Appendix A

[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-11757

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MAURICIO GONZALEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 9:21-cr-80087-DMM-1

Before WILSON, LUCK, and ANDERSON, Circuit Judges.

PER CURIAM:

Mauricio Gonzalez, proceeding *pro se*, appeals the district court's denial of his third motion for a new trial under Fed. R. Crim. P. 33. He argues that his motion was timely because he filed it within the three-year deadline and identified newly discovered evidence. The government raised a jurisdictional question in its response brief, arguing that the district court did not have jurisdiction to hear the motion because Gonzalez's second motion for a new trial was already pending on appeal.

I.

When a district court lacks jurisdiction, we have jurisdiction on appeal only to correct the "lower court's error in entertaining the suit." *Boyd v. Homes of Legend, Inc.*, 188 F.3d 1294, 1298 (11th Cir. 1999).

Filing a notice of appeal "is an event of jurisdictional significance" that confers jurisdiction to the appellate court and divests the district court's jurisdiction over aspects of the case involved in the appeal. *United States v. Diveroli*, 729 F.3d 1339, 1341 (11th Cir. 2013) (quotation marks omitted). When a notice of appeal is filed, the district court maintains jurisdiction to take actions only "in aid of the appeal." *Id.* Likewise, the district court generally maintains jurisdiction to entertain a motion for a new trial based on newly discovered evidence under Rule 33(b)(1) while an appeal is

pending, and it can either deny the motion or indicate its intent to grant the motion. Fed. R. Crim. P. 37(a); *United States v. Khoury*, 901 F.2d 975, 976 & n.3 (11th Cir. 1990). However, the language of Rule 37 provides that it must be a "timely motion." Fed. R. Crim. P. 37(a).

We review a district court's denial of a motion for a new trial for abuse of discretion. *United States v. Scrushy*, 721 F.3d 1288, 1303 (11th Cir. 2013). We also review a denial of a motion on grounds of untimeliness for abuse of discretion. *United States v. Smith*, 918 F.2d 1501, 1509 (11th Cir. 1990). "A district court abuses its discretion when it misapplies the law in reaching its decision or bases its decision on findings of fact that are clearly erroneous." *Scrushy*, 721 F.3d at 1303.

Under Rule 33, a district court may "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). Generally, a motion for a new trial must be filed within 14 days after the verdict is returned. Fed. R. Crim. P. 33(b)(2). An exception exists, however, for motions based on newly discovered evidence, which may be filed within three years of the return of the verdict. Fed. R. Crim. P. 33(b)(1).

The timeliness of a Rule 33 motion for a new trial is not a jurisdictional question but rather, a claim-processing rule. *Eberhart v. United States*, 546 U.S. 12, 19 (2005). The deadline for filing a motion for a new trial, based on any ground other than newly discovered evidence, is rigid. *United States v. Campa*, 459 F.3d 1121, 1154 (11th Cir. 2006) (*en banc*) (upholding the district court's denial

of a renewed motion for a new trial based on the interests of justice under Rule 33(b)(2) where the motion was untimely). The government can forfeit its defense of untimeliness if it fails to raise the defense before the district court reaches the merits of the Rule 33 motion. *See Eberhart*, 546 U.S. at 17-19.

To merit a new trial based on newly discovered evidence, the defendant must show that: (1) the evidence was discovered following trial, (2) the defendant exercised due care to discover the evidence, (3) the evidence is not merely cumulative or impeaching, (4) the evidence is material, and (5) the evidence is of such nature that a new trial would probably produce a different result. *United States v. Lee*, 68 F.3d 1267, 1273 (11th Cir. 1995). "The failure to satisfy any one of these elements is fatal to a motion for new trial." *Id.* at 1274. Newly discovered evidence "may be probative of another issue of law," but does not need to directly relate to the defendant's guilt or innocence to justify a new trial. *Campa*, 459 F.3d at 1151 (quotation marks omitted) (explaining that a *Brady* violation or questions of the impartiality of the jury may justify a new trial).

Here, the district court properly found that the motion for new trial was untimely. It did not present any new evidence so it did not qualify for the larger timeframe in which to file. Instead, a motion such as the one Gonzalez filed should have been filed within two weeks of July 27, 2021—the date he was convicted—and as such was over two years late. Because the filing was untimely, it does not fall within the exception found in Rule 37(a) for

motions filed when an appeal is docketed and pending. Therefore, the district court lacked jurisdiction and should have dismissed the motion. We vacate and remand for the district court to dismiss the motion.

