No. ____

IN THE SUPREME COURT OF THE UNITED STATES

SARAH MELISA COX, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
A - 1 to A - 207

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SARAH MELISA COX, AKA Sarah Cox, AKA Sarah Cunningham, Defendant-Appellant.	No. 18-10416 D.C. No. 3:16-cr-08202-ROS-1 District of Arizona, Prescott ORDER

Before: R. NELSON and BRESS, Circuit Judges, and GWIN,* District Judge.

Judge R. Nelson and Judge Bress have voted to deny Petitioner Sarah Melisa Cox's petition for rehearing en banc, and Judge Gwin so recommends. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc (Docket Entry No. 57) is **DENIED**.

* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

No. 18-10416

Date of Memorandum Disposition: June 26, 2020
Panel: Nelson, Bress, CJJ, Gwin, DJ

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee.

vs.

SARAH MELISA COX, Defendant-Appellant.

Appeal from the United States District Court
for the District of Arizona
Hon. Roslyn O. Silver, Senior District Judge, Presiding
D. C. No. 16-cr-8202-PCT-ROS

PETITION FOR REHEARING EN BANC

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STATEMENT IN SUPPORT OF EN BANC HEARING

Pursuant to FRAP 35(b)(1)(B), the Appellant states that this proceeding involves a question of exceptional importance in that the decision of the Panel conflicts with the opinion in *United States v. Caniff*, 955 F.3d 1833 (11th Cir. 04/09/2020) (*Caniff II)*, which is authoritative and applicable to the charge and facts in this case.

INTRODUCTION

From November 22, 2015 through December 28, 2015, the Appellant and one other individual, Richard Hennis, exchanged dozens of highly salacious messages and attachments pertaining to and disclosing child pornography through the internet application Kik chat. In the one exchange, which is the subject of this appeal, Cox sent a message just to Hennis without any intended distribution beyond them referencing a Dropbox location containing twenty-four videos of child pornography. For this exchange, Cox was convicted of knowingly making notice of the distribution of child pornography, in violation of 18 U.S.C. §§2251(d)(1)(A) and 2256. As Cox has argued, however, this single message between only two individuals is not sufficient to sustain a conviction for violating Section 2251(d)(1)(A).

At the very least, whether a single one-to-one exchange of child

pornography can constitute sufficient evidence to sustain a conviction of the notice provision is subject to a confusing plethora of dictionary analyses as to the meaning of the critical charging word - - "notice" - - particularly when it is assessed in conjunction with its statutory antecedents - - "make," "print," and "published." Moreover, when "notice" is juxtaposed in the same sentence with the other prohibited action of "advertising," the average person's understanding as to the conduct prohibited by making notice is doubtful. Consequently, the conviction based on the evidence in this case constitutes a violation of due process.

The confusion over whether "notice" can cover just a one-to-one exchange was recognized by the Eleventh Circuit in *Caniff II*, also a case of one-to-one exchanges of messages pertaining to child pornography brought under Section 2251(d)(1)(A). In *Caniff II*, which reversed its decision in *United States v. Caniff*, 916 F.3d 929 (11th Cir. 2010) (*Caniff I*) approving a one-to-one exchange, the court held that the rule of lenity applied and dismissed the charge against the defendant. The Appellant respectfully requests that the Court reconsider the Panel's decision in light of *Caniff II* and reverse Cox's conviction.

BACKGROUND

The government filed a superseding indictment charging a single defendant, Sarah Cox, with three counts of receiving child pornography, one count

of notice and advertising child pornography and one count of distribution of child pornography. (CR 50; ER 250.) Count 4 alleged that on December 3 and 4, 2015, the Defendant knowingly made a notice seeking to distribute child pornography, in violation of Section 2251(d)(1)(A). In relevant part, Section 2251(d)(1)(A) prohibits:

> **(d)(1)** Any person who . . . knowingly makes, prints, or publishes . . . any notice or advertisement seeking or offering –
>
> > **(A)** to . . . distribute . . . any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct []

The exchange occurred when Cox sent a Dropbox link via Kik chat to Hennis containing several videos of child pornography. (*Id.*, p. 174, l. 12 to p. 178, l. 17; Tr. Exh. 18, MK 6458 at 79/89: Tr. Exhs. 4-6.) She did not disclose this Dropbox location to anyone else and did not direct, request or otherwise indicate to Hennis that he should do the same. No one else participated in the exchange of this message or in any of the other messages between the two. There was no comment accompanying the link. Although there were other exchanges between Cox and Hennis on December 3 - 4, 2015, and at other times as well (Tr. Exh. 18,

MKs 6426, 6427 at p. 78/89), the evidence showed that none of these, including the one in Count 4, were sent to or were intended to be exchanged with other individuals, groups, chat rooms or shared entities.

The case proceeded to trial, and Cox was convicted on all counts. The district court sentenced her to concurrent sentences of 240 months on the three counts of receiving child pornography and the one count of distributing the same and 262 months on Count 4's notice charge.

THE PANEL'S OPINION

The Panel held that a one-to-one communication can satisfy the "notice" requirement of Section 2251(d)(1)(A) and that there was sufficient evidence when viewed in the light most favorable to the government that a rational juror could have convicted her of the charge. The Panel rejected Cox's argument that the "notice" component of the statute was too vague to apply to her single message to Hennis. Rather, it examined the "notice" provision in Section 2251(d)(1)(A) for its "plain language," its location with other terms in the statute, as well as the objective that Congress intended to accomplish by legislating against child pornography.

1. Dictionary Definitions of "Notice"

The Panel determined that the key word "notice" is not defined, so it

is to be given its ordinary meaning, which required applying dictionary definitions. In construing various dictionaries the Panel concluded that the several definitions of "notice" gave little guidance to the scope of its coverage when applied to the acts of "mak[ing]," "print[ing]" or "publish[ing]." Thus, for example, in citing an edition of *Merriam-Webster.com*, which gave four different definitions, the Panel concluded that "[n]one of these definitions implicate audience size." (Dkt. 54-1, pp. 9-10.) Thus, the dictionary was of little help in resolving whether a one-to-one exchange is covered by Section 2251(d)(1)(A), and would give no guidance to the average person.

The Panel also referred to decisions in two other circuits, which it stated "have reached similar conclusions" concerning whether Section 2251(d)(1)(A) excludes communications to groups having a limited number." It determined that "[i]n view of these dictionary definitions, the ordinary meaning of 'notice' does not exclude one-to-one communications." (*Id.*, p. 10, n. 16, referring to *United States v. Gries*, 877 F.3d 255, 260 (7th Cir. 2017) and *United States v. Franklin*, 785 F.3d 1365, 1368 (10th Cir. 2015)). Both of these decisions, however, concluded only that "notice" does not require a public dissemination; disclosure to intended groups is sufficient. Neither opinion dealt with the question here: whether notice included one-to-one communication. These decisions are addressed

further below.

2. Notice Modified by Surrounding Terms

The Panel next examined how the terms surrounding "notice" impacted its coverage. Thus, the term "any," which preceded "notice," could be read expansively to cover any communication that could reasonably come within that term. Moreover, the statute did not specifically limit the act of giving notice to the public or a large group of individuals. However, observed the Panel, the actions of publishing and printing a notice do connote a public dissemination when, again, the dictionary definitions are applied. This would seem only to increase the confusion of just what "notice" requires. (*Id.*, p. 12.)

As for the term "making," the Panel noted making any notice is "quite clearly not limited to public dissemination and can include one-to-one communications that are fairly characterized as 'notices.'" (*Id.*, pp. 11-12.) The Panel does not explain just how it arrived at the conclusion that making any notice is "clearly" not just applicable to public distribution and can fairly include one-to-one contacts. The three-judge panel in *Caniff* did not find the matter to be clear at all.

3. Statutory Structure: Object & Policy

The Panel also addressed whether excluding one-to-one

communication would frustrate Congress' purpose in regulating child pornography. The Panel noted that the expansive nature of laws covering child pornography in general dictated that "notice" should be broadly construed, to include an exchange between two individuals. (*Id.*, p. 13.) This conclusion fails to consider the extensive coverage by Congress of other acts between two individuals involving child pornography, such as transporting, shipping, receiving, distributing or even the possession of such materials. *See,* 18 U.S.C. §§ 2252(a)(1), (a)(2) and (a)(4)(B).

4. The Impact of the Eleventh Circuit Opinion in *Caniff II*

The Panel did not address Cox's argument that "notice" is unconstitutionally vague, since it concluded that there was sufficient evidence for a conviction. However, it did consider the decision by the Eleventh Circuit in *Caniff II*. In that case, the defendant sent several text messages requesting sexually explicit photos to an undercover agent posing as a 13-year old girl. As in the Cox case, no one else was involved in the exchanges. In applying the rules of statutory interpretation, the Eleventh Circuit had "serious doubts" whether the charged conduct in that case applied. (*Caniff II*, 955 F.3d at 1189.) In resolving the confusion over whether a one-to-one exchange applied, the court determined that the rule of *lenity* should govern.

The Panel here rejected the need to apply the rule of *lenity*. It distinguished the application of *Caniff* based on the evidence in that case. The difference, according to the Panel, is that in *Caniff* the defendant made notice of seeking to *receive* child pornography, whereas Cox made such notice by *sending* a link to Hennis. (*Id.*, pp. 14-16.) The Panel does not explain why making notice has broader coverage when it is sent than when received.

REASONS FOR GRANTING REHEARING

1. The *Caniff* Court's Opinion Is In Direct Conflict with the Panel

The *Caniff II* court posed the issue this way: "The more difficult question, we think – and the question to which our lion's share of our analysis is devoted – is whether the ordinary meaning of 'notice' can fairly be understood to encompass private, person-to-person text messages." (*Caniff II*, at 1188.) So, as far as the Eleventh Circuit is concerned, the issue of such a limited exchange was not so easily resolved. The Eleventh Circuit determined that due to the confusion in the meaning and application of relevant terms a one-to-one exchange did not constitute notice for the purpose of Section 2251(d)(1)(A).

a. The Dictionary Is No Help

Like the Panel here, *Caniff II* started its analysis by consulting the dictionary. The court found that some definitions were broad enough to cover one-

to-one exchanges. On the other hand, it came across four others, found in such sources as *Webster's Second New International* (1944), *Webster's Third New International* (1993), *New Oxford American Dictionary* (3d ed. 2010) and *Black's Law Dictionary* (10th ed. 2009), which provided that notice referred only to public communications. (*Id.*, at 1188-89.) The court concluded that definitions showed only that either coverage is plausible.

b. Statutory Construction Is Not Conclusive

Just as the Panel did here, *Caniff II* also turned to the statute's other provisions in examining the context of the crime of "mak[ing]", "print[ing]", or "publish[ing]" any notice seeking or offering child pornography. There were two reasons why the court concluded that " . . . we are reluctant to read the term 'make[]' – and with it the phrase 'make[] . . . any notice' – for all it might possibly be worth." First, the phrase "make any notice" did not ordinarily in its usual sense convey to the average person that a one-to-one communication was covered. Second, the words "print" and "publish," which follow immediately after "make," "clearly contemplate only public communication" and thus also limit the coverage of "making" a notice to a public exchange. (*Id.*, at 1189-90.)

Moreover, noted the court, applying the statutory construction rule that words grouped together should be given a similar meaning would require that

notice be limited to public coverage as is clearly contemplated by the neighboring term "advertisement." The court concluded, however, that this tenet of construction may be of limited application where there are less than three terms, which is the case here. (*Id.*, 1190-91, citations omitted.)

And so, *Caniff II* could not "neatly resolve" the scope of notice by resorting to the dictionary or statutory construction methods. Thus, "[t]o resolve this seemingly intractable ambiguity, therefore, we turn to a traditional interpretive tiebreaker: the rule of lenity." The rule of lenity provides that "having exhausted the applicable semantic and contextual canons of interpretation, and thus 'seiz[ed] everything from which aid can be derived' *Ocasio v. United States*, ___ U.S. ___, 136 S. Ct. 1423, 1434 n. 8, 194 L.Ed.2d 520 (2016) (internal quotation marks omitted) – meaningful doubt remains about the application of a criminal statute to a defendant's conduct, then the doubt should be resolved in the defendant's favor.'" (*Id.*, p. 1191.) (*See also*, *United States v. Nosal*, 676 F.3d 854, 863 (9th Cir. 2012) ("The rule of lenity requires 'penal laws to be construed strictly' [citation omitted] '[w]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" (citation omitted.)

The Eleventh Circuit applied the rule to Caniff's conduct and overturned his convction on the charge of making notice to receive child pornography.

c. Sufficiency of the Evidence Is Not the Issue

The dissenting judge in *Caniff I* agreed in his concurrence in *Caniff II* that lenity was an appropriate outcome: "For the reasons that I've already explained at length and needn't repeat here, I am convinced that 18 U.S.C. § 2251(d)(1) is best (if unfortunately) interpreted *not* to reach Caniff's conduct. It has always seemed pretty obvious to me that when Caniff sent private, person-to-person text messages requesting explicit photos, he didn't 'make[]' a 'notice' for them. (italics in the original; citation omitted.) Having said that, because, at the very least, § 2251(d)(1) doesn't clearly cover Caniff's conduct, I am satisfied with the Court's lenity-based resolution." (*Id.*, p. 1196, Newsom, CJ concurring.)

However, the concurring judge had decided in *Caniff I* that as a matter of law that Section 2251(d)(1) did not cover one-on-one communications: "The unfortunate bottom line for me is this: No ordinary speaker of American English would describe a person-to-person text message – whether requesting milk from the grocery or, far more disgustingly, pornographic images from a teenager – as the 'mak[ing]' of a 'notice.' And the context in which those terms are used in §

2251(d)(1) – surrounded as they are by words like 'print[ ],' 'publish[ ],' and 'advertisement' – confirms that the proscription on 'mak[ing]' a 'notice' does not reach Caniff's conduct." Rather, he termed the majority opinion as a "purposive" decision – not textual. (*Caniff I* at 946.)

d. Congressional Coverage of Pornography Is Broad

Like the majority in *Caniff I*, the Panel appeared to have been headed towards a goal-directed outcome: extend the coverage of Section 2251(d)(1) to Cox's message to Hennis in order to combat child pornography. *Caniff II* addressed this very concern, noting that 18 U.S.C. § 2252A(a)(2) prohibits the knowing receipt of any child pornography sent through interstate commerce by any means including a computer; it is punishable by 5 to 40 years. (*Id.*, p. 1192.) The same stiff penalty applies to the sending of child pornography under similar circumstances. *See*, 18 U.S.C. § 2252A(a)(1).

2. Other Opinions Do Not Support the Panel's Decision

Opinions by other courts relied on by the Panel do not support its conclusion that notice includes a one-to-one communication. For example, the Panel referred to *United States v. Franklin*, 785 F.3d 1365 (10th Cir. 2015), as a case that addressed whether notice could be applied to a closed network. *Franklin* considered 18 definitions of notice and found that none of them had a public

component. (Doc. 54-1, p. 9, n. 12.) However, *Franklin* has no application here. In that case, the Tenth Circuit addressed the defendant's argument that "public" meant the *general* public, which the court rejected as too broad a requirement. "Notice," held the court, covered the defendant's sending of communications to his "tribe," which included 108 individuals whose common interest was dissemination of child pornography. (*Franklin*, at 1367.)

Moreover, to underscore the different ways that the same definition can be viewed, *Caniff II* considered one of the very dictionaries that *Franklin* examined, *Webster's Third New International Dictionary.* It found that a definition in *Webster did* include an instance in which notice meant public dissemination. *Caniff II*, 955 F.3d at 1188-89 ("And in its opinion in Franklin, the Tenth Circuit cited a host of definitions of 'notice' taken from a different version of Webster's Third, observing that none of them required a 'public component.' 785 F.3d at 1368 (citing Webster's Third International Dictionary, 1544 (1993) . . . Other definitions, though, indicate that 'notice' refers only to public communications. . . . So, too, Webster's Third: 'a written or printed announcement or bulletin' – like 'insert[ing] a [notice] in the newspaper.' Webster's Third at 1544)."

The Panel also referred to *United States v. Gries*, 877 F.3d 255 (7th

Cir. 2017), which, in considering two definitions of "notice," also found that it was not limited to disseminations to the general public. (*Id.*) The dissemination in *Gries* consisted of thousands of file-sharing messages posted in a password-protected online chat room. The Seventh Circuit merely determined that "[t]he term is not limited to warnings or notifications disseminated to the general public, and nothing about the context in which it is used here suggests a more limited meaning." (*Id.*, at 260.)

3. Lenity Is the Appropriate Outcome

The Panel stated that it need not reach Cox's rule of lenity argument. The Appellant maintains that the resolution of the issue here is that not only as a matter of due process is a one-to-one exchange an insufficient "notice," but given the lack of certainty that arises from using definitions of words and phrases and statutory construction principles the rule of lenity must apply.

As the Appellant stated in her letter to the Court of May 7, 2020, an argument not presented in an opening brief may be raised in a reply brief if a "manifest injustice" would arise, and if the failure to raise the issue does not prejudice the opposing party. *United States v. Mageno*, 762 F.3d 933, 940 (9th Cir. 2014), citing *United States v. Ullah*, 976 F.2d 509, 514 (9th Cir.1992). *See also*, *United States v. Salman*, 792 F.3d 1087, 1090 (9th Cir. 2015) (noting that the

parties had the opportunity to address the matter at oral argument).

A manifest injustice to Cox has arisen. Sufficient evidence to prove "notice," an element for a Section 2251(d)(1)(A) conviction, is a matter of due process. Both parties relied on the first opinion in *Caniff*. After the Cox case was fully briefed, the Eleventh Circuit reversed its original holding on April 9, 2020, concluding that it was unclear whether "notice" was broad enough to include person-to-person text messages and applied the rule of lenity. Failure to raise an issue in an opening brief can be excused due to "manifest injustice" if a conviction is upheld on an erroneous legal ruling. *United States v. Trinidad Hernandez*, 759 Fed.Appx. 590, 593-94 (9th Cir. 2019). There is no doubt that a defendant convicted of activity that is not so clearly a crime faces a manifest injustice.

Moreover, the issue has been sufficiently addressed for the Court to make "an informed resolution of the dispute." *Mageno*, citing *Ullah*, 976 F.2d at 514. Cox raised lenity in her reply brief (Rep. Br. at 20-21); the parties' joint motion for supplemental briefing covered the issue (Dkt. 46); and the government addressed lenity in its letter of May 6, 2020 (Dkt. 49). The government has fully addressed the argument in its filings. It will not be prejudiced by the Court's review of the issue. *Id.*

CONCLUSION

It is quite clear that there is a distinct split in whether a one-to-one exchange involving the sender of child pornography is sufficient for a conviction under the "notice" clause in Section 2251(d)(1)(A). The Panel here concluded that a rational individual would find in the ordinary, everyday language of the term that it covers a one-to-one exchange. The Eleventh Circuit has held otherwise: at the very least, the several definitions of "notice" and other relevant words and order of placement of these terms within Section 2251 give no clear understanding as to whether such an exchange is covered. Accordingly, the Eleventh Circuit applied the rule of lenity to the one-to-one exchange. This case presents the same type of limited exchange as *Caniff* and should result in the same outcome.

RESPECTFULLY SUBMITTED this 9th day of August, 2020.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. SARAH MELISA COX, AKA Sarah Cox, AKA Sarah Cunningham, *Defendant-Appellant.*	No. 18-10416 D.C. No. 3:16-cr-08202-ROS-1 OPINION

Appeal from the United States District Court
for the District of Arizona
Roslyn O. Silver, District Judge, Presiding

Argued and Submitted May 11, 2020
San Francisco, California

Filed June 26, 2020

Before: Ryan D. Nelson and Daniel A. Bress, Circuit Judges, and James S. Gwin,* District Judge.

Opinion by Judge Gwin

* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

SUMMARY**

Criminal Law

The panel affirmed convictions on child pornography-related charges, including one count of making a notice offering child pornography in violation of 18 U.S.C. § 2251(d)(1)(A).

The panel held that one-to-one communications can satisfy the "notice" requirement in § 2251(d)(1), and that a rational fact-finder could find that the defendant made a notice offering child pornography when she sent a one-to-one electronic message linking to a Dropbox account that contained child pornography. The panel also held that the district court did not abuse its discretion when it admitted under Fed. R. Evid. 404(b) an uncharged Kik messenger exchange to prove the defendant's identity and absence of mistake.

COUNSEL

David Eisenberg (argued), Phoenix, Arizona, for Defendant-Appellant.

Krissa M. Lanham (argued), Deputy Appellate Chief; Robert I. Brooks, Assistant United States Attorney; Michael Bailey, United States Attorney; United States Attorney's Office, Phoenix, Arizona; for Plaintiff-Appellee.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

OPINION

GWIN, District Judge:

Sarah Cox used an online instant messaging platform to exchange child pornography with one other individual. A jury convicted Cox of five child pornography-related charges, including one count of making a notice offering child pornography in violation of 18 U.S.C. § 2251(d)(1)(A).

With this appeal, Cox argues that a one-to-one communication cannot support a conviction for "mak[ing] . . . [a] notice . . . offering" child pornography under § 2251(d)(1)(A). Cox also argues that the district court erred when it admitted evidence of uncharged conduct.

We disagree with Cox's reading of the statute, and we conclude that the district court did not err in admitting the uncharged conduct evidence. We affirm.

I. BACKGROUND

A. Case Overview

In late August 2015, Richard Hennis and a person using the moniker "JadeJeckel" communicated on Kik Messenger[1] and discussed child pornography and child sex. In later November 2015 to January 2016 Kik messages, JadeJeckel and Hennis exchanged child pornography. At trial, the Government argued that Defendant Sarah Cox used the JadeJeckel messaging account. Cox denied that she sent or

[1] Kik Messenger is an instant messaging application available for smartphones and tablets. It functions similarly to a standard text messaging service.

received the messages. The jury convicted Cox on all counts.

Although the indictment only alleged criminal conduct in December 2015, the Government offered the August 2015 Kik conversation to prove that Defendant Cox used the JadeJeckel account. Appellant Cox says this was prejudicial error.

Cox also argues on appeal that insufficient evidence supported her conviction of making a notice offering child pornography when the notice was in a person-to-person text message. She claims the statute could only be violated through a wider distributed notice.

B. The Kik Messenger Conversation

On August 24, 2015, Richard Hennis started a Kik Messenger conversation with user "JadeJeckel." The Government later claimed Sarah Cox was the JadeJeckel user.

A few hours into the August 2015 Kik exchange, Defendant Cox steered the conversation to child sex. In this text exchange, Defendant Cox and Hennis discussed child sex, whether to murder a mother to take her child, and their desire to kidnap, enslave, and rape children. After several days of these August 2015 messages, Cox ended the conversation.

On November 22, 2015, Defendant Cox and Hennis reinitiated their Kik conversation. Cox and Hennis quickly resumed discussing their child sexual interest. Minutes after reconnecting in November 2015, Cox asked Hennis to send her his "nastiest favorite" "naughty" videos. In response, Hennis sent Cox eleven separate child pornography files.

For the next several weeks, Defendant Cox and Hennis continued to discuss their child sexual interest. Central to the charge for making a notice offering child pornography, on December 4, 2015, Defendant Cox used Kik to send Hennis two separate Dropbox links, calling them "[g]oodies for daddy." One of the Dropbox accounts contained child pornography videos. On December 23, 2015, Hennis sent Cox three child pornography images. Hennis and Cox ended their text conversation on January 18, 2016.

C. Investigation and Arrest

In early 2016, law enforcement received a tip that Richard Hennis had child pornography on his phone. Law enforcement arrested Hennis, seized his phone, and extracted the Hennis-Cox Kik Messenger conversations described above. Investigation into the JadeJeckel identity showed substantial evidence linking Sarah Cox to the JadeJeckel account, including IP addresses, an email from jadejeckel@live.com containing Cox's resume; Cox's driver's license listing the same birthday as JadeJeckel; non-public photographs of Cox sent by JadeJeckel; and Cox's social media accounts using the JadeJeckel moniker.

The Government arrested Cox and charged her with five counts arising out of her Kik Messenger conversation with Hennis: three counts of receiving child pornography,[2] one count of making a notice offering child pornography,[3] and one count of distributing child pornography.[4]

[2] 18 U.S.C. §§ 2252A(a)(2)(A), 2252A(b), 2256.

[3] 18 U.S.C. §§ 2251(d)(1)(A), 2256.

[4] 18 U.S.C. §§ 2252A(a)(2)(A), 2252A(b), 2256.

D. Trial and Appeal

The case went to trial. The Government presented substantial evidence that Sarah Cox was the JadeJeckel Kik user. Cox did not contest that JadeJeckel transmitted and received child pornography. Instead, Cox argued that she was not JadeJeckel. Cox called one witness, a computer forensics expert, who testified that hackers can frame people by creating fake internet profiles. The expert witness also testified that Cox's surrendered electronic devices did not have Kik conversation evidence. The jury convicted Sarah Cox on all counts.

