APPENDIX

TABLE OF CONTENTS

Page

Unpublished Opinion of the
United States Court of Appeals
For the Fourth Circuit,
With Attachment,
entered August 24, 2021 ..... 1a

Attachment:

Bitmoji, Cambridge Dictionary Online,
https://dictionary.cambridge.org/us/dictionary/english/bitmoji
last visited August 23, 2021 ..... 34a

Judgment of the
United States Court of Appeals
For the Fourth Circuit
entered August 24, 2021 ..... 35a

Memorandum Opinion of the
United States District Court
For the Eastern District of Virginia
entered July 9, 2019 ..... 36a

Order of the
United States District Court
For the Eastern District of Virginia
Re: Denying Defendant's Motion for Acquittal, or in the
Alternative, for a New Trial
entered June 28, 2019 ..... 45a

Judgment of the
United States District Court
For the Eastern District of Virginia
entered June 28, 2019 ..... 46a

50 U.S.C. § 1801 ..... 52a

50 U.S.C. § 1802 ..... 58a

50 U.S.C. § 1803 ..... 61a

50 U.S.C. § 1804 ..... 67a

50 U.S.C. § 1805 ..... 71a

50 U.S.C. § 1824 ..... 79a

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4510

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SEITU SULAYMAN KOKAYI,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge. (1:18-cr-00410-LMB-1)

Argued: July 16, 2021 Decided: August 24, 2021

Before FLOYD, THACKER, and QUATTLEBAUM, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ARGUED: Anthony Hamilton Nourse, LAW OFFICE OF ANTHONY H. NOURSE, PLC, Fairfax, Virginia; Mark John Petrovich, PETROVICH & WALSH, PLC, Fairfax, Virginia, for Appellant. Joseph Attias, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee. **ON BRIEF:** G. Zachary Terwilliger, United States Attorney, Kellen S. Dwyer, Assistant United States Attorney, Dennis M. Fitzpatrick, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Seitu Sulayman Kokayi ("Appellant") appeals his conviction on two counts of coercion and enticement of a minor in violation of 18 U.S.C. § 2422(b), and one count of transferring obscene material to a minor in violation of 18 U.S.C. § 1470. The Government gathered the evidence supporting these convictions while Appellant was under surveillance pursuant to the Foreign Intelligence Surveillance Act ("FISA").

Appellant lodges four challenges to his convictions. First, he claims the district court erred in denying his requests to disclose and suppress the evidence collected pursuant to FISA. Second, he contends that his convictions pursuant to § 2422(b) violate double jeopardy. He argues that the convictions were for violations of the same statute and based on the same course of conduct and facts. Third, Appellant maintains that one of his convictions pursuant to § 2422(b) violates the Equal Protection Clause because § 2422(b) more heavily penalizes those who use interstate communication facilities to engage in prohibited sexual conduct with minors. And fourth, he challenges the convictions for lack of sufficient evidence.

For the reasons explained below, we find no error and affirm.

I.

A.

Factual Background

Appellant was convicted following a bench trial. The following facts were presented at trial. We view them in the light most favorable to the Government. *See United States v. Garcia-Ochoa*, 607 F.3d 371, 376 (4th Cir. 2010).

At the time of the underlying events giving rise to this case, Appellant, a United States citizen, was 29 years old. From 2009 until his arrest in August 2018, he was a teacher at a mosque in Washington, D.C., where he taught the Koran to students between the ages of five and 18. The 15 year old victim (hereinafter "Victim") was a student of Appellant's at the time of the charged conduct. She had been his student on and off for five to six years, after she and her family immigrated to the United States from Ethiopia. Appellant was also socially familiar with the Victim's family, and he sometimes drove the Victim and her sister to and from Koran class.

The Victim got her own iPhone in early August 2018. Around August 2, 2018, Appellant sent a direct message to the Victim on Instagram asking for her phone number. On August 4, 2018, Appellant and the Victim had their first of many phone conversations. They discussed the Victim's timeline for marriage and work and study abroad opportunities once she began high school. The Victim stated that she could not study abroad "because . . . I'm not in high school yet." J.A. 270.[1] Appellant responded, "[Y]ou literally have to wait until summer is over." *Id.* At the end of the call, Appellant asked whether he was "up in the ranks with [Victim]," adding, "I would say maybe top uh, like 50?" *Id.* at 271. The Victim replied that Appellant was "Like top 5. Top 5." *Id.* at 272.

Between August 4, 2018, and Appellant's arrest 19 days later, Appellant spoke on the phone with the Victim 256 times. Cumulatively, the 256 calls lasted over 32½ hours,

[1] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

which averages to around 12 to 13 calls a day. In addition, during this same period, Appellant had at least 43 FaceTime[2] calls with the Victim.

On August 4, 2018, Appellant drove the Victim and her sister to the airport because the Victim was traveling to Minnesota to visit relatives. During the two and a half weeks the Victim was in Minnesota and Appellant remained in the D.C. area, the following conversations between Appellant and the Victim took place:

- August 9, 2018, at 2:42 a.m. -- Appellant and the Victim spoke about when "things changed" between them. The Victim stated, "we started getting to know you and you started giving us . . . ride[s] home," to which Appellant responded "Yeah, then things changed." Appellant asked, "Wait…does your mom know?" The Victim responded, "Do I actually look like the girl that talks to her mom about these things? … I've been hiding it okay." J.A. 273. Later, Appellant talked about whether he and the Victim would "touch" and whether things will "escalate." He continued … "I'm just throwing it out there, right? And like, that's gonna like, escalate, and, right? … because then [the Victim]'s going to be hooked, so, we can't have that." The Victim responded, "probably you would be hooked." To which Appellant responded, "you wish." After some more banter, Appellant stated, "Look, if we do kiss, you will be hooked, just saying, okay? Leave it at that." *Id.* at 276. Later Appellant asked, "have you thought about, like, what I said … Scenarios or situations where things could happen." After the Victim deflected the question a few times, Appellant stated again, "the question is, I said, 'have you thought about what I said could happen?' … Meaning, like, oh, if we're alone, or something like that." *Id.* at 279. The Victim deflected the question but Appellant persisted, stating multiple times that

[2] FaceTime is an Apple Inc. cell phone application that allows users to communicate over video. *See United States v. Perrin*, 926 F.3d 1044, 1048 n.4 (8th Cir. 2019). There are both audio and video components to FaceTime. According to the Government, Apple stores the audio but not video recordings, so the Government only introduced audio recordings and transcripts of phone calls and FaceTime calls in the district court. *See* Appellee's Br. 6–7; J.A. 642.

"It's hard for me to stop thinking about it…. Thinking about you and things that we could do, okay?" Appellant later asked, "What if we kiss?" The Victim answered, "Then we kiss, I guess. I don't know." *Id.* at 281–82.

- August 11, 2018, at 1:28 a.m. -- Appellant asked the Victim several times whether "hypothetically" she would marry him, and she eventually said she would. J.A. 294. After discussing being together, the Victim asked, "If you see me, what is the first thing you would do if you could?" Appellant responded, "give you a hug, and kiss you." In response, the Victim quipped, "That's two things." Appellant then asked, "What about you?" to which she responded, "[a] kiss." *Id.* at 297. Appellant then asked, "You want more? … if you could do two things, then . . . what's your next thing?" The Victim responded, "Like, if we're in a comfy place, I would literally cuddle . . . . And kiss, still kiss." *Id.* at 297–98. Appellant then asked repeatedly, "So um, what's the third thing?" to which the Victim responded, "the only thing left." *Id.* at 300. Appellant then pressed her to say it more explicitly. In response, the Victim stated, "The third thing . . . was going to be sex . . . ." Appellant pressed the Victim, stating, "What? Say it again." When she refused, Appellant stated, "Oh my god just say it . . . [w]hat's the third thing?" Appellant stated that the second thing was "[k]issing, obviously . . . And then find a place we can go and we start your lessons." *Id.* at 301. Appellant then asked repeatedly, "what's your third thing . . . what's your third thing . . . [o]h my god, what is your third thing?" The Victim responded, "It's the last thing left on my, uh, you know?" "Okay, so tell me," Appellant insisted. The Victim responded by spelling, "'S'…'E,' you got it or do you want me to finish?" Appellant laughed and said, "I got it," before asking, "So, how are we going to make this happen?" *Id.* at 302. Appellant then asked the Victim whether she was "wet right now" and demanded that she "be honest," to which she responded, "[y]es." *Id.* at 303. Appellant then asked whether they could FaceTime, and the call ended.

- August 11, 2018, at 2:47 a.m. -- Appellant told the Victim she was very attractive and, "I really want you." Shortly thereafter, Appellant told the Victim, "It would have been the perfect time for you to, uh, be in the area while I'm off," and that "I'm already thinking how I can see you and different things."

Appellant asked the Victim if she knew "the list of things that I want to do?" J.A. 312. When the Victim asked what it was, Appellant stated, "I want …to give you an orgasm first … and then I feel like after that, then you can start your lessons." *Id.* at 311. The Victim later stated, "but you been through this before" because "[y]ou did help create somebody, right?" referring to the fact that Appellant is a father. He responded that it is "[e]asy as riding a bike," and the Victim responded: "We'll find out then. Probably I will find out?" *Id.* at 314. Appellant stated, "You have a lot to learn." Appellant then said, "I feel like a want to give you a hug. Just squeeze you," and that he would do so "once you get back" from the Midwest. *Id.* at 315–16. Appellant later stated, "I can't wait until you get back." The telephone call ended after Appellant and the Victim discussed transitioning to FaceTime. *Id.* at 319. Records obtained from Apple show that Appellant initiated a FaceTime call to the Victim at 4:09 a.m.

- August 12, 2018, at 3:37 p.m. -- Appellant and the Victim discussed the FaceTime session that occurred the night before, with Appellant asking whether the victim "actually ha[d] an orgasm too?" to which the Victim responded, "[y]es." J.A. 643. Appellant then said he was "still really upset" because the Victim had "put [him] on mute." *Id.* Appellant said, "What the hell is wrong with you? …. Don't you know that's the point? So, I can hear you? Not so you can be like, 'Oh, ok...I think it's about that time. I'm gonna mute myself.' What?" Appellant then asked, "[B]ut did you enjoy it though?" and the Victim said, "yep." Appellant then stated, "I saw you, uh, staring extra hard at my side. I was like, 'Oh, shoot' . . . I didn't think that it would escalate more than that. I surprised myself." Appellee's Br. 9–10 (quoting Gov't's Tr. Ex. 38).

- August 19, 2018, at 2:50 a.m. -- Appellant repeatedly asked the Victim to participate in a FaceTime call. After the Victim gave multiple excuses not to, he told her multiple times, "[Y]ou should take a picture." J.A. 328. The Victim said that she wanted to but couldn't because she was cold and her tooth hurt, but she did say, "I love you," to which Appellant responded by whispering, "love you." *Id.* at 329–30. Later, Appellant asked what the Victim would say if he asked to marry her in four years. The Victim initially said, "Now, I don't know. [In]

> [f]our years, I have no clue." *Id.* at 333. Finally, the Victim said "you know what? I would probably say yes." *Id.* at 334.

The Victim's father asked Appellant to pick up the Victim and her sister at the airport when they returned from Minnesota on August 24. On August 22 into the morning of August 23, Appellant and the Victim spoke 20 times by phone and FaceTime. Most of these conversations revolved around discussing Appellant's penis and Appellant asking the Victim to film herself taking a shower:

- August 22, 2018, 2:32–3:31 p.m. -- Records from the Victim's iPhone show a FaceTime call with Appellant. During this conversation, Appellant asked the Victim, "[H]ow should I act when I see you?" "What if I touched you?" "Are you gonna sit in the front seat?" "[H]ow about my lap?" J.A. 344–46. The Victim indicated that she could not sit on his lap given the size of his penis, asking rhetorically, "Have you seen that thing?" *Id.* at 346.

- August 22, 2018, 4:02–4:23 p.m. -- Appellant and the Victim spoke by phone. Appellant asked the Victim if she was having "that time of the month problems." J.A. 349. The Victim told Appellant that it was a false alarm and Appellant responded by stating, "[s]o you're telling me we could've, uh, you know?" *Id.* at 350.

  Appellant and the Victim went on to discuss Appellant taking a shower and he said, "I would say you wanna come with." J.A. 351. The Victim declined, but later brought up the shower again and Appellant said, "Let's stop talking about the shower before [the Victim's sister] comes back and be like, 'Were you all talking about the shower?'" *Id.* at 354. Shortly thereafter, Appellant asked the Victim, "Okay? So [Victim] can you just do it for me[?] … shower [with] me. Call it a day." The Victim said, "I would love to, but no. . . . I don't want to." *Id.* at 355.

  Appellant responded, "If I ever ask you that and you were here, you better say yes…. We have an agreement," and the Victim said, "No." J.A. 355. Appellant asked again and

> the Victim again said "no" and changed the topic. At the end of this telephone conversation, Appellant said he should probably take a shower. The Victim responded, "I'm gonna come with." Appellant responded, "Oh you wanna come . . . I literally told you you can." Appellant then stated, "I'll FaceTime you." *Id.* at 358. That phone call ended at 4:23 p.m.
>
> - August 22, 2018, 4:23–5:04 p.m. -- Directly thereafter, Appellant and the Victim had a series of FaceTime calls. At the beginning, Appellant stated, "Oh, did you get prepared and ready[?]" The Victim's response was unintelligible, but Appellant then said, "That's why I literally said, you better -- well, if I am like this, there better not be some random person like walks by, like 'uh, okay.'" J.A. 360. Appellant continued, "That would be very awkward." Appellant started to say, "need to find my under--," but instead recounted a story about when he stopped wearing "tighty whities" and started wearing boxers. *Id.*
>
> - August 22, 2018, 5:26–5:29 p.m. -- Presumably after the Victim showered, the Victim said, "I don't know what's wrong with my phone." Appellant responded, "I think I do. I think I know." Appellant asked the Victim if she had rice in the house and the Victim said, "Yeah." Appellant asked, "Uncooked? Okay you're probably gonna have to put your phone in there maybe, so it can like suck out all of the water." Appellant continued, "That's why I feel bad! I told you but I thought that you would know like to try to keep your phone away somehow." Appellee's Br. 13 (quoting Gov't's Tr. Ex. 54).

