IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Respondent,

– against –

RONALD SPOOR,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

STATEMENT OF QUESTIONS PRESENTED

1. Must a video be considered in its totality, as opposed to a brief isolated snippet, in determining whether it is a "lascivious exhibition of the genitals or pubic area of any person" within the meaning of 18 U.S.C. § 2256(2)(A)(v)?

2. May a video which is merely voyeuristic and does not depict any sexual conduct be deemed "lascivious" under the foregoing subsection of Section 2256?

3. Is Rule 414 evidence of uncharged crimes relevant where the defendant is charged with an offense to which his sexual proclivities are not pertinent?

PARTIES TO THE PROCEEDING

The parties to the proceeding are the United States of America and petitioner Ronald Spoor.

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United States v. Ronald Spoor,
904 F.3d 141 (2d Cir. 2018)

Decision: September 14, 2018

The decision of the Court of Appeals was an affirmance of the conviction and sentence imposed by the United States District Court for the Northern District of New York (Hon. Charles J. Siragusa, J.), entered August 18, 2016, upon a jury verdict adjudging Petitioner guilty of production of child pornography (two counts) and possession of child pornography (four counts).

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) in that this is a petition for *certiorari* from a final judgment of the United States Court of Appeals for the Second Circuit in a criminal case. The instant petition is timely because the judgment of the Second Circuit was entered on September 14, 2018. There have been no orders extending the time to petition for *certiorari* in the instant matter.

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

18 U.S.C. § 2256 (in pertinent part):

(2)(A) Except as provided in subparagraph (B), "sexually explicit conduct" means actual or simulated—

(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) bestiality;

(iii) masturbation;

(iv) sadistic or masochistic abuse; or

(v) lascivious exhibition of the genitals or pubic area of any person;

Fed. R. Evid. 414 (in pertinent part):

(a) Permitted Uses. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.

[...]

(d) Definition of "Child" and "Child Molestation." In this rule and Rule 415:

(1) "child" means a person below the age of 14; and

(2) "child molestation" means a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513) involving:

(A) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;

(B) any conduct prohibited by 18 U.S.C. chapter 110;

(C) contact between any part of the defendant's body--or an object--and a child's genitals or anus;

(D) contact between the defendant's genitals or anus and any part of a child's body;

(E) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or

(F) an attempt or conspiracy to engage in conduct described in subparagraphs (A)-(E).

STATEMENT OF FACTS

A. The Charges.

By indictment entered April 11, 2013, petitioner Spoor was charged with two counts of production of child pornography (18 U.S.C. §§ 2251(a) and 2251(e)) and four counts of possession of child pornography (18 U.S.C. §§ 2252A(a)(5)(B) and 2252A(b)(2)). (A19-23).[1] Count One alleged that petitioner produced a video entitled PICT0016.avi ("the Camper Video") in or about April 2012, and Count Two related to a video entitled PICT0002.avi ("the Bathroom Video") in or about July 2012. (A19-20). Counts Three through Six alleged that Spoor possessed child pornography images on four electronic devices that had been seized from his home. (A21-22).

As discussed infra, the Camper Video was a 20-minute video of petitioner's son, 9 years old, and a friend, 10, playing naked in a camper, during approximately 20 seconds of which the children got under the covers of a sofabed and the footage included, inter alia, the genital area of one (not both) of the boys. The petitioner did not command or importune the children to go under the covers; instead, he followed them there with the camera, and the sequence in which their genitals are visible is poorly focused and brief.

The Bathroom Video depicts an adult female and two prepubescent males, one of them Spoor's son, changing into bathing suits, with the males' penises visible. It is undisputed that Spoor did not hold the camera and the children were not aware that

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[1] Citations to "A" refer to the appendix submitted on appeal to the Second Circuit, a copy of which will be provided upon request.

they were being filmed.

B. The Rule 414 Notice and Colloquy.

On December 22, 2015, the Government served notice that it intended to offer evidence of Spoor's state plea in Seneca County Court to Criminal Sexual Act in the First Degree relating to two minors not involved in the instant charges. (A247-56). The Government also sought to admit testimony concerning Spoor's alleged admission to sexually touching those minors, as well as thetestimony of three minors including the two who were the subject of the state charge as well as a third minor who was allegedly photographed naked in a hotel. (A247-48). This proffer was made under Fed. R. Evid. 414 or alternatively 404(b). (A249-56).

The Government argued that the charges against Spoor qualified as "child molestation" under Rule 414 and that the Second Circuit had previously permitted evidence of similar acts to be admitted under that rule. (A249-53). Significantly, however, all but one the cases cited by the Government involved charges where, unlike the instant case, the defendant's sexual intent toward the victims had to be proved, and in that one case - United States v. Dickinson, 16 F. Supp. 3d 230, 234 (W.D.N.Y. 2014) - the proffered evidence was precluded.

The Rule 414 issue was taken up at a pretrial conference on January 4, 2016, at which Spoor's objection to the proffered evidence was noted. (A257). Later in the colloquy, petitioner further noted that his state conviction was on appeal and that he retained a Fifth Amendment right as to the matters the Government sought to put in question. (A267-68).

The district court, citing several of the cases relied upon by the Government, opined that Rule 414 was broadly inclusive and that the conviction would come in. (A258-67, 268-70). However, the court declined to admit the proposed testimony of the minor witnesses on the ground that it would be unduly prejudicial (A270-71), nor did it admit Spoor's alleged admissions because they related to the same conduct as the state conviction (A275-76, 278). Moreover, the court also rejected the Government's alternative Rule 404(b) argument. (A275).

C. The Trial.

Prior to any testimony being taken, the certificate of conviction showing defendant's guilty plea in Seneca County was admitted, and the district court instructed the jury on the meaning of criminal sexual act in the first degree under New York law. (A334-35).

As pertinent to this Petition, Edward Williams of the Department of Homeland Security testified to, inter alia, his viewing of the Camper Video, which he described as "two prepubescent naked boys jumping on a bed," and the Bathroom Video, which was taken on "a camera that was placed underneath what looked to be a bathroom sink or vanity that was focused on the toilet inside of a residence." (A338). The Camper Video video took place in a room of the family camper where the two naked boys were jumping on the bed, and a Disney movie could be seen playing on the television. (A338). That video was some 20 minutes long. (A339).

The Camper Video was ultimately admitted as Government Exhibit 52. During the more than 20 minutes of footage, the great majority is taken from some distance

and shows the two boys playing and bouncing around on the bed. For a period of approximately 20 seconds, the video shows the boys going under the cover of the bed. The camera follows them under the covers and continues to film them, and during this period, one of the boys' genitals are visible. However, the film does not show *only* the genital areas - it shows as much of their bodies as are visible from the awkward angle at which the camera is being held. At no point are the minors shown engaging in any kind of sexual behavior or contact. Nor is there any indication that the petitioner ordered or requested that the boys go under the covers or otherwise place themselves so that he could film their genitals.

The Bathroom Video was admitted as Government Exhibit 53 and shows two minors and a woman (later identified as the grandmother of one of the boys) in a bathroom. The boys are changing into swimwear and the camera shows the time that they are unclothed. At one point, one of the boys is shown urinating into the toilet. At this point his penis is visible. Again, the video does not at any point depict either of the minors, or the adult woman, engaging in sexual activity.

In addition to these videos, Williams also testified to viewing images of young unclothed boys engaging in sexual activity, which had allegedly been found on Spoor's computer. (A350).

Williams testified that, after viewing these images, he and another DHS agent, Karen Wisniewski, interviewed Spoor in his home and that Spoor admitted to searching for and viewing child pornography. (A354-57).

Spoor stated that he possessed a pinhole camera for the purpose of recording his

wife, who at the time was abusive toward him and would assault him. (A359, 373). Spoor stated that he recorded the Camper Video on the pinhole camera in order to show "how silly the boys were being when they were together." (A359). He stated that the boys were depicted naked. (A359, 374-77). He said that the Bathroom Video was not sexual in nature. (A376).

Notably, Williams testified that he did not believe that he had a basis to arrest Spoor based on the videos he had viewed and Spoor's admissions concerning the videos. (A382).

Various other witnesses testified regarding chain of custody, the execution of search warrants, and the forensic examination of electronic devices seized from the petitioner. In addition, three witnesses testified as to the ages of certain minors depicted in the videos. Their testimony is not pertinent to this Petition.

After the government rested, Spoor moved to dismiss the production counts, One and Two, on the ground that clandestine bathroom videos, even if voyeuristic, were not child pornography, and that neither of the videos went beyond nudity to lascivious exhibition. (A753-55). Spoor also contended that the Government had failed to establish a prima facie case as to the possession counts (A755-57), noting as well that Counts Four through Six related only to the Camper Video, which did not qualify as child pornography (A757-58).

The Government acknowledged that Camper Video and Bathroom Video did not exhibit sexual contact but contended that "the framing [and] focal point" rendered them a lascivious exhibition. (A758). The Government also argued that the device at

issue in Count Five contained not only the Camper Video but 24 images of child pornography (A759-80).

The district court denied the motions and sent all counts to the jury, finding issues of fact as to whether the videos constituted child pornography. (A769-71). After deliberations, the jury convicted defendant on all counts. (A918-20).

