IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 07-15458

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

BRUCE MICHAEL ORR,
Defendant-Appellant.

A DIRECT APPEAL OF A CRIMINAL CASE
FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA

PETITION FOR PANEL REHEARING

WILLIAM MALLORY KENT
Fla. Bar No. 0260738
1932 Perry Place
Jacksonville, Florida 32207
904-398-8000
904-348-3124 Fax
kent@williamkent.com

Counsel for Appellant
BRUCE MICHAEL ORR

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, I hereby certify that the following named persons are parties interested in the outcome of this case:

1. Richard G. Alexander, initial court appointed counsel for Defendant-Appellant Orr at the district court.

2. Magistrate Judge William E. Cassady.

3. T. Jefferson Deen, III , Trial Counsel for Defendant-Appellant Orr.

4. Ian N. Friedman & Associates, Ian N. Friedman, Isadora Alexis Almaro, Ronald L. Frey, and Kristina M. Walter, for Defendant-Appellant Orr on Motion for New Trial, Sentencing and Appeal.

5. United States District Court Chief Judge Callie V. S. Granade.

6. William Mallory Kent, Substituted Appellate Counsel for Defendant-Appellant Orr on Rehearing.

7. Dennis J. Knizley, local counsel for Ian Friedman & Associates on behalf of Defendant-Appellant Orr.

8. Bruce Michael Orr, Defendant-Appellant.

9. United States Attorney for the Southern District of Alabama by Maria E. Murphy, John G. Cherry, Jr., and Sean P. Costello.

TABLE OF CONTENTS

Pages

TABLE OF CITATIONS

PRIMARY CASE AUTHORITY

NON-PRIMARY CASE AUTHORITY

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF THE ISSUE MERITING REHEARING

MR. ORR WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BASED ON TRIAL COUNSEL'S VIOLATION OF COURT ORDER AND FAILURE TO COMPLY WITH THE DICTATES OF FEDERAL RULE OF CRIMINAL PROCEDURE 16.

The panel decision disposed of this issue as follows:

> Bruce's claim fails, however, because he has not demonstrated that he was prejudiced by the fact that Black's expert testimony was limited. According to Bruce's brief, had Black been able to testify without limitation, he would have testified to the following: (1) although the Bruce account on the computer had administrative rights to the computer, so did all user accounts; (2) the password to the Bruce account was changed on June 18th by the user of the M account; and (3) the shortcut to the temporary internet file folder which was created when the computer was under Goodman's care was also accessed and deleted.
>
> The record on appeal demonstrates that these issues were presented at trial when Bruce's counsel cross-examined the Government's expert. Further, Bruce fails to explain how any testimony Black would have provided would have influenced the outcome. Thus, even assuming that Bruce meets the first Strickland prong, he fails to show that but-for any trial counsel error, the result of the proceeding would have been different.

Slip Opinion, pp. 6-7.

The slip opinion (1) failed to properly articulate the *Strickland* prejudice standard, (2) failed to correctly apply the *Strickland* standard, (3) failed to consider the full scope of the prejudice Orr suffered from his counsel's conceded deficient performance, and (4) failed to balance that prejudice against the weight of evidence

at trial in the context of the Government's theory of prosecution and Orr's theory of defense to determine whether Orr received a fundamentally fair trial.

ARTICULATION AND APPLICATION OF THE *STRICKLAND* STANDARD

The slip opinion's affirmance was bottomed on the conclusion that Orr was not prejudiced, holding: "[Orr] fails to show that but-for any trial counsel error, the result of the proceeding *would have been* different." [Slip Opinion, p. 7; emphasis supplied] "Would have been different" is not a correct statement of the *Strickland* prejudice standard. Orr does not shoulder the burden of proving that the outcome of the trial *would have been* different. Instead, his burden under *Strickland v. Washington,* 466 U.S. 668 (1984), is:

> "'[T]he defendant must show that 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*.'" App. to Pet. for Cert. 95 (quoting *Strickland*, 466 U.S., at 694, 104 S.Ct. 2052).

Strickland quoted in *Holland v. Jackson*, 542 U.S. 649 (2004) [emphasis supplied].

