

IN THE
SUPREME COURT OF THE UNITED STATES

Jerald Francis Gray,
Petitioner,

v.

United States of America,
Respondent

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

Petitioner's Appendix

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FILED: April 11, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4060
(7:22-cr-00001-TTC-RSB-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JERALD FRANCIS GRAY

Defendant - Appellant

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: March 14, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4060
(7:22-cr-00001-TTC-RSB-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JERALD FRANCIS GRAY

Defendant - Appellant

O R D E R

Upon review of memoranda relative to this bail appeal, the court affirms the district court's order regarding release.

Entered at the direction of Judge Niemeyer with the concurrence of Judge King and Judge Heytens.

For the Court

/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

UNITED STATES OF AMERICA,) Case No. 7:22-cr-00001
)
v.) **MEMORANDUM OPINION**
)
JERALD GRAY,) By: Hon. Thomas T. Cullen
) United States District Judge
Defendant.)
)

Defendant Jerald Gray (“Defendant”) requests review of the United States Magistrate Judge’s Order of Detention Pending Trial and seeks release on terms and conditions. As explained below, the court concludes, based on clear and convincing evidence, that there are no conditions of release that “will reasonably assure . . . the safety of any other person and the community . . .” 18 U.S.C. § 3142(e)(1). It will therefore deny Defendant’s request for pretrial release.

Background

Defendant is charged with unlawful possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B).¹ At his initial appearance, the government moved for detention pending trial, and the Magistrate Judge conducted an evidentiary hearing on the motion. The government called FBI Special Agent (“SA”) Lynne Witt to testify about the evidence underlying the child-pornography charge and various admissions Defendant made prior to his arrest.

¹ The government initially arrested Defendant on a criminal complaint filed on December 16, 2021, and a grand jury returned an indictment charging that offense on January 13, 2022. (See ECF Nos. 3 [criminal complaint] and 27 [indictment].)

SA Witt first provided a detailed overview of her investigation of Defendant and how the government came to suspect him of committing the instant offense. Specifically, SA Witt testified that after learning that a person utilizing a particular internet protocol (“IP”) address had accessed a peer-to-peer file sharing network involving child pornography, she determined that the IP subscriber was Jerald Gray, and that he resided at 610 East Cedar Street in Covington, Virginia. (Bond Hr’g Tr. 12:4–20, Dec. 17, 2021 [ECF No. 23].) SA Witt testified that she then obtained a federal search warrant for the residence, which she and other agents executed on December 8, 2021. During this search, SA Witt testified that Defendant “volunteered to an interview.” (*Id.* at 13:17.) SA Witt related that Defendant identified which bedroom in the residence was his, admitted that the computer located in that bedroom belonged to him, and admitted that he was the computer’s primary user. SA Witt further testified that two FBI forensic examiners, who were on scene for the execution of the search warrant, accessed Defendant’s computer and determined that its hard drive contained approximately 60 separate files depicting child pornography. Some of these files depicted minors under the age of 12 engaged in sexual activities. According to SA Witt, Defendant admitted to downloading these images from the peer-to-peer file sharing network and viewing them. (*Id.* at 14:10–15:23.)

SA Witt asked Defendant if he would be willing to undergo a polygraph examination, and Defendant agreed to do so. During the post-polygraph interview,² Defendant was asked about a 2005 incident involving a 12-year-old female that had been visiting his minor daughter

² SA Witt did not reveal—and the court does not know—the results of the polygraph examination. The court only considers the admissions Defendant made to the agents during this post-polygraph interview.

at their residence.³ Defendant admitted that he had, in fact, sexually molested this child—specifically, by touching and kissing her breasts.⁴ (*Id.* at 16:12–17:21.) Defendant also acknowledged that, on at least one other occasion prior to 2005, he touched the breasts of an underage babysitter, also at his home. (*Id.* at 17:25–18:9.) Defendant admitted during this second interview that he “preferred” early- or pre-teen girls, but that he was not interested in young children. (*Id.* at 18:10–14.) In addition, Defendant described prior occasions when he had seen minor females in public, and then returned home and “masturbate[d] when thinking about that young female he had seen” (*Id.* at 18:15–22.)

