

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

ROBERT FENN,)	
)	Case No. 1:12-CR-510
Petitioner,)	
)	
v.)	The Honorable James C. Cacheris
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

**MEMORANDUM IN SUPPORT OF PETITIONER’S MOTION UNDER 28 U.S.C. § 2255
TO VACATE, SET ASIDE OR CORRECT A SENTENCE
BY A PERSON IN FEDERAL CUSTODY**

COMES NOW the Petitioner, Robert Fenn, through counsel, and moves this Honorable Court to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. § 2255. In support thereof, the Petitioner submits the following:

PROCEDURAL BACKGROUND

On December 6, 2012, Robert Fenn was indicted in the United States District Court for the Eastern District of Virginia on one count of receipt of child pornography and one count of possession of child pornography. On April 2, 2013, this case proceeded to trial by jury. On April 3, 2013, the jury returned a verdict of guilty as to both counts.

On April 17, 2013, Mr. Fenn filed a Motion for New Trial on the grounds that the government made pretrial erroneous Brady disclosures regarding child pornography found on other computers in the Fenn home. The government filed their opposition on April 29, 2013, arguing that they had corrected the pretrial disclosure as to the location of William Fenn’s computer containing child pornography. On May 9, 2013, the district court judge issued a memorandum opinion denying Mr. Fenn’s Motion for New Trial. On June 21, 2013, the

Honorable James C. Cacheris sentenced Mr. Fenn to 120 months on each count, to run concurrently, with a 20 year supervised release term. The district court entered the judgment of conviction and sentence on June 25, 2013.

On June 26, 2013, Mr. Fenn appealed his conviction to the United States Court of Appeals for the Fourth Circuit. On February 4, 2014, the appeal was denied. On February 3, 2014, in the Eastern District of Virginia, Mr. Fenn filed a Motion for New Trial Based on Newly Discovered Evidence. This motion was based on the discovery that William Fenn had sexually abused his stepdaughters when they were the same age as the children depicted in the child pornography at issue in this case. On March 20, 2014, a hearing on that motion was held before Judge Cacheris, and on April 3, 2014, that motion was denied.

On April 8, 2014, Mr. Fenn appealed the judgment denying his Motion for a New Trial to the Fourth Circuit. On October 1, 2014, his appeal was denied. On October 15, 2014, Mr. Fenn petitioned the Fourth Circuit for a panel rehearing, and that petition was denied on November 4, 2014.

FACTUAL BACKGROUND

On June 12, 2012, Fairfax County Police entered the home of William, Catherine, Robert and John Fenn (hereinafter “the Fenn home”) to execute a search warrant obtained by Special Agent Tarrah Green Romanoff of Homeland Security Investigations. The first wave of law enforcement entered the Fenn home with guns drawn. These officers entered Robert Fenn’s bedroom on the second floor, and escorted Robert Fenn at gunpoint from his bedroom to the living room. During execution of the search warrant, Robert was interviewed by law enforcement in the Fenn home. Robert stated he had two desktop computers, an Acer and Powerspec, located in his bedroom. Robert denied that any child pornography would be found

on computers that belonged to him. Eventually, police allowed Robert to leave the Fenn home and go to work at a nearby elementary school.

Agents seized the Acer and Powerspec computers and found videos and images containing child pornography. Specifically, the Acer computer contained a folder named “62” within a user account named “Trebor” with numerous videos and images of child pornography. Police also seized a Western digital loose hard drive located in Robert’s bedroom found to contain images of child pornography. During the search warrant execution, approximately ten computers and eleven hard drives were seized from the Fenn home. In addition to the Acer Computer and the Western digital loose hard drive, suspected child pornography was found on a computer belonging to John Fenn seized from his bedroom and on a Toshiba laptop belonging to William Fenn seized from the living room.

Later that same day, Agent Romanoff and Detective John Spata of the Fairfax County Police Department arrived at Robert’s place of employment and requested to speak with him again. This time, the detectives escorted Robert into Detective Spata’s vehicle located outside of the school. During the second interview, Robert admitted to downloading and viewing Hentai images of young girls ages 9 to14. Hentai is legal to possess. He also admitted to possessing images of young girls ages 9 to14 that were dressed. Robert denied any knowledge of possession or receipt of illegal child pornography at any time. Immediately after the second interview, Robert Fenn was arrested for possession and receipt of child pornography.

EVIDENCE PRESENTED AT TRIAL

At trial, the government presented evidence that the Acer desktop computer contained videos and images of confirmed child pornography. Trial transcript (“Tr.”) 59, 70.

Additionally, suspected child pornography was found on a computer belonging to John Fenn,

Robert's brother, seized from John's bedroom and on a computer belonging to William Fenn, Robert's father, seized from the Fenn home's living room.¹ Tr. 64-65, 100. Although detectives testified they found the Acer desktop in Robert's room, other witnesses established it had been located in the basement from 2010 to June of 2012. Tr. 200-206, 214-218, 238, 242. William Fenn spent a great deal of time alone in the basement working on his electronics and HAM radio. Tr. 211-212, 216, 230-231, 236; 241. The government presented evidence that Robert admitted possessing Hentai but insisted that child pornography would not be found on his computers. Tr. 25-26; Def. exh. 1, 2, 4, 5. The jury also learned that the Hentai was found on the Powerspec computer and is legal to possess. Tr. 59.

The government also presented charts and calendars prepared by Detective John Nelson and Agent Romanoff comparing when child pornography was accessed on the Acer desktop to the corresponding activity of Robert, John, and William Fenn. Tr. 100-113, 142-161, Gov. exh. 29A, 29B, 29C, 29D, 33, 34. The charts documented when John Fenn was working at Petco, and they documented when William Fenn was on a computer other than the Acer desktop. Tr. 100-113, 142-161, Gov. exh. 29A, 29B, 29C, 29D, 33, 34. The charts concluded that William Fenn was on another computer on 5 of the 231 occasions when suspected child pornography was downloaded onto the Acer desktop. Tr. 155. Specifically, William was on the portable Toshiba laptop (found to contain suspected child pornography) or a Powerspec computer located in the

¹ To prove that an image or video is child pornography, the government must establish that actual minors were used in the production of the video or image. Prior to trial in this matter, the parties stipulated that the Center for Missing and Exploited Children had confirmed that 59 videos and 255 photographs, including images depicted in Gov. Exhibits 9 through 13, used minors in their production. No other images were confirmed in this manner. Therefore, all other images found on devices located in the Fenn home qualify simply as "suspected child pornography."

basement. Tr. 142-161.² Although the charts established that William Fenn was on another computer during the Acer child pornography downloads, they could not establish that he was not in the same vicinity as the Acer desktop.

Robert's trial counsel failed to present any evidence of Robert's activities that conflicted with the time and dates child pornography was accessed on the Acer desktop. Moreover, the government failed to identify any computer activity by Robert positively placing him on the Acer at the time child pornography was downloaded or viewed. For example, Sharon S. Williams, the principal of the school where Robert worked, testified for the government that April 9, 2012 (a date when child pornography was downloaded to the Acer at 1:45, 1:46, 1:48 and 1:51 p.m.) was a teacher workday when teachers could either work at school or at home. Tr. 138-139; Gov. exh. 33. Ms. Williams was unable to confirm whether or not Robert worked at school that day. Tr. 138.

In his defense, Robert's trial counsel called Catherine Fenn. Catherine testified that the Acer desktop was located in the basement and that William Fenn spent a large amount of time alone in the basement. Tr. 214-217. When defense counsel asked Catherine about a statement William Fenn had made to her, the government objected on hearsay grounds. Tr. 220. Defense counsel proffered that Catherine would testify that William Fenn told her that he, William Fenn, had been downloading child pornography onto computers. Tr. 220. Counsel argued that William Fenn was unavailable because neither side subpoenaed him to court; therefore, his hearsay statement was admissible. Tr. 221. The Court excluded William Fenn's statement, citing Federal Rule of Evidence 804, requiring that for a declarant to be unavailable, the Court must

² Officer Nelson testified that the Toshiba laptop, although found in the living room during the search, was portable. J.A. 180.

find that the statement's proponent was not able to procure the declarant's attendance by process or other means. Tr. 221-222.

