No. _____

In The Supreme Court of the United States

JONATHON WILLIAM-DURAND NEUHARD,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Sixth Circuit Court of Appeals held that the language "one prior conviction ... under the laws of any State" in the enhancement provision, 18 U.S.C. §2251(e), authorizes a federal court to decide whether an adjudication under the Michigan Holmes Youthful Trainee Act is an eligible "prior conviction," even though Michigan law expressly states such an adjudication is not a conviction.

Accordingly, the first question presented is:

> Whether the federal court of appeals below correctly found that the determination of whether a state adjudication qualifies as a prior conviction under the statutory language of 18 U.S.C. §2251(e), "one prior conviction . . . under the laws of any State," to enhance the punishment for the offense of sexual exploitation of children is a federal question rather than dependent on the law of the state where the adjudication occurred, in the context of the court below holding a prior Michigan adjudication is an eligible enhancement conviction despite state statutory and decisional law expressly stating that specific adjudication is not a conviction.

The Sixth Circuit Court of Appeals held that an evidentiary harpoon injected into Petitioner's trial by an experienced and well trained law enforcement agent, via an unresponsive blurt to the prosecutor's question, to undermine the known defense theory of the case, despite the parties' agreement that such information would not be introduced, did not warrant any curative relief beyond an admonition.

Accordingly, the second question presented is:

> Whether the federal court of appeals below correctly held that the experienced

Homeland Security Investigation Special Agent, who was present throughout the trial proceedings at the prosecution's table, heard the defense theory of the case espoused in the defense opening statement, knew that the parties had agreed not to discuss polygraph examinations during the trial, and blurted out in an unresponsive answer that the three men identified by the defense as potential perpetrators of the charged offenses had offered to take lie detector tests, was entitled to no more curative relief than a jury admonition to remedy the evidentiary harpoon injected into the trial.

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STATEMENT OF RELATED PROCEEDINGS

United States of America v. Jonathon William-Durand Neuhard, No. 17-2422 (6th Cir.), opinion issued and judgment entered May 20, 2019.

United States of America v. Jonathon William-Durand Neuhard, No. 2:15-cr-20425 (E.D. Mich.), original judgment entered November 11, 2017, amended judgment entered April 27, 2018.

OPINION BELOW

The Sixth Circuit Court of Appeals' opinion is unpublished and is reproduced at App. 1-7.

JURISDICTION

The Sixth Circuit Court of Appeals rendered its opinion on May 20, 2019. No rehearing petition was filed. On August 12, 2019, Justice Sotomayor extended the time for filing a petition for certiorari to and including October 17, 2019. (Application 19A157.) This Court has jurisdiction under 28 U.S.C. §1254(1).

The federal district court had jurisdiction of this case pursuant to 18 U.S.C. §3231 because Defendant was charged with violations of 18 U.S.C. §2251 and §2252A. The Court of Appeals had jurisdiction of this appeal pursuant to 28 U.S.C. §1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall ... be deprived of life, liberty, or property, without due process of law ...." U.S. Constitution, Amend. V.

18 U.S. C. §2251(e) provides in pertinent part:

"Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward ... such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years ...." The entirety of 18 U.S.C. §2251(e) is reproduced in App. 8.

Michigan Compiled Law 762.14(2) provides in pertinent part:

"An assignment of an individual to the status of youthful trainee as provided in this chapter is not a conviction for a crime ... ." The entirety of Michigan Compiled Law 762.14 is reproduced in App. 9.

STATEMENT OF THE CASE

Jonathon Neuhard, Petitioner, was convicted for production, receipt and possession of child pornography, pursuant to 18 U.S.C. §2251(a) (count one), 18 U.S.C. §2252A(2)(count two) and 18 U.S.C. §2252A(5)(B)(count three). He was sentenced to 420 months on count one, 240 months on count two, and 120 months on count three to run concurrently with each other for a total sentence of 35 years. Judgement, App. 10-17.

Petitioner"s indictment charged him with production of child pornography relating to images of his nine-year-old niece (MV-1) in four sexually explicit photographs (count one), receipt of child pornography for two videos downloaded onto his laptop (count two), and possession of the videos and the four photos (count three).

The investigation into Petitioner began when his niece, MV-1, then nine years old, told her

grandmother and mother that Petitioner had sexually assaulted her. The mother reported this to the local police. A state investigation ensured, including a search of Petitioner's home. During the search, a tablet computer and Petitioner's cell phone and laptop were seized.

A forensic examination of the tablet detected a memory card with four deleted images of child pornography. Each of the images were embedded with data indicating GPS coordinates and that the images had been recorded with a cell phone similar to the one seized at Petitioner's home. The state's investigation was referred to Homeland Security Investigations. A criminal complaint was issued against Petitioner and the three count indictment issued on July 9, 2015.

MV-1 testified that Petitioner touched her at least three times. She testified that on one occasion Petitioner showed her a pornographic video, telling her, "this is what you have to do to me," and molested her. On another occasion, according to MV-1, Petitioner took pictures of her genitals and bare chest with his cell phone. She was seven or eight years old when these incidents were said to take place. Her sister, MV-2, testified to one assault that took place when she was six.

At his arraignment, Petitioner was told the minimum penalty for count one was fifteen years and the maximum was thirty years. The Acknowledgment of Indictment prepared by the Government reiterated the same penalties. [R15, Acknowledgment, Pg ID 36.] The PSR listed under the category "Adult Criminal Convictions" Petitioner's 2006 adjudication for Criminal Sexual Conduct - 3rd degree under Michigan's Holmes Youthful Trainee Act (YTA) and his completion of probation and discharge in 2008. [PSR, ¶ 65.] The PSR scored this YTA adjudication at 0 and Petitioner's criminal history points as 0. [*Id.*, ¶¶ 65-66.] The PSR stated Petitioner's mandatory minimum sentence was twenty-five years and his maximum was fifty years. [PSR, ¶ 93.] This increase in the sentencing range was based on Petitioner's YTA adjudication being a "prior

conviction ... under the laws of any State" that enhanced the penalties in 18 U.S.C. §2251(e).

Petitioner objected to the application of the statutory enhancement provision as a violation of Due Process and his rights under Michigan law. [PSR, pg. A-3; R154, TR 11/16, Sentence, Pg ID 1502-1504, 1508.] The district court relied on case law, *i.e.*, *United States v. Adams*, 622 F.3d 608, 61–613 (6th Cir. 2010), to reject Petitioner's objections and sentenced Petitioner to thirty-five years under the "one prior conviction ... under the laws of any State" enhancement provision of 18 U.S.C. §2251(e), even though under Michigan law a YTA adjudication is not a "conviction." Michigan Compiled Law ("MCL") 762.11; 762.14(1), (2).

During Petitioner's jury trial, Homeland Security Investigations (HSI) Special Agent Lisa Keith testified she investigated child pornography crimes. [R126, TR 3/16/17, L. Keith, Pg ID 963-964.] Sanchez Fernandez, Rustam Razzaq and Forest McNiff were three of the men who during 2012-2015 lived at or frequented the address where the charged offenses occurred. [*Id.*, Pg ID 970-980.] SA Keith interviewed them and testified their demeanor was "cooperative, helpful, offered to take lie detector tests . . . ." [R126, TR 3/16/17, L. Keith,, Pg ID 981.]

Petitioner immediately asked for a sidebar to object to the testimony about the offer to take a polygraph. [*Id.*] Petitioner then asked to introduce testimony from Detective Zupic that Petitioner had also offered to take a polygraph. The Government objected and argued the only remedy was to strike the testimony and instruct the jury not to consider it. The trial court agreed only to strike the testimony and instruct the jury to disregard the reference to the three men's offers to take lie detector tests. [*Id.*, Pg ID 982-984.] The trial court admonished the jury to disregard the testimony about the men offering to take polygraphs and not consider it. [*Id.*, Pg ID 984-985.]

After the Government rested, Petitioner moved for a new trial arguing SA Keith's testimony

about the three men's offers to take lie detector tests violated his agreement with the Government that there would be no testimony about Detective Zupic urging Petitioner to take a polygraph during Petitioner's uncounseled interview or about Petitioner's offer to take a polygraph. [*Id.*, Pg ID 1019.] Petitioner argued that his defense – "everything I have done from the start" – was to identify other people who could have committed the crimes charged against Petitioner. Defense counsel argued SA Keith's testimony about the other men offering to take polygraphs was "very damaging" to the defense and was now the "elephant in the room" that could not be cured by a jury instruction but required a new trial. [*Id.*, Pg ID 1019-1020).]

The Government argued that Petitioner had offered to take a polygraph but that offer was later withdrawn by Petitioner's attorney, the erroneous testimony was unintentional and the way to correct the error was to strike the testimony and instruct the jury as the trial court had already done. [*Id.*, Pg ID 1020-1021.] The trial court initially denied the motion for a new trial without prejudice. [*Id.*, Pg ID 1023-1024.]

Once the trial court denied Petitioner's new trial motion, Petitioner returned to his earlier request. "[I]f the Court is not going to grant the motion for a new trial, then, and I'm not saying this would be sufficient, but ... if the Court denies my motion for a new trial, ...then I would ask the Court to allow me ... to put Detective Zupic back on the stand just to ask him ... if my client offered to take a polygraph, and that's it. I think we should balance the equation." [*Id.*, Pg ID 1022-1023.] After further colloquy with the parties, the court stated, "... no. I'm just going to deny it. I'm just going to deny it." [*Id.*, Pg ID 1025.]