VACATED and REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

December 30, 2024

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 24-11757-CC
Case Style: USA v. Mauricio Gonzalez
District Court Docket No: 9:21-cr-80087-DMM-1

Opinion Issued
Enclosed is a copy of the Court's decision issued today in this case. Judgment has been entered today pursuant to FRAP 36. The Court's mandate will issue at a later date pursuant to FRAP 41(b).

Petitions for Rehearing
The time for filing a petition for panel rehearing or rehearing en banc is governed by 11th Cir. R. 40-2. Please see FRAP 40 and the accompanying circuit rules for information concerning petitions for rehearing. Among other things, **a petition for rehearing must include a Certificate of Interested Persons**. See 11th Cir. R. 40-3.

Costs
No costs are taxed.

Bill of Costs
If costs are taxed, please use the most recent version of the Bill of Costs form available on the Court's website at www.ca11.uscourts.gov. For more information regarding costs, see FRAP 39 and 11th Cir. R. 39-1.

Attorney's Fees
The time to file and required documentation for an application for attorney's fees and any objection to the application are governed by 11th Cir. R. 39-2 and 39-3.

Appointed Counsel
Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation via the eVoucher system no later than 45 days after issuance of the mandate or the filing of a petition for writ of certiorari. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 21-80087-CR-MIDDLEBROOKS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MAURICIO GONZALEZ

Defendant.
_____/

ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL

THIS CAUSE comes before the Court pursuant to Defendant's Second Motion for New Trial Pursuant to Federal Rules of Criminal Procedure 33(a) (DE 147). As I indicated in my previous order denying the motion for new trial (DE 133), this case was tried on July 27, 2021, and the conviction affirmed on July 18, 2023. Defendant's second motion for new trial does not identify any newly discovered evidence. Defendant has filed Notices of Appeal (DE 135, 137) appealing that order and that appeal is still pending. Therefore, it is

ORDERED and ADJUDGED that Defendant's Second Motion for New Trial **(DE 147)** is hereby **DENIED.**

DONE AND ORDERED at West Palm Beach, Florida this 15 day of May, 2024.

Donald M. Middlebrooks
United States District Judge

cc: Counsel of Record
Mauricio Gonzalez, Defendant

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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David J. Smith
Clerk of Court

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February 27, 2025

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 24-11757-CC
Case Style: USA v. Mauricio Gonzalez
District Court Docket No: 9:21-cr-80087-DMM-1

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

REHG-1 Ltr Order Petition Rehearing

In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-11757

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MAURICIO GONZALEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 9:21-cr-80087-DMM-1

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before LUCK, ANDERSON, and WILSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 40. The Petition for Panel Rehearing also is DENIED. FRAP 40.

Appendix D

MR. SILVERIO: I pulled up Lee.

MS. LOPEZ: Your Honor, may I approach?

THE COURT: Sure.

MR. SILVERIO: The quote, your Honor, would be, "The Court determined the substantial step requirement was met where the Defendant, over the course of several months, discussed in graphic detail when and how he wanted to engage in sexual acts with minors, sent graphic photographs to the minors, and promised the minors gifts and specifically wanted to create child pornography videos with the minors." That is cited in Thornberg as well.

THE COURT: All right. Let's figure out where we are going with respect to this.

I deny your motion as to Counts 2 and 3. I am going to reserve ruling as to Count 1, the 2251 count.

Let me turn to you. Are you going to put on a case?

MR. JOHANSSON: No, your Honor.

THE COURT: You have discussed that with your client?

MR. JOHANSSON: Yes, your Honor, I discussed extensively with Mr. Gonzalez his right to testify and I have also discussed with him his right to invoke his Fifth Amendment privilege on self-incrimination. He wants to waive his right to testify and does not want to testify.

THE COURT: All right. Mr. Gonzalez, your lawyer tells me you don't want to testify. You have a right to

testify. You also have a right not to testify. If you choose not to testify, I won't consider that in any way.

While you can accept your lawyer's advice and consider it, in the final analysis it is your decision whether to testify or not.

What is your decision?

THE DEFENDANT: I'd rather not testify.

THE COURT: Okay. Let's have then -- and you renew your motion as to 2 and 3 as well at the end of the case?

MR. JOHANSSON: Yes, your Honor.