On October 24, 2018, Cox appealed. On appeal, Cox concedes that the Government showed sufficient evidence that she was JadeJeckel. Instead she argues that the evidence was insufficient to support a conviction for making a notice offering child pornography and that the district court erred in admitting certain evidence warranting a new trial.

II. DISCUSSION

A. One-to-One Communications Can Satisfy the 18 U.S.C. § 2251(d)(1) "Notice" Requirement, and Sufficient Evidence Supported Cox's § 2251(d)(1) Conviction.

Cox challenges her conviction for violating 18 U.S.C. § 2251(d)(1)(A), that provides:

> **(d)(1)** Any person who . . . knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering—

> **(A)** to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct[]
>
> . . .
>
> shall be punished as provided under subsection (e).[5]

To prove this violation, the Government presented evidence that Cox sent Hennis a Kik message with a link to a Dropbox account that contained child pornography. Cox's message with the link said, "[g]oodies for daddy."

On appeal, Cox argues that a one-to-one communication cannot be a "notice or advertisement" of child pornography under 18 U.S.C. § 2251(d)(1). She argues that the statute requires "something more than a one-on-one exchange." Because her communication ran only to Hennis, she argues there was insufficient evidence for her § 2251(d)(1) conviction.

"We review challenges to the sufficiency of evidence, including questions of statutory interpretation, de novo."[6] "There is sufficient evidence to support a conviction if, viewing the evidence in the light most favorable to the

[5] 18 U.S.C. § 2251(d)(1)(A).

[6] *United States v. Aldana*, 878 F.3d 877, 880 (9th Cir. 2017).

prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[7]

As a preliminary matter, we agree with the Government that we only need consider whether the trial evidence supports a conviction under the statute's "notice" prong. If the Government proves the "notice" prong, the Government does not need to prove the "advertisement" prong.

Section 2251(d)(1) is disjunctive (*i.e.*, the statute prohibits "notice *or* advertisement").[8] The Government prosecuted Cox under the "notice" prong. Therefore, we consider only whether any rational juror could find that evidence of a one-to-one communication could be a "notice" under 18 U.S.C. § 2251(d)(1).

1. Statutory Construction

Before we consider the sufficiency of the evidence, we first examine the statute. Whether 18 U.S.C. § 2251(d)(1)'s "notice" provision applies to one-to-one messages is an issue of first impression in this circuit.

In statutory interpretation, "our starting point is the plain language of the statute."[9] "[W]e examine not only the specific provision at issue, but also the structure of the

[7] *Id.* (quoting *United States v. Roach*, 792 F.3d 1142, 1144 (9th Cir. 2015)).

[8] 18 U.S.C. § 2251(d)(1) (emphasis added).

[9] *United States v. Williams*, 659 F.3d 1223, 1225 (9th Cir. 2011).

statute as a whole, including its object and policy."[10] "If the plain meaning of the statute is unambiguous, that meaning is controlling . . . ."[11]

We first look to the key word in our review: "notice."[12] The statute does not define notice, so we construe the word pursuant to its ordinary meaning.[13] To determine ordinary meaning, we consider dictionary definitions.[14]

Most standard English-language dictionary notice definitions do not define notice in relation to audience size. For example, *Merriam-Webster.com* gives the following definitions of "notice":

> 1 a (1): warning or intimation of something : announcement
> (2): the announcement of a party's intention to quit an agreement or relation at a specified time

[10] *Id.* (quoting *Children's Hosp. & Health Ctr. v. Belshe*, 188 F.3d 1090, 1096 (9th Cir. 1999)).

[11] *Id.*

[12] *See United States v. Franklin*, 785 F.3d 1365, 1367 (10th Cir. 2015) (considering whether 18 U.S.C. § 2251(d)(1) applies to a closed network).

[13] *See Sebelius v. Cloer*, 569 U.S. 369, 376 (2013); *see Animal Legal Def. Fund v. United States Dep't of Agric.*, 933 F.3d 1088, 1093 (9th Cir. 2019) ("When a statute does not define a term, we typically give the phrase its ordinary meaning." (quoting *FCC v. AT&T Inc.*, 562 U.S. 397, 403 (2011))).

[14] *See Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070–71 (2018); *United States v. Ezeta*, 752 F.3d 1182, 1185 (9th Cir. 2014).

(3): the condition of being warned or notified—usually used in the phrase *on notice*

b: information, intelligence

2 a: attention, heed

b: polite or favorable attention : civility

3: a written or printed announcement

4: a short critical account or review[15]

None of these definitions implicate audience size.

Relying on similar dictionary definitions, the Seventh and Tenth Circuits have reached similar conclusions when reviewing whether 18 U.S.C. § 2251(d)(1) prohibits communications to groups with limited membership.[16] In view of these dictionary definitions, the ordinary meaning of "notice" does not exclude one-to-one communications.

We nonetheless continue our inquiry and consider the word modifying "notice." Section 2251(d)(1) proscribes

[15] *Notice*, Merriam-Webster, https://www.merriam-webster.com/dictionary/notice (last visited May 20, 2020) (capitalization altered and examples omitted).

[16] *United States v. Gries*, 877 F.3d 255, 260 (7th Cir. 2017) (reviewing two "notice" definitions and opining that "[i]n everyday parlance, the term is not limited to warnings or notifications disseminated to the general public"); *Franklin*, 785 F.3d at 1368 (reviewing 18 "notice" definitions and concluding that none have "a public component") (citing *Notice*, Webster's Third New International Dictionary 1544 (ed. Philip Babcock Gove 1993)).

"*any* notice . . . seeking or offering" child pornography.[17] The Supreme Court has observed that, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"[18] Thus, Congress's use of "any" suggests Congress intended "notice" to cover any communication that could reasonably fall within that term.[19] Notably, the statute does not limit notices to those that are widely disseminated to the public at large or a large group of people.

We also consider the verbs that precede "any notice." Section 2251(d)(1) prohibits "[a]ny person [from] . . . *mak[ing]*, *print[ing]*, or *publish[ing]* . . . any notice."[20] A review of these verbs' dictionary definitions suggests that "publish" has a public dissemination component.[21] We can

[17] 18 U.S.C. § 2251(d)(1) (emphasis added).

[18] *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (alteration in original) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)); *accord Olympic Forest Coal. v. Coast Seafoods Co.*, 884 F.3d 901, 906 (9th Cir. 2018) (collecting cases for the proposition that the "any" is "broad and all-encompassing"); *Do Sung Uhm v. Humana, Inc.*, 620 F.3d 1134, 1153 (9th Cir. 2010) ("The word 'any' is generally used in the sense of 'all' or 'every' and its meaning is most comprehensive.") (quoting *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 115 (3d Cir. 1992)).

[19] *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588–89 (1980) (construing Section 307(b)(1) of the Clean Air Act expansively in light of a 1977 amendment that added the word "any").

[20] 18 U.S.C. § 2251(d)(1) (emphasis added).

[21] *Merriam-Webster* includes two representative definitions of "publish": "to make public announcement of" and "to disseminate to the public." *Publish*, Merriam-Webster, https://www.merriam-

assume that "print" often could refer, and even more typically may refer, to a more public dissemination. But as we have explained, the phrase "make[] . . . any notice" is quite clearly not limited to public dissemination and can include one-to-one communications that are fairly characterized as "notices." At least in the context of this case, which involves a defendant who is offering child pornography, we do not think the statute's inclusion of the words "publish" and "print" requires us to adopt an unnaturally narrow interpretation of the phrase "make[] . . . any notice." Once again, if Congress had intended to limit the statute in the way Cox suggests, we think it would have chosen different language than it did.

At this stage of the inquiry, in view of the ordinary meaning of the statutory terms and § 2251(d)(1)'s proscription of "*any* notice," the statute strongly suggests that "make[] . . . any notice" can reach one-to-one communications.[22]

We also consider "the structure of the statute as a whole, including its object and policy,"[23] and "whether the proposed interpretation would frustrate or advance that purpose."[24] With its child pornography legislation, Congress enacted a "comprehensive" regulatory scheme that

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webster.com/dictionary/publish (definitions 1b and 2a, respectively) (last visited June 6, 2020).

[22] 18 U.S.C. § 2251(d)(1) (emphasis added).

[23] *Williams*, 659 F.3d at 1225 (quoting *Children's Hosp. & Health Ctr.*, 188 F.3d at 1096).

[24] *See United States v. Mohrbacher*, 182 F.3d 1041, 1049 (9th Cir. 1999).

"seeks to regulate (more accurately, exterminate) the entire child pornography market."[25] Construing "notice" to include one-to-one communications furthers this broad statutory objective.

In summary, based upon the statute's plain meaning, we hold that one-to-one communications can satisfy the "notice" requirement under 18 U.S.C. § 2251(d)(1).

2. Sufficiency of the Evidence

Applying our construction of § 2251(d)(1) to the instant case, we decide that a rational fact-finder could find that Cox made a notice offering child pornography when she sent a one-to-one electronic message with a Dropbox link and informed Hennis that it contained child pornography. As discussed above, the critical Kik messages conveyed Dropbox links and the message "[g]oodies for daddy." Taken together and when viewed in the context of the overall conversation between Cox and Hennis, these Kik messages reflected an offer to provide child pornography and means for how to gain access to it. This is sufficient to constitute "mak[ing] . . . any notice . . . offering . . . to . . . exchange, . . . display, distribute, or reproduce" child pornography."[26] The district court therefore did not err in denying Cox's Rule 29 motion for a directed verdict as to the § 2251(d)(1)(A) count.

[25] *United States v. McCalla*, 545 F.3d 750, 755 (9th Cir. 2008); *accord United States v. Maxwell*, 446 F.3d 1210, 1217 n.7 (11th Cir. 2006).

[26] 18 U.S.C. § 2251(d)(1).

3. *United States v. Caniff*

Considering our ruling, we do not reach Cox's argument that § 2251(d)(1) notice is unconstitutionally vague (or whether this argument has been waived). We nonetheless observe that the Eleventh Circuit case Cox relies upon for her associated rule of lenity argument—*United States v. Caniff*[27]—is distinguishable.

Caniff is the only other case in which a court of appeals directly considered whether § 2251(d)(1) notice applies to one-to-one communications.[28] In *Caniff*, the 32-year-old defendant engaged in a text-message conversation with an FBI agent who posed as a 13-year-old girl.[29] In the text conversation, the defendant asked the purported 13-year-old girl for sexually explicit pictures of herself.[30] For this conduct, the defendant was charged and convicted of "mak[ing]" a "notice" "*seeking*" to "*receive*" child pornography in violation of § 2251(d)(1)(A).[31] (In contrast, Defendant Cox was charged with "mak[ing]" a "notice" "offering" to "display, distribute, or reproduce" child pornography.[32])

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[27] 955 F.3d 1183 (11th Cir. 2020) (per curiam).

[28] *See id.* at 1185.

[29] *Id.* at 1185–86.

[30] *Id.* at 1186.

[31] *Id.* at 1186–87 (quoting 18 U.S.C. § 2251(d)(1)(A) (emphasis added)).

[32] *See* 18 U.S.C. § 2251(d)(1)(A).

On appeal, Caniff argued that 18 U.S.C. § 2251(d)(1) was ambiguous when applied to this conduct.[33] The Eleventh Circuit agreed. After applying the tools of statutory interpretation, the Eleventh Circuit had "serious doubts" about the statute's applicability to Caniff's conduct.[34] The court applied the rule of lenity in Caniff's favor and reversed his conviction under § 2251(d)(1)(A).[35]

The Eleventh Circuit's holding was based on a perceived ill fit between § 2251(d)(1) and defendant Caniff's conduct. Caniff had *asked* for pictures of the supposed 13-year-old girl, and he was therefore convicted of "mak[ing]" a "notice . . . *seeking*" to "receive" child pornography.[36] The Eleventh Circuit's decision seems to turn on its view that "mak[ing] . . . any notice . . . seeking . . . to receive" is an unusual phrasing that created "serious doubts" about the applicability of § 2251(d)(1) to Caniff's conduct.[37]

We do not have the same doubts about the applicability of § 2251(d)(1) to Cox's conduct. Cox *sent* Hennis a link to child pornography. The jury found Cox guilty of "mak[ing]" a "notice . . . *offering*" to "display, distribute, or reproduce"

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[33] *Caniff*, 955 F.3d at 1187.

[34] *Id.* at 1191–92; *see also id.* at 1185 ("Caniff's private, person-to-person text messages asking an individual he thought was a minor to send him sexually explicit pictures of herself cannot support a conviction for 'mak[ing]' a 'notice' to receive child pornography in violation of 18 U.S.C. § 2251(d)(1).").

[35] *Id.* at 1193.

[36] 18 U.S.C. § 2251(d)(1)(A) (emphasis added); *Caniff*, 955 F.3d at 1185–86.

[37] *See Caniff*, 95 F.3d at 1189–91.

child pornography.[38] The § 2251(d)(1)(A) application to Cox's conduct does not warrant application of the rule of lenity.

We have no occasion to decide whether all one-to-one communications will be a § 2251(d)(1)(A) notice violation. Today, we hold only that one-to-one exchanges can satisfy the legal definition of "notice" under § 2251(d)(1), and that the evidence in Cox's case, viewed in the light most favorable to the prosecution, sufficiently supported her conviction.

B. The District Court Did Not Err by Admitting the August 2015 Hennis-Cox Kik Messenger Exchange.

Cox and Hennis's Kik Messenger conversation occurred in two distinct times: (1) from August 24 to 27, 2015, and (2) from November 22, 2015 to January 18, 2016. The indictment charged violations of child pornography laws only in the latter period.

Before trial, Cox sought to exclude evidence of the initial August 2015 exchange. The district court denied Cox's motion. The district court reasoned that while the August 2015 messages were not admissible as direct evidence of Cox's December 2015 crimes, the messages were admissible under Federal Rule of Evidence 404(b) to prove Cox's identity as the JadeJeckel user and to prove an absence of mistake. The district court also found the August 2015 communications were not unduly prejudicial under Federal Rule of Evidence 403.

[38] 18 U.S.C. § 2251(d)(1)(A) (emphasis added).

With this appeal, Cox argues that the district court erred in admitting the August 2015 messages under Rule 404(b) and 403.

1. Rule 404(b)

Rule 404(b)(1) says that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Nonetheless, the Rule provides that such other-act "evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[39]

The Ninth Circuit uses a four-part test to determine the admissibility of evidence under Rule 404(b):

> Such evidence may be admitted if: (1) the evidence tends to prove a material point; (2) the other act is not too remote in time; (3) the evidence is sufficient to support a finding that defendant committed the other act; and (4) (in certain cases) the act is similar to the offense charged.[40]

"The government 'has the burden of proving that the evidence meets all of the above requirements.'"[41] This court

[39] Fed. R. Evid. 404(b)(2).

[40] *United States v. Bailey*, 696 F.3d 794, 799 (9th Cir. 2012) (quoting *United States v. Romero*, 282 F.3d 683, 688 (9th Cir. 2002)).

[41] *Id.* (quoting *United States v. Arambula-Ruiz*, 987 F.2d 599, 602 (9th Cir. 1993)).

reviews a district court's admission of Rule 404(b) evidence for an abuse of discretion.[42]

Here, the district court did not abuse its discretion when it admitted the August 2015 messages under Rule 404(b).

As to the first requirement, the August 2015 Hennis-Cox exchange tends to prove two material issues—Cox's use of the JadeJeckel account (identity) and the absence of mistake. The August 2015 messages show Cox's strong interest in child pornography, negating the possibility that the later child pornography transmissions were mistakes. The August messages also included substantial evidence identifying Defendant Sarah Cox as using the JadeJeckel moniker. For example, in the August 2015 exchanges, JadeJeckel sent a non-public nude selfie of Cox and described personal information that applied to Cox.

As to the timeliness requirement, the August 2015 exchange occurred approximately three to four months before the charged conduct.[43]

With regards to the need to show that Cox committed the earlier acts, enough evidence suggested that Cox was the August 2015 JadeJeckel user. As described, there was considerable evidence identifying Cox as JadeJeckel.[44]

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[42] *United States v. Carpenter*, 923 F.3d 1172, 1180–81 (9th Cir. 2019).

[43] *See United States v. Lozano*, 623 F.3d 1055, 1059-60 (9th Cir. 2010) (per curiam) (concluding that three years was not too remote).

[44] *See Romero*, 282 F.3d at 688 (observing that the third prong of our Rule 404(b) test is a "low threshold").

In consideration of the final requirement, the August 2015 messages were similar to the November 2015 to January 2016 conversations, which included the criminal acts charged. Both sets of messages involved the same participants and their shared interest in child pornography.

The Government satisfied its Rule 404(b) burden. The district court did not abuse its discretion in admitting the August 2015 conversation under Rule 404(b) to prove Cox's identity and absence of mistake.

2. Rule 403

"Even if the proffered evidence satisfies these [four Rule 404(b)] requirements, the district court should decline to admit it [under Rule 403] if its probative value is substantially outweighed by the danger of unfair prejudice."[45] We review the district court's admission of evidence under Rule 403 for an abuse of discretion.[46]

We are satisfied that the district court did not abuse its discretion under Rule 403 when it admitted the August 2015 Kik conversation.

The August 2015 exchange's probative value was substantial. The trial largely concerned only one contested issue—the identity of JadeJeckel. The August exchange included significant evidence linking Cox to the JadeJeckel account.

[45] *United States v. Banks*, 514 F.3d 959, 976 (9th Cir. 2008) (internal quotation marks omitted).

[46] *United States v. Flores-Blanco*, 623 F.3d 912, 919 n.3 (9th Cir. 2010).

As to the danger of unfair prejudice, the August 2015 messages included prejudicial evidence. In the August 2015 messages, Cox and Hennis discussed murdering a mother to steal a child and their desire to kidnap, enslave, and rape children. But other-act evidence in sex-crimes cases is often emotionally charged and inflammatory, and this does not control the Rule 403 analysis.[47]

Other-act evidence should be considered in the context of each case.[48] Here, the August 2015 messages were prejudicial but no more prejudicial than the November 2015 to January 2016 messages. The November 2015 to January 2016 messages included actual child rape and child sexual assault images and videos. In this context, the August 2015 messages were not unduly prejudicial.

The district court recognized that the August 2015 messages were potentially prejudicial but found that their probative value justified admission. "The district court is to be given 'wide latitude' when it balances the prejudicial

[47] *See United States v. LeMay*, 260 F.3d 1018, 1027–30 (9th Cir. 2001) (concluding that evidence of defendants' prior acts of child molestation, admitted under Federal Rule of Evidence 414, did not need to be excluded under Rule 403).

[48] *United States v. Jayavarman*, 871 F.3d 1050, 1064 (9th Cir. 2017) ("That [probative] value was not substantially outweighed by any risk of unfair prejudice that might have arisen from the evidence, especially in the context of other evidence adduced at trial."); *see also LeMay*, 260 F.3d at 1031 ("[E]vidence of a defendant's prior sex crimes will always present the possibility of extreme prejudice, and that district courts must accordingly conduct the Rule 403 balancing inquiry in a careful, conscientious manner that allows for meaningful appellate review of their decisions.").

effect of proffered evidence against its probative value."[49] Here, the district court did not abuse its discretion in admitting the evidence.

III. CONCLUSION

Based on the plain statutory language, we hold that one-to-one communications can satisfy the legal definition of "notice" under 18 U.S.C. § 2251(d)(1). Applying this construction to the instant case, we conclude that a rational trier of fact could find that Cox made a notice offering child pornography when she sent a one-to-one electronic message linking to a Dropbox account that contained child pornography. We also hold that the district court did not abuse its discretion when it admitted the uncharged August 2015 messages under Federal Rule of Evidence 404(b).

The judgment of conviction is **AFFIRMED.**

[49] *United States v. Higuera-Llamos*, 574 F.3d 1206, 1209 (9th Cir. 2009) (quoting *United States v. Spencer*, 1 F.3d 742, 744 (9th Cir. 1993)).

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. SARAH MELISA COX, AKA Sarah Cox, AKA Sarah Cunningham, *Defendant-Appellant.*	No. 18-10416 D.C. No. 3:16-cr-08202-ROS-1 OPINION

Appeal from the United States District Court
for the District of Arizona
Roslyn O. Silver, District Judge, Presiding

Argued and Submitted May 11, 2020
San Francisco, California

Filed June 26, 2020

Before: Ryan D. Nelson and Daniel A. Bress, Circuit Judges, and James S. Gwin,* District Judge.

Opinion by Judge Gwin

* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

SUMMARY[**]

Criminal Law

The panel affirmed convictions on child pornography-related charges, including one count of making a notice offering child pornography in violation of 18 U.S.C. § 2251(d)(1)(A).

The panel held that one-to-one communications can satisfy the "notice" requirement in § 2251(d)(1), and that a rational fact-finder could find that the defendant made a notice offering child pornography when she sent a one-to-one electronic message linking to a Dropbox account that contained child pornography. The panel also held that the district court did not abuse its discretion when it admitted under Fed. R. Evid. 404(b) an uncharged Kik messenger exchange to prove the defendant's identity and absence of mistake.

COUNSEL

David Eisenberg (argued), Phoenix, Arizona, for Defendant-Appellant.

Krissa M. Lanham (argued), Deputy Appellate Chief; Robert I. Brooks, Assistant United States Attorney; Michael Bailey, United States Attorney; United States Attorney's Office, Phoenix, Arizona; for Plaintiff-Appellee.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

OPINION

GWIN, District Judge:

Sarah Cox used an online instant messaging platform to exchange child pornography with one other individual. A jury convicted Cox of five child pornography-related charges, including one count of making a notice offering child pornography in violation of 18 U.S.C. § 2251(d)(1)(A).

With this appeal, Cox argues that a one-to-one communication cannot support a conviction for "mak[ing] . . . [a] notice . . . offering" child pornography under § 2251(d)(1)(A). Cox also argues that the district court erred when it admitted evidence of uncharged conduct.

We disagree with Cox's reading of the statute, and we conclude that the district court did not err in admitting the uncharged conduct evidence. We affirm.

I. BACKGROUND

A. Case Overview

In late August 2015, Richard Hennis and a person using the moniker "JadeJeckel" communicated on Kik Messenger[1] and discussed child pornography and child sex. In later November 2015 to January 2016 Kik messages, JadeJeckel and Hennis exchanged child pornography. At trial, the Government argued that Defendant Sarah Cox used the JadeJeckel messaging account. Cox denied that she sent or

[1] Kik Messenger is an instant messaging application available for smartphones and tablets. It functions similarly to a standard text messaging service.

received the messages. The jury convicted Cox on all counts.

Although the indictment only alleged criminal conduct in December 2015, the Government offered the August 2015 Kik conversation to prove that Defendant Cox used the JadeJeckel account. Appellant Cox says this was prejudicial error.

Cox also argues on appeal that insufficient evidence supported her conviction of making a notice offering child pornography when the notice was in a person-to-person text message. She claims the statute could only be violated through a wider distributed notice.

B. The Kik Messenger Conversation

On August 24, 2015, Richard Hennis started a Kik Messenger conversation with user "JadeJeckel." The Government later claimed Sarah Cox was the JadeJeckel user.

A few hours into the August 2015 Kik exchange, Defendant Cox steered the conversation to child sex. In this text exchange, Defendant Cox and Hennis discussed child sex, whether to murder a mother to take her child, and their desire to kidnap, enslave, and rape children. After several days of these August 2015 messages, Cox ended the conversation.

On November 22, 2015, Defendant Cox and Hennis reinitiated their Kik conversation. Cox and Hennis quickly resumed discussing their child sexual interest. Minutes after reconnecting in November 2015, Cox asked Hennis to send her his "nastiest favorite" "naughty" videos. In response, Hennis sent Cox eleven separate child pornography files.

For the next several weeks, Defendant Cox and Hennis continued to discuss their child sexual interest. Central to the charge for making a notice offering child pornography, on December 4, 2015, Defendant Cox used Kik to send Hennis two separate Dropbox links, calling them "[g]oodies for daddy." One of the Dropbox accounts contained child pornography videos. On December 23, 2015, Hennis sent Cox three child pornography images. Hennis and Cox ended their text conversation on January 18, 2016.

C. Investigation and Arrest

In early 2016, law enforcement received a tip that Richard Hennis had child pornography on his phone. Law enforcement arrested Hennis, seized his phone, and extracted the Hennis-Cox Kik Messenger conversations described above. Investigation into the JadeJeckel identity showed substantial evidence linking Sarah Cox to the JadeJeckel account, including IP addresses, an email from jadejeckel@live.com containing Cox's resume; Cox's driver's license listing the same birthday as JadeJeckel; non-public photographs of Cox sent by JadeJeckel; and Cox's social media accounts using the JadeJeckel moniker.

