the state in enforcing child pornography laws**"

US v Andersson, 803 F.2d 903 @907 (CA7 1986)
"Act extends its regulation **beyond** the 'age of consent' to precisely this type of behavior with anyone under the age of eighteen".

US v Labella, Lexis 385 (USAF July-2-2014)
"The house report explained: **This will improve the coverage of the act, and facilitate prosecution** and conviction in cases in which the age of the child depicted cannot be proven by positive identification of the child. Usually the child who is depicted in child pornography cannot be located. Proof of the child's age has therefore been by circumstantial evidence. This meant that unless the child appeared to have not yet attained puberty (**and therefore was definitely under age 16**), an offense could not be proven. By raising the age to 18, if the child depicted does not look like an adult, a conviction can be obtained. H.R.Rep No. 98-536 @8-9 (1984).

129 Con Rec, H9780 daily ed. Nov 14 1983 (statement of Rep. Pashayan)
"the bill raises to 18 years from 16 the age of children depicted in child pornography, **to aid prosecutors** in identifying one age of youngsters depicted in these materials while some 13-and-14-year-olds **may pass for 16, they will rarely pass for 18**"

H.R.Rep. No 98-536 (1983)
"The prosecution **for distribution** are (sic) most often soley on thepornography which is the subject of the offense; the children cannot be located. Based on the picture alone, the prosecution must show that the child is under the age of sixteen. This is extremely difficult once the child shows any signs of puberty"

Conclusion

1) Bail should be among the availible remedies for a respondant's delay(s), and 2) the long delay here should trigger that remedy.

3) The courts should begin to take into account the "neutral" delays resulting from bureacratic paralysis, and 4) impose the uniquely temporary sanction of bail upon the public as the root source and origin of such delay.

5) Alternatively, bail is appropriate in light of the likelihood of success in either of the STA claim which is conclusively established by the record and has a mandatory sanction of dismissal; or the First Amendment claim where the governing legal standard was not applied and it is further readily established in both name and substance that the unprotected characteristics are absent as a facial matter, or alternatively absent in this particular case.

/S/ Tim Fry

United States District Court
Central District of Illinois

Timothy Fredrickson
v
Warden Rivers, et, al,

No. 22-04154

17-40032

Request for bail pending disposition of §2255 petition

Now comes the petitioner, Fredrickson, respectfully requesting that the court grant bail under any and all conditions it deems necessary, and in support states as follows:

1) Fredrickson incorporates by refrence Dkt 277 and it's refrence to government delay and caselaw providing a presuption of unconstitutional detention in cases with a delay shorter than that present here, in §2255 petitions.

2) Fredrickson is very much willing to follow any conditions of temporary release, no matter how restrictive or burdensome.

3) Fredrickson is able to provide for transportation from FCI Seagoville to any district of this court's choosing.

4) Fredrickson will promptly and willfully self-surrender in the event that the petition is denied.

5) Several of Fredrickson's family members are willing to host, and ensure compliance with any court conditions.

6) Fredrickson has discussed with the Federal Public Defender's Office how it implements internships, and is willing and willing to create conditions which would permit the office to employ (and thereby supervise) Fredrickson.

/S/ Tim Fred

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Appendix G – Appeal Brief (Response)

No. 23-2582

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TIMOTHY FREDRICKSON,

Petitioner-Appellant.

On Appeal from the United States District Court
for the Central District of Illinois, No. 17-cr-40032
The Honorable Michael M. Mihm

BRIEF FOR THE UNITED STATES

GREGORY K. HARRIS
United States Attorney

KATHERINE V. BOYLE
Assistant United States Attorney
Office of the United States Attorney
201 South Vine Street, Suite 226
Urbana, Illinois 61802
(217) 373-5875

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JURISDICTIONAL STATEMENT[1]

The jurisdictional summary in the petitioner's brief is not complete and correct because it is absent.

In March 2017, a grand jury sitting in the Central District of Illinois returned a single-count indictment charging the petitioner with sexual exploitation of a child, in violation of 18 U.S.C. § 2251(a), (e). The district court had subject matter jurisdiction under 18 U.S.C. § 3231.

The petitioner was convicted following a jury trial on January 22, 2020. On June 4, 2020, the district court imposed a sentence of 200 months' imprisonment, to be followed by a ten-year term of supervised release. The court entered final judgment the following day. The petitioner timely appealed, and this Court affirmed the judgment of the district court. *United States v. Fredrickson*, 996 F.3d 821, 823 (7th Cir. 2021).

Amid other post-sentencing litigation, in October 2022, the petitioner filed a motion to vacate his sentence under 28 U.S.C. § 2255, which remains pending. *See*

[1] We use the following abbreviations for record citations: "R." followed by a number refers to a document in the district court record; "D.E." followed by a date refers to a docket entry in the district court record; "PSR" refers to the revised presentence report (R. 172); "Trial Tr." refers to the transcripts of the jury trial held on January 21 and 22, 2020 (R. 192, 193); "Sent. Tr." refers to the transcript of the sentencing hearing held on June 4, 2020 (R. 194); and "Pet. Br." refers to the petitioner's opening brief in this appeal.

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Fredrickson v. United States, CDIL No. 22-cv-4154.[2] The district court had subject-matter jurisdiction under 28 U.S.C. § 1331.

The petitioner then filed a motion for bail pending disposition of the § 2255 motion. The district court denied the motion on July 18, 2023. The petitioner did not request a certificate of appealability.

The petitioner filed a notice of appeal on August 11, 2023. He attested under penalty of perjury that he placed the notice in his institution's internal mailing system on August 1, 2023, with first-class postage prepaid. The notice was thus timely. *See* Fed. R. App. P. 4(c)(1)(A)(i).

Nonetheless, there is a circuit split as to whether an appellate court has jurisdiction over an appeal in these circumstances. Title 28, United States Code, Section 2253 states that "[u]nless a circuit justice or [district] judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a proceeding under Section 2255." 28 U.S.C. § 2253(c)(1)(B); *see also* Fed. R. App. P. 22 "(in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)). A certificate of appealability may issue

[2] The § 2255 motion was initially docketed in *Fredrickson v. United States*, No. 22-cv-4154, R. 1 (C.D. Ill. Oct. 18, 2022). Although the § 2255 proceeding is civil, the court subsequently ordered that all § 2255 filings would be docketed in the criminal case. *Fredrickson*, No. 22-cv-4154, D.E. 10/18/2022 (C.D. Ill. Oct. 18, 2022).

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"only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2).

Certain courts have held that this requirement applies to petitioners like Fredrickson, who seek an interlocutory appeal of the denial of bail pending habeas review. *See, e.g., United States v. Nesbitt*, 610 F. App'x 310, 311 (4th Cir. 2015) (citing 28 U.S.C. § 2253(c)(1)); *United States v. Jeffus*, 615 F. App'x 137 (4th Cir. 2015);[3] *Pagan v. United States*, 353 F.3d 1343, 1346 (11th Cir. 2003).

Following the Supreme Court's decision in *Harbison v. Bell*, 556 U.S. 180 (2009), however, several circuits have held to the contrary that a certificate of appealability is "not required when appealing from orders in a habeas proceeding that are collateral to the merits of the habeas claim itself, including the denial of bail." *Illarramendi v. United States*, 906 F.3d 268, 270 (2d Cir. 2018); *see also Pouncy v. Palmer*, 993 F.3d 461, 464 (6th Cir. 2021) (holding the same in the context of a 28 U.S.C. § 2254 motion); *Watson v. Goodwin*, 709 F. App'x 311, 312 (5th Cir. 2018) (same).

[3] Despite the more thorough analyses in *Nesbitt* and *Jeffus*, the Fourth Circuit concluded with little discussion in *United States v. Sharpe* that jurisdiction to consider such an appeal existed under the collateral order doctrine and held that a certificate of appealability was unnecessary. 834 F. App'x 823, 824 (4th Cir. 2021).

This Court has yet to directly consider the issue. *E.g., United States v. Tartareanu*, No. 2:12-CR-175-PPS-APR, 2019 WL 92600, at *1 (N.D. Ind. Jan. 3, 2019) (noting this Court has not "definitively answered this question").

Notably, the petitioner here did not seek a certificate of appealability from the district court prior to filing his appeal. As a result, the district court did not grant one. Nor did the district court decline to issue a certificate of appealability (or even fail to act on a request for one) such that this Court could issue one now. *See* Fed. R. App. P. 22(b)(1) ("If the district judge has denied the certificate [of appealability], the applicant may request a circuit judge to issue it.").

Should this Court determine that a certificate of appealability is required, the Court must dismiss this appeal for lack of jurisdiction.

If a certificate of appealability is not required, this Court has jurisdiction under 28 U.S.C. § 1291; *see also Cherek v. United States*, 767 F.2d 335, 336-37 (7th Cir. 1985).

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ISSUE PRESENTED FOR REVIEW

Did the district court act within its discretion in denying the petitioner's motion for bail pending disposition of his motion to vacate his sentence under 28 U.S.C. § 2255.

STATEMENT OF THE CASE

The petitioner, Timothy Fredrickson, is a convicted sex offender who pursued two minors in the span of a month and convinced one – a sixteen-year-old Illinois girl – to send him explicit videos. The district court sentenced Fredrickson to a below-Guidelines sentence of 200 months' imprisonment, to be followed by a ten-year term of supervised release. Fredrickson subsequently filed a motion to vacate that sentence under 28 U.S.C. § 2255, which remains pending. In the instant appeal, he challenges the district court's denial of his motion for bail pending the disposition of his § 2255 motion. Pet. Br. 8-17. His arguments lack merit.

I. Factual Background

A. Pursuit of Fifteen-Year-Old Girl

In December 2016, Fredrickson engaged in sexually explicit discussions with not one but two minors. PSR ¶¶ 14-22. These communications first came to law enforcement's attention when they discovered Fredrickson, who was twenty-seven at the time, sitting alone in his car during a nighttime vehicle check at a park in Rapid City, Illinois. PSR ¶ 14. Fredrickson falsely told law enforcement agents that he was waiting for an individual whom he believed to be nineteen years old. PSR ¶¶ 14-15. The officers were familiar with a minor of the same name and suspected Fredrickson planned to meet her. PSR ¶ 14. Fredrickson claimed he met the individual via an online dating application, but once the officers asked to see

her profile, he said that she had deleted it. *Id.* He provided the officers with the individual's phone number, and they permitted him to leave, warning him that he was not allowed to be in the park, which closed after dark. *Id.* The individual was later confirmed to be a fifteen-year-old girl. *Id.*

Further investigation – including an interview of the minor and examination of her cell phone – revealed that Fredrickson had previously sent her a "Sexual Question Survey." PSR ¶ 15. In responding to that survey, the minor had informed Fredrickson that she was fifteen. *Id.*

B. Offense Conduct

Less than two weeks later, apparently undeterred by his encounter with law enforcement, Fredrickson began chatting with a second minor, a sixteen-year-old Illinois girl, via the phone application Whisper and later through social media. PSR ¶ 16; *see also United States v. Fredrickson*, 996 F.3d 821, 823 (7th Cir. 2021). Though Fredrickson was aware of the girl's age, the conversation turned sexually explicit. PSR ¶¶ 16-22. Fredrickson requested and received videos of the girl's genitals and encouraged her to masturbate during these recordings, which he saved to his cell phone. PSR ¶¶ 19-22.

In February 2017, the girl's mother learned that Fredrickson sent flowers to the girl's high school. PSR ¶ 17. That prompted the mother's discovery of

Fredrickson's exploitative, online relationship with her daughter and a subsequent law enforcement investigation. PSR ¶¶ 17, 19-22; Trial Tr. 44.

The investigation confirmed that Fredrickson was aware the girl was a minor. Trial Tr. 44-45, 49-50; R. 1 at 2. Law enforcement officers eventually obtained a search warrant for Fredrickson's residence in Davenport, Iowa, and his truck and recovered numerous electronic devices. Trial Tr. 49, 54; *see Fredrickson v. McAuliffe et al.*, No. 4:19-cv-121, R. 24, Ex. 3 (S.D. Iowa July 13, 2020). The home screen of a cell phone – which showcased the apparently topless minor victim (though she was partially covered by a pillow) – further verified Fredrickson's illegal communications, and Fredrickson himself admitted that he had requested certain sexual images and videos from the victim. PSR ¶ 18; Trial Tr. 71-73, 77, 79. Trial Tr. 59-73, 77, 79; Gov. Exs. 9, 9A, 9B; R. 1 at 4.

Investigators later obtained a federal search warrant that permitted them to search Fredrickson's electronic devices. R. 1 at 6; *see also* Trial Tr. 92-102. Agents discovered sexually explicit videos from the minor victim on Fredrickson's cell phone. *Id.* at 6-7, 151-78; PSR ¶¶ 17, 19-22. In addition to that phone, a hard drive from the residence also contained explicit videos of the minor victim that had apparently been saved to the device by Fredrickson. Trial Tr. 101-08, 199-200. Fredrickson's arrest followed. PSR ¶¶ 23-24.

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II. Court Proceedings

A. Underlying Criminal Case

A federal grand jury in the Central District of Illinois returned a single-count indictment charging Fredrickson with sexual exploitation of a child, in violation of 18 U.S.C. § 2251(a), (e). R. 1, 13. Substantial pretrial litigation ensued, including the district court's denial of Fredrickson's motion to dismiss the indictment because his statute of conviction, 18 U.S.C. § 2251(a), purportedly violated the First Amendment and was thus unconstitutionally overbroad. R. 142, 142-1; D.E. 1/17/2020. The case proceeded to trial in January 2020, and the jury returned a verdict of guilty on January 22, 2020. D.E. 1/21/2020, 1/22/2020; R. 142, 142-1, 154.

At the sentencing hearing in June 2022, the district court determined that Fredrickson faced an advisory Guidelines range of 235 to 293 months' imprisonment, based on his total offense level of 38 and criminal history category of I. Sent. Tr. 40; *see also* PSR ¶ 79. The statutory mandatory minimum sentence for Fredrickson's offense was fifteen years' imprisonment and the maximum sentence was thirty years' imprisonment. PSR ¶ 79.