Petitioner was subsequently sentenced to an aggregate prison term of 360 months, and judgment was entered accordingly. (SA46-51).[2]

D. The Appeal.

Petitioner filed a timely notice of appeal (A945) and appealed to the Second Circuit. In his briefs to the circuit court, petitioner argued *inter alia* that the evidence was insufficient to show that the Camper Video and Bathroom Video constituted lascivious exhibitions of the genitals, and that Rule 414 evidence should not have been omitted where his sexual proclivities were irrelevant to the charged offenses.

On September 14, 2018, the Second Circuit issued a precedential opinion determining the appeal. (App. 1-28).[3] The circuit court acknowledged that the two videos were "not the most obvious examples of child pornography." (App. 10). Nevertheless, it went on to find that both qualified as lascivious exhibitions within the relevant statutory framework. (App. 10-12).

As to the Camper Video, the circuit court relied upon the facts that (a) the boys

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[2] Citations to "SA" refer to the Special Appendix submitted in the Second Circuit, a copy of which will be provided upon request.

[3] Citations to "App." refer to the appendix to this Petition.

depicted therein were naked; (b) the video was "set on a sofa bed, an area that can be associated with sexual activitity"; and (c) "*for a few seconds*, the camera is positioned under the covers so that the genitals of one of the boys are *visible*." (App. 10) (emphasis added). Based on those circumstances, the court determined that a jury could conclude (a) that "filming a boy's genitalia, while the boy was in bed *and without any other context*, serves no obvious purpose other than to present the child as a sexual object," and (b) that Spoor followed the boys under the covers with the camera "because he intended to create a video that would elicit a sexual response from the viewer." (App. 10-11) (emphasis added).

As to the Bathroom Video, the court found that a reasonable juror could find it lascivious because of the positioning of the camera resulted in the boys' genitals being in-frame. (App. 11). The court stated that "although most typically used as a place to serve biological functions... bathrooms can also be the subject of sexual fantasy," and that although "the videos do not involve suggestive posing, sex acts, or inappropriate attire, none of those is necessary to child pornography." (App. 11). The court also rejected, due to the focus of the video, the contention that it was "simply voyeuristic" rather than lascivious. (App. 12).

The court then expanded further upon the overall definition of "lascivious" and held that, to the extent that the intent to elicit a sexual response from the viewer was a relevant factor in determining whether an image was child pornography, is objective, i.e., that it "should be considered by the jury only to the extent that it is relevant to the jury's analysis of the five other factors and the objective elements of the image." (App.

12-16). In other words, "whether a video is, objectively, a lascivious exhibition depends on the content of the video itself and not on the sexual predilection of its creator." (App. 14). Paradoxically, however, the court nevertheless stated, notwithstanding that the image must be considered objectively, that "the subjective intent of the photographer can [still] be relevant to whether a video or photograph is child pornography." (App. 14).

Additionally, the Second Circuit found that the admission of Rule 414 evidence against Spoor was not an abuse of discretion. (App. 20-24). The court acknowledged that Rule 414 was not a blanket rule of admission and that it was subject to both the rule of relevance and to Rule 403. (App. 21-22). The court then disagreed with Spoor about the relevance of the Rule 414 evidence, stating that evidence of Spoor's uncharged conduct toward other minors was "evidence of his motive to make child pornography" and "tends t show the videos were intended or designed to elicit a sexual response in the viewer." (App. 23). Hence, the court found that evidence was admissible, and further found that the district court "properly balanced the probative value of the Government's prior act evidence against its potential prejudicial effect" by limiting the Rule 414 proof that the government could offer. (App. 24).

Petitioner did not seek panel rehearing or rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

POINT I

TO DETERMINE WHETHER A VIDEO IS A "LASCIVIOUS EXHIBITION" UNDER 18 U.S.C. § 2256, IT MUST BE JUDGED OBJECTIVELY AND IN ITS TOTALITY

1. It is a federal crime to, *inter alia*, "use" a minor for the purpose of depicting "sexually explicit conduct." 18 U.S.C. § 2251(a). "Sexually explicit conduct," in turn, is defined as actual or simulated "(i) sexual intercourse... ; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. § 2256(2)(A). Of these five forms of sexually explicit conduct, the only one pertinent to this case is the last.

The term "lascivious exhibition" is not defined in the statute and, as the Second Circuit has observed in a masterpiece of understatement, it "is not self-defining." United States v. Rivera, 546 F.3d 245, 249 (2d Cir. 2008), citing United States v. Villard, 885 F.2d 117, 121 (3d Cir. 1989) ("lascivious exhibition" is "less readily discernable than the other, more concrete types of sexually explicit conduct") and United States v. Hill, 322 F. Supp. 2d 1081, 1084 (C.D. Cal. 2004) ("[l]asciviousness is an elusive concept"). This Court has never attempted to define lasciviousness, and the leading case construing Section 2256(2)(A)(v) is in fact a district court case: United States v. Dost, 636 F. Supp. 828 (S.D.Cal.1986).

The Dost court developed a non-exhaustive list of six factors to be used in determining whether an image is lascivious, as follows:

> 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
>
> 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
>
> 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
>
> 4) whether the child is fully or partially clothed, or nude;
>
> 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
>
> 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Dost, 636 F. Supp. at 832. The Dost court stated that not all these factors need be present for an image to be a lascivious depiction of the genitals; however, it also made the point that a depiction of the genital area - even that of a child - is not automatically lascivious. See id. For instance, "[i]f, for example, [a child] is dressed in a sexually seductive manner, with her open legs in the foreground, the photograph would most likely constitute a lascivious exhibition of the genitals," whereas an image of a child acting appropriately for his or her age might not constitute such an exhibition. See id.

While a majority of circuits have found the Dost factors useful, those factors have been criticized as both underinclusive and overinclusive. (App. 12-13 & n.7). Particularly controversial is the last factor, with courts differing on whether it refers to the objective characteristics of the photograph or the subjective intent or motive of the creator of the image.

Petitioner here contends that a proper interpretation of Section 2256 dictates

(a) that images be considered objectively; (b) that they be considered in their totality as opposed to isolated snippets; and (c) that merely voyeuristic videos which do not depict sexual conduct and are not otherwise made in sexually suggestive circumstances cannot be deemed lascivious. To the extent that any of the Dost factors permits the consideration of images other than their totality and/or a finding that voyeuristic images are lascivious, this Court should disapprove of Dost and provide appropriate guidance to the lower courts. Moreover, as will be detailed below, the Second Circuit's substantive holdings in this case place it in direct conflict with, *inter alia*, the Third and Fifth Circuits, and this Court should resolve that conflict.

2. As a threshold matter, the Second Circuit correctly joined the First, Third and Seventh Circuits in holding that the lasciviousness of images must be adjudged objectively rather than based on the subjective intent and/or motivation of their creator. Such objectivity is critical to preventing the determination of lasciviousness from becoming a standardless exercise in which juries are permitted (and indeed invited) to convict based on their emotional reaction to the photograph or the photographer.

The Second Circuit in Rivera observed that the Dost factors introduce a necessary objectivity to the analysis of lasciviousness because they "mitigate the risk that jurors will react to raw images in a visceral way, rely on impulse or revulsion, or lack any framework for reasoned dialogue in the jury room." Rivera, 546 F.3d at 253. To that end, the circuit cited with approval the Third Circuit's decision in Villard, supra, which stated that the court must apply the Dost factors objectively and "look at

the photograph, rather than the viewer." Villard, 885 F.2d at 125. The Dost analysis images photographs from being deemed lascivious "[m]erely because [the defendant] found them sexually arousing," because the court otherwise "would be engaging in conclusory bootstrapping rather than the task at hand-a legal analysis of the sufficiency of the evidence of lasciviousness." Id.; accord United States v. Amirault, 173 F.3d 28, 34-35 (1st Cir. 1999) (lasciviousness must be viewed objectively because if the defendant's "subjective reaction were relevant, a sexual deviant's quirks could turn a Sears catalog into pornography").

This is the correct analysis and indeed, if lasciviousness were to be weighed subjectively, Section 2256(2)(A)(v) would come perilously close to being rendered unconstitutionally vague or even cross the line into vagueness. The well-settled maxim that statutes should be construed in order to avoid vagueness problems mandates that the objective construction adopted by the First, Third and Fifth Circuits – and now the Second – is the proper one.

3. Having correctly determined that the images at issue in this case must be considered objectively, however, the Second Circuit departed from a sound construction of the statute in a way that places it in direct conflict with precedential decisions from other federal courts of appeal. First, in United States v. Steen, 634 F.3d 822, 827-28 (5th Cir. 2011), the Fifth Circuit found that a video showing a naked girl in a tanning salon was not lascivious. The Steen court, significantly, focused on the video in its totality rather than only the short period of time when the victim's genitalia were visible. See id. at 827. Additionally, the court noted that where a

victim does not know he or she is being filmed, he or she "is, of course, acting naturally" and not displaying sexual coyness. Id.

The Third and Sixth Circuits have similarly found that brief exhibitions of the genitals do not transform an otherwise non-lascivious video into a lascivious one. See Doe v. Chamberlin, 299 F.3d 192, 196-97 (3d Cir. 2002) (although voyeuristic photos of naked girls in the shower depicted them nude and the genital areas were exhibited, no other Dost factor was present because the pubic areas are not focal, an shower was not a place associated with sexual activity, and the girls were not depicted in unnatural or sexually coy poses); United States v. Hodge, 805 F.3d 675, 680 (6th Cir. 2015) (citing Doe; footage of girl exiting a shower naked and wrapping a towel around herself not lascivious).[4]

The Second Circuit's analysis of the Camper Video is in direct conflict with these holdings. The circuit focused on the 20 seconds of the video during which one (but not both) boys' genitals were visible to the exclusion of the surrounding 20 minutes which showed both boys engaged in innocent play. Moreover, the circuit, in its own words, found that the genitals merely being "visible" were proof that the video was lascivious, as opposed to considering the overall focus of the video and the circumstances under which the genital area was briefly brought into view.