The slip opinion may simply have been addressing the correct standard but in "shorthand" fashion and if so, the Supreme Court and this Circuit have upheld *state* court adjudications of deficient performance prejudice claims (under the unreasonable application standard of 28 U.S.C. § 2254), when state court decisions used similar short hand formulations which failed to correctly capture *Strickland*'s nuance. But

if this is more than simple shorthand, that is, if the shorthand led to an inadvertent shortcut in analysis, we would respectfully ask the panel to carefully reexamine Orr's counsel's deficient performance and resulting prejudice (particularly as presented below), in light of the "*reasonable probability*" standard applied to "*confidence* in the outcome," bearing in mind that Orr shoulders *no burden* to establish that the outcome would have been different.

> *Strickland* held that to prove prejudice the defendant must establish a " reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," id., at 694, 104 S.Ct. 2052 (emphasis added); *it specifically rejected the proposition that the defendant had to prove it more likely than not that the outcome would have been altered*, id., at 693, 104 S.Ct. 2052.

Woodford v. Visciotti, 537 U.S. 19, 22, 123 S.Ct. 357, 359 (2002) [emphasis supplied].

This is much more than a matter of semantics. This goes right to the heart of the matter, which is whether Orr received a fundamentally fair trial. In Orr's case the question is not simply the proper *articulation* of the standard (although words certainly matter), but the correct *application* of the standard, irrespective of how loosely the standard may be expressed. As the *Strickland* court and this Court have explained:

> "[*A*]*n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally*

> *unfair or unreliable, is defective*. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." Id. [*Strickland*] at 369-70, 113 S.Ct. at 842-43 (internal marks and citations omitted); see also, *Brady v. Maryland*, 373 U.S. 83, 90, 83 S.Ct. 1194, 1198, 10 L.Ed.2d 215 (1963) (rejecting a "sporting theory of justice" in regard to the prejudice component of *Brady* claims).

Jefferson v. Fountain, 382 F.3d 1286, 1298 (11th Cir. 2004) [emphasis supplied].

The result was that Orr's proceeding was fundamentally unfair, because in Orr's case it was the *Government* which received a windfall to which the law did not entitle them, which came as a result of Orr's counsel's deficient performance.[1]

SCOPE AND EFFECT OF PREJUDICE

All of the child pornography ("CP") at issue was found in the temporary internet file folder ("TIFF")[2] on Q2 and Q3.[3] [R144-685]

---

[1] Although the Government did not concede deficient performance, this Court and the lower court both assumed for purposes of the *Strickland* analysis that Orr's counsel's performance was deficient.

[2] Not to be confused with the ordinary definition of TIFF meaning "tagged image file format."

[3] The Government expert confirmed this on direct examination:

Q Did you find any evidence that there was any child pornography that came from anywhere other than the internet?

A There was no user-created child pornography or saved child pornography to any folder outside of the Temporary Internet Files folder, which is an automatic process of the operating system. [R143-360]

> Each time a user visits a website using Microsoft Internet Explorer, files downloaded with each web page (including html, images, Cascading Style Sheets and JavaScript scripts) are saved to the Temporary Internet Files folder, creating a cache of the web page on the local computer's hard disk, or other form of digital data storage. . . . Despite the name "temporary," the cache of a website remains stored on the hard disk until the user manually clears the cache. . . . The contents of the folder are indexed using an index.dat file, a form of database.

Wikipedia, *Temporary Internet Files*[4]

This was an unusual feature of the case and one which goes to the heart of Orr's factual and legal defense. Orr's case is the *only* reported or unreported case counsel has found in the Eleventh Circuit in which a conviction was based upon CP found only in the TIFF. There are few other similar decisions nationwide, and those that are reported reflect a debate as to the sufficiency of the evidence when CP is found in the TIFF. All of the cases appear to require evidence that the defendant had actual knowledge that webpages showing CP images accessed over the internet would be cached in the TIFF, and perhaps further evidence that the defendant then exercised

---

[4] http://en.wikipedia.org/wiki/Temporary_Internet_Files.

> On Windows XP, the cache is usually located at %USERPROFILE%\Local Settings\Temporary Internet Files (where %USERPROFILE% is an environment variable pointing to the root directory of the logged-in user's user profile). *However, the cache may be moved by changing a value in the registry.*

Wikipedia, Temporary Internet Files [emphasis supplied].

some additional control over the TIFF, for example by deleting the images there. *See e.g., United States v. Romm,* 455 F.3d 990, 999-1001 (9th Cir. 2006) (upheld conviction when defendant admitted he sought out child pornography, viewed it on screen for five minutes and as he said "saved" and "downloaded" it; court distinguished images accidentally viewed as a result of a pop-up), *United States v. Bass*, 411 F.3d 1198, 1201-02 (10th Cir.2005) (a divided panel upheld conviction where defendant conceded knowledge that files were cached), *United States v. Tucker*, 305 F.3d 1193, 1204 (10th Cir. 2002) (defendant conceded he knew files viewed over the internet were cached).