The district court imposed a below-Guidelines sentence of 200 months' imprisonment, to be followed by a ten-year term of supervised release. Sent. Tr. 58; D.E. 6/4/2020; R. 183.

The court entered final judgment the next day, and Fredrickson timely filed a notice of appeal. R. 183, 188.

B. Direct Appeal

Fredrickson's direct appeal reprised his argument that his statute of conviction, 18 U.S.C. § 2251(a), was unconstitutionally overbroad. *United States v. Fredrickson*, 996 F.3d 821, 823 (7th Cir. 2021). This Court held that Supreme Court precedent prohibited his challenge. While the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, the Supreme Court had held that "child pornography was categorically unprotected under the First Amendment." *Id.* at 824 (citing *New York v. Ferber*, 458 U.S. 747, 763 (1982)).

C. Denials of Compassionate Release Motions and Related Appeals

On January 18, 2022, Fredrickson filed pro se motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A), which the district court denied, along with his subsequent motion to reconsider. R. 203, 214, 215; D.E. 1/19/2022, 3/21/2022. Fredrickson appealed the denials of both that motion for compassionate release and the motion to reconsider. *United States v. Fredrickson*, No. 22-1542, 2022 WL 16960322 (7th Cir. Nov. 16, 2022). This Court affirmed the judgment of the district court. *Id.*

Subsequently, in June 2022, Fredrickson filed a second pro se compassionate release motion. R. 224. The district court denied the motion without prejudice on

September 15, 2022, citing Fredrickson's failure to exhaust his administrative remedies. R. 232. Fredrickson subsequently filed a motion for reconsideration of the denial, which the court denied in a text order. R. 241; D.E. 12/15/2022. This Court affirmed the judgment of the district court. *United States v. Fredrickson*, No. 23-1042, 2023 WL 6859761 (7th Cir. Oct. 18, 2023).

D. Section 2255 Motion and Related Litigation

Meanwhile, on October 18, 2022, Fredrickson filed a motion under 28 U.S.C. § 2255 raising, by his count, approximately eighty claims regarding a host of issues regarding the investigation of his offense, his prosecution and trial, his attorney's performance, and the constitutionality of the statute under which he was convicted, among others. R. 239.[4]

[4] Shortly after, Fredrickson also filed a motion for recusal of the trial judge – Senior U.S. District Judge Michael M. Mihm – from presiding over his § 2255 motion. R. 242. Fredrickson filed a related motion giving "consent for all proceedings before a magistrate judge," which the district court construed as a request for the proceedings to occur before a magistrate. R. 243. On December 15, 2022, the district court (Mihm, J.) denied the motion for recusal and the motion requesting proceedings before a magistrate judge. D.E. 12/15/2022. Fredrickson appealed the denials of his motions for recusal and for referral to a magistrate judge. R. 250; *United States v. Fredrickson*, No. 22-3311 (7th Cir.). That appeal remains pending and was consolidated with his appeal of the denial of his motion for a new trial, *United States v. Fredrickson*, No. 23-1003 (7th Cir.); *see also infra*, pp. 14-15.

The government filed a motion to dismiss, arguing that the § 2255 motion was untimely, R. 244, which the district court denied, permitting the government additional time to file a substantive response; R. 267.[5]

The government later requested sixty additional days to respond. R. 268. The government explained that while reviewing Fredrickson's many claims to determine which were properly raised and which were procedurally barred, it had determined that although "excerpts of the jury trial were previously ordered and received, the transcripts of the remaining portions of the jury trial [were] required to properly address Fredrickson's claims." *Id.* at 2. The government was in the process of preparing the transcripts so it could "provide an appropriate response" to the district court. *Id.* The government averred that the motion was "not for the purpose of delay." *Id.* The district court granted the motion, noting that good cause had been shown. D.E. 5/19/2023.

Fredrickson later filed a motion to request counsel to assist with the § 2255 motion, R. 276, which the district court also denied, D.E. 6/16/2023. Fredrickson then filed a motion to reconsider that denial, which the district court denied as well. R. 278; D.E. 7/18/2023 (first).

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[5] Fredrickson also filed an appeal of the district's order granting the government additional time to submit a response on the merits to his § 2255 motion after denying its motion to dismiss. R. 267; *United States v. Fredrickson*, No. 23-2124 (7th Cir.). That appeal has been dismissed. *Fredrickson*, No. 23-2124, R. 7 (7th Cir. July 13, 2023).

Additionally, Fredrickson filed a motion requesting that the district court amend its prior order denying the government's motion to dismiss to include a default judgment against the government. R. 277. The court declined that request. D.E. 7/18/2023 (third).

On July 18, 2023, the government filed a second motion for an extension of time to respond to the § 2255 motion, asking for an additional week. R. 280. The government explained that in finalizing its response, it again reviewed Fredrickson's approximately ninety claims, and identified "potential claims of ineffective assistance of counsel that were not initially contemplated [and addressed] in its response." *Id.* at 2. The government therefore sought the extension to provide the district court with "more thorough briefing on those claims." *Id.* The court granted the motion. D.E. 7/20/2023.

On July 24, 2023, Fredrickson filed a supplemental memorandum of law in support of certain claims in his § 2255 motion. R. 281. Two days later, on July 26, 2023, Fredrickson filed another supplemental memorandum of law in support of different habeas claims. R. 282.

On July 27, 2023, the government filed a response in opposition to Fredrickson's § 2255 motion. R. 283.

On August 21, 2023, Fredrickson filed a motion requesting leave to file "further factual and legal information in support of existing [§ 2255] claims without it being

construed as [his] reply, such that the government may give an initial response to the claims it [had chosen] not to address." R. 287 at 1. Alternatively, Fredrickson requested that the court permit an amendment to the original petition to include that information. *Id.*

That same day, Fredrickson filed a motion requesting that the district court order the government to more fully respond to his § 2255 motion and permit Fredrickson an extension of time to reply. R. 288. He also requested copies of the transcripts ordered by the government and, with that request, reiterated his prior motion for an extension. R. 289.

The district court has not yet ruled on Fredrickson's § 2255 motion.

E. Motion for New Trial

Around the same time frame, on November 18, 2022, Fredrickson filed a motion for new trial under Rule 33 of the Federal Rules of Criminal Procedure. R. 245. Within the motion, he requested that the Federal Public Defender's Office be appointed to assist. *Id.* at 1. The district court likewise denied the motion for new trial. D.E. 12/15/2022. Once again, Fredrickson appealed that denial. R. 252; *United States v. Fredrickson*, No. 23-1003 (7th Cir.). That appeal also remains

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pending and was consolidated with another of Fredrickson's pending appeals, *United States v. Fredrickson*, No. 22-3311 (7th Cir.); *see also supra*, p. 11, n. 4.[6]

F. Denial of Motion for Bail and the Instant Appeal

In July 2023, Fredrickson filed the motion for bail pending the disposition of his § 2255 motion that is the subject of the instant appeal, arguing primarily that the government's purportedly undue delay in responding to his § 2255 motion justified granting his bail request. R. 279. Within the motion for bail, Fredrickson referenced his prior motion requesting default judgment against the government, in which he claimed that the government forfeited other defenses by failing to raise them in its motion to dismiss his habeas petition as untimely. *Id.* (citing R. 277 at 2). In that motion, Fredrickson had also criticized the government's alleged failure to promptly order the transcripts needed to respond to the § 2255 motion while the government's motion to dismiss was pending or during the initial twenty-one days following the denial of the motion to dismiss. R. 277 at 3. One possible remedy, he argued, was for the court to grant release on bail pending the disposition of his § 2255 motion. *Id.*

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[6] Fredrickson also filed a motion requesting the immediate return of his property in the fall of 2022. R. 236. The court declined to order the government to return the property given pending post-conviction matters and in light of the fact that some of the seized evidence was not in the government's possession. D.E. 3/30/2023. Fredrickson appealed the order, R. 262, and that appeal, too, remains pending, *see United States v. Fredrickson*, No. 23-1735 (7th Cir.).

In the motion for bail, Fredrickson also claimed that he would follow any condition of release, no matter how restrictive or burdensome, and said that his family members were willing to host him and assure his compliance. R. 279 at 1. He stated that he understood how the Federal Public Defender's Office runs its internship program and said he was "willing to create conditions [that] would permit the office to employ (and thereby supervise)" him. *Id.* Finally, he said he would promptly surrender should his § 2255 motion be denied. *Id.*

The district court denied Fredrickson's motion for bail on July 18, 2023. D.E. 7/18/2023 (second). The court explained that is power to release a prisoner on bail pending the disposition of a § 2255 motion was "to be exercised very sparingly, and only when the Petitioner has shown both a substantial claim of law based on the facts surrounding his petition and circumstances making the motion for bail exceptional and deserving of special treatment in the interests of justice." *Id.* (citing *Cherek v. United States*, 767 F.2d 335, 337 (7th Cir. 1985)). The court explained that while it had not yet addressed Fredrickson's § 2255 motion on the merits, it was "clear from a cursory review of his submissions that he [had] not met this strict standard." *Id.*

Fredrickson's notice of appeal followed within fourteen days, *see* Fed. R. App. P. 4(b)(1)(A). He did not request a certificate of appealability. R. 284; *see also supra*, pp. 1-4.

SUMMARY OF THE ARGUMENT

The district court acted within its discretion in denying Fredrickson's motion for bail pending disposition of his 28 U.S.C. § 2255 motion. Fredrickson failed to meet the requisite two-pronged test to deterine whether bail was warranted: "(1) does the petition raise a substantial constitutional claim which has a high probability of success, *and* (2) do extraordinary or exceptional circumstances exist such that bail must be granted to afford the petitioner an effective remedy?" *United States v. Krieg*, No. 2:17-CR-146-JVB-JEM, 2022 WL 2867418, at *11 (N.D. Ind. July 21, 2022) (emphasis added); *see also United States v. Dade*, 959 F.3d 1136, 1138 (9th Cir. 2020). First, the court correctly concluded that it was not readily evident that Fredrickson's § 2255 motion should be granted. D.E. 7/18/2023 (second). Second, the court properly adduced that Fredrickson presented no extraordinary circumstances warranting his release. *Id.*

ARGUMENT

The District Court Acted Within Its Discretion In Denying Fredrickson's Motion For Bail Pending The Resolution Of His Motion To Vacate Under 28 U.S.C. § 2255

A. Standard of Review

This Court reviews a district court's habeas bail decision for an abuse of discretion. *See, e.g., Pouncy v. Palmer*, 993 F.3d 461, 463 (6th Cir. 2021); *Landano v. Rafferty*, 970 F.2d 1230, 1238 (3d Cir. 1992).

B. Legal Framework

"[F]ederal district judges in habeas corpus and section 2255 proceedings have inherent power to admit applicants to bail pending the decision of their cases, but a power to be exercised very sparingly." *Cherek v. United States*, 767 F.2d 335, 337 (7th Cir. 1985); *see also Bolante v. Keisler*, 506 F.3d 618, 620 (7th Cir. 2007) ("Inherent judicial authority to grant bail to persons who have asked for relief in an application for habeas corpus is a natural incident of habeas corpus, the vehicle by which a person questions the government's right to detain him.").

The reason for "parsimonious exercise of the power should be obvious." *Cherek*, 767 F.2d at 337.

> A defendant whose conviction has been affirmed on appeal (or who waived his right of appeal, as by pleading guilty, or by foregoing appeal after being convicted following a trial) is unlikely to have been convicted unjustly; hence the case for bail pending resolution of his postconviction proceeding is even weaker than the case for bail

> pending appeal. And the interest in the finality of criminal proceedings is poorly served by deferring execution of sentence till long after the defendant has been convicted.

Id.

District courts within this Circuit "have adopted a two-pronged test for determining whether bail is appropriate pending resolution of a § 2255 motion: (1) does the petition raise a substantial constitutional claim which has a high probability of success, *and* (2) do extraordinary or exceptional circumstances exist such that bail must be granted to afford the petitioner an effective remedy?" *United States v. Krieg*, No. 2:17-CR-146-JVB-JEM, 2022 WL 2867418, at *11 (N.D. Ind. July 23, 2022) (emphasis added); *see also Rogers v. Lumpkin*, No. 22-10654, 2023 WL 109720, at *2 (5th Cir. Jan. 5, 2023) (same in the 28 U.S.C. § 2254 context) (internal quotation marks omitted) (citing *Calley v. Callaway*, 496 F.2d 701, 702 (5th Cir. 1974)). Both prongs of the test must be met for the motion to be granted. *Petrunak v. United States*, No. 1:17-CV-04396, 2017 WL 11469612, at *1 (S.D. Ind. Dec. 21, 2017), *aff'd*, No. 18-1173, 2018 WL 11601299 (7th Cir. Jan. 26, 2018); *see also United States v. Dade*, 959 F.3d 1136, 1138 (9th Cir. 2020) (explaining the same).

The courts have denied motions for bail in circumstances where it is not "readily evident" that a habeas petition should be granted. *Pierce v. Eplett*, No. 20-CV-1300, 2022 WL 489527, at *1 (E.D. Wis. Feb. 17, 2022); *see also United States v. Yoder*, No. 3:17-CR-30 JD, 2022 WL 16835810, at *8 (N.D. Ind. Nov. 9, 2022)

(denying motion for bail where likelihood of success via § 2255 motion was not "readily apparent"). The denial of bail is appropriate even if the petitioner has presented a matter that requires an evidentiary hearing where the court is nonetheless unable to conclude that the petitioner's "chance of success" following such a hearing "is greater than the Government's." *Krieg*, No. 2:17-CR-146-JVB-JEM, 2022 WL 2867418, at *11.

Examples of "extraordinary circumstances" justifying release "include where there has been a serious deterioration of the petitioner's health while incarcerated, short sentences for relatively minor crimes so near completion that extraordinary action is essential to make collateral review truly effective, or possibly extraordinary delay in processing a habeas corpus petition." *Lumpkin*, No. 22-10654, 2023 WL 109720, at *2 (internal quotation marks omitted); *see also Petrunak*, No. 1:17-CV-04396, 2017 WL 11469612, at *1 (quoting *Landano*, 970 F.2d at 1239) (noting that situations in which extraordinary circumstances exist "seem to be limited to situations involving poor health or the impending completion of the prisoner's sentence and stating that projected release within the next year was "not sufficiently soon enough.").