At the time of the search and Defendant’s subsequent arrest, Defendant’s adult daughter and two grandchildren also lived in his home. In support of his petition for review, Defendant represents that he is willing to reside at a local hotel—and away from his minor grandchildren—to mitigate any concerns about risk of harm to them.⁵

Standard of Review

When a magistrate judge orders the detention of a criminal defendant, the defendant “may file, with the court having original jurisdiction over the offense, a motion for revocation or amendment of the order.” 18 U.S.C. § 3145(b). The district court reviews the original

³ In investigating Defendant’s background prior to the execution of the search warrant, SA Witt learned of the 2005 allegations involving Defendant and the child. (*See* Bond Hr’g Tr. 16:24–17:11.) Although the local police apparently investigated that incident at the time, no charges were ever filed.

⁴ The minor victim reported shortly after the incident that Defendant had also touched her buttocks area, but Defendant told the FBI agents that he could not recall whether he had done that as well. (*See id.* at 19:8–12.)

⁵ Defendant also proposed the same to the Magistrate Judge after the entry of the original order of detention. The Magistrate Judge, after considering the proposal, concluded that it “does not reasonably assure the safety of the community given the nature of the present offense alleged and the admissions to federal law enforcement officers regarding past contact offenses.” (Order, Jan. 3, 2022 [ECF No. 18].)

detention order *de novo*. See *United States v. Sprouse*, No. 3:12cr200, 2012 WL 2366455, at *2 (W.D.N.C. June 21, 2012). But the reviewing court may rely on the record from the original bond hearing and is not required to conduct a second evidentiary hearing. See *United States v. Jackson*, No. 7:19-cr-126, 2016 WL 4689144, at *1 (E.D.N.C. Sept. 25, 2019). The court has carefully reviewed the record from the December 17, 2021 detention hearing and finds that a second hearing and additional oral argument would not aid its decision.⁶

Analysis

In this case, the government seeks detention under 18 U.S.C. § 3142(f)(1)(E), arguing that Defendant, if he were released, would pose a danger to the community. In determining whether that is, in fact, the case, the court must consider: (1) the nature and circumstances of the offense; (2) the weight of the evidence against the defendant; (3) the history and characteristics of the defendant; and (4) the nature and seriousness of the danger that the defendant's release would present to any person. 18 U.S.C. § 3142(g). Defendant is charged with a violation of 18 U.S.C. § 2252(a)(4)(B), so there is not a rebuttable presumption in favor of detention. “[T]he government must [therefore] convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any other person.” *United States v. Salerno*, 481 U.S. 739, 750 (1987).

Based on the evidence presented at the detention hearing, the court finds that the government has satisfied this burden, and that the Magistrate Judge was correct in ordering the Defendant's detention pending trial. The charged offense—possession of child

⁶ Defendant filed a brief in support of the instant petition for review. (ECF No. 21.) The court has also considered that, as well as the government's response in opposition. (ECF No. 30.)

pornography—is a serious one. Because the government has alleged that one or more of the pornographic images depicted a child younger than 12, Defendant faces a maximum possible penalty of 20 years in prison. Although Defendant is presumed innocent of this offense, the evidence against him is very strong. As noted above, he is the registered owner of the IP address utilized to download the images at issue, and he admitted to investigators that he utilized his computer (and the IP address) to download and view these images. And an examination of Defendant's hard drive confirmed that it contained at least 60 images depicting child pornography, including unlawful images of children under the age of 12.