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[4] The necessity of viewing a production in its totality applies primarily to videos but also affects still images. For instance, if a person were to take a non-pornographic image of a minor, zoom in on the image so that the genital area is enlarged on the screen, and then zoom out, has he or she created child pornography for the few seconds when the photo is zoomed?

Notably, there were no other indicia of lasciviousness in this video. The "focal point" of the video is not the genital area of either of the boys; to the contrary, the great majority of the video depicts the children's entire bodies or large portions of them from some distance away without giving prominence to their pubic region. Moreover, the 20 seconds or so in which the boys go under the covers and one of their genitals can be seen *was not done at the petitioner's urging.* At no time did Spoor ask the boys to go under the covers or remain there, and he certainly did not ask them to take a position from which their genitals could be filmed. He simply followed them under the covers with the camera, filming what could be seen from the awkward angle at which the camera was held.

Second, the setting of the video – in - in a living room with a movie playing and the children jumping around - is not "a place or pose generally associated with sexual activity." While the scene includes a sofabed, it is not in a bedroom but instead in a family room where the television is on and a movie is playing. The furniture is functioning as sofa rather than bed - the children are not lying on it in a pose of sexual suggestivity - and as such, this factor does not support a finding of lasciviousness. See, e.g., Villard, 885 F.2d at 124 ("the setting of a bed... is not [alone] enough to support a finding of lasciviousness").

In this regard, the Second Circuit's citation of United States v. Barry, 634 Fed. Appx. 407 (5th Cir. 2015), is inapposite. The images at issue in Barry were set on a "makeshift bed" that was located in a bedroom and on which the minors were sexually posed. Id. at 409. The images in Barry were boudoir photos, which stand in stark

contrast to the video in the instant case which was taken on a sofabed in a living room with the children acting naturally.

Third, the children are not depicted in unnatural or sexually suggestive poses; instead, they are playing and jumping around naturally in a way that children of that age often do. Fourth, there is no suggestion whatsoever of "sexual coyness or a willingness to engage in sexual activity" - no sexually charged words are exchanged, no sexual behavior or even borderline behavior is depicted, and the children are not posed or manipulated in a way that connotes sexual openness. Moreover, the "objective criteria of the [video's] design," Amirault, 173 F.3d at 34-35 - twenty minutes of naked boys jumping around a sofabed - is not designed to elicit a sexual response, as even a pedophile would find such a video totally wanting in sexual content and lacking in the poses, sexy attire and sexual acts that typically come up in the cases where this Court has considered advertising and trading for child pornography.

To be sure, the boys in the Camper Video are nude. But nudity - even nudity that depicts the genitalia - does not suffice to establish lasciviousness where the other factors are absent. See Amirault, 173 F.3d at 33-34; see also Steen, supra; Doe, supra. Indeed, nudity combined with natural action is *less* suggestive of lasciviousness than a photo in which a minor is presented in sexy attire or a sexually suggestive pose. Villard, 885 F.2d at 124.

In the instant case, as in Amirault, "[t]he only truly striking aspects of [the Camper Video] were the [boys'] nakedness and [their] youth." And as in Steen, it is the totality of the video that matters, and in the great majority of the video, the genitalia

were not the focus of the exhibition. For the Second Circuit to characterize the Camper Video as a photo in which the genitals are visible "without any other context" (App. 11) ignores the fact that, as the Steen court made clear, the totality of the 20-minute video *is* the "context," and that this totality – children playing naturally in a non-bedroom setting, going under the covers for a very brief period without any importuning by Spoor, and the image taken during this brief period being dictated by the camera angle – categorically excludes the video from being a lascivious exhibition.

Indeed, an interpretation contrary to Steen might result in a person being prosecuted and spending years in prison because a small portion of a long video focuses by happenstance on a child's genital area, which would make many family videos potentially subject to being charged as child pornography if a prosecutor chooses, after the fact, to regard them as such. This Court should accordingly grant certiorari to make clear that the Steen construction of the statute, not the Second Circuit's disregard of the image's totality and context, is the correct one.

4. The Second Circuit's analysis of the Bathroom Video suffers from a different but related flaw: that, in contrast to other circuits, the Second Circuit deemed a merely voyeuristic video to fall within the category of child pornography. As observed in Steen, the Dost factors "have never been deployed where a defendant's conduct said to be criminal under the statute at issue proved to be no more than voyeurism." Steen, 634 F.3d at 827. "Set[ting] up a camera... indicates nothing more than an attempt to capture mere nudity and is very different than a person ... telling a minor to undress, lay on a bed, and open his legs for a nude photo." Id. at 828, quoting United States v.

Johnson, 719 F. Supp. 2d 1059, 1068 (W.D. Mo. 2010). "When a photographer selects and positions his subjects, it is quite a different matter from the peeking of a voyeur upon an unaware subject *pursuing activities unrelated to sex*." Id. (emphasis added).

That is precisely what happened here: that Spoor set up a camera, but by doing so, he merely "peek[ed]... upon an unaware subject pursuing activities unrelated to sex." To be sure, it appears that portions of the boys' bodies were cut off in the video and that their penises are plain to see. However, a toilet is not a setting suggestive of sexual activity and urination is not a sexually charged act. The boys are not unnaturally posed and are not acting in an age-inappropriate manner or depicted as willing to engage in sexual activity. The objective design of the video, while perhaps voyeuristic, does not suggest sex. Measured objectively, such a video, even if indicative of voyeurism, does not rise to the level of sexually explicit conduct as required by 18 U.S.C. §§ 2251 and 2256.

Again, the Second Circuit's analysis, which rests on the parts of the body shown in the video, conflicts with Steen and its progeny by ignoring the *activity* in which those body parts were displayed. All the voyeuristic videos considered in Steen, Doe, Hodge and their respective progeny involved display of the genitals, but the all-important factor in each case was that the display occurred in conjunction with an inherently non-sexual activity and that the subjects of the images were not posed or arranged in a sexually suggestive manner. Petitioner thus submits that this Court should grant certiorari to resolve the issue of whether, as the Second Circuit now holds but other courts forbid, such a non-sexual voyeuristic video can be deemed lascivious

merely due to the camera's positioning and focus.

POINT II

RULE 414 EVIDENCE FAILS THE TEST OF RELEVANCE WHERE A DEFENDANT'S SEXUAL PROCLIVITIES ARE NOT PERTINENT TO THE CHARGED OFFENSES

1. The rule that allegedly-lascivious images must be analyzed objectively also mandates review of the Second Circuit's holding that Rule 414 evidence is relevant to non-contact child pornography offenses. As noted above, the circuit held that uncharged sexual crimes may be relevant to the petitioner's "motive" to produce the images as well as whether the videos "were intended or designed to elicit a sexual response in the viewer." But if, as the Second Circuit correctly held, images are to be analyzed for their objective characteristics, then neither of these things is pertinent to the jury's decision. The motive and subjective intent of an image's creator simply do not matter: instead, the image is either lascivious or it is not, regardless of what was in the creator's mind when it was made.

2. Rule 414 provides: "In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered *on any matter to which it is relevant.*" (Emphasis added). Petitioner does not dispute that both the offenses for which he was indicted in this case and the offense to which he pled guilty in Seneca County were crimes of "child molestation" within the meaning of the rule. However, the rule remains subject to both Rule 403 and, by its own language, the basic threshold

of relevance. See United States v. Larson, 112 F.3d 600, 604 (2d Cir. 1997). Petitioner thus submits that, as to offenses whose elements are objective and to which the defendant's sexual propensities ar not relevant, Rule 414 will not permit evidence of uncharged crimes.

The offenses here are of precisely such character. As discussed above, petitioner was indicted on two counts of producing child pornography and four counts of possessing child pornography. As to the possession counts, Spoor was charged with "knowingly possess[ing]" materials containing images of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). Notably, he was not charged with "access[ing] with intent to view" those materials, which is the other method by which 18 U.S.C. § 2252A(a)(5)(B) may be violated, so his intentions vis-à-vis the child pornography were not before the jury. Instead, the government was only required to prove that defendant knew that he possessed images of child pornography - something that is self-evident from the images themselves and that a non-pedophile would know just as well as a pedophile would. Issues of motive and intent play no part in a child porn possession case.

As such, evidence concerning whether a defendant is or is not a pedophile with a sexual interest in children, or whether he has a propensity to perform sexual acts with children, is irrelevant to whether he is guilty of possessing images of child pornography. This is illustrated by United States v. Wallenfang, 568 F.3d 649, 660 (8th Cir. 2009), which held that expert testimony that the defendant "was not a pedophile and was not sexually attracted to young girls" was "immaterial and

irrelevant." The Wallenfang court held that "the relevant factual inquiry in this case is not whether the pictures in issue appealed, or were intended to appeal, to Wallenfang's sexual interests but whether, on their face, they appear to be of a sexual character." Id. (emphasis added), quoting United States v. Kemmerling, 285 F.3d 644, 646 (8th Cir. 2002); see also United States v. Pires, 642 F.3d 1, 11-12 (1st Cir. 2011) (defendant's pedophilia or lack thereof was "wholly irrelevant" because "[i]n enacting the federal child pornography statute, Congress proscribed certain conduct *without regard to the underlying motive*") (emphasis added).