Appellant was arrested on August 23, 2018, while the Victim was still in Minnesota. Appellant submitted to a voluntary interview with the FBI, during which he admitted the following:

> - He and the Victim had talked about being physical when she returned from Minnesota.

- He planned to pick up the Victim at the airport on August 24.
- He and the Victim showered simultaneously over FaceTime on August 22 and they "[b]asically" "played with [them]selves in front of each other" in the shower. J.A. 408.
- He saw the Victim naked and they transmitted FaceTime video of each other masturbating.
- He and the Victim both climaxed.
- He denied knowing that the Victim was under 16 years old.

The Victim was interviewed by a Child and Adolescent Forensic Interviewer ("CAFI") while in Minnesota. She told the CAFI that she was visiting a relative and planned to fly home the next day. When the CAFI asked the Victim if she knew why they were interviewing her, she replied with Appellant's first name and identified him as her Koran teacher.

The Victim said she had been communicating with Appellant while she was in Minnesota by phone and FaceTime. She explained that her FaceTime conversations with Appellant included the showing of nude body parts. For example, the Victim stated that Appellant told her how to move her clothing to expose her breasts and to "flash" her breasts at him. J.A. 644. She said Appellant showed his penis multiple times and he was "doing stuff physically with his hands with his penis" during these times. *Id.* However, the Victim claimed that she always moved her phone away so that she did not actually see Appellant's penis.

The Victim also said Appellant told her he wanted to "grab [her] boobs," and that he wanted to "kiss [her] boobs. Eat [her] out. And …. Play with [her]." J.A. 649. She explained that "play with [her]" meant "play with [her] vagina." *Id.* An FBI special agent also testified that Appellant "confirmed that he had talked with the [Victim] on a few occasions about having sex and that they had also discussed getting a hotel room." *Id.* at 556; *see also id.* at 644 (district court noting that Appellant told the Victim "they could get a hotel room to have sex once she returned to the D.C. area").

The Victim stated Appellant climaxed while they were on FaceTime together. She also said Appellant initiated a FaceTime call to her while he was in the shower. Appellant "asked her to finger herself while on previous FaceTime sessions," although she stated that she did not do so, but instead, just told Appellant that she did. J.A. 603–04.

The Victim also told the CAFI that Appellant knew her age because of Koran class registration. The Victim stated that she met Appellant in 2012 upon her arrival in the United States when she first began taking Koran lessons, at which time she would have been approximately nine or ten years old. Other evidence revealed that on the Victim's fifteenth birthday, Appellant sent her three Bitmojis[3] on Instagram wishing her a happy birthday. Appellant also helped the Victim to apply for a visa, and in order to do so, the Victim had to text him a photograph of her permanent resident card. That card showed the Victim's date of birth. Minutes after receiving the Victim's green card, Appellant's Google

[3] A Bitmoji is "a brand name for a digital cartoon image that is intended to look like and represent you, used in electronic communication." *Bitmoji*, Cambridge Dictionary Online, https://dictionary.cambridge.org/us/dictionary/english/bitmoji.

history shows that he searched "where is the number on a permanent resident card." J.A. 655. Finally, during one of their conversations, Appellant said that four years from then, the Victim "would most likely be in college," and the Victim clarified she would be in her "first year." *Id.*

B.

Procedural History

On November 8, 2018, a grand jury in the Eastern District of Virginia returned an indictment against Appellant, charging him with the following:

- Count One: knowingly using a facility or means of interstate commerce to knowingly persuade, induce, entice and coerce a 15 year old girl to engage in sexual activity that is illegal under federal law,[4] "specifically, to produce child pornography in violation of [18 U.S.C. § 2251]," all in violation of 18 U.S.C. § 2422(b);

- Count Two: knowingly using a facility or means of interstate commerce to knowingly persuade, induce, entice, and coerce a 15 year old girl to engage in sexual activity that is illegal under Virginia law,[5] "specifically, to engage in sexual acts with 29 year old Appellant, in violation of [Va. Code § 18.2–371]," all in violation of 18 U.S.C. § 2422(b); and

- Count Three: knowingly using a facility or means of interstate commerce to knowingly transfer and attempt to transfer obscene matter, "specifically, a live video depiction of his penis and Appellant masturbating," to

[4] The indictment also charged a violation of Virginia and Minnesota child pornography laws, but the conviction was based on the federal child sexual exploitation statute, 18 U.S.C. § 2251(a).

[5] The indictment also charged a violation of Maryland and D.C. laws, but the conviction was based on Virginia law.

> someone who has not attainted the age of 16 years, in violation of 18 U.S.C. § 1470.

The day after the indictment was returned, the Government filed a Notice of Intent to use FISA information in the district court. On December 17, 2018, Appellant filed a motion to suppress "all evidence and interceptions made and electronic surveillance and physical searches conducted pursuant to [FISA] and any fruits thereof" and for "disclosure of the underlying applications for FISA warrants." J.A. 134. The motion explained,

> [D]isclosure of the FISA applications to defense counsel is an essential prerequisite to an accurate determination of the legality of the FISA surveillance and due process in this case. Otherwise the defense will be unable to adequately represent the defendant[], and the Court will not have the benefit of the defense perspective on the key issues related to determining whether the FISA surveillance was lawful.

Id.

On February 21, 2019, the Government filed an unclassified response to the motion to suppress, along with an affidavit from the Attorney General, explaining that disclosure of the materials to defense counsel or an adversarial hearing would "harm the national security of the United States" and that it was appropriate for the district court to conduct an in camera, ex parte review of the materials. J.A. 201. After reviewing the FISA materials in camera, the district court denied the request to disclose those materials, explaining that disclosure to the defense was neither warranted nor necessary. The district court also denied the motion to suppress, finding that the surveillance was lawfully authorized, conducted in compliance with FISA, and did not violate Appellant's rights.

On April 8 and 9, 2019, the district court held a bench trial. At the close of the Government's case, Appellant made a motion for acquittal pursuant to Federal Rule of Criminal Procedure 29, which was denied. In that motion -- for the first time -- Appellant moved to dismiss Counts One and Two on double jeopardy grounds. Following trial, the district court found Appellant guilty of Counts One and Three and took the resolution of Count Two under advisement. Ultimately, on May 8, 2019, the district court found Appellant guilty of Count Two, rejected the double jeopardy argument, and filed a memorandum explaining its findings and conclusions on all counts (the "Memorandum Opinion"). Appellant then filed a renewed motion for acquittal, again asserting, inter alia, that his convictions on Counts One and Two constituted a violation of double jeopardy.

On June 28, 2019, Appellant was sentenced to 120 months of imprisonment -- 120 months on each of Counts One and Two, and 60 months on Count Three, all to run concurrently. On July 9, 2019, the district court denied the renewed motion for acquittal. Appellant timely noted this appeal the following day.

II.

FISA Evidence

We first address Appellant's challenges to the district court's decisions on the FISA evidence. Appellant makes two arguments: (1) the district court failed to disclose the FISA application and supporting documentation to defense counsel, in violation of *Franks v.*

Delaware, 438 U.S. 154 (1978)[6]; and (2) the district court erred in denying its motion to suppress the FISA evidence. We reject both of these arguments.

A.

Disclosure

Where, as here, an aggrieved person files a motion to suppress a FISA application and supporting documentation, and where the Attorney General certifies that disclosure of FISA materials or an adversarial hearing would "harm the national security of the United States" -- the district court "shall" "review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." 50 U.S.C. § 1806(f). "[T]he court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance." *Id*. If the district court "determines that the surveillance was lawfully authorized and conducted, it shall deny the motion of the aggrieved person except to the extent that due process requires discovery or disclosure." *Id.* § 1806(g).

[6] *Franks* held, "[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." 438 U.S. at 155–56.

Putting all of this together, we have explained, "The language of section 1806(f) clearly anticipates that an *ex parte, in camera* determination is to be the rule. Disclosure and an adversary hearing are the exception, occurring *only* when necessary." *United States v. Squillacote*, 221 F.3d 542, 554 (4th Cir. 2000) (quoting *United States v. Belfield*, 692 F.2d 141, 147 (D.C. Cir. 1982)) (emphasis in *Belfield*); *see also United States v. Hassan*, 742 F.3d 104, 138 (4th Cir. 2014) ("We have emphasized that, where the documents 'submitted by the government are sufficient' to 'determine the legality of the surveillance,' the FISA materials should not be disclosed." (quoting *Squillacote*, 221 F.3d at 554) (alteration omitted)). And this court has rejected the argument that "the FISA structure denied [defendants] their constitutionally established right to a *Franks* hearing." *United States v. Dhirane*, 896 F.3d 295, 300 (4th Cir. 2018). Recognizing "the benefit that an open, adversarial proceeding could provide, particularly in cases where a falsehood in the affidavit could be more readily identified by the defendant or his counsel than by a court perhaps less familiar with the subject matter," we nonetheless concluded, "Congress did not run afoul of the Constitution when it reasoned that the additional benefit of an unconditional adversarial process was outweighed by the Nation's interest in protecting itself from foreign threats." *Id.* at 301.

In the case at hand, the district court concluded that disclosure of FISA materials to the defense "[wa]s not necessary to make an accurate determination of the legality of the surveillance." J.A. 261. Against this legal backdrop and having reviewed the FISA materials at issue here in camera, we find no error in this determination.

B.

Suppression

With regard to the suppression motion, Appellant, without having had a chance to review the FISA materials, argues that the Government's FISA application(s) "may fail to establish the requisite probable cause"; "may contain intentional or reckless falsehoods or omissions"; "may not have included required certifications"; and "may not have contained or implemented the requisite minimization procedures." Appellant's Br. 28–33. Addressing these issues required this court to review classified materials in camera. Having reviewed the materials, and having fully considered Appellant's arguments, we affirm the district court's denial of Appellant's suppression motion.

III.

Double Jeopardy

Next, Appellant contends his convictions violate the Double Jeopardy Clause protection against multiple punishments for the same offense because "Counts 1 and 2 of the Indictment both allege violations of 18 U.S.C. § 2422(b) [and] while the Indictment alleges different predicate offenses to form the basis for the violation of count 1 and 2, there is no difference in the factual allegations supporting those alleged violations." Appellant's Br. 35. Appellant further avers that because "the elements of the underlying criminal offenses do not become elements of § 2422(b)," "Counts 1 and 2 allege violations of the exact same statute and statutory elements." *Id.* at 35–36.

We review de novo questions concerning the Double Jeopardy Clause. *See United States v. Schnittker*, 807 F.3d 77, 81 (4th Cir. 2015).

A.

The Counts

The Government charged Appellant with two violations of the same statute, 18 U.S.C. § 2422(b), in Counts One and Two. That statute provides:

> Whoever, using the mail or any facility or means of interstate or foreign commerce . . . knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in . . . ***any sexual activity for which any person can be charged with a criminal offense***, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

18 U.S.C. § 2422(b) (emphasis supplied). The difference between Counts One and Two is that each count charges a different "sexual activity for which any person can be charged with a criminal offense." *Id.*

The "criminal offense" listed in Count One (and the one relied upon by the district court) is 18 U.S.C. § 2251(a). This law punishes a defendant who "employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct." 18 U.S.C. § 2251(a). "Sexually explicit conduct" is defined in relevant part as "actual or simulated . . . masturbation." *Id.* § 2256(2)(A)(iii).

In contrast, the "criminal offense" charged in Count Two is Virginia Code section 18.2–371. This law provides, "Any person 18 years of age or older . . . who . . . engages in consensual sexual intercourse or anal intercourse with or performs cunnilingus, fellatio,

or anilingus upon or by a child 15 or older not his spouse, child, or grandchild is guilty of a Class 1 misdemeanor." Va. Code § 18.2–371.

Through his filings and representations to this court, Appellant's double jeopardy arguments appear to involve two separate aspects of the proceedings below: (1) the indictment; and (2) the evidence used to convict on each count. We address each in turn.

B.

Challenge to the Indictment

We first address Appellant's purported challenge to the indictment that the same offense was charged in more than one count, also known as multiplicity. *See United States v. Lawing*, 703 F.3d 229, 235 n.7 (4th Cir. 2012) ("Multiplicity is the charging of a single offense in several counts." (internal quotation marks omitted)). The Government argues that Appellant has waived any multiplicity challenge by not raising it before trial. We agree.

Federal Rule of Criminal Procedure 12 clearly provides:

> The following defenses, objections, and requests **must be raised by pretrial motion** if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits: . . . a defect in the indictment or information, including: . . . charging the same offense in more than one count (multiplicity).

Fed. R. Crim. Proc. 12(b)(3)(B)(ii) (emphasis supplied). "If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely." Fed. R. Crim. Proc. 12(c)(3). It is undisputed that the first time Appellant raised his double jeopardy argument was in his motion for acquittal after the close of the Government's case, and he again made

the argument in his renewed motion for acquittal after the verdict. Thus, by operation of the rule, Appellant's multiplicity challenge to the indictment must fail.

However, "a court may consider the defense, objection, or request if the party shows good cause." Fed. R. Crim. Proc. 12(c)(3). Here, Appellant contends there is good cause for this court to entertain his challenge to the indictment because he asserts the issue he raises "did not arise until the close of the Government's evidence and argument." Appellant's Br. 40. But this argument falls flat because in both Appellant's motion for acquittal and in this appeal, much of his argument is based on the way Counts One and Two were charged, which was readily available on the face of the indictment and would clearly have put Appellant on notice before trial. *See, e.g.*, J.A. 659 ("Counts I and II allege violations of the exact same statute and statutory elements."); *id.* at 661 ("[I]n the indictment, other than identifying the alleged predicate offenses, there are no different facts alleged in the different counts."); *see also* Appellant's Br. 35–36, 38 (making these same arguments on appeal). Therefore, to the extent Appellant is making a multiplicity argument based on charges in the indictment, his argument is waived pursuant to Federal Rule of Criminal Procedure 12(b)(3).