Defendant nevertheless argues that his history and characteristics demonstrate that he does not pose a danger to the community and is a viable candidate for release on terms and conditions. Defendant points out that he has a minor criminal record,⁷ he has lived in the district for approximately 30 years, he has long maintained steady employment, and he is the sole provider for his adult daughter and her two children (Defendant's grandchildren), who reside with him. (*See generally* Def.'s Mot. for Bond Review, Jan. 3, 2022 [ECF No. 21].)

Although the court credits these positive qualities, it cannot overlook his recent admissions to federal law enforcement agents that he sexually molested minors at his home on multiple occasions. In addition, he readily acknowledged having a predilection for teenage and pre-teen girls and taking steps to gratify himself sexually after seeing children in public. Considering this in conjunction with the evidence related to the charged offense—specifically, that Defendant recently accessed, downloaded, and viewed up to 60 images depicting child

⁷ Defendant pleaded guilty to possession of synthetic marijuana in 2013, and the court sentenced him to three years of supervised probation. He completed probation without incident.

pornography—the court finds that Defendant does, in fact, pose a danger to the community, particularly minor females.

Finally, Defendant contends this risk can be mitigated by imposing a condition of release that bars him from his residence and requires him to live in a nearby hotel. In making this argument, Defendant assumes that the court’s primary concern regarding his purported dangerousness relates to his minor grandchildren. Accordingly, Defendant proffers that “there is no credible evidence that [he] would endanger his grandchildren.” (*Id.* at 2 n.1.) While this may be true, there is abundant evidence in the record that Defendant, through his prior acts of child molestation and procuring child pornography, poses an acute risk to *other* persons in the community—particularly minor females who are not members of his immediate family. Therefore, the court concludes that allowing Defendant to live in a hotel would not eliminate that danger.

Conclusion

For these reasons, the court will deny Defendant’s petition and order him detained pending trial.

The clerk is directed to forward a copy of this Memorandum Opinion and accompanying Order to all counsel of record.

ENTERED this 21st day of January, 2022.

/s/ Thomas T. Cullen
HON. THOMAS T. CULLEN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

for the

Western District of Virginia

United States of America)
v.)
JERALD FRANCIS GRAY) Case No. 7:21MJ166

Defendant)

ORDER OF DETENTION PENDING TRIAL

Part I - Eligibility for Detention

Upon the

- Motion of the Government attorney pursuant to 18 U.S.C. § 3142(f)(1), or
 Motion of the Government or Court's own motion pursuant to 18 U.S.C. § 3142(f)(2),

the Court held a detention hearing and found that detention is warranted. This order sets forth the Court's findings of fact and conclusions of law, as required by 18 U.S.C. § 3142(i), in addition to any other findings made at the hearing.

Part II - Findings of Fact and Law as to Presumptions under § 3142(e)

- A. Rebuttable Presumption Arises Under 18 U.S.C. § 3142(e)(2) (previous violator):** There is a rebuttable presumption that no condition or combination of conditions will reasonably assure the safety of any other person and the community because the following conditions have been met:
- (1) the defendant is charged with one of the following crimes described in 18 U.S.C. § 3142(f)(1):
- (a) a crime of violence, a violation of 18 U.S.C. § 1591, or an offense listed in 18 U.S.C. § 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed; **or**
- (b) an offense for which the maximum sentence is life imprisonment or death; **or**
- (c) an offense for which a maximum term of imprisonment of 10 years or more is prescribed in the Controlled Substances Act (21 U.S.C. §§ 801-904), the Controlled Substances Import and Export Act (21 U.S.C. §§ 951-971), or Chapter 705 of Title 46, U.S.C. (46 U.S.C. §§ 70501-70508); **or**
- (d) any felony if such person has been convicted of two or more offenses described in subparagraphs (a) through (c) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (a) through (c) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; **or**
- (e) any felony that is not otherwise a crime of violence but involves:
- (i) a minor victim; (ii) the possession of a firearm or destructive device (as defined in 18 U.S.C. § 921);
 (iii) any other dangerous weapon; or (iv) a failure to register under 18 U.S.C. § 2250; **and**
- (2) the defendant has previously been convicted of a Federal offense that is described in 18 U.S.C. § 3142(f)(1), or of a State or local offense that would have been such an offense if a circumstance giving rise to Federal jurisdiction had existed; **and**
- (3) the offense described in paragraph (2) above for which the defendant has been convicted was committed while the defendant was on release pending trial for a Federal, State, or local offense; **and**
- (4) a period of not more than five years has elapsed since the date of conviction, or the release of the defendant from imprisonment, for the offense described in paragraph (2) above, whichever is later.