The Government arrested Cox and charged her with five counts arising out of her Kik Messenger conversation with Hennis: three counts of receiving child pornography,[2] one count of making a notice offering child pornography,[3] and one count of distributing child pornography.[4]

[2] 18 U.S.C. §§ 2252A(a)(2)(A), 2252A(b), 2256.

[3] 18 U.S.C. §§ 2251(d)(1)(A), 2256.

[4] 18 U.S.C. §§ 2252A(a)(2)(A), 2252A(b), 2256.

D. Trial and Appeal

The case went to trial. The Government presented substantial evidence that Sarah Cox was the JadeJeckel Kik user. Cox did not contest that JadeJeckel transmitted and received child pornography. Instead, Cox argued that she was not JadeJeckel. Cox called one witness, a computer forensics expert, who testified that hackers can frame people by creating fake internet profiles. The expert witness also testified that Cox's surrendered electronic devices did not have Kik conversation evidence. The jury convicted Sarah Cox on all counts.

On October 24, 2018, Cox appealed. On appeal, Cox concedes that the Government showed sufficient evidence that she was JadeJeckel. Instead she argues that the evidence was insufficient to support a conviction for making a notice offering child pornography and that the district court erred in admitting certain evidence warranting a new trial.

II. DISCUSSION

A. One-to-One Communications Can Satisfy the 18 U.S.C. § 2251(d)(1) "Notice" Requirement, and Sufficient Evidence Supported Cox's § 2251(d)(1) Conviction.

Cox challenges her conviction for violating 18 U.S.C. § 2251(d)(1)(A), that provides:

> **(d)(1)** Any person who . . . knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering—

> **(A)** to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct[]
>
> . . .
>
> shall be punished as provided under subsection (e).[5]

To prove this violation, the Government presented evidence that Cox sent Hennis a Kik message with a link to a Dropbox account that contained child pornography. Cox's message with the link said, "[g]oodies for daddy."

On appeal, Cox argues that a one-to-one communication cannot be a "notice or advertisement" of child pornography under 18 U.S.C. § 2251(d)(1). She argues that the statute requires "something more than a one-on-one exchange." Because her communication ran only to Hennis, she argues there was insufficient evidence for her § 2251(d)(1) conviction.

"We review challenges to the sufficiency of evidence, including questions of statutory interpretation, de novo."[6] "There is sufficient evidence to support a conviction if, viewing the evidence in the light most favorable to the

[5] 18 U.S.C. § 2251(d)(1)(A).

[6] *United States v. Aldana*, 878 F.3d 877, 880 (9th Cir. 2017).

prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[7]

As a preliminary matter, we agree with the Government that we only need consider whether the trial evidence supports a conviction under the statute's "notice" prong. If the Government proves the "notice" prong, the Government does not need to prove the "advertisement" prong.

Section 2251(d)(1) is disjunctive (*i.e.*, the statute prohibits "notice *or* advertisement").[8] The Government prosecuted Cox under the "notice" prong. Therefore, we consider only whether any rational juror could find that evidence of a one-to-one communication could be a "notice" under 18 U.S.C. § 2251(d)(1).

1. Statutory Construction

Before we consider the sufficiency of the evidence, we first examine the statute. Whether 18 U.S.C. § 2251(d)(1)'s "notice" provision applies to one-to-one messages is an issue of first impression in this circuit.

In statutory interpretation, "our starting point is the plain language of the statute."[9] "[W]e examine not only the specific provision at issue, but also the structure of the

[7] *Id.* (quoting *United States v. Roach*, 792 F.3d 1142, 1144 (9th Cir. 2015)).

[8] 18 U.S.C. § 2251(d)(1) (emphasis added).

[9] *United States v. Williams*, 659 F.3d 1223, 1225 (9th Cir. 2011).

statute as a whole, including its object and policy."[10] "If the plain meaning of the statute is unambiguous, that meaning is controlling . . . ."[11]

We first look to the key word in our review: "notice."[12] The statute does not define notice, so we construe the word pursuant to its ordinary meaning.[13] To determine ordinary meaning, we consider dictionary definitions.[14]

Most standard English-language dictionary notice definitions do not define notice in relation to audience size. For example, *Merriam-Webster.com* gives the following definitions of "notice":

> 1 a (1): warning or intimation of something : announcement
> (2): the announcement of a party's intention to quit an agreement or relation at a specified time

[10] *Id.* (quoting *Children's Hosp. & Health Ctr. v. Belshe*, 188 F.3d 1090, 1096 (9th Cir. 1999)).

[11] *Id.*

[12] *See United States v. Franklin*, 785 F.3d 1365, 1367 (10th Cir. 2015) (considering whether 18 U.S.C. § 2251(d)(1) applies to a closed network).

[13] *See Sebelius v. Cloer*, 569 U.S. 369, 376 (2013); *see Animal Legal Def. Fund v. United States Dep't of Agric.*, 933 F.3d 1088, 1093 (9th Cir. 2019) ("When a statute does not define a term, we typically give the phrase its ordinary meaning." (quoting *FCC v. AT&T Inc.*, 562 U.S. 397, 403 (2011))).

[14] *See Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070–71 (2018); *United States v. Ezeta*, 752 F.3d 1182, 1185 (9th Cir. 2014).

(3): the condition of being warned or notified—usually used in the phrase *on notice*

b: information, intelligence

2 a: attention, heed

b: polite or favorable attention : civility

3: a written or printed announcement

4: a short critical account or review[15]

None of these definitions implicate audience size.

Relying on similar dictionary definitions, the Seventh and Tenth Circuits have reached similar conclusions when reviewing whether 18 U.S.C. § 2251(d)(1) prohibits communications to groups with limited membership.[16] In view of these dictionary definitions, the ordinary meaning of "notice" does not exclude one-to-one communications.

We nonetheless continue our inquiry and consider the word modifying "notice." Section 2251(d)(1) proscribes

[15] *Notice*, Merriam-Webster, https://www.merriam-webster.com/dictionary/notice (last visited May 20, 2020) (capitalization altered and examples omitted).

[16] *United States v. Gries*, 877 F.3d 255, 260 (7th Cir. 2017) (reviewing two "notice" definitions and opining that "[i]n everyday parlance, the term is not limited to warnings or notifications disseminated to the general public"); *Franklin*, 785 F.3d at 1368 (reviewing 18 "notice" definitions and concluding that none have "a public component") (citing *Notice*, Webster's Third New International Dictionary 1544 (ed. Philip Babcock Gove 1993)).

"*any* notice . . . seeking or offering" child pornography.[17] The Supreme Court has observed that, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"[18] Thus, Congress's use of "any" suggests Congress intended "notice" to cover any communication that could reasonably fall within that term.[19] Notably, the statute does not limit notices to those that are widely disseminated to the public at large or a large group of people.

We also consider the verbs that precede "any notice." Section 2251(d)(1) prohibits "[a]ny person [from] . . . *mak[ing]*, *print[ing]*, or *publish[ing]* . . . any notice."[20] A review of these verbs' dictionary definitions suggests that "publish" has a public dissemination component.[21] We can

[17] 18 U.S.C. § 2251(d)(1) (emphasis added).

[18] *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (alteration in original) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)); *accord Olympic Forest Coal. v. Coast Seafoods Co.*, 884 F.3d 901, 906 (9th Cir. 2018) (collecting cases for the proposition that the "any" is "broad and all-encompassing"); *Do Sung Uhm v. Humana, Inc.*, 620 F.3d 1134, 1153 (9th Cir. 2010) ("The word 'any' is generally used in the sense of 'all' or 'every' and its meaning is most comprehensive.") (quoting *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 115 (3d Cir. 1992)).

[19] *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588–89 (1980) (construing Section 307(b)(1) of the Clean Air Act expansively in light of a 1977 amendment that added the word "any").

[20] 18 U.S.C. § 2251(d)(1) (emphasis added).

[21] *Merriam-Webster* includes two representative definitions of "publish": "to make public announcement of" and "to disseminate to the public." *Publish*, Merriam-Webster, https://www.merriam-

assume that "print" often could refer, and even more typically may refer, to a more public dissemination. But as we have explained, the phrase "make[] . . . any notice" is quite clearly not limited to public dissemination and can include one-to-one communications that are fairly characterized as "notices." At least in the context of this case, which involves a defendant who is offering child pornography, we do not think the statute's inclusion of the words "publish" and "print" requires us to adopt an unnaturally narrow interpretation of the phrase "make[] . . . any notice." Once again, if Congress had intended to limit the statute in the way Cox suggests, we think it would have chosen different language than it did.

At this stage of the inquiry, in view of the ordinary meaning of the statutory terms and § 2251(d)(1)'s proscription of "*any* notice," the statute strongly suggests that "make[] . . . any notice" can reach one-to-one communications.[22]

We also consider "the structure of the statute as a whole, including its object and policy,"[23] and "whether the proposed interpretation would frustrate or advance that purpose."[24] With its child pornography legislation, Congress enacted a "comprehensive" regulatory scheme that

webster.com/dictionary/publish (definitions 1b and 2a, respectively) (last visited June 6, 2020).

[22] 18 U.S.C. § 2251(d)(1) (emphasis added).

[23] *Williams*, 659 F.3d at 1225 (quoting *Children's Hosp. & Health Ctr.*, 188 F.3d at 1096).

[24] *See United States v. Mohrbacher*, 182 F.3d 1041, 1049 (9th Cir. 1999).

"seeks to regulate (more accurately, exterminate) the entire child pornography market."[25] Construing "notice" to include one-to-one communications furthers this broad statutory objective.

In summary, based upon the statute's plain meaning, we hold that one-to-one communications can satisfy the "notice" requirement under 18 U.S.C. § 2251(d)(1).

2. Sufficiency of the Evidence

Applying our construction of § 2251(d)(1) to the instant case, we decide that a rational fact-finder could find that Cox made a notice offering child pornography when she sent a one-to-one electronic message with a Dropbox link and informed Hennis that it contained child pornography. As discussed above, the critical Kik messages conveyed Dropbox links and the message "[g]oodies for daddy." Taken together and when viewed in the context of the overall conversation between Cox and Hennis, these Kik messages reflected an offer to provide child pornography and means for how to gain access to it. This is sufficient to constitute "mak[ing] . . . any notice . . . offering . . . to . . . exchange, . . . display, distribute, or reproduce" child pornography."[26] The district court therefore did not err in denying Cox's Rule 29 motion for a directed verdict as to the § 2251(d)(1)(A) count.

[25] *United States v. McCalla*, 545 F.3d 750, 755 (9th Cir. 2008); *accord United States v. Maxwell*, 446 F.3d 1210, 1217 n.7 (11th Cir. 2006).

[26] 18 U.S.C. § 2251(d)(1).

3. *United States v. Caniff*

Considering our ruling, we do not reach Cox's argument that § 2251(d)(1) notice is unconstitutionally vague (or whether this argument has been waived). We nonetheless observe that the Eleventh Circuit case Cox relies upon for her associated rule of lenity argument—*United States v. Caniff*[27]—is distinguishable.

Caniff is the only other case in which a court of appeals directly considered whether § 2251(d)(1) notice applies to one-to-one communications.[28] In *Caniff*, the 32-year-old defendant engaged in a text-message conversation with an FBI agent who posed as a 13-year-old girl.[29] In the text conversation, the defendant asked the purported 13-year-old girl for sexually explicit pictures of herself.[30] For this conduct, the defendant was charged and convicted of "mak[ing]" a "notice" "*seeking*" to "*receive*" child pornography in violation of § 2251(d)(1)(A).[31] (In contrast, Defendant Cox was charged with "mak[ing]" a "notice" "offering" to "display, distribute, or reproduce" child pornography.[32])

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[27] 955 F.3d 1183 (11th Cir. 2020) (per curiam).

[28] *See id.* at 1185.

[29] *Id.* at 1185–86.

[30] *Id.* at 1186.

[31] *Id.* at 1186–87 (quoting 18 U.S.C. § 2251(d)(1)(A) (emphasis added)).

[32] *See* 18 U.S.C. § 2251(d)(1)(A).

On appeal, Caniff argued that 18 U.S.C. § 2251(d)(1) was ambiguous when applied to this conduct.[33] The Eleventh Circuit agreed. After applying the tools of statutory interpretation, the Eleventh Circuit had "serious doubts" about the statute's applicability to Caniff's conduct.[34] The court applied the rule of lenity in Caniff's favor and reversed his conviction under § 2251(d)(1)(A).[35]

The Eleventh Circuit's holding was based on a perceived ill fit between § 2251(d)(1) and defendant Caniff's conduct. Caniff had *asked* for pictures of the supposed 13-year-old girl, and he was therefore convicted of "mak[ing]" a "notice . . . *seeking*" to "receive" child pornography.[36] The Eleventh Circuit's decision seems to turn on its view that "mak[ing] . . . any notice . . . seeking . . . to receive" is an unusual phrasing that created "serious doubts" about the applicability of § 2251(d)(1) to Caniff's conduct.[37]

We do not have the same doubts about the applicability of § 2251(d)(1) to Cox's conduct. Cox *sent* Hennis a link to child pornography. The jury found Cox guilty of "mak[ing]" a "notice . . . *offering*" to "display, distribute, or reproduce"

[33] *Caniff*, 955 F.3d at 1187.

[34] *Id.* at 1191–92; *see also id.* at 1185 ("Caniff's private, person-to-person text messages asking an individual he thought was a minor to send him sexually explicit pictures of herself cannot support a conviction for 'mak[ing]' a 'notice' to receive child pornography in violation of 18 U.S.C. § 2251(d)(1).").

[35] *Id.* at 1193.

[36] 18 U.S.C. § 2251(d)(1)(A) (emphasis added); *Caniff*, 955 F.3d at 1185–86.

[37] *See Caniff*, 95 F.3d at 1189–91.

child pornography.[38] The § 2251(d)(1)(A) application to Cox's conduct does not warrant application of the rule of lenity.

We have no occasion to decide whether all one-to-one communications will be a § 2251(d)(1)(A) notice violation. Today, we hold only that one-to-one exchanges can satisfy the legal definition of "notice" under § 2251(d)(1), and that the evidence in Cox's case, viewed in the light most favorable to the prosecution, sufficiently supported her conviction.

B. The District Court Did Not Err by Admitting the August 2015 Hennis-Cox Kik Messenger Exchange.

Cox and Hennis's Kik Messenger conversation occurred in two distinct times: (1) from August 24 to 27, 2015, and (2) from November 22, 2015 to January 18, 2016**.** The indictment charged violations of child pornography laws only in the latter period.

Before trial, Cox sought to exclude evidence of the initial August 2015 exchange. The district court denied Cox's motion. The district court reasoned that while the August 2015 messages were not admissible as direct evidence of Cox's December 2015 crimes, the messages were admissible under Federal Rule of Evidence 404(b) to prove Cox's identity as the JadeJeckel user and to prove an absence of mistake. The district court also found the August 2015 communications were not unduly prejudicial under Federal Rule of Evidence 403.

[38] 18 U.S.C. § 2251(d)(1)(A) (emphasis added).

With this appeal, Cox argues that the district court erred in admitting the August 2015 messages under Rule 404(b) and 403.

1. Rule 404(b)

Rule 404(b)(1) says that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Nonetheless, the Rule provides that such other-act "evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[39]

The Ninth Circuit uses a four-part test to determine the admissibility of evidence under Rule 404(b):

> Such evidence may be admitted if: (1) the evidence tends to prove a material point; (2) the other act is not too remote in time; (3) the evidence is sufficient to support a finding that defendant committed the other act; and (4) (in certain cases) the act is similar to the offense charged.[40]

"The government 'has the burden of proving that the evidence meets all of the above requirements.'"[41] This court

[39] Fed. R. Evid. 404(b)(2).

[40] *United States v. Bailey*, 696 F.3d 794, 799 (9th Cir. 2012) (quoting *United States v. Romero*, 282 F.3d 683, 688 (9th Cir. 2002)).

[41] *Id.* (quoting *United States v. Arambula-Ruiz*, 987 F.2d 599, 602 (9th Cir. 1993)).

reviews a district court's admission of Rule 404(b) evidence for an abuse of discretion.[42]

Here, the district court did not abuse its discretion when it admitted the August 2015 messages under Rule 404(b).

As to the first requirement, the August 2015 Hennis-Cox exchange tends to prove two material issues—Cox's use of the JadeJeckel account (identity) and the absence of mistake. The August 2015 messages show Cox's strong interest in child pornography, negating the possibility that the later child pornography transmissions were mistakes. The August messages also included substantial evidence identifying Defendant Sarah Cox as using the JadeJeckel moniker. For example, in the August 2015 exchanges, JadeJeckel sent a non-public nude selfie of Cox and described personal information that applied to Cox.

As to the timeliness requirement, the August 2015 exchange occurred approximately three to four months before the charged conduct.[43]

With regards to the need to show that Cox committed the earlier acts, enough evidence suggested that Cox was the August 2015 JadeJeckel user. As described, there was considerable evidence identifying Cox as JadeJeckel.[44]

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[42] *United States v. Carpenter*, 923 F.3d 1172, 1180–81 (9th Cir. 2019).

[43] *See United States v. Lozano*, 623 F.3d 1055, 1059-60 (9th Cir. 2010) (per curiam) (concluding that three years was not too remote).

[44] *See Romero*, 282 F.3d at 688 (observing that the third prong of our Rule 404(b) test is a "low threshold").

In consideration of the final requirement, the August 2015 messages were similar to the November 2015 to January 2016 conversations, which included the criminal acts charged. Both sets of messages involved the same participants and their shared interest in child pornography.

The Government satisfied its Rule 404(b) burden. The district court did not abuse its discretion in admitting the August 2015 conversation under Rule 404(b) to prove Cox's identity and absence of mistake.

2. Rule 403

"Even if the proffered evidence satisfies these [four Rule 404(b)] requirements, the district court should decline to admit it [under Rule 403] if its probative value is substantially outweighed by the danger of unfair prejudice."[45] We review the district court's admission of evidence under Rule 403 for an abuse of discretion.[46]

We are satisfied that the district court did not abuse its discretion under Rule 403 when it admitted the August 2015 Kik conversation.

The August 2015 exchange's probative value was substantial. The trial largely concerned only one contested issue—the identity of JadeJeckel. The August exchange included significant evidence linking Cox to the JadeJeckel account.

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[45] *United States v. Banks*, 514 F.3d 959, 976 (9th Cir. 2008) (internal quotation marks omitted).

[46] *United States v. Flores-Blanco*, 623 F.3d 912, 919 n.3 (9th Cir. 2010).

As to the danger of unfair prejudice, the August 2015 messages included prejudicial evidence. In the August 2015 messages, Cox and Hennis discussed murdering a mother to steal a child and their desire to kidnap, enslave, and rape children. But other-act evidence in sex-crimes cases is often emotionally charged and inflammatory, and this does not control the Rule 403 analysis.[47]

Other-act evidence should be considered in the context of each case.[48] Here, the August 2015 messages were prejudicial but no more prejudicial than the November 2015 to January 2016 messages. The November 2015 to January 2016 messages included actual child rape and child sexual assault images and videos. In this context, the August 2015 messages were not unduly prejudicial.

The district court recognized that the August 2015 messages were potentially prejudicial but found that their probative value justified admission. "The district court is to be given 'wide latitude' when it balances the prejudicial

[47] *See United States v. LeMay*, 260 F.3d 1018, 1027–30 (9th Cir. 2001) (concluding that evidence of defendants' prior acts of child molestation, admitted under Federal Rule of Evidence 414, did not need to be excluded under Rule 403).

[48] *United States v. Jayavarman*, 871 F.3d 1050, 1064 (9th Cir. 2017) ("That [probative] value was not substantially outweighed by any risk of unfair prejudice that might have arisen from the evidence, especially in the context of other evidence adduced at trial."); *see also LeMay*, 260 F.3d at 1031 ("[E]vidence of a defendant's prior sex crimes will always present the possibility of extreme prejudice, and that district courts must accordingly conduct the Rule 403 balancing inquiry in a careful, conscientious manner that allows for meaningful appellate review of their decisions.").

effect of proffered evidence against its probative value."[49] Here, the district court did not abuse its discretion in admitting the evidence.

III. CONCLUSION

Based on the plain statutory language, we hold that one-to-one communications can satisfy the legal definition of "notice" under 18 U.S.C. § 2251(d)(1). Applying this construction to the instant case, we conclude that a rational trier of fact could find that Cox made a notice offering child pornography when she sent a one-to-one electronic message linking to a Dropbox account that contained child pornography. We also hold that the district court did not abuse its discretion when it admitted the uncharged August 2015 messages under Federal Rule of Evidence 404(b).

The judgment of conviction is **AFFIRMED.**

[49] *United States v. Higuera-Llamos*, 574 F.3d 1206, 1209 (9th Cir. 2009) (quoting *United States v. Spencer*, 1 F.3d 742, 744 (9th Cir. 1993)).

LAW OFFICE OF
DAVID EISENBERG, PLC

May 7, 2020

Molly Dwyer, Clerk of the Court
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *United States v. Sarah Melisa Cox*
C. A. No. 18-10416

Oral Argument Set For: May 11, 2020 at 9:00 a.m.
Courtroom 3, James R. Browning U. S. Courthouse, San Francisco
Panel: R. Nelson and Bress, CJJ, and Gwin, DJ

Response to United States Citation of Supplemental Authorities on Waiver

Dear Ms. Dwyer:

The government claims in its May 6, 2020, correspondence (Dkt. 49) that Appellant waived her rule of lenity argument. Although Cox did not address lenity until her reply brief, the argument is preserved in this case.

An argument not presented in an opening brief may be raised in a reply brief if: a "manifest injustice" would arise; the issue is raised in appellee's brief; or failure to raise the issue does not prejudice the opposing party. *U.S. v. Mageno*, 762 F.3d 933, 940 (9th Cir. 2014), citing *U.S. v. Ullah*, 976 F.2d 509, 514 (9th Cir.1992). *See also*, *U.S. v. Salman*, 792 F.3d 1087, 1090 (9th Cir. 2015) (noting the parties had the opportunity to address the matter at oral argument).

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A manifest injustice to Cox arises. Sufficient evidence to prove "notice," an element for a § 2251(d)(1)(A) conviction, is a matter of due process. Both parties relied on the first opinion in *U.S. v. Caniff*, 916 F.3d 929 (11th Cir. 2019), where the majority held that "notice" is satisfied by a one-to-one exchange. However, on April 9, 2020, the Eleventh Circuit held that it was unclear whether "notice" was broad enough to include person-to-person texts and applied the rule of lenity. *U.S. v. Caniff*, 2020 WL 1802764 (11th Cir. 2020.) Failure to raise an issue in an opening brief can be excused due to "manifest injustice" if a conviction is upheld on an erroneous legal ruling. *U.S. v. Trinidad Hernandez*, 759 Fed.Appx. 590, 593-94 (9th Cir. 2019)

A "key inquiry" is whether the issue has been sufficiently addressed for the Court to make "an informed resolution." *Mageno*, citing *Ullah*, 976 F.2d at 514. Cox raised lenity in her reply brief (Rep. Br., 20-21); the parties' joint motion for supplemental briefing covered the issue (Dkt. 46); and the government's May 6, 2020 letter addressed it (Dkt. 49).

The government's filings have fully addressed the argument. It will not be prejudiced by the Court's review of the issue. *Id.*

Appellant requests that this correspondence be distributed to the panel members considering this case.

Respectfully yours,

s/ David Eisenberg
DAVID EISENBERG
Attorney for Appellant Sarah Melisa Cox

cc: Krissa Lanham, Esq.
Assistant U. S. Attorney
Attorney for Plaintiff-Appellee

Certificate of Compliance
U.S. v. Cox, 9th Cir. Case Number 18-10416

I am the attorney or self-represented party.

This document contains 349 words in the body of the Response to United States Citation of Supplemental Authorities on Waiver.

I certify that this document complies with the 350 word limit of FRAP 28-j.

s/David Eisenberg Date: May 7, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Federal Correctional Institution
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Dublin, California 94568

Description of Document(s) *(required for all documents)*:

Response to United States Citation of Supplemental Authorities on Waiver

Signature s/David Eisenberg **Date** May 7, 2020

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U.S. Department of Justice

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May 6, 2020

Molly Dwyer, Clerk of the Court
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, California 94103-1526

Re: ***United States v. Sarah Melisa Cox***, C.A. No. 18-10416
Oral Argument Scheduled: May 11, 2020, 9:00 a.m.
Courtroom 3, James R. Browning U.S. Courthouse, San Francisco
Panel: R. Nelson, and Bress, CJJ, and Gwin, DJ
FRAP 28(j) Citation of Supplemental Authorities

Dear Ms. Dwyer:

Pursuant to FRAP 28(j), the government advises the Court of additional relevant citations discovered in the course of preparing for oral argument.