"Virtually all habeas corpus petitioners argue that their confinement is unlawful." *Iuteri v. Nardoza*, 662 F.2d 159, 162 (2d Cir. 1981). For that reason, a "claim of merely being confined unlawfully pending a decision on a § 2255 motion

is not unusual and ordinarily will not warrant bond." *Staszak v. United States,* No. 12-CR-40064-JPG, 2017 WL 5612601, at *6 (S.D. Ill. Nov. 21, 2017) (citing *Martin v. Solem,* 801 F.2d 324, 330 (8th Cir. 1986)). That is true even where the claim may have merit, barring the aforementioned showing that the petitioner's bail request is "exceptional and deserving of special treatment in the interest of justice." *United States v. Swanson,* No. 06-CR-083, 2017 WL 1232590, at *2 (E.D. Wis. Apr. 3, 2017). Otherwise, petitioners "must follow the same procedural rules as all other prisoners who believe" their incarceration is in violation of the Constitution or laws of the United States. *Id.*

C. Analysis

The district court acted within its discretion in denying Fredrickson's motion for bail pending the disposition of his § 2255 motion. Fredrickson can show neither that his § 2255 motion raises a substantial constitutional claim that has a high probability of success nor that extraordinary or exceptional circumstances exist such that bail must be granted to afford him an effective remedy. *Krieg,* No. 2:17-CR-146-JVB-JEM, 2022 WL 2867418, at *11.

1. Fredrickson cannot show that his § 2255 motion has a high probability of success

The bar for habeas relief is itself high. Section 2255(a) provides for relief where a prisoner's sentence "was imposed in violation of the Constitution or laws of the

United States, or [where] the court was without jurisdiction to impose such sentence, or [where] the sentence was in excess of the maximum authorized by law." § 2255(a). This Court has explained that relief under the statute "is available 'only in extraordinary situations, such as an error of constitutional or jurisdictional magnitude or where a fundamental defect has occurred which results in a complete miscarriage of justice.'" *United States v. Coleman*, 763 F.3d 706, 708 (7th Cir. 2014), *as amended on denial of reh'g and reh'g en banc* (Oct. 16, 2014).

As noted above, Fredrickson must show, in part, that his § 2255 motion raises "a substantial constitutional claim which has a high probability of success" under those metrics to justify his request for bail. *Krieg*, No. 2:17-CR-146-JVB-JEM, 2022 WL 2867418, at *11; *see also Rogers*, No. 22-10654, 2023 WL 109720, at *2. This he cannot do. The courts have routinely denied motions for bail where, as here, it is not "readily evident" that a habeas petition should be granted. *Pierce*, No. 20-CV-1300, 2022 WL 489527, at *1.

While Fredrickson brought a number of claims in his § 2255 motion, the district court correctly adduced that he nonetheless had not shown "a substantial claim of law based on the facts surrounding his petition and circumstances making the motion for bail exceptional and deserving of special treatment in the interests of justice." D.E. 7/18/2023 (second) (citing *Cherek v. United States*, 767 F.2d 335, 337 (7th Cir. 1985)). Although the court had not yet addressed Fredrickson's § 2255

motion on the merits, it was "clear from a cursory review of his submissions that he [had] not met this strict standard." *Id.*

The district court not only acted within its discretion in reaching that conclusion, it was particularly suited to make the decision. The same district judge (Mihm, J.) handled Fredrickson's criminal proceedings, § 2255 motion, and the instant motion for bail. The eighty or more claims raised by Fredrickson in his § 2255 motion involved the investigation of his offense, his prosecution and trial, his attorney's performance, and the constitutionality of the statute under which he was convicted, among others. R. 239. The district judge had a front-row seat to the related proceedings.

The procedural posture of Fredrickson's case further counseled the district court's "parsimonious exercise" of its power to release a petitioner pending the disposition of his § 2255 motion. *Cherek*, 767 F.2d at 337. Fredrickson was found guilty in a court of law following jury trial. D.E. 1/21/2020, 1/22/2020; R. 142, 142-1, 154. That conviction was affirmed by this Court on appeal following his challenge to the constitutionality of his statute of conviction. *United States v. Fredrickson*, 996 F.3d 821, 823 (7th Cir. 2021). And the district court denied Fredrickson's motion for a new trial, the appeal of which remains pending. *United States v. Fredrickson*, No. 22-3311 (7th Cir.)

This Court also affirmed the district court's denials of Fredrickson's first compassionate release motion and related motion to reconsider. *United States v. Fredrickson*, No. 22-1542, 2022 WL 16960322 (7th Cir. Nov. 16, 2022). And the Court likewise affirmed the district court's denial of Fredrickson's motion to reconsider its denial of his second compassionate release motion. *United States v. Fredrickson*, No. 23-1042, 2023 WL 6859761 (7th Cir. Oct. 18, 2023).

It would make little sense to require the district court to commit to a deeper inquiry regarding Fredrickson's § 2255 claims to deny the motion for bail. And the case law does not require it. *Yoder*, No. 3:17-CR-30 JD, 2022 WL 16835810, at *8 (motion for bail properly denied where likelihood of success via § 2255 motion was not "readily apparent"). That is particularly true where, as here, it is only on appeal that Fredrickson points to the most viable claims among the more than eighty he raised in his § 2255 motion. R. 279; Pet. Br. 7, 11-16. In any case, neither of the claims he highlights now has a high likelihood of success. They are a Speedy Trial claim, which was more appropriate for direct appeal, and a challenge to the statute of conviction, even though this Court already held the statute constitutional on appeal. Pet. Br. 7, 11-16; *see also* R. 239 at 1; *Fredrickson*, 996 F.3d at 823.

As a final point, the district court has not even determined that an evidentiary hearing is warranted on Fredrickson's ineffective assistance of counsel claim. In

similar circumstance, the Fifth Circuit declined to determine that a petitioner had "demonstrated a high probability of success" on such a claim. *United States v. Pfluger*, 522 F. App'x 217, 218 (5th Cir. 2013).

2. Fredrickson does not present extraordinary circumstances

Regardless of Fredrickson's chance of success on the merits of his § 2255 claims, there can be no dispute that he has failed to show any "extraordinary circumstances" justifying his release, which alone dooms his motion for bail. *Landano*, 970 F.2d at 1239. Initially, Fredrickson has not shown that the above claims are notably different from those of other habeas petitioners, who nearly all claim that their confinement is unlawful. *Iuteri*, 662 F.2d at 162. His claims are thus "not unusual" and do not "warrant bond." *Staszak*, No. 12-CR-40064-JPG, 2017 WL 5612601, at *6.

Moreover, Fredrickson does not point to any other extraordinary circumstances. Fredrickson makes no claim of poor health. *Landano*, 970 F.2d at 1239. He has substantial time remaining on his sentence, with a scheduled release date of June 25, 2031. *See* Federal Bureau of Prisons, Find an inmate, available at https://www.bop.gov/ inmateloc/ (last visited Oct. 23, 2023). And his crime of conviction – the sexual exploitation of a minor – was among the most serious the government charges and indicates the potential threat he poses to public safety. *Jenkins v. United States*, No. 20-CV-233-SMY, 2023 WL 2483416, at *2 (S.D. Ill. Feb.

6, 2023) (declining to grant bail given the gravity of the petitioner's kidnapping conviction and the threat he posed to public safety).

Fredrickson's primary remaining argument – that delay by the government warrants his release – does not hold water. Pet. Br. 8-10. The United States District Court for the Western District of Wisconsin recently explained, in case where the government had missed several deadlines to respond to the petitioner's habeas petition, that delay did not present "exceptional circumstances" justifying the petitioner's release. *Strong v. Buesgen*, No. 21-CV-296-JDP, 2023 WL 2156735, at *3 (W.D. Wis. Feb. 22, 2023).

The case for exceptional circumstances is even weaker here, given the government's well-justified reasons for the delay. First, the government had a viable argument that Fredrickson's § 2255 motion was untimely, which it diligently pursued. R. 244. Following the denial of its motion to dismiss, R. 267, the government prepared its response to Fredrickson's wide-ranging § 2255 motion, realizing through that work that it required additional transcripts and requesting a sixty-day extension to obtain them. R. 268. The district court granted that extension. D.E. 5/19/2023. The government also obtained a short, additional extension of one week to ensure it had fully responded to all of Fredrickson's eighty-plus claims. R. 280; D.E. 7/20/2023.

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Furthermore, Fredrickson own conduct in district court undermines his objection to the government's purported delay. Notably, only days before the government filed its response to Fredrickson's § 2255 motion, he attempted to supplement his § 2255 claims R. 281, 282. And even after the government's response was filed, Fredrickson continued to attempt to provide "further factual and legal information in support of existing [§ 2255] claims without it being construed as [his] reply, such that the government [could] give an initial response to the claims it [had chosen] not to address." R. 287 at 1. Alternatively, Fredrickson requested that the court permit him to amend his original petition. *Id.* Fredrickson even requested that the district court order the government to more fully respond to his § 2255 motion and permit Fredrickson an extension of time to reply. R. 288. He also requested the transcripts initially ordered by the government, despite having had time to do so earlier (and now, on appeal, curiously blames the government for its purported failure to attach them to its § 2255 response, Pet. Br. 8-9).

It makes little sense to permit Fredrickson to blame the government for delaying the disposition of his lengthy § 2255 motion such that his release on bail was warranted in light of (1) the government's amply justified reasons for its extensions of time, and (2) his own later attempts to supplement and alter his

habeas claims and obtain an additional response from the government, all of which further extended the proceedings.

In sum, Fredrickson demonstrates neither that his § 2255 motion raises a substantial constitutional claim that has a high probability of success nor that extraordinary or exceptional circumstances exist such that bail must be granted to afford him an effective remedy. The district court acted within its discretion in denying his motion for bail based on his failure to meet either required prong.

CONCLUSION

For the reasons discussed above, this Court should affirm the judgment of the district court.

Respectfully submitted,

GREGORY K. HARRIS
United States Attorney

By: /s/ KATHERINE V. BOYLE
Assistant United States Attorney
Office of the United States Attorney
201 South Vine Street, Suite 226
Urbana, Illinois 61802-3369
(217) 373-5875

CERTIFICATE OF SERVICE

I certify that on October 23, 2023, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, and I hereby certify that within three days of this same date I caused a true and correct copy to be sent via United States Mail, first class and postage prepaid, addressed to the Petitioner-Appellant:

Timothy B. Fredrickson, Reg. No. 22005-026
FCI Seagoville
Federal Correctional Institution
P.O. Box 9000
Seagoville, TX 75159

/s/ KATHERINE V. BOYLE
Assistant United States Attorney

Appendix H – Appeal Brief (Reply)

Appendix I – District Court Text Order: Rule 41(g) Motion for Return of Property

10/29/2019		TEXT ORDER denying 116 Motion to Return Property: On 9/30/2019, Defendant Timothy Fredrickson filed a pro se Motion to Return Property requesting entry of an order compelling "the return of all physical and intellectual property falling outside the scope of any and all warrants." The Government filed its Response 125 on 10/22/2019, stating that law enforcement only seized property within the scope of the authorized warrants. Rule 41(g) of the Federal Rules of Criminal Procedure states that "[a] person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the propertys return." Fed. R. Crim. P. 41(g); see also United States v. Sweeney, 688 F.2d 1131, 1146 (7th Cir. 1982). Defendant bears the burden of establishing that the retention of property is unreasonable while the prosecution is ongoing. United States v. Nelson, 190 Fed. Appx. 712, 714 (10th Cir. 2006). Defendant did not identify the property at issue, nor did he explain why his property should be returned during the pendency of this prosecution. Therefore, Defendant's Motion to Return Property is DENIED. Defendant is again reminded that he is represented by counsel and that counsel may file any additional non-frivolous motions on his behalf. See United States v. Rollins, 309 Fed. Appx. 37, 38 (7th Cir. 2009) (defendant who is represented by counsel does not have right to file pro se submissions). Entered by Judge Michael M. Mihm on 10/29/2019. (VH, ilcd) (Entered: 10/29/2019)

10/31/2022		TEXT ONLY ORDER RE Defendant's Motion to Return Property 236 . Defendant filed a motion asking for status update on certain items of his that were seized. On May 6, 2020, the Court entered a Final Order of Forfeiture. There, the Court explained that commencing on March 5, 2020 the United States posted an official government internet site notice of forfeiture to dispose of the property in accordance with the law. The Court was advised that no petitions or claims were filed. ECF No. 170. Accordingly, the Court entered a final order of forfeiture as to **one LG G5** cellphone and **one HP P600 desktop** without objection. The Court notes that the documents that Petitioner provided to the Court indicates that it was the local police department that ***seized*** the items. Accordingly, it is not clear that the U.S. Attorney's Office has possession or knowledge of the location of any items that were not forfeited. However, the Government is ORDERED to respond to the motion within 30 days of the entry of this order regarding whether it currently has or ever had in its possession any of the seized items that have not been forfeited and any necessary explanation. Entered by Judge Michael M. Mihm on 10/31/2022. (AH) (Entered: 10/31/2022)

(continued on next page)

03/30/2023		TEXT ONLY ORDER RE 236 . Defendant filed a motion for status of property, and the Court ordered the Government to respond, which the Government has done (ECF No. 247). The Government notes in Defendant's Motion to Vacate (ECF No. 239), he challenges some of the very evidence that he seeks to have returned. Accordingly, the Government argues that the pending post-conviction matters means the criminal matter is not complete since the evidence would be necessary if Defendant's Motion to Vacate is successful. The Court agrees the Government need not return evidence needed for retrial at this juncture. Moreover, the Government notes that ***some* of seized evidence is not *directly* in its possession.** Accordingly, Defendant's Motion for Status is GRANTED to the extent that the Court ordered the Government to respond and DENIED to the extent that Defendant seeks to have the Government return the property. Entered by Judge Michael M. Mihm on 3/30/2023. (VH) (Entered: 03/30/2023)

pb

Appendix J – Appeal Opening Brief

Appendix K – Appeal Brief (Response)

property

No. 23-1735

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TIMOTHY FREDRICKSON,

Defendant-Appellant.