On appeal, the court below held that that Petitioner's "YTA guilty plea is a 'prior conviction' for the purposes of § 2251(e)," "[t]he district court correctly calculated a statutory sentencing range

of 25 to 50 years, and the 35-year sentence does not exceed the statutory maximum." *U. S. v. Neuhard*, App. 6.

With regard to Agent Keith's unresponsive blurt of the inadmissible information that the three potential suspects had offered to take lie detector tests, the court below held "the district court was within its discretion to remedy that error by issuing a limiting instruction, which we presume the jury followed." *Neuhard*, App. 4.

The court below affirmed "the judgment of conviction and sentence, and the amended judgment." *Neuhard*, App. 6.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Holding That the Words, "One Prior Conviction ... Under the Laws of Any State," in the Enhancement Provision, 18 U.S.C. §2251(e), Indicate Congress's Intention That Federal Courts Rather Than the State Laws Governing the Adjudication Should Determine Whether the State Disposition Qualifies as an Enhancing "Conviction," Raises Important Unresolved Questions of Statutory Construction, Due Process, Integrity of State Proceedings, Comity and Federalism That This Court Should Address and Resolve.

Petitioner was convicted in count 1 of a violation of 18 U.S.C. §2251, which provides in pertinent part:

> (e)Any individual who violates ... this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction ... under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor ... such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years ....

18 U.S.C. §2251(e); App. 8.

In 2006, when Petitioner was seventeen, he pled guilty to a third-degree criminal sexual conduct, pursuant to Michigan's Holmes Youthful Trainee Act ("YTA"), Michigan Compiled Law ("MCL") 762.11-16. On the basis of this YTA adjudication being treated as " one prior conviction,"

the district court found the sentencing range to be between 25 and 50 years and sentenced Petitioner to 35 years of imprisonment.

Michigan's YTA states, "if an individual pleads guilty to a criminal offense, committed on or after the individual's seventeenth birthday but before his or her twenty-fourth birthday," the sentencing court "may, *without entering a judgment of conviction* and with the consent of that individual, consider and assign that individual to the status of youthful trainee." MCL 762.11(1); (emphasis added). If the youthful trainee status is not terminated or revoked, "upon final release of the individual from the status as youthful trainee, the court shall discharge the individual and dismiss the proceedings." *Id.*, 762.14(1); App. 9. "An assignment of an individual to the status of youthful trainee as provided in this chapter *is not a conviction for a crime*, and the individual assigned to the status of youthful trainee shall not suffer a civil disability or a loss of right or privilege following his or her release from that status because of his or her assignment as a youthful trainee." MCL 769.14(2); (emphasis added).

As the Michigan Supreme Court has emphasized, YTA contains an "express promise that upon successful completion of his youthful training, he [the participant] would not have a conviction on his record." *People v. Temelkoski*, 905 N.W. 2d 593, 594 (Mich. 2018).

The district court relied on the decision in *United States v. Adams*, 622 F.3d 608, 610-613 (6th Cir. 2010), to reject Petitioner's objections and sentenced Petitioner to 35 years, five years beyond the maximum sentence if the YTA adjudication is not a "prior conviction" for enhancement purposes under 18 U.S.C. §2251(e).

On appeal, the court below initially concluded that "as a general rule, federal law controls the question of whether a state adjudication is a 'conviction' for purposes of a federal statute." *U.*

S. v. Neuhard, App. 5, citing *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 111-112 (1983) ("Whether one has been 'convicted' within the language of the gun control statutes is necessarily . . . a question of federal, not state, law, despite the fact that the predicate offense and its punishment are defined by the law of the State."). The court below did acknowledge that "Congress could override this default rule with 'a plain indication to the contrary[.]'" *Neuhard*, App. 5, citing *Dickerson*, *supra*, at 119.

Nevertheless, the court below disregarded the phrase "one prior conviction ... under the laws of any State" by concluding that, "[i]f Congress would have wanted to override *Dickerson*'s default rule and have state law determine what counts as a conviction, it would have said so more explicitly." *Neuhard*, App. 5. By the court below's analysis, Congress apparently inserted the words "under the laws of any State" to modify "one prior conviction" for no reason and not as a legislative directive. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). This canon would apply to both "conviction" and "under the laws of any State." It is difficult to believe that Congress added "under the laws of any State" to modify "one prior conviction" as mere surplusage. Unlike the statutory language in *Jones v. United States*, 526 U.S. 227, 234 (1999), "[t]he text alone" in this statute does "justify" a "confident inference" that the enhancing conviction must be a conviction under the law of the state where the disposition was adjudicated. Contrary to the analysis of the court below, "under the laws of any State" is a plain indication that whether a state adjudication is a conviction for enhancement purposes under this statute is dependent on state law and is not a federal question.

An analysis of the *Dickerson* default rule demonstrates its inapplicability to 18 U.S.C.

§2251(e). The gun control statutes imposed disabilities upon "any person who has been convicted ...of a crime punishable by imprisonment for a term exceeding one year." *Dickerson*, *supra*, 105-106. Unlike 18 U.S.C. §2251(e), the gun control statutes contained no specific reference to a "prior conviction ... under the laws of any State" or any comparable modifying or limiting words. The modifier "under the laws of any State" limits the scope of "prior conviction" and requires the determination of whether the adjudication in question was a conviction to be made on the basis of state law, not federal law.

In interpreting the gun control statutes, this Court noted that ""[i]n the absence of a plain indication to the contrary, . . . it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law."" *Dickerson*, *supra*, at 119, citing *NLRB v. Natural Gas Utility Dist.*, 402 U. S. 600, 603 (1971), quoting *NLRB v. Randolph Electric Membership Corp.*, 343 F. 2d 60, 62-63 (4th Cir. 1965). "This is because the application of federal legislation is nationwide and at times the federal program would be impaired if state law were to control." *Dickerson, supra*, 119-120, citing *Jerome v. United States*, 318 U. S. 101, 104 (1943). This Court noted that "[t]he legislative history reveals that Congress believed a uniform national program was necessary to assist in curbing the illegal use of firearms." *Dickerson*, 120.

Sentencing in federal court, however, is not a "uniform national program," but rather a structured approach to provide the appropriate sentence for a convicted offender. "Federal sentencing law requires the district judge in every case to impose 'a sentence sufficient, but not greater than necessary, to comply with' the purposes of federal sentencing, in light of the Guidelines and other § 3553(a) factors." *Freeman v. United States*, 131 S. Ct. 2685, 2692 (2011), citing 18 U.S.C. § 3553(a). In this context, unlike the gun control statutes, it is understandable that Congress

in enacting the punishment provision of 18 U.S.C. §2251(e) would want the enhancement by a prior conviction to be determined by the law of the jurisdiction in which the prior adjudication occurred rather than as a question of federal law.

By requiring that state law determine whether an adjudication is a "prior conviction" for enhancement purposes, Congress undoubtedly recognized that an individual may have elected to proceed under a State law disposition, such as Michigan's YTA, because, if properly completed, the individual would have no criminal conviction for any purpose, whether in state or federal court, including enhancement under 18 U.S.C. §2251(e). To do otherwise would have been an effort by Congress to undermine or violate the guarantees provided by various State jurisdictions to induce charged persons to resolve their cases without fear of a criminal conviction by electing to enter a diversion program.

"Although the analogy may not hold in all respects, plea bargains are essentially contracts." *Puckett v. United States*, 556 U.S. 129, 129 S.Ct. 1423, 1430 (2009). This is equally true of diversion agreements in criminal courts. Michigan contracted with Petitioner that should he complete the YTA, he would have no conviction of any kind and certainly not a conviction for third-degree criminal sexual conduct. The court below's interpretation of Michigan's YTA adjudication for purposes of an 18 U.S.C. §2251(e) enhancement effectively tears up Michigan's contract with Petitioner that promised no conviction would result from his successful completion of the YTA program. As the Michigan Supreme Court has explained, "there can be little doubt that the possibility of a HYTA discharge was 'one of the principal benefits sought by defendant[] [in] deciding whether to [plead guilty] or instead to proceed to trial.'" *People v. Temelkoski*, *supra*, 593, quoting *INS v. St Cyr*, 533 U.S. 289, 323 (2001).

The decision of Congress to modify the enhancing "one prior conviction" with the limitation "under the laws of any State" reflects "the respect that federal courts owe the States" under the principles of federalism and comity. *Coleman v. Thompson*, 501 U.S. 722, 726 (1991). Comity is "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971). In another context, this Court has recognized "the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts," including the need to be "careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). To allow a federal court to reject out of hand the explicit determination by Michigan statutory and decisional law that Petitioner's 2006 YTA adjudication was not a "conviction" flies in the face of the principles of federalism and comity.