The child pornography production counts are perhaps a closer call, but they too did not put Spoor's sexual interests or proclivities in issue. Significantly, although the indictment alleged that Spoor "did employ, use, persuade, induce, entice and coerce minors... to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct," the Government's theory of the case did not include persuasion, inducement, enticement and/or coercion. The Government did not argue to the jury, or present any evidence, that Spoor persuaded, induced, enticed and/or coerced anyone to perform the conduct depicted in the videos. There was no testimony that Spoor told the boys shown in either video to take their clothes off and/or to engage in the acts of jumping around or urination.

Therefore, this case was presented solely on a theory that Spoor "employ[ed]" or "use[d]" the minors in making images, and the only intent the Government was required to or did prove was intent to take the videos. The Government was not required to prove that Spoor had the specific intent to make child pornography. The

issue of whether the videos constitute child pornography or not is judged objectively and without regard to Spoor's sexual interests, see Amirault, supra; Villard, supra; accord Rivera, supra, so the only things the Government was required to prove was that defendant (a) used or employed minors, (b) to make images, (c) which turned out to be child pornography whether he intended it to be or not. This too is an offense which the jury was required to weigh "without regard to the underlying motive."

The Wallenfang case, supra, involved production charges as well as possession charges: specifically, he was accused of producing lascivious images of his six-year-old daughter. Indeed, unlike Spoor, Wallenfang was alleged to have posed the victim and dressed her in sexually charged attire. See Wallenfang, 568 F.3d at 652. But even as to this, the court held that evidence regarding whether he did or did not have a sexual interest in children was irrelevant. Id. at 660. "The issue of Wallenfang's motive in producing... the photographs at issue [was] immaterial and irrelevant," and instead, "the relevant inquiry was not whether the photographs appealed to Wallenfang's sexual interests but whether they were of a sexual nature." Id. at 660-61; see also United States v. Dost, 1989 WL 61737, *2 (9th Cir. 1989) (in production case, "the issue of whether Dost was or was not a pedophile is irrelevant to the child pornography charges").

Petitioner emphasizes that the Wallenfang, Pires and Dost courts held that evidence concerning the defendant's sexual interests should be excluded, not because of a balancing test, but because it was irrelevant. This suggests, in turn, that in any case where the defendant is charged merely with making or possessing images of child

pornography, and where the Government's theory of the case does not put his sexual interests in issue by alleging that he engaged in sexual persuasion or committed sexual acts on the children, Rule 414 evidence should not be admitted. It necessarily flows from the objective analysis of images that issues such as motive and subjective intent, cited by the Second Circuit in support of its holding in this case, are simply outside the scope of the issues that the jury must resolve.

The cases cited by the Government in the courts below bear this distinction out. In Larson, supra, the defendant was charged not with child pornography offenses but with transporting a minor across state lines to engage in sexual conduct, and he was alleged to have "plied [the victim] with liquor and engaged him in sexual acts." Larson, 112 F.3d at 602. Plainly, Larson's sexual proclivities were relevant to whether he would engage in such acts, in a way that they would not be if he were merely charged with offenses involving images. Likewise, in United States v. Davis, 624 F.3d 508 (2d Cir. 2010), the defendant was charged with inter alia personally performing sexual acts on his four-year-old daughter; and in both United States v. Vonneida, 601 Fed. Appx. 38 (2d Cir. 2015) and United States v. Donaldson, 577 Fed. Appx. 63 (2d Cir. 2014), the defendants were charged with and convicted of transporting minors across state lines for sex.

Research does not reveal any case, other than this one, in which an appellate court has upheld the admission of uncharged crime evidence under Rule 414 where the defendant was not alleged, as part of the offenses charged, to have personally committed sexual acts against minors. And it should not do so now. Although Rule

414 allows the admission of uncharged acts on any matter, including propensity, for which they may be relevant, it does not permit evidence of such acts to be admitted where even propensity is irrelevant to the matters before the jury. Under Wallenfang, supra, and its progeny, that is the case here.

3. Alternatively, petitioner submits that the uncharged-crime evidence should have been excluded under Rule 403. The uncharged act was dissimilar to the offenses alleged in the instant indictment, because the charges in this case did not involve any allegations of actual sexual contact with children while the uncharged Seneca County crime did. A contact offense is considerably more inflammatory than the conduct charged in the indictment - especially where, as here, it was read and explained to the jury before they heard any other item of evidence - and is thus not merely prejudicial but unfairly prejudicial because of the high risk of causing the jury to prejudge the defendant before a single witness opens his or her mouth to testify. See, e.g., United States v. Dickinson, 16 F. Supp. 3d 230, 234 (W.D.N.Y. 2014).[5]

Finally, petitioner notes that the district court was entirely correct in rejecting the Government's alternative Rule 404(b) rationale. Unlike Rule 414, Rule 404(b) does not permit evidence to be introduced on the issue of propensity, and since, as noted above, a sexual intent or motive was not an element of any offense with which Spoor

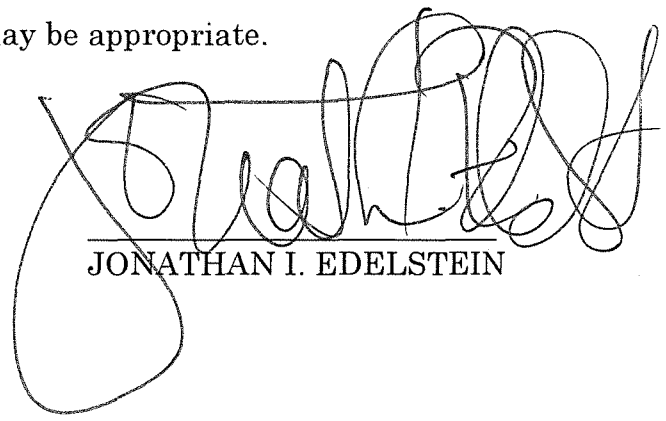
[5] Moreover, to the extent that the Second Circuit may have been correct in finding that the Rule 414 evidence was relevant to whether petitioner or his wife was the one who downloaded child pornography from the internet – which is not conceded – it was nevertheless (a) inadmissible under Rule 403 because the government had ample other proof, including the petitioner's statement, to make that point; and (b) in any event, relevant *only* to the possession counts and inadmissible as to the production counts for the reasons set forth above.

was charged, there was no basis to admit proof of a dissimilar crime involving different victims under this rule. The evidence of the Seneca County plea was admissible under Rule 414 or not at all, and since it was inadmissible under Rule 414, this Court should grant certiorari and find that the district court erred in allowing the Government to offer this evidence at the very beginning of trial.

CONCLUSION

WHEREFORE, in light of the foregoing, this Court should grant certiorari on all issues raised in this Petition and, upon review, should vacate the judgment against petitioner and remand for such remedies as may be appropriate.

Dated: New York, NY
December 11, 2018



JONATHAN I. EDELSTEIN

In the

United States Court of Appeals
for the Second Circuit

AUGUST TERM 2017

No. 16-2972-cr

UNITED STATES OF AMERICA,
Appellee,

v.

RONALD T. SPOOR,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of New York

ARGUED: MARCH 8, 2018
DECIDED: SEPTEMBER 14, 2018

Before: CABRANES, CARNEY, *Circuit Judges*, and CAPRONI, *District Judge.*[*]

TIFFANY H. LEE, Assistant United States Attorney, *for* James P. Kennedy, Jr., United States Attorney for the Western District of New York, Rochester, NY, *Appellee*.

JONATHAN I. EDELSTEIN, Edelstein & Grossman, New York, NY, *for Appellant-Defendant*.

VALERIE CAPRONI, *District Judge*:

Defendant-appellant Ronald T. Spoor ("Spoor") appeals from an August 18, 2016 judgment of the United States District Court for the Western District of New York (Siragusa, J.) convicting him, following a jury trial, of two counts of production of child pornography, in violation of 18 U.S.C. §§ 2251(a) and (e),[1] and four counts of possession

[*] Judge Valerie Caproni, of the United States District Court for the Southern District of New York, sitting by designation.

[1] 18 U.S.C. § 2251(a) provides that:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor

App. 2

of child pornography, in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and (b)(2).[2] The District Court sentenced Spoor principally to 360 months

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> engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

18 U.S.C. § 2251(a). In turn, "sexually explicit conduct" is defined in Section 2256 as:

> actual or simulated—
> **(i)** sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
> **(ii)** bestiality;
> **(iii)** masturbation;
> **(iv)** sadistic or masochistic abuse; or
> **(v)** lascivious exhibition of the genitals or pubic area of any person;

18 U.S.C. § 2256(2)(A).

[2] Section 2252A(a)(5)(B) provides that:

> Any person who .— knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer . . . shall be punished as provided in subsection (b).

18 U.S.C. § 2252A(a)(5)(B).

of imprisonment and 15 years of supervised release. On appeal, Spoor challenges the sufficiency of the evidence; the District Court's *in limine* ruling to admit evidence of his prior conviction for a Criminal Sexual Act in the First Degree, in violation of New York Penal Law § 130.50(3); and the reasonableness of his 360-month sentence. We reject each of Spoor's arguments, and, accordingly, **AFFIRM** the District Court's judgment.