The United States argues "a principal canon of statutory construction is that courts 'must give effect, if possible, to every clause and word of a statute.'" (Answ. Br. at 31 (quoting *United States v. Corrales-Vazquez*, 931 F.3d 944, 950 (9th Cir. 2019)).) In *United States v. Harrison*, the Third Circuit embraced similar reasoning when construing the "notice or advertisement" child pornography sentencing enhancement in U.S.S.G. § 2G2.2(b)(5). 357 F.3d 314, 322 (3d Cir. 2004), *judgment vacated on other grounds*, 543 U.S. 1102 (2005). The Third Circuit rejected Harrison's argument that "notice" implied a public component, because:

> the language of § 2G2.2(b)(5) contemplates [a] broader definition of "notice," by contrasting it with an "advertisement." If "notice" is interpreted to mean an announcement to the general public, it leaves very little useful work for the word "advertisement," which is itself defined as "a public notice." *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 59 (1988). We assume that by

> including both terms, the drafters meant there to be a difference between them—"advertisement" implicates announcement to a wider audience, while "notice" may simply mean the communication of information to another party.

Id. at 321-22.

Please distribute this letter to the members of the Court considering this case. Your assistance is appreciated.

Very truly yours,

MICHAEL BAILEY
United States Attorney
District of Arizona

s/ Krissa M. Lanham
KRISSA M. LANHAM
Assistant U.S. Attorney

cc via ECF: David Eisenberg, Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Tammie R. Holm
Legal Assistant
U.S. Attorney's Office

U.S. Department of Justice

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May 6, 2020

Molly Dwyer, Clerk of the Court
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, California 94103-1526

Re: ***United States v. Sarah Melisa Cox***, C.A. No. 18-10416
Oral Argument Scheduled: May 11, 2020, 9:00 a.m.
Courtroom 3, James R. Browning U.S. Courthouse, San Francisco
Panel: R. Nelson, and Bress, CJJ, and Gwin, DJ
FRAP 28(j) Citation of Supplemental Authorities

Dear Ms. Dwyer:

Pursuant to FRAP 28(j), the government advises the Court of additional relevant citations discovered in the course of preparing for oral argument.

Cox argues for the first time in her reply brief that 18 U.S.C. § 2251(d)(1)'s "notice" provision is unconstitutionally vague. (Repl. Br. at 20-21.) She invokes case law governing both facial and as-applied vagueness challenges. (Repl. Br. at 21.)

Cox has waived both challenges by failing to raise them until her reply brief, and in any event, does not merit relief. To mount a facial challenge, Cox would bear the burden of demonstrating § 2251(d)(1) substantially risks suppressing her First Amendment-protected speech. *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998); *United States v. Purdy*, 264 F.3d 809, 811 (9th Cir. 2001) ("Where, as here, a statute is challenged as unconstitutionally vague in a cause of action not involving the First Amendment, we do not consider whether the statute is unconstitutional on its face."). This she has not attempted to do.

As-applied vagueness challenges are waived when an appellant fails to raise them in the opening brief, as Cox did here. *Alphonsus v. Holder*, 705 F.3d 1031, 1043 n.12 (9th Cir. 2013), *abrogated on other grounds as recognized in Guerrero v. Whitaker*, 908 F.3d 541 (9th Cir. 2018); *see also Cerezo v. Mukasey*, 512 F.3d 1163, 1165 (9th Cir. 2008). And even if she hadn't waived her claim, "Section 2251(d) is not unconstitutionally vague" as applied to Cox's conduct, because "'notice' [is a] word[ ] of common usage that ha[s] plain and ordinary meanings" that are "sufficiently definite that ordinary people using common sense could grasp the nature of the prohibited conduct." *United States v. Yong Wang*, No. 11 CR. 730 PGG, 2013 WL 452215, at *19 (S.D.N.Y. Feb. 5, 2013) (quoting *United States v. Gagliardi*, 506 F.3d 140, 147 (2d Cir. 2007)).

Please distribute this letter to the members of the Court considering this case. Your assistance is appreciated.

Very truly yours,

MICHAEL BAILEY
United States Attorney
District of Arizona

s/ Krissa M. Lanham
KRISSA M. LANHAM
Assistant U.S. Attorney

cc via ECF: David Eisenberg, Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

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s/ Tammie R. Holm
Legal Assistant
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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SARAH MELISA COX, AKA Sarah Cox, AKA Sarah Cunningham, Defendant-Appellant.	No. 18-10416 D.C. No. 3:16-cr-08202-ROS-1 District of Arizona, Prescott ORDER

The parties' joint motion for leave to file supplemental briefing and to reschedule oral argument (Dkt. No. 46) is DENIED.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Allison Fung
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SARAH MELISA COX, Defendant-Appellant.	C.A. No. 18-10416 D. Ct. No. 16-CR-08202-PCT-ROS **JOINT MOTION FOR SUPPLEMENTAL BRIEFING AND REQUEST TO RESCHEDULE ORAL ARGUMENT CURRENTLY SET FOR MAY 11, 2020**

The parties, through undersigned counsel, hereby jointly move this Court pursuant to Fed. R. App. P. 27 to permit supplemental briefing regarding the application of the rule of lenity to the "notice" provision of 18 U.S.C. § 2251(d)(1).

Defendant-Appellant Sarah Cox raises two arguments in her opening brief. The second challenges the sufficiency of the evidence as to Count 4, which charged a violation of 18 U.S.C. § 2251(d)(1). (Op. Br., Dkt. 9, at 32-37.) The parties relied on *United States v. Caniff*, 915 F.3d 929 (11th Cir. 2019), throughout their briefing on this issue. (Op. Br. at 36; Answ. Br., Dkt. 22, at 29, 34-35; Repl. Br., Dkt. 27, at 18.) As the government noted in its answering brief, the Eleventh Circuit in *Caniff* was "the only court to have squarely addressed the issued that Cox raises: whether a private, one-to-one communication providing or seeking child pornography is sufficient to be convicted of providing notice of child pornography pursuant to 18

U.S.C. § 2251(d)(1).” (Answ. Br. at 29 (citing *Caniff*, 916 F.3d at 932-38).) The *Caniff* opinion that the parties cited concluded that one-to-one communications were criminalized by the “notice” provision of 18 U.S.C. § 2251(d)(1). *Id*. at 937.

On April 9, 2020, the *Caniff* panel sua sponte vacated the opinion on which the parties here relied and substituted an opinion reversing Caniff’s conviction under 18 U.S.C. § 2251(d)(1). *United States v. Caniff*, --- F.3d ----, 2020 WL 1802764 (11th Cir. Apr. 9, 2020). The Eleventh Circuit analyzed whether the common, everyday meaning of “notice” under § 2251(d)(1) could fairly be understood to encompass “private, person-to-person text messages.” *Id*. at *3-*4. Because “neither dictionary definitions nor the traditional canons of statutory interpretation neatly resolve the question,” the *Caniff* panel applied the rule of lenity to “hold that 18 U.S.C. § 2251(d)(1)—and specifically, its prohibition against ‘knowingly mak[ing] ... any notice ... seeking or offering [child pornography]’—does not apply to a private text message sent from one individual to another.” *Id*. at *6.

Cox argued for the first time in her reply brief that “the meaning of *notice* is vague, to the point that it lacks sufficient guidance as to the conduct it seeks to prohibit.” (Repl. Br. at 20-21.) Ordinarily, this Court may deem waived an argument raised for the first time in a reply brief. *United States v. Kelly*, 874 F.3d 1037, 1051 n.9 (9th Cir. 2017). However, in light of the recent, substantial change to the *Caniff* opinion on which the parties relied and the close relationship between the void-for-

vagueness argument raised in Cox's reply and the rule of lenity principles now underlying *Caniff*, *see United States v. Lanier*, 520 U.S. 259, 266 (1997), the parties agree that supplemental briefing may assist the Court in deciding this matter.

If the Court agrees, the parties propose the following schedule: (1) the United States' supplemental brief would be due fourteen days after the Court's order approving supplemental briefing; (2) Cox's supplemental brief would be due fourteen days after the United States' supplemental brief. No reply briefs would be permitted. The parties propose a limit of 3,500 words for the supplemental briefs. The parties also respectfully suggest that, to enable them to complete the supplemental briefing and the Court to consider it prior to oral argument, the oral argument currently scheduled for May 11, 2020, be rescheduled to a date following the conclusion of the supplemental briefing.

Respectfully submitted this 23rd day of April, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Tammie R. Holm
TAMMIE R. HOLM
Legal Assistant

No. 18-10416

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA	)	
	)	
Plaintiff-Appellee,	)	Dist. Crt. # CR 16-08202-ROS
	)	District of Arizona
vs.	)	
	)	
SARAH MELISA COX,	)	
	)	
Defendant-Appellant,	)	
	)	

ON APPEAL FROM THE JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

APPELLANT'S REPLY BRIEF

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ARGUMENT I

THE DISTRICT COURT ERRED BY ALLOWING INTO EVIDENCE PURSUANT TO RULE 404(b) THE AUGUST 2015 KIK CHAT EXCHANGES. THEY WERE UNNECESSARY TO PROVE IDENTITY AND THEY WERE SO HIGHLY PREJUDICIAL TO THE DEFENDANT THAT THEY SHOULD HAVE BEEN EXCLUDED PURSUANT TO RULE 403, FRE.

1. Rule 403 Is Particularly Relevant in This Case

The government's principal argument is that the August 2015 Kik chat conversation proved JadeJeckel's identity, and, therefore, was admissible as Rule 404(b) evidence. (Ans. Br. at 17-21.) This begs the Appellant's position that the messages exchanged in August 2015 (the "August Conversation") were unnecessary to prove identity but were so highly prejudicial that they deprived her of a fair trial. The government's counter is that since the November 2015 to January 2016 chats (the "November Conversations") were so egregious, the 28+ pages of exchanges in three days of August out of 89 pages of Kik chat communications were of no consequence. Thus, states the government: "There is no question that Cox used shocking language and disturbing, graphic imagery in the August Conversation. However, within the context of this case – *where the jurors had to watch videos of children actually being raped, not just read words discussing it* – the prejudice does not substantially outweigh the probative value of the evidence" (italics provided). (Ans. Br. at 25.) In other words, in a trial in

which 60+ pages of the highly repulsive November Conversations were admitted, including videos supplied by Richard Hennis of prepubescent children being assaulted, an additional 28+ pages of the same gross nature are perfectly acceptable. The government cites no authority for its claim that the analysis of Rule 403's exclusion of evidence for prejudice, confusion, waste of time and other reasons becomes less of a concern in a highly-charged child pornography trial. The opposite should be the guide: the more inflammatory the charges and the more gross the direct proof, the higher the level of vigilance in admitting material not inextricably intertwined with the charged conduct. Indeed, if in its opinion the government had such an overwhelming case based on the November - December 2015 exchanges and other evidence, it did not need the August Conversation at all.

The government correctly notes that the standard of review for Rule 403 rulings is abuse of discretion, citing *United States v. Curtin*, 489 F.3d 935, 943 (9th Cir. 2007). (Ans. Br. at 16.) Yet, the Court in *Curtin* was very clear in preventing evidence of the propensity, or character trait of a defendant, from being admitted to show that a defendant acted in accordance with the trait on a particular occasion. The investigation in *Curtin* involved a sting operation of sexual predators who were using the internet to locate juvenile victims. Las Vegas police arranged for the defendant to meet with an intended juvenile after he exchanged

extensive discussions about sex with the individual, who was actually an undercover lure. The defense was based on Curtin's claim that his subjective intent was not to meet and have sex with a minor but with a 30- to 40-year-old adult female who pretended that she was a child having incestuous sex with her "daddy." The government's response to this defense was to offer evidence in its case-in-chief of five stories it located in Curtin's personal digital assistant ("PDA"). The stories were titled "My Little Sister" (involving incest and impregnation of a nine-year-old girl), "Love for the World" (involving incest), and three other stories involving an eleven-year-old girl having sex with her father and her teacher: "Melanie's Busy Day," "Restrictions" and "Daddy's Lessons." Although the issue before the Court was the extent to which the district judge had to review the content of each of these stories, the Court warned: "Because evidence of other crimes, wrongs, or acts carries with it the inherent potential to see the defendant simply as a bad person and then to convict because of who he is rather than what he did, a trial court must take appropriate care to see that this does not happen." *Id.* at 957. The same caution should have been applied in this case.

Propensity in a case like this, with its revolting language and even worse video and photographic depictions, is a very real concern. The concurring opinion in *Curtin* offers critical guidance in cases like this one, where jurors will

be repulsed by the proof, including the August exchanges. As the opinion warned, evidence is unduly prejudicial if it creates "an undue tendency" suggesting an improper basis for a decision, notably one on emotional grounds. The opinion related this to "perverse sexual fantasies," such as child molestation, which could perpetrate "intense disgust," to the extent it creates revulsion of and hostility toward the defendant that overwhelming prejudice arises. (*Id.*, 964.) That is precisely what occurred in this case

At least one juror's revulsion to the evidence during trial became clear, to the point where he could no longer serve. This juror was overheard by another member of the panel to be sighing, muttering under his breath and uttering such words as "ugh, God" during the evidence. His remarks indicated to the other juror that he had already made up his mind about the case. At one point during the trial, this juror was heard to say "something to the effect of, 'we need to get this over with, and you know, render our verdict.'" The court dismissed the juror in question. (R/T, Day 3 of Trial, 05/10/2018, p. 32, l. 22 to p. 38, l. 6; ER 401-407.) The incident underscores the inherent prejudice arising from this type of prosecution, where children are the victims and vivid statements and images of rape, incest and such are put before the jury.

The August Conversation was loaded with disgusting conversation.

For example, as the agent read every single word of every one of the 302 exchanges in August, he included JadeJeckel telling Hennis that she found him in "fetlife." The witness, agent Christopher Schrable, described "fetlife" as "an adult bondage website for particular minded individuals to chat and exchange pictures videos of a graphic sexual nature." (*Id.*, p. 96, ll. 16-18.) As to Hennis's profile, the agent testified that it projected his interest in "family taboos and other kinks," including "Father/Daughter." An exchange by JadeJeckel also made reference to incest and rape: "Found a naughty dad that fucks his 11 yr old" (*id.*, p. 104, ll. 5-11; Tr. Exh. 18, MK 3630 at p. 3/89). Hennis responded, "I want you and me to have our own little fuck toy," to which she replied, "Yes, so do I. Soooooooo badly. Get us one daddy, pleaaaaase" (*Id.*, p. 106, ll. 8-13; Tr. Exh. 18, MKs 3651-3653 at p. 5/89) . Other references, including one about killing a child, started out by Hennis stating "You could find a meth head girl on CL, and take her little girl." JadeJeckel replied, "Yes but witnesses are no bueno. Credible or not. I'd have to kill her to do it." Hennis says next: "Then do it." (*Id.*, p. 110, ll. 6-13; Tr. Exh. 18, MK 3688-3691 at p. 8/89.) Still other August Conversations talk about enslavement. (*Id.*, p. 125, l. 10 to p. 126, l. 13; Tr. Exh. 18, MKs 3833-3837; 3842-3845; 3850-3853 at pp. 26-29/89.)

The government argues that emails and chat logs in sexual predator

cases have been admitted in other trials. However, the circumstances in this trial were a far cry from the emails and chat logs admitted as 404(b) evidence to prove identity in *United States v. McCormack*, 700 Fed.App'x 643 (9th Cir. 2017), a sexual exploitation of children case. (Ans. Br. at 19.) The Court determined that evidence of emails and chat logs in which the defendant discussed the crimes and sought to exchange child pornography with others was highly probative of the perpetrator's identity, intent and opportunity, as well as location of the crime. However, there is no indication as to the content of the emails and logs, so the extent of highly inflammatory content is not known and does not appear to have been the basis on which the defendant sought to keep these materials out of the case.

The government also relies on *United States v. Lindsay*, 931 F.3d 852, 868-69 (9th Cir. 2019), and *United States v. Dhingra*, 371 F.3d 557, 566-67 (9th Cir. 2004), which it offers as examples of the admission of Rule 404(b) evidence in recognition of the difficulty the government has in proving child pornography crimes. (*Id.*, p. 19.) However, neither of the holdings in *Lindsay* and *Dhingra* provide that 404(b) evidence is admitted because of the government's difficulty in proving up child pornography charges.

The charges in *Dhingra* included coercion and enticement of an

individual not yet 18 years old to engage in sexual activity. The testimony by a witness in *Dhingra* that the defendant sexually assaulted her when he knew she was 17 years old was admitted because it tended to show that the defendant's purpose in contacting the 14-year old victim in the case was because he knew that she, too, was a minor. *Id.*, at 566-67. The prejudicial evidence in *Dhinga* of a non-charged assault of a minor was overcome by the need to prove the defendant's knowledge that the victim was a minor, which was an element of the charge.

Regardless of the Defendant's position at trial that the government had to prove the element of identity, the evaluation of the prejudicial nature of the evidence pursuant to Rule 403 still remains. The evidence offered by the government of JadeJeckel's identity that was *not* based on the August exchanges certainly covered the issue, and the government does not rebut the Appellant's argument that it was more than sufficient in that regard.

2. Knowledge and Absence of Mistake

The government also claims that the August Conversation constituted evidence of the Appellant's knowledge of child pornography and lack of mistake that the exchanges and materials pertained to child pornography. (Ans. Br., at 21-22.) While the text messages clearly pertained to sexual contact with children and worse, the August Conversation pales as indicia of child pornography when

compared to the exchanges of messages, photos and videos in the November Conversations, which started up again on November 22, 2015 and ran through January 18, 2016. Indeed, all of the five charges in this case pertained to events occurring with a few days if not hours of each other in early December 2015.

Thus, the evidence with respect to the three possession of child pornography charges, Counts 1, 2 and 3, occurred within approximately one minute of each other on one day – December 3, 2015. (Tr. Exh. 18, MK 7256 at p. 85/89; Tr. Exh. 1; Tr. Exh. 18, MK 7257 at p. 85/89; Tr. Exh. 2; Trial Exhibit 18, MK 1258, Exh. 3.) The exchange pertaining to the notice and advertisement charge, Count 4, happened the next day, on December 4, 2015, when JadeJeckel sent a Dropbox link to Hennis containing several videos of child pornography, portions of which were admitted into evidence. (*Id.*, Trial Exh. 18, MK 6458 at 79/89: Tr. Exhs. 4-6.) As for Count 5, which charges distribution of child pornography on December 3 - 4, 2015, Trial Exhibit 4, which was one of the videos found in the Dropbox account at Message Key 6458, was the distributed item. Thus, all five counts occurred within two days of each other and were preceded in November by a multitude of exchanges clearly of a child pornographic nature.

For example, Hennis sent a greeting to JadeJeckel on November 22nd:

"Hi. It's taboo daddy." (Tr. Exh. 18, MK 5552, 5553.) A short time later, JadeJeckel wrote: "I am surrounded by people and their kids, a lot yes." Hennis responded: "Have you ever tried anything with any of them?" JadeJeckel replied: "No, was afraid they would tell." (*Id.*, MK 5575, 5576, 5577.) Also on the same day, JadeJeckel sent: "Watched a guy fuck his dog, was kinda hot" and "a giant dog in a tiny pussy even better." (*Id.*, MK5633, 5634.) Hennis then said: "Would you fuck a dog?" and JadeJeckel said "Mmm not sure." (*Id.*, MK 5637, 5638.)

Other examples of such content include the sending by Hennis of 11 photos of child pornography on November 22nd. (Tr. Exhs. 7 - 17) interspersed with comments such as "You just have to want me" to which JadeJeckel replied "I do and all your sick fantasies;" "Mmmm yea keep em coming daddy;" "Wish I could see it in action." (Tr. Exh. 18, MK 5646, 5647, 5659, 5660.) Without further elaborating on the actual content of the pornographic remarks, the Court is respectfully referred to the content of message keys for the rest of the Kik chat chart.

The government offers two cases in support of its argument that the August exchanges were admissible to show knowledge and absence of mistake. In *United States v. Salcido*, 506 F.3d 729 (9th Cir. 2007), chat logs were admitted into evidence because they showed that the defendant knew that the pornographic

images he was charged with possessing were of children. The Court affirmed the admission of the logs because the defendant claimed that the government had to prove the images were of children, and, therefore, the government had to prove knowledge. (*Id.*, pp. 773-75.) Here, the defense conceded the November - January messages were relevant and that they contained obvious images of child pornography. Indeed, the very issue of knowledge of the involvement of minors in a child pornography case could be left to the jury, since in many cases the answer is self-evident. *See, United States v. Welton*, 2009 WL 4507744, *10 (C.D. Cal. 2009) (noting that in *Salcido*, the Court held that the images themselves are sufficient to prove that minors are depicted.) Rather, the issue in this case is not whether logs (or the Kik chat exhibit) are relevant, but whether the entire exhibit comes into evidence in the circumstances where the contents of the November Conversations on their face consisted of child pornography.

In a second case relied on by the government, *United States v. Phipps*, 523 Fed.Appx 498 (9th Cir. 2013), pornographic stories found on the defendant's computer were admitted as "other act" evidence because they also showed knowledge. In *Phipps*, however, the Court noted that the trial court allowed just three of thousands of such stories into evidence; they were presented to the jury in a limited fashion and they were not discussed at length in testimony or argument.

(*Id.*, 500.) In this case, the government studiously, painstakingly read each and every line of each and every message in the August Conversation.

3. Prejudice Outweighs Probative Value

In the government's view, the probative weight of the August exchanges is not outweighed by the prejudice of its admission because "the jurors had to watch videos of children actually being raped, not just read words discussing it . . ." (Ans. Br. at 25.) This argument is tantamount to saying that evidence no matter how prejudicial to the defendant is admissible if the government has a really good case proving up the charges themselves. If so, then the government did not need the August exchanges in the first place. Yet, it compounded the prejudice to the Appellant by reading word-for-word every line in the exchanges. (R/T 05/09/2018, Testimony of Christopher Schrable, p. 225, l. 4 to p. 259, l. 20; ER 281 - 315.)

4. Inextricably Intertwined Evidence

The government maintains that the trial court erred in its ruling that the August messages were not inextricably intertwined with the charged events. (Ans. Br. at p. 28.) Yet, the District Court determined that the August exchanges was not inextricably intertwined because the government charged that the five offenses occurred in December 2015, not in August. Accordingly, the court ruled

that the government could not admit the August communications as direct evidenced of the charged offenses. (CR 121, p. 2; ER 2.)

Moreover, not only did the government fail to charge any event occurring in August, but as the Defendant pointed out in its motion *in limine* and as the district court noted in its Order, the August communications simply, abruptly broke off. Communications between Hennis and JadeJeckel did not resume until November 22nd, nearly three months later. The only thing that could be said for the link between the two sets of communications is that the same individuals participated. Yet, none of the August communications was needed to understand the evidence of the November exchanges and the photos and videos that came with them.

5. Conclusion

The government's proof of JadeJeckel's identity did not hinge on the August Conversation. The August exchanges, however, did raise the specter of propensity. The communications showed JadeJeckel's availability to discuss child pornography, but she dropped the contact with Hennis after a few days. It was Hennis who re-initiated contact nearly three months later, eager to resume the exchanges. JadeJeckel's consent to continue the conversation showed nothing more than a propensity to discuss child pornography. Nothing occurred between

these two time periods to show that either individual was trying to arrange the possession, distribution or notice/advertisement pertaining to child pornography offenses.

Accordingly, the case should be remanded for a new trial on Counts 1, 2, 3 and 5.

ARGUMENT II

THE DISTRICT COURT ERRED BY ALLOWING COUNT 4, CHARGING THE DEFENDANT WITH GIVING NOTICE AND ADVERTISEMENT SEEKING TO DISTRIBUTE VISUAL DEPICTIONS OF MINORS ENGAGING IN SEXUALLY EXPLICIT ACTIVITIES, TO GO TO THE JURY

1. Notice in Section 2252(d)(1) as a Factual Issue

The government correctly points out that what constitutes "notice" for a violation of 18 U.S.C. § 2251(d)(1) is a factual matter left to the jury.[1] (Ans. Br. at 31.) However, in the context of this case, the one-to-one exchange on December 4, 2015 from JadeJeckel to Hennis could not have constituted "notice." There was not enough evidence on which a jury could have concluded otherwise.

In *United States v. Brown*, 859 F.3d 730 (9th Cir. 2017), this Court held that the defendant had the constitutional right to rely on the closed nature of a bulletin board for posting messages of child pornography as a defense to the charge of notice. (*Id.*, at 737.) In reaching its decision, the Court noted that the issue before it was not whether the evidence was sufficient to support a conviction, but whether the trial court's decision to preclude Brown from making the argument deprived him of his constitutional right to a defense. If, held the Court, the issue in

[1] The government elected to proceed solely on the theory that the Defendant gave "notice" - - not "advertisement" - - apparently conceding that she did not advertise a visual depiction using a minor in sexually explicit conduct.