It is unlikely that Congress intended that 18 U.S.C. §2251(e) constitute such a federal intrusion into a state criminal court adjudication to violate the integrity of that disposition, hence the modifying limitation, a "prior conviction ... under the laws of any State." In Petitioner's case the YTA's guarantee of no conviction "may have been the only motivation for his decision to waive his right to a trial and plead guilty." *Temelkoski*, *supra*, 594. Yet the court below's holding on this question violates comity by rendering Michigan's promise of no conviction to Petitioner a nullity in the application of the federal enhancement provision, 18 U.S.C. §2251(e).

By ruling that Petitioner's YTA adjudication is a conviction for purposes of enhancement,

the court below has decided an important federal question in a way that conflicts with the Michigan Supreme Court's decision in *Temelkoski* that a YTA adjudication is not a conviction for any purpose. SCR 10(a).

The court below's reliance on its own 2010 precedent, *United States v. Adams*, was misplaced to the prejudice of Petitioner. The court below noted that the *Adams* court "had previously held that a YTA guilty plea 'qualifies as a prior conviction for federal sentencing purposes[.]'" *Neuhard*, App. 5. The *Adams* case involved the accused having "his statutory minimum sentence ... increased from five to ten years" under the enhancement provision of 21 U.S.C. §841(b)(1)(B) "based upon the acknowledgment that [Adams] had previously pleaded guilty in a Michigan court to the felony of attempting to possess less than 50 grams of a controlled substance" under the YTA. *Adams*, 609-610. The enhancement language of 21 U.S.C. §841(b)(1)(B) states "if any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years." Unlike the enhancement provision in Petitioner's case, 21 U.S.C. §841(b)(1)(B) contains no modifying or limiting language, such as "under the laws of any State." Congress apparently voiced a different intention with regard to resorting to the law of the State governing the "prior conviction" in 18 U.S.C. §2251(e), the enhancement provision in Petitioner's case, than in the drug enhancement provision in 21 U.S.C. §841(b)(1)(B). Additionally, finality is an explicit key ingredient of the enhancement provision of 21 U.S.C. §841(b)(1)(B).

As a result, the court below's use of the *Adams*' decision as controlling precedent when parsing the enhancement provision in Petitioner's case was akin to "compar[ing] apples to oranges."

Fulton Corp. v. Faulkner, 516 U.S. 325, 337 (1996).

Additionally, in *Adams* the appellant, claiming ineffective assistance of counsel, did not challenge that his adjudication under YTA was not a conviction under Michigan law, but only that it was not final. As the *Adams* court stated, "[w]hether a prior conviction is 'final' pursuant to 21 U.S.C. § 841(b)(1)(B) is a question of federal law." *Adams*, 612, citing *United States v. Miller*, 434 F.3d 820, 823-824 (6th Cir.2006). Finality is an explicit key ingredient of the enhancement provision of 21 U.S.C. §841(b)(1)(B). Petitioner claimed that his YTA adjudication was not a conviction under Michigan law, not that it lacked finality.

The court below noted that "[t]he D.C. Circuit has held that a Michigan YTA guilty plea triggers a similar sentencing enhancement in another federal child-pornography statute, 18 U.S.C. § 2252A(b)(2)." *Neuhard*, App. 6 n.4, citing *United States v. Bruns*, 641 F.3d 555, 558 (D.C. Cir. 2011). The court below acknowledged that "[t]he *Bruns* court conducted its own analysis of Michigan law, but we do not need to reach these issues in light of *Adams*." *Id.*

Importantly, the *Bruns* court conducted that "analysis of Michigan law" because "[t]he question in this appeal is whether Aaron Bruns had such a 'prior conviction' under the laws of the State of Michigan." *Bruns, supra*, 556. Acknowledging that Bruns had argued that "[t]he reference to state law in 18 U.S.C. § 2252A(b)(2) ... signifies that Congress intended state law to determine whether a person has a prior conviction," the *Bruns* court "assume[d], without deciding, that Bruns [wa]s correct." *Bruns*, 557.

In resolving whether a Michigan's YTA adjudication is "a prior conviction ... under the laws of the States" is a question of federal law or Michigan law, the court below and the *Bruns* court used entirely different readings of the key phrase. The *Bruns* decision did not support the court below's

determination that Petitioner's YTA adjudication was a prior conviction for enhancement purpose under federal law rather than state law. As a result, the Sixth Circuit and the D.C. Circuit, although both concluded that a YTA adjudication is a conviction for federal sentencing purposes, have disagreed upon how the language "one prior conviction ... under the laws of any State" should be determined in federal enhancement provisions.

The court below's decision that the interpretation of "one prior conviction... under the laws of any State" is a federal question conflicts with the *Bruns* court's opinion that it is a state law question and justifies a grant of certiorari on this important matter. SCR 10(a).

As the court below emphasized, in *Adams* "we noted that 'Michigan's own sentencing scheme supports this view,' as the state sentencing guidelines count YTA adjudications in a defendant's criminal-history score." *Neuhard*, App. 6, citing *Adams*, *supra*, 612,citing MCL 777.50(4)(a). That Michigan guideline provision states "[i]n scoring prior record variables ... "[a]s used in this part ... '[c]onviction' includes ... [a]ssignment to youthful trainee status ...." MCL 777.50(4)(a)(i). The *Bruns* court, following the lead of the *Adams* court, also placed great weight on that statutory provision to the exclusion of all other Michigan statutes and case law, neglecting specifically MCL 777.43(2)(a). The *Bruns* court "believe[d] this provision, dealing directly with sentencing in light of prior offenses, is the controlling state-law definition of conviction, rather than the more general provision of the Holmes Act." *Bruns*, 557.

Yet neither the court below nor the opinions in *Adams* and *Bruns* factored in MCL 777.43(2)(a), which states "[f]or determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." This provision explicitly nullifies the conclusion that the limited

definition of "conviction" in MCL 777.50(4)(a)(I) "is the controlling state-law definition of conviction, rather than the more general provision of the Holmes Act" and Michigan decisional law. Here again the court below's rejection of the controlling Michigan law on this question offends the principle of comity.

Relying on the rubric that "federal law controls the question of whether a state adjudication is a 'conviction' for purposes of a federal statute" rather than the relevant state law, the court below held the "one prior conviction ... under the laws of any State"" in the enhancement provision of 18 U.S.C. §2251(e) is to be determined as a matter of federal law without resort to the law of the state where the alleged conviction occurred.

The court below has decided an important question of federal law that has not been, but should be, settled by this Court, which justifies this Court granting certiorari on this question. SCR 10©. The importance of this question of federal law is magnified by the spread and continued use of diversion programs throughout this country that entice individuals with the promise of no conviction if they forego a trial to determine their guilt or innocence.

According to the court below, "[t]he argument heading and a few sentences in [Petitioner's] opening brief frame this as a due-process claim, but it appears to actually be a statutory-construction argument." *Neuhard*, App. 5 n.3. However, the court below's refusal to attribute any significance to the words "under the laws of any State" in the enhancement provision does solidify the federal due process aspects of the claim.

"'The prohibition of vagueness in criminal statutes' ... is an 'essential' of due process, required by both 'ordinary notions of fair play and the settled rules of law.'" *Sessions v. Dimaya*, 138 S.Ct. 1204, 1212 (2018) (plurality opinion) (quoting *Johnson v. United States*, 135 S.Ct. 2551,

2557 (2015)). "The void-for-vagueness doctrine ... guarantees that ordinary people have 'fair notice' of the conduct a statute proscribes." *Sessions*, *supra*, 1212. "And the doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges." *Id.* This Court's "doctrine prohibiting the enforcement of vague laws rests on the twin constitutional pillars of due process and separation of powers." *United States v. Davis*, 139 S. Ct. 2319 (2019). "Vague laws contravene the 'first essential of due process of law' that statutes must give people 'of common intelligence' fair notice of what the law demands of them." *Id.*

Assuming *arguendo* the language "one prior conviction ... under the laws of any State" does not require the enhancement to be predicated on a conviction under the state law where the adjudication occurred, as the court below found, what notice was Petitioner given that the punishment for his federal offense would be enhanced by his Michigan "no conviction" conviction, in view of Congress using the words "one prior conviction ... under the laws of any State"?

Petitioner was convicted of three counts and sentenced to 35 years on count one, 20 years on count two and 10 years on count three, all counts to run concurrent with one another for a total sentence of 35 years. Without the enhancement provision in count one, 18 U.S.C. §2251(e), the maximum sentence Petitioner could receive at a resentencing on count one would be 30 years, but as little as 15 years, as opposed to the 35 he did receive on that count.

The court below: (1) has decided an important question of federal law, *i.e.*, whether federal law or state law controls whether a state adjudication is a 'conviction' for purposes of the enhancement provision in 18 U.S.C. §2251(e), which has not been, but should be, settled by this Court; (2) in holding that a Michigan YTA adjudication is a "prior conviction" for enhancement

under 18 U.S.C. §2251(e), has decided an important federal question in a way that conflicts with a 2018 decision of the Michigan Supreme Court; and (3) in holding that the determination of what is a "prior conviction ... under the laws of any State" is a question of federal law, has entered a decision that is in conflict with the D. C. Court of Appeals on the same important matter. SCR 10(a), (c).

This case is a an excellent vehicle for this Court to resolve this important federal question as the issue is framed as a clear cut clash between Michigan's statutory and decisional law position that a YTA adjudication is not a "conviction" and a federal court of appeals disregarding the integrity of Michigan law to decide for enhancement purposes that a YTA adjudication is a "conviction," regardless of express Michigan law. This certiorari petition should be granted.