EVIDENCE NOT PRESENTED AT TRIAL

A. Receipts that conflict with the date and time of the child pornography downloads.

Prior to trial, Robert Fenn provided his counsel with receipts that Robert obtained from his credit card company. These receipts contained dates and times during the period the government alleged child pornography was downloaded and viewed on the Acer desktop. On one of these dates, April 9, 2012, Robert provided a receipt showing a \$9.00 parking payment at George Mason University at 4:46 p.m. (Attached as Exh. 1.) George Mason's parking fee is \$3.00 per hour, so Robert arrived at the parking deck between 1:46 and 2:46 p.m. The government's evidence at trial showed child pornography downloaded to the Acer on April 9, 2012 at 1:45, 1:46, 1:48 and 1:51 p.m., and that April 9, 2012 was a teacher workday at Robert's school that allowed him to work from home or at school. Despite possession of this receipt, Robert's trial counsel failed to present this critical evidence to establish Robert could not have been on the Acer computer on April 9, 2012 when child pornography was downloaded.

Through additional investigation, Robert's present counsel discovered other receipts that conflict with the government's evidence of two other dates child pornography was allegedly downloaded to the Acer computer. Through the calendar charts, the government introduced evidence that child pornography was downloaded to the Acer desktop at 5:41 p.m. on December 15, 2011. However, investigation by current counsel produced a receipt found in Robert's car from a Popeye's restaurant on Centreville Road at 5:33 p.m. on December 15, 2011.³ (Attached

³ Google maps measures the estimated time from the Fenn home to Popeye's restaurant on Centreville road as four minutes, without traffic. At 5:33 p.m. on Monday afternoon, a jury would have been able to rely on their own personal knowledge and experience of Northern

as Exh. 2.) Robert's trial counsel failed to present any evidence of this receipt or Robert's whereabouts on December 15, 2011 at the time of the downloads. The government also produced evidence that on May 25, 2012, child pornography was downloaded to the Acer computer at 4:37 and 4:52 p.m. However, investigation by current counsel revealed that Robert used his credit card at Pho Bac restaurant in Chantilly, Virginia at 5:05 p.m. and at Milwaukee Frozen Custard, also in Chantilly, at 5:09 p.m.⁴ (Attached as Exh. 3.) Trial counsel failed to present any evidence of these receipts or Robert's whereabouts on May 25, 2012 at the time of the downloads.

B. Any evidence of an independent forensic examination of the computers found to contain child pornography.

In preparation for trial, defense counsel never retained an independent expert to examine the computers containing child pornography. Thus, no expert evidence was presented by the defense to explain anonymous computer logons discovered by the government's analyst, to question the credibility and accuracy of the government experts' conclusions, or to develop additional evidence linking the child pornography to William Fenn or otherwise exculpating Robert Fenn.

Virginia traffic at that time. Moreover, trial counsel failed to present any evidence from an independent witness who could have driven the route at that time and testified as to the time it took them to drive from Popeye's to the Fenn home at the same time on a Monday evening.

⁴ Google maps measures the estimated time from the Fenn home to Pho Bac restaurant in Chantilly, Virginia as nine minutes, without traffic. At 5:05 p.m. on the Friday afternoon before Memorial Day weekend, a jury would have been able to rely on their own personal knowledge and experience of Northern Virginia traffic at that time. Moreover, trial counsel failed to present any evidence from an independent witness who could have driven the route at that time and testified as to the time it took them to drive from the Fenn home to Pho Bac at a similar time on a Friday evening.

ARGUMENT

A. Standard of Review:

28 U.S.C. § 2255 mandates as follows:

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that . . . the sentence imposed was . . . otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A petitioner is entitled to “a prompt hearing” under 28 U.S.C. § 2255 except in cases where “the motion and the files and the records. . . conclusively show that the prisoner is entitled to no relief.” *See, e.g., United States v. Witherspoon*, 231 F.2d 923, 925 (4th Cir. 2000) (reversible error to dismiss petition without evidentiary hearing unless record conclusively precludes relief). The statutory language of § 2255 “confers a broad and flexible power to the district courts to fashion an appropriate remedy.” *United States v. Hillary*, 106 F.3d 1170, 1171 (4th Cir. 1997); *accord Schlup v. Delo*, 513 U.S. 298 (1995) (because habeas relief is equitable in nature, district court has greater flexibility in determining an appropriate remedy).

In cases where constitutional infringement is alleged, the petitioner bears the burden of demonstrating by a preponderance of the evidence that a constitutional violation has occurred. *Miller v. United States*, 261 F.2d 546, 547 (1958). Once such a showing has been made, the burden shifts to the Government to establish that the violation was harmless. *Kelly v. Warden, House of Correction*, 701 F.2d 311, 313 (4th Cir. 1983); *see also Chapman v. California*, 386 U.S. 18, 24 (1967) (constitutional error casts on someone other than the person prejudiced by it a burden to show it was harmless).

B. This Court should set aside Mr. Fenn’s judgment of conviction and sentence because his defense counsel failed to provide him with effective legal assistance.

A defendant’s Sixth Amendment right to effective assistance of counsel is violated when (1) his counsel has performed deficiently, and (2) the deficient performance prejudiced the defense. United States v. Baker, 719 F.3d 313, 318 (2013) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). “A lawyer’s performance is deficient when his representation falls below an objective standard of reasonableness[.]” Id. (quoting Strickland, 466 U.S. at 490). A deficient performance prejudices the defense when “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Williams v. Taylor, 529 U.S. 362, 391 (2000)(citing Strickland, 466 U.S. at 694).

1. Robert Fenn’s Sixth Amendment right to effective legal assistance was violated when his trial counsel failed to subpoena and call William Fenn as a witness.
 - a. Trial counsel performed deficiently by failing to subpoena and call William Fenn as a witness.

An attorney’s representation is deficient when he fails to to contact and interview important witnesses, especially when they are available and identified by the defendant prior to trial. Huffington v. Nuth, 140 F.3d 572, 580 (4th Cir. 1998). “Unless some cogent tactical or other consideration justified it[,], an attorney’s failure to present available exculpatory evidence is ordinarily deficient.” Griffin v. Warden, Maryland Correctional Adjustment Center, 970 F.2d 1355, 1358 (4th Cir. 1992). While the Court must presume that trial counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,” a court should only defer to “strategic choices” made by an attorney if his investigation of law and facts is reasonable. Wiggins v. Smith, 539 U.S. 510, 527 (2003). “Strategic choices ‘resulting from lack of diligence in preparation and investigation are not

protected by the presumption in favor of counsel.” Armstrong v. Kemna, 534 F.3d 857, 864 (8th Cir. 2008) (citing Kenley v. Armontrout, 937 F.2d 1298, 1304 (8th Cir. 1991); Wiggins, 539 U.S. at 527.

By failing to subpoena William Fenn for trial, counsel’s representation fell below an objective standard of reasonableness. The core of Robert’s defense was that William Fenn was the person in the Fenn home who downloaded and possessed the child pornography at issue. To support this defense, trial counsel introduced evidence that the Acer desktop computer was located in the Fenn’s basement, where William Fenn spent much more time than Robert, and that child pornography was found on a Toshiba laptop belonging to William Fenn. However, trial counsel failed to secure or attempt to secure the most important evidence to support Robert’s defense: William Fenn’s statement that it was he, not Robert, who downloaded the child pornography.

Even assuming trial counsel’s investigation yielded doubts about the contents of William Fenn’s testimony, his decision to not subpoena William was unreasonable. William Fenn’s testimony could have followed only three possible scenarios: (1) William would deny downloading the child pornography; (2) William would admit downloading the child pornography; or (3) William would invoke his Fifth Amendment privilege against self-incrimination. Both the second and third scenarios exculpate Robert Fenn, while the first and third would have allowed Catherine Fenn to testify that William Fenn told her he committed the offenses. If William denied downloading the child pornography, his statement to Catherine would have been admissible as a declarant-witness’s prior inconsistent statement under Federal Rules of Evidence 614 and 801(d)(1). If William invoked his Fifth Amendment privilege, his statement to Catherine would have been admissible as a statement against interest under FRE

804(a)(1) and (b)(3). See United States v. Brainard, 690 F.2d 1117, 1123 (4th Cir. 1982)(holding that when a witness asserts his Fifth Amendment privilege, he is unavailable for purposes of FRE 804(a)(1)). Trial counsel's failure to subpoena William Fenn as a witness resulted in the trial court sustaining the government's objection to Catherine Fenn's testimony on the grounds that William Fenn was not unavailable.