Brown was sufficiency of the evidence, then the issue on appeal would have been whether in viewing the evidence in the light most favorable to the prosecution, could any rational trier of fact have found that the elements of the charge been proven beyond a reasonable doubt. (*Id.*, at 736-37.) This would necessarily have included whether "notice" had been shown. That is the question now before the Court.

As the record discloses, the evidence - even when viewed in the light most favorable to the government - does not show beyond a reasonable doubt that JadeJeckel's transfer of a Hypertext Transfer Protocol (commonly "http") link to Hennis constituted notice seeking to exchange a visual depiction pursuant to Section 2251(d)(1). On December 4, 2015, at 3:08 a.m. she messaged at MK6458 the following to Hennis: "http://www.dropbox.com/sh/7/rzitqiiboagqu2 /AADJUrZ5s8rB-ynSERZF087fa/kik%20videos?dl=0." Hennis was the only recipient. No other message, such as a request to disseminate the link to anyone else, was included in this message key, and no other message preceded or followed this one indicating to Hennis that the link was to be shared. Throughout the multitude of messages exchanged between JadeJeckel and Hennis, there is no mention of sharing this video or any other with a third person, much less a chat room, bulletin board or third-party group.

The government appears to recognize that this one-to-one communication is a problem when it declares that the message "goodies for daddy" sent from JadeJeckel a few exchanges later (Tr. Exh. 18, MK 6460 at p., 880/89, ER 371) elevates the notice from its lone recipient to others unknown. (Ans. Br. at 33.) To the contrary, this message actually shows that JadeJeckel had no more interest to disclose the link to anyone beyond "daddy." There certainly is no evidence that "goodies for daddy" related to anyone else.

The government relies heavily on the dictionary definitions of "notice" (Ans. Br. at 33), but these are not dispositive. The legislative history indicates that Congress was concerned with a wider dissemination than just one-to-one. The history leading to the passage of child sexual abuse statutes, including Section 2251, emphasizes the need to ban the production and use of advertisements for child pornography. "The bill prohibits *advertising*—to buy or sell child pornography, to offer or seek children for sex acts for the purpose of producing child pornography, or to participate with children in sex acts for the purpose of producing child pornography" (italics supplied). H. R. Rep. No. 99-910 (1986), 1986 WL 31957, *3. Thus, the use of "advertising" without reference to a sub category of communication - - "notice" - - indicates a broader range of dissemination than one-to-one.

Further, the legislative history provides that "[t]he *advertising* of child pornography has been a very serious problem. There are a number of magazines and newsletters which serve to *advertise* the availability of child pornography or to offer children to participate in sexually explicit conduct. Control of *advertising* of this type was the first recommendation of the Senate Permanent Subcommittee on Investigations" (italics supplied). (*Id*, *6.) The problem, as the history recognized, was the ease in which many individuals had access to child pornography and its extended abuses: "A recent technological phenomenon, computer 'bulletin boards,' have been discovered to be used to offer pornography for sale or exchange or to *advertise* the availability of children for sexual exploitation. Use of computer bulletin boards for such *notices*, since they are a means of interstate commerce, would also be prohibited by this section." (*Id.*, at *6-*7.) Thus, it is quite clear that Congress' concern over the dissemination of child pornography was due to the extraordinary expansion of communication among groups of people through information technology. The history discloses that "notice" for the purpose of this statute contemplates the communication finding its way onto an exchange available to more than just a single person.

Only one case has concluded that notice can be one-to-one. In *United States v. Caniff*, 916 F.3d 929, 936 (11th Cir. 2019), based on its review of the dictionary definitions of notice, the Eleventh Circuit held that an individually directed text message could constitute notice for the purpose of Section 2251(d)(1). The dissent saw it otherwise, for several reasons. First, people simply would not use the term "notice" to include the event of one person sending a text message to another. (*Id.*, 941-42.) Second, when viewed in juxtaposition to the common understanding of words describing prohibited actions, such as "make," "publish," or "print," the act of giving notice contemplates more than a one-on-one exchange. (*Id.*, 922-24.) Third, when the term notice is viewed where it appears in Section 2251(d)(1), alongside of its companion advertisement, it takes on the concept of some form of public communication. Fourth, the definition of notice in many dictionaries is comparable to the more public concept of advertisement. For example, as the dissent pointed out, an example of "notice" according to Webster is "[a] written or printed sign ... communicating information or warning"—as in "to put a notice on a door," which conveys the idea that the public is informed. Similarly in the Oxford English Dictionary, notice could be "a displayed sign or placard giving news or information." Black's Dictionary as well defines notice as "[a] written or printed announcement." (*Id.*, 924-26.) Thus, the answer to the

coverage of "notice" is not so easily disposed of by consulting the dictionary of choice.

The government recognizes that relying on the dictionary is not the answer to the coverage of notice. (Ans. Br. at 34, quoting *United States v. Peterson*, 2015 WL 13657215, *6 (C.D. Cal. 2015) ("the related but independent term 'notice' is not primarily defined, even in dictionaries, by reference to the audience.") The court in *Peterson* did state that whether a communication amounts to advertising must be determined in context. (*Id.*, *7.) The same contextual application should apply to notice. Here, the contextual setting is nothing more than JadeJeckel referring Hennis to a link. The making, printing, publishing of visual depictions of minors engaging in sexually explicit conduct has a far broader reach, seemingly designed to prevent a broader spectrum of communication than from one individual to another.

The government claims that in *United States v. Grovo*, 826 F.3d 1207, 1219 (9th Cir. 2016), the Court determined that advertising for Section 2251(d)(1) purposes does not need to be made publicly. (Ans. Br. at 35.) The Court did, however, consider that some public dissemination was required. The Court concluded that "Assuming without deciding that an 'advertisement' under § 2251(d) requires some public component, we hold that advertising to a particular

subset of the public is sufficient to sustain a conviction under the statute." (*Id.*, 1218.)

The other cases relied on by the government would not conclude otherwise: that is, more than a one-to-one sharing is required. Thus, the government relies on the conclusion in *United States v. Gries*, 877 F.3d 255, 260 (7th Cir. 2017) that notice in Section 2251(d)(1) must be given a broad meaning. (Ans. Br. at 36.) Yet, the extent of the holding by the Seventh Circuit in *Gries*, which pertained to exchanges in a chat room, was that "notice" is not limited to the dissemination to the general public and that the number of participants is relevant. (*Id.*, at 260, citing *Grovo* at 1218-19 [posts among a closed community of 40 to 45 individuals on an internet message board], *United States v. Franklin*, 785 F.3d 1365, 1369-70 (10th Cir. 2015) [sharing files in a closed, online network of "friends"], *United States v. Staples*, 2019 WL 1354144 (M.D.Pa 2019) [video chatrooms].)

2. Conclusion

Perhaps the clearest statement that could be made about the conduct proscribed in Section 2251(a)(1) is that the meaning of *notice* is vague, to the point that it lacks sufficient guidance as to the conduct it seeks to prohibit. A lack of a coherent description of prohibited criminal conduct renders the activity void for

vagueness. *United States v. Skilling*, 561 U.S. 358, 415 (2010) ("A criminal statute must clearly define the conduct it proscribes" (Scalia, J. Concurring in part) (citing *Graymed v. City of Rockford,* 408 U.S. 104, 108 (1972); *United States. v. Zhi Yong Guo*, 634 F.3d 1119, 1121 (9th Cir. 2011) ("A criminal statute is void for vagueness if it is 'not sufficiently clear to provide guidance to citizens concerning how they can avoid violating it and to provide authorities with principles governing enforcement.'" (quoting *United States v. Jae Gab Kim*, 449 F.3d 933, 942 (9th Cir. 2006)); *United States v. Kilbride,* 584 F.3d 1240, 1257 (9th Cir. 2009) ("[a] statute is unconstitutionally vague on its face if it 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008.)

Even if *notice* is sufficiently clear, in the circumstances of this case the Appellant had no intent to make, print or publish a *notice*, as the term should be applied in this case, offering to distribute a visual depiction of a minor engaged in

sexually explicit conduct. Accordingly, the verdict on Count 4 should be overturned and the sentence vacated.

RESPECTFULLY SUBMITTED this 25th day of October, 2019.

s/David Eisenberg

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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C.A. No. 18-10416

D. Ct. No. CR-16-08202-PCT-ROS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SARAH MELISA COX,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLEE

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III. STATEMENT OF JURISDICTION

A. District Court Jurisdiction

The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231 because the defendant-appellant, Sarah Melisa Cox, was charged with a federal crime. (CR 50; ER 250-52.)[1]

B. Appellate Court Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 based on the entry of the final judgment by the district court on October 23, 2018. (CR 172; ER 6-11.)

C. Timeliness of Appeal

Following the entry of the final judgment on October 23, 2018, Cox filed a notice of appeal on October 24, 2018. (CR 174; ER 5.) The notice was timely pursuant to Fed. R. App. P. 4(b).

D. Bail Status

Cox is currently in custody, serving her sentence, and is expected to be released on May 13, 2037, according to the Bureau of Prisons.

[1] "CR" refers to the Clerk's Record, followed by the document number(s). "RT" refers to the Reporter's Transcript, followed by a date and page number(s). "ER" refers to the Excerpts of Record, followed by the page number(s). "SER" refers to the Supplemental Excerpts of Record, followed by the relevant page number(s). "TE" refers to exhibits admitted at trial.

IV. ISSUES PRESENTED

A. The district court admitted a conversation between Cox and another child pornography possessor that occurred approximately three months prior to Cox receiving and providing notice of child pornography. This conversation provided significant evidence of Cox's identity, knowledge, and absence of mistake, and also rebutted potential defenses. Did the district court err in admitting this evidence pursuant to Rule 404(b) and determining that its important probative value was not significantly outweighed by any undue prejudice?

B. The United States proceeded with a notice theory under 18 U.S.C. § 2251, which criminalizes both providing notice of and advertising child pornography. The statute does not define notice, but its common definition permits a non-public one-to-one communication. Cox sent another individual a notice through the Kik Messenger Application that child pornography existed in a Drop Box link. Did the district court err in denying Cox's Rule 29 motion with regards to providing notice of child pornography, when construing the evidence in a light most favorable to the Government?

V. STATEMENT OF THE CASE

A. Nature of the Case; Course of Proceedings

A criminal complaint was issued against Cox on August 4, 2016, charging her with three counts of Receipt of Child Pornography in violation of 18 U.S.C. §§ 2252A(a)(2)(A) and 2256. (CR 1; ER 258-65.) Law enforcement arrested Cox on August 15, 2016. (CR 5.) On August 31, 2016, a federal grand jury indicted Cox on the same three counts of Receipt of Child Pornography. (CR 10; ER 256-57.) On June 14, 2017, the United States advised the district court that Cox had rejected the offered plea agreement, and that it may supersede to add more serious charges following the failure of plea negotiations. (CR 42; ER 253-55.) On July 18, 2017, a federal grand jury returned a superseding indictment which, in addition to the three original counts, also charged Cox with Notice and Advertising of Child Pornography in violation of 18 U.S.C. §§ 2251(d)(1)(A) and 2256, and Distribution of Child Pornography in violation of 18 U.S.C. §§ 2252A(a)(2)(A), (b) and 2256. (CR 50; ER 250-52.) A three-day jury trial was held between May 8, 2018 and May 10, 2018, after which the jury found Cox guilty of all five counts. (CR 126, 127, 128; ER 58-60.) The district court sentenced Cox to 262 months of incarceration on Count 4, and 240 months of incarceration on Counts 1-3 and 5, with all counts to run concurrently. (CR 172 at 1; ER 6.)

B. Statement of Facts

1. The Investigation

a. *Richard Hennis*

In January 2016, members of the Colorado Springs Internet Crimes Against Children task force executed a search warrant at the residence of Richard Hennis, a Colorado resident, based on a report that Hennis was in possession of child pornography. (RT 5/8/18 65-66; SER 121-22.) During the execution of the search warrant, law enforcement located an iPhone of investigative interest. (RT 5/8/18 67; SER 123.)

Detective Rodney Curtis of the Colorado Springs Police Department conducted a forensic examination of the iPhone. (RT 5/8/18 75; SER 131.) During his initial forensic examination of the iPhone, Detective Curtis located seven images of what he suspected to be sexually explicit photographs of an infant in a directory structure associated with the Kik Messenger application ("Kik"). (RT 5/8/18 78-79; SER 134-35.)

Based on this discovery, Detective Curtis engaged in a more thorough forensic investigation that included an extraction of Hennis's Kik conversations. (RT 5/8/18 79-82; SER 135-38.) Detective Curtis identified Hennis by the Kik account name "Funguy4u2use" and extracted a conversation between Hennis and a Kik user identified as "JadeJeckel." (RT 5/8/18 81-82; SER 137-38.) This extracted Kik

conversation was admitted at trial as Exhibit 18, and is the subject of most of the litigation in this matter as discussed below. (TE 18; RT 5/8/18 82; SER 138.) Detective Curtis's second forensic investigation identified numerous images of child pornography on Hennis's phone, in addition to various photographs that appeared to be "selfies" of "JadeJeckel," pictures of marijuana, and clothed pictures of young girls. (RT 5/8/18 87-88; SER 143-44.) Cox now concedes that the Government proved at trial that she is JadeJeckel. (Op. Br. at 12.)

b. *The Kik Conversation*[2]

On August 24, 2015, Cox and Hennis began a conversation through Kik that continued until January 18, 2016. (TE 18; ER 292-380.) Significant conversation occurred between August 24, 2015 and August 29, 2015 (TE 18; ER 292-320) (the "August Conversation"), and then continued from November 22, 2015 through January 18, 2016 (the "Remainder Conversation.") (TE 18; ER 320-80.)[3] Within hours of the August Conversation beginning, Cox sent Hennis photographs of herself, including a naked picture in the shower with Cox's distinctive tattoos showing. (TE 18; ER 290, 293.) Cox next told Hennis that she had found "a naughty dad that fucks his 11 yr old" and that she was working on obtaining "pics." (TE 18;

[2] Additional facts about the Kik conversation are provided below as relevant.

[3] Because the Kik conversation was extracted from Hennis's phone, messages indicating "sent" mean that they were sent from Hennis to Cox, and messages indicating "received" mean that they were sent from Cox to Hennis. (RT 5/9/18 225; SER 281.)

ER 294.) Later on August 24, 2015, Cox asked Hennis to send her a "vid of Vicky grabbing her daddy…" (TE 18; ER 297); Vicky is a well-known child pornography series. (RT 5/9/18 237-38; SER 293-94.) The August Conversation discussed various acts Cox and Hennis would like to perform on children. (TE 18; ER 292-320.) A couple of days after the August Conversation began, Cox ended it abruptly after an argument with Hennis about trust. (TE 18; ER 317-320.)

The Remainder Conversation began when Hennis contacted Cox on November 22, 2015. (TE 18; ER 320.) Within hours of reconnecting, Hennis and Cox again discussed sexual fantasies, including sex with children. (TE 18; ER 324-26.) During this conversation, Hennis sent various child pornography images to Cox, during which Cox responded with responses such as "Hot," "Great pic," "My pussy is soooo wet right now," and "Mmmm yea keep em coming daddy." (TE 18; ER 324-27.) On November 23, 2015, Cox and Hennis engaged in a conversation similar to their August Conversation, where they discussed taking a young child and "t[ying] her up with her legs spread wide open…" (TE 18; ER 327-329.) On November 29, 2015, Cox told Hennis that she had "thought about getting my friend's 3 yr old girl" and that her plan was to "[e]at her and touch her." (TE 18; ER 355-56.) Later, Cox told Hennis that she had "some really hot rape vids" and discussed trying to send those videos to Hennis. (TE 18; ER 357-59.)

On December 3, 2015, Cox told Hennis that she "found a great dropbox with some beastiality stuff and am hunting for new bad daddy vids for us." (TE 18; ER 367.) A few minutes later, Cox provided a link to Hennis of a Drop Box account. (TE 18; ER 367.) Cox confirmed that the Drop Box link worked, and then told Hennis "[e]xcellent…I like having someone to share with." (TE 18; ER 368.) On December 4, 2015, Cox shared two additional Drop Box links with Hennis, saying "[g]oodies for daddy." (TE 18; ER 370-71.) Within these Drop Box links were 24 videos containing child pornography (RT 5/9/18 303-306; SER 359-62.)

On December 23, 2015, Hennis sent photographs of a young infant being sexually assaulted to Cox. (TE 18; ER 376.) Hennis knew the female producer of the images, and was directly communicating with her. (TE 18; ER 376-77.) In response to receiving these pictures of child pornography, Cox responded: "Nice, her baby?" and described the producer as a "[l]ucky woman." (TE 18; ER 376-77.) Cox later told Hennis that she "[f]ound a man with a nine year old that let my friend have her…he is willing to share." (TE 18; ER 379.) This was the last substantive communication between Cox and Hennis. (TE 18; ER 380.)

c. *Identification of JadeJeckel as Cox*

After extracting the Kik conversation, Detective Curtis provided his findings to Homeland Security Investigations Special Agent John Armbruster, who conducted additional investigation to determine the identity of "JadeJeckel."

(RT 5/8/18 108; SER 164.) Special Agent Armbruster sent a subpoena to Kik, which provided various identifying information about the JadeJeckel subscriber, including IP addresses, connection logs, subscription date, date of birth, and associated devices. (RT 5/8/18 109; SER 165.) Special Agent Armbruster found that the IP addresses utilized by the JadeJeckel account were owned by CenturyLink. (RT 5/8/18 115; SER 171.) He then subpoenaed CenturyLink, who associated those IP addresses with Cox's account at the time JadeJeckel was using them. He also determined that this address was utilized in Arizona, and therefore sent the investigation to a special agent in Arizona. (RT 5/8/18 117; SER 173.)

Arizona Homeland Security Investigations Special Agent Shrable continued the investigation to determine the identity of JadeJeckel. (RT 5/9/18 185; SER 241.) At the time of his initial investigation, Shrable had the Kik information, as well as the CenturyLink subscriber information that listed the subscriber's name as Cox. (RT 5/9/18 186-87; SER 242-43.) Despite obtaining additional personal information about Cox, including various addresses, Shrable was unable to locate Cox. (RT 5/9/18 188-190; SER 244-46.) To further his investigation, Shrable obtained additional information from Kik and from CenturyLink, which again pointed towards Cox. (RT 5/9/18 191-94; SER 247-50.) Shrable also identified various social media accounts that appeared to belong to Cox and also appeared to be associated with the name JadeJeckel. (RT 5/9/18 194-97; SER 250-53.)

Despite Special Agent Shrable's investigation, he was unable to physically locate Cox. (RT 5/9/18 200; SER 256.) Based on his investigation, however, Shrable obtained an arrest warrant on August 4, 2016. (RT 5/9/18 200; SER 256.) Prior to her arrest, Cox was contacted by the Phoenix New Times and provided an interview about the facts of this case. (CR 92; SER 5.) The Phoenix New Times reporter stated that in that interview, Cox variously stated that the criminal activity was (1) her 12-year old daughter's actions; (2) her attempt to track down online predators; or (3) the result of being hacked by someone else trying to frame her. (CR 92, att. B; SER 16-24.) Ultimately, however, Cox appeared to blame her then-12-year old daughter. (CR 92; SER 5.)

After the Phoenix New Times told Cox about the arrest warrant, Cox arranged to self-surrender at the federal courthouse in Phoenix. (RT 5/9/18 201; SER 257.) When she self-surrendered, she provided a number of devices to Special Agent Shrable, including an HP desktop tower, an RCA tablet, an iPod, two MP3 players, and a cell phone. (RT 5/9/18 202; SER 258.) Previous Kik returns had identified the devices associated with the JadeJeckel account as an RCA device and an iPod. (RT 5/9/18 200; SER 256.) The iPod no longer functioned due to water damage. (RT 5/9/18 206; SER 262.) The RCA tablet had been factory reset. (RT 5/9/18 207; SER 263.) And the sim card within the cell phone had been nearly torn in half. (RT5/9/18 209; SER 265.)

2. Pre-Trial Litigation

a. *Admission of the August 2016 Kik Conversation*

i. The Parties' Briefing

Prior to trial, the Government filed a "Notice of Intent to Introduce Inextricably Intertwined or Other Act Evidence." (CR 91; ER 237-249.) Among other items, the Government provided notice that it would seek to admit the entirety of the Kik conversation, which included Cox and Hennis discussing other criminal activity, such as kidnapping and raping children. (CR 91; ER 240.) The Government argued that this evidence was both inextricably intertwined and admissible pursuant Federal Rule of Evidence 404(b) to show Cox's intent, knowledge, lack of mistake, and modus operandi. (CR 91; ER 243.)

Cox filed a motion in limine to preclude introducing the Kik exchanges that occurred prior to November 22, 2015. (CR 99; ER 176-82.) Cox argued that the evidence involving kidnapping and murder was highly prejudicial, the evidence was not intertwined because there had been a break in the communication, and that Rule 404(b) was not applicable. (CR 99; ER 179-81.) The Government responded that the evidence was intertwined, contained numerous photographs of Cox that JadeJeckel described as photographs of herself, and that it would be impossible for the Government to tell a coherent narrative without the August Conversation. (CR 104; ER 173-74.) The Government again noted that even if not intertwined, the

chat was admissible as Rule 404(b) evidence of intent, knowledge, plan, and modus operandi. (CR 104; ER 175.) Cox filed a reply challenging the Government's grounds and arguing the August Conversation could only show a propensity by JadeJeckel to engage in child pornography. (CR 116; ER 168.)

ii. District Court's Order

Prior to the Pre-Trial Conference, the district court issued an order that "the government will not be permitted to introduce the August conversations as direct evidence of the charged crimes, but will be permitted to introduce this evidence pursuant to Rule 404(b)." (CR 121; ER 1.) The district court reasoned that the evidence was admissible to "demonstrate the absence of mistake and Cox's general style of communication, which is particularly relevant because Cox's defense is that her minor daughter, M.C., engaged in these communications, not Cox." (CR 121; ER 3.) The district court analyzed the four relevant factors under Rule 404(b) to determine that the evidence was admissible, and also concluded that "the risk of unfair prejudice [does] not outweigh this evidence's probative value, and any possible prejudicial impact of the evidence will be sufficiently lessened by an appropriate limiting instruction." (CR 121; ER 3-4.)

b. *Count 4: Advertising and Notice of Child Pornography*

At no point prior to trial did Cox file a motion to dismiss Count 4, which charged Cox with advertising or providing notice of child pornography to Hennis.

The Government informed the district court and Cox in its trial brief that it was operating under the theory that Cox provided a notice of child pornography. (CR 92; SER 7-9.) The Government even gave Cox its theory of the case by outlining the specific video and manner in which Cox had provided notice. (CR 92; SER 9.) Similarly, the First Joint Jury Instructions the parties filed in the district court discussed the relevant element as "the defendant knowingly made or published, a notice," and made no reference to advertisement within the elements. (CR 98; ER 231.) Over the Government's objection, Cox requested that the Count 4 jury instruction include "advice that what constitutes 'notice' and 'advertisement' are matters of fact to be determined by the jury." (CR 98; ER 232; RT 5/1/18 21; SER 45) ("with respect to the first one, that's U.S. v. Brown, I really don't think that's a jury charge. It just says notice and advertisement for count 4 are matters of fact to be determined by the jury. And if you look at the charge, if one looks at the charge, it's pretty clear that's what the charge is requiring.").) Ultimately, the jury instruction did contain the advertisement language the defense requested, without objection from either party. (RT 5/10/18 362-63; SER 418-19.)

3. The Trial

Cox was tried over three days from May 8, 2018 to May 10, 2018. At the end of the Government's case, Cox moved for a directed verdict with no argument. (RT 5/10/18 351; SER 407.) After the district judge denied the directed verdict

motion, the parties discussed the proposed jury instructions. (RT 5/9/18 353-63; SER 409-19.) During these discussions, Cox reiterated that the defense was "in effect…is she JadeJeckel." (RT 5/10/18 356; SER 412.) A significant discussion ensued about whether a Rule 404(b) instruction should be given, during which the Government asked for the instruction and offered various modifications to assuage some of Cox's concerns. (RT 5/10/18 357-59; SER 413-15.) Cox requested that the instruction not be given at all. (RT 5/10/18 360; SER 416.) At Cox's request, the district court did not give the instruction. (RT 5/10/18 360; SER 416.)

Cox presented one witness at trial, a computer forensics expert named Tami Loehrs. (RT 5/10/18 368; SER 424.) The thrust of Ms. Loehrs's testimony was that any individual could have "masked" or "spoofed" the various IP addresses and created the various social media accounts with Cox's pictures publicly available on her social media accounts (RT 5/10/18 375-78, 381-87; SER 431-34, 437-443), and that none of the devices Cox turned in contained any evidence of Kik. (RT 5/10/18 378-81; SER 434-37.)