II. The Decision Below Holding that the Experienced, Well Trained Special Agent, Who was Present Throughout the Trial Proceedings at the Prosecution's Table, Heard the Defense Theory Espoused in the Defense Opening Statement and Knew the Parties had Agreed not to Discuss Polygraph Examinations During Trial, Blurting Out an Unresponsive Answer that the Three Men Identified by the Defense as Potential Perpetrators of the Charged Offenses had Offered to Take Lie Detector Tests Entitled the Defense to no More Curative Relief than a Jury Admonition to Remedy this Evidentiary Harpoon Injected into the Trial Raises an Important Question in the Administration of Justice as to What Measures Courts Should Take to Address This Type of Misconduct to Preserve the Integrity of Jury Trials in Criminal Cases.

Although the terminology "evidentiary harpoon" was never used in the trial court or in the appeal, the unresponsive answer of prosecution witness, HSI Special Agent Lisa Keith, on direct examination that the three men she interviewed as part of her investigation were "cooperative, helpful, *offered to take lie detector tests*" was an obvious "evidentiary harpoon." Before trial, the Government and Petitioner had agreed there would be no mention of polygraphs at trial. Special Agent Keith was the case agent and federal investigator in Petitioner's case; Keith sat at the prosecution's table throughout Petitioner's trial. The prosecutor had an obligation to inform Keith

and every other prosecution witness that no mention of polygraphs could be made while testifying. The prosecutor either informed Keith about the prohibition on any reference to lie detectors when testifying or should have.

Keith blurted out her unresponsive answer, they "offered to take lie detector tests," to the prosecutor's question as to what was "the attitude, the demeanor, how they [these three men] presented to you as a federal investigator asking them questions." [R126; TR 3/16/17; L. Keith, Pg ID 981.] This reference to these men's offers "to take lie detector tests" would appear on its face to be an unresponsive answer calculated to provide the jury with information the parties had agreed would be kept from the jury. Conversely, to the extent Keith's reference to the offers to take lie detector tests is viewed as responsive, then the prosecutor's question was designed to elicit a reference to inadmissible lie detector test offers from Keith, the prosecution witness. Under either scenario, the prosecutor, the Government witness or both working in tandem sought to violate the agreement to preclude any reference to these three men's offers to take lie detector tests and to plant this information in the minds of the jury, contrary to the parties' agreement.

Petitioner immediately asked for a sidebar to object to the testimony about these three men, Sanchez Fernadez, Rustam Razzaq and Forest McNiff, offering to take lie detector tests. [*Id.*, Pg ID 981.] Petitioner then asked to introduce testimony from Detective Zupic that Petitioner had also offered to take a polygraph. The Government objected and argued the only remedy was to strike the testimony and admonish the jury not to consider it. The court denied the defense request to introduce evidence that Petitioner had offered to take a polygraph exam and instead agreed to strike the testimony and admonish the jury. [*Id.*, Pg ID 982-984.]

The trial judge gave the following admonition:

> Ladies and gentlemen, let me just tell you that the reference here through the witness about other people offering to go take a polygraph is something that should not have come in and so I'm going to order that that be stricken, and so it's something you cannot consider when you discuss the case and deliberate on the case. So that testimony about other people offering to take a polygraph is to be stricken and not considered by you.

[*Id.*, Pg ID 984-985.]

When the Government rested, Petitioner moved for a new trial[1] arguing that SA Keith's testimony about the three men offering to take lie detector tests violated his agreement with the Government that there would be no testimony about Detective Zupic urging Petitioner to take a polygraph during an uncounseled interview or about Petitioner's offer to take a polygraph. [*Id.*, Pg ID 1019.] Defense counsel explained, "It's my understanding that the witness blurted out the information about the polygraph. It was not elicited by the government, but it did come out." [*Id.*] While seemingly exonerating the prosecutor of intentionally eliciting the reference to lie detector tests, defense counsel emphasized that Keith, the experienced special agent, "blurted out" the unresponsive reference to these three men "offering to take lie detector tests."

Defense counsel, in moving for a new trial before beginning Petitioner's case, explained that "[t]he problem is that the import of my cross-examination, my opening statement, the import of everything I have done during the trial was that there were other people living in this house who could have perpetrated the abuse and they could have taken those pictures, but the big thing is they could have taken those pictures, whether they perpetrated the abuse or not, is different, but they could have taken those pictures." [*Id.*] Defense counsel asserted in that context the reference to those

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[1] Moving for a new trial at the conclusion of the prosecution's case-in-chief, obviously before a judgment has been entered, translates as a motion for a mistrial, which was denied. See Federal Rule of Criminal Procedure 33(a) ("Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires").

same three men offering to take lie detector tests is "very damaging and it should not have been" placed before the jury. [*Id.*, 1019-1021.] Defense counsel, challenging the curative value of the admonition, emphasized "there's no way that an instruction could make them [the jury] forget that they hear[d] that .... it's the elephant in the room."[2] [*Id.*, 1020.] Defense counsel also emphasized that there is "no evidence [as to] what happened with these people that she said offered to take a polygraph," no information whether any or all of them actually took a polygraph examination and no information as to the results of any exams, if taken. [*Id.*, 1022.] This means SA Keith presented the jury with this reference to the offers of these three men to take lie detector tests as an exonerating factor, even though none of the three apparently did take a polygraph exam. The trial court denied the motion for a new trial, which was in essence a mistrial motion.

Despite both the pretrial agreement to keep any references to polygraphs out of the trial and the extremely close association of the blurting witness with the prosecution, the trial judge with no evidentiary basis assumed that Agent Keith's blurt was unintentional and would only strike the testimony and admonish the jury to not consider it. [*Id.*, Pg ID 982-984, 1023.]

Interestingly, the wording of the curative admonition twice repeated and emphasized that the testimony was about "other people offering to go take a polygraph" and "other people offering to take a polygraph." [*Id.*, Pg ID 984-985.] However, the court below in setting out the admonition in its opinion sanitized it to some degree by omitting one of the two references to the inadmissible evidence of "other people offering to take a polygraph." *Neuhard*, App. 4.

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[2] *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury, [citation omitted,] all practicing lawyers know to be unmitigated fiction."), quoted in, *e.g.*, *Bruton v. United States*, 391 U.S. 123, 129 (1968), and *Jackson v. Denno*, 378 U.S. 368, 388 n.15 (1964).

Obviously troubled by the ineffectiveness of a curative admonition under these circumstances, Petitioner's counsel sought to purge the unresponsive and improper reference to the offers to take lie detector tests and the admonition by requesting at the close of the prosecution's case in chief that Petitioner be granted a new trial. The trial court denied the defense request and provided no further curative relief.

Petitioner's defense theory, as explained in counsel's opening statement, was to elicit testimony that these three men: (1) had lived in the house of MV's grandmother, where the offenses allegedly occurred; (2) had frequent contact with the MVs; (3) had access to and use of Petitioner's computer, phone, tablet and SD card; and (4) could have generated the images of MV-1. [R125; TR 3/15/17, Pg ID 822-823.] In this context, Keith's unresponsive blurt about these same three men all offering to take lie detector tests was extremely prejudicial to Petitioner's defense.[3]

The prejudice is further amplified by the credentials of the blurting witness that the jury heard prior to her unresponsive reference to the three men's offers to take lie detector tests. In introducing Agent Keith to the jury, the prosecutor identified her as an experienced investigator and participant in the Government's prosecution of child exploitation and pornography cases, noted her investigation of "nearly a hundred" child exploitation or child pornography cases, and elicited Keith's background, education, special training, and participation in a multi-jurisdictional task force. [R126; TR 3/16/17, Pg ID 963-981.] The jury would be hard pressed to disregard this reference to these

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[3] As the court below recognized, Sixth Circuit case law recognizes that "evidence of a party's willingness to submit to a polygraph" contains the potential "hazard of unfair prejudice and jury confusion." *Neuhard*, App. 3, citing *United States v. Harris*, 9 F.3d 493, 501-502 (6th Cir. 1993). The court below was willing to use that to support the trial court's decision to deny the defense request to inform the jury that Petitioner too had offered to take a polygraph exam, but not in evaluating the unfair prejudice to the defense generated by Agent Keith's blurt.

three men's offers to take lie detector tests when stated under oath by such an experienced and accomplished law enforcement officer, even after the judge's admonition.

Keith's particular credentials must be factored into the equation when evaluating how much credence the jury would give her unsolicited reference to these three men's offers to take lie detector tests. The answer is simple. The jury would have trusted Agent Keith's comment about the offers to take lie detector tests as accurate and reliable, making it extremely difficult for the jurors to disregard the bolstering of the innocence of these three men and the undermining of the defense theory of the case.

In view of Keith's credentials, the jury would have taken her positive reference to these men's offers to take lie detector tests as an endorsement not only of the validity of polygraph exams to accurately determine truth and falsity, but also of these men's innocence, as the prosecution had declined to prosecute any of them, generating an inference of Petitioner's guilt as he must have failed his polygraph since he is being prosecuted.