THE COURT: Let's have brief argument, if you want to present any, on Counts 2 and 3. You can argue Count 1, too, if you choose.

It looks to me like Palomino, there is enough of an argument there for me to want to read all the cases. I have read Orr. Orr has stronger facts than this in terms of a purpose other than sex. Orr, I guess it was a published decision. Actually that is the Lee case.

In Lee, they argued he really was trying to have sex with the mom and got the pictures incidentally of the children, but there was a lot more activity with the children than here.

Here, it seems to me there is a lot of evidence that they were -- that he was -- they were having a sexual and, as she saw it, a romantic relationship. The age disparity is such that there is no consent, he is 39, she is 17.

So, I don't see how he has much of an argument on Counts 2 and 3, but I think there is an argument there on Count 1.

I will hear from first the Government and then the Defense.

MR. SILVERIO: Your Honor, if the Court requests supplemental briefing, we are happy to oblige. I will point out that even Palomino -- two things. One, there is -- the question here is could a reasonable jury, in this case your Honor, conclude that the Defendant attempted to induce the victim to produce a sexually explicit image. That is the question.

Even Palomino cites Lee approvingly in our context. Palomino, at 131, explains that there are -- "Courts have sometimes been able to rely on direct evidence indicating a Defendant's purpose." And there is direct evidence in this case.

The victim took the stand, she testified that on September 6th, she received a message requesting shots of her vagina. She understood that is what it meant because in the past she has produced those images to the Defendant and they had actually filmed each other having sex. She completely understood what that request was.

There is direct evidence that that request was to induce a production of an explicit image, in this case a vagina

shot. That already sets this case apart from Palomino and some of the other cases --

THE COURT: So your argument is, any time somebody that's 17 is having sex with someone, say, over -- what is the law, 21, that Romeo and Juliet thing? An older person. So, whenever people of that age disparity are having sex and send each other sexually explicit photos, that is production of child pornography in and of itself?

MR. SILVERIO: Your Honor, I think that the way the Courts address that safeguard your Honor seems to be concerned with is by requiring a substantial step in addition to whether there is inducement to produce an image. I think they are different issues.

The attempt to produce an image was met in this case by direct evidence, the text messages that she understood entirely because of their past conduct, as well as circumstantial evidence. Basically Lee says, Lee, which again is binding --

THE COURT: So your answer is, yes, you think any time people with an age disparity, if one of them is under 18, sends sexually explicit photos back and forth to each other, that that violates this 22 -- or 2451.

MR. SILVERIO: Your Honor, there is a protection to that, and that is you have to induce a person. The way you induce under the case law is that there has to be a substantial

step, and many Courts have interpreted that substantial step to require more than merely a request.

For instance, in United States versus Schwarte, 645 F.3d 1022, and this is a case out of the Eighth Circuit, your Honor, they go into great detail about what a substantial step means, and that is effectuating the safeguard your Honor is speaking of. Can we just prosecute everything? No, there has to be a substantial step taken --

THE COURT: There is always a substantial step if two people who are having a sexual relationship send each other photos. I don't understand how that is any kind of safe harbor.

MR. SILVERIO: Because the way the Courts have interpreted substantial step is that they require Defendants to basically do one of several things in addition to the request to take the substantial step or the attempt.

One thing they require usually is request some kind of posing specifically, or dictating of how they would want photos. Another way to do it is by showing some kind of compensation back and forth.

We dispute, for example, the Defendant's contention that there is no compensation in this case. We know, based on unrebutted testimony by the victim, that while these communications were occurring he was paying for her wifi, which enabled the communications.

THE COURT: There is no doubt about that. They are having a sexual relationship, they are sending each other sexual -- texts with sexual content back and forth, they are both saying they want to have sex with each other every opportunity and talking about how great it is. There is no question about that part of the case. He is trying to get her to come over here and have sex with him, and he succeeds in that. She comes over, she has sex with him within four hours of getting there.

All that begs the question whether the purpose for that, to the degree it is a specific intent crime, is to produce child pornography.

The Lee case, as I read it, they talked about how many pictures they wanted, the poses of the pictures. It doesn't seem like this guy was interested in a lot of pictures or copies of pictures, or a particular pose, or some way to put it on the internet for everyone to see. He is interested in sexually explicit pictures for him.

I guess my question then is, is it your contention that that is enough?

MR. SILVERIO: For him, yes, your Honor. The fact that he had no interest in further distribution is irrelevant.