The Government presented no rebuttal case. (RT 5/10/18 392; SER 448.) Cox again moved for a directed verdict with no argument. (RT 5/10/18 392; SER 448.) After closing arguments, the jury took just over an hour to return a guilty verdict on all five counts. (CR 128; ER 58.)

VI. SUMMARY OF ARGUMENTS

The district court properly admitted the August Conversation as Rule 404(b) evidence, because central aspects of the case involved identity, knowledge, and absence of mistake. The August Conversation had significant probative value on each of these issues, including important identification information about Cox, and her knowledge that she was later providing a notice of and receiving child pornography. Also, even if the August Conversation was not admissible 404(b) evidence, it was inextricably intertwined. Further, given the nature of other evidence the jury had to view in this case, which included the actual rape of a child, verbal descriptions of Cox's fantasies of kidnapping and raping other children was not unfairly prejudicial and did not substantially outweigh the significant probative value of the August Conversation.

The Government proceeded under a theory that Cox made a notice of child pornography, not that she advertised child pornography. 18 U.S.C. § 2251(d)(1) does not provide a definition of the word "notice"; therefore, this Court looks to the ordinary use of the word in determining whether any rational jurist, with the evidence construed most favorably to the Government, could find that Cox's sending of a Drop Box link containing child pornography and describing it as "goodies for daddy" was a notice of child pornography. The ordinary and common use of the

word "notice" includes a notice given during a private, one-to-one communication like the one here.

VII. ARGUMENTS

A. The August Conversation was Inextricably Intertwined and Admissible Pursuant to Rule 404(b)

1. Standard of Review

This Court reviews *de novo* whether evidence is other act evidence within the meaning of Federal Rule of Evidence 404(b), and the admission of this evidence is reviewed for an abuse of discretion. *United States v. Carpenter*, 923 F.3d 1172, 1180-81 (9th Cir. 2019). This Court will "not reverse the district court's decisions under an abuse of discretion standard unless it is found that the reviewed decision cannot be reasonably justified under the circumstances." *Boyd v. City & County of San Francisco*, 576 F.3d 938, 943 (9th Cir. 2009) (internal quotation marks and citation omitted). This Court also reviews for abuse of discretion the district court's balancing of the probative value of prior acts evidence against the danger of unfair prejudice under Rule 403. *United States v. Curtin*, 489 F.3d 935, 943 (9th Cir. 2007) (en banc). If a district court errs in admitting other act evidence, this Court reviews for harmless error. *Boyd*, 576 F.3d at 943.

2. Argument

a. *The District Court Properly Admitted the August Conversation as Rule 404(b) Evidence.*

Under Rule 404(b), evidence of a crime, wrong, or other act may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge,

identity, absence of mistake, or lack of accident." Fed. R. Evid. 404. This Court liberally construes Rule 404(b) as a rule of "inclusion" and such evidence is deemed admissible on any ground other than to show propensity. *United States v. Jackson*, 84 F.3d 1154, 1159 (9th Cir. 1996); *United States v. Ayers*, 924 F.2d 1468, 1473 (9th Cir. 1991).

Under Rule 404(b), evidence that demonstrates a defendant's crimes, wrongs, or other acts "is admissible where it 1) proves a material element charged, 2) … is similar to the offense charged, 3) is based on sufficient evidence, and 4) is not too remote in time." *United States v. Hardrick*, 766 F.3d 1051, 1055 (9th Cir. 2014) (quoting *United States v. Ramirez-Robles*, 386 F.3d 1243, 1242 (9th Cir. 2004)). Rule 404(b) evidence to prove knowledge "need not be similar to the charged act as long as the prior act was one which would tend to make the existence of defendant's knowledge more probable than it would be without the evidence." *United States v. Fuchs*, 218 F.3d 957, 965 (9th Cir. 2000) (internal quotation marks omitted). Once the four-part test is satisfied, the district court should admit the evidence, unless its probative value is substantially outweighed by the danger of unfair prejudice. *United States v. Blitz*, 151 F.3d 1002, 1008 (9th Cir. 1998).

i. The August Conversation Proved Identity

The August Conversation provided necessary evidence for the Government to prove that JadeJeckel was Cox, which was the central issue at trial. While Cox now

concedes that the Government proved that she was JadeJeckel, she did not do so at trial. (Op. Br. at 18.) Prior to trial, the parties filed a Joint Proposed Pretrial order; in that order Cox provided that she "contend[ed] that she was not the user of the kik account belonging to 'JadeJeckel,' and instead, that her minor daughter, M.C., was the user of that account during the incidents charged in the superseding indictment." (CR 88.) Nearly the first thing the defense told the jury was that "this case isn't about pictures and photographs of [Cox]…[w]hat it is about is whether [Cox] is the one who received pornography or sent pornography." (RT 5/8/18 61; SER 117.) Cox reiterated to the judge that the defense was "in effect…is she JadeJeckel." (RT 5/10/18 356; SER 412.) During closing arguments, the defense argued that they were not disputing the child pornography, but that the Government failed to prove that Cox was JadeJeckel. (5/10/18 421-22; SER 477-78.) Indeed, the defense argued that the best evidence of identity was "missing in this case." (RT 5/10/18 425; SER 481.) While Cox argued some issues relating to the notice of child pornography count as well, the central theme of her case was that the Government could not prove that she was JadeJeckel. Any evidence of her identity was therefore central to the case.

The district court correctly noted that the August Conversation provided evidence of identity by "demonstrat[ing]…absence of mistake and Cox's general style of communication, which is particularly relevant because Cox's defense is that

her minor daughter, M.C., engaged in these communications, not Cox." (CR 121; ER 3.)

Chat logs of a defendant discussing sexual exploitation and seeking to exchange child pornography with others is admissible to show identity. *See, e.g., United States v. McCormack*, 700 F. App'x 643, 645 (9th Cir. 2017) (affirming admission of emails, chat logs, photographs, and videos discussing the sexual exploitation of children to identify the perpetrator of the crime). Indeed, Rule 404(b) evidence is often admitted in sexual exploitation cases due to the difficulty of establishing various elements of these crimes. *See, e.g., United States v. Lindsay*, 931 F.3d 852, 868-69 (9th Cir. 2019) (affirming admission of evidence of defendant's sex acts with other minor females to show that the defendant had intercourse with the named victim); *United States v. Dhingra*, 371 F.3d 557, 566-67 (9th Cir. 2004) (affirming admission of witness testimony about the defendant's sexually explicit instant messenger conversation as probative of modus operandi and intent).

Here, the August Conversation contained crucial evidence demonstrating that Cox was JadeJeckel. Cox, using the JadeJeckel handle, sent a nude selfie during the August Conversation that was located nowhere else in her social media. (RT 5/10/18 343; SER 399.) Indeed, Cox's own expert demonstrated why it was necessary to introduce this evidence: the bulk of Ms. Loehr's testimony discussed how easy it

would have been to frame Cox based on publicly-accessible photographs, and the expert even created a video to drive home the point. (RT 5/10/18 384-87; SER 440-43.) Cox argues that the Government could have relied on photographs in the Remainder Conversation, but fails to note that those photographs were publicly accessible through Cox's public social media accounts. (*Compare* TE 46; SER 496 (found within the Remainder Conversation) *with* TE 51; SER 506 (Cox's Twitter account that features the same photographs.)) Given Cox's defense and her expert's testimony, the August Conversation contained unique identifying information that was highly probative to the central issue at trial.

Despite Cox's claim that the August Conversation had "no bearing on [JadeJeckel's] identity as Cox" (Op. Br. at 29) that conversation also provided other significant identifying information. This included that JadeJeckel: (1) lives in a small town (TE 18; ER 296); (2) had a daughter who is "protected" (TE 18; ER 297-99); (3) was unable to still have children (TE 18; ER 302); (4) has a son-in-law (TE 18; ER 306); (5) that she had not been with anyone else for almost 12 years (TE 18; ER 308); (6) identified as a hacker for almost 20 years (TE 18; ER 309-10)[4]; and (7) was with her "ex" for approximately a year and a half 11 years prior (TE 18; ER 313). Nearly every page of the August Conversation contained information that

[4] Cox's expert identified the mask that Cox is wearing in one of the photographs as associated with the hacker group Anonymous. (RT 5/10/18 388; SER 444.)

linked Cox to JadeJeckel. Given the centrality of identity in this matter, this evidence of identity alone was sufficient to make the 404(b) evidence probative. Further, as the district judge noted, the style of writing, and the consistency of the conversation, demonstrated that the individual who wrote the August Conversation was the same individual engaging in the Remainder Conversation.

ii. The August Conversation Demonstrates Knowledge and Absence of Mistake

Cox focuses on whether the August Conversation was necessary for identity, but the Government also used it to prove knowledge. For every charged count, the Government was required to prove some form of knowledge of child pornography; the August Conversation was highly probative on that point. Sexually-explicit chat logs are admissible at trial in cases involving possession and receipt of child pornography, because they help to prove knowledge. *United States v. Salcido*, 506 F.3d 729, 735 (9th Cir. 2007). Similarly, written pornographic stories found on a defendant's computer are admissible as "other act" evidence, because they are probative of knowledge in a child pornography case. *See United States v. Phipps*, 523 F. App'x 498, 500 (9th Cir. 2013).

The August Conversation was probative of Cox's knowledge and lack of mistake that the materials she was charged with sending, noticing, or receiving involved child pornography. Within six hours of their first communication, Cox told Hennis that she was working on obtaining "pics" of a "naughty dad that fucks his 11

year old." (TE 18; ER 294.) A few minutes later, she asked Hennis to send her a "vid" of "Vicky," a well-known child pornography series. (TE 18, ER 297; RT 5/9/18 237-38; SER 293-94.) Hours later, Cox told Hennis she was trying to earn a different man's trust to obtain child pornography the second man produced. (TE 18; ER 304.) The August Conversation was probative of knowledge and absence of mistake, and therefore admissible for those purposes as well.

iii. The August Conversation Rebutted Cox's Central Arguments

Finally, Rule 404(b) evidence is especially probative where a defendant claims that a hacker was the person who actually downloaded the child pornography. *Hardrick*, 766 F.3d at 1055. Indeed, refuting of an anticipated defense can generally be an appropriate use of Rule 404(b) evidence. *See United States v. Hanson*, -- F.3d --, 2019 WL 4051595, at *4 (9th Cir. Aug. 28, 2019) (affirming admission of prior child pornography conviction to rebut defense of intent and mistake). The Government may anticipate, and address, defenses in its case-in-chief. *Curtin*, 489 F.3d at 940 (reversed on other grounds) ("Federal courts repeatedly have held that the government may offer evidence in its case-in-chief in anticipation of an expected aspect of the defense.") It was clear, both before and during trial, that Cox's defense was that some third party had engaged in this behavior, whether her 12-year-old daughter or a "hacker." (CR 88.) At trial, Cox utilized an expert witness to demonstrate how a hacker could have framed Cox. (RT 5/10/18 368-87; SER 424-

43.) The August Conversation was probative to rebut Cox's anticipated and actual defense.

Cox only objects to the admission of the August Conversation to demonstrate identity. While the August Conversation was probative of identity, it was also probative of knowledge and absence of mistake, and enabled the Government to address anticipated defenses. Other acts evidence does not need to be the central evidence for the Government, only that they have probative value. *United States v. Gatewood*, 601 F. App'x 580, 581 (9th Cir. 2015), *citing United States v. LeMay*, 260 F.3d 1018, 1029 (9th Cir. 2001) ("Prior acts evidence need not be absolutely necessary to the prosecution's case in order to be introduced; it must simply be helpful or practically necessary."). The district court properly ruled that the August Conversation was admissible pursuant to Rule 404(b).[5]

b. *The Probative Value of the August Conversation was not Substantially Outweighed by its Potential Prejudice.*

Rule 403 provides that the "Court may exclude relevant evidence if its probative value is substantially outweighed by a danger of…unfair prejudice." Fed.

[5] Cox does not object based on any other *Hardrick* factor. But the district court also properly analyzed these issues, finding that the three-month break from August to November was not too remote in time, there was sufficient evidence, that the jury could determine the messages' credibility and whether they were actually sent by Cox, and that the August Conversation was "clearly similar" to the charged offenses. (CR 174; ER 3-4 *citing United States v. Arambula-Ruiz*, 987 F.2d 599, 604 (9th Cir. 1993) and *United States v. Bailey*, 696 F.3d 794, 799 (9th Cir. 2012).)

R. Evid. 403. "The district court is to be given 'wide latitude' when it balances the prejudicial effect of proffered evidence against its probative value." *Lindsay*, 931 F.3d at 868-69 (affirming admission of other act evidence that defendant had molested other teenage girls in the Philippines). The question is not whether the evidence was merely prejudicial, "but whether the evidence was *unfairly* prejudicial." *United States v. Medicine Horn*, 447 F.3d 620, 623 (9th Cir. 2006).

District courts must take care to prevent emotionally charged evidence that may lead to a decision on an improper basis, *see United States v. Gonzalez-Flores*, 418 F.3d 1093, 1098 (9th Cir. 2005); however, in cases involving sexual assault and child pornography, most of the evidence is likely to be emotionally charged, and the prejudice should be evaluated in that context. *See Lemay*, 260 F.3d at 1030 ("evidence of a defendant's prior acts of molestation will always be emotionally charged and inflammatory, as is the evidence that he committed the charged crimes," but that is not dispositive in and of itself); *United States v. Jayavarman*, 871 F.3d 1050, 1064 (9th Cir. 2017) ("That [probative] value was not substantially outweighed by any risk of unfair prejudice that might have arisen from the evidence, especially in the context of other evidence adduced at trial"); *Hardrick*, 766 F.3d at 1055-56 (collecting cases); *United States v. McLeod*, 755 F. App'x 670, 674-65 (9th Cir. 2019) (Rule 404(b) evidence not unduly prejudicial because given "all the charges against [the defendant], and the sexually explicit and graphic nature of the

other evidence presented at trial that was probative of the production charges, the district court permissibly concluded that in this context, admitting the victim's testimony was not extraordinarily inflammatory.")

There is no question that Cox used shocking language and disturbing, graphic imagery in the August Conversation. However, within the context of this case – where the jurors had to watch videos of children actually being raped, not just read words discussing it – the prejudice does not substantially outweigh the probative value of the evidence.

Further, the language that Cox complains about in the August Conversation is also littered throughout the Remainder Conversation, and therefore could not have caused any more prejudice to Cox than what she agrees was admissible. Cox worries that the August Conversation "clearly portrayed Cox as a person with a vivid, warped imagination concerning deviant sexual and physical conduct with children" (Op. Br. at 26) and that "[b]y the time in the trial when agent Schrable started to recite the [Remainder Conversation], the jury would have come to the conclusion that Cox was already guilty of deviant behavior." (Op. Br. at 30.) However, the Remainder Conversation discusses equally deviant sexual and physical conduct with children. Admitting the August Conversation caused no additional, undue prejudice.

Cox's reliance on *United States v. Preston*, 873 F.3d 829 (9th Cir. 2017), is misplaced. In *Preston*, this Court reversed the admission of other act evidence that

occurred five years after the charged incident, because the other act evidence was not similar to the charged crime and was unduly prejudicial where it had essentially no probative value. 873 F.3d at 840-42. When the value of other act evidence is minimal, but "there's even a modest likelihood of unfair prejudice or a small risk of misleading the jury" the evidence should not be admitted. *Id.* at 841. Here, not only was the August Conversation probative, it was probative to the central issue at trial. *Preston* is simply inapplicable here.[6]

Finally, the Government attempted to mitigate any potential prejudice by offering a jury instruction regarding other act evidence. A jury instruction can protect a defendant against undue prejudice of evidence admitted pursuant to Rule 404(b). *See, e.g., United States v. Romero*, 282 F.3d 683, 688, n.1 (9th Cir. 2002). Cox, however, as a matter of trial strategy, requested that the jury instruction not be given, despite the Government's request that the court provide the instruction. (RT 5/10/18 357-60; SER 413-16.) A party invites error when it both invites the error and relinquishes a known right. *See United States v. Perez*, 116 F.3d 840, 845

[6] Further, even if the type of evidence and prejudice involved in this matter were similar to *Preston*, this Court reversed the district court due to a culmination of errors that prejudiced the defendant, not on the other act evidence alone. 873 F.3d at 845-846. In addition, *Old Chief v. United States*, 519 U.S. 172 (1997) has no relevance to this matter; this case does not involve the Government choosing to put on evidence concerning a stipulated fact.

(9th Cir. 1997) (en banc). Cox cannot reject a remedy intended to mitigate potential prejudice at trial, and now complain about prejudice on appeal.

c. *Any Error was Harmless*

If a district court errs in admitting other act evidence, this Court reviews for harmless error. *Boyd*, 576 F.3d at 943. The Government bears the burden of proving beyond a reasonable doubt that any error was harmless. *United States v. Benamor*, -- F.3d --, 2019 WL 4198358, *7 (9th Cir. Sept. 5, 2019). Here, given the amount of evidence the Government presented against Cox and because the 404(b) evidence would alternatively have properly been admitted as inextricably intertwined, any error was harmless.

i. The Government Presented Significant Evidence Against Cox

At trial, the Government presented significant evidence proving that Cox engaged in this criminal activity. *See Carpenter*, 923 F.3d at 1183 ("Considering the mountain of evidence against [the defendant]" any unduly prejudicial evidence was harmless.) The IP address that was associated with the JadeJeckel account was utilized by Cox. (RT 5/8/18 109; SER 165.) The types of devices registered to JadeJeckel, an RCA tablet and an iPod, were in Cox's possession at her self-surrender. (RT 5/9/18 411-12; SER 467-68.) Emails from Cox's personal email address also discussed deviant sexual behavior consistent with the type of

conversation in the Kik chat. (RT 5/10/18 410; SER 466.) The jury could have convicted Cox even without the introduction of the August Conversation.

ii. The August Conversation was Inextricably Intertwined

The admission of the August Conversation as 404(b) evidence was also harmless because it could have properly been admitted as inextricably intertwined. This Court will affirm on any ground support by the record, "even if it differs from the rationale of the district court." *United States v. Nichols*, 464 F.3d 1117, 1122 (9th Cir. 2006). Other act evidence is exempted from the requirements of Rule 404(b) where it is "inextricably intertwined" with the underlying offense. *Carpenter*, 923 F.3d at 1181. Two categories of evidence may be inextricably intertwined. First, evidence that "constitutes a part of the transaction that serves as a basis for the criminal charge." *United States v. DeGeorge*, 380 F.3d 1203, 1220 (9th Cir. 2004) (citations omitted). Second, evidence that is "necessary…to permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime." *Id*. In *United States v. Beckman*, 298 F.3d 788, 793-94 (9th Cir. 2002), this Court affirmed the government's presentation of cooperator testimony regarding a prior drug run to provide a "coherent and comprehensible story" establishing the relationship between the cooperator and the defendant, showing that that relationship was ongoing, refuting the defendant's claim that he had no knowledge of drugs, and explaining why he was entrusted with the drugs.

"The jury cannot be expected to make its decisions in a void—without knowledge of the time, place, and circumstances which form the basis of the charge." *Id.*

Like in *Beckman*, here the August Conversation was inextricably intertwined with the Remainder Conversation, because it was necessary for the prosecution to be able to tell a coherent narrative. The August Conversation provides the context for how Hennis and Cox met and demonstrates that from the beginning of their relationship, they were engaged in attempting to obtain and exchange child pornography. Thus, even if the district court erred in admitting the August Conversation under Rule 404(b), any error was harmless not only because of the strong evidence generally, but because the evidence would have been properly admitted on another ground.

B. Cox was Properly Convicted of Providing Notice of Child Pornography

The Eleventh Circuit is the only court to have squarely addressed the issue that Cox raises: whether a private, one-to-one communication providing or seeking child pornography is sufficient to be convicted of providing notice of child pornography pursuant to 18 U.S.C. § 2251(d)(1). *United States v. Caniff*, 916 F.3d 929, 932-38 (11th Cir. 2019)[7]. The Eleventh Circuit determined that this type of communication *is* criminalized by 18 U.S.C. § 2251(d). *Id*. at 937 ("We conclude

[7] Cox cites the *Caniff* dissent in support of her argument, but fails to note the majority's decision affirmed the Government's position in this case.

that…there was sufficient evidence for the jury to find that [the defendant's] text messages to Mandy requesting photos of her engaging in sexually explicit conduct were 'notices' made criminal under § 2251(d)(1).") This Court should hold the same and affirm Cox's conviction.

1. Standard of Review

This Court reviews the district court's decision to deny a Rule 29 motion for judgment of acquittal *de novo*, "construe[s] the evidence in the light most favorable to the prosecution, and only then determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Nevils*, 598 F.3d 1158, 1161 (9th Cir. 2010).

2. Argument

18 U.S.C. § 2251(d)(1) makes it illegal for

> Any person [to] . . . knowingly make[], print[], or publish[], or cause[] to be made, printed or published, any notice or advertisement seeking or offering –
>
> (A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct.

a. *"Notice" and "Advertisement" are Distinct Crimes within § 2251*

Congress wrote § 2251(d) in the disjunctive, with "notice" and "advertisement" separated by an "or," as opposed to the conjunctive "and." 18

U.S.C. § 2251(d)(1). The Supreme Court has recognized that the "ordinary use of 'or' is almost always disjunctive, that is, the words it connects are to be given separate meanings." *Loughrin v. United States*, 573 U.S. 351, 357 (2014) (quoting *United States v. Woods*, 571 U.S. 31, 45 (2013) (internal quotations omitted)). Indeed, a principal canon of statutory construction is that courts "must give effect, if possible, to every clause and word of a statute." *United States v. Corrales-Vazquez*, 931 F.3d 944, 950 (9th Cir. 2019), quoting *Loughrin*, 573 U.S. at 568. The word "or" indicates a prohibition of different conduct; reading the word "or" to simply mean "including" would be "a definition foreign to any dictionary we know of." *Id*. at 952 (internal quotations omitted).

The United States pursued a conviction in this matter pursuant to "notice," not "advertisement." Therefore, while Cox spends the majority of her time discussing interpretations of the word "advertisement," this Court need not reach that issue. Instead, this Court need only determine whether the jury could find that the evidence, in a light most favorable to the government, could support a guilty verdict for making or publishing a notice of child pornography.

b. *Whether a Communication Constitutes "Notice" is a Factual Determination*

Whether an action falls within the meaning of notice in § 2251(d)(1) is a question of fact for the jury to decide. *See United States v. Brown*, 859 F.3d 730, 733-36 (9th Cir. 2017). In *Brown*, the district court provided a jury instruction that

the terms "advertisement," "advertise," and "notice "should be interpreted as taking their ordinary, contemporary, common meaning." *Id*. at 732-33. A part of the defense theory in *Brown* was that a closed, online message board did not meet the definition of "advertise." *Id*. at 733. The district court prevented the defense attorney from making this argument, reasoning that because this Court has affirmed convictions for advertising child pornography in closed online message boards, this argument would be contrary to settled law. *Id*. This Court reversed the district court as a violation of the Sixth Amendment, reasoning that this Court's precedent did not establish whether the word "advertise" was settled as a matter of law, instead clarifying that with the Rule 29 context, the meaning of the words in 2251(d)(1) was a factual question for the jury. *Id.* at 736-37.

"Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013), *quoting BP America Production Co. v. Burton*, 549 U.S. 84, 91 (2006); *see also United States v. Price*, 921 F.3d 777, 784 (9th Cir. 2019) ("We begin with the statutory text and interpret statutory terms in accordance with their ordinary meaning, unless the statute clearly expresses an intention to the contrary") (internal citations omitted). This Court also considers the statute's purpose, history, and past decisions and controlling law in interpreting a statute. *Taylor v. United States*, 495 U.S. 575, 581 (1990); *United States v. Lo*, 447 F.3d 1212, 1229 (9th Cir. 2006).

This Court can look to dictionary definitions to determine the ordinary meaning of the word. *See Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070-71 (2018). The third definition of "notice" in Black's Law Dictionary, the most applicable here, provides that notice is "[a] written or printed announcement." *Notice*, Black's Law Dictionary (11th Ed. 2019). The Seventh and Eleventh Circuits have noted that Webster's Third New International Dictionary defines "notice" to include "a 'warning or intimation of something," as does the New Oxford American Dictionary, which defines "notice," inter alia, "as a 'notification or warning of something.'" *Caniff*, 916 F.3d at 933, *citing United States v. Gries*, 877 F.3d 255, 260 (7th Cir. 2017).