SA Keith sat at the prosecution's table during defense counsel's opening statement and heard defense counsel reveal his defense theory that these three men each had the wherewithal to commit some or all of these crimes. This could easily have provided Keith with the motivation or incentive to undermine the defense theory by blurting out unresponsively all three of these men offered to take lie detector tests.

Once the trial court denied Petitioner's misnamed mistrial motion, Petitioner returned to his earlier request. "[I]f the Court is not going to grant the motion for a new trial, then, and I'm not saying this would be sufficient, but ... if the Court denies my motion for a new trial, ...then I would ask the Court to allow me ... to put Detective Zupic back on the stand just to ask him ... if my client

offered to take a polygraph, and that's it. I think we should balance the equation." [R126; TR 3/16/17, Pg ID 1022-1023.] The trial court again denied that request. [*Id.*, Pg ID 1025.]

This problem of law enforcement officers injecting inadmissible evidence into a criminal trial to prejudice the defense has long been well recognized across the country. "The volunteering by police officers of inadmissible testimony prejudicial to the defendant has been condemned time and again by both state and federal courts." *Gregory v. United States*, 369 F.2d 185, 189-90 (D.C. Cir. 1966). In some jurisdictions some courts have acknowledged the "evidentiary harpoon," which is the effort by a law enforcement officer to place clearly inadmissible information before the jury in an attempt to sabotage the defense case and buttress the prosecution's case. "An evidentiary harpoon is the placing of inadmissible evidence before the jury with the deliberate purpose of prejudicing the jurors against the defendant." *Kirby v. State*, 774 N.E.2d 523, 535 (Ind. Ct. App. 2002); *Wright v. State*, 325 P.2d 1089, 1093 (Okl. Cr. 1958). Regardless of the terminology, there is a danger that experienced law enforcement officers when testifying will intentionally blurt out inadmissible prejudicial inadmissible information, despite being warned that such evidence is off limits, prejudicing the jury against the defendant.

Experienced law enforcement officers know it is difficult to "unring the bell." *Sandez v. United States*, 239 F. 2d 239, 248 (9th Cir. 1956). As courts have recognized, "[i]t is better to follow the rules than to try to undo what has been done. Otherwise stated, one 'cannot unring a bell'; 'after the thrust of the saber it is difficult to say forget the wound'; and finally, 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it'." *Dunn v. United States*, 307 F. 2d 883, 886 (5th Cir. 1962). This common knowledge encourages experienced law enforcement witnesses to roll the dice and violate an exclusion order or agreement, when they are confident that the judge will

respond to their introduction of excluded evidence with an admonition, not a mistrial.

"Officers must be aware that an overzealous attitude is, in most instances, detrimental to the prosecution and often results in a retrial of the case at considerable expense to the state." *Wright v. State*, *supra*, 1093. Having been warned by the prosecutor that such evidence is inadmissible, the violation of a pretrial order or agreement by an experienced police officer should generate, as a matter of policy, the granting of a new trial.

Importantly, a claim of error premised on an alleged evidentiary harpoon does not require a claim of intentional misconduct on the part of the prosecutor. For example, the Indiana courts "do not place distinguishing significance upon the fact that the deliberate act was that of the police officer witness rather than that of the prosecution itself." *Perez v. State*, 728 N.E.2d 234, 237 (Ind. Ct. App. 2000). Witness statements that are unresponsive to posed questions can amount to evidentiary harpoons. Certainly inadmissible evidence volunteered by an experienced law enforcement officer, in violation of the parties' agreement, can be an evidentiary harpoon.

The Oklahoma courts have "set out the elements necessary to classify an officer's statement as an evidentiary harpoon: '(1) they are generally made by experienced police officers; (2) they are voluntary statements; (3) they are willfully jabbed rather than inadvertent; (4) they inject information indicating other crimes; (5) they are calculated to prejudice the defendant; and (6) they are prejudicial to the rights of the defendant on trial.'" *Anderson v. State*, 704 P. 2d 499, 501 (Okl. Cr. 1985), quoting *Bruner v. State*, 612 P.2d 1375 (Okl. Cr. 1980). Under Oklahoma's criteria, Keith's reference to these three men having "*offered to take lie detector tests*" was an "evidentiary harpoon," by injecting inadmissible evidence prejudicial to the defense, although not evidence of other crimes, into the minds of the jurors.

The court below acknowledged that "the government conceded that this testimony was inadmissible," but made no mention that Petitioner's mistrial motion on this matter was denied, even though this information was provided in Petitioner's briefing. *Neuhard*, App. 4.

In instances where a prosecution witness, who is presented to the jury as an experienced, well trained and credentialed law enforcement officer, blurts out in an unresponsive answer inadmissible evidence that on its face is detrimental to the defense case, especially where the witness knew or should have known the information to be inadmissible, there should be a rebuttable presumption that the evidentiary harpoon was intentionally injected to harm the defense, placing the burden on the prosecution to demonstrate the blurt was inadvertent, not intentional. In Petitioner's case both the trial court and the court below apparently presumed the seasoned law enforcement agent inadvertently violated the agreement between the parties with regard to references about polygraphs.

Although "[a] jury is presumed to follow its instructions," that presumption can be overcome by other factors. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000), citing *Richardson v. Marsh*, 481 U. S. 200, 211 (1987).

The same factors that support the conclusion that Agent Keith's blurt was not inadvertent also demonstrate why the admonition should not be presumed effective. Agent Keith was presented as an experienced, well trained, credential law enforcement officer, who would be a reliable source for the information regarding the three men offering to take a lie detector test and whose status would increase the importance of her disclosure of those offers to submit to polygraph exams, even though Keith should have been aware that any reference to offers to take lie detector tests would be inadmissible. Agent Keith's disclosure of these three men offering to take lie detector tests would have created the impression on the jurors that since these three men were not charged, Petitioner

must have refused to take a polygraph examination or failed it resulting in him being charged. Agent Keith was not just a prosecution law enforcement officer, she was present throughout the trial, in full view of the jury, sitting next to the prosecutor as his investigative assistant, which would have enhanced her stature as a witness, at least in the jury's eyes.

Denied a mistrial under these circumstances, Petitioner's counsel sought at least the right to present either by a testifying witness or by stipulation that Petitioner had offered to take a polygraph exam. Both the prosecution at trial and the court below placed great emphasis on the fact that Petitioner had later, after being represented by counsel, decided not to submit to such an examination. "The evidence that [Petitioner] offered to take a polygraph ... was misleading, because he later withdrew his offer." *Neuhard*, App. 4. This smacks of hypocrisy as nothing in the record and nothing presented to the jury disclosed that any of these three men ever actually took a lie detector test, passed such a test or even whether any of them retracted the offer to submit to the test. Balancing the equation by allowing the jury to know that, like the three men in the blurt, Petitioner had once offered to take a lie detector test would not have been misleading.

Denied a mistrial at the conclusion of the prosecution's case-in-chief and granted only an admonition that reminded the jury twice of the specific testimony they were to disregard, Petitioner was reduced to requesting that the jury be informed, either by a stipulation or witness testimony, that he, like the three potential perpetrators, at one point had offered to take a lie detector test. Even this was denied Petitioner by both the trial court and the court below.

The evidentiary harpoon remains a significant problem in the administration of both federal and state courts that this Court has not, but should address. To allow trial courts to presume, under the most telling circumstances, that experienced and well trained law enforcement officers blurt out

unresponsive extremely prejudicial information inadvertently rather than intentionally, undermines the integrity of criminal jury trials. To combat these obvious evidentiary harpoons with only a curative instruction is not a sanction, but in reality a reward to the offender's use of the tactic. This case presents a vehicle for this Court to address how federal courts should approach the challenges that evidentiary harpoons create to the goal of just and fair criminal trials.

This Court should grant this petition to address this question.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for certiorari.

Respectfully submitted,

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October 17, 2019

APPENDIX

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APPENDIX A

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

JONATHON WILLIAM-DURAND NEUHARD, Defendant-Appellant.

No. 17-2422.

United States Court of Appeals, Sixth Circuit.

May 20, 2019.

On Appeal from the United States District Court for the Eastern District of Michigan.

BEFORE: BOGGS, KETHLEDGE, and STRANCH, Circuit Judges.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

BOGGS, Circuit Judge.

Two of Jonathon Neuhard's nieces told their mother, and eventually the police, that he had sexually assaulted them. Officers obtained a warrant to search his electronic devices. They discovered child pornography, including photos he had taken and videos he had downloaded. A jury convicted Neuhard of producing, receiving, and possessing child pornography. On appeal, he contests the district court's denial of his motion to suppress the photos and videos found on his electronic devices. He also challenges several aspects of his trial and sentence. Finding all of these arguments unpersuasive, we affirm Neuhard's conviction and sentence.

I. Background

The investigation into Neuhard began when his nieces, whom we will call MV1 (then nine years old) and MV2 (then seven), told their mother that Neuhard had sexually assaulted them. Their mother informed the police.

According to MV1, Neuhard molested her at least three times. One time, he showed her a pornographic video, told her, "this is what you have to do to me," and molested her. Another time, Neuhard took pictures of her genitals and bare chest with his cell phone. MV1 was seven or eight years old at the time of these assaults. Her sister, MV2, reported one assault, which happened when she was six.