C.

Evidence Supporting the Convictions

1.

Despite specific challenges to the indictment and the allegations therein, Appellant maintains that the type of challenge he is bringing is not *merely* a challenge to the indictment. Rather, he argues, "the Double Jeopardy violation herein . . . is based on a

combination of the statute, the indictment, [and] *the evidence presented*, *argued* and *relied on* to support the allegations." Appellant's Br. 39 (emphases in original). Even assuming this argument does not fall within the ambit of Rule 12(b)(3), it is without merit.

In the district court, Appellant argued "the allegations of Count 1 are more narrow and would have essentially been subsumed by Count 2 [in violation of] double jeopardy." J.A. 571–72. Specifically, in his posttrial motion for acquittal, Appellant asserted:

> [T]he Government relied on *all* of the evidence presented, including all of the FaceTime calls . . . to establish and support both arguments that [Appellant] was "grooming" the minor female victim . . . , and generally that he violated the statute as alleged in Count 2. This was evident in writing . . . and during oral arguments in court. Likewise, the Court relied on *all* the evidence presented to accept the government's position. For example, the [Memorandum] Opinion notes "[t]he hundreds of phone calls and FaceTime sessions between the defendant and the minor and the substance of their conversations, both benign and sexual, constitute a substantial step towards getting the minor to assent to sexual activity." Accordingly, since both the government and the Court relied on ***all the evidence*** to find [Appellant] guilty of Count 2, both the government and the Court relied on ***some of the same evidence*** to find [Appellant] guilty of Count 1. While the evidence argued to support Count 1 was less substantial, it nonetheless ***was a subset*** of "all the evidence," and was thus the same evidence relied upon for Count 2. Accordingly, [Appellant] was found guilty of two counts of the exact same statute based on the same facts in violation of his constitutional rights.

J.A. 661–62 (bold emphases supplied) (citations omitted); *see* Appellant's Br. 38–39 (making same arguments on appeal).

2.

"It is well-settled that a defendant may be charged and prosecuted for the same statutory offense multiple times when each prosecution is based on discre[t]e[] acts that

each constitute a crime." *United States v. Goodine*, 400 F.3d 202, 208 (4th Cir. 2005); *see id.* at 209 (rejecting double jeopardy challenge where "[t]he evidence supporting the two incidents is . . . different"); *see also United States v. Swaim*, 757 F.2d 1530, 1536–37 (5th Cir. 1985) (upholding conviction for violations of the same statute based on "different evidence" and where each count "recite[d] a separate and distinct prohibited act").

As explained below and as detailed in the district court's Memorandum Opinion, the verdicts on Counts One and Two set forth distinct prohibited acts, required different proof, and were based on different evidence.

a.

Proof and Evidence: Count One

With regard to Count One, the district court relied on evidence that Appellant coerced the Victim to engage in either real or simulated masturbation for the purpose of transmitting the video of the same to Appellant. In its oral decision, the district court explained that Appellant encouraged the Victim to appear naked and masturbate over FaceTime and explained to her how to do so, and also instructed her to do a "flash" of her breasts so that he could take a picture. The district court concluded "those two . . . separate incidents . . . alone are . . . sufficient to establish that Count 1" was proven. J.A. 635. And in its Memorandum Opinion, the district court reasoned:

> There was overwhelming evidence that [Appellant] persuaded [the Victim] to send him images over FaceTime of her naked breasts, of herself masturbating, and of her naked body while she was in the shower. [The Victim] described how [Appellant] told her "step by step" how to take off her shirt to expose her breasts and told her to finger herself, instructing her to "put [her] finger there put use [sic] two fingers to do that,

> put it there." [Appellant] scolded [the Victim] for putting him "on mute" while she was ostensibly having an orgasm, telling her that he was "still really upset with [her]" for silencing her phone, as apparently watching her orgasm was not sufficient. He repeatedly asked her to shower with him over FaceTime, and he admits to seeing her naked body over FaceTime during the shower session.

J.A. 646–47 (quoting Gov't's Tr. Exs. 67, 38). Additionally, in its opinion denying Appellant's renewed posttrial motion for acquittal, the district court reiterated that as to Count One, Appellant "persuaded or attempted to persuade the victim to send him live videos not only of her exposing her breasts and showering, but also of her engaging in either actual or simulated masturbation." *Id.* at 721. Further, "[i]n addition to the recordings of phone calls and FaceTime sessions introduced into evidence, the victim credibly explained to a[] [CAFI] how [Appellant] instructed her to finger herself and once chastised her for putting him 'on mute' while she was ostensibly having an orgasm. . . . There was more than sufficient evidence to convict him of attempting to produce child pornography." *Id.* (citations omitted).

b.

Proof and Evidence: Count Two

As to Count Two, the district court focused on the FaceTime and phone conversations as establishing a pattern of grooming the Victim to ultimately have sex with him. In the Memorandum Opinion, the district court explained:

> In Count 2, the defendant is charged with persuading, inducing, enticing, and coercing the minor to engage in sexual relations, conduct, and acts with the defendant upon her return to the D.C. area. The government argued, and the evidence established, that the sheer volume of phone calls and FaceTime

> conversations between the defendant and [the Victim] established that he was attempting to seduce her. The two had more than 250 conversations in a one-month period and spoke for over 32 hours. [Appellant] argued that only a small portion of these conversations were sexual; however, even those seemingly innocuous conversations played a role in the sexual grooming of the minor. . . .
>
> "Grooming refers to deliberate actions taken by a defendant to expose a child to sexual material; the ultimate goal of grooming is the formation of an emotional connection with the child and a reduction of the child's inhibitions in order to prepare the child for sexual activity." This is exactly what happened here.

J.A. 647–48 (quoting *United States v. Engle*, 676 F.3d 405, 412 (4th Cir. 2012)) (citation omitted). The district court provided the example of Appellant telling the Victim about his "troubled relationship with his father," explaining to her that "not too many people know like, unless they're like super close, like friends or like family." *Id.* at 648. The district court found that by these conversations, Appellant was "developing a special relationship with [the Victim] to break down any inhibitions [the Victim] may have towards engaging in sexual activity with him" and was engaging in "classic sexual grooming behavior." *Id.* at 648–49. The district court then marshaled all the ways that Appellant was grooming the Victim and coercing or persuading her to engage in sexual conduct with him. *See id.* at 649 (recounting that Appellant asked the Victim "how are we going to make this happen?"; suggested that he would travel to see the Victim; discussed getting a hotel room so they could have sex; told her he would like to "kiss [her] boobs" and "eat her out" and "play with [her vagina]"; told her "[i]f I ever ask you [to shower together] and you were here, you better say yes"; planned to pick her up from the airport; asked whether they would

touch and whether she would sit on his lap when he picked her up; discussed explicit sexual acts he would like to perform). Notably, as to Count Two, the district court did not specifically rely on the conversations demonstrating Appellant's intent to cause the Victim to transmit naked or masturbatory images and videos to him. Although the district court mentioned the phone and FaceTime conversations, it was in the context of the frequency, volume, and the "substance of their conversations" in attempting to build a special relationship. *Id.*

c.

Analysis

Appellant maintains that the evidence used to convict on Count One "was subsumed and used by the government and court to convict Appellant" on Count Two. Appellant's Br. 23; *see also* Appellant's Reply Br. 15 ("Both the government and the court relied on the exact same evidence to convict Appellant in Count 1 of the Indictment as that to convict in Count 2" and "[t]he evidence for Count 2 completely subsumed that for Count 1."). We disagree. The district court clearly relied on different evidence in convicting Appellant on the two counts, specifically on two different types of conduct in which Appellant coerced the Victim to engage: production of child pornography and sexual relations.

On Count One, the district court focused on Appellant *instructing* the Victim to engage in sexually explicit conduct, that is, masturbation, in furtherance of producing an image or video that, crucially, would be transmitted to him. In Count Two, by contrast, the district court relied on Appellant's grooming conduct -- speaking to the Victim about private and personal things, earning her trust, and then finding a way to arrange a place to

have sexual relations. Although both of these approaches were conducted on FaceTime and phone calls and both involved coercion, the evidence used to convict under Count One were "discre[t]e[] acts" and "different" evidence, *Goodine*, 400 F.3d at 208, than the evidence used to convict on Count Two.

For these reasons, we affirm the district court's rejection of the double jeopardy argument.

IV.

Equal Protection Challenge

Appellant next contends that 18 U.S.C. § 2422 violates the Equal Protection Clause because of the disparity between its two subsections -- § 2422(a), which provides a *20 year maximum sentence* for those who coerce and entice an individual to travel in interstate or foreign commerce to engage in "any sexual activity for which any person can be charged with a criminal offense," and § 2422(b), which provides a *10 year minimum sentence and a maximum sentence of life* for using the mail or "any facility or means of interstate or foreign commerce" to coerce or entice "any individual who has not attained the age of 18 years" to engage in sexual activity for which "any person can be charged with a criminal offense." Appellant claims that "there is no rational relationship" between this disparate treatment, and Appellant is "similarly situated to an individual who entices a minor without using any facility or means of interstate commerce." Appellant's Br. 58, 57. He also takes issue with the predicate Virginia crime used to satisfy the "criminal offense" aspect of § 2422(b) -- which is a misdemeanor carrying a twelve month maximum sentence -- and

Count Two of the indictment, which carries a 10 year minimum sentence. *See id.* at 55. We conclude that each of these arguments fail.

We review an equal protection challenge to a federal statute de novo. *See United States v. Timms*, 664 F.3d 436, 444 (4th Cir. 2012).

First, Appellant overlooks the single most important difference between § 2422(a) and (b): subsection (b) prohibits using the Internet to entice *minors*, whereas subsection (a) applies to all potential victims, not just minors. Rational basis review (which Appellant agrees is applicable here) requires only that "the classification at issue bears some fair relationship to a legitimate public purpose." *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982). We have held the "[G]overnment's interest in safeguarding the physical and psychological wellbeing of children" is of "surpassing importance." *United States v. Malloy*, 568 F.3d 166, 175 (4th Cir. 2009); *see also United States v. Brown*, 681 F. App'x 268, 270 (4th Cir. 2017) (per curiam) ("[P]rotecting children from sexual exploitation clearly constitutes a government objective of surpassing importance" (internal quotation marks omitted)). As the Government notes, "Congress could rationally have reserved the ten-year mandatory minimum for § 2422(b) convictions while leaving sentencing judges to fashion sentences under § 2422(a) based on individual circumstances while allowing a twenty-year maximum for the most aggravated cases." Gov't's Br. 58; *see also United States v. Banker*, 876 F.3d 530, 538 n.6 (4th Cir. 2017) ("[T]he two subsections contain different penalty provisions, which is consistent with Congress intending the victim's age to be an aggravating factor."). The disparity in sentences readily passes rational basis review.

As for the difference in the state and federal crimes involved here, pursuant to the dual sovereignty doctrine, Congress and the states may choose to treat a similar crime differently. *See Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019) (in the double jeopardy context, explaining, "this Court has long held that two offenses are not the 'same offence' . . . if prosecuted by different sovereigns" (emphasis and internal quotation marks omitted)); *United States v. Brucker*, 646 F.3d 1012, 1018 (7th Cir. 2011) (rejecting the equal protection argument that "the state offense on which federal liability is based has no corresponding mandatory minimum" because "Congress and the state legislatures are free to fashion their own, differing approaches to criminal problems and sentencing" (internal quotation marks omitted)). And at least one other court has persuasively explained that the "criminal offense" aspect of § 2422(b) "is generally understood to encompass both misdemeanors and felonies." *United States v. Shill*, 740 F.3d 1347, 1351 (9th Cir. 2014); *see also id.* ("Black's Law Dictionary defines 'criminal offense' . . . as 'a violation of the law; a crime, often a minor one.'" (quoting Black's Law Dictionary (9th ed. 2009)). We agree.

Therefore, Appellant's equal protection challenge fails.

V.

Sufficiency of Evidence

Finally, Appellant challenges the sufficiency of the evidence used to convict him on Counts One and Three, claiming the district court erred in denying his motion for acquittal on these counts.

We review de novo a trial court's denial of a motion for judgment of acquittal. "[I]t is well settled that the verdict . . . must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it." *United States v. Hassan*, 742 F.3d 104, 139 (4th Cir. 2014) (alterations and internal quotation marks omitted). Substantial evidence is "evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *United States v. Landersman*, 886 F.3d 393, 406 (4th Cir. 2018) (internal quotation marks omitted).

A.

Sufficiency: Count One

As to the predicate criminal offense on Count One, which was based on 18 U.S.C. § 2251, Appellant contends "there is no controlling authority to support the assertion that the images in this case of the minor's naked breasts and body while taking a shower were pornography, or child pornography." Appellants' Br. 41. Appellant further argues, "[t]he evidence only established that Appellant and the minor FaceTimed each other while taking a shower," *id*. at 42, and otherwise, "[t]here was nothing specific about which area of [the Victim's] clothes [Appellant] could see, or that he requested her to show him anything specifically. There was also nothing in her statements describing that he indicated to her that he saw her feigned masturbation," *id.* at 44. We flatly reject these arguments.

First of all, § 2251 punishes a defendant who entices or coerces a minor "to engage in [actual or simulated masturbation] for the purpose of producing any visual depiction of

such conduct or for the purpose of transmitting a live visual depiction of such conduct," 18 U.S.C. §§ 2251(a), 2256.

Appellant admitted in his FBI interview that he "saw [the Victim] completely naked" and she saw him "completely naked," J.A. 413; that they were "transmitting the video of [the two of them] masturbating or in the nude," *id.* at 417; that "over the past two weeks [he] had a handful of FaceTime sessions where [they] saw each other naked or . . . masturbated for each other," one of which was in the shower and other times in the bedroom, *id.* at 421. And the Victim admitted she pretended to masturbate at Appellant's request. *See id.* at 664 ("I always had my finger in my shorts, but it never happened"; "I had long pants and I had my hands in my pants."). At the very least, this satisfies the "simulated . . . masturbation" aspect of the federal statute.