I. BACKGROUND

On December 17, 2012, Spoor's nephew discovered a cache of what appeared to be child pornography on a hard drive attached to Spoor's computer. The images included young boys, in sexually suggestive positions, and engaged in sex acts with adult men. In response, Spoor's ex-wife and his nephew immediately contacted the New York state police, who took possession of several hard drives found in Spoor's work area and began an investigation.

The hard drives turned over to law enforcement contained two videos that are the subject of the child pornography production charges in this case, as well as certain of the possession charges. The first video is a 24-minute video of Spoor's son and another boy, both naked, playing in a recreational vehicle, or R/V. This video is referred to by the parties as the "Camper Video." The Camper Video begins in a dark, dimly lit room, which appears to be the sleeping area of an R/V. The two boys are under the covers. After several minutes, an unseen person, later identified as Spoor, carries the camera to the foot of the bed and positions it under the covers. For the briefest of moments, the

genitals of one of the boys are visible in the center of the screen. The remainder of the video shows the boys playing on the bed while a children's movie plays in the background. The second video, or "Bathroom Video," was shot with a pinhole camera Spoor installed in a bathroom at his parents' home. The camera was positioned underneath what appears to be a sink or vanity and was trained on the toilet. Footage from the camera captured Spoor's son—one of the boys in the Camper Video—changing into a swimsuit and urinating and another boy, identified at trial as "Victim-3," urinating. The genitals of both children are visible in the Bathroom Video.

State authorities referred the case to the Department of Homeland Security ("DHS"). On December 21, 2012, Edward Williams, a DHS special agent, interviewed Spoor. As Agent Williams later recounted at trial, Spoor admitted to him that there was child pornography, which he had downloaded from the internet, on his computers and that he was attracted primarily to boys, aged approximately 13. He also admitted making the videos at issue in this case, but provided innocuous, nonsexual reasons for doing so. According to Williams, Spoor told him he made the videos to show "how silly the boys were being when they were together." A-359.

Spoor was indicted on April 11, 2013. On December 22, 2015, the Government provided notice that, pursuant to Rule 414(a) of the Federal Rules of Evidence, it intended to prove at trial that Spoor had

previously committed an offense (or offenses) of "child molestation."[3] Specifically, the Government sought to introduce: evidence that Spoor was convicted in 2013 of Criminal Sexual Act in the First Degree, in violation of New York Penal Law § 130.50(3);[4] that he had admitted to molesting two seven-year-old boys sometime in 2010;[5] testimony from a girl and an adult woman that Spoor had sexually abused them repeatedly when they were children; and testimony from a boy that Spoor had taken photos of him and another boy, naked, in a hotel room sometime in 2011. The District Court ruled that it would admit evidence of Spoor's 2013 conviction, but precluded the Government's other Rule 414 evidence on the grounds that the risk of undue prejudice from this evidence outweighed its marginal probative value.

The case proceeded to trial on January 6, 2016. As is relevant to Spoor's arguments on appeal, the Government relied on the testimony of the agents who examined Spoor's hard drives, the agents who

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[3] Rule 414(a) provides: "In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant." Fed. R. Evid. 414(a). Rule 414(b) requires advance notice of the Government's intent to introduce such evidence "at least 15 days before trial or at a later time that the court allows for good cause." Fed. R. Evid. 414(b). The rule defines "child molestation" to include production and possession of child pornography. Fed. R. Evid. 414(d)(2)(B).

[4] Penal Law § 130.50(3) provides that "[a] person is guilty of criminal sexual act in the first degree when he or she engages in oral sexual conduct or anal sexual conduct with another person: . . . [3.] Who is less than eleven years old; . . . ." N.Y. Penal Law § 130.50(3).

[5] This conduct was the basis for Spoor's 2013 state conviction.

interviewed him, and the videos themselves. The mothers of the three boys in the videos also testified. The mother of Spoor's son, Robin Cooley, testified that her son was born in June 2002 and appeared to be "around seven or eight" years old in the Camper Video, and "at least eight" in the Bathroom Video. A-688-89. Cooley also testified that, based on her recollection, the Camper Video would have been made around her son's tenth birthday in June 2012. The mother of the other boy in the Camper Video testified that he was born in January 2002 and appeared to be "approximately eight or nine" in the Camper Video. A-704. The mother of the second boy in the Bathroom Video testified that he was born in April 2007, and therefore was four or five at the time the Bathroom Video was made.

The jury found Spoor guilty on all counts. On August 15, 2016, the District Court sentenced him principally to 360 months of imprisonment. In explaining the sentence, the District Court began by calculating Spoor's Guidelines range as 360 and 1200 months of incarceration—a point Spoor concedes on appeal.[6] Taking the Guidelines range as a baseline, the District Court rejected Spoor's argument that a below-Guidelines sentence was appropriate in light of his age—Spoor was 52 at the time of sentencing—and because neither of the videos depicts sexual contact or involves lewd or suggestive posing. The District Court explained that, in its view,

[6] The District Court calculated Spoor's offense level as 42. Spoor had 3 criminal history points, putting him in criminal history category II. Pursuant to U.S.S.G. § 4B1.5, however, because of his 2013 child molestation conviction, he was put in criminal history category V as a "repeat and dangerous sex offender against minors."

Spoor's case was within the "heartland of cases" and characterized his conduct as "deplorable." SPA-36-37. The District Court further found that Spoor's conduct was "indicative of a manifestation of continuing sexual exploitation" and that Spoor was, in the District Court's judgment, "really socially depraved and morally bankrupt." SPA-38. Addressing Spoor's argument that his age made him less likely to recidivate, the District Court explained that, in its view, "anything less [than 360 months] might subject children, even perhaps at your [Spoor's] advanced age, to some danger." SPA-40.

This appeal followed.

II. DISCUSSION

On appeal, Spoor challenges the sufficiency of the evidence, the District Court's decision to admit his 2013 conviction, and the substantive reasonableness of his sentence. We address each of these arguments in turn.

A.

This court reviews a claim related to the sufficiency of the evidence de novo. *United States v. Cuti*, 720 F.3d 453, 461 (2d Cir. 2013). Nonetheless, a defendant raising such a challenge carries a "heavy burden." *United States v. Santos*, 449 F.3d 93, 102 (2d Cir. 2006) (quoting *United States v. Bruno*, 383 F.3d 65, 82 (2d Cir. 2004)) (additional citation omitted). The Court must view the evidence in the light most favorable to the prosecution and must draw all inferences in favor of the Government. *Id.* Accordingly, "[a] judgment of acquittal can be

entered 'only if the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt.'" *Cuti*, 720 F.3d at 461 (quoting *United States v. Espaillet*, 380 F.3d 713, 718 (2d Cir. 2004)). "In a close case, where 'either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, the court must let the jury decide the matter.'" *Id.* (quoting *United States v. Temple*, 447 F.3d 130, 137 (2d Cir. 2006)). But it remains "axiomatic that[] 'it would not satisfy the Constitution to have a jury determine that the defendant is *probably* guilty.'" *United States v. Rodriguez*, 392 F.3d 539, 544 (2d Cir. 2004) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993)) (alterations omitted).

We reject Spoor's argument that there was insufficient evidence from which a jury could conclude that the Camper Video and Bathroom Video constituted child pornography. As is set out in the margin above, Section 2251(a) criminalizes the "use" (among other things) of a minor to engage in "sexually explicit conduct for the purpose of producing any visual depiction of such conduct . . . ." 18 U.S.C. § 2251(a). As far as the production counts are concerned, the only issue presented to the jury was whether the videos depicted "sexually explicit conduct," as that term is defined by Section 2256(2)(A), and, more specifically, whether the videos were "lascivious exhibition[s] of the genitals or pubic area of any person," *Id.* § 2256(2)(A)(v). The statute does not define a "lascivious exhibition." The District Court, relying on the so-called *Dost* factors,

instructed the jury that in determining whether the videos constituted a "lascivious exhibition" it was to consider:

> [S]uch factors as, one, whether the focal point of the picture or image is on the child's genitals or pubic area; two, whether the setting of the picture or image is sexually suggestive, that is, in a place or pose generally associated with sexual activity; three, whether the child is depicted in an unnatural or in inappropriate attire considering the age of the minor; four, whether the child is fully or partially clothed or nude; five, whether the picture or image suggests sexual coyness or [willingness] to engage in sexual activity; and six, whether the picture or image is intended or designed to elicit a sexual response from the viewer.

A-879; *see also United States v. Rivera*, 546 F.3d 245, 252-53 (2d Cir. 2008) (approving the factors identified by the District Court and citing *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986)). Although the videos are not the most obvious examples of child pornography, given that we must view the evidence in the light most favorable to the Government, there was sufficient evidence from which a jury could conclude that each of the videos depicted a lascivious exhibition.