Here, a rational trier of fact could find that posting a link to a Drop Box account and immediately describing those links as "goodies for daddy," as Cox did here (TE 18; ER 371), was a notice of child pornography, especially given the surrounding context of Cox's and Hennis's conversation.[8] *United States v. Grovo*, 826 F.3d 1207, 1219 (9th Cir. 2016) (affirming conviction for advertising child pornography where the defendant provided two posts linking to child pornography in a closed forum and stating that a "rational factfinder could conclude beyond a

[8] Indeed, Cox's observation that "[t]here is no message accompanying the video" (Op. Br. at 32) demonstrates the probative value of the August Conversation further, because it is the context of the conversation that provided proof of Cox's knowledge of what it was that she was sending to Hennis.

reasonable doubt that there two posts were advertisements 'offering to…display' child pornography…"). Each of the definitions of notice support the jury's finding that Cox's message to Hennis providing him a link to a Drop Box account full of child pornography and describing it as "goodies for daddy" was a notice of child pornography.

Nothing in the wording of the statute indicates that a notice must be given to more than one person to be sufficient for a conviction under 18 U.S.C. § 2251(d)(1). "Notice" is regularly used to refer to one-to-one communication: the electronic "notice" that will be sent after the filing of this answering brief could be a communication to a single person; the Rule 404(b) notice that the Government was required to provide to Cox was a notice to a single person. The types of "notices" given in one-to-one communication are potentially infinite. *See, Caniff*, 916 F.3d at 933-34 (providing additional examples of one-to-one notice communications).

Cox's reliance on *United States v. Peterson*, 2015 WL 13657215, *6 (C.D. Cal. 2015), does not counsel otherwise. First, the district court in *Peterson* noted that "advertising requires something more than one-to-one exchanges," but "advertising" is not the term at issue in this matter. *Id*. Second, the district court in *Peterson* astutely noted that "the related but independent term 'notice' is not primarily defined, even in dictionaries, by reference to the audience." *Id.* at *5. *Peterson* supports the Government's contention that a notice to one person is

sufficient, because, as the district court noted, the term notice does not contemplate a number of recipients at all.

Further, a notice does not need to be made publicly to be sufficient for conviction under 18 U.S.C. § 2251(d)(1). *Caniff*, 916 F.3d at 934. This Court has already determined that an advertisement under 18 U.S.C. § 2251(d)(1) need not be made publicly to sustain a conviction under that statute. *See Grovo*, 826 F.3d at 1217-19. Nothing changes *Grovo*'s analysis for the notice prong. Just as with the word advertisement, there is no definition of notice that limits a notice to public proclamation. 826 F.3d at 1217. In a different context, the Tenth Circuit examined eighteen different definitions of "notice" found in Webster's Third International Dictionary (1993), and noted that none of them "contain[ed] a public component." *United States v. Franklin*, 785 F.3d 1365, 1368 (10th Cir. 2015). Notice does not require that the communication be made publicly.[9]

Finally, the purpose of 18 U.S.C. § 2251(d)(1) is to protect children and punish those who would do them harm. *See generally*, H.R. Rep. No. 99-910 (1986).

[9] Cox's argument that the Comment to the Jury Instruction 8.183 implies a public component is inaccurate. The Comment simply reiterates that distribution does not necessarily equate to sexual exploitation as that term is defined in the Instruction; it has no bearing on whether a notice must be made publicly or to more than one person. The Comment cites *United States v. Kemmish*, 120 F.3d 937, 942 (9th Cir. 1997), which concerned whether a sentencing enhancement applies for sexual abuse and clarifies that the defendant must have personally participated in the sexual abuse to receive said sentencing enhancement. It sheds no light on this issue.

The legislative history shows that Congress's intent was not to narrowly define "any notice." *Gries*, 877 F.3d at 260 ("any notice or advertisement in § 2251 casts a wide net for this offense"). Cox's actions here served as a notice of child pornography.[10]

The statute, case law, and legislative history all support an interpretation of notice including private one-to-one communications. Here, a rational jury, with the evidence provided to it and interpreted it in the light most favorable to the Government, could – and did – determine that Cox provided Hennis a notice of child pornography. There is no reason to disturb the jury's verdict.

[10] Cox's actions met the elements of notice of child pornography and distribution of child pornography. This Court has previously noted that Section 2251(d)(1) and Section 2252A (distribution of child pornography) have some "overlapping elements, [b]ut the existence of common elements in other criminal statutes does not limit the scope of the statute at issue." *United States v. Williams*, 659 F.3d 1223, 1228 (9th Cir. 2011). That does not mean, however, that meeting the elements of one offense will always necessarily entail meeting the elements of the other. For example, an individual may provide notice of child pornography by standing at a corner handing out flyers noticing child pornography at a particular bookstore. When the individual goes to the bookstore, they are provided the child pornography by a clerk with no further comment. The individual who handed out the flyer only meets the elements of notice of child pornography, while the clerk only meets the elements of distribution.

VIII. CONCLUSION

For the foregoing reasons, the judgment of conviction and sentence should be affirmed.

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s/ Robert I. Brooks
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IX. STATEMENT OF RELATED CASES

To the knowledge of counsel, there are no related cases pending.

X. CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NO. 18-10416

I certify that: (check appropriate option(s))

☒ 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

☒ Proportionately spaced, has a typeface of 14 points or more and contains 8,456 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words), or is

☐ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or ___ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

☐ 2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

☐ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

☐ This brief complies with a page or size-volume limitation established by separate court order dated __ and is

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October 4, 2019
Date

s/ Robert I. Brooks
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Assistant U.S. Attorney

XI. CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October, 2019, I electronically filed the Brief of Appellee with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Robert I. Brooks
ROBERT I. BROOKS
Assistant U.S. Attorney

No. 18-10416

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. SARAH MELISA COX, Defendant-Appellant.	)	Dist. Crt. # CR 16-08202-ROS District of Arizona

ON APPEAL FROM THE JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

APPELLANT'S OPENING BRIEF

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CERTIFICATION WITH REFERENCE TO PARTIES INTERESTED IN THE OUTCOME OF THE APPEAL

United States of America vs. Sarah Melisa Cox, No.16-08202-ROS

David Eisenberg certifies the following:

I am an attorney licensed to practice law in the state of Arizona, and I am a member of the Bar of this Court. I am counsel for Sarah Melisa Cox.

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ISSUES PRESENTED FOR REVIEW

ARGUMENT I

WHETHER THE DISTRICT COURT ERRED BY ALLOWING INTO EVIDENCE PURSUANT TO RULE 404(b) MESSAGES OFFERED TO PROVE THE IDENTITY OF THE APPELLANT AS THE SENDER/RECIPIENT WHERE THE MESSAGES COVERED KIDNAPING, SLAVERY AND RAPE OF CHILDREN, WHICH WERE NOT CHARGES IN THE CASE BUT WERE OF SUCH SALACIOUS CONTENT THAT THEIR PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY UNFAIR PREJUDICE TO THE APPELLANT.

ARGUMENT II

WHETHER THE DISTRICT COURT ERRED BY ALLOWING A COUNT TO GO TO THE JURY CHARGING THE APPELLANT WITH GIVING NOTICE AND ADVERTISEMENT SEEKING TO DISTRIBUTE VISUAL DEPICTIONS OF MINORS ENGAGING IN SEXUALLY EXPLICIT ACTIVITIES IN VIEW OF THE VERY PRIVATE, NON-PUBLIC EXCHANGE OF THE DEPICTIONS BETWEEN THE APPELLANT AND THE RECIPIENT.

JURISDICTION OF THE U.S. DISTRICT COURT

The U.S. District Court for the District of Arizona had jurisdiction of this matter pursuant to the provisions of 18 U.S.C. § 3041, as the alleged offense charged against the Defendant-Appellant was an offense against the laws of the United States.

JURISDICTION OF THE U.S. COURT OF APPEALS

This Court has jurisdiction of this matter pursuant to the provisions of 28 U.S.C. § 1291, as the judgment and disposition appealed from is a final decision of the United States District Court for the District of Arizona.

APPEALABILITY OF THE DISTRICT COURT'S ORDER

The judgment and order of the District Court are appealable as they fully and finally disposed of all claims of the parties in this matter.

THE APPEAL IS TIMELY

On October 23, 2018, the District Court sentenced the Appellant. (CR 172; ER 6.) On October 24, 2018, Appellant filed her Notice of Appeal. (CR 174; ER 5.) This filing is timely pursuant to the provisions of Rule 4(b) of the Federal Rules of Appellate Procedure.

BAIL STATUS

The Appellant is in custody at:

Ms. Sarah Melisa Cox
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FCI Dublin
Federal Correctional Institution
5701 8th Street – Camp Parks
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ABBREVIATIONS

The following abbreviations shall be used in Appellant's Opening Brief.

1. The Clerk's Record will be referred to as "CR," followed by the corresponding number of the pleading or order.

2. The Reporter's Transcript shall be referred to as "RT," followed by the date of the transcript and the page number (p. or pp.) and lines (l. or ll.) to be referenced.

3. The Appellant, Sarah Melisa Cox, will be referred to as the "Appellant," the "Defendant" or by name.

4. The Appellee, the United States of America, will be referred to as "Appellee" or "the government."

5. Exhibits admitted into evidence at trial will be referred to by their number and prefix "Tr. Exh." Trial Exhibit 18, an 89-page document contained enumerated message keys and in some cases messages for several thousand entries. Each message key is referred to as "MK," followed by the specific message key number and the page number on Trial Exhibit 18 at which the message key (and message) is found.

STATEMENT OF THE CASE

Over a five week period of time, from November 22, 2015 through December 28, 2015, two people exchanged dozens of highly salacious messages and attachments pertaining to and disclosing child pornography. They sent and received these messages through a Kik Messenger application, which is a messaging mobile service that can transmit and receive messages, photos and videos, among other materials. The Defendant, known in the message exchange as "JadeJeckel," sent a one-time message reference to the other person, known in the exchange as "funguy4u2use" ("Funguy"), referencing a Dropbox location containing twenty-four videos of child pornography. She did not distribute this Dropbox location to anyone else and did not direct, request or otherwise indicate to Funguy that he should do the same. No one else participated in the message exchanges. Thus, her conviction for knowingly making, printing or publishing a notice or advertisement seeking to distribute a visual depiction of a minor engaging in a sexual explicit act should be reversed: the proof, which was limited to a single exchange of child pornography between two persons without any distribution beyond their limited connection is not sufficient to sustain a conviction for violating 18 U.S.C. §§2251(d)(1)(A) and 2256, the notice and advertising statute covering the distribution of child pornography.

All five counts in the superseding indictment in this case occurred in December, 2015: Counts 1 - 3 pertaining to the possession of child pornography each took place on December 23rd and Counts 4 and 5, pertaining to the notice and advertisement and distribution charges, occurred on December 3 - 4th. However, for four days in late August 2015, Funguy and JadeJeckel also exchanged Kik chats. These, too, pertained to child pornography, but JadeJeckel broke off contact with Funguy because of trust issues raised by him. The government sought to put these chats into evidence as inextricably intertwined events with the November - December 2015 exchanges or through Rule 404(b), FRE as similar acts essentially to prove the identity of JadeJeckel. The court permitted their introduction solely to prove identity: that JadeJeckel was Sarah Cox. This was not necessary because the government had plenty of other, non-Rule 404(b) evidence to prove her identity. Yet, proof of the August exchanges was tremendously unfairly prejudicial to the Defendant, containing discussions about child rape, incest, slavery and kidnaping. They served no purpose other than to inflame the jury to the extent that the verdicts on all counts should be overturned on that basis alone.

STATEMENT OF FACTS

1. The Complaint

On August 4, 2016, the Department of Homeland Security ("HSI") submitted a Complaint alleging that between November 29th and December 3, 2015, an individual by the name of Richard Hennis transmitted to "JadeJeckel," later identified as Sarah Cox images by electronic messaging through Kik, an instant messaging service, depicting a sexual assault of a prepubescent child. HSI in conjunction with the Colorado Springs, Colorado police department, executed a search warrant in January 2016 disclosing that Hennis had engaged in the sexual exploitation of children and that he had sent JadeJeckel several images through Kik of prepubescent children engaged in sexual contacts. (CR 1, ¶ 4a; ER 258.)

More specifically, the complaint alleged 17 instances between November 29 and December 3, 2015 in which Hennis, using the moniker "funguy4u2use," exchanged messages and images with Cox. Of these, 16 messages occurred on one day, November 29, 2015, stretching over about a 13 minute period from 10:03 p.m. to 10:16 p.m. A 17th message was exchanged the next day at 1:00 a.m. Each of these messages contained explicit references to the sexual engagement of Hennis and another woman in sexual contact with clearly prepubescent minors and also included messages pertaining to the same conduct

by Hennis and Cox. (*Id.* ¶¶ 6a-6q.)

On December 23, 2015, Hennis sent Cox two image files consisting of a still image in color showing a female infant lying down with her legs and private parts exposed, with an adult using a thumb and forefinger to expose the inner part of the child's vagina. One minute later, Hennis sent Cox another image of an adult female appearing to perform oral sex on a prepubescent female child. (*Id.*, ¶ 4c.) It was these three instances that formed the basis for the three counts in the Complaint charging Cox with receiving child pornography, in violation of 18 U.S.C. §§ 2252A(a)(2)(A) and 2256.

2. The Indictments

a. The Initial Indictment

The initial indictment in this case was returned on August 31, 2016. It charged three counts of receiving child pornography, in violation of 18 U.S.C. §§ 2252A(a)(2)(A) and 2256, which covered the three message images sent on December 23, 2015, as alleged above in the complaint. (CR 10; ER 256.) Conviction for the receipt of child pornography carries a five year mandatory minimum sentence with a maximum term of 20 years. 18 U.S.C. § 2252A(b)(1). The statute makes it illegal for any person to knowingly receive or distribute any child pornography that uses any means or facility of interstate commerce,

including by way of a computer.

b. The Government's Notice of a Rejected Plea Offer

On June 14, 2017, the government submitted a Notice of Rejection of Plea Agreement in which it detailed the disposition it had proposed to resolve the case and its intended action in view of the Defendant's rejection of the offer. The terms of the offer included that the Defendant would plead guilty o possession of child pornography in violation of 18 U.S.C. §2252A, dismissal of the Indictment charging receipt of child pornography, which contained the five year mandatory minimum, a stipulation to a sentence not to exceed five years and the assurance that the Defendant would not be charged for any other criminal activity known to the government. The notice informed that the Defendant had rejected the offer. (CR 42; ER 253.)

As for the government's intentions in view of the rejection, the Notice announced that the discovery indicated that Cox could be subject to charges based on 18 U.S.C. §2251(d). These charges pertain to knowingly advertising, seeking or offering to receive any visual depiction involving a minor engaged or participating in sexually explicit conduct and the visual depiction shows such conduct. A conviction for advertising carries a range of 15 to 30 years. 18 U.S.C.

§ 2251(d)(1)(B) & (e).[1] Further, the notice portended other charges in violation of Section 2252A. (CR 42; ER 253.) These could include distribution of child pornography, which has a five year mandatory minimum and a maximum of twenty years in prison. (*Id.*)

In a hearing on June 22, 2017, the parties informed the court of the status of the case. The government stated that it had extended an offer to the Defendant involving possession of child pornography, which carried no mandatory minimum, a stipulation to a cap of no more than five years and no potential charges for advertising child pornography. (RT, 06/22/2017, p. 7, ll. 1-10.) (ER 381, 387.)

The court inquired whether the new charges would be based on newly discovered evidence. The government responded that "We are continuing to investigate this, and given that we will be going to trial, we are doing our due diligence and continuing to investigate, and should we obtain evidence warranting such charges, yes, we will proceed." (*Id.*, p. 9, ll. 14-17.) However, the government soon amended its statement about newly discovered evidence leading to additional charges, stating that, " . . . I don't mean to represent to the Court that

[1] This advertising statute differs from the advertising crime covered in 18 U.S.C. §2252A(3)(B), which carries a range of 5 to 20 years.

we are going to be drumming up a bunch of new evidence to supersede – " (*Id.*, R/T p. 10, ll. 9-11.)

In effect, the government candidly acknowledged that it already had the information it needed to bring the new, more serious charges. Less than a month after the Defendant rejected the plea offer, the government filed a new, superseding indictment.

c. The Superseding Indictment

On July 18, 2017, the government filed its superseding indictment, which kept the three receipt of child pornography charges but added one count of notice and advertising and one count of distribution of child pornography. These two new charges, Counts 4 and 5, respectively, alleged violations occurring on or between December 3 and December 4, 2015. (CR 50; ER 250.)

Thus, Counts 1, 2 and 3, which charged receipt of child pornography on December 23, 2015, listed visual depictions in the following image files for each count: Count 1 – fa5507ae-e788-4566-9203-686ed73de131.jpg (for ease of reference referred to as "de131"); Count 2 – dbb47bf9-flf0-4cca-b16a-078ee03ede39.jpg ("ede39"); Count 3 – 3cb34426-38f5-4baf-9c3f-97ff75441c05.jpg ("c05").

Count 4, the notice and advertising charge alleged that on December 3

and 4, 2015, the Defendant " . . . knowingly made, printed, published, or caused to be made, printed or published, a notice and advertisement seeking to receive, exchange, produce, display, distribute or reproduce a visual depiction the production of which involved the use of a minor engaging in sexually explicit conduct and which depiction was of such conduct and the defendant knew or had reason to know that such notice and advertisement would be transported using . . . or . . . affecting interstate commerce by any means including by computer . . ." 18 U.S.C. § 2251(d)(1)(A) and 2256. No specific visual image was mentioned in the indictment.

Lastly, Count 5, the distribution charge, alleged on the same dates as Count 4 that the Defendant " did knowingly distribute child pornography that had been . . . transported in interstate . . . commerce by any means, including computer, including a visual depiction of an actual minor engaging in sexually explicit conduct, to wit: Image file "4ff061c3-b35b-4736-91b8-107359a20cb8.mp4" ("cb8").

3. Pretrial Motion - Admissibility of Evidence

The government gave notice that it intended to elicit in its direct case three categories of what it termed to be inextricably intertwined or other act evidence, that is: 1) eleven uncharged images of child pornography sent by Hennis

to Cox on November 22, 2015; 2) twenty-four videos of additional child pornography sent by Hennis to Cox via a Dropbox link on December 4, 2015 that were not part of the video files for the charged conduct on December 3-4, 2015; 3) a complete set of statements between Hennis and Cox, including what the government described as "other potentially criminal activity, including kidnaping and raping children." In order to elicit this third category of proof the government proposed to admit "the entirety of the kik conversation, including portions of the conversations containing these statements." (CR 91, p. 4; ER 237, 240.)

The complete set of this third category of evidence included Kik exchanges between Hennis and Cox running from August 24, 2015 through August 27, 2015, which takes up 27 of the 87-page long chart of all the Kik exchanges. (The Kik chart would be admitted into evidence as Exhibit 18 and is referred to in more detail below.) The government did not specify exactly which of these exchanges fell within potentially criminal activity, except to state that "it is nearly impossible to understand the kik conversation without having the entirety of it admitted at trial." (*Id.*, p. 4; ER 240.)

The Defendant submitted a motion *in limine* opposing the admission of the third category of evidence, the Kik chart as it pertained to the August 2015 exchanges (but not as to the November - December 2015 passages and the images

and videos of child pornography that Hennis sent during this period.) (CR99; ER 176.) The Defendant maintained that without a further description by the government as to the specific August 2015 exchanges it wanted to come into evidence and the basis for their admission, the notice was deficient. The Defendant also claimed that the government failed to describe how the remaining 60 pages of the Kik chats - - those that contained all of the charged activity in December 2015 - - could not be comprehended in and of themselves by a jury without the need to inject kidnaping, rape and other such crimes (including child slavery) into the case as referenced in the August Kik chats into the case. Moreover, the defendant noted that the first of the August exchanges occurred on August 24, 2015, at 12:05 p.m. and the last took place on August 29, 2015, at 2:30 a.m. The next exchange did not occur until almost three months later, on November 22, 2015 at 8:20 p.m. The December group of exchanges were comprehensible on their own. (CR99, pp. 3-4; ER 176; ER 178-179.)

The government responded that the prosecution was not simply a typical possession of child pornography case involving distinct acts of downloading an image or a file but consisted of advertising and distribution charges as well, that the August exchanges helped to identify the Defendant as JadeJeckel, the name used by the person with whom Hennis was communicating,

and that they would also explain how Hennis came to meet JadeJeckel. The government also claimed that they were admissible to prove such Rule 404(b) concepts as intent, modus operandi, knowledge, plan and identity. (CR 104, pp. 1-3; ER 172-174.)

The district court directed the Defendant to submit a reply to the government's response. (CR 111; ER 170.)

The defense's reply pointed out that all of the charges - - the possession, advertising and distribution counts - - occurred well after August 2015, more than three months later on December 3rd – 4th and 23rd, and that they all were distinct in nature from the August exchanges. Moreover, the Kik exchanges starting on November 22nd, covering 60 pages, certainly answered the Government's need to prove each of the elements of the crimes charged, including identity. (CR 116, pp. 1-2; ER 165-166.)

As the Defendant also argued, proof of how the two met was not a requirement for conviction. Nor were the August exchanges actually helpful in that regard in the first place. At the beginning of the exchanges, Hennis called JadeJeckel, stating, "Hi. It's daddy," indicating that Hennis must have had contact with JadeJeckel before this first documented exchange.

Moreover, Defendant argued that the other Rule 404(b) purposes, such

as intent, preparation, plan, motive etc. were simply not relevant to the analysis of whether these earlier exchanges should be admitted.

On the other hand, the emotional reaction to child pornography particularly in view of the large amount of pornographic images and videos and the obscene, graphic exchanges between Hennis and JadeJeckel during the relevant period of November - December, 2015, the prejudice to the Defendant in admitting additional exchanges was a prime example of an instance when the unfair prejudice analysis required by Rule 403 should have resulted in the exclusion of the August exchanges. (CR 116; ER 165.)

The district court agreed with the Defendant that the August exchanges were not inextricably intertwined with the November-December messages and attachments. However, the court ruled that the August exchanges were admissible pursuant to Rule 404(b) as a matter of identity to show that it was Cox who was JadeJeckel, one of the two parties to the exchanges. (CR 121; ER 1.)

4. The Trial

The Appellant concedes that the government proved at trial that she was JadeJeckel. She does not concede, however, that the district court's determination to admit the August 2017 Kik exchanges was either necessary or correct. These exchanges had a highly prejudicial effect on her, to the point that

the proof of these 3 days of communications in August with Hennis were not only unnecessary but inflamed the jury, forcing it to consider statements (not even actions) of childhood kidnaping, slavery, incest and rape that had nothing to do with possession, advertising or distribution of child pornography.

Moreover, the evidence at trial of advertising and distribution did not rise to the level of proof of guilt beyond a reasonable doubt, and the conviction for Counts 4 and should be overturned.

a. JadeJeckel's Identity

John Armbruster, a Department of Homeland Security ("DHS") special agent, testified that the child pornographic images and videos that were the subject of the charges were produced by a third party who sent them to Hennis, and he sent them on to JadeJeckel. (RT on 05/08/18, p. 48, ll.17-19.) Much of Armbruster's testimony also centered on establishing JadeJeckel's identity.

Armbruster testified that DHS issued a subpoena to Kik seeking the IP addresses and connection logs for JadeJeckel in the recent past. (*Id.*, p. 48, l. 20 to p. 49, l. 7; Tr. Exh. 85.) Kik's return on the subpoena disclosed IP addresses for JadeJeckel, the date she registered for Kik service, her date of birth and her registered device, an Adroid SDK 21. . (*Id.*, p. 48, l. 20 to p. 49, l. 7; p. 51, ll. 2-8; p. 52, ll. 8-16.) As the agent testified, these details constituted identification

information associated with the JadeJeckel Kik account. (*Id*., p. 49, ll. 13-15.)

Next, in his review of the IP addresses, Armbruster was able to identify Century Link as the service provider and administrator for the addresses. He concluded that Century Link would be able to identify the subscriber. (*Id.*, p. 54, ll. 7-24.) Accordingly, he addressed a follow-up subpoena to Century Link. Its return disclosed that Sarah Cox was the user for all three of the IP addresses that Kik showed for the user JadeJeckel. Also provided was the subscriber telephone number and city and state, Clarkdale, Arizona, associated with the telephone number. (*Id.*, p. 56, l. 7 to p. 57, l. 5; Tr. Exh. 87.)

A second DHS special agent, Christopher Schrable, also testified about the identity of JadeJeckel. First, he repeated agent Armbruster's testimony about the Century Link information, stating that the Century Link return had identified Sarah Cox as the subscriber that paid for the service using the Internet protocol addresses. (RT, 05/09/17, p. 57, ll. 11-17.) Then, he obtained Cox's driver's license information including her photograph. (*Id.*, p. 57, l. 18 to p. 58, l. 6; Tr. Exh. 82.) Schrable compared the driver's license information, which contained name, date of birth, social security number and address with the Kik subpoena return and found the dates of birth matched. (*Id.*, p. 59, ll. 8-25.) Schrable also reviewed the Twitter account pages for Sarah Cox, which disclosed

her email address as Sarah Cox @ JadeJeckel. Other twitter pages showed a photo of a tattoo banner behind a facial shot of a woman and another picture of an individual wearing a mask and an exposed upper body. (*Id.*, p. 65, l. 12 to p. 68, l. 5; Tr. Exh. 51.) The Defendant, who, of course, was present in court during the trial, was certainly the woman in the photograph on the driver's license and Twitter documentation.