B. Rebuttable Presumption Arises Under 18 U.S.C. § 3142(e)(3) (narcotics, firearm, other offenses): There is a rebuttable presumption that no condition or combination of conditions will reasonably assure the appearance of the defendant as required and the safety of the community because there is probable cause to believe that the defendant committed one or more of the following offenses:

- (1) an offense for which a maximum term of imprisonment of 10 years or more is prescribed in the Controlled Substances Act (21 U.S.C. §§ 801-904), the Controlled Substances Import and Export Act (21 U.S.C. §§ 951-971), or Chapter 705 of Title 46, U.S.C. (46 U.S.C. §§ 70501-70508);
- (2) an offense under 18 U.S.C. §§ 924(c), 956(a), or 2332b;
- (3) an offense listed in 18 U.S.C. § 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed;
- (4) an offense under Chapter 77 of Title 18, U.S.C. (18 U.S.C. §§ 1581-1597) for which a maximum term of imprisonment of 20 years or more is prescribed; **or**
- (5) an offense involving a minor victim under 18 U.S.C. §§ 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425.

C. Conclusions Regarding Applicability of Any Presumption Established Above

- The defendant has not introduced sufficient evidence to rebut the presumption above, and detention is ordered on that basis. *(Part III need not be completed.)*

OR

- The defendant has presented evidence sufficient to rebut the presumption, but after considering the presumption and the other factors discussed below, detention is warranted.

Part III - Analysis and Statement of the Reasons for Detention

After considering the factors set forth in 18 U.S.C. § 3142(g) and the information presented at the detention hearing, the Court concludes that the defendant must be detained pending trial because the Government has proven:

- By clear and convincing evidence that no condition or combination of conditions of release will reasonably assure the safety of any other person and the community.
- By a preponderance of evidence that no condition or combination of conditions of release will reasonably assure the defendant's appearance as required.

In addition to any findings made on the record at the hearing, the reasons for detention include the following:

- Weight of evidence against the defendant is strong
- Subject to lengthy period of incarceration if convicted
- Prior criminal history
- Participation in criminal activity while on probation, parole, or supervision
- History of violence or use of weapons
- History of alcohol or substance abuse
- Lack of stable employment
- Lack of stable residence
- Lack of financially responsible sureties

- Lack of significant community or family ties to this district
- Significant family or other ties outside the United States
- Lack of legal status in the United States
- Subject to removal or deportation after serving any period of incarceration
- Prior failure to appear in court as ordered
- Prior attempt(s) to evade law enforcement
- Use of alias(es) or false documents
- Background information unknown or unverified
- Prior violations of probation, parole, or supervised release

OTHER REASONS OR FURTHER EXPLANATION:

The clear and convincing evidence shows that the evidence of the underlying offense is strong, and further evidence shows that the defendant has been involved in past contact offenses with minors. The proposed home plan did not reasonable assure the safety of the community given the strength of the evidence submitted at the detention hearing.

Part IV - Directions Regarding Detention

The defendant is remanded to the custody of the Attorney General or to the Attorney General's designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. The defendant must be afforded a reasonable opportunity for private consultation with defense counsel. On order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility must deliver the defendant to a United States Marshal for the purpose of an appearance in connection with a court proceeding.

Date: 12/21/2021

Robert S. Ballou

United States Magistrate Judge

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

UNITED STATES OF AMERICA

)

V.