Throughout the Camper Video, the boys are naked. Although nudity is neither a necessary nor a sufficient feature of child pornography, *see United States v. Amirault*, 173 F.3d 28, 33 (1st Cir. 1999), the Camper Video includes other indicia from which the jury could find that the video was lascivious. The video is set on a sofa bed, an area that can be associated with sexual activity. *See United States v. Barry*, 634 F. App'x 407, 414 (5th Cir. 2015) (finding a "makeshift bed" and a bedroom to be "suggestive"). And, for a few seconds, the camera is positioned under the covers so that the genitals of one of the boys are visible. A reasonable jury could conclude that filming a boy's

genitalia, while the boy was in bed and without any other context, serves no obvious purpose other than to present the child as a sexual object. A jury could also have concluded that Spoor removed the camera from its stand and positioned it under the covers because he intended to create a video that would "elicit a sexual response from the viewer." A-879.

A reasonable juror could also find the Bathroom Video to be lascivious. Spoor positioned the camera beneath the sink of the bathroom so that the pubic region of a boy standing at the toilet would occupy the center of the shot. *See United States v. Holmes*, 814 F.3d 1246, 1252 (11th Cir. 2016) (affirming conviction for production of child pornography based on "placement of the cameras in the bathroom," "focus on videoing and capturing images of [the child's] pubic area," and "the angle of the camera set up"); *United States v. Wells*, 843 F.3d 1251, 1256 (10th Cir. 2016) (affirming conviction for production of child pornography based, in part, on placement of the camera "on the bathroom floor with its lens angled upwards" so that the child's "exposed pubic area [was] near the center of the frame"). A reasonable finder of fact could also have found the setting of the video relevant. Although most typically used as a place to serve biological functions, as our sister circuits have recognized, bathrooms also can be the subject of sexual fantasy. *See Wells*, 843 F.3d at 1256 (citing *United States v. Larkin*, 629 F.3d 177, 183 (3d Cir. 2010)). Although, as Spoor points out, the videos do not involve suggestive posing, sex acts, or inappropriate attire, none of these is necessary to child pornography. Rather, as the District Court instructed, whether a video or image is a

lascivious exhibition must be decided by the jury based on the overall content of the material.

We are not persuaded by Spoor's analogy between the videos in this case and the picture at issue in *Amirault*, 173 F.3d at 33-34. The photograph in *Amirault* depicted a naked girl, at the beach, buried up to her pubic area in sand. *Id.* at 33. The girl's genitals were not prominently featured in the picture, she was not posed, and the setting was innocuous. Absent any other indicia that the photo was lascivious, the First Circuit vacated the defendant's sentence and held that the picture was not lascivious. By contrast, the videos in this case display the boys' genitals (albeit briefly), involve potentially sexually suggestive locations – unlike a beach, where nudity is to be expected to some degree, *see Doe v. Chamberlin*, 299 F.3d 192, 196 (3d Cir. 2002) – and there was extrinsic evidence of Spoor's intent in making the videos, including his admitted attraction to young boys. For the same reasons, we do not find persuasive Spoor's argument that his videos were simply "voyeuristic" as in *United States v. Steen*, 634 F.3d 822, 828 (5th Cir. 2011) (finding that surreptitiously recorded videos in a tanning salon, not focused on the genitals of the victim, were voyeuristic but not lascivious).

We pause here to address, briefly, the jury instructions, which Spoor does not challenge on appeal. We approved jury instructions incorporating the so-called *Dost* factors in *Rivera*, but noted at the time that they are an imperfect guide for the jury. 546 F.3d at 252. In some cases, the *Dost* factors are perhaps underinclusive. *See United States v. Frabizio*, 459 F.3d 80, 88 (1st Cir. 2006) (the *Dost* factors may

"inappropriately *limit* the scope of the statutory definition"). In others they are potentially overinclusive.[7] *See Amirault*, 173 F.3d at 34 (expressing concern that the sixth factor is vague and confusing); *see also Steen*, 634 F.3d at 829 (Higginbotham, J., concurring) (expressing concern that the sixth factor invites overreliance on extrinsic evidence of the defendant's intent). With respect to the sixth *Dost* factor, we took note in *Rivera* of the potential that – "if the sixth factor were to focus on the defendant's 'subjective reaction' to the photograph, as opposed to the photograph's 'intended effect,' 'a sexual deviant's quirks could turn a Sears catalog into pornography.'" 546 F.3d at 252 (quoting *Amirault*, 173 F.3d at 34). In light of this concern, the First Circuit and Third Circuit have held that "rather than being a separate substantive inquiry about the photographs," the sixth *Dost* factor "is useful as another way of inquiring into whether any of the other five

[7] Other courts have found it possible to define a "lascivious exhibition" without reliance on a list of difficult-to-apply, judicially-created factors. *See United States v. Grimes*, 244 F.3d 375, 381 (5th Cir. 2001) (a photo is a lascivious exhibition if it is a "depiction which displays or brings forth to view in order to attract notice to the genitals or pubic area of children, in order to excite lustfulness or sexual stimulation of the viewer" (quoting *United States v. Knox*, 32 F.3d 733, 745 (3d Cir. 1994))); *but see Rivera*, 546 F.3d at 249 (noting that the term "lascivious" is not "self-defining"). As we held in *Rivera*, consideration of the *Dost* factors is not mandatory, and it is possible to charge a jury without using them. *See United States v. Price*, 775 F.3d 828, 839-40 (7th Cir. 2014) (discouraging use of the *Dost* factors because the statutory text is "clear enough on its face"); *see also Steen*, 634 F.3d at 828 (Higginbotham, J., concurring) ("I write separately to note my misgivings about excessive reliance on the judicially created *Dost* factors that continue to pull courts away from the statutory language of 18 U.S.C. § 2251.").

Dost factors are met." *United States v. Villard*, 885 F.2d 117, 125 (3d Cir. 1989); *see also Amirault*, 173 F.3d at 34-35.

We pick up where *Rivera* left off, and clarify that the sixth *Dost* factor – whether the image was designed to elicit a sexual response in the viewer – should be considered by the jury in a child pornography production case only to the extent that it is relevant to the jury's analysis of the five other factors and the objective elements of the image. *See Villard*, 885 F.2d at 125; *Amirault*, 173 F.3d at 34-35; *United States v. Miller*, 829 F.3d 519, 526 & n.3 (7th Cir. 2016) (citing *Villard* and holding that "the subjective intent of the viewer cannot be the *only* consideration in a finding of lascivious[ness]"); *see also United States v. Brown*, 579 F.3d 672, 683-84 (6th Cir. 2009) (limiting extrinsic evidence of intent to the "limited context" in which the images were taken to prevent overreliance on the filmmaker's subjective intent). Whether a video is, objectively, a "lascivious exhibition" depends on the content of the video itself and not on the sexual predilection of its creator. It follows that the jury may not find a film to be a "lascivious exhibition" – and therefore sexually explicit – based *solely* on the defendant's intent in creating the video.[8] *Miller*, 829 F.3d at 526 n.3.

To be sure, the subjective intent of the photographer can be relevant to whether a video or photograph is child pornography. As the Supreme Court has explained, the child pornography laws are

[8] We do not address whether such a defendant, intending to create child pornography, but who is ultimately unsuccessful, might be charged with attempt. *See United States v. Hodge*, 805 F.3d 675, 680 (6th Cir. 2015).

directed at preventing the "psychological, emotional, and mental" harm to a child of being used as a sexual object, to gratify the lust of another – either the viewer or the photographer. *See New York v. Ferber*, 458 U.S. 747, 775 (1982) (O'Connor, J., concurring). But overreliance on the intent of the photographer, and his idiosyncratic desires, raises constitutional concerns regarding criminalization of expressive conduct and creates a risk that a defendant could be convicted for being sexually attracted to children without regard to whether the material produced is, objectively, child pornography. *See id*. at 764 ("There are, of course, limits on the category of child pornography . . . . As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined" and "suitably limited and described."); *Brown*, 579 F.3d at 683.

Limiting the role of the sixth *Dost* factor in this manner focuses the jury on the objective elements of the photograph and reduces the risk that a jury will criminalize otherwise protected speech based solely on evidence of a defendant's disturbing sexual interest in children.[9] We leave it to the district courts in the first instance to

[9] As we noted above, Spoor has not objected on appeal to the jury instructions, and he requested the District Court to charge the jury on the *Dost* factors. *See United States v. Spoor*, No. 13-CR-6059 (CJS), Dkt. 86 at 3 (W.D.N.Y. Dec. 29, 2015) (requesting *Dost* factors instruction). In the District Court, Spoor requested that the jury be charged that "more than one [*Dost*] factor must be present." *Id.* at 3. That is not a correct statement of the law, and it was properly rejected by the District Court. (A jury could, for example, conclude that a picture was lascivious because it displayed prominently the genitals of a child or because the child was posed seductively, notwithstanding that none of the other *Dost* factors was satisfied.) What we hold today is that it is improper for a jury to find that an

consider whether any additional gloss on the *Dost* factors is appropriate to clarify for the jury the limited role and import of the sixth factor. At a minimum, and particularly where evidence is admitted pursuant to Rule 414, district courts should consider charging the jury expressly that the defendant's subjective intent alone is not sufficient to find the content lascivious.