The only reported case counsel has discovered which involved TIFF files, with no evidence that the defendant had knowledge that his computer would automatically save pages accessed on the internet in the TIFF, is *United States v. Kuchinski*, 469 F.3d 853 (9th Cir. 2006). *Kuchinski* held that it would be improper to convict for either possession or receipt of CP based solely on the existence of CP in the TIFF.

> Did Kuchinski knowingly receive and possess the images in those files, or, rather, does the evidence support a determination that he did? [footnote omitted] We think not.
>
> According to the evidence before the district court, when a person accesses a web page, his web browser will automatically download that page into his Active Temporary Internet Files, so that when the site is revisited the information will come up much more quickly than it would have if it had not been stored on the computer's own hard drive. When

the Active Temporary Internet Files get too full, they spill excess saved information into the Deleted Temporary Internet Files. All of this goes on without any action (or even knowledge) of the computer user. A sophisticated user might know all of that, and might even access the files. But, "most sophisticated-or unsophisticated users don't even know they're on their computer." [footnote omitted]

Much of the above also appears in our discussion of this area in *Romm*, 455 F.3d at 997-1001. There we also pointed out that "the cache is a 'system-protected' area, which the operating system tries to prevent users from accessing by displaying a warning that access involves an 'unsafe' system-command." Id. at 998. We also noted that a user, who knows what he is doing, can go forward and get access to the cache files anyway. Id. In the case at hand, there was no evidence that Kuchinski was sophisticated, that he tried to get access to the cache files, or that he even knew of the existence of the cache files.

There is no question that the child pornography images were found on the computer's hard drive and that Kuchinski possessed the computer itself. Also, there is no doubt that he had accessed the web page that had those images somewhere upon it, whether he actually saw the images or not. What is in question is whether it makes a difference that, as far as this record shows, Kuchinski had no knowledge of the images that were simply in the cache files. It does.

While we have not confronted this precise issue, we have come quite close. In *Romm*, 455 F.3d at 995-96, the evidence demonstrated that the defendant knew about the cache files and had actually taken steps to access and delete them. On appeal, he conceded knowledge, and contested dominion and control, but we rejected his arguments. Id. at 997-98. In so doing, we opined that "to possess the images in the cache, the defendant must, at a minimum, know that the unlawful images are stored on a disk or other tangible material in his possession." Id. at 1000. We relied upon a case wherein the Tenth Circuit Court of Appeals had declared that the defendant was properly found guilty where he knew that child pornography images would be sent to his "browser cache file and thus saved on his hard drive." *Tucker*, 305

> F.3d at 1204. As the court put it: "Tucker, however, intentionally sought out and viewed child pornography knowing that the images would be saved on his computer. Tucker may have wished that his Web browser did not automatically cache viewed images on his computer's hard drive, but he concedes he knew the web browser was doing so." Id. at 1205.
>
> We were also at some pains to distinguish *Romm's* situation from one where it could be argued that "the cache is an area of memory and disk space available to the browser software, not to the computer user." *United States v. Gourde*, 440 F.3d 1065, 1082 (9th Cir.2006) (*en banc*) (Kleinfeld, J., dissenting). In *Romm*, 455 F.3d at 1001, we noted that we were confronting a different situation because Romm did have both knowledge of and access to his cache files.
>
> Where a defendant lacks knowledge about the cache files, and concomitantly lacks access to and control over those files, it is not proper to charge him with possession and control of the child pornography images located in those files, without some other indication of dominion and control over the images. To do so turns abysmal ignorance into knowledge and a less than valetudinarian grasp into dominion and control.
>
> Therefore, on this record it was not proper to consider the cache file images [for guideline purposes; defendant was not charged with the TIFF files].

United States v. Kuchinski, 469 F.3d 853, 862-863 (9th Cir. 2006).