On Appeal from the United States District Court
for the Central District of Illinois, No. 17-cr-40032
The Honorable Michael M. Mihm

BRIEF FOR THE UNITED STATES

GREGORY K. HARRIS
United States Attorney

KATHERINE V. BOYLE
Assistant United States Attorney
Office of the United States Attorney
201 South Vine Street, Suite 226
Urbana, Illinois 61802
(217) 373-5875

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JURISDICTIONAL STATEMENT[1]

The jurisdictional summary in the defendant's brief is not complete and correct because it is absent.

In March 2017, a grand jury sitting in the Central District of Illinois returned a single-count indictment charging the defendant with sexual exploitation of a child, in violation of 18 U.S.C. § 2251(a), (e). The district court had subject matter jurisdiction under 18 U.S.C. § 3231.

The defendant was convicted following a jury trial on January 22, 2020. On June 4, 2020, the district court imposed a sentence of 200 months' imprisonment, to be followed by a ten-year term of supervised release. The court entered final judgment the following day. The defendant timely appealed, and this Court affirmed the judgment of the district court. *United States v. Fredrickson*, 996 F.3d 821, 823 (7th Cir. 2021).

Amid other post-sentencing litigation, on September 19, 2022, the defendant filed a motion requesting information regarding the status of property seized during his criminal case and requesting the return of certain property by the

[1] We use the following abbreviations for record citations: "R." followed by a number refers to a document in the district court record; "D.E." followed by a date refers to a docket entry in the district court record; "PSR" refers to the revised presentence report (R. 172); "Trial Tr." refers to the transcripts of the jury trial held on January 21 and 22, 2020 (R. 192, 193); "Sent. Tr." refers to the transcript of the sentencing hearing held on June 4, 2020 (R. 194); and "Def. Br." refers to the defendant's opening brief in this appeal.

government. The district court ordered the government to respond, which it did on November 30, 2022. On March 30, 2023, the district court denied the motion to the extent the defendant sought the return of the property but noted it had granted the motion in part given that it ordered the government to provide an update on the status of the defendant's property.

The defendant filed a timely notice of appeal on April 18, 2023.[2] This Court has jurisdiction over the appeal under 28 U.S.C. § 1291. *See also infra*, pp. 28-32.

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[2] Although April 18, 2023, was outside the fourteen-day window for filing the notice of appeal in a criminal case, Fed. R. App. P. 4(b)(1)(A), this Court has stated that claims for the return of seized or forfeited property are civil in nature even when filed as part of a criminal proceeding, and the defendant would therefore have sixty days to file his notice of appeal, Fed. R. App. P. 4(a)(1)(B). *See, e.g., Young v. United States*, 489 F.3d 313, 315 (7th Cir. 2007) ("motion labeled as one under Rule 41 is sufficient to commence a civil equitable proceeding to recover seized property that the government has retained after the end of a criminal case"); *United States v. Taylor*, 975 F.2d 402, 403 (7th Cir. 1992) (discussing Rule 41(g)'s predecessor, Federal Rule of Criminal Procedure 41(e)).

In any case, even under a shorter, fourteen-day timeframe, the defendant would have filed a timely notice of appeal under the prison-mailbox rule, Fed. R. App. P. 4(c)(1)(A). He dated the notice of appeal April 12, 2023 (though he did not attest to that date), and the postmark is dated April 14, 2023.

ISSUES PRESENTED FOR REVIEW

I. Did the district court act within its discretion in denying the defendant's motion for the return of property seized in connection with his underlying criminal case where (1) the defendant's pending litigation challenged the validity of his conviction and raised a wide range of claims relating to the investigation of his criminal offense and the criminal proceedings, and (2) those property items were of future evidentiary value.

II. Alternatively, was venue improper below where Federal Rule of Criminal Procedure 41(g) mandates that a post-conviction motion for return of property be filed in the district of seizure.

STATEMENT OF THE CASE

The defendant, Timothy Fredrickson, is a convicted sex offender who pursued two minors in the span of a month and convinced one – a sixteen-year-old Illinois girl – to send him explicit videos. Fredrickson has filed a number of post-trial motions and now appeals the district court's partial denial of his motion requesting a status update on and the return of property seized during his criminal case. Def. Br. 3-5.[3] For the reasons described within, this Court should reject Fredrickson's claims.

I. Factual Background

A. Pursuit of Fifteen-Year-Old Girl

In December 2016, Fredrickson engaged in sexually explicit discussions with not one but two minors. PSR ¶¶ 14-22. These communications first came to law enforcement's attention when they discovered Fredrickson, who was twenty-seven at the time, sitting alone in his car during a nighttime vehicle check at a park in Rapid City, Illinois. PSR ¶ 14. Fredrickson falsely told law enforcement agents that he was waiting for an individual whom he believed to be nineteen years old. PSR ¶¶ 14-15. The officers were familiar with a minor of the same name and

[3] Fredrickson's brief does not include page numbers. For ease of reference – even though the document contains multiple cover pages, briefs, and appendices – the government's cites to "Def. Br. _" refer to the corresponding page number for the entire document.

suspected Fredrickson planned to meet her. PSR ¶ 14. Fredrickson claimed he met the individual via an online dating application, but once the officers asked to see her profile, he said that she had deleted it. *Id.* He provided the officers with the individual's phone number, and they permitted him to leave, warning him that he was not allowed to be in the park, which closed after dark. *Id.* The individual was later confirmed to be a fifteen-year-old girl. *Id.*

Further investigation – including an interview of the minor and examination of her cell phone – revealed that Fredrickson had previously sent her a "Sexual Question Survey." PSR ¶ 15. In responding to that survey, the minor had informed Fredrickson that she was fifteen. *Id.*

B. Offense Conduct

Less than two weeks later, apparently undeterred by his encounter with law enforcement, Fredrickson began chatting with a second minor, a sixteen-year-old Illinois girl, via the phone application Whisper and later through social media. PSR ¶ 16; *see also United States v. Fredrickson*, 996 F.3d 821, 823 (7th Cir. 2021). Though Fredrickson was aware of the girl's age, the conversation turned sexually explicit. PSR ¶¶ 16-22. Fredrickson requested and received videos of the girl's genitals and encouraged her to masturbate during these recordings, which he saved to his cell phone. PSR ¶¶ 19-22.

In February 2017, the girl's mother learned that Fredrickson sent flowers to the girl's high school. PSR ¶ 17. That prompted the mother's discovery of Fredrickson's exploitative, online relationship with her daughter and a subsequent law enforcement investigation. PSR ¶¶ 17, 19-22; Trial Tr. 44. The mother provided her daughter's iPod and cell phone to the Moline, Illinois, Police Department and gave consent for law enforcement to search those devices, which she said her child had used to communicate with Fredrickson. Trial Tr. 44-45, 50. The officers recovered data helpful to their investigation. Trial Tr. 50. Additionally, in a Child Advocacy Center interview, the minor victim provided Fredrickson's name and other identifying information, including the fact that he lived in Davenport, Iowa. Trial Tr. 49. She also stated that Fredrickson knew she was underage. R. 1 at 2.

The Davenport police were subsequently able to provide Illinois investigators with a Davenport address for Fredrickson and eventually obtained a state search warrant for his residence and truck. Trial Tr. 49, 54; *see Fredrickson v. McAuliffe et al.*, No. 4:19-cv-121, R. 24, Ex. 3 (S.D. Iowa July 13, 2020). During the ensuing search, law enforcement agents discovered approximately eighteen electronic devices belonging to Fredrickson, including his LG G5 cell phone, the home screen of which contained a photo of the minor victim, who was apparently topless, though partially covered by a pillow. PSR ¶ 18; Trial Tr. 71-73, 77, 79. The officers also collected a flash drive from his truck. Trial Tr. 77. Fredrickson signed a

Miranda waiver and agreed to be interviewed by law enforcement; he then admitted requesting certain sexual images and videos from the minor victim. Trial Tr. 59-70; Gov. Exs. 9, 9A, 9B; R. 1 at 4.

A few days later, investigators obtained a federal search warrant that permitted them to search Fredrickson's electronic devices and subsequently examined at least twelve of them. R. 1 at 6; *see also* Trial Tr. 92-102. Agents discovered the sexually explicit videos from the minor victim on Fredrickson's LG G5 cell phone. *Id.* at 6-7, 151-78; PSR ¶¶ 17, 19-22. In addition to that phone, a Seagate hard drive – one of three hard drives removed from Fredrickson's computer tower – also contained explicit videos of the minor victim that had apparently been saved to the device by Fredrickson. Trial Tr. 101-08, 199-200.

Notably, Fredrickson had previously told law enforcement that he planned to give a Samsung phone recovered from his residence to the minor victim. Trial Tr. 138-39. And he said that he had an *Alice in Wonderland* movie on the flash drive recovered from his truck that he planned to put on that phone because it was the minor victim's favorite movie. *Id.* Law enforcement confirmed the presence of the movie on both devices. Trial Tr. 142. Fredrickson's arrest followed. PSR ¶¶ 23-24.

A month or so later, federal law enforcement obtained a second search warrant for Fredrickson's truck, which was at a towing facility. Trial Tr. 202-06. Various items were found in the truck, including two cell phones discovered behind the

car's stereo and a battery pack with "Tim Fred" and a phone number written on it. Trial Tr. 204-06. Other items included a wallet, flash drives, an envelope, and mail. *Id.* Certain items were photographed to help show ownership or possession of the contents of the truck. Trial Tr. 206.

One of the recovered cell phones, an LG G4, was partially locked, preventing law enforcement from doing a deeper extraction, though they were able to determine the phone was associated with an email address bearing the name "Tim.Fred.007@gmail.com" and contained contact information for and chats with the minor victim, including one in which he discussed deleting any traces of their messages. Trial Tr. 209-11, 231-33. They also recovered emails of interest from the device and from Google, pursuant to a search warrant, including one that showed an attempt by Fredrickson to erase the contents of the LG G5 phone seized from his apartment shortly after the February search of his residence was completed. Trial Tr. 212-29.[4]

II. Court Proceedings

A. Underlying Criminal Case

A federal grand jury in the Central District of Illinois returned a single-count indictment charging Fredrickson with sexual exploitation of a child, in violation

[4] Fortunately, the attempt was foiled because law enforcement had placed the device in airplane mode. Trial Tr. 229-30.

of 18 U.S.C. § 2251(a), (e). R. 1, 13. Substantial pretrial litigation ensued, including the district court's denial of Fredrickson's motion to dismiss the indictment because his statute of conviction, 18 U.S.C. § 2251(a), purportedly violated the First Amendment and was thus unconstitutionally overbroad. R. 142, 142-1; D.E. 1/17/2020. The case proceeded to trial in January 2020, and the jury returned a verdict of guilty on January 22, 2020. D.E. 1/21/2020, 1/22/2020; R. 142, 142-1, 154.

Prior to the sentencing hearing, the minor victim submitted a victim impact statement detailing the "unimaginable" trauma she had suffered due to Fredrickson's exploitation. PSR ¶ 26; *see also* Sent. Tr. 21, 33. She explained that she lost her dignity, her mental health declined, and she lost her trust in people. *Id.* She stated that there were some days she could not even look at herself in the mirror "without feeling disgusted and ashamed." PSR ¶ 26. Everyone around her felt guilty for what happened to her except Fredrickson, "the one person who never once accepted blame for it." *Id.* He put her, her family, and his own family "through hell," and she believed she would never "fully recover." *Id.*

At the sentencing hearing in June 2022, the district court determined that Fredrickson faced an advisory Guidelines range of 235 to 293 months' imprisonment, based on his total offense level of 38 and criminal history category of I. Sent. Tr. 40; *see also* PSR ¶ 79. The statutory mandatory minimum sentence for

Fredrickson's offense was fifteen years' imprisonment and the maximum sentence was thirty years' imprisonment. PSR ¶ 79.

The district court imposed a below-Guidelines sentence of 200 months' imprisonment, to be followed by a ten-year term of supervised release. Sent. Tr. 58; D.E. 6/4/2020; R. 183.

The court entered final judgment the next day, and Fredrickson timely filed a notice of appeal. R. 183, 188.

B. Direct Appeal

Fredrickson's direct appeal reprised his argument that his statute of conviction, 18 U.S.C. § 2251(a), was unconstitutionally overbroad. *United States v. Fredrickson*, 996 F.3d 821, 823 (7th Cir. 2021). This Court held that Supreme Court precedent prohibited his challenge. While the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, the Supreme Court had held that "child pornography was categorically unprotected under the First Amendment." *Id.* at 824 (citing *New York v. Ferber*, 458 U.S. 747, 763 (1982)).

C. Denials of Compassionate Release Motions and Related Appeals

On January 18, 2022, Fredrickson filed pro se motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A), which the district court denied, along with his subsequent motion to reconsider. R. 203, 214, 215; D.E. 1/19/2022, 3/21/2022. Fredrickson appealed the denials of both that motion for compassionate release

and the motion to reconsider. *United States v. Fredrickson*, No. 22-1542, 2022 WL 16960322 (7th Cir. Nov. 16, 2022). This Court affirmed the judgment of the district court. *Id.*

Subsequently, in June 2022, Fredrickson filed a second pro se compassionate release motion. R. 224. The district court denied the motion without prejudice on September 15, 2022, citing Fredrickson's failure to exhaust his administrative remedies. R. 232. Fredrickson subsequently filed a motion for reconsideration of the denial, which the court denied in a text order. R. 241; D.E. 12/15/2022. Fredrickson's appeal of both denials remains pending. *See United States v. Fredrickson*, No. 23-1042 (7th Cir.).