William's statement to Catherine that he had been downloading child pornography sufficiently establishes that William's testimony would have been exculpatory to Robert's defense. In any event, Catherine's testimony of William's statement to her unequivocally qualifies as exculpatory evidence. Even assuming that failure to secure or attempt to secure William's presence at trial was a strategic decision based on the potential contents of William's testimony, its effect on the admissibility of William's statement to Catherine renders that decision unreasonable. Moreover, because trial counsel sought to admit William's statement to Catherine, the record establishes a lack of "cogent tactical or other consideration" that would justify trial counsel's failure to present exculpatory evidence. Griffin, 970 F.2d at 1358 (finding counsel's performance deficient where no reasonable excuse for failing to notify the state of the defendant's alibi and to secure the attendance of alibi witnesses "appears or is even suggested in the evidentiary record."); Sanders v. Ratelle, 21 F.3d 1446, 1457 (9th Cir. 1994)(finding counsel's performance deficient when he failed to offer into evidence confession of third party where there was no conceivable strategic or tactical reason not to use this evidence.)

b. Trial counsel's failure to subpoena and call William Fenn as a witness prejudiced the defense.

To establish prejudice under the second part of the Strickland test, "a defendant need not establish that the attorney's deficient performance more likely than not altered the outcome." Nix v. Whiteside, 475 U.S. 157, 175 (1986). Instead, Strickland requires a "reasonable

probability” that the result of the proceeding would have been different if not for trial counsel’s deficiency. Id. The government relied entirely on circumstantial evidence to establish that Robert was the member of the Fenn household who accessed the child pornography at issue. No confession or other direct evidence tied Robert to the child pornography. William Fenn’s confession would have changed the entire evidentiary picture. Its absence deprived Robert of the most critical evidence supporting the defense he put forth at the trial: that it was William Fenn, not Robert, who downloaded and possessed the child pornography. *See Sanders v. Ratelle*, 21 F.3d at 1461 (“[G]iven the fact that the jury could have been presented with the confession of a person who claimed to be and may have been the ‘real’ shooter, there can simply be no fair assurance that the verdict would have been the same had the defendant received effective representation.”).

The jury considered circumstantial evidence of both Robert and William Fenn’s guilt and ultimately weighed it against Robert. A direct confession from William at trial, or extra-judicially through Catherine, would have had a pervasive effect on the jury’s evaluation of the evidence. Counsel’s failure to present this evidence eliminates any “fair assurance that the verdict would have been the same.” Sanders, 21 F.3d at 1461. Prejudice to the defense under Strickland is undeniable. *See also Washington v Smith*, 219 F.3d 620, 633-634 (7th Cir. 2000)(holding that counsel’s failure to subpoena three alibi witnesses in addition to the one alibi witness who testified at trial resulted in prejudice where the one alibi witness’ credibility was impeached due to prior convictions. “[G]iven the absence of these [alibi] witnesses, the jury had good reason to find [the defendant’s] alibi dubious.”)

2. Robert Fenn's Sixth Amendment right to effective legal assistance was violated when his trial counsel failed to investigate and present an alibi defense.
 - a. Trial counsel performed deficiently by failing to investigate and present an alibi defense.

When trial counsel failed to present evidence of the April 9, 2012 alibi provided by Robert Fenn, his performance fell below an objective standard of reasonableness. This evidence would have contradicted the government's evidence that Robert could have been home to download the child pornography. It was available exculpatory evidence that trial counsel inexplicably failed to present. *See Griffin*, 970 F.2d at 1358 (holding "an attorney's failure to present available exculpatory evidence is ordinarily deficient, unless some cogent tactical or other consideration justified it.")(citing *Washington v. Murray*, 952 F.2d at 1476).

Additionally, trial counsel performed deficiently when he failed to investigate additional alibi evidence that conflicted with the times the child pornography was accessed. Robert's credit card receipts could have been discovered with minimal effort. Having received one receipt establishing an alibi, counsel had an undeniable duty to take reasonable steps to determine if other, similar evidence could be obtained. The receipts from Popeye's restaurant and Robert's credit card company establish that Robert could not have been at home on the Acer computer during two additional times when child pornography was downloaded. *See Glover v. Miro*, 262 F.3d 268, 276 (4th Cir. 2001) (holding that attorney's failure to contact certain alibi witnesses even though defendant provided the attorney with names of potential alibi witnesses was not objectively reasonable); *Griffin*, 970 F.2d at 1358 (holding that failing to notify the state of the defendant's alibi and to secure attendance of alibi witnesses is deficient performance under the first *Strickland* factor).

b. Trial counsel's failure to investigate and present an alibi defense prejudiced the defense.

The outcome of the trial would have been different if Robert's counsel had investigated and presented Robert's alibi evidence. Through its calendars and charts, the government presented evidence of the activity of the potential suspects, John, Robert, and William Fenn. The government used this evidence to exclude William Fenn as a suspect by showing he was on another computer *in the Fenn home* on a few occasions when child pornography was accessed. The government also used this evidence to exclude John Fenn by showing he was working at Petco on occasions when child pornography was accessed. The government then used this evidence to indirectly incriminate Robert by claiming he could never be excluded from having access to the Acer computer on any occasion when child pornography was viewed. For example, the government argued that Robert could have been accessing child pornography on a teacher work day because teachers were allowed to work at school or from home on such days.

Despite being in possession of evidence that directly refuted the government's claim, Robert's trial counsel never presented it. Robert's defense hinged on his claim that William Fenn was the most likely perpetrator of this crime. The receipts establish that Robert was out of the house when at least three downloads occurred. The government's evidence regarding William Fenn, on the other hand, establish that William could have been on a computer in the same room as the Acer downloading the child pornography.⁵ Thus, the alibi evidence would have added tremendous weight to the substance of Robert's defense. Trial counsel's failure to

⁵ Agent Nelson testified on cross-examination that his opinion that William Fenn was not on the Acer when the child pornography was viewed was based on the difficulty William would have typing on two computers at once even if both were located in the basement. "It's difficult to do two things at once. . . Certainly you can start downloading something, and then if the download takes for a while, move to another computer." Tr. 124-126.

present it undermines any confidence the Court can have in the outcome of the trial. *See Washington, supra.*, 219 F.3d at 634 (finding prejudice under the second Strickland prong where trial attorney's failure to call three alibi witnesses "would have added a great deal of substance and credibility to [the defendant's] alibi").

3. Robert Fenn's sixth amendment right to effective legal assistance was violated when his trial counsel failed to secure an expert to independently analyze the Acer computer and William Fenn's Toshiba laptop.

"A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. A reviewing court's deference to counsel's professional judgment does not mean that a strategic decision is automatically justified by a cursory investigation. Wiggins, 539 U.S. at 527. Instead, a court must determine whether counsel's investigation supporting his judgment was reasonable. *Id.*; Strickland, 466 U.S. at 690 ("[c]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.")

- a. Trial counsel performed deficiently by failing to seek an independent forensic analysis of the computers.

Trial counsel's failure to have an expert independently analyze the Acer and Toshiba computers amounted to an objectively unreasonable investigation. The government had no direct evidence that Robert viewed or downloaded child pornography. Its dominant method of proof was to exclude William and John during the times the Acer recorded that child pornography was downloaded and viewed. The accuracy of these times was therefore critical to the government's case and to Robert's defense. Moreover, trial counsel was in possession of an email from David Luehring, the government analyst who examined the Acer and found anonymous logons from other computers. (Attached as Exh. 4.) The email stated the analyst's

conclusion that these logons weren't necessarily into the Trebor account but qualified that conclusion by stating "at least that's my story—and I'm sticking to it."

Despite this information, trial counsel failed to have the Acer examined by an independent expert to either confirm the government's conclusions or offer evidence that the anonymous logons could have been the source of the child pornography. This failure is particularly egregious in light of the defense's theory that William Fenn was surreptitiously accessing the Acer to view child pornography. Such an examination could have produced evidence connecting the anonymous logons to the illegal downloads. Even if it failed to produce such direct evidence, it could have uncovered weaknesses in the government's analysis undermining its credibility. Trial counsel's failure to seek an independent exam of the Acer cannot be viewed as a strategic decision. At worst, it would have produced no valuable evidence, a fact that the defense would not be obligated to divulge. Trial counsel failed to conduct even a "cursory investigation" of the computer where the child pornography was discovered. His conduct was therefore unreasonable. Wiggins, U.S. at 527.

In further support of the highly beneficial potential of an independent analysis, the petitioner points to an interview his current counsel conducted with William Fenn on October 24, 2013. The interview was taped. During the interview, William Fenn gave a detailed account of his computer activities in which he admitted to using a KDM switch to link one keyboard to two computers. As he explained, "A KDM switch allows you to hook a keyboard monitor and a mouse to 2 computers at the same time. Then you do control 1 or control 2 to switch between the two computers." Interview of William Fenn, p. 18 (attached as Exh. 5). Given William Fenn's abilities to work with multiple computers at one time (contrary to Agent Nelson's opinion, *see* Note 3, *supra*.) and the proximity of the Acer to William Fenn's basement workspace, it is

possible that an independent examination of the Acer could have disclosed evidence linking it to William Fenn's computers.