Based on the girls' and their mother's statements, the local police obtained a search warrant from an Oakland County, Michigan judge. They found a tablet with a memory card, which contained four photos of Neuhard performing sexual acts on MV1. On Neuhard's laptop, they found two child-pornography videos downloaded from the internet.

A grand jury indicted Neuhard on three counts: producing child pornography (the photos of MV1) and receiving and possessing child pornography (the videos from the internet). *See* 18 U.S.C. §§ 2251(a), 2252A(a)(2), 2252A(a)(5)(B). He moved to suppress the videos and photos, arguing that the police lacked probable cause to search his electronic devices and that the warrant violated the Fourth Amendment's particularity requirement. The district court denied his motion.

Neuhard went to trial, and the jury convicted him on all three counts. The district court sentenced him to 35 years in prison and later ordered him to pay $40,356 in restitution. Neuhard timely appealed his conviction and prison sentence, but he did not file an additional notice of appeal from the subsequent restitution order.

II. Motion to Suppress

We begin with the search of Neuhard's electronic devices. The Fourth Amendment requires that search warrants be based "upon probable cause . . . and particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. Neuhard argues that the warrant here violated both requirements: The police lacked probable cause to

search for child pornography and the warrant was overbroad. We disagree on both grounds, and so we affirm the district court's denial of Neuhard's motion to suppress.

"When reviewing the denial of a motion to suppress, we review the district court's findings of fact for clear error and its conclusions of law de novo, considering the evidence in the light most favorable to the government." *United States v. Richards*, 659 F.3d 527, 536 (6th Cir. 2011).

A. Probable Cause

Neuhard first argues that the affidavit supporting the search warrant did not establish probable cause to search for child pornography. "Considering the totality of the circumstances," *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018), his argument is meritless.

Probable cause exists if the facts, circumstances, and "reasonably trustworthy information" would allow a person "of reasonable caution" to believe that a crime has been committed. *Brinegar v. United States*, 338 U.S. 160, 175 (1949). This is "a practical, nontechnical conception," *ibid.*, and it "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 243-44 n.13 (1983). We give "great deference" to the issuing magistrate's probable-cause determination. *Id.* at 236.

Detective Mark Zupic submitted an affidavit in support of the warrant application. In it, Zupic explained that he had observed forensic interviews of MV1 and MV2. Both girls accused Neuhard of sexually assaulting them. MV1 stated that Neuhard "got on his computer and typed `sex video,'" and showed her a video "of a girl sucking a boy's part . . . neither actors were wearing any clothes and then the boy shoved his part into the girl." R. 34-1 at 119. Neuhard "told her `this is what you have to do to me'" and then molested her. *Ibid.* She also stated that "when she was 7 or 8 years old, on Christmas," Neuhard took pictures of her genitals with his cell phone. *Ibid.*

Neuhard contends that this affidavit failed to establish probable cause to search his electronic devices for child pornography. He is right that standing alone, evidence of child molestation does not establish probable cause to search for child pornography. *United States v. Hodson*, 543 F.3d 286, 292 (6th Cir. 2008). But *Hodson* does not help him. In that case, the affidavit contained evidence of molestation but "no information whatsoever" about child pornography. *Id.* at 289. Here, the affidavit stated that Neuhard both showed MV1 child pornography stored on his computer and produced child pornography using his cell phone.

Neuhard also cites *United States v. Doyle*, 650 F.3d 460 (4th Cir. 2011). *Doyle* is even easier to distinguish. The affidavit in *Doyle* claimed that the defendant had shown someone "pictures of nude children." *Id.* at 464. But during the pre-warrant investigation, "none of the alleged child victims made allegations to law enforcement that they were shown pornographic material. Indeed, there is no indication in the record that the children were even *asked* during the interview process about the presence of child pornography." *Id.* at 473. Neuhard does not argue that Detective Zupic's affidavit misrepresented MV1's statements.

Neuhard's final argument is that when MV1 described the video he showed her, she may have used the words "boy" and "girl" to refer to adults. "But probable cause does not require . . . rul[ing] out a suspect's innocent explanation for suspicious facts." *Wesby*, 138 S. Ct. at 588. The question is whether, "considering all of the surrounding circumstances, including the plausibility of the explanation itself . . . there was a substantial chance of criminal activity." *Ibid.* (cleaned up). Zupic's affidavit easily clears this bar.

B. Particularity

Next, Neuhard argues that the search warrant violated the Fourth Amendment's particularity requirement. We disagree.

"The particularity requirement encompasses two separate concerns—whether the warrant supplies adequate information to guide officers in selecting what items to seize, and whether the category of items specified in the warrant is too broad because it includes articles that should not be seized." *United States v. Evers*, 669 F.3d 645, 651-52 (6th Cir. 2012). Neuhard's arguments relate to the second concern. The warrant allowed the police to seize from Neuhard's house:

> Any and all records or evidence of the crime of child sexual assault/abuse, including but not limited to . . . cell phones, smart phones, tablets, or any other handheld/portable electronic devices, computers . . . video game consoles . . . photographs related to child pornography or the victims . . . external hard drives . . . digital cameras . . . any and all information and/or data stored . . . on computer media or media capable of being read by a computer including, but not limited to, floppy diskettes, fixed hard disk drives, flash drives, CD's or DVD's, secure digital (SD) cards, removable hard disk cartridges, and any other device designed to store computer data, with the intent of all the aforementioned electronics and electronic storage devices that are seized will be analyzed by a forensic examiner.

R. 34-1 at 115. According to Neuhard, the warrant was overbroad.

First, Neuhard argues that the warrant should only have allowed the police to search his cell phone and computer, the devices MV1 mentioned in her forensic interview. But a search warrant is "valid if it is as specific as the circumstances and the nature of the activity under investigation permit." *Guest v. Leis*, 255 F.3d 325, 336 (6th Cir. 2001) (cleaned up). This warrant was as specific as the circumstances permitted. The police knew that Neuhard used his computer and cell phone to view videos and take pictures, but they did not know where he *stored* his child-pornography files. *See Evers*, 669 F.3d at 653.

Next, Neuhard contends that the warrant should have included a date restriction. Presumably, he means that it should have allowed the police only to search for files created around the time of MV1's allegations. But even if the warrant should have included a date restriction, suppression is not the right remedy. When a warrant is overbroad, we "sever the infirm portion . . . from the remainder which passes constitutional muster." *United States v. Blakeney*, 942 F.2d 1001, 1027 (6th Cir. 1991). Neuhard makes no argument that the files the police found fail to match the time period MV1 described.

Finally, Neuhard complains that the warrant did not include a search protocol. But our precedent does not require search protocols in all cases. *Richards*, 659 F.3d at 538-39. Instead, we undertake "a reasonableness analysis on a case-by-case basis." *Id.* at 539. "In general, so long as the computer search is limited to a search for evidence explicitly authorized in the warrant, it is reasonable for the executing officers to open the various types of files" stored on the seized devices "in order to determine whether they contain such evidence." *Id.* at 540 (cleaned up). Neuhard has given us no reason to think this general rule leads to unreasonable results in his case.

For these reasons, the search of Neuhard's electronic devices was reasonable. The warrant complied with the Fourth Amendment's particularity and probable-cause requirements, and the district court rightly denied Neuhard's motion to suppress.

III. Trial

Neuhard also claims that three errors require a retrial. First, he argues, the district court erred when it refused to admit evidence that he offered to take a polygraph test. Second, he claims that the prosecutor's closing argument improperly included facts not in evidence and personal opinions with no basis in the record. Finally, he makes a cumulative-error claim. All three arguments are meritless.

A. Polygraph Testimony

After the police searched Neuhard's house and seized his electronics, he agreed to an uncounseled interview with a detective. During this interview, he offered to submit to a polygraph examination. At trial, Neuhard tried to introduce evidence of this offer, but the district court refused to admit it. The district court did not abuse its discretion.

While polygraph results are usually inadmissible, "in limited circumstances, evidence of a party's willingness to submit to a polygraph may, within the discretion of the trial court, become admissible . . . . The trial court must first determine whether the proffered evidence is relevant. If the court finds that the evidence is relevant, it must then balance the probative value of the evidence against the hazard of unfair prejudice and jury confusion. We review the court's conclusion on this matter for an abuse of discretion." *United States v. Harris*, 9 F.3d 493, 501-02 (6th Cir. 1993) (cleaned up).

The polygraph-evidence dispute began with testimony from a government witness. Case agent Lisa Keith interviewed three other men who had lived in the house where the pornographic photos of MV1 were taken. Neuhard's theory was that one of these other men was responsible for the images. On direct examination, the government asked Keith to describe "[t]he attitude, the demeanor, how they presented" during the interviews. R. 126 at 981. Keith responded that the three men "offered to take lie detector tests[.]" *Ibid.* Defense counsel objected, and the government conceded that this testimony was inadmissible. The district court instructed the jury that "the reference . . . about other people offering to go take a polygraph is something that should not have come in and so I'm going to order that that be stricken, and so it's something you cannot consider when you discuss the case and deliberate on the case." *Id.* at 984-85. Later, defense counsel asked for permission to call the detective who interviewed Neuhard "just to ask him . . . if my client offered to take a polygraph." *Id.* at 1022. The district court denied this request.