D. Motion for Status of and Return of Property

Forming the basis of this appeal, in September 2022, Fredrickson filed a motion requesting information regarding the status of property seized during the investigation of his criminal offense and requesting its immediate return. R. 236. Fredrickson claimed that "at least 18 articles of property" were seized in connection with the search warrant that Davenport police officers executed at his residence and attached the related inventory of seized and recovered property. R. 236 at 1.[5] He further alleged that additional property, including "another phone

[5] This information was apparently copied from a pending civil suit involving a *Bivens* claim that he initially filed in United States District Court for the Central District of Illinois, *see Fredrickson v. McAwful*, CDIL No. 19-cv-4041, and was later transferred to the

whose evidentiary purpose was unclear," was seized during a later inventory search of his truck. *Id.*

Fredrickson noted that the district court had only ordered that property named in the indictment be forfeited. R. 236 at 1. And he claimed that "[a] vast majority of the property seized was not within the scope of property named in the indictment, and further had no connection to the conviction returned by the jury." *Id.* That property included, he alleged, but was not "limited to an iPad, several laptop computers, and all phones other than the named LGG5" that he had used to commit his sexual exploitation offense. *Id.* He further cited a portion of his criminal trial transcript in which the testifying Secret Service task force officer (a member of the Moline, Illinois, Police Department) stated that two of the hard drives he had examined from Fredrickson's apartment did not have information related to the minor victim. *Id.* (quoting Trial Tr. 101). He also complained that the

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United States District Court for the Southern District of Iowa, *Fredrickson v. McAuliffe et al.*, SDIA Case No. 19-cv-121. (In the original lawsuit, Fredrickson referred to the lead defendant as "Jermy McAwful," which presumably was a flippant reference to "Jeremy McAuliffe," the officer with the Moline, Illinois, Police Department and Special Federal Officer with the United States Secret Service, who investigated Fredrickson's case and testified at his trial.)

In that case, responding to Fredrickson's allegations that his Fourth Amendment rights were violated during the search of his home, attorneys for the defendant law enforcement officers and the Davenport Police Department filed a motion to dismiss his claims as untimely and attached a copy of the state search warrant for his residence, along with the related inventory, as an exhibit. *McAuliffe et al.*, SDIA Case No. 19-cv-121, R. 24. Ex. 3 (S.D. Iowa July 13, 2020).

government had not returned seized "letters and indicia of residency, LGG4 phone taken from Fredrickson's truck . . . , [and] GoPro video sun glasses taken off of Fredrickson's person at the Davenport[,] Iowa[,] police station by Federal agents." *Id.* at 2.

Responding to the motion at the end of October 2022, the district court explained that in May 2020 it had entered a final order of forfeiture. D.E. 10/31/2022. Within that order, the court had stated that "commencing on March 5, 202,0 the United States posted an official government internet site notice of forfeiture to dispose of the property in accordance with the law." *Id.* The court "was advised that no petitions or claims were filed." *Id.* (citing R. 170). The court therefore "entered a final order of forfeiture as to one LG G5 cellphone and one HP P600 desktop without objection." *Id.*

Addressing the motion to return property, the court noted that the documents that Fredrickson provided to the court indicated "that it was the local police department that seized the items." D.E. 10/31/2022. As a result, it was "not clear that the U.S. Attorney's Office ha[d] possession or knowledge of the location of any items that were not forfeited." *Id.* Nonetheless, the court ordered the government to respond to Fredrickson's motion within thirty days

and to state "whether it currently has or ever had in its possession any of the seized items that have not been forfeited and any necessary explanation." *Id.*

On November 30, 2022, the government responded, explaining that Fredrickson had recently filed a motion to vacate his conviction and sentence under 28 U.S.C. § 2255 and a motion for a new trial, both of which remained pending. R. 247 at 1-2; *see also infra,* pp. 15-17. Within these motions, Fredrickson had challenged "some of the very evidence" he sought to have returned. *Id.* at 2. Because his criminal proceedings were not complete, items of evidence seized pursuant to a valid search warrant should be maintained until the proceedings came to a conclusion. *Id.* at 3-4. As an alternative basis for denial, the government argued that all of the items that had not either been entered into evidence with the court or been forfeited were in the possession of the Moline Police Department. *Id.* at 2-3. The government requested leave to supplement its response with evidence to support the necessary factual findings under Federal Rule of Criminal Procedure 41(g) if the court reached the latter issue. *Id.* at 4. Fredrickson filed a reply in opposition. R. 259.

The court declined to order the government to return the property given pending post-conviction matters and in light of the fact that some of the seized

evidence was not in its possession. D.E. 3/30/2023. Fredrickson timely filed the instant appeal. R. 262.

E. Section 2255 Motion and Related Litigation

Meanwhile, on October 18, 2022, shortly after filing the motion for return of property, Fredrickson filed the aforementioned motion under 28 U.S.C. § 2255 raising, by his count, approximately eighty claims regarding a host of issues regarding the investigation of his offense, his prosecution and trial, his attorney's performance, and the constitutionality of the statute under which he was convicted, among others. R. 239.[6]

The government filed a motion to dismiss, arguing that the § 2255 motion was untimely, R. 244, which the district court denied, permitting the government additional time to file a substantive response, R. 267.[7] Fredrickson later filed a

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[6] Shortly after, Fredrickson also filed a motion for recusal of the trial judge – Senior U.S. District Judge Michael M. Mihm – from presiding over his § 2255 motion. R. 242. Fredrickson filed a related motion giving "consent for all proceedings before a magistrate judge," which the district court construed as a request for the proceedings to occur before a magistrate. R. 243. On December 15, 2022, the district court (Mihm, J.) denied the motion for recusal and the motion requesting proceedings before a magistrate judge. D.E. 12/15/2022. Fredrickson appealed the denials of his motions for recusal and for referral to a magistrate judge. R. 250; *United States v. Fredrickson*, No. 22-3311 (7th Cir.). That appeal remains pending and was consolidated with his appeal of the denial of his motion for a new trial, *United States v. Fredrickson*, No. 23-1003 (7th Cir.).

[7] Fredrickson also filed an appeal of the district's order granting the government additional time to submit a response on the merits to his § 2255 motion after denying its motion to dismiss. R. 267; *United States v. Fredrickson*, No. 23-2124 (7th Cir.). That appeal has been dismissed. *Fredrickson*, No. 23-2124, R. 7 (7th Cir. July 13, 2023).

motion to request counsel to assist with the § 2255 motion, R. 276, which the district court also denied, D.E. 6/16/2023. Fredrickson then filed a motion to reconsider that denial, which the district court denied as well. R. 278; D.E. 7/18/2023 (first).

Additionally, Fredrickson filed a motion requesting that the district court amend its prior order denying the government's motion to dismiss to include a default judgment against the government. R. 277. The court declined that request. D.E. 7/18/2023 (third).

On July 27, 2023, the government filed a response in opposition to Fredrickson's § 2255 motion. R. 283. The district court has yet to rule on the § 2255.[8]

F. Motion for New Trial

Around the same time frame, on November 18, 2022, Fredrickson filed a motion for new trial under Rule 33 of the Federal Rules of Criminal Procedure. R. 245. Within the motion, he requested that the Federal Public Defender's Office be appointed to assist. *Id.* at 1. The district court likewise denied the motion for new trial. D.E. 12/15/2022. Once again, Fredrickson appealed that denial. R. 252; *United States v. Fredrickson*, No. 23-1003 (7th Cir.). That appeal also remains

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[8] Recently, Fredrickson filed another appeal, this time contesting the district court's denial of his motion for bail pending disposition of his § 2255 motion. *United States v. Frederickson*, No. 23-2582 (7th Cir.); *see also* R. 279, 284; D.E. 7/18/2023. That appeal, too, remains pending.

pending and was consolidated with another of Fredrickson's pending appeals, *United States v. Fredrickson*, No. 22-3311 (7th Cir.).

G. Appeal of Partial Denial of Motion for Return of Property

In this appeal, Fredrickson reprises his complaints that the government is inappropriately retaining items seized during the investigation of his sexual exploitation offense, without providing a sufficient explanation for its need for each piece of property. Def. Br. 2-6. Fredrickson further argues that the government failed to provide sufficient evidence that the items he seeks are not in its possession. *Id.* This Court should reject his arguments, for reasons described below.

SUMMARY OF THE ARGUMENT

The district court acted within its discretion in denying Fredrickson's motion as to the return of his property because his criminal proceedings remain pending, and his post-conviction challenges reach nearly every aspect of the criminal investigation, including the searches of his apartment and truck, and the district court proceedings. Furthermore, based on the record, the items are of obvious evidentiary value in potential future proceedings.

Alternatively, Fredrickson's motion is subject to dismissal because venue was improper below under the dictates of Federal Rule of Criminal Procedure 41(g).

ARGUMENT

The District Court Acted Within Its Discretion In Partially Denying Fredrickson's Motion For Return of Property

A. Standard of Review

This Court reviews "a district court's denial of a Rule 41(g) motion for return of seized property for abuse of discretion." *United States v. Rachuy*, 743 F.3d 205, 211 (7th Cir. 2014) (citing *Stevens v. United States*, 530 F.3d 502, 506 (7th Cir. 2008)). A court's decision not to hold an evidentiary hearing on the matter is likewise reviewed for abuse of discretion. *Id.* "A court abuses its discretion when it makes an error of law or when it makes a clearly erroneous finding of fact." *Id.* (citing *United States v. Freeman*, 650 F.3d 673, 678–79 (7th Cir.2011)).

B. Legal Framework

Federal Rule of Criminal Procedure 41(g) provides that a "person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return." Fed. R. Crim. P. 41(g). The rule further states that the "motion must be filed in the district where the property was seized." *Id.* And it mandates that the "court must receive evidence on any factual issue necessary to decide the motion." *Id.*

Where a Rule 41(g) motion is filed post-conviction, it is treated as a civil action for equitable relief. *See, e.g., United States v. Shaaban*, 602 F.3d 877, 879 (7th Cir.

2010) ("once a defendant has been convicted, a motion under Rule 41(g) is deemed to initiate a *civil* equitable proceeding"); *Young v. United States*, 489 F.3d 313, 315 (7th Cir. 2007) ("motion labeled as one under Rule 41 is sufficient to commence a civil equitable proceeding to recover seized property that the government has retained after the end of a criminal case").[9] "Rule 41(g) may be invoked . . . to seek the return of property that was seized but not forfeited." *Suggs v. United States*, 256 F. App'x 804, 806 (7th Cir. 2007) (citing *United States v. Sims*, 376 F.3d 705, 708 (7th Cir. 2004)); *see also United States v. Flournoy*, 714 F. App'x 592, 594 (7th Cir. 2018) (same); *Young*, 489 F.3d at 315 ("a criminal forfeiture is part of the defendant's sentence and must be challenged on direct appeal or not at all.").

Any such motion thus must be filed within six years after the right of action first accrues and is subject to the procedural requirements for maintaining a federal civil suit, such as the payment of a filing fee, and, where the defendant is a prisoner, "the limitations on prisoner civil rights suits imposed by the Prison Litigation Reform Act, 28 U.S.C. § 1915." *United States v. Howell*, 354 F.3d 693, 695 (7th Cir. 2004); *see also* 28 U.S.C. § 2401(a); *Sims*, 376 F.3d at 708–09.[10] The right of action accrues when the district court enters judgment in the underlying criminal

[9] Although such actions are civil in nature, in describing related cases, the government will continue to describe the individuals bringing such claims as defendants, given the overlap with their underlying criminal cases that is addressed here.

[10] Fredrickson does not appear to have complied with these procedural requirements.

case, as the claimant then knows "that he has a present right to return of seized property that has not been forfeited." *United States v. Mendez*, 860 F.3d 1147, 1149–50 (8th Cir. 2017); *see also Sims*, 376 F.3d at 708–09.

C. The District Court Acted Within Its Discretion in Denying Fredrickson's Motion

1. The district court correctly denied Fredrickson's motion given his pending post-conviction litigation

The district court acted within its discretion in denying Fredrickson's motion as to the return of his property because the government had a continuing interest in the evidence seized, given his wide-ranging, pending 28 U.S.C. § 2255 and new trial motions.

In construing Rule 41(g)'s predecessor – Rule 41(e) – the Advisory Committee on the Federal Rules of Criminal Procedure noted saliently that "reasonableness under all of the circumstances must be the test when a person seeks to obtain the return of property." Fed. R. Crim. P. 41, advisory committee's note to 1989 amendment. The Committee further explained that "[i]f the United States has a need for the property in an investigation or prosecution, its retention of the property generally is reasonable." *Id.* Multiple circuit courts have followed this sage advice, holding that the pendency of a direct appeal or post-conviction proceeding may justify the government's further retention of property in a criminal case. *Mendez*, 860 F.3d at 1150; *see also United States v. Stoune*, 842 F. App'x

433, 435–36 (11th Cir. 2021) (holding that defendant was not entitled to return of items linked to his criminal conduct and further stating that because the defendant's § 2255 motion remained pending, the government might need the items in the event of a new trial); *United States v. Pierre*, 484 F.3d 75, 87 (1st Cir. 2007) (Rule 41(g) motion is properly denied if the government has a continuing need for the property as evidence). In *United States v. Davis*, for instance, the Ninth Circuit held that the district court had properly denied a defendant's motion to return remaining items of property "in light of the government's explanation that it was retaining the property in connection with his pending habeas corpus proceedings under 28 U.S.C. § 2255." *United States v. Davis*, 749 F. App'x 618, 619, n.1 (9th Cir. 2019).

This case is analogous (even though here the property is not presently in the government's possession, *see infra*, pp. 25-28). Fredrickson had multiple post-conviction proceedings pending. His § 2255 motion remains pending in district court and by his own admission raises more than eighty claims related to the investigation of his offense and his criminal proceedings. R. 239. Those claims include multiple challenges to the initial search of his residence and truck by the Davenport Police and the subsequent search of the truck at the towing lot. *Id.* at 1-2. Furthermore, the district court has the authority to hold an evidentiary hearing on these claims. 28 U.S.C. § 2255(b).

The denial of Fredrickson's motion for a new trial is on appeal. *United States v. Fredrickson*, No. 23-1003 (7th Cir.); *see also* R. 245; D.E. 12/15/2022. That motion likewise raised claims regarding the search of Fredrickson's residence and truck, along with discovery allegations under the umbrella of "newly discovered" ineffective assistance of counsel. R. 245.