Case No.: 7:21mj00166

JERALD FRANCIS GRAY

1

ORDER

Defendant has proposed a home plan to include staying in an America's Best Value Inn in Covington, Virginia. The proposed plan does not reasonably assure the safety of the community given the nature of the present offense alleged and the admissions to federal law enforcement officers regarding past contact offenses. The request for release to the proposed home plan is DENIED.

It is so ORDERED.

Enter: January 3, 2022

1/ Robert S. Ballou

Robert S. Ballou
United States Magistrate Judge

USA v. Jerald Francis Gray - 12/17/2021

1

1 IN THE UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF VIRGINIA
3 ROANOKE DIVISION

3 *****
4 **UNITED STATES OF AMERICA,**

5 Plaintiff,

CRIMINAL NO.: 7:21MJ166

6 -v-

7 December 17, 2021
8 Roanoke, Virginia
9 Initial Appearance and
Detention Hearing

10 **JERALD FRANCIS GRAY,**

11 Before:
ROBERT S. BALLOU
12 UNITED STATES MAGISTRATE JUDGE
WESTERN DISTRICT OF VIRGINIA

13 Defendant.

14 *****
15 APPEARANCES:

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26 Brittany Davis - FTR Recorder
27 Mary J. Butenschoen - Transcriber

28 PROCEEDINGS TAKEN BY FTR; TRANSCRIBED USING COMPUTER-AIDED
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1 (Proceedings commenced 3:11 p.m.)

2 THE COURT: Mr. Gray, my name is Robert Ballou. I'm
3 magistrate judge here in the Western District of Virginia. Let
4 me start by -- first of all by asking Ms. Davis to call the
5 case, please.

6 THE CLERK: *United States of America v. Jerald*
7 *Francis Gray*, Criminal Action Number 7:21MJ166.

8 THE COURT: Let the record reflect the government is
9 present by its counsel and defendant, likewise, is present
10 along with counsel.

11 Mr. Gray, good afternoon. Like I said, my name is
12 Robert Ballou. I'm magistrate judge here in the Western
13 District of Virginia. We're heard today in connection with a
14 new criminal complaint that's been filed as to a Jerald Francis
15 Gray. Let me introduce you to everyone who is on the screen
16 here so you'll know who they are and what their role is, and
17 then we'll get about to your hearing. Of course, we have your
18 attorney, Ms. Lee. Ms. Cleary is the United States Attorney
19 involved in your case. Lynne Witt is the government law
20 enforcement agent with the FBI that's involved in your case.
21 Ms. Falatic is with our probation office. You may have spoken
22 with her or one of her colleagues in advance of today's
23 hearings. And Ms. Davis, she's our courtroom deputy who
24 coordinates these proceedings.

25 You can see a black box that says "Judge Ballou's

1 public line". That's in the event that anyone wishes to listen
2 to today's proceedings, they can certainly do so, but they can
3 not participate, but they can hear everything that's ongoing.

4 All right. So let me start, Mr. Gray, by asking you
5 to state your full name for me, please, sir.

6 THE DEFENDANT: Jerald Francis Gray.

7 THE COURT: How old are you, sir?

8 THE DEFENDANT: 49.

9 THE COURT: How far did you go in school?

10 THE DEFENDANT: I graduated high school.

11 THE COURT: All right. Fair to say you read and
12 write English?

13 THE DEFENDANT: Sir?

14 THE COURT: Do you read and write English without a
15 problem?

16 THE DEFENDANT: Yes.

17 THE COURT: Very well. And today you feel
18 clearheaded and understand where you are and why you're here?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: All right. Mr. Gray, you're entitled to
21 have this hearing before me in person if you wish to do so. We
22 can proceed by videoconference only with your agreement and
23 permission.

24 Do you understand that?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Do I have your permission to proceed by
2 way of videoconference?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: All right. Ms. Lee, on behalf of
5 Mr. Gray, do I have your permission to proceed by way of
6 videoconference?