Trial counsel's failure to have the Toshiba laptop independently analyzed is also objectively unreasonable under Strickland. The government introduced testimony that Robert possessed Hentai images of females similar in age to the child pornography. Agent Nelson testified that suspected child pornography was found on a Toshiba laptop belonging to William Fenn, but trial counsel failed to have the laptop analyzed to extract these images to compare the gender and age to the child pornography at issue in the case. The record is devoid of any reasonable justification or decision for failing to examine the Toshiba laptop. *See Williams v. Thaler*, 684 F.3d 597 (2012) (holding that defendant's counsel's performance fell below an objective standard of reasonableness when he "failed to obtain any independent ballistics or forensics experts, and was therefore unable to offer an meaningful challenge to the finds and conclusions of the state's experts, many of which proved to be incorrect.")

b. Trial counsel's failure to seek an independent forensic analysis of the computers prejudiced the defense.

If trial counsel had enlisted an expert to examine the Acer desktop and the Toshiba laptop, a reasonable probability exists that the trial would have had a different outcome. As discussed above, the crux of Robert's defense was that William Fenn committed the crimes, not Robert. The jury's knowledge that images of the same age and gender were found on William's laptop undoubtedly would have strengthened Robert's theory of defense. Therefore, trial counsel's failure to analyze the computer, find these images and present them to the jury prejudiced the defense and undermines the outcome of the trial.

WHEREFORE, based on the foregoing and such additional evidence as may be presented to the Court at a hearing on this petition, counsel for the petitioner moves this Honorable Court

to vacate and set aside the judgment of conviction entered against him or grant such other relief as the Court deems just and necessary.

Respectfully submitted,

ROBERT FENN

By: _____/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2015, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following:

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Merchant ID: 385100940247005
Term ID: 0010545100940247005002

Sale

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VISA

Entry Method: Swiped

Total: \$ 45.00

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15:37:21

Inv #: 000020

Appr Code: 003288

Apprvd: Online

I agree to pay above total amount
according to card issuer agreement
(Merchant agreement if credit voucher)

[Signature]

FENN-ROBERT C

Merchant Copy

THANK YOU!



Student Union 1, Room 2300
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Robert Fenn

has an appointment with
I Injections [Injections]
Monday
4/9/2012 AT 2:40:00PM

Robert Fenn Downloads

~ April 2012 ~

Sun	Mon	Tue	Wed	Thu	Fri	Sat
1 01:17:01PM 01:32:33PM 02:04:39PM 02:08:46PM 02:08:51PM 02:13:46PM 02:13:52PM 02:16:43PM 02:23:49PM	2 SPRING VACATION	3 SPRING VACATION	4 SPRING VACATION	5 SPRING VACATION	6 SPRING VACATION	7 11:27:46AM 12:04:35PM
8	9 01:45:42PM 01:46:05PM 01:48:06PM 01:51:58PM	10 12:31:36AM 12:34:22AM 12:35:21AM 12:36:34AM	11 SPRING VACATION	12 SPRING VACATION	13 SPRING VACATION	14 11:26:29AM
15	16 TEACHER WORKDAY	17	18	19	20	21 07:11:20PM 07:17:01PM 07:31:27PM 07:33:21PM
22	23 04:55:31PM 04:56:08PM 05:10:32PM 05:14:44PM 05:18:54PM 05:20:03PM 05:24:10PM 05:27:17PM 05:30:44PM	24 08:22:31PM	25	26	27	28 07:35:03PM

Parking FAQ

I've heard that there isn't any enforcement during the first two weeks of school. Is this true?

It is not true. All rules and regulations are enforced at all times unless otherwise noted.

I'm visiting the campus. What options do I have for parking?

Please visit our website parking.gmu.edu and click on "purchase my permit" at the top. Printable permits can be used for daily (\$8.00), weekly (\$25.00), and monthly parking (\$60.00).

- Go to parking.gmu.edu and click on Purchase Your Permit
- Create a guest account
- Follow the prompts and select the permit you need to purchase*
- Select the date that you need and be sure to verify the dates each step of the process
- Once you get to the receipt page make sure to hit the print permit link just below the permit description
- Permits are non-refundable

Please note that Weekly and Monthly permits will restrict you to parking at the Field House lots of M, O, and P. Daily permits are good for any of the General Areas on campus. These permits are not valid at the Arlington campus without prior approval from Parking Services.

You also have the option to park in the visitor areas of any of the three parking garages (Mason Pond, Shenandoah, or Rappahannock River) at the Fairfax Campus or Founders Hall Garage at the Arlington Campus for these rates.

- 1hrs = \$3.00
- 2hrs = \$6.00
- 3hrs = \$9.00
- 4hrs = \$12.00
- All day = \$14.00
- Founders Hall Garage weekend: \$7
- Resident students may purchase discounted weekend validations at <http://parking.gmu.edu/New%20folder/studentvalidations3-2014.pdf>

POPEYES #4773
3075 CENTERVILLE ROAD
HERNDON, VA.

ITEM	IN
1 5-TENDERCOMBO	8.99
1 W/FF	
3 FREE SPRITE	
1 NO SAUCE	
1 NO SAUCE	

TXB1	8.99

TXTL	.45
TOTL	9.44
CASH	9.44
CHNG	.00

R05A
0274 17:33 #00 DEC. 15 '11 REG0003

EXHIBIT
tabbler
2

Robert Fenn Downloads

~ December 2011 ~

Sun	Mon	Tue	Wed	Thu	Fri	Sat
Notes: Each Time Represents a File Download	Data in BOLD=EyeOnline Chat with Trebortlocke participant	Data in RED=Information provided by FCPS		1 Leave Sick/Inid (6.5 hours)	2	3 06:00:06PM 06:00:53PM 06:01:35PM 06:15:19PM 06:21:57PM 06:23:10PM 06:33:26PM 06:35:22PM 06:37:14PM 06:39:07PM 06:40:44PM 06:42:40PM
4	5 08:08:02PM 08:08:21PM 08:08:28PM 08:13:20PM 08:14:19PM 08:16:24PM 08:18:22PM	6 09:14:08PM 09:14:53PM 09:17:07PM 09:21:12PM 09:21:22PM 09:21:23PM 09:26:15PM 09:26:41PM 09:27:41PM 09:28:17PM 09:36:13PM	7	8	9	10 03:17:41PM 03:40:37PM 03:41:54PM 03:46:42PM 03:50:19PM 03:54:12PM
11	12 06:28:09PM 06:32:25PM 06:34:59PM 06:50:54PM 06:52:27PM 06:53:32PM 06:59:20PM 07:13:45PM 07:14:13PM 07:14:38PM 07:16:41PM 07:34:45PM	13	14	15 05:41:28PM 05:41:29PM 05:44:53PM	16 06:41:09PM	17



WENDY'S #0121 WENDY'S #0121 FAIRFAX VA US 04/23/12 10:11:42
ED=P CV=P CV2=NA AV=NA CAVV=NA POSEMODE=900 MCC=5814 CP SIG

No transactions 4/24

No transactions 5/8

4789750000732916 000 05/13/12 12:30:23 23.14 PCB FR CK .00 EXCH 07699259 213410430432 0000216039017
KMART 13910 METROTECH DRI CHANTILLY VA US 05/13/12 09:30:23
ED=P CV=P CV2=NA AV=NA CAVV=NA POS EMODE=000

No transactions 5/18

4789750000732916 000 05/25/12 16:05:38 10.45 PAD FR CK .00 VDCS 6543 214623053850
0000216039017

PHO BAC PHO BAC CHANTILLY VA US 05/25/12 16:05:38
ED=P CV=P CV2=NA AV=NA CAVV=NA POS EMODE=902 MCC=5812 CP SIG

4789750000732916 000 05/25/12 16:09:19 4.50 PAD FR CK .00 VDCS 91306861 214645622585
0000216039017

MILWAUKEE FROZEN CUST MILWAUKEE FROZEN CUSTA CHANTILLY VA US 05/25/12 16:09:19
ED=P CV=P CV2=NA AV=NA CAVV=NA POS EMODE=902 MCC=5814 CP SIG

4789750000732916 000 05/25/12 17:20:29 39.99 PAD FR CK .00 VDCS 00718222 214600540523
0000216039017 Pacific Standard Time

VALVE SOFTWARE VALVE SOFTWARE SEATTLE WA US 05/25/12 17:20:30
ED=P CV=NA CV2=NA AV=Y CAVV=NA POS EMODE=010 MCC=7994 CNP SIG