A decision in Fredrickson's favor in either of these proceedings could require a retrial, in which case, the government would need to again present evidence of Fredrickson's sexual exploitation offense. And an evidentiary hearing on the § 2255 motion could also require the presentation of evidence related to the executed searches and other case issues.

Fredrickson nonetheless criticizes the government's alleged failure to draw a specific line between each item of property and its evidentiary value in his criminal case. Def. Br. 2-5. Given the extraordinarily broad range of post-conviction issues he raises, the items have numerous uses that were evident to the district court based on the record and are of obvious value both in post-conviction proceedings and on retrial, as the government asserted. Initially, each item the government listed as entered into evidence with the district court during Fredrickson's first trial was clearly of evidentiary value in any potential retrial, without the government having to belabor the point. A total of four items from the list of

twenty-six items provided by the government met that description: the Dual USB flash drive, Samsung S3 cellphone, LG G4 cell phone, and Sim card. R. 247 at 3.

The discussion of these items at trial further demonstrates their utility. For example, Fredrickson told law enforcement in his initial interview that he planned to give the Samsung phone recovered from his residence to the minor victim. Trial Tr. 138-39. And he said that he had an *Alice in Wonderland* movie on the flash drive initially recovered from his truck that he planned to put on that phone because it was the minor victim's favorite movie. *Id.* Law enforcement later confirmed the presence of the movie on both devices. Trial Tr. 142. And law enforcement discovered evidence of Fredrickson's attempt to evade law enforcement detection on the LG G4 phone, along with a related chat with the minor victim. Trial Tr. 209-11, 231-33. Each of these items was thus inculpatory, even though no explicit videos of the minor victim were present on the devices.

Furthermore, essentially every item on the government's list could also be used to show Fredrickson's occupancy of his residence and possession of the truck, as well as the fact that he was the primary user of these spaces, a fact that could be contested at any retrial where Fredrickson might suggest numerous others had access. R. 247 at 2-3; *see also* Trial Tr. 206 (noting certain items from the truck were photographed to help show Fredrickson's ownership or possession). That proposition extends beyond electronic devices to correspondence and a battery

pack with Fredrickson's name and a phone number on it. Trial Tr. 204-06. Furthermore, at least one of the Seagate hard drives listed that law enforcement removed from Fredrickson's computer tower had explicit videos of the minor victim and thus was of obvious evidentiary value. Trial Tr. 101-08, 199-200. Finally, Fredrickson's sunglasses with a video recorder on them were also potentially relevant in future proceedings given the nature and character of his offense conduct. R. 247 at 3.

Though the government did not explicitly draw each of these connections below, they were apparent from the record and provide more than sufficient support for the district court's denial of the motion in light of the pending post-conviction proceedings. Thus, even if the district court erred in failing to explicitly elicit this information from the government or summarize it itself, any such error was harmless.

This Court should affirm the district court's denial on these grounds alone.

2. The district court did not have the authority to order the property's return

Additionally, though this Court need not reach the issue to resolve this appeal, a district court does not have the authority to order state or local agencies to return Fredrickson's property. Federal Rule of Criminal Procedure 41(g) permits the return of property in the federal government's possession but confers no authority

on the district court to order state and local authorities to return such property. *See, e.g., United States v. Rachuy*, 743 F.3d 205, 211 (7th Cir. 2014) (holding that the defendant's request to a federal district court to order state authorities to return property seized in connection with a state prosecution was "not made in the proper forum"); *Jackson v. United States*, 427 F. App'x 524, 525 (7th Cir. 2011) (district court lacked jurisdiction to order return of property not in the federal government's possession); *United States v. Webster*, 690 F. App'x 417, 418 (7th Cir. 2017) ("the only relief available under Rule 41(g) is return of any property the United States possesses").

Nonetheless, this Court held in *United States v. Stevens* that "whether the Government still possesses the property at issue is a question of fact" and that "Rule 41(g) provides that the district court '*must* receive *evidence* on any factual issue necessary to decide the motion.'" 500 F.3d 625, 628 (7th Cir. 2007) (emphases in original) (citing Fed. R. Crim. P. 41(g)). The Court explained that the provision makes clear that "any factual determinations supporting the court's decision must be based on evidence received." *Id.* That does not mean that "a district court must conduct an evidentiary hearing to resolve all factual disputes." "It does require, however, that the district court receive evidence to resolve factual disputes." *Id.* "Such evidence may come, for example, in the form of sworn affidavits or documents verifying the chain of custody of particular items." *Id.* However,

"arguments in a Government brief, unsupported by documentary evidence, are *not* evidence." *Id.* at 629.

Stevens, however, can arguably be distinguished from the present case, though the government acknowledges it is close. In each case, the government provided a list detailing the current custodial status of the each of the items of property at issue. *Stevens*, 500 F.3d at 628; R. 247 at 2-3. However, in Fredrickson's case, the government attorney explained - in the signed court filing – that it requested and received the custodial information from its case agent, a task force officer with the Secret Service who also worked at the local police department that had retained the property. *Id.* at 2. That explanation to the court – to whom the attorney owed a duty of candor – constituted more than the bare assertion in *Stevens*; it included detailed information on how the government obtained the custodial information and from what knowledgeable source. R. 247 at 2-3. The items in question were universally either in the custody of the Moline Police Department or had been entered into evidence with the district court. *Id.*

In any event, though, this Court need not parse the difference between these two cases because the district court's denial was proper in light of the pending post-conviction proceedings alone. *See supra*, pp. 21-25. Any purported error in denying it on these grounds as well was therefore harmless.

Finally, it is also notable that even in *United States v. Stevens*, where the court had "failed to receive [any] evidence to support its factual determinations as required by Rule 41(g)[,]" the remedy was a remand for the district court to "receive evidence and make the appropriate factual findings with respect to the current status of the property" the defendant sought to recover. *Stevens*, 500 F.3d at 629. If this Court should determine both that (1) the government's signed court filing with a reproduction of the list received from its case agent was not sufficient evidentiary support for denial of the motion, *and* (2) that the motion cannot be denied solely due to the pending post-conviction proceedings, at most the Court should remand for further receipt of evidence and factual findings on the part of the district court. In the event of this dual determination, that result would also be sensible given that the government had requested permission to present evidence on this issue if the district court decided the motion on other grounds than the pending post-conviction proceedings. R. 247 at 4.

D. Alternatively, Venue Was Improper

Alternative, venue was improper below, and this Court should remand the case for the dismissal of Fredrickson's motion on that basis. As noted above, Rule 41(g) states that a motion for return of property "*must* be filed in the district where the property was seized." Fed. R. Crim. P. 41(g) (emphasis added). Here, as explained

above, Fredrickson's property was seized in the Southern District of Iowa; venue was therefore improper in the Central District of Illinois. *See supra*, pp. 4-8.

Given the plain language of Rule 41(g), multiple courts – including the Second, Third, and Tenth Circuits – have appropriately applied its venue provision to post-conviction motions framed as Rule 41(g) motions. *See, e.g., United States v. Toombs*, No. 22-3191, 2023 WL 3883958, at *2 (10th Cir. June 8, 2023) ("Venue in the district of seizure is . . . mandatory"); *United States v. Smith*, 253 F. App'x 242, 243 (3d Cir. 2007) (per curiam) (holding district court acted within its discretion in denying a post-conviction motion seeking return of property in part because the motion was not filed in the district in which the property was seized, as required under Rule 41(g)); *Elfand v. United States*, 161 F. App'x 150, 151 (2d Cir. 2006) (transferring case to district in which property was seized where venue was proper); *but see Ford-Bey v. United States*, No. CV 19-2039 (BAH), 2020 WL 32991, at *11 (D.D.C. Jan. 2, 2020), *aff'd*, No. 21-5053, 2021 WL 2525374 (D.C. Cir. June 2, 2021) ("application of Rule 41(g)'s venue provision after criminal proceedings have ceased would be improper").

Addressing an earlier version of Rule 41(g) – then listed as Rule 41(e) – this Court indicated in *United States v. Sims* that a motion for return of property under that provision might be brought in the district of seizure or in the district in which "the criminal proceedings are underway." 376 F.3d 705, 708 (7th Cir. 2004)

(emphasis added). That earlier version of the rule, however, contained a more permissive venue provision, stating that the aggrieved person "*may* move the district court for the district in which the property was seized" for its return. Fed. R. Crim. P. 41(e) (1993) (emphasis added). In fact, the purpose of the amendment resulting in Rule 41(g) was to resolve a circuit split on proper venue for a post-conviction motion for return of property. *Ford-Bey v. United States*, No. CV 19-2039 (BAH), 2020 WL 32991, at *11 (citing *United States v. Parlavecchio*, 57 F. App'x 917, 921 (3d Cir. 2003) (per curiam), and noting that "the amended Rule 41(g) [was intended to] eliminate much of the confusion surrounding venue for post-conviction motions for return of property").

Nonetheless, even after acknowledging the change to the rule, the Court again suggested that its position is that "a claim under Rule 41(g) may be brought after the defendant's conviction, as well as before, as an ancillary proceeding to the criminal case." *Okoro v. Callaghan*, 324 F.3d 488, 490 (7th Cir. 2003). Subsequently, however, in *United States v. Howell*, the Court stated that under Rule 41(g) a defendant potentially brought his post-conviction motion for return of property in the "wrong venue" – the district in which his criminal proceedings had occurred – rather than the district of seizure. 354 F.3d 693, 695 (7th Cir. 2004).[11] The *Howell*

[11] It bears noting that in *Okoro* and *Howell*, too, the defendant's district court motion appears to have been filed under the earlier Rule 41(e), though the Court solely referred

Court concluded, though, that "objections to venue are waivable" and stated that the government had waived the venue objection by failing to raise it below. *Id.*; *see also Rumsfeld v. Padilla*, 542 U.S. 426, 452 (2004) (Kennedy, J., concurring) (objections to venue rules can be waived by the government).

On this basis, the Court here might deem the government's improper venue argument to be waived. But whether the Court determines the argument has been waived or forfeited, it may affirm the district court on any grounds for which there is a record sufficient to allow conclusions of law to be drawn. *See, e.g., United States v. Combs*, 657 F.3d 565, 571 (7th Cir. 2011) (stating that "[t]he government can forego a defense – whether by design or neglect – but [the Court is] not obligated to accept the government's waiver"). The government respectfully submits that, in light of the plain language of Rule 41(g) and the reasoned decisions of its sister circuits, it should do so here.

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to Rule 41(g) in its *Howell* opinion.

CONCLUSION

For the reasons discussed above, this Court should affirm the judgment of the district court.

Respectfully submitted,

GREGORY K. HARRIS
United States Attorney

By: /s/ KATHERINE V. BOYLE
Assistant United States Attorney
Office of the United States Attorney
201 South Vine Street, Suite 226
Urbana, Illinois 61802-3369
(217) 373-5875

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and (a)(6), as modified by Cir. R. 32(b), because I have prepared this brief in proportionally spaced typeface using Microsoft Word for Office 365 in 13-point (body) and 12-point (footnotes) Book Antiqua font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified by Cir. R. 32(c), in that it contains 7,156 words.

/s/ KATHERINE V. BOYLE
Assistant United States Attorney

CERTIFICATE OF SERVICE

I certify that on June 22, 2023, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, and I hereby certify that within three days of this same date I caused a true and correct copy to be sent via United States Mail, first class and postage prepaid, addressed to the Defendant-Appellant:

Timothy B. Fredrickson, Reg. No. 22005-026
FCI Seagoville
Federal Correctional Institution
P.O. Box 9000
Seagoville, TX 75159

/s/ KATHERINE V. BOYLE
Assistant United States Attorney

CERTIFICATE OF SERVICE

I certify that on August 21, 2023, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, and I hereby certify that within three days of this same date I caused a true and correct copy to be sent via United States Mail, first class and postage prepaid, addressed to the Defendant-Appellant:

Timothy B. Fredrickson, Reg. No. 22005-026
FCI Seagoville
Federal Correctional Institution
P.O. Box 9000
Seagoville, TX 75159

/s/ KATHERINE V. BOYLE
Assistant United States Attorney

Appendix L – Appeal Brief (Reply)

Appendix M – District Court Text Order: Rule 33 Motion for a New Trial

(and related discovery requests)

12/15/2022		TEXT ONLY ORDER DENYING 245 . Defendant has filed a Rule 33 Motion for a New Trial. A motion for a new trial must generally be brought 14 days after the verdict. Fed. R. Crim. Pro. 33(b)(2). One exception is that a motion for a new trial may be filed within three years is there is newly discovered evidence. ECF No. 33(b)(1). Defendant argues that he just "discovered" that counsel was ineffective. He asserts, without providing support, that a certain search warrant was not authorized until after the search was completed. Thus, he argues that evidence from the search should have been suppressed, and there would have been "no evidence" for his criminal trial. It is not clear how he now came into possession of the search warrant, he does not provide the search warrant, and he does not provide support or explanation for his assertion that the search happened before the warrant was issued. He further suggests that Counsel may have had information about his search warrants prior to trial but that failing to follow-up on that information was ineffective. Defendants' assertions are wholly unsupported, and he does not otherwise connect the dots between their being a time discrepancy on the warrant and there being "no evidence" at his trial. The Court further observes that it ordered that Defendant have access to discovery while in the presence of counsel during his incarceration and that his access to discovery was repeatedly a topic of conversation, undermining his assertion that he did not have access to this document prior to trial. See minute entries dated: 7/23/2019; 8/5/2019; 8/26/2019; 8/27/2019. Accordingly, Defendants' Motion for a New Trial is denied. Entered by Judge Michael M. Mihm on 12/15/2022. (VH) (Entered: 12/15/2022)

03/26/2019	91	MOTION Allow Defendant's Access to Discovery by Timothy Brandon Fredrickson. (Robertson, Donovan) (Additional attachment(s) added on 3/26/2019: # 1 proposed order) (ED, ilcd). (Entered: 03/26/2019)