Given that all of the CP in Orr's case was found in the TIFF, and that the case was built solely on circumstantial evidence, the Government had to establish that Orr possessed knowledge and exercised dominion and control over the CP in the TIFF. Key to the Government's proof that Orr did not merely accidentally view CP in pop-

ups[5] or as an unintended consequence of his adult pornography browsing, was the evidence relating to the "TIFF shortcut." [6]

The Government relied upon the implication that Orr used the TIFF shortcut to establish the required evidence of knowledge, dominion and control. The Government expert on direct examination explained that otherwise only an expert would know how to access the CP in the TIFF on Orr's computer:

> Q I thought you testified earlier this morning that I, an ordinary user, couldn't get to that.
>
> A That's correct. Only advanced users can get to it.

---

[5] A pop-up is an unsolicited advertisement that appears in its own window while browsing the Internet. A pop-up can contain any information that any normal website can have, which includes slanderous, violent, or pornographic material. The code for pop-ups is embedded within the normal code for the website, sometimes required by the domain provider. They are typically created using JavaScript or Adobe Flash. Since they are embedded into another site they are designed to run automatically and show themselves in several different ways.

Internet Safety Wiki, http://wiki.internetsafetypodcast.com/index.php?title=Pop-ups

Orr testified that the only time he ever visited sites that were inappropriate as to CP was inadvertent or the result of pop-ups. [R144-589]

[6] A shortcut is a computer icon that allows quick access to a computer file or program. In Windows a shortcut is created by locating the file in Windows Explorer, then simultaneously depressing the control plus shift key while dragging the file to the favorites folder or desktop or other location. Thereafter clicking on the icon will open the file or program.

Microsoft Help and Support, http://support.microsoft.com/kb/140443

[R143-345]

Arguably without the shortcut evidence, the Government's case would have been legally insufficient. In any event the shortcut evidence, when properly understood, becomes the essential link between Orr and the CP, without which the conviction could not stand. Any evidence that cast doubt on Orr's tie to the shortcut inexorably cast doubt on his legal and factual guilt. Thus the exclusion of expert testimony regarding the shortcut and its connection to the CP achieves paramount importance. The exclusion of expert testimony concerning the creation and possible use directly undermines confidence in the outcome of the trial.

The defense expert swore in his affidavit in support of the new trial that "At the second trial, 'I was unable to testify to any information regarding administrator/administrative rights, password changes, creation of shortcuts, access to removable drives, the particulars regarding the jump drive, advanced utilities, key loggers and serial key generators .'" [R109-Ex. B] The defense expert explained in his post-trial affidavit:

> First some background information for the basis of my opinion. The shortcut was created on 4/16/2005 3:11:45 AM UTC, last accessed on 6/18/2005 8:15:00 PM UTC and recycled (deleted) on 6/23/2005 6:06:03 PM UTC. The maria (1003) account was created between Restore Point 4 and Restore Point 5. The last written logon time was 4/16/2005 3:46:10 UTC. In Restore Point 5, the last password change occurred on 4/16/2005 2:59:49 UTC. The megan (1004) account was

created between Restore Point 4 and Restore Point 5. Last written time was 4/16/2005 3:30:16 UTC and the last logon time was 4/16/2005 3:14:33 UTC. In Restore Point 5, the last password change occurred on 4/16/2005 3:01:35 UTC.

The bruce (1005) account was created between Restore Point 4 and Restore Point 5. Last written/Logon time was 4/16/2005 3:11:44 UTC. At this time there was no password change on the account.

The shortcut was located in a system created folder that is unique to each user. In other words, the folder is not created until after the user account is created. As you can see, the shortcut was created immediately after the bruce account logon on 4/16/2005. After the shortcut was created, the megan and maria accounts were accessed within 15 minutes of each other. It was stated in testimony that all accounts were created by a member of the Prisoner Outreach Program. *Based on this information, it is my opinion that the shortcut to the temporary internet files was created during the initial setup of the system by a member of the Prisoner Outreach Program.*

[R109-Ex. C; emphasis supplied]

The Government expert explained:

A I located a Temporary Internet Files folder link, a shortcut to the temporary internet files.

Q I thought that wasn't accessible.

A It is only accessible if you unhide it. Normally it is not accessible by the user.

Q So there was a shortcut created to what?

A There was a shortcut that was created to the folder that contained all of the child pornographic images.

Q So there was a shortcut to the content?

A To the content, the actual pictures of child pornography.

. . .