The district court did not abuse its discretion. The evidence that Neuhard offered to take a polygraph "was marginally relevant at best," *Harris*, 9 F.3d at 502, and it was misleading, because he later withdrew his offer. Moreover, "[t]he waste of time that would result from the inquiry into this collateral issue, both on cross-examination and on redirect, is a sufficient reason to exclude the evidence." *United States v. Stephens*, 148 F. App'x 385, 389 (6th Cir. 2005). Neuhard argues that the evidence should have been admitted "to balance the evidentiary equation" after Keith's testimony, Reply Br. at 9, but the district court was within its discretion to remedy that error by issuing a limiting instruction, which we presume the jury followed. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000).

B. Closing Argument

The prosecutor's closing argument included remarks about "how those with a sexual interest in children groom, condition, and prey on their victims." R. 127 at 1098. The prosecutor argued that "[w]hen a person has a sexual interest in children, like the defendant here, and he has the access and opportunity to sexually exploit those children, like the defendant here, that person . . . will groom their victims into believing that sex between children and adults is okay. And will show them pornographic videos to normalize this, but also to instruct the child how to perform the sex acts that they will then be forced to do." *Id.* at 1098-99. Neuhard argues that these remarks were improper because there was no expert testimony about grooming. In his view, the prosecutor argued facts not in evidence and expressed a personal opinion with no support in the record. Even assuming the prosecutor's remarks were improper, they were not flagrant, and so they do not require a new trial.

"Whether the government's closing argument constitutes prosecutorial misconduct presents a mixed question of law and fact that we review de novo." *United States v. Emuegbunam*, 268 F.3d 377, 403-04 (6th Cir. 2001). A prosecutor's improper argument warrants a new trial if it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). "We employ a two-step process in reviewing claims of prosecutorial misconduct. First, we determine whether the prosecutor's comments were improper. Second, if the comments were improper, we consider whether they were so flagrant as to warrant reversal." *United States v. Lawrence*, 735 F.3d 385, 431 (6th Cir. 2013).

Even if the prosecutor's comments here were improper,[1] they were not so flagrant as to warrant reversal. Flagrancy "is a pretty high standard." *United States v. Francis*, 170 F.3d 546, 552 (6th Cir. 1999). Neuhard cannot meet it. For one thing, it is hard to see how the prosecutor's comments "tended to mislead the jury or prejudice the defendant[.]" *United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001). Grooming was not at issue in this case. It was not an element of any of the three offenses Neuhard was charged with, and it was irrelevant to his defense theory (which blamed his former roommates for the child pornography on his devices). Moreover, "the evidence against the defendant was strong." *Ibid.*[2] Thus, the prosecutor's closing argument does not warrant reversal, even assuming it was improper.

C. Cumulative Error

Neuhard next makes a cumulative-error claim. Neuhard is entitled to a new trial based on errors that are "harmless" when considered "in isolation" if, "[a]fter examining them together . . . we are left with the distinct impression that the due process was not satisfied[.]" *United States v. Parker*, 997 F.2d 219, 221 (6th Cir. 1993). Neuhard points to three errors: the case agent's testimony that his roommates were willing to take polygraphs, the district court's refusal to admit testimony that he offered to take a polygraph, and the government's closing-argument comments about grooming. Neuhard asserts that "the

cumulative effect was toxic," Appellant Br. at 50, but he does not explain why the combined effect was a denial of due process. In particular, he points to no "connection, reliance, or relation" between the polygraph testimony and the grooming comments. *United States v. Daniel*, 932 F.2d 517, 521 (6th Cir. 1991). His conclusory assertion of cumulative error does not warrant a retrial.

IV. Sentencing

Finally, Neuhard challenges two aspects of his sentence: a statutory enhancement based on a prior conviction, and the restitution the district court ordered him to pay. The first argument is meritless, and he forfeited the second.

A. Statutory Enhancement

In 2006, when Neuhard was 17, he pled guilty to third-degree criminal sexual conduct in state court. He successfully completed a diversion program, so the state court dismissed the proceedings without entering a final judgment of conviction. In sentencing Neuhard in this case, the district court held that his 2006 guilty plea is a "prior conviction" that subjects him to a higher statutory sentencing range. 18 U.S.C. § 2251(e). On appeal, Neuhard argues that the sentencing enhancement is improper because his 2006 guilty plea is not a conviction under Michigan law. Our precedent forecloses this argument.

The jury convicted Neuhard of producing child pornography. *See* 18 U.S.C. § 2251(a). This offense usually carries a sentence of "not less than 15 years nor more than 30 years" in prison. 18 U.S.C. § 2251(e). However, the sentencing range rises to "not less than 25 years nor more than 50 years" if the defendant "has one prior conviction . . . under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography." *Ibid.* The district court applied the higher range and sentenced Neuhard to 35 years—above the statutory maximum absent the prior-conviction enhancement.

Neuhard entered his 2006 guilty plea pursuant to Michigan's Holmes Youthful Trainee Act. Under the YTA, "if an individual pleads guilty to a criminal offense, committed on or after the individual's seventeenth birthday but before his or her twenty-fourth birthday," the sentencing court "may, without entering a judgment of conviction and with the consent of that individual, consider and assign that individual to the status of youthful trainee." Mich. Comp. Laws § 762.11(1). If the defendant complies with certain conditions, "upon final release of the individual from the status as youthful trainee, the court shall discharge the individual and dismiss the proceedings." *Id.* § 762.14(1). The statute specifies that "[a]n assignment of an individual to the status of youthful trainee as provided in this chapter is not a conviction for a crime[.]" *Id.* § 762.14(2).

Neuhard completed two years of probation on youthful-trainee status, so the state court apparently dismissed the proceedings against him without entering a judgment of conviction. He now argues that his YTA guilty plea is not a "prior conviction" under Michigan law, so he is not subject to the 25-to-50-year enhanced sentencing range under § 2251(e), and his 35-year sentence exceeds the correct statutory maximum.[3] "We review de novo the district court's legal conclusion that a prior conviction is a qualifying offense" for a sentencing enhancement. *United States v. McGrattan*, 504 F.3d 608, 610 (6th Cir. 2007).

Neuhard's argument cannot overcome two high hurdles. First, as a general rule, federal law controls the question of whether a state adjudication is a "conviction" for purposes of a federal statute. *See Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 111-12 (1983) ("Whether one has been `convicted' within the language of the gun control statutes is necessarily . . . a question of federal, not state, law, despite the fact that the predicate offense and its punishment are defined by the law of the State."). Of course, Congress could override this default rule with "a plain indication to the contrary[.]" *Id.* at 119 (cleaned up).

More to the point, we have already held that a YTA guilty plea "qualifies as a prior conviction for federal sentencing purposes[.]" *Adams v. United States*, 622 F.3d 608, 612 (6th Cir. 2010). *Adams* involved a provision raising the mandatory minimum sentence for certain federal drug offenses from five years to ten if the defendant "commits such a violation after a prior conviction for a felony drug offense has become final[.]" 21 U.S.C. § 841(b)(1)(B). We concluded that a YTA guilty plea is sufficient to trigger the § 841(b)(1)(B) enhancement, even though it does not result in a formal judgment of guilt. *Adams*,

622 F.3d at 612. And we noted that "Michigan's own sentencing scheme supports this view," as the state sentencing guidelines count YTA adjudications in a defendant's criminal-history score. *Id.* (citing Mich. Comp. Laws § 777.50(4)(a)).

Neuhard tries to get around both precedents in one stroke. He relies on § 2251(e)'s text, which refers to prior convictions "under the laws of any State[.]" According to Neuhard, this phrase directs us to use state law to determine whether an adjudication is a conviction, negating *Dickerson*'s default rule and distinguishing this case from *Adams*, where the federal sentencing statute lacked a similar phrase. With these two cases out of the way, he urges, we should look to Michigan law to conclude that a YTA guilty plea is not a conviction.

We disagree. Looking at a longer excerpt of the statutory text reveals the problem with Neuhard's argument. The statute provides that:

> Any individual who violates . . . this section shall be . . . imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be . . . imprisoned for not less than 25 years nor more than 50 years[.]

18 U.S.C. § 2251(e). In plain English, a violation of § 2251 usually carries a sentence of 15 to 30 years. There are two ways to increase the range to 25 to 50 years: if the defendant has a prior conviction under one of the listed federal sex-offense statutes, or if the defendant has a prior conviction under a state statute that criminalizes the same kind of conduct. Section 2251(e) tells the sentencing court to analyze the *subject* of the state law, not (as Neuhard contends) the present status of the prior judgment under state law. If Congress wanted to override *Dickerson*'s default rule and have state law determine what counts as a conviction, it would have said so more explicitly. *See, e.g.,* 18 U.S.C. § 921(a)(20) ("What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held.").

Thus, *Adams* and *Dickerson* control this case. We hold, in accordance with *Adams,* that Neuhard's YTA guilty plea is a "prior conviction" for the purposes of § 2251(e).[4] The district court correctly calculated a statutory sentencing range of 25 to 50 years, and the 35-year sentence does not exceed the statutory maximum.