Other photos clearly of Cox that were attachments to Kik chat exchanges were admitted through Schrable into evidence, including an email from jadejeckel@live.com to which a resume was attached for Sarah M. Cox on a specific address in Clarkdale and a specific telephone number. (*Id.*, p. 87, l. 21 to p. 89, l. 14; Tr. Exh. 65.)

Thus, the government did not need the August 2015 Kik chat exchanges to prove identity. These exchanges are covered below.

b. The November - December 2015 Exchanges

The exchanges and attachments between Hennis and JadeJeckel starting on November 22, 2015 supplied the evidence of the counts in the government's case.

i) The exchanges supporting Counts 1, 2 and 3 of the superseding indictment all took place on December 23, 2015. Message key 7256

reflects that at 3:36 a.m. Hennis sent de131 to JadeJeckel (Tr. Exh. 18, MK 7256 at p. 85/89; Tr. Exh. 1.) Message key 7257 shows that at the same time, Hennis sent ede39 to JadeJeckel (Tr. Exh. 18, MK 7257 at p. 85/89; Tr. Exh. 2) and that one minute later at message key 1258, he sent c05 to her. All three of these images were created by Brandi Leonard. (RT on 05/09/18, p. 183, l. 23 to p. 184, l. 5; Tr. Exh. 18, MK 1258 at p. 85/89; Tr. Exh. 3.) As Hennis stated in the Kik exchange, "Some girl I've been chatting with sent these."

ii) The exchange pertaining to Count 4, which covers the notice and advertisement charge, essentially occurred on December 4, 2015 at 3:08 a.m. when JadeJeckel sent a Dropbox link to Hennis which contained several videos of child pornography. Portions of three of these videos were admitted into evidence. (*Id.*, p. 174, l. 12 to p. 178, l. 17; Tr. Exh. 18, MK 6458 at 79/89: Tr. Exhs. 4-6.) There was no comment accompanying the link.

There were other exchanges between JadeJeckel and Hennis on December 3, 2015, also pertaining to a Dropbox account. None of these exchanges were sent to or were intended to be exchanged with other individuals, groups, chat rooms or shared entities. Thus, Jadejeckel sent another link to Hennis and asked:

> JadeJeckel: "Do you have one? I do, so you should set one up so you can keep all the goodies you find." (Tr.

Exh. 18, MKs 6400, 6401 at p. 76/89 .)

Hennis: "you find." (Tr. Exh. 18, MK 6402 at p. 76/89.)

JadeJeckel: "I did ☺." (Tr. Exh. 18, MK 6404 at p. 76/89.)

Hennis: "I think after a Db account is so old, it doesn't allow the link to work. I've tried several times with others and it won't work. As vice versa." (Tr. Exh. 18, MK 6405 at p. 77/89.)

JadeJeckel: "Did the one I give you work? Worked good for me this morning." (Tr. Exh. 18, MK 6407 at p. 77/89.)

Hennis: "Yes." (Tr. Exh. 18, MK 6408 at p. 77/89.)

JadeJeckel: "Excellent ☺ I like having someone to share with." (Tr. Exh. 18, MK 6409 at p. 77/89.)

* * *

Hennis: "Save that zip file to your Db then send me the link." (Tr. Exh. 18, MK 6422 at p. 78/89.)

Hennis: I'm dying to see that zip file. Please send it to me ☺ ." (Tr. Exh. 18, MK 6425 at p. 78/89.)

JadeJeckel: "I know babe but it isn't letting me upload it or you would have already have." "If it would let me save it, you would have it already. It wont save it." (Tr. Exh. 18, MKs 6426, 6427at p. 78/89.)

iii) As for Count 5, which charged distribution of child pornography on December 3 - 4, 2015, agents Armbruster and Schrable identified Trial Exhibit 4, which was one of the videos found in the Dropbox account at Message Key 6458, as the distributed material.

There are several other exchanges from JadeJeckel to Hennis involving Dropbox links. However, there is no indication from the Kik chat chart or any other piece of evidence that the messages and accompanying links went to any other person or referred in any way to a third recipient or that they should be passed on to anyone else, including Brandi Leonard, the only other individual in this case who appears to be linked to child pornography.

c. August 2015 Exchanges

The government elicited from Trial Exhibit 18 "the images and the videos that are of note in this case." (RT on 05/09/18, p. 95, ll. 6-7.) According to the government, those started with the August 2015 exchanges, and an agent read every entry for the three days in August during which the Kik exchanges took

place. Thus, agent Schrable identified several exchanges that did not relate to the charges in the indictment and had nothing to do with the identity of JadeJeckel.

The first exchange of note is a message sent from JadeJeckel disclosing how she found Hennis, which was in a profile in a website called "fetlife," identified by the agent as "an adult bondage website for particular minded individuals to chat and exchange pictures videos of a graphic sexual nature." (*Id.*, p. 96, ll. 16-18.) The agent was able to capture Hennis' profile in fetlife. It announced that he had interests in "family taboos and other kinks," including "Father/Daughter," which was a favorite. The fetlife feature was admitted into evidence and read to the jury in all of its salacious details. (*Id.*, p. 97, l. 17 to p. 98, l. 21; Tr. Exh. 18, MK 3618 at p. 2/89; Tr. Exh. 33.)

Additional examples of exhibits admitted into evidence that were linked to exchanges in August included a picture of the topless Defendant taking a shower (*Id.*, p. 99, l. 24 to p. 100, l. 7; Tr. Exh. 18, MK 3624 at p. 2/89; Tr. Exh. 37) and another one of Cox wearing a mask and a negligee (*Id.*, p. 101, l. 22 to p. 102, ll. 21-23; Tr. Exh. 18, MK 3629 at p. 3/89; Tr. Exh. 46.)

Another example of exchanges sent by JadeJeckel that are extremely shocking but not the stuff of identification include one dealing with incest and rape: "Found a naughty dad that fucks his 11 yr old" (*id.*, p. 104, ll. 5-11; Tr. Exh.

18, MK 3630 at p. 3/89); "Men trust easier. He says he's been looking for a naughty mommy for a very long time too" (*id.*, p. 105, ll. 10-12; Tr. Exh. 18, MKs 3639, 3640 at p 4/89.) In response to Hennis' question "How long has he been fucking her?" JadeJeckel responded "For a little while actually he has three. The 11 and 12 yr old are his favorites tho. The youngest in particular because she looks like her mom so he punishes her for it." (*Id.*, p. 105, ll. 11-21; Tr. Exh. 18, MKs 3641-3644 at p. 4/89). Hennis told JadeJeckel "I want you and me to have our own little fuck toy," to which she responded "Yes, so do I. Soooooo badly. Get us one daddy, pleaaaaase" (*Id.*, p. 106, ll. 8-13; Tr. Exh. 18, MKs 3651-3653 at p. 5/89.)

There was also a reference to killing a child, which started with Hennis stating "You could find a meth head girl on CL, and take her little girl." JadeJeckel replied, "Yes but witnesses are no bueno. Credible or not. I'd have to kill her to do it." Hennis says next: "Then do it." JadeJeckel sends back, "Would rather just get a willing player with all the pieces mommy needs." (*Id.*, p. 110, ll. 6-13; Tr. Exh. 18, MK 3688-3691 at p. 8/89.)

There are also exchanges pertaining to enslavement.

Hennis: "Do you know how to access the dark web?"

JadeJeckel: "I do."

Hennis: "You should be able to find all sorts of naughty vids out there

including slaves for sale. I don't know how to access it. Just found out about it last year."

JadeJeckel: "Hmmmm may have to dig deeper into that one."

* * *

Hennis: If you could have another little girl, would you make her your slave?"

JadeJeckel: "Yes."

Hennis: Do you want our little girl to be a slave all the time or just during naughty play time.?

JadeJeckel: "All the time would suit our needs best."

* * *

Hennis: "Will she be ours forever or will we release her when she is older?"

JadeJeckel: "Hmmmm depends how she grows and acts."

Hennis: "Is she going to have babies for us to enslave?"

JadeJeckel: "Of course."

(*Id.*, p. 125, l. 10 to p. 126, l. 13; Tr. Exh. 18, MKs 3833-3837; 3842-3845; 3850-3853 at pp. 26-29/89.)

The entire exchange in the three days of August 2015 ended abruptly,

when Hennis questioned JadeJeckel whether she was "out to get [him]." She appears to have cut off the exchanges, stating that she did not have time for his paranoia. After Hennis sent out several messages seeking to regain contact, the last message in August on the 29th provided: "Misty Justice has been removed from the group." (*Id.*, p. 128, l. 10 to p. 130, l. 11; Tr. Exh. 18, MKs 3885-4024 at p. 26-29/89.)

There were no further contacts until November 22nd, nearly three months later, when Hennis again reached out for JadeJeckel and resumed the exchanges.

d. Juror Excused

On May 10, 2018, the last day of trial, the court excused one of the jurors because he expressed his dismay at the evidence and believed he could not continue to sit on the case. (Dkt. 128.)

e. Defense Trial Motions

The Defendant moved for directed verdicts at the end of the government's direct case and at the end of the Defendant's case. The district court denied the motions. (CR 128; ER 58.)

5. Sentencing

In its draft presentence investigation report, the United States

Probation Office ("USPO") calculated an adjusted offense level of 37, which included enhancements for such specific offense characteristics as materials involving prepubescent minors (2 levels), engaging in the distribution of 24 videos containing child pornography (2 levels), materials portraying sexual abuse or exploitation of an infant or toddler (4 levels), using a computer (2 levels) and the number of images (5 levels). At a Criminal History of Category of III, Cox's guideline range for Count 4 was 262 to 327 months, which carried a minimum term of imprisonment of 15 years. (CR 135 [under seal].)

The Defendant maintained that Count 4, which required proof of publishing a notice or advertisement had not been proven. JadeJeckel sent a single message to Hennis - - no one else - - indicating a Dropbox link. This one act of limited disbursement is not sufficient proof of advertising. The Defendant further argued that the USPO's sentencing guideline calculation included two enhancements that overlapped, and, therefore, there was double counting. (CR 146; ER 28.) The government opposed the reduction (CR 166; ER 23) and the probation office denied the objection. (CR 168 [under seal].)

The Defendant submitted a sentencing memorandum, again addressing the guideline calculation and the lack of proof on Count 4. (CR 167; ER 12.)

On October 22, 2018, the district court sentenced Cox to terms of 240

months on Counts 1, 2, 3 and 5, and 262 months on Count 4, the terms to run concurrently. (Dkt. 171, ER 394; CR 172; ER 6.)

The Appellant does not contest the sentencing guideline calculation in this appeal and, therefore, waives the argument concerning double counting.

6. The Notice of Appeal

The Appellant promptly filed her notice of appeal on October 24, 2018. (CR 174; ER 5.)

SUMMARY OF ARGUMENTS

I. The district court erred by allowing the August 2015 Kik chat exchanges into evidence, as they were not necessary to prove the identity of JadeJeckel, which was the only reason why they were admitted pursuant to Rule 404(b). Moreover, the exchanges covered kidnaping, rape and enslaving children, acts which were not the charged in the case but were so highly emotional that they could not have but inflamed the jury.

II. The district court erred by allowing Count 4 to go to the jury. The evidence did not support the charge of giving notice or advertisement of a minor engaging in sexual explicit activities.

ARGUMENT I

THE DISTRICT COURT ERRED BY ALLOWING INTO EVIDENCE PURSUANT TO RULE 404(b) THE AUGUST 2015 KIK CHAT EXCHANGES. THEY WERE UNNECESSARY TO PROVE IDENTITY AND THEY WERE SO HIGHLY PREJUDICIAL TO THE DEFENDANT THAT THEY SHOULD HAVE BEEN EXCLUDED PURSUANT TO RULE 403, FRE.

The standard of review for the entry of evidence pursuant to Rule 404(b), FRE is for abuse of discretion. *United States v. Bailey*, 696 F.3d 794, 798-99 (9th Cir. 2012).

Cox argued below that the August 2015 Kik exchanges occurred well before the charged conduct, which arose more than three months later, on December 3rd - 4th and 23rd, that the 60 pages of chats from November 22nd to the end of the year provided sufficient proof of identity, that how the defendant met Hennis was not essential to the proof of the charges, and that the prejudice arising from August 2015 exchanges, including references to child rape, incest, slavery and kidnaping, should have been excluded pursuant to Rule 403, FRE. The August exchanges clearly portrayed Cox as a person with a vivid, warped imagination concerning deviant sexual and physical conduct with children. That this character trait for deviant conduct was never translated into any actual act makes evidence of the exchanges all the more prejudicial to the Defendant.

In *United States v. Preston*, 873 F.3d 879 (9th Cir. 2017), the Court

recognized that Rule 404(a)(1), FRE set out a general prohibition against admitting evidence of a defendant's character or character trait as proof that the person acted in accordance with that trait on a specific occasion. *Id.* at 839. The Court noted that even when evidence might be admitted under one of the enumerated purposes set out in Rule 404(b)(2), it should be excluded under Rule 403 if its probative value is substantially outweighed by a danger of unfair prejudice. *Id.*, at 840. Moreover, the trial court abuses its discretion by not excluding evidence under Rule 403 if its probative value is slight and "'if there's even a modest likelihood of unfair prejudice or a small risk of misleading the jury.'" *Id.*, at 841, citing *United States v. Wiggan*, 700 F.3d 1204, 1213 (9th Cir. 2012) (quoting *United States v. Hitt*, 981 F.2d 422, 424 (9th Cir.1992).)

The probative value here of the August exchanges was not integral in any way to helping the jury understand the possession, advertising and distribution charges occurring three months later. Thus, its probative value was slight. But, the exchanges would raise more than a modicum of unfair prejudice. The prejudice to Cox was real.

The Supreme Court has elaborated on the standard for excluding evidence under Rule 403 in *Old Chief v. United States*, 519 U.S. 172 (1997). There, the defendant was accused of assault with a dangerous weapon, using a

firearm during a crime of violence and being a felon-in-possession, in violation of 18 U.S.C. § 992(g)(1). The defendant's prior offense was assault causing serious bodily injury. To avoid the prejudice that would arise from the government's proof of the underlying events of the prior conviction, Old Chief sought to preclude the government from mentioning the nature of the prior offense during the reading of the indictment and in its opening and closing or from otherwise referring to it during the proof of the case. Rather, Old Chief proposed that all the government need do to prove the prior felony offense was merely make reference to the fact that the defendant had a prior felony conviction. His offer to stipulate to the same was rejected by the government, and the trial court refused to give a jury charge consistent with Old Chief's proposal. The Supreme Court reversed Old Chief's conviction on the grounds that the admission of the details surrounding his prior conviction turned on the degree to which "unfair prejudice" exists in a criminal case: it "speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Id.*, at 180 (citations omitted.)

In a related vein, the Court cited the Advisory Committee Notes to Rule 403, which provided that "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not

necessarily, an emotional one." *Id.* That propensity evidence may be relevant is beside the point. The Court referred to Rule 404(b)'s prohibition against evidence of other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith. *Id.*, at 181-82.

These admonitions against admitting propensity evidence and proof of highly emotional acts (or merely statements in this case) apply to JadeJeckel's exchanges in August 2015. They had no bearing on her identity as Cox and they had nothing to do with receiving, advertising or distributing child pornography nearly three months later. Similarly, the racy photographs of Cox that were attached to messages she sent Hennis had no bearing on any element in the case except for identity, and they were unnecessary for that purpose.

The government did have other ways to prove the point it sought to reach through similar act evidence. In that regard, the Court again referred to the Notes to Rule 403, which provide the trial court should consider whether there are other means to prove the matter. The same analytical structure appears in the Notes to Rule 404(b), which asks whether there are other means of proof and other facts that reduce the danger of unfair prejudice and still address the factor that the offering party seeks to prove. *Id.*, at 184-85, citing 1 McCormick 782, and n. 41 ("suggesting that Rule 403' s 'probative value' signifies the 'marginal probative

value' of the evidence relative to the other evidence in the case"); 22 C. Wright & K. Graham, Federal Practice and Procedure § 5250, pp. 546–547 (1978) ("'The probative worth of any particular bit of evidence is obviously affected by the scarcity or abundance of other evidence on the same point"').

Here, the government did not need to have agent Schrable recite the scurrilous passages concerning sexual contacts, fantasies, child labor and enslavement, kidnaping and murder. Not only did these exchanges offer nothing by way of the identity of JadeJeckel, but by their very nature they would have created the natural instinct of revulsion in the jurors' minds. By the time in the trial when agent Schrable started to recite the November - December 2015 exchanges, the jury would have come to the conclusion that Cox was already guilty of deviant behavior: anyone suggesting, even in private exchanges, that child enslavement, rape, kidnaping and such surely had a propensity to possess child pornography, advertise and give notice of its availability and distribute it. None of the August exchanges, however, dealt with intent, modus operandi, plan, knowledge, absence of mistake, lack of accident or any other conceivable use permitted by Rule 404(b) to prove the charged conduct.

Accordingly, the staggering weight of this evidence was such that each of the Defendants convictions should be overturned and the case remanded for

retrial on all counts, except for Count 4, which as argued below, should be dismissed outright.

ARGUMENT II

THE DISTRICT COURT ERRED BY ALLOWING COUNT 4, CHARGING THE DEFENDANT WITH GIVING NOTICE AND ADVERTISEMENT SEEKING TO DISTRIBUTE VISUAL DEPICTIONS OF MINORS ENGAGING IN SEXUALLY EXPLICIT ACTIVITIES, TO GO TO THE JURY

The standard of review for the denial of a Rule 29 motion for judgment of acquittal based on insufficiency of evidence is *de novo*. *United States v. Ruiz-Lopez*, 749 F.3d 1138, 1141 (9th Cir. 2014). If the evidence is sufficient to support the conviction when viewed in the light most favorable to the government such that a rational trier of fact could have found the elements of the crime beyond a reasonable doubt, the denial of the motion will not be disturbed. *Id.*

The evidence did not support a conviction for Count 4, which charged the Defendant with publishing a notice or advertisement seeking, in this case, to distribute visual depictions of minors engaging in sexually explicit conduct, in violation of 18 U.S.C. §§ 2251(d)(1)(A) and 2256. The relevant Kik chat exchange, which is found at Message Key 6458, provided a Dropbox link. It was sent by JadeJeckel to a single recipient, Hennis. (Tr. Exh. 18, Message Key 6458, p. 75.) There is no message accompanying the video. Messages before and after the exchange do not indicate that JadeJeckel told or even suggested that Hennis send the video to a third party, including Brandi Leonard. Nor is there any

indication that Hennis himself planned to or did send the video even simply the link to it to anyone else.

The most recent decision by this Court that addresses the scope of the advertisement requirement is *United States v. Grovo*, 826 F.3d 1207 (9th Cir. 2016), in which the Court concluded that an advertisement did not necessarily require publication in the press or broadcast over the air. However, it noted that "Assuming without deciding that an 'advertisement' under § 2251(d) requires some public component, we hold that advertising to a particular subset of the public is sufficient to sustain a conviction under the statute." (*Id.* at 1218.) The activity in *Grovo* consisted of the defendant's exchange of posts on message boards with a "closed community of 40 to 45 individuals."

This observation in *Grovo* concerning the possible requirement as to the extent of a public component in Section 2251(d) is consistent with the Comment to the Jury Instruction 8.183, which pertains to Sexual Exploitation of Child – Notice Or Advertisement Seeking or Offering. As the comment states, "A defendant who simply possesses, transports, reproduces, or distributes child pornography does not sexually exploit a minor even though the materials possessed, transported, reproduced, or distributed involve such sexual exploitation by the producer. *See*, Comment to 8.183, *United States v. Kemmish*, 120 F3d 937,

942 (9th Cir. 1997)." It appears that there must be some intent to distribute beyond a single recipient in order for a case of advertisement to be made out.

In *Grovo*, the Court relied on *United States v. Franklin*, 785 F.3d 1365, 1369 (10th Cir. 2015), in which the Tenth Circuit determined that the advertisement activity involved a website to which the defendant had access, allowing him entry into a "closed community of subscribers" he described as his "tribe" with whom he exchanged images of child pornography. The tribe consisted of 108 like-minded individuals interested in sharing such material. The Tenth Circuit held that the defendant's interactions with his "tribe" satisfied the advertisement element, "concluding that even if the word had a 'public' component, that component could be construed to encompass a 'subset of the public,' such as 'an informal group of like-minded individuals.'" *Grovo*, at 1218; s*ee also, United States v. Rowe*, 414 F.3d 271, 276 (2nd Cir. 2005) (notice or advertisement occurred where the defendant posted images of children in a "preteen00" chat room along with inquires for "anybody with baby sex pics for trade?"); *United States v. Gries*, 877 F.3d 255, 260 (7th Cir. 2017) (where the defendant posted thousands of file-sharing messages in an online chat room). Each of these decisions involved groups of persons, not just a one-to-one relationship.

At least one court has agreed that the advertisement charge in Section

2251(d)(1)(A) requires something more than a one-on-one exchange. In *United States v. Peterson*, 2015 WL 13657215, *6 (C.D. Cal. 2015), the district court gave the following charge as to the meaning of "advertisement" in Section 2251(d):

> As used here, the word "advertisement" is defined as a posting or notice that has the purpose of advising an audience that child pornography is available. A directed message such as an email or a one on one chat does not constitute advertisement. Further, distribution alone does not constitute advertisement. (*Id.*, *2.)

Although the district court in *Peterson* rejected the defendant's argument that notice or advertising meant some sort of *public* communication, it did agree that a mere exchange between two individuals was not enough. "Thus, while the Court agrees with Peterson that advertising requires something more than one-on-one exchanges, it does not believe that Congress meant 'its bar on [child pornography] advertising to be ... easily evaded' by shifting to nominally 'private' fora [citing *United States v. Rowe*, 414 F.3d 271, 277 (2nd Cir. 2005)]. The Court would therefore reject Peterson's effort to redefine § 2251(d) in a manner requiring that prohibited advertisements be 'public' in some generic sense." (*Id.*, *6.)

In any event, the email from JadeJeckel to Hennis on December 3,

2015, disclosing a Dropbox site for child pornography was nothing more than a one-to-one exchange and, consistent with the decision in *Peterson*, does not fulfill the notice and advertisement requirement.

Other jurists have also viewed the requirement for notice and advertising more in line with the defendant in *Peterson* that some action in the nature of a more public disclosure is necessary. The dissent in *United States v. Caniff*, 916 F.3d 929, 941-46 (1st Cir. 2019), concluded in its ordinary and usual sense "notice" and "advertisement" contemplate more than sending a message from one person to another. (*Id.* at 941-42.) When put into the context of the statute criminalizing sexual abuse of children, the average person is not going to conclude that a private, one-to-one message is tantamount to notice or advertising, particularly because the words surrounding these terms, such as "mak[ing], print[ing], or publish[ing]" the notice or advertisement, have a broader expanse. (*Id.* at 942.) Taking definitions from a standard dictionary, the dissent views, for example, that to "publish" means making a public announcement or to make known generally, certainly to more than one individual. (*Id.*, 943.) Moreover, placing notice in the same clause as advertising indicates that it, too, contemplates more than a one-to-one exchange. (*Id.* 944.)

The Comment to the Circuit's Jury Instructions for advertising child

pornography states as much: the mere distribution of child pornography is not the same as the child exploitation arising form giving notice and advertising it. All that occurred here is distribution.

If advertising and notice are to be given their common meaning, then no such act occurred in this case. Thus, Count 4 should be reversed. Should the Court remand this case for retrial, Count 4 should not be the subject of a new prosecution.

CONCLUSION

While crimes pertaining to child pornography are reprehensible, when it comes to the principles that each element must be proved for each crime charged and that evidence is to be admitted by recognized standards, including excluding proof which creates unfair prejudice to the defendant, then the August 2015 Kik chats should have been excluded and proof of the notice and advertising charge is lacking. In that vein, the Appellant respectfully requests that the Court enter an order reversing her conviction for giving notice advertising the distribution of child pornography in Count 4 and that it remand this case to the district court for a retrial on the receipt and distribution charges in Counts 1, 2, 3 and 5 respectively.

RESPECTFULLY SUBMITTED this 8th day of May, 2019.

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UNITED STATES COURT OF APPEALS
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STATEMENT OF RELATED CASES

To the knowledge of undersigned counsel for appellant, the following are related cases pending before this Court:

NONE

DATED THIS 8th day of May, 2019.

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