Q Where was this link or this shortcut, where was it found or where was it located?

A Originally it was created where the folder, the Temporary Internet folder, is located. That's under another parent folder which is called Local Settings. So a shortcut was created where the folder is located.

Q And where did you find it?

A It was then moved to the temporary -- to the Favorites folder of the Bruce account.

[R143-349-350]

The Government agent conceded that he had never before in any CP case seen a shortcut to the TIFF. [R143-354]

The Government agent testified that the TIFF shortcut was deleted on June 19, 2005, and that this activity occurred under Bruce Orr's account on the Windows operating system, implying that Orr deleted the TIFF shortcut, thereby tying Orr to the TIFF shortcut. [R143-402-403] This Court's slip opinion implicitly relies upon this evidence in dismissing the significance of the exclusion of Orr's expert witness on these matters. [Slip Opinion, p. 7]

But considered together with the fact that Orr's expert was prepared to testify

that it was a member of the Prisoner Outreach Program who established the administrator account and its password and who also installed his own key logger program, it becomes clear that the only consistent explanation for the totality of this evidence is that someone other than Orr set up the entire sequence of events which made it *appear* that Orr had accessed then deleted this material.

Orr's expert swore in his affidavit to the supplement to Orr's motion for new trial:

> It was stated during trial that Mr. Orr was the administrator. This is not a complete picture of how the system was configured In Microsoft Windows Operating Systems there are system created accounts and user created accounts. By default, Microsoft Operating Systems have a system created account called administrator This account is the administrator of the system. At the same time, the user created account can be given equivalent rights of the administrator account by assigning the user created account to the administrators groups.
>
> Microsoft also keeps simple information in accounts such as Full Name and Description. This is only to help distinguish cryptic user names to a specific person and/or function. For example, I could have an account rsimpson. The Full Name could contain Randy Simpson and the Description would be his job title of Office Manager The Description field has nothing to do with privileges an account will posses.
>
> Until Restore Point 41, all user created accounts, megan, maria and bruce had the Full Name field and the Description field set to their respected user names, i e. Full Name: maria and Description: maria
>
> Between RP40 and RP41 (5/21/2005 00:24:13 UTC), the description field on the bruce account was changed from bruce to administrator. This does not have any bearing as to if the bruce account is the

administrator. The true administrator would be the person who installed the system and knows the administrator account password, or any user created account that was assigned to the administrators group.

In trial it was stated that Mr. Orr was the administrator, it was not stated that since Restore Point 5, all user created accounts, megan, maria and bruce, had administrator privileges. In other words, all user created accounts had administrator privileges because the accounts were assigned to the administrators group.

This information is very important. It shows that anyone on the system could look at anyone's data, make system changes, change other user's passwords, install applications, etc. Also, the required information to determine group memberships was not included in the report provided by their expert.

There were a few password changes that occurred on the system, but one that is very important was captured in Restore Point 71.

The megan account logged in at 6/18/2005 20:01:32 UTC. Exactly 00:01.04 later, at 6/18/2005 20:02:36, the bruce account password is changed to blank or simply removed. Exactly 00:00.24 later, at 6/18/2005 20.03:00, the bruce account password is changed to blank or simply removed. Exactly 00:00.24 later, at 6/18/2005 20.03:00, the bruce account logons.

Exactly 00:12.00 later at 6/18/2005 20.15.00 PM UTC, the shortcut to the temporary internet files is accessed.

This is very important. In my opinion this shows a couple of key points:

1. The megan account was used to remove the password from the bruce account. This shows that the person using the megan account knew that the megan account had administrator privileges

2. The person using the megan account knew the shortcut to temporary internet files existed.

[R109-Ex. C]

This information was not brought out during the trial. Had Orr been able to introduce this evidence through his expert, he would have been able to tie together the structure of his defense. Without this testimony, he was forced to rely solely upon the Government expert's piecemeal admission of some individual components of the defense.

If Orr was the one creating, saving, then accessing CP through the TIFF shortcut, why would he go through the *Megan* account to change his own password and manipulate the TIFF shortcut? There really is only one explanation for this, and that is that either the same person who set up the administrator account so that Megan could access Bruce's account and who also set up the TIFF shortcut in the first place also subsequently went in under the Megan account to undo the TIFF shortcut, or someone who worked in tandem with him, did so.