07/23/2019		Minute Entry for proceedings held before Judge Michael M. Mihm: Parties present in open court by AUSA Kevin Knight and Attorney Donovan Robertson with Defendant Timothy Fredrickson for Status Conference held on 7/23/2019. In-camera hearing held. MOTION to Withdraw as Attorney 95 is MOOT. Pretrial Conference is set for Monday, 8/26/2019 at 11:00 AM. Jury Trial set for 7/30/2019 is VACATED and RESET for Monday, 9/30/2019 at 8:45 AM. BOTH hearings to be held in U.S. Courthouse, 131 E 4th Street, Davenport, IA 52801 before Judge Michael M. Mihm. Court finds that it is in the interest of justice that the time between today and 9/30/2019 is excludable pursuant to the Speedy Trial Act. Discussion held regarding discovery. **The Court**

		orders discovery be made available to the defendant in a proper area of the jail where he's being held. However, he will not be allowed to take any of those materials out of that room. Proposed Voir Dire and a joint witness list due on or before 9/25/2019. Dft remanded to the custody of the US Marshal. (Court Reporter JJ.) (JS, ilcd) (Entered: 07/24/2019)

08/05/2019		Minute Entry for proceedings held before Judge Michael M. Mihm: Parties present via phone with AUSA K. Knight and D. Allegro and Dft Timothy Brandon Fredrickson with Atty D. Robertson for Motion Hearing held on 8/5/2019. Discussion held re 96 Motion for Protective Order. Motion 96 is GRANTED. **Parties to comply with Local Rule 16.2. Dft to only access discovery in this case in presence of his attorney until at least Pretrial Conference set 8/26/2019 at 11:00 a.m.** (Court Reporter L. Cosimini.) (SAG, ilcd) (Entered: 08/05/2019)

08/26/2019	99	MOTION for Order Denying 96 and Provide Discovery by Timothy Brandon Fredrickson. (VH, ilcd) (Entered: 08/26/2019)
08/26/2019		Minute Entry for proceedings held before Judge Michael M. Mihm on Monday 8/26/2019 as to Timothy Brandon Fredrickson (1). Parties present in open court by AUSA Knight and Attorney Robertson with Defendant Fredrickson. Pending motions argued and ruled on as stated in open court. Court reserves ruling on 79 and 83 . **Discussion held regarding discovery.** Jury Trial remains set for 9/30/2019 at 8:45 a.m. in U.S. Courthouse, 131 E 4th Street, Davenport, IA 52801 before Judge Michael M. Mihm. Proposed Voir Dire, Jury Instructions, and Joint Witness list due by 9/25/2019. Exparte discussion held. Any pending motions due within 7 days. Defendant Fredrickson is remanded to custody of the USM. (Court Reporter JJ.) (ED, ilcd) (Entered: 08/27/2019)
08/27/2019		TEXT ONLY ORDER denying 99 Motion as to Timothy Brandon Fredrickson: Defendant filed the instant Motion on his own behalf requesting the Court to deny 96 the Government's Motion for Protective Order. In his Motion and an accompanying affidavit, **Defendant argues that he should have access to the discovery in this case that does not contain personal identifying information. He also states that Mercer County Jail can provide access to discovery on an as-needed basis.** During a telephone hearing on 8/5/2019, the Court directed the parties to comply with Local Rule 16.2 and held that Defendant could access discovery in this case **in the presence of his attorney.** During the pretrial conference on 8/26/2019, the Court revisited the issue and held that the parties must continue to comply with **Local 16.2** and that Defendant may review discovery with his attorney present between now and the trial on 9/30/2019. Defendant's Motion is **DENIED**. Entered by Judge Michael M. Mihm on 8/27/2019. (MNS, ilcd) (Entered: 08/27/2019)

Appendix N – Appeal Opening Brief

No. 23-01003

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

TIMOTHY FREDRICKSON
APPELLANT-DEFENDANT

VS

UNITED STATES OF AMERICA
APPELLEE-RESPONDANT

ON APPEAL FROM THE CENTRAL DISTRICT OF ILLINOIS
HON. SR. JUDGE MICHAEL MIHM PRESIDING
NO. 17-CR-40032

APPELLANT'S OPENING BREIF

Brief Background Necessary to Understand Question Presented

Federal Rule of Criminal Procedure 33, which governs new trials, has a three year limitations period that begins to run upon a jury's finding of guilt. Caselaw currently requires counsel to assist defendants in thier Rule 33 motion, but only if they happen to be currently represented by counsel. The problem arises from how the rough and general line, between when an American Citizen is represented or not, is drawn.

A few examples demonstrate this inconsistency:

1) When a citizen does not appeal thier conviction, the right to assistence of counsel for a new trial motion expires a mere 15-days after he is sentenced, resulting in an entitlement to counsel for less than one year of Rule 33's three year limitations period.

2) When a citizen has a long sentencing delay, or is part of a multi-defendant/conspiracy and otherwise complex appeal, this situation often results in an entitlement to counsel for approximately all three years of Rule 33's limitation period.

Questions Presented

Whether the right to counsel's assistence in drafting a Rule 33 motion for a new trial should be left to happenstance

Summary of Argument

Fredrickson merely advances the common sense proposition that all timely Rule 33 motions be treated alike. Caselaw currently states an absolute: If a Rule 33 motion for a new trial is filed before the circuit court decides a direct appeal, then the defendant is entitled to counsel. Caselaw is less clear about whether a defendant is still entitled to counsel as a matter of right if the very same motion were filed the very next day after a direct appeal is decided. This is so even though the limitations period for Rule 33 is 3-years, the bulk of which elapses after any direct appeal is filed. Those whom do not appeal at all fare even worse, having only 14 days in which to file a motion for a new trial, before the general right to counsel's assistance expires.

The unclear state of the right to counsel within Rule 33's 3-year period should be decided in favor of protecting constitutional rights, that is, both the 6th Amendment right to assistance of counsel, as well as the variety of basic constitutional rights that Rule 33 itself was designed to safeguard. Not only is it wise policy to give uniform treatment to all Rule 33 motions, it is also arbitrary to give favorable treatment to early Rule 33 motions -- that is, the benifit of counsel -- based entirely on the fortuitious timing of a prolonged sentencing and/or a late decision in a direct appeal. Defendants are also effectively penalized by a circumstance entirely out of thier ability to control --when the new evidence comes to light. This is worth repeating: If the circuit finds that there is no right to counsel, it is literally punishing defendants based on a circumstance entirely out out thier control --when new evidence is discovered.

This appeal also concerns another issue. In the absence of counsel, the district court failed to liberally construe Fredrickson's Pro Se motion. It was error to conclude that Fredrickson did not connect the dots between the newly discovered evidence showing the search was performed without a warrant, and a resulting suppression of all evidence at trial, which in turn would have resulted in an aquittal. Fredrickson also repeated this argument through the lens of ineffective assistence of counsel, substituting the discovery of ineffectiveness and counsel's failure to bring the aforementioned newly discovered evidence to light sooner through due dilligence. In any event, had the Rule 33 motion been drafted with the assistence of counsel, sufficient clarity would be achived.

Argument

New trial motions are a crucial aspect of a criminal proceeding, which confer a per se right to the assistence of counsel

It is beyond dispute that "once a defendant's right to counsel attatches, the right continues to apply 'at every stage of a criminal proceeding where substantial rights of a criminally accused may be affected'" Kitchen v US, 227 F.3d 1014 @1017 (CA7 2000) quoting Mempa v Rhay, 389 us 128 @134 (1967).

There are unquestionably substantial rights at stake in Rule 33 motions for a new trial. In fact, the Seventh Circuit "routinely evaluate[s] Brady, Giglio, and other Constitutional claims that were raised in postjudgement Rule 33(b)(1) motions". US v O'Malley, 833 F.3d 810 @814 (CA7 2016). See also US v Olson, 846 F.2d 1103 (CA7 1988) (recanting witnesses); US v Kaufman, 783 F.2d 708 (CA7 1986) (perjered testimony); US v Woods, 169 F.3d 1077 @1078 (CA7 1999) (suppression of evidence). See also Kitchen @1018 (noting that "an unrepresented [new trial applicant] --like an unrepresented defendant at trial-- is unable to protect the vital interests at stake"). rel US v Ash, 413 us 300 @312 (1973) (discussing "the counsel guarantee [in] trial-like confrontations").

The rights of an American citizen before a direct appeal, do not become any less substantial after that appeal. In Kitchen, the Seventh Circuit recognized that "in a Rule 33 proceeding, a defendant must face an adversary proceeding that --like a trial-- is governed by intricate rules that to a lay person would be hopelessly forbidding". ID @1018. Such a trial-like confrontation with "intricate rules" that must be navigated in order "to protect the vital interests at stake", is exactly the sort of proceeding that courts regularly find triggers a right to counsel.

This court should find a right to counsel, if for no other reason than the fact that a Rule 33 new trial proceeding is a "stage of a criminal proceeding where substantial rights of a criminally accused may be affected". Kitchen @1017 quoting Rhay @134.

As a matter of good policy and fair play, this court should find a right to counsel

It goes without saying, that the most crucial aspect of any trial is evidence. The irony of Rule 33 is, that under the cloak of a seemingly lawful sentence, a prisoner is removed from the community and any mechanism of discovering new evidence. In light of this reality, the need for counsel is at it's zenith when a defendant is incarcerated. When society is led to belive that it has already obtained justice, only an advocate for the defendant will continue to dig for new evidence of the truth. As a matter of good policy, as well as to promote confidence in both the verdict as well as the judiciary as a whole; Courts should take the modest step of requireing counsel to keep an ear to the wind for new evidence.

The court must take steps to ensure that the purpose of Rule 33 is not frustrated. As a matter of fair play, a defendant must have a means to use Rule 33. Because the vast majority of those suffing a guilty verdict are incarcerated, potential applicants are unable to find the very evidence that would entitle them to a new trial in pursuit of the truth. The best (and perhaps only) way to give a defendant the means of utilizing Rule 33, is to find that counsel must continue looking for new evidence during what little time remains of the 3 year window --most of which is absorbed while a sentence or appeal is pending, and while such a right already exists.

To ensure that the purpose and intent of Rule 33 is not frustrated, this court should find a right to counsel for another reason: Many incarcerated persons are laymen and actually do know where to find evidence of innocence, but are either unable to access it, or, because they are laymen, do not know that Rule 33 exists, and thus leave this procedural vehicle unused.

Finally, it must be emphasised that this claim to a right to counsel is a facial one. Even if this court were to disagree that Fredrickson's evidence were not "newly discovered" or that the evidence was immaterial, or even that the claim was fairly presented with sufficient clarity to render counsel unneccessary, --others have a right to counsel.

To avoid anomolus results, this court must find a right to counsel

The view adopted by the district courts produces anomolus results. for example, when there are two codefendants, one of whom appeals and the other does not, and new evidence is discovered a year after trial, only the defendant whose appeal has not yet been decided is entitled to counsel --even though both motion are filed on the same day, and subject to the same limitations period.

The anomoly is most startling when the same new evidence would have entitled both citizens to a new trial, but because the second defendant is not aware of the evidence (where counsel would collaborate), or because he does not know that there is a procedure for a new trial based on new evidence (counsel presumably knows about Rule 33), or because he does not plead sufficient facts such as timing of discovery (where counsel would) --only one defendant gets a new trial based on that new evidence, where both were equally entitled to that new trial.

The anomoly is most pronounced in guilty plea convictions. One who pleads guilty is often sentenced very quickly, having stipulated most sentencing factors. An appeal is also almost universally absent due to a waiver. This combination of fast sentencing and waived appeal, results in a very short entitlement to counsel under current precedent --often well short of a year-- during which time a defendant must hope to discover and utilize new evidence. Given that an overwhelming majority of verdicts are obtained by plea bargain, this court should be quick to find that counsel has a duty to obtain a "new trial" opportunity based on evidence discovered after sentencing, but before three years has elapsed.

For bargained verdicts, the importance of counsel (and thus the avalibility of Rule 33) takes on an added dimention when one considers that most such verdicts are obtained by "confessions" to a lesser crime which was often never committed. New evidence in such cases are tricky, because there are two crimes: The one that the government truly belives the defendant committed (but has no evidence for), and the one that the defendant is innocent of (but is able to aquire an easy conviction for). A court should zealously protect our constitutional rights. Here, it would also curtail the strange situation where only some citizens have a right to counsel. In today's society, only the rich get a new trial.

The district court held that Fredrickson did not "provid[e] support that a certain search warrant was not authorized until after the search was completed". Appendix @3. The support that the court mistakenly belived was missing, was actually cited in bullet-point (4)(e) in Fredrickson's motion. Appendix @1. There, Fredrickson cited the supporting documents, explaining that they could be found on the docket of a civil-rights lawsuit, 19-cv-04041. While it is true that Fredrickson did not attatch this document, the citation he provided was enough to entitle him to the "wide latitude of construction" afforded to pro se litigants like Fredrickson. Specifically, the district court needed only to take judicial notice of the record in the cited case, Fredrickson vs McAwful, No. 19-cv-04041. Fredrickson thus did provide documented support for his claim.

The district court next faults Fredrickson for not explaining "how he [only] now came into possession of the search warrant". Appendix @3. The court is again mistaken. Fredrickson explained that he had drafted a "strategic lawsuit [] in such a way that the only way for [McAullife] to prevail was to include the [warrant application]". Appendix @3. Fredrick also explained why it was only aquired after trial; The adversaries intentionally "delayed until after [Fredrickson's] criminal trial". Appendix @1.

Next, the court stated that Fredrickson did "not provide support or explanation for his assertion that the search happened before the warrant was issued". Appendix @3. Again the district court is mistaken. Fredrickson explained that he came to this conclusion by simply "[c]omparing the time that the warrant was authorized with the time the search was completed by officers". Appendix @1. As for supporting documents, where the two times to be compared may be found, Fredrickson has only ever referenced the same document throughout his motion --the the search warrant located in Fredrickson v McAwful, No. 19-cv-04041. ID.

The district court ends with the conclusion that "[d]efendant's assertions are wholly upsupported, and [that] he does not otherwise connect the dots between their being a time discrepancy on the warrant and there being 'no evidence' at his trial". Appendix @3. In light of the above, that conclusion was patently incorrect, however one other error warrants a remand. An evidentiary hearing was required to determine whether Fredrickson had it prior to trial.