In any event, § 2422(b) does not require the victim to actually *perform* the sexual act; rather, it punishes the defendant for *coercing* the victim to do so. Here, there is ample evidence that Appellant urged, persuaded, enticed, and coerced the Victim to shower over FaceTime, show him her naked body, and masturbate. As the district court explained in its Memorandum Opinion, Appellant "described how [Appellant] told her 'step by step' how to take off her shirt to expose her breasts and told her to finger herself, instructing her to 'put [her] finger there put use [sic] two fingers do that, put it there'"; Appellant "scolded [the Victim] for putting him 'on mute' while she was ostensibly having an orgasm, telling her that he was 'still really upset with [her]' for silencing her phone, as apparently watching her orgasm was not sufficient"; and Appellant "repeatedly asked her to shower with him

over FaceTime, and he admits to seeing her naked body over FaceTime during the shower session." J.A. 646–47.

Additionally, Appellant relies on *United States v. Palomino-Coronado*, 805 F.3d 127 (4th Cir. 2015), for the proposition that "the government was required to prove that production of a visual depiction was a purpose of engaging in the sexually explicit conduct," and the Government did not do so here. Appellant's Br. 46 (quoting *Palomino-Coronado*, 805 F.3d at 130) (alteration omitted). Rather, per Appellant, "the production of the 'visual depiction' claimed by the government was not the *purpose* of the communications and use of FaceTime." *Id.* at 46 (emphasis in brief). According to Appellant, FaceTime was merely "the means by which the two could engage in such communications." *Id.* at 46–47.

But *Palomino-Coronado* does not help Appellant. *Palomino-Coronado* explained that pursuant to § 2251(a), the Government must prove the defendant engaged in sexual activity *with the specific intent* to produce a visual depiction. In other words, it is not enough to prove merely that the defendant took a picture or video during the sexual activity. *See* 805 F.3d at 130–31. In *Palomino-Coronado*, the defendant had sexual relations with a minor several times and, on one occasion, took and then deleted a single picture. *See id.* at 132. We explained that the single deleted photo, standing alone, was "not evidence that [the defendant] engaged in sexual activity with [the minor] *to* take a picture, only that he engaged in sexual activity with [the minor] *and* took a picture." *Id.* (emphases in original). But in the case at hand, the evidence demonstrates that Appellant enticed the Victim to

produce live visual depictions of her naked body and masturbation (simulated or real) *for the purpose* of transmitting those live video depictions to Appellant.

B.

Sufficiency: Count Three

As to Count Three, Appellant contends there is insufficient evidence that Appellant had actual knowledge that the Victim was less than 16 years old. He claims the proof was based "almost entirely upon circumstantial evidence." Appellant's Br. 48.

The evidence on this element was strong, and the district court did not err in finding that Appellant had actual knowledge of the Victim's age. On this point, the district court found:

> [T]he evidence established beyond a reasonable doubt that he knew she was less than 16 years old. When asked if [Appellant] knew how old she was, [the Victim] stated unequivocally, "He knows I'm 15." She said he knew her age because he knows her birthday from having registration papers for Quran class[,] which list her date of birth and because she had told him on her most recent birthday in June 2018 that she was turning 15 and would be missing Quran class to celebrate. On her birthday, [Appellant] sent [the Victim] three happy birthday Bitmojis on Instagram. In addition, [the Victim] had sent [Appellant] a copy of her permanent resident card so that he could help her with a visa application. Seconds after receiving the permanent resident card, [Appellant] searched "where is the number on a permanent resident card" on Google. This Google search proves that [Appellant] was examining the permanent resident card closely. That permanent resident card included [the Victim]'s date of birth. Other evidence clearly put [Appellant] on notice of [the Victim's] young age. For example, he knew that she was about to start high school, and when [the Victim] said that she could not study abroad because she was not yet in high school, he responded "you literally have to wait until summers over." Later in that same conversation, [Appellant] asked [the Victim] where she sees herself in five years and she

> replied, "out of high school and fresh into college." During another conversation, [Appellant] said that four years from now, [the Victim] would "most likely be in college," and [the Victim] clarified that she would be in her "first year." Most students are less than 16 years old when they begin high school. Accordingly, the government adduced more than enough direct and indirect evidence at trial to prove that [Appellant] knew that [the Victim] was less than 16 years.

J.A. 655. This evidence is quite compelling. As a result, there is no error in the district court's denial of Appellant's motion for acquittal.

VI.

For the foregoing reasons, none of Appellant's arguments have merit, and we affirm the district court in all respects.

AFFIRMED

*Meaning of **Bitmoji** in English*

Bitmoji

noun • TRADEMARK

US /ˈbɪt.moʊ.dʒi/ **UK** /bɪtˈməʊ.dʒi/

[C]

a brand name for a digital cartoon image that is intended to look like and represent you, used in electronic communication:

- *After you sign up and are logged in, you can create your own Bitmoji.*
- *I use my Bitmoji in my Snapchat messages.*

[U]

a brand name for an app (= a piece of software for your phone or mobile device) that allows you to create a digital cartoon image to look like and represent you:

- *Thanks to Bitmoji, it's easy to create a personalized cartoon image on social media.*

More examples

- *Now you can create a Bitmoji that looks exactly like you.*
- *When Bitmojis first became popular, I jumped at the opportunity to create a cartoon version of myself.*
- *You can change your Bitmoji's clothing by heading to the Dress Your Avatar section of the app.*
- *Bitmoji was the most downloaded iOS app of 2017.*

FILED: August 24, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4510
(1:18-cr-00410-LMB-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

SEITU SULAYMAN KOKAYI

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

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

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	
SEITU SULAYMAN KOKAYI,	)	1:18-cr-410 (LMB)
	)	
Defendant.	)	

MEMORANDUM OPINION

After a two-day bench trial, the Court issued a 17-page Memorandum Opinion which detailed the Court's factual findings and conclusion that defendant Seitu Sulayman Kokayi ("defendant") was guilty as charged of two counts of coercion and enticement of a minor to engage in unlawful sexual activity in violation of 18 U.S.C. § 2422(b) and one count of transfer of obscene materials to a minor in violation of 18 U.S.C. § 1470. See United States v. Kokayi, No. 1:18-cr-410, 2019 WL 2028517 (E.D. Va. May 8, 2019) ("May 8 Opinion"). Defendant's motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29 at the close of the government's case was denied. Defendant has filed a renewed Motion for a Judgment of Acquittal, or in the Alternative, for a New Trial, pursuant to Rules 29 and 33 [Dkt. No. 108] ("Mot."). For the reasons stated in open court and supplemented in this Memorandum Opinion, defendant's motion has been denied.

DISCUSSION

I.

Federal Rule of Criminal Procedure 29 ("Rule 29") provides in relevant part, "If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal." Fed. R.

Crim. P. 29(c)(2).[1] In considering a motion for judgment of acquittal, a court is "obliged to sustain a guilty verdict if, viewing the evidence in the light most favorable to the prosecution, the verdict is supported by 'substantial evidence.'" United States v. Smith, 451 F.3d 209, 216 (4th Cir. 2006) (quoting United States v. Burgos, 94 F.3d 849, 862 (4th Cir. 1996) (en banc)). "Substantial evidence" is "evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." Id. (quoting Burgos, 94 F.3d at 862). A court should consider "circumstantial as well as direct evidence, and allow the government the benefit of all reasonable inferences from the facts proven to those sought to be established." United States v. Tresvant, 677 F.2d 1018, 1021 (4th Cir. 1982). "[C]ircumstantial evidence is not inherently less valuable or less probative than direct evidence and may alone support a guilty verdict." United States v. Martin, 523 F.3d 281, 289 (4th Cir. 2008) (internal quotation marks and citation omitted). In addition, a court should "consider the evidence in cumulative context rather than in a piecemeal fashion." United States v. Strayhorn, 743 F.3d 917, 921 (4th Cir.) (internal quotation marks and citation omitted), cert. denied, 572 U.S. 1145 (2014).

Federal Rule of Criminal Procedure 33 provides, "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). A trial court "should exercise its discretion to grant a new trial sparingly," and "it should do so only when the evidence weighs heavily against the verdict." United States v. Perry, 335 F.3d 316, 320 (4th Cir. 2003) (internal quotation marks and citation omitted).

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[1] This standard of review is the same whether the trial was before a jury or before the court. Compare Glasser v. United States, 315 U.S. 60, 80 (1942) (jury trial), with United States v. Ismail, 97 F.3d 50, 55 (4th Cir. 1996) (bench trial).

II.

Defendant first argues that his convictions on both Counts 1 and 2, which involved violations of the same statute, 18 U.S.C. § 2422(b), violate the Double Jeopardy Clause of the Fifth Amendment of the Constitution. Mot. 3. Section 2422(b) makes it a crime to use "any facility or means of interstate or foreign commerce" to "knowingly persuade[ ], induce[ ], entice[ ], or coerce[ ] any individual who has not attained the age of 18 years, to engage in . . . any sexual activity for which any person can be charged with a criminal offense, or attempt[ ] to do so." For Count 1, the alleged illegal act was the production of child pornography in violation of 18 U.S.C. § 2251 and for Count 2, the alleged illegal act was engaging in sexual relations, sexual conduct, and sexual acts with defendant upon the victim's return to the D.C. area, in violation of Virginia Code § 18.2-371, which prohibits sexual contact between adults and minors. The elements of the underlying criminal offenses do not become formal elements of § 2422(b). See United States v. Roman, 795 F.3d 511, 515 n.2 (6th Cir. 2015). Defendant argues that because the government relied upon all of the evidence produced at trial to convict on both counts, the evidence supporting each count of conviction was the same. Mot. 5–6.

In response, the government first points out that defendant waived this argument by failing to raise it before trial. Opp'n [Dkt. No. 110] 4. Federal Rule of Criminal Procedure 12(b)(3)(B)(ii) requires that an allegation that the indictment charges the same offense in more than one count (multiplicity) must be raised by a pretrial motion. Defendant replies that he is not alleging a defect in the indictment, but rather a defect "based on a combination of the statute, the indictment, the evidence presented, argued and relied on to support the allegation and the case law." Reply [Dkt. No. 115] 1. Despite that argument, the alleged defect essentially constitutes an untimely attack on the indictment. Although a court may grant relief from the waiver of such

attack if good cause is shown, see Fed. R. Crim. P. 12(e), "[f]ailure to object to a count on grounds of multiplicity prior to trial generally waives that objection," United States v. Colton, 231 F.3d 890, 909 (4th Cir. 2000). Defendant did not raise this objection before trial and has not shown good cause for the delay. Defendant's argument "that the issue did not arise until the close of the Government's evidence and argument," Reply 2, is not persuasive, as the indictment clearly put defendant on notice about this issue. Because any claim of multiplicity should have been raised pretrial, it is waived.

Even if the court were inclined to provide defendant relief from waiver, his challenge to Counts 1 and 2 would also fail on the merits. As the government correctly argues, Counts 1 and 2 involve "entirely different predicate offenses." Opp'n 5. "It is well-settled that a defendant may be charged and prosecuted for the same statutory offense multiple times when each prosecution is based on discreet acts that each constitute a crime." United States v. Goodine, 400 F.3d 202, 208 (4th Cir. 2005); see also United States v. Thomas, 669 F.3d 421, 426 (4th Cir. 2012) ("An indictment may divide a course of conduct into separate assaults only when the Government demonstrates that 'the actions and intent of [the] defendant constitute distinct successive criminal episodes, rather than two phases of a single assault.'" (alteration in original) (citation omitted)). The predicate offense in Count 1 was the production of child pornography and the predicate offense in Count 2 was the attempt to engage in sexual relations with a minor. The prosecution of each count was based on "discreet acts that each constitute a crime." Goodine, 400 F.3d at 208. Although those acts may overlap to support each other, as soliciting the production of child pornography evidenced an intent to engage in sexual relations with the victim, being found guilty

as to one count did not necessarily render defendant being found guilty of the other. See Opp'n 5.[2] For these reasons, defendant's convictions on Counts 1 and 2 do not violate Double Jeopardy.

III.

Defendant argues that there was insufficient evidence to support his conviction for Count 1 because images of neither the victim's naked breasts nor naked body while in the shower constitute child pornography. Mot. 6–7. For the purposes of the federal child pornography statute, sexually explicit conduct consists of "actual or simulated . . . masturbation . . . or . . . lascivious exhibition of the anus, genitals, or pubic area of any person." 18 U.S.C. § 2256(2)(A). Courts have held that a live video of a minor naked in the shower is alone sufficient to meet the federal definition of child pornography. See Courtade v. United States, No. 2:15-cr-29, 2017 WL 6397105, at *8–10 (E.D. Va. Dec. 13, 2017) (holding that a video of a minor showering constituted child pornography because of the defendant's sexual intent and coercion of the minor); see also United States v. Holmes, 814 F.3d 1246, 1252 (11th Cir. 2016) ("[W]e join the Eighth, Ninth, and Tenth Circuits and hold that a lascivious exhibition may be created by an individual who surreptitiously videos or photographs a minor and later captures or edits a depiction, even when the original depiction is one of an innocent child acting innocently"); United States v. Larkin, 629 F.3d 177, 183 (3d Cir. 2010) (holding that a nude video of a minor in the shower can constitute child pornography because "showers and bathtubs are frequent hosts to fantasy sexual encounters as portrayed on television and in film"). Here, both the victim and defendant described how defendant repeatedly asked the victim to shower

[2] Neither party argued that the traditional Blockburger inquiry was appropriate here. Opp'n 6 & Reply 3.

with him over FaceTime and to show her naked body to him over FaceTime when the shower session eventually occurred. GX56 & GX67.