Orr's expert further explained in his post-trial affidavit how he would have testified about an external drive, a jump drive, advanced utilities and key loggers and how this evidence would have supported the theory that someone other than Orr had manipulated the system to create the impression that Orr was responsible for the CP:

> I was not allowed to testify that there was an external drive used to access files that were stored on Q2. The files accessed ranged from data to temporary internet files and also a folder that was recovered by

> a member of the Prisoner Outreach Program that was stated to have child porn. *The file names accessed on the removable drive match the file names stated in the search warrant.* The drive was accessed on 4/15/2005 21:35:13 UTC. This would be during the time that the system was being reinstalled.
>
> *During the trial, it was never discussed that a second jump drive was used on the system.* This is very important as this drive was used to install software from the maria account. The second jump drive was used on or about 6/15/2005 01:54:03 UTC. On 6/15/2005 01:57:32, a Microsoft Windows Service Patch was installed from the F:\. After this, on 6/15/2005 02:00:18 UTC, the Ad-Aware SE Personal Edition software was uninstalled. This software is used to detect spyware and malware, such as keyloggers. In about 00:11:05 later, Ghostkeylogger is installed from the F:\.

[R109-Ex. C; emphasis supplied]

This has to be understood in context with the Government expert's testimony that the index.dat file was deleted:

> Q And what about the index.dat, this database of the footprints of what sites were visited? You testified that that's never deleted; right?
>
> A That's correct.
>
> Q Okay. And was that deleted in this case?
>
> A It was deleted.
>
> . . .
>
> Q How is that possible?
>
> A It's -- it's complex. Only someone with sophistication can delete that file.

[R143-347]

> Orr's expert explained in his post trial affidavit:
>
> > There is a reference that regedit was used by the maria account on 6/15/2005 02.01:23 UTC This is an advanced tool and would require advanced knowledge to use. This application was used 00:02:00 after the ghost keylogger installation.

[R109-Ex. C]

By deleting the index.dat file it was impossible to see whether the CP had come from visiting internet websites - - as the Government hypothesized that Orr had done - - or whether instead the CP was loaded onto Orr's computer via an external device. There simply was no evidence that Orr had the sophisticated knowledge to delete the index.dat file or that he had done so to cover his tracks. Instead, Orr's expert would have cogently explained that the most reasonable explanation which fit all of the evidence in the case was that the member of the Prison Outreach Ministry and or someone working in cooperation with him, such as Orr's soon to be ex-wife, had orchestrated this chain of events, loading the CP in the TIFF via the shortcut, changing the password then accessing Orr's account to do so, then erasing the evidence via editing of the registry and the deletion of the index.dat file.

This was a wholly circumstantial evidence case. The case was tried twice, the first trial ending in a hung jury, because the first jury was not unanimously persuaded

beyond a reasonable doubt that the circumstantial evidence proved Orr guilty beyond a reasonable doubt. The only meaningful difference between the evidence presented at the two trials was that each side, Government and Defense, went back to their respective experts to work up further expert opinion testimony. The Government was able to use its expert's second review and enhanced conclusions, the Defense was not, solely as a result of counsel's deficient performance. A case that was in equipoise if not balanced in favor of the defense shifted to guilty based solely on the changed positions of the expert testimony. It is an indisputable fact that the first trial resulted in a hung jury and that the second trial resulted in a guilty verdict based essentially on nothing more than the Government's advantage in the matter of the experts. This was fundamentally unfair, and as explained above, resulted in a trial that was fundamentally unreliable. This Court cannot be confident beyond a reasonable doubt that there is not a reasonable probability that the outcome was affected by counsel's deficiency and the ensuing prejudice.

CONCLUSION

This Court should grant rehearing and remand the case for a new trial.

Respectfully submitted,

WILLIAM MALLORY KENT
The Law Office of William Mallory Kent
1932 Perry Place
Jacksonville, Florida 32207
904-398-8000 TELEPHONE
904-348-3124 FAX
kent@williamkent.com Email

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished to Maria E. Murphy, Esquire, Assistant United States Attorney, Office of the United States Attorney, Riverview Plaza, Suite 600, 63 South Royal Street, Mobile, Alabama 36602, by United States Postal Service, first class mail, postage prepaid (and by email for her convenience), this 31st day of October, 2008.

_____

William Mallory Kent

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant certifies that the size and style of type used in this petition is 14 point Times New Roman.

COPY OF PANEL OPINION