B. Restitution

Finally, in his opening brief, Neuhard challenged the district court's restitution order, arguing that the court improperly used a tort proximate-cause standard to calculate the amount he owed. As Neuhard concedes in his reply brief, we cannot consider this argument.

After the sentencing hearing, the district court entered an initial judgment imposing terms of imprisonment and supervised release. It subsequently held a second hearing to determine the amount of restitution, after which it entered an amended judgment. Neuhard filed a notice of appeal from the initial judgment, but he did not file a second notice of appeal from the amended judgment. The government objects to appellate review of the restitution award.

In this circumstance, we cannot review the restitution award. *Manrique v. United States*, 137 S. Ct. 1266, 1274 (2017) ("[A] defendant who wishes to appeal an order imposing restitution in a deferred restitution case must file a notice of appeal *from that order*." (emphasis added)).

V. Conclusion

For these reasons, we AFFIRM the denial of Neuhard's motion to suppress, the judgment of conviction and sentence, and the amended judgment.

[1] We need not decide this issue to resolve Neuhard's claim.

[2] MV1 testified that Neuhard showed her pornographic videos on his red and black computer, and that one of the videos involved "a little girl." R. 123 at 629-30. She also testified that Neuhard used his cell phone to take pictures of himself touching her "private part." *Id.* at 635, 638. She identified herself in the photos found on the memory card in Neuhard's tablet. *Id.* at 637. Neuhard's zebra-striped bed linens were visible in some of the photos. The image files' metadata confirmed that they were taken at Neuhard's house using the same model of cell phone he owned.

[3] The argument heading and a few sentences in Neuhard's opening brief frame this as a due-process claim, but it appears to actually be a statutory-construction argument. He cites only one due-process case, and it is inapposite. In *People v. Temelkoski,* the Michigan Supreme Court held that retroactively requiring a defendant sentenced under the YTA to register as a sex offender deprived him of the benefits of his guilty plea, and therefore violated due process. 905 N.W.2d 593, 594 (Mich. 2018). *Temelkoski* does not support Neuhard's arguments, which are not grounded in retroactivity concerns.

[4] The D.C. Circuit has held that a Michigan YTA guilty plea triggers a similar sentencing enhancement in another federal child-pornography statute, 18 U.S.C. § 2252A(b)(2). *United States v. Bruns*, 641 F.3d 555, 558 (D.C. Cir. 2011). The *Bruns* court conducted its own analysis of Michigan law, but we do not need to reach these issues in light of *Adams.*

APPENDIX B

U.S. Code §2251(e). Sexual exploitation of children.

Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years, but if such person has 2 or more prior convictions under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 35 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for not less than 30 years or for life.

APPENDIX C

THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

762.14 Discharge of individual and dismissal of proceedings upon final release; assignment as youthful trainee not conviction; compliance with sex offenders registration; proceedings closed to public inspection; inspection by courts, state departments, and law enforcement personnel.

Sec. 14. (1) If consideration of an individual as a youthful trainee is not terminated and the status of youthful trainee is not revoked as provided in section 12 of this chapter, upon final release of the individual from the status as youthful trainee, the court shall discharge the individual and dismiss the proceedings.

(2) An assignment of an individual to the status of youthful trainee as provided in this chapter is not a conviction for a crime and, except as provided in subsection (3), the individual assigned to the status of youthful trainee shall not suffer a civil disability or loss of right or privilege following his or her release from that status because of his or her assignment as a youthful trainee.

(3) An individual assigned to youthful trainee status before October 1, 2004 for a listed offense enumerated in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722, is required to comply with the requirements of that act.

(4) Unless the court enters a judgment of conviction against the individual for the criminal offense under section 12 of this chapter, all proceedings regarding the disposition of the criminal charge and the individual's assignment as youthful trainee shall be closed to public inspection, but shall be open to the courts of this state, the department of corrections, the family independence agency, law enforcement personnel and, beginning January 1, 2005, prosecuting attorneys for use only in the performance of their duties.

History: Add. 1966, Act 301, Eff. Jan. 1, 1967;—Am. 1993, Act 293, Eff. Jan. 1, 1994;—Am. 1994, Act 286, Eff. Oct. 1, 1995;—Am. 2004, Act 226, Eff. Jan. 1, 2005;—Am. 2004, Act 239, Eff. Oct. 1, 2004.

APPENDIX D

UNITED STATES DISTRICT COURT

Eastern District of Michigan

UNITED STATES OF AMERICA

v.

Jonathon Neuhard

Date of Original Judgment: 11/14/2017
(Or Date of Last Amended Judgment)

Reason for Amendment:

- ☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)
- ☐ Other:

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 0645 2:15CR20425 (1)
USM Number: 51124-039
Richard D. Korn
Defendant's Attorney

- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☑ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- ☐ pleaded guilty to count(s)
- ☐ pleaded nolo contendere to count(s) which was accepted by the court.
- ☐ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 2251(a)	Production of Child Pornography	01/24/2014	1
18 U.S.C. § 2252A(a)(2)	Receipt of Child Pornography	04/01/2015	2
18 U.S.C. § 2252A(a)(5)(B)	Possession of Child Pornography	04/01/2015	3

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s)
- ☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

03/030/2018
Date of Imposition of Judgment

s/Gershwin A. Drain
Signature of Judge

Gershwin A. Drain, U.S. District Judge
Name and Title of Judge

04/27/2018
Date

DEFENDANT: Jonathon Neuhard
CASE NUMBER: 0645 2:15CR20425 (1)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of :

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 420 months on Count 1, 240 months on Count 2, and 120 months on count 3, all counts concurrent to one another. Further, this sentence shall be concurrent to any State sentence imposed upon the defendant.

☐ The court makes the following recommendations to the Bureau of Prisons:

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Jonathon Neuhard
CASE NUMBER: 0645 2:15CR20425 (1)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

120 months on counts 1, 2 and 3, concurrent.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☑ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☑ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Jonathon Neuhard
CASE NUMBER: 0645 2:15CR20425 (1)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Jonathon Neuhard
CASE NUMBER: 0645 2:15CR20425 (1)

SPECIAL CONDITIONS OF SUPERVISION

☐ The defendant shall participate in the home confinement program for a period of _____.
☐ The cost of electronic monitoring is waived.

☐ The defendant shall make monthly payments on any remaining balance of the:
☐ restitution, ☐ fine, ☐ special assessement
at a rate and schedule recommended by the Probation Department and approved by the Court.

☐ The defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer , unless the defendant is in compliance with the payment schedule.

☐ The defendant shall provide the probation officer access to any requested financial information.

☑ The defendant shall participate in a program approved by the Probation Department for mental health counseling.
☑ If necessary.

☐ The defendant shall participate in a program approved by the Probation Department for substance abuse, which program may include testing to determine if the defendant has reverted to the use of drugs or alcohol.
☐ If necessary.

Additional Terms of Special Conditions:

1. The defendant shall submit to a psychological/psychiatric evaluation as directed by the probation officer, if necessary.
2. The defendant shall submit his person, residence, office, vehicle(s), papers, business or place of employment, and any property under
his control to a search. Such a search shall be conducted by a United States Probation Officer at a reasonable time and in a reasonable
manner based upon a reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to such a
search may be grounds for revocation; the defendant shall warn any residents that the premises may be subject to searches.
3. The defendant shall successfully complete any sex offender diagnostic evaluations, treatment or counseling programs, and polygraph
examinations as directed by the probation officer. Reports pertaining to sex offender assessments, treatment, and polygraph
examinations shall be provided to the probation officer. Based on the defendant's ability to pay, the defendant shall pay the cost of
diagnostic evaluations, treatment or counseling programs, and polygraph examinations in an amount determined by the probation
officer.
4. The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.)
as directed by the probation officer, the United States Bureau of Prisons, or any state sex offender registration agency in which he or
she resides, works, is a student, or was convicted of a qualifying offense.
5. The defendant shall not have contact of any kind with children under the age of 18, without prior approval of the probation officer.
The defendant shall not frequent places where children congregate on a regular basis (such as but not limited to school grounds,
playgrounds, child toy stores, video arcades, etc.).
6. The defendant shall not purchase, sell, view, or possess images, in any form of media or live venue, that depict pornography,
sexually explicit conduct, child erotica, or child nudity. The defendant shall not patronize any place where such material or

DEFENDANT: Jonathon Neuhard
CASE NUMBER: 0645 2:15CR20425 (1)

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 300.00	$ 0.00	$ 0.00	$ 40,356.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
MV-1, 25638 Firwood Avenue, Warren, Michigan 48089.	$40,356.00	$40,356.00	

TOTALS	$ 40,356.00	$ 40,356.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☑ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for ☐ fine ☑ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Jonathon Neuhard
CASE NUMBER: 0645 2:15CR20425 (1)

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

While incarcerated the defendant shall participate in the Inmate Financial Responsibility Program (IFRP). The Court is aware of the requirements of the IFRP and approves the payment schedules of this program and hereby orders the defendant's compliance.

DEFENDANT: Jonathon Neuhard
CASE NUMBER: 0645 2:15CR20425 (1)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☑ Lump sum payment of $ 300.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

While incarcerated the defendant shall participate in the Inmate Financial Responsibility Program (IFRP). The Court is aware of the requirements of the IFRP and approves the payment schedules of this program and hereby orders the defendant's compliance.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.