Furthermore, as fully discussed in the Court's factual findings in its May 8 Opinion, the evidence in this case supports finding that defendant persuaded or attempted to persuade the victim to send him live videos not only of her exposing her breasts and showering, but also of her engaging in either actual or simulated masturbation. See May 8 Opinion, at *4. Defendant's argument that there was insufficient evidence to find that he instructed the victim to show him that she was allegedly masturbating is similarly unavailing. In addition to the recordings of phone calls and FaceTime sessions introduced into evidence, the victim credibly explained to an FBI Child and Adolescent Forensic Interviewer how defendant instructed her to finger herself and once chastised her for putting him "on mute" while she was ostensibly having an orgasm. See id. The victim specifically said that defendant could see her clothes and that she "had [her] hands in [her] pants," and she explained that she pretended to masturbate for defendant. GX67. Drawing all reasonable inferences in the light most favorable to the government, defendant's argument clearly fails. There was more than sufficient evidence to convict him of attempting to produce child pornography.

In addition, defendant argues that under United States v. Palomino-Coronado, 805 F.3d 127 (4th Cir. 2015), 18 U.S.C. § 2251(a), the predicate act charged in Count 1, requires specific intent to produce a visual depiction, which the government failed to prove. Mot. 9–10. Section 2251(a) makes it a crime to coerce a minor to engage in "any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct." The Court found defendant guilty of the second prong, which was not at issue in Palomino-Coronado. In this case, defendant and the victim interacted

primarily over FaceTime, which transmits live visual depictions to its users. As discussed fully in the May 8 Opinion, there was extensive evidence showing that defendant clearly enticed the victim to produce live visual depictions of sexually explicit conduct for the purpose of transmitting those live video depictions to him and did in fact transmit those live video depictions to him. See May 8 Opinion, at *4. This conduct fully supports defendant's conviction for the charge in Count 1.

Defendant's argument as to the Count 2 conviction focuses on the sentencing disparity between 18 U.S.C. § 2422(b), a felony, and the predicate state misdemeanor offense, Virginia Code § 18.2-371, arguing that the disparity is so great as to violate the Equal Protection and Due Process clauses of the Constitution. Mot. 11–14. Section 2422(b) carries a ten-year mandatory minimum sentence, with a maximum sentence of life imprisonment, while Section 18.2-371 is a state misdemeanor with a maximum sentence of one-year imprisonment. The Court raised this disparity at trial and addressed it in its May 8 Opinion, although not specifically through the framework of the Equal Protection or Due Process clauses. See May 8 Opinion, at *5–6. There, the Court found that § 2422(b) clearly encompasses state misdemeanors and that the sentencing disparity was justified by the legitimate government purpose of combatting the "very real and dangerous problem of online enticement of minors," which is an aggravating factor justifying a higher sentence. Id. at *6 (citing United States v. Shill, 740 F.3d 1347, 1354 (9th Cir. 2014)).[3]

[3] Defendant also argues that state offenses cannot serve as predicate acts for § 2422(b) and that a ten-year mandatory minimum sentence for a violation of § 2422(b) violates the Eighth Amendment. Mot. 14–16. The Court explicitly addressed the question of whether § 2422(b) encompasses state misdemeanors and held that it does. See May 8 Opinion, at *6. Admittedly, the Court was focused on the distinction between felonies and misdemeanors, not federal versus state offenses, but the cases cited specifically upheld convictions under state misdemeanors, and defendant may very well have waived this other argument by not raising it pretrial. The Court also discussed United States v. Shill, 740 F.3d 1347 (9th Cir. 2014), which held that the

Accordingly, the Court has already addressed this issue and found defendant's conviction and requisite ten-year mandatory minimum sentence to be permissible.

Defendant further argues that the sentencing disparity between § 2422(a), which criminalizes enticement of "any individual to travel" to engage in prostitution or other illegal sexual activities but carries no mandatory minimum sentence and has a maximum sentence of twenty years, and §2422(b), which exposes a defendant to a mandatory minimum sentence of ten years, is unconstitutional. Mot. 11–14. Defendant's argument that the only difference between § 2422(a) and (b) is the requirement of "using . . . any facility or means of interstate or foreign commerce" in § 2422(b), Mot. 12–13, ignores arguably the most important difference between the two sections: § 2422(b) criminalizes sexual activity with minors, a difference which unquestionably justifies significant sentencing disparities. Because the sentencing exposure in § 2422(b) does not lack a rational basis, this punishment does not violate either the Equal Protection or Due Process clauses.

IV.

Defendant argues that there was insufficient evidence to support defendant's conviction for Count 3, which alleges a violation of 18 U.S.C. § 1470. That statute prohibits individuals from using interstate commerce to knowingly transfer or attempt to transfer obscene matter to another individual who has not obtained the age of 16 years, knowing that said other individual has not attained the age of 16 years. Specifically, defendant claims that there was insufficient evidence to establish the element that he knew the victim's age to be under 16 years. Mot. 17.

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mandatory minimum sentence did not violate the Eighth Amendment, and the Fourth Circuit's application of Shill in United States v. Brown, 681 F. App'x 268 (4th Cir.), cert. denied, 138 S. Ct. 152 (2017), as well as cases from other circuits holding that § 2422(b)'s mandatory minimum sentence does not violate the Eighth Amendment, May 8 Opinion, at *6 n.3 (collecting cases).

When the evidence is examined in the light most favorable to the prosecution, as it must be when considering a Rule 29 motion, defendant's argument fails. As detailed in the May 8 Opinion, the direct and circumstantial evidence fully support finding that defendant knew the victim to be less than 16 years old. See May 8 Opinion, at *8. As her Quran teacher, defendant had access to the victim's paperwork, which included her birthdate; the victim sent him a copy of her permanent resident card, which included her birthdate, to help with her visa application; and he knew that she had celebrated her 15th birthday in June 2018 and that she was just about to start high school. Id. Circumstantial evidence "may alone support a guilty verdict." Martin, 523 F.3d at 289. None of defendant's arguments on this issue are persuasive.

CONCLUSION

The May 8 Opinion found both a factual and legal basis supporting defendant's conviction for all three charges and the explanations made in open court during the hearing on defendant's post-trial motion further support the conclusion that defendant is not entitled to either a judgment of acquittal or a new trial. For all these reasons, his post-trial motion [Dkt. No. 108] has been denied.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 9th day of July, 2019.

Alexandria, Virginia

/s/
Leonie M. Brinkema
United States District Judge

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

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	
SEITU SULAYMAN KOKAYI,	)	1:18-cr-410 (LMB)
	)	
Defendant.	)	

ORDER

For the reasons stated open court, it is hereby

ORDERED that defendant Seitu Sulayman Kokayi's Motion for Acquittal, or in the Alternative, For a New Trial [Dkt. No. 108] be and is DENIED.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 28th day of June, 2019.

Alexandria, Virginia

/s/ LMB
Leonie M. Brinkema
United States District Judge

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Alexandria Division

UNITED STATES OF AMERICA

v. Case Number 1:18cr00410-001

SEITU SULAYMAN KOKAYI,

Defendant.

JUDGMENT IN A CRIMINAL CASE

The defendant, SEITU SULAYMAN KOKAYI, was represented by Mark Petrovich and Anthony Nourse, Esquires.

The defendant was found guilty after a bench trial as to Counts 1, 2, and 3 of the Indictment. Accordingly, the defendant is adjudged guilty of the following count(s), involving the indicated offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 2422 (b)	**Coercion and Enticement of a Minor to Produce Child Pornography (Felony)**	**08/22/2018**	**1**
18 U.S.C. § 2422 (b)	**Coercion and Enticement of a Minor in an Attempt to Engage in Sexual Relations (Felony)**	**08/22/2018**	**2**
18 U.S.C. § 1470	**Transfer of Obscene Materials to a Minor (Felony)**	**08/22/2018**	**3**

As pronounced on June 28, 2019, the defendant is sentenced as provided in pages 2 through 8** of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Signed this 28th day of June, 2019.

/s/
Leonie M. Brinkema
United States District Judge

**Page 8 of this document contains sealed information.

AO 245 S (Rev. 2/99)(EDVA rev.1) Sheet 2 - Imprisonment

Defendant: SEITU SULAYMAN KOKAYI
Case Number: 1:18cr00410-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of ONE HUNDRED AND TWENTY (120) MONTHS; consisting of 120 months concurrent as to Counts 1 and 2, and SIXTY (60) months as to Count 3, concurrent with Counts 1 and 2, with credit for time served.

The Court makes the following recommendations to the Bureau of Prisons:

The defendant to be designated to a facility as close to the Washington D.C. Metropolitan area as possible.

The defendant is remanded into the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

c: P.O. (2) (3)
Mshl. (4) (2)
U.S.Atty.
U.S.Coll.
Dft. Cnsl.
PTS
Financial
Registrar
ob

_____
United States Marshal

By _____
Deputy Marshal

AO 245 S (Rev. 2/99)(EDVA rev.1) Sheet 3 - Supervised Release

Judgment--Page 3 of 8

Defendant: SEITU SULAYMAN KOKAYI
Case Number: 1:18cr00410-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a total term of TWENTY (20) YEARS as to each of Counts 1 and 2, THREE (3) YEARS as to Count 3, all terms to run concurrent.

The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of supervised release.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime.

While on supervised release, the defendant shall not illegally possess a controlled substance.

While on supervised release, the defendant shall not possess a firearm or destructive device.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

STANDARD CONDITIONS OF SUPERVISED RELEASE

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below):

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the Probation Officer within 72 hours, or earlier if so directed, of any change in residence.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by physician.
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered.
9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer.
11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: SEITU SULAYMAN KOKAYI
Case Number: 1:18cr00410-001

SPECIAL CONDITIONS OF SUPERVISION

While on supervised release, pursuant to this Judgment, the defendant shall also comply with the following additional conditions:

1. The defendant may not associate or communicate by any means with any terrorists or terrorist organization.

2. The defendant shall comply with the requirements of the Computer Monitoring Program as administered by the Probation Office. The defendant shall consent to the installation of computer monitoring software on any computer to which the defendant has access. Installation shall be performed by the probation officer. The software may restrict and/or record any and all activity on the computer, including the capture of keystrokes, application information, internet use history, email correspondence, and chat conversations. A notice will be placed on the computer at the time of installation to warn others of the existence of the monitoring software. The defendant shall also notify others of the existence of the monitoring software. The defendant shall not remove, tamper with, reverse engineer, or in any way circumvent the software. The costs of the monitoring shall be paid by the defendant.

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

4. The defendant shall submit to polygraph testing as directed by the United States Probation Officer. The costs of the testing are to be paid by the defendant, as directed by the probation officer.

5. The defendant shall participate in a program approved by the United States Probation Office for mental health treatment, to include a psychosexual and psychological evaluation and sex offender treatment. The defendant shall waive all rights of confidentiality regarding sex offender/mental health treatment to allow the release of information to the United States Probation Office and authorize communication between the probation officer and the treatment provider. The costs of these programs are to be paid by the defendant, as directed by the probation officer.

6. The defendant shall not utilize any sex-related adult telephone services, websites, or electronic bulletin boards. The defendant shall provide any records requested by the probation officer to verify compliance with this condition including, but not limited to, credit card bills, telephone bills, and cable/satellite television bills.

7. The defendant shall not purchase, possess or view any sexually explicit material or images using young juvenile models under the age of 18 in any format including, but not limited to, in magazines, books, on the computer, or any electronic device, in videos, movies, and television.

8. The defendant shall have no contact with minors other than his children unless supervised by a competent, informed adult, approved in advance by the probation officer.

9. The defendant shall not engage in employment or volunteer services that allow him access to computers or minors.

10. Pursuant to the Adam Walsh Child Protection and Safety Act of 2006, the defendant shall register with the state sex offender registration agency in any state where the defendant resides, works, or attends school, according to federal and state law and as directed by the probation officer.

AO 245 S (Rev. 3/99)(EDVA rev.) Sheet 3 (cont'd) - Supervised Release

Judgment--Page 5 of 8

Defendant: SEITU SULAYMAN KOKAYI
Case Number: 1:18cr00410-001

SPECIAL CONDITIONS OF SUPERVISION

11. Pursuant to the Adam Walsh Child Protection and Safety Act of 2006, the defendant shall submit to a search of his person, property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning unlawful conduct or a violation of a condition of supervision, upon prior notification to and approval by the court of with a warrant.

12. During the term of supervision, the defendant shall not possess or utilize any video gaming system, console, or other such device which would enable contact and/or the sharing of data with other individuals known or unknown to the defendant.

13. Although mandatory drug testing is waived pursuant to 18 U.S.C §3564 (a)(4), the defendant must remain drug free and his probation officer may require random drug testing at any time. Should a test indicate drug use, then the defendant must satisfactorily participate in, and complete, any inpatient or outpatient drug treatment to which defendant is directed by the probation officer.

AO 245 S (Rev. 3/99)(EDVA rev.) Sheet 5 - Financial Penalties

Defendant: SEITU SULAYMAN KOKAYI
Case Number: 1:18cr00410-001

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total monetary penalties in accordance with the schedule of payments set out below.

Count	Special Assessment	Fine
1	$100.00	$0.00
2	$100.00	$0.00
3	$100.00	$0.00
Total	**$300.00**	**$0.00**

FINE

No fines have been imposed in this case.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

The special assessment is due in full immediately. If not paid immediately, the court authorizes the deduction of appropriate sums from the defendant's account while in confinement in accordance with the applicable rules and regulations of the Bureau of Prisons.

Any special assessment, restitution, or fine payments may be subject to penalties for default and delinquency.

If this judgment imposes a period of imprisonment, payment of Criminal Monetary penalties shall be due during the period of imprisonment.

All criminal monetary penalty payments are to be made to the Clerk, United States District Court, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

FORFEITURE

Forfeiture is directed in accordance with the Consent Order of Forfeiture entered by this Court on June 28, 2019.

50 USCS § 1801

Copy Citation

Current through Public Law 117-57, approved November 12, 2021.