4789750000732916 000 05/30/12 13:09:45 6.50 PAD FR CK .00 VDCS 000655884 215120645177
0000216039017

MCDONALD'S F20652 MCDONALD'S F20652 FAIRFAX VA US 05/30/12 13:09:45
ED=P CV=P CV2=NA AV=NA CAVV=NA POSEMODE=908 MCC=5814 CP SIG

4789750000732916 000 05/30/12 09:22:41 53.11 PCB FR CK .00 VDCS 00162637 215195311444
0000216039017

Staples, Inc Staples, Inc HERNDON VA US 05/30/12 17:22:41
ED=P CV=P CV2=NA AV=NA CAVV=NA POS EMODE=901 MCC=5943 CP PIN

4789750000732916 000 05/30/12 16:17:00 1.00 PAD FR CK .00 VDCS 000419050 215123607562
0000216039017

SUNOCO 0887734201 SUNOCO 0887734201 FAIRFAX VA US 05/30/12 16:17:01
ED=P CV=P CV2=NA AV=NA CAVV=NA POS EMODE=901 MCC=5542 CP SIG

4789750000732916 000 05/30/12 19:48:09 85.01 PUR FR CK .00 EXCH 00735435 215156561628
0000216039017

TOYS R US 13035 FAIRLAKES SHP FAIRFAX VA US 05/30/12 16:48:09
ED=P CV=P CV2=NA AV=NA CAVV=NA POSEMODE=000 MCC=5945 CP PIN

No transactions 6/3 and 6/4



Robert Fenn Downloads

~ May 2012 ~						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
6 02:29:03AM	7	8 08:00:50PM 08:07:58PM 08:09:43PM 08:12:15PM 08:14:38PM	9	10	11	12
13 04:30:03PM 04:30:56PM 04:35:30PM 04:45:14PM	14	15	16	17	18 04:54:33PM	19 03:11:11PM
20	21	22	23	24	25 04:37:09PM 04:52:47PM	26
27	28 FCPS HOLIDAY	29	30 10:17:14PM 10:17:48PM 10:22:08PM 10:23:28PM	31 IAD (Dulles, VA) Flight to CMH (Columbus, OH) @ 12:32PM Leave: Personal (7.5 Hours)	Notes: Each Time Represents a File Download Data in RED=Information provided by FCPS Data in [redacted]=Petco Information Regarding John Fenn	

Yass, Alicia J. (USAVAE)

From: Nelson, David <David.E.Nelson@ice.dhs.gov>
Sent: Tuesday, March 12, 2013 11:35 AM
To: Yass, Alicia J. (USAVAE)
Subject: FW: Event Log
Attachments: screenshot1.png; screenshot2.png; screenshot3.png; screenshot4.png; screenshot5.png

Hi Alicia,

This is an email correspondence I had with personnel at C3 (our CyberCrimes HQ) regarding analysis of the Security Event Log on the Fenn Acer Desktop.

Dave

From: Luehring, David A (CTR)
Sent: Friday, October 19, 2012 4:50 PM
To: Nelson, David
Subject: RE: Event Log

Dave,

For what it's worth, I don't see any other logons to Trevor-PC except for anonymous logons from other computers on his network – see the attached screenshots as examples. I believe anonymous logons from other computers on a network happen automatically from time to time. Windows uses a browser service to periodically “seek” which other computers are on the network. These records do not mean that users were logging onto Trevor-PC, but instead a Windows service running in the background was causing it (at least that's my story – and I'm sticking to it). To test this theory, Alan and I looked at our Security logs on our computers, and I had records of Alan's PC anonymously logging onto mine, and vice-versa. Both of our computers also had anonymous logons from other computers on our network.

Hope this helps. Let me know if you find anything interesting. Have a good weekend.

From: Nelson, David
Sent: Friday, October 19, 2012 1:39 PM
To: Luehring, David A (CTR)
Subject: Event Log

Hi Dave,

Thanks for your help with this. I am attaching the Security event log which I copied out just after accessing files from another computer on the network. I am also attaching a screenshot showing the Logon event in the Security log created when I accessed files using the Trebor username and password, which is the account of interest on the suspect's computer.

The suspect's computer is Trebor-PC. The vm I used to access files on the Trebor-PC is FennNetworkOthe. Please feel free to call if I left out any needed information – my cell is 202-207-4093.

Thanks,

Dave



David Nelson, EnCE, ACE, A+, Net+, Security+
Special Agent/Digital Forensic Agent
ICE/Homeland Security Investigations
2675 Prosperity Ave., Suite 400
Fairfax, VA 20598-5114
O: 703-285-6714
F: 703-285-6709
David.E.Nelson@ice.dhs.gov

WF = William Fenn; JH = Jim Hundley; MC = Marivette Castellano

Entire Duration: 50 minutes, 41 seconds

Interview of William Fenn

Date: October 24, 2013

[Unaudible noise until 1:04]

JH: Mr. Fenn, I'm Jim Hundley, Hi. I'm Robert's attorney. This is Marivette Castellano...

MC: Hi, how ya doing...

JH: ...She is working on Robert's case as well. We are representing Robert on his appeal...

WF: Mmhhh.

JH: ...And we are, you know, obviously one of the big things that we are trying to do is get his conviction either set aside, or dismissed, overturned, what have you. Um, and one of the major issues on appeal is the sufficiency of the evidence that the Government presented at the trial to convict Robert. A lot of that evidence deals with computers that were taken from the house and what was found on the computers and where the computers were, so we were hoping we could talk to you about that. We've been investigating the case and we were hoping we could talk to you and ask you some questions about that...

WF: Okay.

JH: ...where the computers were and stuff. Want to sit down somewhere and talk?



WF: Yeah, let me catch my breath...

JH: ...Oh, okay, sorry...

WF: You know, I have emphysema and COPD, so...

JH: Oh, okay...

WF: No, y'all can sit on the couch...

MC: Okay, thank you.

JH: Um, so, we took the case over on appeal and we've been working on that for a couple of months. I don't know, have you had any contact with your son, Robert?

WF: Not really.

JH: I haven't seen him since the day he left the Alexandria jail. Once they're in the Bureau of Prisons, you know, it can be difficult. Um, well, like I told you, I have some notes here just to try to keep myself focused because there is just so much about what was going on with these computers and what the government tried to do with them. Um, so, let me, let me start out with, you, you were here the day the police came with their search warrant, weren't you?

WF: Mmhmm.

JH: And Robert was here...

WF: [Inaudible]

JH: ...I guess John and Cass, everybody was here. They came at like 6:00 in the morning. Now, my understanding is they actually seized a computer that belonged to you, in addition to – they basically took all of the computers out of the house. But there was a computer that belonged to you, like a laptop?

WF: Mmhmm.

JH: Do you know, what kind of lap top was that?

WF: It was a Toshiba.

JH: A Toshiba, yeah. Um, was that a computer that only you would have had access to? Was that basically your computer?

WF: That was my computer, yes, but it had no passwords.

JH: Yes, I was going to say, that's my next question – was it password protected or anything? Do you know if anybody else in the house ever used it?

WF: I really don't know, I don't think so.

JH: You don't think so and you never saw anybody using it?

WF: You know, I'd carry it on the road with me.

JH: Yeah.

WF: And I would leave it in my hotel room and things like that.

JH: Well, one of the issues in the case was, they, the government, said in their case in chief that they found what they suspected was child pornography on that computer.

WF: Mhmm.

JH: Did, were you aware of that? Did they ever discuss that with you?

WF: No.

JH: Did you ever see what they said was suspected child pornography...

WF: No.

JH: ...On the computer? Were you aware that it was on there?

WF: I was not aware of any child pornography...

JH: Okay.

WF: ...On that computer.

WF: Now, I had looked off a CD, at one time, uh, at some adult pornography...

JH: It was on a CD?

WF: Yeah, it was on a CD.

JH: So you downloaded it and put the CD in the...

WF: No, it was just a CD that I had

JH: You put it in the disc drive...

WF: Yeah.

JH: ...And view it?

WF: Yeah.

JH: Okay.

WF: And that was it.

JH: Okay.

WF: And, you know, there was no child pornography on that.

JH: Ok, um... So you would have no way of knowing where this suspected child pornography would come from or how it got on your computer?

WF: Nope.

JH: And you never asked Robert about it or John about it?

WF: Well, I didn't know it was on there.

JH: Right, well after you found out about it?

WF: After I found out about it... I didn't find out about it until after Robert was convicted.

JH: Ok...

WF: Or after his – while he was in trial.