THE COURT: So, why does that statute make sense? This is, apparently, a minimum mandatory 15 years. If you try to get someone to come over and have sex with you, that is a

lesser crime, even if you accomplish it, than sending a sex video? That doesn't seem to make sense.

MR. SILVERIO: Those seem to me concerns about the penalties associated with the statute versus the elements. I think the case law is pretty clear the elements don't consider whether he wants to further distribute.

For instance, your Honor, and this is binding precedent, United States versus Miller, 819 F.3d 1314, that is an Eleventh Circuit case in 2016, the Government is not required to prove the Defendant's sole or dominant purpose of communicating with a child is to create child pornography. It just has to be a purpose.

If you speak to someone and induce an image, even if you generally just want to have sex with them, but one of your purposes is that that person will send you sexually explicit conduct, you have violated the statute.

We have that evidence here in abundance. Not only do we have a specific text message, the one we have all been referring to, we also have other text messages.

On September 14, this is in evidence, "that's okay, send me pictures of that ass, though. I see what you are wearing." There are numerous instances in which he is requesting photographs.

Moreover, your Honor, with respect to the September 6 incident, after he requests the vagina shots and expresses that

he is in a hurry, he video calls her within minutes. That is a live stream. He is requesting sexually explicit conduct from the victim, and not only requesting shots, which are pictures and images which are criminalized under the statute, but then he video calls her, which would be a sexually explicit depiction of a minor.

THE COURT: Okay. Do you want to say anything about 2 and 3, Counts 2 and 3?

MR. SILVERIO: With respect to Counts 2 and 3, your Honor, again, I haven't really heard much argument with respect to them, but we have met each one of the elements.

Specifically with respect to Count 3, I think it is pretty clear, I would say beyond a reasonable doubt, but again we are not at that posture, that the Defendant transported the victim to the United States on October 16th with the intent of having sex.

Your Honor said it yourself, he clearly wanted to have sex with this girl and he did. He was willing to pay for her to come over from the Bahamas. In fact, he was willing to go over there himself, then changed his flight and flew her over. That establishes Count 3 not only for Rule 29 purposes, your Honor, but beyond a reasonable doubt.

With respect to Count 2, knowingly has been interpreted by the Supreme Court in a very interesting way, and Schwarte speaks very intelligently about this. Knowingly,

under Supreme Court precedent, is that the Defendant has to be aware the result is practically certain to follow from his conduct.

In Schwarte, for instance, the conduct they were looking at is, look, if you repeatedly ask someone -- or you repeatedly send someone, so you send the victim items related to child pornography, if you request pictures, etc., you know that sooner or later that is what you are getting, and that is what knowingly comes down to.

In this case, with respect to Count 2, there is, again, substantial evidence that the days before September 30th, for instance, and I was writing this down as my co-counsel was going through it with Agent Miller, on the 28th, he is sending her pornographic video links, he is -- they are discussing the sex they want to engage in together. There is constant communication about being fresh.

I think the record reflects at this point, and your Honor can certainly make that deduction as the trier of fact, it has to do with masturbation. It's just on and on, the entire context of their conversation is laden with the desire to have sex.

So, it can be no surprise to the Defendant, in fact, it can be practically certain that at some point she is going to oblige, not to mention that on the 6th he specifically requested shots of her vagina, which he got on the 30th.

THE COURT: All right. Thank you.

MR. JOHANSSON: Your Honor, if I was Nina Totenberg I would call this, when does sexting become producing child pornography?

THE COURT: Let's focus on Counts 2 and 3 at this point.

MR. JOHANSSON: I have made my Rule 29 both at the conclusion of the Government's evidence as well as the Defendant concluding. I don't want to lose my credibility with the Court on those two, I would like to focus on Count 1. That is going to be a strategy call on my part.

With respect to Count 1, your Honor, the jury instruction, "the Defendant persuaded the minor to engage in sexually explicit conduct" -- and here is the part that the Government is missing -- for the purpose of producing child pornography of that conduct."

As you heard from Alexus, there is this discussion about send me a pussy shot, it had to do with her having sex with her cousins, there is sex with all sorts of people, and then a crotch shot of somebody's vaginal area got sent. September 6th, done, over. 24 days later -- and one of the cases that I recall reading and my lovely associate is trying desperately to find is United States versus Wright, 774 F.3d 1085.