- **United States Code Service**
- **TITLE 50. WAR AND NATIONAL DEFENSE (§§ 1 — 4852)**
- **CHAPTER 36. FOREIGN INTELLIGENCE SURVEILLANCE (§§ 1801 — 1885c)**
- **ELECTRONIC SURVEILLANCE (§§ 1801 — 1813)**

§ 1801. Definitions

As used in this title [**50 USCS §§ 1801** et seq.]:

(a) "Foreign power" means—

(1) a foreign government or any component thereof whether or not recognized by the United States;

(2) a faction of a foreign nation or nations, not substantially composed of United States persons;

(3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;

(4) a group engaged in international terrorism or activities in preparation therefor;

(5) a foreign-based political organization, not substantially composed of United States persons;

(6) an entity that is directed and controlled by a foreign government or governments; or

(7) an entity not substantially composed of United States persons that is engaged in the international proliferation of weapons of mass destruction.

(b) "Agent of a foreign power" means—

(1) any person other than a United States person, who—

(A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4), irrespective of whether the person is inside the United States;

(B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the

United States, when the circumstances of indicate that such person may engage in such activities, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities;

(C) engages in international terrorism or activities in preparation therefore;

(D) engages in the international proliferation of weapons of mass destruction, or activities in preparation therefor; or

(E) engages in the international proliferation of weapons of mass destruction, or activities in preparation therefor, for or on behalf of a foreign power, or knowingly aids or abets any person in the conduct of such proliferation or activities in preparation therefor, or knowingly conspires with any person to engage in such proliferation or activities in preparation therefor; or

(2) any person who—

(A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States;

(B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States;

(C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power;

(D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or

(E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C) or knowingly conspires with any person to engage in activities described in subparagraph (A), (B), or (C).

(c) "International terrorism" means activities that—

(1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;

(2) appear to be intended—

(A) to intimidate or coerce a civilian population;

(B) to influence the policy of a government by intimidation or coercion; or

(C) to affect the conduct of a government by assassination or kidnapping; and

(3) occur totally outside the United States or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

(d) "Sabotage" means activities that involve a violation of chapter 105 of title 18, United States Code [18 USCS §§ 2151 et seq.], or that would involve such a violation if committed against the United States.

(e) "Foreign intelligence information" means—

(1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against—

(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or

(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to—

(A) the national defense or the security of the United States; or

(B) the conduct of the foreign affairs of the United States.

(f) "Electronic surveillance" means—

(1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United

States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;

(2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States, but does not include the acquisition of those communications of computer trespassers that would be permissible under section 2511(2)(i) of title 18, United States Code;

(3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or

(4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

(g) "Attorney General" means the Attorney General of the United States (or Acting Attorney General), the Deputy Attorney General, or, upon the designation of the Attorney General, the Assistant Attorney General designated as the Assistant Attorney General for National Security under section 507A of title 28, United States Code.

(h) "Minimization procedures", with respect to electronic surveillance, means—

(1) specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;

(2) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in subsection (e)(1), shall not

be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance;

(3) notwithstanding paragraphs (1) and (2), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes; and

(4) notwithstanding paragraphs (1), (2), and (3), with respect to any electronic surveillance approved pursuant to section 102(a) [50 USCS § 1802(a)], procedures that require that no contents of any communication to which a United States person is a party shall be disclosed, disseminated, or used for any purpose or retained for longer than 72 hours unless a court order under section 105 [50 USCS § 1805] is obtained or unless the Attorney General determines that the information indicates a threat of death or serious bodily harm to any person.

(i) "United States person" means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act [8 USCS § 1101(a)(20)]), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3).

(j) "United States", when used in a geographic sense, means all areas under the territorial sovereignty of the United States and the Trust Territory of the Pacific Islands.

(k) "Aggrieved person" means a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance.

(l) "Wire communication" means any communication while it is being carried by a wire, cable, or other like connection furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications.

(m) "Person" means any individual, including any officer or employee of the Federal Government, or any group, entity, association, corporation, or foreign power.

(n) "Contents", when used with respect to a communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication.

(o) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

(p) "Weapon of mass destruction" means—

(1) any explosive, incendiary, or poison gas device that is designed, intended, or has the capability to cause a mass casualty incident;

(2) any weapon that is designed, intended, or has the capability to cause death or serious bodily injury to a significant number of persons through the release, dissemination, or impact of toxic or poisonous chemicals or their precursors;

(3) any weapon involving a biological agent, toxin, or vector (as such terms are defined in section 178 of title 18, United States Code) that is designed, intended, or has the capability to cause death, illness, or serious bodily injury to a significant number of persons; or

(4) any weapon that is designed, intended, or has the capability to release radiation or radioactivity causing death, illness, or serious bodily injury to a significant number of persons.

50 USCS § 1802

Copy Citation

Current through Public Law 117-57, approved November 12, 2021.

- **United States Code Service**
- **TITLE 50. WAR AND NATIONAL DEFENSE (§§ 1 — 4852)**
- **CHAPTER 36. FOREIGN INTELLIGENCE SURVEILLANCE (§§ 1801 — 1885c)**
- **ELECTRONIC SURVEILLANCE (§§ 1801 — 1813)**

§ 1802. Electronic surveillance authorization without court order; certification by Attorney General; reports to congressional committees; transmittal under seal; duties and compensation of communication common carrier; applications; jurisdiction of court

(a)

(1) Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this title [50 USCS §§ 1801 et seq.] to acquire foreign intelligence information for periods of up to one year if the Attorney General certifies in writing under oath that—

(A) the electronic surveillance is solely directed at—

(i) the acquisition of the contents of communications transmitted by means of communications used exclusively between or among foreign powers, as defined in section 101(a) (1), (2), or (3) [50 USCS § 1801(a)(1), (2), or (3)]; or

(ii) the acquisition of technical intelligence, other than the spoken communications of individuals, from property or premises under the open and exclusive control of a foreign power, as defined in section 101(a) (1), (2), or (3) [50 USCS § 1801(a)(1), (2), or (3)];

(B) there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party; and

(C) the proposed minimization procedures with respect to such surveillance meet the definition of minimization procedures under section 101(h) [50 USCS § 1801(h)]; and if the Attorney General reports such minimization procedures and any changes thereto to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence at least thirty days prior to their effective date, unless the Attorney General determines immediate action is required and notifies the committees immediately of such minimization procedures and the reason for their becoming effective immediately.

(2) An electronic surveillance authorized by this subsection may be conducted only in accordance with the Attorney General's certification and the minimization procedures adopted by him. The Attorney General shall assess compliance with such procedures and shall report such assessments to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence under the provisions of section 108(a) [50 USCS § 1808(a)].

(3) The Attorney General shall immediately transmit under seal to the court established under section 103(a) [50 USCS § 1803(a)] a copy of his certification. Such certification shall be maintained under security measures established by the Chief Justice with the concurrence of the Attorney General, in consultation with the Director of National Intelligence, and shall remain sealed unless—

(A) an application for a court order with respect to the surveillance is made under sections 101(h)(4) and 104 [50 USCS §§ 1801(h)(4) and 1804]; or

(B) the certification is necessary to determine the legality of the surveillance under section 106(f) [50 USCS § 1806(f)].

(4) With respect to electronic surveillance authorized by this subsection, the Attorney General may direct a specified communication common carrier to—

(A) furnish all information, facilities, or technical assistance necessary to accomplish the electronic surveillance in such a manner as will protect its secrecy and produce a minimum of interference with the services that such carrier is providing its customers; and

(B) maintain under security procedures approved by the Attorney General and the Director of National Intelligence any records concerning the surveillance or the aid furnished which such carrier wishes to retain.

The Government shall compensate, at the prevailing rate, such carrier for furnishing such aid.

(b) Applications for a court order under this title [50 USCS §§ 1801 et seq.] are authorized if the President has, by written authorization, empowered the Attorney General to approve applications to the court having jurisdiction under section 103 [50 USCS § 1803] and a judge to whom an application is made may, notwithstanding any other law, grant an order, in conformity with section 105 [50 USCS § 1805], approving electronic surveillance of a foreign power or an agent of a foreign power for the purpose of obtaining foreign intelligence information, except that the court shall not have jurisdiction to grant any order approving electronic surveillance directed solely as described in paragraph (1)(A) of subsection (a) unless such surveillance may involve the acquisition of communications of any United States person.

50 USCS § 1803

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- **United States Code Service**
- **TITLE 50. WAR AND NATIONAL DEFENSE (§§ 1 — 4852)**
- **CHAPTER 36. FOREIGN INTELLIGENCE SURVEILLANCE (§§ 1801 — 1885c)**
- **ELECTRONIC SURVEILLANCE (§§ 1801 — 1813)**

§ 1803. Designation of judges

(a) Court to hear applications and grant orders; record of denial; transmittal to court of review.

(1) The Chief Justice of the United States shall publicly designate 11 district court judges from at least seven of the United States judicial circuits of whom no fewer than 3 shall reside within 20 miles of the District of Columbia who shall constitute a court which shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States under the procedures set forth in this Act, except that no judge designated under this subsection (except when sitting en banc under paragraph (2)) shall hear the same application for electronic surveillance under this Act which has been denied previously by another judge designated under this subsection. If any judge so designated denies an application for an order authorizing electronic surveillance under this Act, such judge shall provide immediately for the record a written statement of each reason for his decision and, on motion of the United States, the record shall be transmitted, under seal, to the court of review established in subsection (b).

(2)

(A) The court established under this subsection may, on its own initiative, or upon the request of the Government in any proceeding or a party under section 501(f) [50 USCS § 1861(f)] or paragraph (4) or (5) of section 702(i) [50 USCS § 1881a(i)], hold a hearing or rehearing, en banc, when ordered by a majority of the judges that constitute such court upon a determination that—

(i) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(ii) the proceeding involves a question of exceptional importance.

(B) Any authority granted by this Act to a judge of the court established under this subsection may be exercised by the court en banc. When

exercising such authority, the court en banc shall comply with any requirements of this Act on the exercise of such authority.

(C) For purposes of this paragraph, the court en banc shall consist of all judges who constitute the court established under this subsection.

(b) Court of review; record, transmittal to Supreme Court. The Chief Justice shall publicly designate three judges, one of whom shall be publicly designated as the presiding judge, from the United States district courts or courts of appeals who together shall comprise a court of review which shall have jurisdiction to review the denial of any application made under this Act. If such court determines that the application was properly denied, the court shall provide for the record a written statement of each reason for its decision and, on petition of the United States for a writ of certiorari, the record shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to review such decision.

(c) Expeditious conduct of proceedings; security measures for maintenance of records. Proceedings under this Act shall be conducted as expeditiously as possible. The record of proceedings under this Act, including applications made and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence.

(d) Tenure. Each judge designated under this section shall so serve for a maximum of seven years and shall not be eligible for redesignation, except that the judges first designated under subsection (a) shall be designated for terms of from one to seven years so that one term expires each year, and that judges first designated under subsection (b) shall be designated for terms of three, five, and seven years.

(e) Jurisdiction and procedures for review of petitions.

(1) Three judges designated under subsection (a) who reside within 20 miles of the District of Columbia, or, if all of such judges are unavailable, other judges of the court established under subsection (a) as may be designated by the presiding judge of such court, shall comprise a petition review pool which shall have jurisdiction to review petitions filed pursuant to section 501(f)(1) or 702(i)(4) [50 USCS § 1861(f)(1) or 1881a(i)(4)].

(2) Not later than 60 days after the date of the enactment of the USA PATRIOT Improvement and Reauthorization Act of 2005 [enacted March 9, 2006], the court established under subsection (a) shall adopt and, consistent with the protection of national security, publish procedures for the review of petitions filed pursuant to section 501(f)(1) or 702(i)(4) [50 USCS § 1861(f)(1) or 1881a(i)(4)] by the panel established under paragraph (1). Such procedures shall provide that review of a petition shall be conducted in camera and shall also provide for the designation of an acting presiding judge.

(f) Stay of order.

(1) A judge of the court established under subsection (a), the court established under subsection (b) or a judge of that court, or the Supreme Court of the United States or a justice of that court, may, in accordance with the rules of their respective courts, enter a stay of an order or an order modifying an order of the court established under subsection (a) or the court established under subsection (b) entered under any title of this Act, while the court established under subsection (a) conducts a rehearing, while an appeal is pending to the court established under subsection (b), or while a petition of certiorari is pending in the Supreme Court of the United States, or during the pendency of any review by that court.

(2) The authority described in paragraph (1) shall apply to an order entered under any provision of this Act.

(g) Establishment and transmittal of rules and procedures.

(1) The courts established pursuant to subsections (a) and (b) may establish such rules and procedures, and take such actions, as are reasonably necessary to administer their responsibilities under this Act.

(2) The rules and procedures established under paragraph (1), and any modifications of such rules and procedures, shall be recorded, and shall be transmitted to the following:

(A) All of the judges on the court established pursuant to subsection (a).

(B) All of the judges on the court of review established pursuant to subsection (b).

(C) The Chief Justice of the United States.

(D) The Committee on the Judiciary of the Senate.

(E) The Select Committee on Intelligence of the Senate.

(F) The Committee on the Judiciary of the House of Representatives.

(G) The Permanent Select Committee on Intelligence of the House of Representatives.

(3) The transmissions required by paragraph (2) shall be submitted in unclassified form, but may include a classified annex.

(h) Compliance with orders, rules, and procedures. Nothing in this Act shall be construed to reduce or contravene the inherent authority of a court established under this section to determine or enforce compliance with an order or a rule of such court or with a procedure approved by such court.

(i) Amicus curiae.

(1) Designation. The presiding judges of the courts established under subsections (a) and (b) shall, not later than 180 days after the enactment of this subsection, jointly designate not fewer than 5 individuals to be eligible to serve as amicus curiae, who shall serve pursuant to rules the presiding judges may establish. In designating such individuals, the presiding judges may consider individuals recommended by any source, including members of the Privacy and Civil Liberties Oversight Board, the judges determine appropriate.