Spoor also challenges the sufficiency of the Government's evidence regarding the timing of the production of the videos. The grand jury charged that Spoor produced the videos in April and July 2012. According to Spoor, however, the testimony at trial established that the children were "around seven or eight" in the Camper Video and "approximately eight or nine" in the Bathroom Video, which suggests the videos were produced well before 2012. A-689, -704, -735. A difference of several years between the dates alleged in the indictment and the Government's proof at trial, Spoor argues, amounts to a constructive amendment of the charges against him, requiring a new trial. *See United States v. Patino*, 962 F.2d 263, 265-66

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image is lascivious based *solely* on the fact that the image is intended to elicit a sexual response from the viewer; the sixth *Dost* factor is relevant only to the extent it bears on whether the other five factors are satisfied. Because Spoor did not raise this argument below (or on appeal) we review the jury instructions for clear error. *See* Fed. R. Crim. P. 30(d) ("A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. . . . Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b)."). Read as a whole, and applied to the videos in this case, the jury instructions were not clearly erroneous. *See United States v. Olano*, 507 U.S. 725, 734 (1993).

(2d Cir. 1992) ("Constructive amendment of an indictment is a *per se* violation of the grand jury clause of the Fifth Amendment.").

Although Spoor characterizes his claim as whether there was a constructive amendment, his argument is more appropriately characterized as a claim of variance. "To prevail on a constructive amendment claim, a defendant must demonstrate that 'the terms of the indictment are in effect altered by the presentation of evidence and jury instructions which so modify *essential elements* of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment.'" *United States v. D'Amelio*, 683 F.3d 412, 416 (2d Cir. 2012) (quoting *United States v. Mollica*, 849 F.2d 723, 729 (2d Cir. 1988)) (emphasis in *D'Amelio*); *see also id.* at 417 (describing the issue as whether the defendant had notice of the core of criminality to be proven at trial). By contrast, "variance occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment." *United States v. Salmonese*, 352 F.3d 608, 621 (2d Cir. 2003) (quoting *United States v. Frank*, 156 F.3d 332, 337 n.5 (2d Cir. 1998)). Spoor does not contend that the possible difference in dates goes to an essential element of the crime of production of child pornography or that the core of the alleged criminality – the production of sexually explicit videos involving prepubescent boys – would be any different had it occurred in 2010 rather than 2012.

Nor are we persuaded that there was a variance in this case. The Government presented sufficient evidence for the jury to conclude that

the videos were produced "in or about" April and July 2012, as charged in the indictment. Viewing the videos, the jury was entitled to find that the boys in the Camper Video were approximately nine and ten years old and that the boys in the Bathroom Video were approximately nine and five years old – thereby establishing that the videos were produced in 2012. There was also evidence at trial that the Camper Video was made around the time of Spoor's son's tenth birthday party, which was in June 2012. Moreover, neither of the mothers testified definitively. Rather, based on their review of the videos, the mothers testified that their children appeared to them to be "approximately eight or nine" and "around seven or eight." A-689, -704. As the District Court explained correctly, any inconsistency between the Government's allegations and the testimony of the boys' mothers was relevant to the jury's consideration of the mothers' credibility but did not impermissibly broaden the charges against Spoor. *See United States v. Josephberg*, 562 F.3d 478, 494 (2d Cir. 2009) ("[W]hen testimonial inconsistencies are revealed on cross-examination, the 'jury [i]s entitled to weigh the evidence and decide the credibility issues for itself. . . .'" (quoting *United States v. McCarthy*, 271 F.3d 387, 399 (2d Cir. 2001))).

Spoor has also failed to persuade us that any difference in dates was prejudicial. A difference between the Government's allegations, as contained in the indictment, and the evidence at trial is grounds for a new trial only if the variance is prejudicial to the defendant. *See United States v. Nersesian*, 824 F.2d 1294, 1323 (2d Cir. 1987). A variance is not prejudicial if it "is not of a character that could have misled the

defendant at the trial, and where the variance is not such as to deprive the accused of his right to be protected against another prosecution for the same offense." *Salmonese*, 352 F.3d at 621-22 (quoting *United States v. Mucciante*, 21 F.3d 1228, 1236 (2d Cir. 1994)); *see also United States v. Heimann*, 705 F.2d 662, 666 (2d Cir. 1983) ("Because proof at trial need not, indeed cannot, be a precise replica of the charges contained in an indictment, this court has consistently permitted significant flexibility in proof, provided that the defendant was given notice of the 'core of criminality' to be proven at trial."). The year in which the videos were made was of little practical relevance at trial. Spoor did not dispute making the videos or that the children depicted in the videos were minors at the time. His argument to the jury was that the videos were not lascivious and that he lacked the intent to make child pornography because his intent was to show "the boys being silly." A-805. Whether the videos were made in 2010 (based on the mothers' testimony) or 2012 (as alleged by the Government) was irrelevant to these arguments. And Spoor has not identified any argument he would have made but did not make in reliance on the Government's allegation that the videos were produced in mid-2012. To the contrary, Spoor's counsel was aware of the potential discrepancy in the Government's proof, cross-examined the mothers on the point, and argued the issue to the jury during summation. Finally, there is no suggestion that Spoor is at risk of being charged again for the same offense.

B.

Next is Spoor's objection to the admissibility of his prior state conviction for a Criminal Sexual Act in the First Degree. On appeal, Spoor concedes that his prior conviction was admissible as a crime of child molestation pursuant to Rule 414. He challenges the District Court's ruling, rather, on the grounds that the conviction was not relevant to any issue in the case and that it should, therefore, have been excluded pursuant to Rule 403 because its probative value was outweighed by the potential for unfair prejudice.

We review the District Court's decision to admit evidence for abuse of discretion. *See Old Chief v. United States*, 519 U.S. 172, 174 n.1 (1997); *see also United States v. O'Connor*, 650 F.3d 839, 853 (2d Cir. 2011) (reviewing district court's decision to admit evidence pursuant to Rule 414 for abuse of discretion). An evidentiary error is grounds for reversal only if it affects a "substantial right" – that is, the error "had a 'substantial and injurious effect or influence' on the jury's verdict." *United States v. Garcia*, 413 F.3d 201, 210 (2d Cir. 2005) (quoting *United States v. Dukagjini*, 326 F.3d 45, 62 (2d Cir. 2003)) (internal citation omitted). We will sustain a district court's decision to admit evidence in the face of a Rule 403 objection "so long as the district court has conscientiously balanced the proffered evidence's probative value with the risk for prejudice," and will reverse only if the district court's decision is "arbitrary or irrational." *United States v. Awadallah*, 436 F.3d 125, 131 (2d Cir. 2006).

Rule 414 provides that in criminal cases involving accusations of child molestation, the district court may "admit evidence that the defendant committed any other child molestation" for "any matter to which it is relevant." Fed. R. Evid. 414(a). In our first encounter with Rule 414 in *United States v. Larson*, 112 F.3d 600 (2d Cir. 1997), we explained that "Rule 414 permits evidence of other instances of child molestation as proof of, *inter alia*, a 'propensity' of the defendant to commit child molestation offenses but that '[i]n other respects, the general standards of the rules of evidence will continue to apply, ...'" *Id.* at 604 (quoting 140 Cong. Rec. S12990 (daily ed. Sept. 20, 1994) (Statement of Sen. Dole); 140 Cong. Rec. H8991 (daily ed. Aug. 21, 1994) (Statement of Rep. Molinari)). More recently we explained that Rule 413 (a companion to Rule 414) reflects an exception in prosecutions for sex crimes to the common law practice of excluding propensity evidence. *United States v. Schaffer*, 851 F.3d 166, 178-79 (2d Cir. 2017).

Although Rule 414 modifies the ban on character evidence otherwise applicable under Rule 404, it does not follow that propensity evidence relative to child molestation is always admissible. *See Larson*, 112 F.3d at 604-05 (concluding that Rule 403 applies to character evidence admissible under Rule 414). The ban on character evidence under Rule 404 is "merely an application of Rule 403 to a recurring issue." *United States v. Guardia*, 135 F.3d 1326, 1330 (10th Cir. 1998) (citing *Old Chief*, 519 U.S. at 181-82). Rule 414 reflects a congressional judgment that such a blanket rule is inappropriate when dealing with child molestation offenses, but it does not require the district courts to

evaluate such evidence with a "thumb on the scale in favor of admissibility."[10] *Johnson v. Elk Lake Sch. Dist.*, 283 F.3d 138, 155-56 (3d Cir. 2000). It is more accurate to say that Rule 414 affects the district court's analysis under Rule 403 because it alters the category of permissible inferences available to the jury. *United States v. Rogers*, 587 F.3d 816, 822 (7th Cir. 2009). Whereas in other cases it is impermissible, and unfairly prejudicial, for the jury to infer a propensity to commit the charged crime from evidence of prior, similar acts, Rule 414 makes that a permissible inference. *Id.* The district court retains discretion, however, to determine the probative value of this inference and to weigh whether the prior act evidence will be unfairly prejudicial. In determining the probative value of prior act evidence, the district court should consider such factors as: "(1) 'the similarity of the prior acts to the acts charged,' (2) the 'closeness in time of the prior acts to the acts charged,' (3) 'the frequency of the prior acts,' (4) the 'presence or lack of intervening circumstances,' and (5) 'the necessity of the evidence

[10] In concluding that Rule 414 does not circumscribe the district court's discretion under Rule 403 we join the majority of circuits to have considered this issue. *See Guardia*, 135 F.3d at 1331; *United States v. Loughry*, 660 F.3d 965, 969-70 (7th Cir. 2011); *Johnson v. Elk Lake Sch. Dist.*, 283 F.3d 138, 155-56 (3d Cir. 2000); *but see United States v. Withorn*, 204 F.3d 790, 794 (8th Cir. 2000) (district courts should apply Rule 403 to evidence of prior acts of child molestation with deference so as to allow Rule 414 to have its intended effect). The Fourth Circuit's position is possibly unclear: in *United States v. Stamper*, the court cited approvingly to the decision in *Guardia* but also suggested that the Court should review Rule 414 evidence with the benefit of a presumption in favor of admissibility. 106 F. App'x 833, 835 (4th Cir. 2004). To the extent the Fourth Circuit has adopted a more deferential standard of review, we respectfully disagree for the reasons stated above.

beyond the testimonies already offered at trial.'" *United States v. LeMay*, 260 F.3d 1018, 1028 (9th Cir. 2001) (quoting *Guardia*, 135 F.3d at 1331). The district court should also consider the potential for unfair prejudice, including the possibility that prior act evidence will lead the jury to convict out of passion or bias or because they believe the defendant is a bad person deserving of punishment – a particular risk with this sort of evidence.[11] *See Rogers*, 587 F.3d at 823.