Basically, what they are saying, your Honor, this is

the Sixth Circuit, is there is a causation element, a proximate cause, and when Congress increased the minimum mandatory to 15 years, it is not just sexting, which sex with a 17 year old is illegal, going back and forth, it is not receipt of child pornography, there is no 15-year mandatory for that. What congress is punishing is somebody who persuades a minor to engage in sexually explicit conduct, and it is very critical, for the purpose of producing child pornography.

And the Wright Court in 774 F.3d 1085 makes it a causation requirement, and if this was a slip and fall, if this was a causation in the civil context, something happens on the 6th, and you slip on the 30th, it just doesn't make sense. There is no causation there, proximate, and that is what I am asking the Court to find.

There is zero connection between -- other than the fact it says pussy, there is zero connection between that conversation which -- you are right, Judge, there is about 14 inches of paper over here.

126 is where he says, "Send me a pussy shot." 1,562, 1400 pages later, 24 days later -- if you look at when she actually sent the masturbation video, there is no discussion on his part, zero. He is not even sending other types of porno stuff, it is just out of the blue, and there it is.

THE COURT: All right. I am going to reserve ruling on Count 1.

On Count 2 and Count 3, I find the Defendant guilty of receipt of child pornography under 18 U.S.C. 2252(a)(2) and (b)(1), and also find him guilty of Count 3, transportation of a minor with intent to engage in criminal sexual activity.

I find as follows: A.S. was 17 at pertinent times during the period of the indictment. She met the Defendant July 4, 2020. They almost immediately entered into a sexual relationship which she viewed as romantic. While the Defendant was initially told she was 19, he found her during the summer she was 17. It is apparent that they both discussed her age in a series of text messages.

He was well aware both of the age of 18 and that significance in Florida, he talked about how the age differed in different parts of the United States, they discussed what the age limit was in Costa Rica, and so I find that he was aware that she was 17, and she lived with the Defendant for a period of time during the summer, but then returned to the Bahamas.

On September 6, 2020, the Defendant asked A.S. for pussy shots. On September 30th, A.S. sent to the Defendant via the internet a sexually explicit video of herself masturbating. The video was produced by an iPhone in the Bahamas. The Defendant stipulates to the sexually explicit nature of the video and it is apparent that the video did use the internet and also traveled in international commerce.

Appendix E

Production of Child Pornography, in violation of 18 U.S.C. § 2251(a) and (e) ("Count One"); Receipt of Child Pornography, in violation of 18 U.S.C. § 2252(a)(2) and (b)(1) ("Count Two"); and Transportation of a Minor with Intent to Engage in Criminal Sexual Activity, in violation of 18 U.S.C. § 2423(a) ("Count Three"). (DE 14). Defendant requested a bench trial. (DE 25). At the conclusion of the bench trial, Defendant moved for a Judgment of Acquittal on Counts One, Two, and Three. (Tr. 131:19-21). I denied that Motion as to Counts Two and Three and found Defendant guilty on those counts. (Tr. 141:14-15). I reserved ruling on Count One and requested supplemental briefing from Defendant and the Government. (DE 53).

Defendant filed a Motion for Judgment Notwithstanding the Verdict on August 20, 2021. (DE 64). The Government responded, treating Defendant's Motion as a Motion for Judgment of Acquittal. (DE 67). Defendant replied (DE 68) and filed an Amended Motion (DE 69) restating the same arguments as in his earlier Motion.

Upon consideration of the Parties' submissions, I have decided to proceed to render a verdict on Count One. That is, by way of this Order I am rendering a verdict on Count One and not ruling on Defendant's Motion for Judgment of Acquittal.[1] As the factfinder in this nonjury trial, I must ultimately determine whether the Government has proven Defendant's guilt as to Count One beyond a reasonable doubt. The burden is on the Government. I will therefore endeavor here to determine and interpret the law relevant to the offense, consider the evidence adduced on both sides (drawing any inferences therefrom which I deem reasonable and appropriate), and apply

[1] The Government requested in its Response that "[s]hould this Court deny the Defendant's motion for judgment of acquittal . . . this matter be set for an in-person hearing for pronouncement of the verdict pursuant to Fed. R. Crim. P. 43." (DE 67 at 19). It is true that Fed. R. Crim. P. 43 requires the defendant to "be present at . . . every trial stage, including . . . the return of the verdict." Fed. R. Crim. P. 43(a)(2). In addition to entering this Order, I will deliver the verdict at Defendant's sentencing hearing in open court.