(2) Authorization. A court established under subsection (a) or (b), consistent with the requirement of subsection (c) and any other statutory requirement that the court act expeditiously or within a stated time—

(A) shall appoint an individual who has been designated under paragraph (1) to serve as amicus curiae to assist such court in the consideration of any application for an order or review that, in the opinion of the court, presents a novel or significant interpretation of the law, unless the court issues a finding that such appointment is not appropriate; and

(B) may appoint an individual or organization to serve as amicus curiae, including to provide technical expertise, in any instance as such court deems appropriate or, upon motion, permit an individual or organization leave to file an amicus curiae brief.

(3) Qualifications of amicus curiae.

(A) Expertise. Individuals designated under paragraph (1) shall be persons who possess expertise in privacy and civil liberties, intelligence collection, communications technology, or any other area that may lend legal or technical expertise to a court established under subsection (a) or (b).

(B) Security clearance. Individuals designated pursuant to paragraph (1) shall be persons who are determined to be eligible for access to classified information necessary to participate in matters before the courts. Amicus curiae appointed by the court pursuant to paragraph (2) shall be persons who are determined to be eligible for access to classified information, if such access is necessary to participate in the matters in which they may be appointed.

(4) Duties. If a court established under subsection (a) or (b) appoints an amicus curiae under paragraph (2)(A), the amicus curiae shall provide to the court, as appropriate—

(A) legal arguments that advance the protection of individual privacy and civil liberties;

(B) information related to intelligence collection or communications technology; or

(C) legal arguments or information regarding any other area relevant to the issue presented to the court.

(5) Assistance. An amicus curiae appointed under paragraph (2)(A) may request that the court designate or appoint additional amici curiae pursuant to paragraph (1) or paragraph (2), to be available to assist the amicus curiae.

(6) Access to information.

(A) In general. If a court established under subsection (a) or (b) appoints an amicus curiae under paragraph (2), the amicus curiae—

(i) shall have access to any legal precedent, application, certification, petition, motion, or such other materials that the court determines are relevant to the duties of the amicus curiae; and

(ii) may, if the court determines that it is relevant to the duties of the amicus curiae, consult with any other individuals designated pursuant to paragraph (1) regarding information relevant to any assigned proceeding.

(B) Briefings. The Attorney General may periodically brief or provide relevant materials to individuals designated pursuant to paragraph (1) regarding constructions and interpretations of this Act and legal, technological, and other issues related to actions authorized by this Act.

(C) Classified information. An amicus curiae designated or appointed by the court may have access to classified documents, information, and other materials or proceedings only if that individual is eligible for access to classified information and to the extent consistent with the national security of the United States.

(D) Rule of construction. Nothing in this section shall be construed to require the Government to provide information to an amicus curiae appointed by the court that is privileged from disclosure.

(7) Notification. A presiding judge of a court established under subsection (a) or (b) shall notify the Attorney General of each exercise of the authority to appoint an individual to serve as amicus curiae under paragraph (2).

(8) Assistance. A court established under subsection (a) or (b) may request and receive (including on a nonreimbursable basis) the assistance of the executive branch in the implementation of this subsection.

(9) Administration. A court established under subsection (a) or (b) may provide for the designation, appointment, removal, training, or other support for an individual designated to serve as amicus curiae under paragraph (1) or

appointed to serve as amicus curiae under paragraph (2) in a manner that is not inconsistent with this subsection.

(10) Receipt of information. Nothing in this subsection shall limit the ability of a court established under subsection (a) or (b) to request or receive information or materials from, or otherwise communicate with, the Government or amicus curiae appointed under paragraph (2) on an ex parte basis, nor limit any special or heightened obligation in any ex parte communication or proceeding.

(11) Compensation. Notwithstanding any other provision of law, a court established under subsection (a) or (b) may compensate an amicus curiae appointed under paragraph (2) for assistance provided under such paragraph as the court considers appropriate and at such rate as the court considers appropriate.

(j) Review of FISA court decisions. Following issuance of an order under this Act, a court established under subsection (a) shall certify for review to the court established under subsection (b) any question of law that may affect resolution of the matter in controversy that the court determines warrants such review because of a need for uniformity or because consideration by the court established under subsection (b) would serve the interests of justice. Upon certification of a question of law under this subsection, the court established under subsection (b) may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(k) Review of FISA court of review decisions.

(1) Certification. For purposes of section 1254(2) of title 28, United States Code, the court of review established under subsection (b) shall be considered to be a court of appeals.

(2) Amicus curiae briefing. Upon certification of an application under paragraph (1), the Supreme Court of the United States may appoint an amicus curiae designated under subsection (i)(1), or any other person, to provide briefing or other assistance.

50 USCS § 1804

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- **United States Code Service**
- **TITLE 50. WAR AND NATIONAL DEFENSE (§§ 1 — 4852)**
- **CHAPTER 36. FOREIGN INTELLIGENCE SURVEILLANCE (§§ 1801 — 1885c)**
- **ELECTRONIC SURVEILLANCE (§§ 1801 — 1813)**

§ 1804. Applications for court orders

(a) Submission by Federal officer; approval of Attorney General; contents. Each application for an order approving electronic surveillance under this title [50 USCS §§ 1801 et seq.] shall be made by a Federal officer in writing upon oath or affirmation to a judge having jurisdiction under section 103 [50 USCS § 1803]. Each application shall require the approval of the Attorney General based upon his finding that it satisfies the criteria and requirements of such application as set forth in this title [50 USCS §§ 1801 et seq.]. It shall include—

(1) the identity of the Federal officer making the application;

(2) the identity, if known, or a description of the specific target of the electronic surveillance;

(3) a statement of the facts and circumstances relied upon by the applicant to justify his belief that—

(A) the target of the electronic surveillance is a foreign power or an agent of a foreign power; and

(B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power;

(4) a statement of the proposed minimization procedures;

(5) a description of the nature of the information sought and the type of communications or activities to be subjected to the surveillance;

(6) a certification or certifications by the Assistant to the President for National Security Affairs, an executive branch official or officials designated by the President from among those executive officers employed in the area of national security or defense and appointed by the President with the advice

and consent of the Senate, or the Deputy Director of the Federal Bureau of Investigation, if designated by the President as a certifying official—

(A) that the certifying official deems the information sought to be foreign intelligence information;

(B) that a significant purpose of the surveillance is to obtain foreign intelligence information;

(C) that such information cannot reasonably be obtained by normal investigative techniques;

(D) that designates the type of foreign intelligence information being sought according to the categories described in section 101(e) [50 USCS § 1801(e)]; and

(E) including a statement of the basis for the certification that—

(i) the information sought is the type of foreign intelligence information designated; and

(ii) such information cannot reasonably be obtained by normal investigative techniques;

(7) a summary statement of the means by which the surveillance will be effected and a statement whether physical entry is required to effect the surveillance;

(8) a statement of the facts concerning all previous applications that have been made to any judge under this title [50 USCS §§ 1801 et seq.] involving any of the persons, facilities, or places specified in the application, and the action taken on each previous application; and

(9) a statement of the period of time for which the electronic surveillance is required to be maintained, and if the nature of the intelligence gathering is such that the approval of the use of electronic surveillance under this title [50 USCS §§ 1801 et seq.] should not automatically terminate when the described type of information has first been obtained, a description of facts supporting the belief that additional information of the same type will be obtained thereafter.

(b) Additional affidavits or certifications. The Attorney General may require any other affidavit or certification from any other officer in connection with the application.

(c) Additional information. The judge may require the applicant to furnish such other information as may be necessary to make the determinations required by section 105 [50 USCS § 1805].

(d) Personal review by Attorney General.

(1)

(A) Upon written request of the Director of the Federal Bureau of Investigation, the Secretary of Defense, the Secretary of State, the Director of National Intelligence, or the Director of the Central Intelligence Agency, the Attorney General shall personally review under subsection (a) an application under that subsection for a target described in section 101(b)(2) [50 USCS § 1801(b)(2)].

(B) Except when disabled or otherwise unavailable to make a request referred to in subparagraph (A), an official referred to in that subparagraph may not delegate the authority to make a request referred to in that subparagraph.

(C) Each official referred to in subparagraph (A) with authority to make a request under that subparagraph shall take appropriate actions in advance to ensure that delegation of such authority is clearly established in the event such official is disabled or otherwise unavailable to make such request.

(2)

(A) If as a result of a request under paragraph (1) the Attorney General determines not to approve an application under the second sentence of subsection (a) for purposes of making the application under this section, the Attorney General shall provide written notice of the determination to the official making the request for the review of the application under that paragraph. Except when disabled or otherwise unavailable to make a determination under the preceding sentence, the Attorney General may not delegate the responsibility to make a determination under that sentence. The Attorney General shall take appropriate actions in advance to ensure that delegation of such responsibility is clearly established in the event the Attorney General is disabled or otherwise unavailable to make such determination.

(B) Notice with respect to an application under subparagraph (A) shall set forth the modifications, if any, of the application that are necessary in order for the Attorney General to approve the application under the second sentence of subsection (a) for purposes of making the application under this section.

(C) Upon review of any modifications of an application set forth under subparagraph (B), the official notified of the modifications under this paragraph shall modify the application if such official determines that such modification is warranted. Such official shall supervise the making of any modification under this subparagraph. Except when disabled or otherwise unavailable to supervise the making of any modification under the preceding sentence, such official may not delegate the responsibility to

supervise the making of any modification under that preceding sentence. Each such official shall take appropriate actions in advance to ensure that delegation of such responsibility is clearly established in the event such official is disabled or otherwise unavailable to supervise the making of such modification.

50 USCS § 1805

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- **United States Code Service**
- **TITLE 50. WAR AND NATIONAL DEFENSE (§§ 1 — 4852)**
- **CHAPTER 36. FOREIGN INTELLIGENCE SURVEILLANCE (§§ 1801 — 1885c)**
- **ELECTRONIC SURVEILLANCE (§§ 1801 — 1813)**

§ 1805. Issuance of order [Caution: See prospective amendment note below.]

(a) Necessary findings. Upon an application made pursuant to section 104 [50 USCS § 1804], the judge shall enter an ex parte order as requested or as modified approving the electronic surveillance if he finds that—

(1) the application has been made by a Federal officer and approved by the Attorney General;

(2) on the basis of the facts submitted by the applicant there is probable cause to believe that—

(A) the target of the electronic surveillance is a foreign power or agent of a foreign power: *Provided,* That no United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the first amendment to the Constitution of the United States; and

(B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power;

(3) the proposed minimization procedures meet the definition of minimization procedures under section 101(h) [50 USCS § 1804(h)]; and

(4) the application which has been filed contains all statements and certifications required by section 104 [50 USCS § 1804] and, if the target is a United States person, the certification or certifications are not clearly erroneous on the basis of the statement made under section 104(a)(7)(E) and any other information furnished under section 104(d).

(b) Determination of probable cause. In determining whether or not probable cause exists for purposes of an order under subsection (a)(2), a judge may

consider past activities of the target, as well as facts and circumstances relating to current or future activities of the target.

(c) Specifications and directions of orders.

(1) Specifications. An order approving an electronic surveillance under this section shall specify—

(A) the identity, if known, or a description of the specific target of the electronic surveillance identified or described in the application pursuant to section 104(a)(3) [50 USCS § 1804(a)(3)];

(B) the nature and location of each of the facilities or places at which the electronic surveillance will be directed, if known;

(C) the type of information sought to be acquired and the type of communications or activities to be subjected to the surveillance;

(D) the means by which the electronic surveillance will be effected and whether physical entry will be used to effect the surveillance; and

(E) the period of time during which the electronic surveillance is approved.

(2) Directions. An order approving an electronic surveillance under this section shall direct—

(A) that the minimization procedures be followed;

(B) that, upon the request of the applicant, a specified communication or other common carrier, landlord, custodian, or other specified person, or in circumstances where the Court finds, based on specific facts provided in the application, that the actions of the target of the application may have the effect of thwarting the identification of a specified person, such other persons, furnish the applicant forthwith all information, facilities, or technical assistance necessary to accomplish the electronic surveillance in such a manner as will protect its secrecy and produce a minimum of interference with the services that such carrier, landlord, custodian, or other person is providing that target of electronic surveillance;

(C) that such carrier, landlord, custodian, or other person maintain under security procedures approved by the Attorney General and the Director of National Intelligence any records concerning the surveillance or the aid furnished that such person wishes to retain; and

(D) that the applicant compensate, at the prevailing rate, such carrier, landlord, custodian, or other person for furnishing such aid.

(3) Special directions for certain orders. An order approving an electronic surveillance under this section in circumstances where the nature and

location of each of the facilities or places at which the surveillance will be directed is unknown shall direct the applicant to provide notice to the court within ten days after the date on which surveillance begins to be directed at any new facility or place, unless the court finds good cause to justify a longer period of up to 60 days, of—

(A) the nature and location of each new facility or place at which the electronic surveillance is directed;

(B) the facts and circumstances relied upon by the applicant to justify the applicant's belief that each new facility or place at which the electronic surveillance is directed is or was being used, or is about to be used, by the target of the surveillance;

(C) a statement of any proposed minimization procedures that differ from those contained in the original application or order, that may be necessitated by a change in the facility or place at which the electronic surveillance is directed; and

(D) the total number of electronic surveillances that have been or are being conducted under the authority of the order.

(d) Duration of order; extensions; review of circumstances under which information was acquired, retained or disseminated.

(1) An order issued under this section may approve an electronic surveillance for the period necessary to achieve its purpose, or for ninety days, whichever is less, except that (A) an order under this section shall approve an electronic surveillance targeted against a foreign power, as defined in section 101(a)(1), (2), or (3) [50 USCS § 1801(a)(1), (2) or (3)], for the period specified in the application or for one year, whichever is less, and (B) an order under this Act for a surveillance targeted against an agent of a foreign power who is not a United States person may be for the period specified in the application or for 120 days, whichever is less.