In closing, the district court "observe[d] that it ordered that [Fredrickson] have access to discovery while in the presence of counsel during his incarceration and that his access to discovery was repeatedly a topic of conversation". Appendix @3. The court's order was not followed, and an evidentiary hearing would have made this explicit. Furthermore, the district court should have wondered **why** access to discovery was repeatedly a topic of conversation. The answer is simple: Fredrickson was very persistent that he be able to review discovery, and went well out of his way to document the fact that he did **not** have access to discovery. In fact, Fredrickson pointed to no less than **nine** attempts to obtain discovery, seeking this document in particular. Appendix @1.

The district court, assuming that it's order had been followed, purported to observe that it's order "undermin[es Fredrickson's] assertion that he did not have access to this document prior to trial". Appendix @3. **That** belief, however, is itself undermined by Fredrickson's many attempts to obtain discovery. Again, an evidentiary hearing would have been wise to resolve this factual dispute.

A second point worth observing, is the court's assumption that counsel had the document so diligently sought by Fredrickson. Assuming arguendo that the court's order had in fact been followed, and that Fredrickson thus had access to discovery --it does not follow that counsel had this document in order to provide Fredrickson access to it. Since the discovery of this singular document is the very crux of the Rule 33 new trial motion, it is crucial to hold an evidentiary hearing to resolve this dispute.

As an alternative point of contention, rather than the document itself being the newly discovered evidence; Fredrickson also argued that after Fredrickson actually obtained the document, that the newfound knowledge of counsel's ineffectivness, as opposed to the document itself, was further "newly discovered evidence" withing the meaning of Rule 33.

Conclusion

Because Rule 33 is an important stage of a criminal proceeding, this circuit should find a right to counsel, as it did in Kitchen; Extending Kitchen's holding of a right to counsel in cases where the appeal has not yet been decided, to cases where the appeal has been decided --eliminating the arbitrary distinction. Remanding the motion to the district court with instructions to appoint counsel, who may refile if necessary.

Alternatively, the circuit should find a right to counsel because of the sheer number of constitutional rights implicated, and because laymen are functionally precluded from utilizing Rule 33. Again remanding the motion to the district court with the same instructions.

The court should alternatively, or additionally, find that Fredrickson's motion had merit, and either remand with instructions to grant a new trial, or alternatively to hold an evidentiary hearing.

/s/ Tim Fox
3/14/2023

SHORT APPENDIX

Key

United States District Court
Central District of Illinois

United States
v
Timothy Fredrickson

No. 17-cr-40032
(Rule 33 Motion for new trial)

Now comes the Defendant, Fredrickson, who respectfully moves the court for a new trial pursuant to Federal Rule of Criminal Procedure 33, and in support states as follows:

1) Fredrickson requests that the public defender's office be appionted in this matter. See Kitchen v US, 227 F.3d 1014 @1019 (CA7 2000) (a defendant "ha[s] a right to counsel in prosecuting such a [Rule 33] motion and in taking an appeal from it's denial").

2) The time-of-day that the Scott County Judge of Iowa authorized the warrant is "newly discovered evidence" for purposes of Rule 33, that Fredrickson did not have prior to trial.

3) Comparing the time that the warrant was authorized with the time the search was completed by officers, conclusively demonstrates that a warrantless search had occurred; Where such search would have culminated in supptession by pretrial motion and no evidence at trial.

4) Fredrickson diligently sought this document in particular, including but not limited to
   a) Filing a request to view discovery [Dkt 91]
   b) Filing a second request to view discovery [Dkt 99]
   c) Filing a FOIA request for this particular document while arguing for presumotive public access, where such FOIA was sent to
      i) The Scott County Courthouse
      ii) The Iowa Federal Courthouse [Dkt 119]
      iii) The FOIA forwarding service in Washington DC
      iv) The Iowa Federal courthouse again, with explicit instructions not to file it on the criminal docket because a FOIA is not a motion.
   d) A Federal Civil-Rights action seeking an injunction and declaratory relief [19-04127]
   e) A strategic lawsuit drafted in such a way that the only way for the defendants to previal was to include the requested documents, where such defendants delayed until after the criminal trial. [19-04041]

5) Alternatively, recently discovered evidence of the ineffectiveness of counsel is "new evidence" within the meaning of Rule 33, where counsel should have sought these documents and filedd a motion to supress based thereon.

Post-Trial aquisition of the warrant application is Rule 33 new evidence

Because Fredrickson can demonstrate that the document was only obtained after the trial had taken place, the document is newly discovered within the meaning of Rule 33. The Rule 33 motion is also timely because it was filed on 11/7/2022, which is within 3-years of trial (1/22/2020) as required by Rule 33.

Appendix 1

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Rule 33's inclusion of new evidence of counsel's ineffectiveness

Rule 33 permits a narrow class of ineffective assistence of counsel claims based on evidence that existed at the time of trial, as long as the evidence itself[2] is what was discovered[3] after trial. See eg US v Kladouris, 739 F.Supp. 1221 @1126 (N.D.IL 1990) (granting a Rule 33 new trial based on the newly discovered evidence of trial counsel's ineffective assistance after noting that "The Seventh Circuit ••• has not closed that door entirely").

Conclusion

Because the warrant application was not discovered until after trial, and it contained evidence that would have resulted in a radically different trial —namely one without any evidence; A new trial should be granted which neccesarily includes a pretrial period where the motion to suppress would be filed.

Alternatively, given the document's existence, it was objectively unreasonable for counsel to not ~~examine~~ seek out and examine it, and ~~why~~ not the result of any valid trial strategy to forego such a pivital motion. The newly discovered evidence ~~that~~ of trial cousel's ineffectiveness is simotaneously layeded upon, and independant of, the newly discovered document, because even if the document had been discovered, (by counsel), Fredrickson was unaware of the document and any theoretical decision to forego a motion based thereon.

/S/ Tim Fredrickson

11/7/2022

Footnotes

2) As opposed tp merely realizing the fact's legal implications. See US v Torres, 115 F.3d 1033 @1035 (DCApp 1997) ("evidence of ineffective assistance of counsel known to but unappreciated by the defendant at the time of trial does not constitute newly discovered evidence").

3) Timing of the discovery of the fact itself is a crucial inquirey. See US v Thiel, 888 F.2d 1532 @1533 (CA7 1989) ("the facts alledged in support of a motion for a new trial were within the defendant's knowledge at the time of trial"); See also US v Johnson, 12 F.3d 1540 @1548 (CA10 1993) (reaffirming availibility of Rule 33 for IAC claims).

Appendix 2

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	Mr. Mihm on 12/15/2022. (VH) (Entered: 12/15/2022)
12/15/2022	TEXT ONLY ORDER DENYING 245 . Defendant has filed a Rule 33 Motion for a New Trial. A motion for a new trial must generally be brought 14 days after the verdict. Fed. R. Crim. Pro. 33(b)(2). One exception is that a motion for a new trial may be filed within three years is there is newly discovered evidence. ECF No. 33(b)(1). Defendant argues that he just "discovered" that counsel was ineffective. He asserts, without providing support, that a certain search warrant was not authorized until after the search was completed. Thus, he argues that evidence from the search should have been suppressed, and there would have been "no evidence" for his criminal trial. It is not clear how he now came into possession of the search warrant, he does not provide the search warrant, and he does not provide support or explanation for his assertion that the search happened before the warrant was issued. He further suggests that Counsel may have had information about his search warrants prior to trial but that failing to follow-up on that information was ineffective. Defendants' assertions are wholly unsupported, and he does not otherwise connect the dots between their being a time discrepancy on the warrant and there being "no evidence" at his trial. The Court further observes that it ordered that Defendant have access to discovery while in the presence of counsel during his incarceration and that his access to discovery was repeatedly a topic of conversation, undermining his assertion that he did not have access to this document prior to trial. See minute entries dated: 7/23/2019; 8/5/2019; 8/26/2019; 8/27/2019. Accordingly, Defendants' Motion for a New Trial is denied. Entered by Judge Michael M. Mihm on 12/15/2022. (VH) (Entered: 12/15/2022)

PACER Service Center

Transaction Receipt

12/15/2022 15:33:40

PACER Login:	fpdo0079	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	4:17-cr-40032-MMM Start date: 12/15/2022
Billable Pages:	3	**Cost:**	0.30
Exempt flag:	Exempt	**Exempt reason:**	Always

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Rule 33. New Trial

(a) Defendant's Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

(b) Time to File.

(1) *Newly Discovered Evidence.* Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

(2) *Other Grounds.* Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.

HISTORY: Dec. 26, 1944, eff. March 21, 1946, as amended Feb. 28, 1966, eff. July 1, 1966; March 9, 1987, eff. Aug. 1, 1987; April 24, 1998, eff. Dec. 1, 1998; April 29, 2002, eff. Dec. 1, 2002; April 25, 2005, eff. Dec. 1, 2005; March 26, 2009, eff. Dec. 1, 2009.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee on Rules. This rule enlarges the time limit for motions for new trial on the ground of newly discovered evidence, from 60 days to two years, and for motions for new trial on other grounds from three to five days. Otherwise, it substantially continues existing practice. See Rule II of the Criminal Appeals Rules of 1933, 292 US 661 [18 USC formerly following § 688]. Cf. Rule 59(a) of the Federal Rules of Civil Procedure [Federal Rules of Civil Procedure, USCS Court Rules, Rule 59(a)].

Notes of Advisory Committee on 1966 amendments.

The amendments to the first two sentences make it clear that a judge has no power to order a new trial on his own motion, that he can act only in response to a motion timely made by a defendant.

Certificate of Service and Declaration of Inmate Filing

I, Tim Fredrickson, a non-attorney and inmate, state under penalty of perjury that I am an inmate confined at Federal Correctional Institution Seagoville, 2113 North Highway 175 Seagoville, TX 75159 and that on this 14th day of March 2023, I served the foregoing Opening Brief

Upon:

:2005-026⇔
Appellate Clerk Of Court Seve
219 S Dearborn ST
Chicago, IL 60604
1 Stat

[X] All attorneys of record via the CM/ECF through the Clerk of Court, whereon it is scanned:

By depositing the same in the institution's internal mail system with first-class postage prepaid, after the hours of 5:00 pm.

/s/ Tim Fr
Executed on: 3/14/2023

Appendix P – Appeal Brief (Reply)

Appendix Q – Circuit Decision

United States Court of Appeals
For The Seventh Circuit

United States of America
Plaintiff

vs

Timothy Fredrickson
Defendant

Nos. 22-3311, 23-1003, 23-1735, 23-2582

Motion to Reconsider, rehear, and rehear en banc

Now comes Fredrickson, respectfully moving this court to reconsider its order based on a mistake of fact, a mistake of law, and key details that have inadvertently been overlooked or misunderstood. This motion is based on the following particulars set forth more fully below.

1. Regarding the return of property, Fredrickson did not concede that any property is currently in the possession of Iowa state police. The misunderstanding likely arose from Fredrickson's alternative "assuming arguendo" position, wherein he argued that the Federal Government should not be permitted to make an end-run around Rule 41(g) by storing property in a strategic location.

2. Fredrickson pointed out that the disputed fact of the location of property, *which is currently unknown*, is required to be established *by evidence* in the clear language of Rule 41 --and that the government actually requested time to gather evidence-- which it has not yet been permitted to do.

3. Regarding the motion for a new trial, both the district court and this panel misunderstood a crucial detail. While the district court did *order* that Fredrickson have access to discovery, the order was never realized. Fredrickson ultimately did *not* have access to this document in discovery --if in fact it was ever in discovery. Thus, for at least these two reasons, the evidence was newly discovered. The court merely assumed, and did not establish, that Fredrickson had the document reflecting a premature search. Additionally, no court has explained why several FOIA requests, and persistently asking for access, would not qualify as due diligence.

4. Both the district court, and this panel, have overlooked an alternative ground that was securely linked to out-of-circuit precedent holding that the learning *of counsel's ineffectiveness* ***also*** qualifies as a new discovery which can trigger Rule 33 --an *alternative* upon which Fredrickson explicitly relied. This independent and freestanding ground was overlooked in its entirety. This was an issue of first impression in this circuit, and the Seventh Circuit may choose to follow the D.C. Circuit or not, but novel arguments may not be ignored by the district court.

5. The panel also did not touch the separate constitutional concerns rasied by the differential treatment in appointment of counsel between a pre and post direct appeal defendant, where both are *within* Rule 33's limitations period. The differential treatment was an outgrowth of two very *general* lines of precedent, and has never been presented as a separate issue, or challenged on the grounds of differential treatment, until now. The panel merely acknowledged two *generally applicable* lines of precedent --but not the conflict that Fredrickson identified-- and offered no reasoned explanation for the differential treatment. As a result, it has inadvertently transformed a general rule of thumb, into a per se rule.

6. Regarding the motion for release pending resolution of habeas corpus, the district court and panel have both overlooked the argument regarding the government's intentional delay in answering the petition; which Fredrickson squarely raised as an *independent* ground for granting bail that does *not* depend on the merits of the petition --a far lesser sanction than a default judgment against the government which is currently recognized by this circuit. In short, Fredrickson asked: if *delay alone* can result in the granting of a petition, then why not bail?

7. Fredrickson accepts the panel's ruling that a district judge must collaterally review the same case he presided over, and that the judge who presided must later decide whether he made or permitted any mistakes at trial. This issue is hereby expressly preserved for review on a greater writ.

Respectfully Submitted

/s/ Tim Fredrickson

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

April 15, 2024

By the Court:

Nos. 22-3311, 23-1003, 23-1735, & 23-2582	UNITED STATES OF AMERICA, Plaintiff - Appellee v. TIMOTHY B. FREDRICKSON, Defendant - Appellant
Originating Case Information:	
District Court No: 4:17-cr-40032-MMM-1 Central District of Illinois District Judge Michael M. Mihm	

On April 12, 2024, this court received a document titled "Motion to Reconsider, rehear, and rehear en banc" from the appellant. The court will construe the document as a request to recall the mandate and to file a late petition for rehearing en banc. Construed as such,

IT IS ORDERED that the request is **DENIED**.

form name: **c7_Order_BTC** (form ID: **178**)

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