The District Court's decision to admit Spoor's prior conviction was consistent with these principles. In arguing to the contrary, Spoor proceeds from the incorrect premise that his sexual attraction to minor boys was irrelevant to the charges against him. As to the production counts, evidence that Spoor had, relatively recently, abused boys who were similar in age to the boys in the videos was relevant to show his attraction to children, thus providing evidence of his motive to make pornography. Additionally, that evidence was relevant to the sixth *Dost* factor, because it tends to show the videos were intended or designed to elicit a sexual response in the viewer. *See United States v. Russell*, 662 F.3d 831, 847 (7th Cir. 2011) ("Prior instances of sexual misconduct with a child victim . . . may establish a defendant's sexual interest in children and thereby serve as evidence of the defendant's motive to commit a charged offense involving the sexual exploitation of children." (quoting *United States v. Sebolt*, 460 F.3d 910, 917 (7th Cir. 2006))). Spoor's sexual interest in children was also relevant to the possession counts. Spoor argued that the hard drives were not his and

[11] In articulating these factors, we do not purport to restrict the district court's analysis of other potentially relevant factors under Rule 403.

that another person with access to the drives had downloaded the child pornography. *See United States v. Emmert*, 825 F.3d 906, 909 (8th Cir. 2016) ("[E]vidence that [the defendant] sexually abused [two girls] is probative of [his] interest in underage girls. . . . In this way, [the defendant]'s prior conduct shows he had a propensity for exploiting young girls and connects him to the pornographic images found on his hard drive."). The fact that Spoor had recently been convicted of molesting children makes it less likely that, by sheer coincidence, he also unwittingly possessed child pornography downloaded by others.

The District Court properly balanced the probative value of the Government's prior act evidence against its potential prejudicial effect. To recap, in advance of trial, the Government moved to admit testimony from three individuals who asserted Spoor had sexually abused them or had taken pictures of them naked when they were children; Spoor's admission that he molested two seven-year-old boys in 2010; and Spoor's 2013 conviction (based on his guilty plea) for Criminal Sexual Act in the First Degree. Of this evidence, the District Court admitted only a sanitized version of Spoor's 2013 conviction and excluded Spoor's highly inculpatory statements and the testimony of Spoor's alleged victims. In so doing, the District Court excluded potentially cumulative evidence of the same prior bad acts and limited the potential for graphic and potentially inflammatory testimony from Spoor's alleged victims. The District Court's ruling also limited the potential for a trial within a trial regarding Spoor's prior bad conduct.

In short, the District Court did not abuse its discretion in admitting the challenged evidence.

C.

Last, we come to Spoor's argument that his sentence of 360 months of incarceration and fifteen years of supervised release is substantively unreasonable. Specifically, Spoor contends that his sentence, in his words a "*de facto* life sentence," is greater than necessary to accomplish the goals of sentencing under 18 U.S.C. § 3553(a) and fails to account for his advanced age and differences in "degrees of repugnance" among child pornography crimes. Had the District Court sentenced Spoor to the statutory minimum of 15 years of imprisonment, he would be approximately 70 at the time of his release, at which point, he contends, he is unlikely to recidivate. And Spoor contends that the videos he produced, although admittedly unacceptable, are less deserving of punishment than the sort of child pornography that involves minors engaged in sexual acts or lewd posing.

We review the substantive reasonableness of a sentence under an abuse-of-discretion standard. *Gall v. United States*, 552 U.S. 38, 46 (2007). A defendant challenging the substantive reasonableness of his or her sentence bears a "heavy burden because our review of a sentence for substantive reasonableness is particularly deferential." *See United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012). We have previously explained that a sentence is substantively unreasonable only if the district court's decision "cannot be located within the range of permissible decisions." *United States v Rigas*, 583 F.3d 108, 124 (2d Cir. 2009) (quoting *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc)) (internal quotation marks and additional citation

omitted). We may consider "whether a factor relied on by a sentencing court can bear the weight assigned to it . . . under the totality of circumstances in the case," *Cavera*, 550 F.3d at 191, but we will reverse the district court's decision only if the sentence imposed amounts to a "manifest injustice or shock[s] the conscience," *Rigas*, 583 F.3d at 124 (internal quotation marks omitted); *see also id.* at 123 (A sentence is substantively unreasonable if it "damage[s] the administration of justice because [it is] shockingly high, shockingly low, or otherwise unsupportable as a matter of law.").

This is not the rare case in which we find the sentence to be unreasonable. We have never decided that a sentence within the Guidelines is presumptively reasonable, but the fact that the District Court sentenced Spoor within the Guidelines – at the bottom of the range, in fact – is relevant to our analysis. *See Gall*, 552 U.S. at 51 (noting that the appellate court should consider, among other things, "the extent of any variance from the Guidelines range"). In rejecting Spoor's argument for a below-Guidelines sentence, the District Court explained that it did not view the videos as being appreciably less deserving of punishment than other examples of child pornography. The District Court went on to explain that it found Spoor's conduct to be a "manifestation of continuing sexual exploitation," SPA-38, including of his own child, and determined that a sentence of 360 months was necessary because "anything less might subject children, even perhaps at your advanced age, to some danger." SPA-40.

The District Court's analysis was not error. The record supports that court's view that a sentence of 360 months of incarceration was

necessary in light of the "nature and circumstances of the offense," and to "protect the public from further crimes." 18 U.S.C. § 3553(a).[12] In addition to the production and possession offenses that were the basis for Spoor's convictions, the record before the District Court included Spoor's 2013 state conviction, his confession that he had molested two other seven-year old boys, and the allegations of several other individuals that Spoor had sexually assaulted them when they were children – a pattern of abuse that amply supports the District Court's desire to incapacitate Spoor. The District Court's sentence was calibrated so that Spoor will not be released until he is approximately 80, an age at which the District Court believed he is unlikely to reoffend. As such, this case is unlike *United States v. Dorvee*, cited by Spoor, in which the district court extrapolated a likelihood the defendant would assault children in the future that was unsupported by the record and despite the defendant's lack of criminal history.[13]

[12] We have previously noted that the line between "substantive" and "procedural" reasonableness is not always a bright one. This case demonstrates the point. The District Court did not explain why it rejected Spoor's argument that the videos he produced were less deserving of punishment than many (if not most) examples of child pornography. Nor did it explain why it believed it was necessary to incapacitate Spoor until he was 80 years old rather than 70 years old. Although the District Court's limited explanation of the sentence does not amount to a procedural error, the brevity of the Court's explanation for the sentence imposed makes our review of the substantive reasonableness of the sentence more difficult.

[13] In *Dorvee*, we expressed concern that the child pornography guideline, U.S.S.G. § 2G2.2, does not adequately distinguish between mere possession offenses and relatively more serious crimes, such as distribution and production of child pornography, and tends to wash out differences in criminal history. *See* 616 F.3d at 187. We have similar concerns regarding the application of U.S.S.G. § 4B1.5 to defendants like Spoor. Pursuant to that section, Spoor was placed in criminal

616 F.3d 174, 183-84 (2d Cir. 2010). The District Court also considered the fact that Spoor had familial ties to some of his victims, an abuse of trust that is quite clearly an aggravating factor. Confronted with this record, we cannot say that the District Court placed undue weight on either the need to protect the public or the seriousness of Spoor's conduct.

III. CONCLUSION

In sum, we reject Spoor's challenges to the sufficiency of the evidence; to the District Court's evidentiary rulings; and to the reasonableness of his sentence.

For the foregoing reasons, we **AFFIRM** the District Court's judgment.

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history category V because he had previously been convicted of a "sex offense." Section 4B1.5 reflects a judgment that sex offenders who recidivate are particularly dangerous. But Section 4B1.5 does not require that the defendant's predicate conviction precede the conduct that gave rise to the instant conviction. Thus, while Spoor had been previously convicted of a sex offense and sentenced to five years imprisonment at the time of sentencing in this case, his offense conduct in the federal case occurred before his arrest in the state case. Spoor was not a recidivist, as the rationale underlying Section 4B1.5 appears to assume. Like Section 2G2.2, Section 4B1.5 can lead to draconian sentences which are not always consistent with the goals of sentencing. Careful application of the Guidelines as they relate to sex offenses and independent analysis of the Section 3553(a) factors is necessary to ensure a reasonable sentence that is not greater than necessary to achieve the goals of sentencing. In this particular case, the required increase in criminal history was of no moment, however. Because Spoor's offense level was 42, his Guidelines range would have been 360 months to life months whether he was in criminal history category II or category V.