(2) Extensions of an order issued under this title [50 USCS §§ 1801 et seq.] may be granted on the same basis as an original order upon an application for an extension and new findings made in the same manner as required for an original order, except that (A) an extension of an order under this Act for a surveillance targeted against a foreign power, as defined in paragraph (5), (6), or (7) of section 101(a) [50 USCS § 1801(a)], or against a foreign power as defined in section 101(a)(4) [50 USCS § 1801(a)(4)] that is not a United States person, may be for a period not to exceed one year if the judge finds probable cause to believe that no communication of any individual United States person will be acquired during the period, and (B) an extension of an order under this Act for a surveillance targeted against an agent of a foreign power who is not a United States person may be for a period not to exceed 1 year.

(3) At or before the end of the period of time for which electronic surveillance is approved by an order or an extension, the judge may assess compliance with the minimization procedures by reviewing the circumstances under which information concerning United States persons was acquired, retained, or disseminated.

(4) A denial of the application made under section 104 may be reviewed as provided in section 103 [50 USCS § 1803].

(e) Emergency orders.

(1) Notwithstanding any other provision of this title [50 USCS §§ 1801 et seq.], the Attorney General may authorize the emergency employment of electronic surveillance if the Attorney General—

(A) reasonably determines that an emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained;

(B) reasonably determines that the factual basis for the issuance of an order under this title [50 USCS §§ 1801 et seq.] to approve such electronic surveillance exists;

(C) informs, either personally or through a designee, a judge having jurisdiction under section 103 [50 USCS § 1803] at the time of such authorization that the decision has been made to employ emergency electronic surveillance; and

(D) makes an application in accordance with this title [50 USCS §§ 1801 et seq.] to a judge having jurisdiction under section 103 [50 USCS § 1803] as soon as practicable, but not later than 7 days after the Attorney General authorizes such surveillance.

(2) If the Attorney General authorizes the emergency employment of electronic surveillance under paragraph (1), the Attorney General shall require that the minimization procedures required by this title [50 USCS §§ 1801 et seq.] for the issuance of a judicial order be followed.

(3) In the absence of a judicial order approving such electronic surveillance, the surveillance shall terminate when the information sought is obtained, when the application for the order is denied, or after the expiration of 7 days from the time of authorization by the Attorney General, whichever is earliest.

(4) A denial of the application made under this subsection may be reviewed as provided in section 103 [50 USCS § 1803].

(5) In the event that such application for approval is denied, or in any other case where the electronic surveillance is terminated and no order is issued

approving the surveillance, no information obtained or evidence derived from such surveillance shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authority of the United States, a State, or political subdivision thereof, and no information concerning any United States person acquired from such surveillance shall subsequently be used or disclosed in any other manner by Federal officers or employees without the consent of such person, except with the approval of the Attorney General if the information indicates a threat of death or serious bodily harm to any person.

(6) The Attorney General shall assess compliance with the requirements of paragraph (5).

(f) Emergencies involving non-United States persons.

(1) Notwithstanding any other provision of this Act, the lawfully authorized targeting of a non-United States person previously believed to be located outside the United States for the acquisition of foreign intelligence information may continue for a period not to exceed 72 hours from the time that the non-United States person is reasonably believed to be located inside the United States and the acquisition is subject to this title or to title III of this Act [50 USCS §§ 1801 et seq. or §§ 1821 et seq.], provided that the head of an element of the intelligence community—

(A) reasonably determines that a lapse in the targeting of such non-United States person poses a threat of death or serious bodily harm to any person;

(B) promptly notifies the Attorney General of a determination under subparagraph (A); and

(C) requests, as soon as practicable, the employment of emergency electronic surveillance under subsection (e) or the employment of an emergency physical search pursuant to section 304(e) [50 USCS § 1824(e)], as warranted.

(2) The authority under this subsection to continue the acquisition of foreign intelligence information is limited to a period not to exceed 72 hours and shall cease upon the earlier of the following:

(A) The employment of emergency electronic surveillance under subsection (e) or the employment of an emergency physical search pursuant to section 304(e) [50 USCS § 1824(e)].

(B) An issuance of a court order under this title or title III of this Act [50 USCS §§ 1801 et seq. or 50 USCS §§ 1821 et seq.].

(C) The Attorney General provides direction that the acquisition be terminated.

(D) The head of the element of the intelligence community conducting the acquisition determines that a request under paragraph (1)(C) is not warranted.

(E) When the threat of death or serious bodily harm to any person is no longer reasonably believed to exist.

(3) Nonpublicly available information concerning unconsenting United States persons acquired under this subsection shall not be disseminated during the 72 hour time period under paragraph (1) unless necessary to investigate, reduce, or eliminate the threat of death or serious bodily harm to any person.

(4) If the Attorney General declines to authorize the employment of emergency electronic surveillance under subsection (e) or the employment of an emergency physical search pursuant to section 304(e) [50 USCS § 1824(e)], or a court order is not obtained under this title or title III of this Act, information obtained during the 72 hour acquisition time period under paragraph (1) shall not be retained, except with the approval of the Attorney General if the information indicates a threat of death or serious bodily harm to any person.

(5) Paragraphs (5) and (6) of subsection (e) shall apply to this subsection.

(g) Testing of electronic equipment; discovering unauthorized electronic surveillance; training of intelligence personnel. Notwithstanding any other provision of this title [50 USCS §§ 1801 et seq.], officers, employees, or agents of the United States are authorized in the normal course of their official duties to conduct electronic surveillance not targeted against the communications of any particular person or persons, under procedures approved by the Attorney General, solely to—

(1) test the capability of electronic equipment, if—

(A) it is not reasonable to obtain the consent of the persons incidentally subjected to the surveillance;

(B) the test is limited in extent and duration to that necessary to determine the capability of the equipment;

(C) the contents of any communication acquired are retained and used only for the purpose of determining the capability of the equipment, are disclosed only to test personnel, and are destroyed before or immediately upon completion of the test; and:

(D) *Provided,* That the test may exceed ninety days only with the prior approval of the Attorney General;

(2) determine the existence and capability of electronic surveillance equipment being used by persons not authorized to conduct electronic surveillance, if—

(A) it is not reasonable to obtain the consent of persons incidentally subjected to the surveillance;

(B) such electronic surveillance is limited in extent and duration to that necessary to determine the existence and capability of such equipment; and

(C) any information acquired by such surveillance is used only to enforce chapter 119 of title 18, United States Code [18 USCS §§ 2510 et seq.], or section 705 of the Communications Act of 1934 [47 USCS § 605], or to protect information from unauthorized surveillance; or

(3) train intelligence personnel in the use of electronic surveillance equipment, if—

(A) it is not reasonable to—

(i) obtain the consent of the persons incidentally subjected to the surveillance;

(ii) train persons in the course of surveillances otherwise authorized by this title [50 USCS §§ 1801 et seq.]; or

(iii) train persons in the use of such equipment without engaging in electronic surveillance;

(B) such electronic surveillance is limited in extent and duration to that necessary to train the personnel in the use of the equipment; and

(C) no contents of any communication acquired are retained or disseminated for any purpose, but are destroyed as soon as reasonably possible.

(h) Retention of certifications, applications and orders. Certifications made by the Attorney General pursuant to section 102(a) [50 USCS § 1802(a)] and applications made and orders granted under this title [50 USCS §§ 1801 et seq.] shall be retained for a period of at least ten years from the date of the certification or application.

(i) Bar to legal action. No cause of action shall lie in any court against any provider of a wire or electronic communication service, landlord, custodian, or other person (including any officer, employee, agent, or other specified person thereof) that furnishes any information, facilities, or technical assistance in accordance with a court order or request for emergency assistance under this Act for electronic surveillance or physical search.

(j) Pen registers and trap and trace devices. In any case in which the Government makes an application to a judge under this title [50 USCS §§ 1801 et seq.] to conduct electronic surveillance involving communications and the judge grants such application, upon the request of the applicant, the judge shall also authorize the installation and use of pen registers and trap and trace devices, and direct the disclosure of the information set forth in section 402(d)(2) [50 USCS § 1842(d)(2)].

50 USCS § 1824

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- **United States Code Service**
- **TITLE 50. WAR AND NATIONAL DEFENSE (§§ 1 — 4852)**
- **CHAPTER 36. FOREIGN INTELLIGENCE SURVEILLANCE (§§ 1801 — 1885c)**
- **PHYSICAL SEARCHES (§§ 1821 — 1829)**

§ 1824. Issuance of an order

(a) Necessary findings. Upon an application made pursuant to section 303 [50 USCS § 1823], the judge shall enter an ex parte order as requested or as modified approving the physical search if the judge finds that—

(1) the application has been made by a Federal officer and approved by the Attorney General;

(2) on the basis of the facts submitted by the applicant there is probable cause to believe that—

(A) the target of the physical search is a foreign power or an agent of a foreign power, except that no United States person may be considered an agent of a foreign power solely upon the basis of activities protected by the first amendment to the Constitution of the United States; and

(B) the premises or property to be searched is or is about to be owned, used, possessed by, or is in transit to or from an agent of a foreign power or a foreign power;

(3) the proposed minimization procedures meet the definition of minimization contained in this title [50 USCS §§ 1821 et seq.]; and

(4) the application which has been filed contains all statements and certifications required by section 303 [50 USCS § 1823], and, if the target is a United States person, the certification or certifications are not clearly erroneous on the basis of the statement made under section 303(a)(6)(E) [50 USCS 1823(a)(6)(E)] and any other information furnished under section 303(c) [50 USCS § 1823(c)].

(b) Determination of probable cause. In determining whether or not probable cause exists for purposes of an order under subsection (a)(2), a judge may consider past activities of the target, as well as facts and circumstances relating to current or future activities of the target.

(c) Specifications and directions of orders. An order approving a physical search under this section shall—

(1) specify—

(A) the identity, if known, or a description of the target of the physical search;

(B) the nature and location of each of the premises or property to be searched;

(C) the type of information, material, or property to be seized, altered, or reproduced;

(D) a statement of the manner in which the physical search is to be conducted and, whenever more than one physical search is authorized under the order, the authorized scope of each search and what minimization procedures shall apply to the information acquired by each search; and

(E) the period of time during which physical searches are approved; and

(2) direct—

(A) that the minimization procedures be followed;

(B) that, upon the request of the applicant, a specified landlord, custodian, or other specified person furnish the applicant forthwith all information, facilities, or assistance necessary to accomplish the physical search in such a manner as will protect its secrecy and produce a minimum of interference with the services that such landlord, custodian, or other person is providing the target of the physical search;

(C) that such landlord, custodian, or other person maintain under security procedures approved by the Attorney General and the Director of National Intelligence any records concerning the search or the aid furnished that such person wishes to retain;

(D) that the applicant compensate, at the prevailing rate, such landlord, custodian, or other person for furnishing such aid; and

(E) that the Federal officer conducting the physical search promptly report to the court the circumstances and results of the physical search.

(d) Duration of order; extensions; assessment of compliance.

(1) An order issued under this section may approve a physical search for the period necessary to achieve its purpose, or for 90 days, whichever is less, except that (A) an order under this section shall approve a physical search targeted against a foreign power, as defined in paragraph (1), (2), or (3) of section 101(a) [50 USCS § 1801(a)], for the period specified in the application

or for one year, whichever is less, and (B) an order under this section for a physical search targeted against an agent of a foreign power who is not a United States person may be for the period specified in the application or for 120 days, whichever is less.

(2) Extensions of an order issued under this title [50 USCS §§ 1821 et seq.] may be granted on the same basis as the original order upon an application for an extension and new findings made in the same manner as required for the original order, except that an extension of an order under this Act for a physical search targeted against a foreign power, as defined in paragraph (5), (6), or (7) of section 101(a) [50 USCS § 1801(a)], or against a foreign power, as defined in section 101(a)(4) [50 USCS § 1801(a)(4)], that is not a United States person, or against an agent of a foreign power who is not a United States person, may be for a period not to exceed one year if the judge finds probable cause to believe that no property of any individual United States person will be acquired during the period.

(3) At or before the end of the period of time for which a physical search is approved by an order or an extension, or at any time after a physical search is carried out, the judge may assess compliance with the minimization procedures by reviewing the circumstances under which information concerning United States persons was acquired, retained, or disseminated.

(e) Emergency orders.

(1) Notwithstanding any other provision of this title [50 USCS §§ 1821 et seq.], the Attorney General may authorize the emergency employment of a physical search if the Attorney General—

(A) reasonably determines that an emergency situation exists with respect to the employment of a physical search to obtain foreign intelligence information before an order authorizing such physical search can with due diligence be obtained;

(B) reasonably determines that the factual basis for issuance of an order under this title [50 USCS §§ 1821 et seq.] to approve such physical search exists;

(C) informs, either personally or through a designee, a judge of the Foreign Intelligence Surveillance Court at the time of such authorization that the decision has been made to employ an emergency physical search; and

(D) makes an application in accordance with this title [50 USCS §§ 1821 et seq.] to a judge of the Foreign Intelligence Surveillance Court as soon as practicable, but not more than 7 days after the Attorney General authorizes such physical search.

(2) If the Attorney General authorizes the emergency employment of a physical search under paragraph (1), the Attorney General shall require that the minimization procedures required by this title [50 USCS §§ 1821 et seq.] for the issuance of a judicial order be followed.

(3) In the absence of a judicial order approving such physical search, the physical search shall terminate when the information sought is obtained, when the application for the order is denied, or after the expiration of 7 days from the time of authorization by the Attorney General, whichever is earliest.

(4) A denial of the application made under this subsection may be reviewed as provided in section 103 [50 USCS § 1803].

(5) In the event that such application for approval is denied, or in any other case where the physical search is terminated and no order is issued approving the physical search, no information obtained or evidence derived from such physical search shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authority of the United States, a State, or political subdivision thereof, and no information concerning any United States person acquired from such physical search shall subsequently be used or disclosed in any other manner by Federal officers or employees without the consent of such person, except with the approval of the Attorney General if the information indicates a threat of death or serious bodily harm to any person.

(6) The Attorney General shall assess compliance with the requirements of paragraph (5).

(f) Retention of applications and orders. Applications made and orders granted under this title [50 USCS §§ 1821 et seq.] shall be retained for a period of at least 10 years from the date of the application.