JH: Um, when the police came to the house that morning...

WF: Mmhhh.

JH: Did... the prosecutor handed over some evidence based on a statement that you gave or you said to the police, words to the... I don't have it with me so I don't know the exact words, but something along the lines of "it's probably something I did," in response to, basically, that's why you're here, right? "It's something I probably did." Did you say that...

WF: I don't remember saying that to them, though.

JH: Okay, any idea why they would think you said that or why you might have said that?

WF: I have no idea.

JH: Um, there was a computer that belongs to your other son, John. Is he still here? Does he still live here?

WF: Well, he's in and out.

JH: Okay. He was living here at the time?

WF: He was in and out at the time, now...

JH: Still? Same status? Um, but, in any event, they seized him computer too...

WF: They seized two computers out of his room.

JH: ...Right. I guess that's right, yeah. And again, they claim, the government claims, that there was child pornography on that. On one of those computers, I'm not even sure which one, it's hard to keep track. Any idea...?

WF: I have no idea.

JH: Okay. The two computers that came out of his room... did, were you familiar with how those computers were used? I mean, they were in John's room.

WF: The only thing I know about John's computers is he would run "Bit Torrent" on the computers.

JH: What's that? "Bit Torrent?"

WF: And I went in there a couple of times and literally had to unplug 'em, to shut it down.

JH: Okay.

WF: I mean he had passwords on them. I have no idea what his passwords were.

JH: He's the only one – to your knowledge – who used those computers?

WF: Robert may have done something with those computers.

JH: Did you ever see Robert...

WF: Nope

JH: ...Using those computers? You said they were password protected, do you know...

WF: I don't, you know, I don't know what the passwords are.

JH: Right, did Robert?

WF: I honestly don't know.

JH: Yeah, if you know, obviously.

MC: What's... do you mind? What's "Bit Torrent?" I don't have any knowledge...

WF: Bit Torrent...

MC: ...of computers like that...

WF: I'm not even familiar with it. I know what it is.

MC: Mhmm...

WF: It's a file sharing program...

MC: Okay...

WF: ...And it's kind of like a whole bunch of computers that are...

MC: Okay...

WF: ...Speaking to each other and they are passing files, but what it is, is that they will take a file and send, send it in... I don't know what you would send it in, but they would send it in pieces amongst the computers.

MC: Okay...

WF: I, I've never done anything with it so I know nothing about Bit Torrent.

JH: Why would you do it? Why would you want to do that, do you know? What is the function of...

WF: Well, John was apparently downloading, uh, software.

JH: Oh, okay.

WF: And, um...

MC: Is he like in the IT field or is that related to his job or...

WF: No, um, I don't know what John was downloading on it. I just know that... during the couple of weeks prior to them showing up at the door, um, John's computer was running Bit Torrent and I would check the, uh... you can check on Cox, uh, computer usage.

JH: Mmhmm.

WF: Because you've got so much you can use a month. The bandwidth you have per month. And, uh, I was seeing some big spikes in computer usage.

JH: Okay.

WF: And I mentioned it to Robert and Robert mentioned well John is running Bit Torrent. And I said, well I don't want that. And then one night, Robert... things quit working right...

JH: Mmhmm.

WF: ...And it turns out it must've been John's Bit Torrent because I went in there, uh, I was gonna try to shut the computer down by just hitting shut down on the computer. I didn't know the password; I couldn't open it up, so the next best thing, you pull the power cord.

JH: Mmhmm. Mmhmm. Okay...

WF: And, uh...

JH: But you don't have any idea what he was trying to accomplish by doing that...

WF: I have no idea...

JH: I don't understand why you would want to do a computer sharing system...

WF: Well...

JH: ...To download...

WF: A, you can get music.

JH: Right.

WF: B, you can get programs that other people have cracked.

JH: Okay. So is it like a peer-to-peer kind of file sharing system?

WF: It's a peer-to-peer file sharing system. That's what Bit Torrent is.

JH: Okay. That's interesting.... Um, the computer that became sort of the focus of the prosecution was this, I don't want to say it was the only one, but this was primarily, it was this Acer laptop. Um, do you know which computer this was that I am talking about?

WF: Acer laptop?

JH: I think it was an Acer brand laptop. It was a laptop that, apparently, Robert has brought home from college and was keeping in the basement.

WF: Robert didn't bring a laptop home from college.

JH: When the police came, they apparently seized it out of his bedroom.

WF: Yeah, they took a computer out of there but it wasn't a laptop. It was a stand up, you know, stand alone, type of computer.

JH: Yeah, well, in the basement, was there a laptop that Robert kept there? Or maybe it was a computer, maybe I'm mistaken and it wasn't a laptop.

WF: Robert has a, uh, small laptop that we have him for Christmas, I believe.

JH: A newer one?

WF: Hm?

JH: A newer one?

WF: It was one that Cass bought at, uh, I think she bought it at Costco...

JH: Mmhmm.

WF: It may have been an Acer laptop.

JH: Okay.

WF: It may have been an Acer laptop. And when his girlfriend would come over, she would sit there and use it and, you know, he didn't, I never saw him using it that much.

JH: Right, but you're not aware... I mean you have some computer equipment...

WF: I had three computers down in the basement.

JH: ...Down in the basement. Um, and from what I understand, what was testified to at trial, there's an area next to where you did your work where there was another computer kept that was used for gaming and...

WF: The computer they supposedly found stuff on in Robert's room had been down in the basement.

JH: That's the computer I'm talking about.

WF: I didn't even realize it was down there.

JH: Okay.

WF: And it was his older computer and he had mentioned it to me at some point a couple of months before that, uh, he was... do you want it?

JH: Mmhmm.

WF: And I basically said yeah, I'll take it if you don't want it. But, you know, it never went beyond that.

[Cell phone vibrating in the background.]

WF: Is that yours humming?

MC: It's mine.

WF: It's setting my hearing aids off.

MC: Sorry.

JH: Sorry, I just turned mine off.

MC: I'm turning it off.

WF: And I recall seeing the computer down there at some point. What that computer was down in the basement was mainly used by Robert for were videogames.

JH: Mmhmm.

WF: He would have people come over here and they would all join up and they would bring their computers...

JH: Mmhmm.

WF: ...And they would play video games.

JH: Okay. Did you, um... you said... you said he offered you that computer, did you ever use it?

WF: Nope.

JH: Was it password protected, do you know?

WF: Yes it was.

JH: Did you know the password?

WF: Nope.

JH: Okay, Robert testified at trial that you did know the passwords... You never used it, you're sure about that?

WF: I'm 100% sure about that.

JH: Do you know why it was in his room when the police came?

WF: Yeah, he, apparently, was in there trying to transfer files from my computer... he had music on it, I guess...

JH: Okay...

WF: ...That's what he said.

JH: And how long had it been in his room? Just for a couple days?

WF: I have no idea.

JH: Okay, but mostly it was downstairs and...

WF: No, it wasn't mostly downstairs. It was down there at some period and I remember seeing it, but I don't remember having seen it down there around the time around the time that the police came. I know at some point... It could have been tucked over there on the floor.

JH: Did it, um... Did Robert ever tell you that there were problems with that computer? That it had somehow been corrupted and he was trying to fix it?

WF: Uh, at some point I think he did say that, but I don't know when.

JH: Um... because... what... that's the computer where the majority... certainly, that's the computer where the child pornography that was the subject of the trial, that's what Robert was charged with possessing, was what was found on that computer. Um, and, there was a... did you actually, did you go to the trial?

WF: [Presumably shakes his head]

JH: Why didn't you go?

WF: Primarily nobody wanted me to go.

JH: Who told you they didn't want you to go? Why... Robert said don't go?

WF: Yeah.

JH: Okay, um, and you were okay with that? I mean, I don't know, it's your son on trial. It just...

WF: ...Well...

JH: ...Strikes me as...

WF: ...Around here sometimes I just learned to keep my mouth shut.

JH: Okay. Um, well, you know...

WF: No, I asked Robert when the trial started. I said "do you want me to be there?"

JH: Mmhmm.

WF: And he said no.

JH: Right, um, okay, I was just curious about that more than anything. But, the reason I ask is because a lot of the evidence that the government put on, they went on these great lengths to try to show that when this child pornography was downloaded onto the computer, you were doing something else or John was somewhere else, but Robert wasn't. So they did this sort of "process of elimination" theory of the case. Um. Which, to my mind, as a criminal attorney – I was a prosecutor for 6 years, I've been doing criminal defense work for 15 years – is a pretty thin way of trying to prove the case, you know? It's really circumstantial to try to say...

WF: I will fully agree with you on that.

JH: So, one of the ways that they...well... They managed to exclude John because... and there were like 250 downloads of child pornography on this computer or something like that... you know, a fairly big number. And they managed to show that like, during 3 of those downloads, John couldn't have done it because he was at work. Setting security or something where he worked, and they knew he was doing that. So that's what they did, that's how they excluded him. Um, but, they basically excluded you by saying that you were logged in on your computer. They mentioned that one time during one download, you were logged onto like a – I'm not really sure what this is – a HAM radio site. What's that?

WF: It could be any site. It could be ARRL, uh, it could be...

JH: Is HAM radio like the HAM radio, like you're communicating, you know...

WF: Yeah, I've been a HAM radio operator for 52 years...

JH: Okay... that's what I thought... but you do that through the computer now?

WF: You do a lot of it through the computer, yeah.

JH: It's not like... when I was a kid... I had neighbors that had...

WF: No, I've got an antenna out in the back.

JH: Yeah, yeah.

WF: No, no, no, the computers you use in HAM radio, like, one of the computers they took that was mine was a Dell computer.

JH: Mmhmm.

WF: It's a [inaudible at 18:57] computer. It had in it 2 audio cards, one was a very high class audio card and the reason for that card is it was attached to what we call a software defined radio.

JH: Okay.

WF: It's a Flex 1000. Which is still downstairs.

JH: Okay.

WF: And, so this computer was used mainly with Flex 1000. It was connected with a KDM switch... do you know what a KDM switch is?

JH: No.

WF: A KDM switch allows you to hook a keyboard monitor and a mouse to 2 computers at the same time. Then you do control 1 or control 2 to switch between the two computers.

JH: Okay.

WF: So I had that computer on a KDM switch.

JH: Mmhmm, mmhmm.

WF: And, I then just had my keyboard and my monitor on the desk.

JH: Okay, and that's downstairs, right?

WF: Mmhmm.

JH: Here's the problem with that – with the government's evidence – in my mind. They are saying you couldn't have been doing the download because you're on the computer doing this, but that computer is right there too.

WF: That computer that was down there, it was not connected to anything – it was not plugged into anything.

JH: Well I mean you said you never went on it, but I don't see how you being on your computer in the basement next to where that computer is, is evidence of exclusion sufficient to prove a case beyond a reasonable doubt. I don't see it. I mean, I just don't know how they're proving that someone other than Robert couldn't have been the person that downloaded the child pornography. Criminal cases are usually, "That's my computer, nobody else has..." You're Mirandized, and you confess. And that's how they do it. Not by saying, "The other people in the house couldn't have been doing it because they were

in the house.” It doesn’t make sense. Um...Here’s another problem I’m having, Mr. Fenn, with the whole idea that somehow you weren’t possibly the person responsible for the child pornography. We’ve been investigating this case, we’ve been investigating it hard. We’ve learned – we know – that when you were married to Shirley Minter, before you were married to Cass, there was a complaint filed with Child Protective Services. Were you aware of that?

WF: Mmhmm.

JH: That there was an allegation that you had been abusing your step-daughters. Why would...

WF: That would have been back... 1986, about, I think.

JH: Yeah, that was a long time ago, for sure. And, the allegation was that - by your step-daughters, I guess – yeah, it was your step-daughters who actually made that report. I think it came through the juvenile court system. But there was a claim that you were sexually abusing them when they were young girls.

WF: I wasn’t.

JH: Um, were you interviewed by the police when they came? Did they question you?

WF: Mmhmm.

JH: Did they ever ask you about this? Did they know about this?

WF: I don’t know if they did or not. They never asked me about it.

JH: And your assertion is that the allegations in that report are flat out not true?

WF: No child abuse, no.

JH: Well, okay. Um, I mean, like I've said, we've been investigating this case hard. We've talked to Jeannine. And she is a grown woman now, and she is telling us that you began abusing her when she was 6 or 7 – she's not positive – but that it continued until the age of 14. That's not true?

WF: That's not true.

JH: I mean, she's saying that today – she's saying that recently, to us.

WF: No.

JH: Well, did you ever attempt to teach your step-daughters – Jeannine or Adina or Jedelle – about sex?

WF: Yes. I showed them what a boy looked like.

JH: Well how did you do that?

WF: I took – took my pants down. But I never did anything to those girls.

JH: Did you masturbate in front of them?

WF: Nope.

JH: Did you ejaculate in front of them?

WF: Nope, not that I know of.

JH: Did you have them take off their clothes and teach them about their body parts?

WF: Nope.

JH: Like I said, we've talked to Jeannine – we've also talked to Adina – and their stories, we talked to them independently, and their stories are amazingly consistent. They say that you would teach them about – you would say that it was okay to teach them about sex – and you had them masturbate you, that you showed them what sperm looked like. None of that? That's all false?

WF: It's all false.

MC: Well, when you did pull your pants down, um, like, was Shirley there?

WF: Nope.

MC: Were they each alone?

WF: No, we were alone.

MC: Did you do that with all three of them?

WF: No.

MC: Who did you do that with specifically?

WF: I don't remember, it was many years ago.

JH: Do you remember how old they were when you did that?

WF: I don't even remember their ages.

JH: Were they 10 or younger?

WF: I don't remember. All I remember is... When we moved up here... They all... I don't know... That's a whole area of life that I don't even want to remember.

MC: Why is that?

WF: Because those girls, together, broke me and Shirley up.

JH: How?

WF: By what you're talking about right now. I mean, uh, they made their accusation while we were living in Charleston, before we moved up to Wilmington, North Carolina. Everything got settled out between us all. We then moved up to Wilmington and the girls... started... I mean... the first one was Adina. We had to send her to her father's. She ran away. She started really being a young bitch. And so we sent her back to her father, kind of tricked her into that. Later – years later – after we moved up here, she moved back in with us, over here in Greenbrier. And then she and her sister Jedelle started going out every night. Raising hell. And yet, they'd come up here with their kids – or actually it was Adina that would come up here with her child – I'm trying to remember if Jedelle... trying to remember if we had one or two kids in the house. But it got to the point that I finally just told Adina, you have to – you know, I kicked her out.

JH: Mmhmm. But this is after she's grown.

WF: Yeah.

JH: Yeah, I mean we're talking about – she's telling us about incidents when she was a little girl...

WF: But I'm just trying to say...

JH: ...Like 7 or 8 years old. I mean, do you remember buying her a rock polishing kit?

WF: No.

JH: Did you have a shed in the back yard of the home, where you kept your HAM radio?

WF: Mmhhh. [Inaudible at 28:29]

JH: Did you ever expose yourself to the girls in there?

WF: Not that I remember. I said I don't remember much about that period of time.

MC: When was... I guess... Did Shirley know? Did you guys talk about, like, that was your way of teaching the girls about boys?

WF: No, we never talked about it. But you know they did go to Shirley and things, you know...

MC: Do you have any idea – or, what was your understanding of what the allegation was back in that time? Was it just that you exposed yourself?

WF: I don't know. I don't even remember now.

MC: And that's the only way you...

WF: Yeah. We're into this line of questioning... I don't honestly see what this has a thing to do with Robert's crime.

JH: Well, I mean, here's the problem that we're having, Mr. Fenn, is we've got these women who are telling us that you sexually abused them when they were young girls.

WF: But I didn't.

JH: I know. I know that's what you say, but the problem is we've got them saying this; we've got this evidence now and then we've got all this child pornography, which is pictures of young girls, about the ages of these women when they were – when they say they were abused by you. So, you know...

WF: From what I understand...

JH: ...It doesn't take much to connect the dots.

WF: ...What you're trying to say is the same thing Shirley has said to me, and apparently Robert's lawyer was saying to Shirley, is since the computer was in the basement, I used that computer to download pornography.

JH: Mhmm.

WF: And then I would look at it on something else. I didn't use that computer to download any pornography. I mean, that computer was Robert's, I have all along respected everybody's computers and I never go into them. Same thing holds true for Cass's computer. Uh, so I mean, how it got onto that computer, I have no idea. I definitely have no idea.

JH: I mean, you know, your son is serving 10 years in prison for this.

WF: I know he is and I would love to know who put that on his computer. I would love to find out who did it or who done it.

JH: I mean, you understand why we have to suspect you. I mean, we've got witnesses telling us that you've exhibited sexual attractions to children in the past, and this is child

pornography, something that only people who have sexual attractions to children would want to look at. I mean, that's not you?

WF: That's not me, no. You're also looking at things that are how many years ago in the past.

MC: I mean, are you saying that the only thing you did was pull down your pants? You never had them touch you or you touch them or anything?

WF: I didn't let them touch me. I don't remember all the fine details from the past. That was many years ago. We're talking 40 years ago, maybe.

JH: Were you sexually aroused when that was going on?

WF: No, not that I recall... I mean, I don't know what those girls are saying.

JH: Um...

WF: I do know that when it comes to Robert, I did not put anything on his computer or download anything onto his computer. I never touched his computer. I do know there were a lot of other people who did. Because he used to have a lot of people come over and use that computer for the computer games. And then a group of them might [inaudible] while playing downstairs. I don't know that computer... you know...

JH: Anything else?

MC: Were you ever confronted at all... or, did they ever say anything to Shirley about this?

WF: Yes.

MC: And what happened after that? You guys remained living together?

WF: Yes. I came in when it started off, I came... that... one of the girls had apparently said something to Shirley. And I was coming in from Florida, because I was working for RCA, this must have been 1973. '74? In there.

MC: Do you remember what she said to you?

WF: No, I don't. But I do remember that we, Shirley and I settled things out, we continued living together. The girls continued living with us.

MC: Do you have any idea why they would now be saying this type of stuff?

WF: I have no idea.

MC: Did get along with them as like, a step...

WF: Yes, got along with them.

MC: Have you remained in contact with any of them throughout the years?

WF: No. I've seen Jedelle. I mean, I was down there... well, the last couple of times I was down there, Jedelle was living with Joyce, my daughter.

MC: You don't know why you haven't maintained contact with them? I mean, if you guys got along.

WF: I just... I had no reason to have contact with them. I mean, I saw Jeannine up here... oh, this was years ago. Uh, when I was... before Cass and I were married but Shirley and I were separated. Jeannine came up a couple of times. Joyce was over my house for the

weekend and Jeannine would come over and there was never any harsh words or anything between us.

MC: Is there anything else you recall that you might have used to teach...

WF: Nope.

MC: ...them about sex or anything?

WF: Nope. All I know is when they got kicked out of the house, they must've been pretty pissed off.

MC: Why?

WF: I do know that we were living in Richmond and I remember that Jeannine was living with her father at the time and she called and she was wanting to move back to Richmond with us and I told her "no, you stay out there with your father."

MC: Was she still like a teen at that point? Or a late teen?

WF: She would have been about 16? 17? Probably. 18, maybe? I don't remember the times or ages or anything like that.

JH: Well, Mr. Fenn, I don't know that we have any choice but to go to the government with what your step-daughters have told us and we'll present the fact that you're denying it and you say it's not true, and... but, I just find it sort of difficult to accept that all these girls are lying and the fact that Robert is saying that you had the password to the computer and that you were down there, and that he believes you're the one most likely to have been

the source of the child pornography. I mean, these are all your step-daughters, your son – they're saying this. Are you sure you want to maintain that it's not true?

WF: What is not true?

JH: That what these women are saying and what your son is saying...

WF: [Inaudible] All I'm saying is that what they're saying is something that's been years...

JH: Ok...

WF: Okay? I was not the most loved person. I mean, Shirley and I broke up. And the girls basically did it. And this was years – this would've been 10 years – after they made their accusations in the beginning.

[Inaudible]

WF: Their accusations... I don't even remember their accusations... I don't even remember what they were. Now. Shirley and I broke up.

JH: Mmhmm.

WF: Over the years, I've made sure that I've never been put in the position where anybody could say that I've been trying to mess with kids or anything like that.

JH: But now your son, who lived in the house with you, is in jail for possessing child pornography.

WF: Yes! Did anybody ever think that...

JH: That's a coincidence?

WF: Huh?

JH: That's a coincidence?

WF: Sure is, isn't?

JH: I mean, I don't know. I'm asking. I mean, it just strikes me as...

WF: I'd say it sure is because I did not put anything on his computer. I did not even turn his computer on. As I said, I don't mess with other people's computers. How the stuff got on his computer, I have no idea.

MC: Prior to Miss Minter, you were married... with another lady, correct?

WF: Mmhmm.

MC: Prior to Miss Minter you were married to another person? I believe you guys had two children.

WF: My, uh...

JH: Your first marriage...

WF: No, my second wife, [inaudible] passed away in 1967. She and I had been married... I'll say 3 years. My first wife – her name was Brock [inaudible] – we had two children. One, Jaclyn Lee, who lived in Augusta, Georgia, no actually just outside of Augusta. And we had a son named Billy. I do speak with Jackie. In fact, she... I spoke with her just about a month ago, I guess. And I send email to her. If you'd like to talk to her, I'll give you her

phone number. Her mother... [Inaudible] her mother was a nymphomaniac and didn't know where to sleep. And she would find me while we were in Myrtle Beach, South Carolina. I came home one day to an empty house. All the furniture gone. Her father had come up with a wagon and she had moved out, down to Charleston.

JH: What happened?

WF: I tried to get everything back together. And, uh, well it was right after she moved out, the Air Force sent me to Albuquerque, New Mexico. And there, in New Mexico, I... She wanted a divorce. Actually, prior to her leaving, I had been up... the Air Force had sent me [inaudible] to Syracuse, New York to go to school. And apparently, when I came out, I found out that she had been sleeping around. And finally she left me. When I went out to New Mexico, using the soldiers and sailor's relief act, I stopped the divorce and then it was about a year and a half later or a year later or something like that, I met Juanita. She knew I was married, I told her. And, she and I were pretty serious so that's when I called my lawyer and I said 'let the divorce go through.' So she ended up with her divorce and then when I tried to see the kids she wouldn't... she didn't want me to see the kids... and I finally figured, rather than put the kids through two parents fighting over them, I decided that – she had remarried very quickly after the divorce – and I decided, well, if she and her husband want to adopt those two kids, fine. I'll stay out of those kid's lives. And I stayed out of their lives until... oh it was back 7 or 8 years ago. I've done a lot of genealogy and I've had stuff posted on a genealogy website and Jackie ran across that and one day I got an email. And it was Jackie. And so at first, I didn't know it was Jackie or not. I knew it was either Jackie or her mother.

JH: How old was Jackie the last time you saw her? How many years was that?

WF: Hm?

JH: How old was Jackie when you last saw her? How many years...

WF: Two years.

JH: She was 2 years old?

WF: 2 years old.

JH: What about Billy?

WF: He would have been 1. And the last time I saw them would've been Christmas of 1963.

Before I'd end up... you know... that was the last time I had seen them before Jackie got in touch with me. And I always said that, oh, you know, if Jackie ever showed up at my door she was welcome at my house. And so, I have 2 grandchildren by her. And 1...2...3 great-grandchildren by her. So that's the history there.

JH: Mmhmm.

WF: But when it comes to Robert's computer, all I can say is I've never turned that computer on.

JH: Okay. I think that's everything I've got.

MC: Yeah.

JH: Anything else, Marivette? Alright, well we won't bother you any more, Mr. Fenn. We will work on Robert's case and we will do the best we can for him.

WF: Well I'll tell ya, now I'll throw some questions into my observations. Any... I don't think the government ever let anyone look at those computers. And I asked Robert about that and Robert said, "Well, they've classified them top secret."

JH: Yeah, I mean, his trial attorney could probably answer that question better than I could at this point, I mean, it wasn't...

WF: No, but I'm just trying to say... I don't know, you know, they had their forensic experts go into the computers.

JH: Mmhm.

WF: But Robert never had any of his forensic experts go into the computers.

JH: Yeah, I think – the trial attorney could tell you there were reasons for that, but I'm not sure what they are.

WF: Yeah, but, to me, I don't see how they could use evidence against you and not let you be able to question the evidence by looking at the same thing.

JH: Right.

WF: Now, to me... I just can't understand it.

JH: Well, that's our argument. That's the argument we're going to make in the Court of Appeals; that they didn't prove the case. So, you know. We'll see what the Court says.

WF: Well, I wish y'all luck. Now, I did say that to Robert's lawyer, because I did go down and I talked to him...

JH: Mr. Rhyne. Bill Rhyne.

WF: I don't remember his name. And I looked at him because I was – Cass had already come at me with what you're talking about and I said "why in the hell didn't you put me up on the stand?" I said "you can ask me questions." I can always take the fifth. And that would have put a doubt in the jurors that might have swung it in Robert's favor. I honestly don't think his attorney did a 100% good job.

JH: Well, yeah, I don't know about that, but it wasn't a good result.

WF: No, I agree. It wasn't a good result.

JH: Okay, well thank you for your time. We'll let you get back to your afternoon.

[Inaudible]

JH: Thanks.

MC: Thank you.

[Inaudible]