7 THE DEFENDANT: Yes, Your Honor.

8 THE COURT: Thank you very much. So Mr. Gray, the
9 Fifth Amendment of the Constitution guarantees you the right to
10 remain silent. You don't have any obligation at all to make
11 any statements about these charges or to answer any questions
12 put to you by the government or its investigating officers, its
13 agents, or its attorneys. You do not have to participate in
14 the government's investigation. The fact of the matter is you
15 never have to take the stand to testify unless you choose to do
16 so.

17 I will advise you that if you choose to waive your
18 right to remain silent, if you wish to make any statements or
19 answer any questions or if you don't wish to testify today or
20 any other time in the future, anything that you say can be used
21 against you.

22 Do you understand this?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Now, the Sixth Amendment of the
25 Constitution gives you the right to be represented by an

1 attorney who will assist you in understanding the nature of the
2 charges you face in challenging the government's evidence, as
3 well as confronting and cross-examining the government's
4 witnesses. Likewise, an attorney will assist you with
5 preparing and presenting any defenses that you may have to
6 these charges. You can hire any lawyer that you see fit to
7 represent you, but if you cannot afford an attorney the
8 government will appoint one for you at its expense.

9 Do you understand this?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: I do have your financial affidavit that
12 you've completed when you spoke with probation by telephone.
13 Am I correct that you wish to have me appoint an attorney for
14 you?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: All right. On that financial affidavit,
17 understand you have an obligation to provide information that
18 is truthful and correct to the best of your knowledge.
19 Otherwise it may be considered a separate felony offense for
20 providing false information under oath.

21 Do you understand that?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: And is the information that you provided
24 to the probation officer true and correct to the best of your
25 knowledge?

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7

1 THE DEFENDANT: Yes, sir.

2 THE COURT: All right. So based upon the allegations
3 that are set forth in the complaint, based upon your affidavit,
4 I find you qualified to have counsel appointed. I'm going to
5 appoint Ms. Lee to be your attorney, and she'll represent you
6 for as long as this matter is pending.

7 So Mr. Gray, this is a one-count criminal complaint
8 that alleges a charge of possession of child pornography in
9 violation of 18 United States Code, Section 2252(a)(4). The
10 complaint -- have you received a copy of it?

11 THE DEFENDANT: No, sir.

12 THE COURT: Okay. We will have that emailed to you
13 there at Western Virginia. Ms. Lee, you now have a copy of the
14 complaint. Am I correct about that?

15 MS. LEE: Yes, Your Honor.

16 THE COURT: All right. First of all, is there -- is
17 there any objection to sending the complaint to Mr. Gray there
18 at Western Virginia? Sometimes complaints of this nature you
19 do not want in the jail.

20 MS. CLEARY: I don't believe so. Let me ask agent
21 Witt, is that correct?

22 MS. LEE: No, it's not up to you.

23 THE COURT: No, it's --

24 MS. CLEARY: Oh, sorry.

25 THE COURT: It's more of a question -- it's a

1 question of Ms. Lee. It's for Mr. Gray's safety.

2 MS. CLEARY: Got it.

3 MS. LEE: Mr. Gray, they are going to send it to you
4 unless you don't want this type of paperwork in the jail. I
5 usually say you don't want it in the jail.

6 THE DEFENDANT: That's fine, yes.

7 MS. LEE: Okay.

8 THE COURT: Let's -- let's not do that. Ms. Lee, you
9 have had an opportunity to go over the --

10 MS. LEE: Yes.

11 THE COURT: -- the complaint with Mr. Gray?

12 MS. LEE: I sure have.

13 THE COURT: Very well. So the complaint -- you will
14 at a point in time in the future, you will see it. There's no
15 doubt, Mr. Gray. The complaint, it has two parts. The front
16 page lays out the nature of the complaint, or nature of the
17 charge, and then behind that is a -- is a -- an affidavit
18 prepared by a federal law enforcement agent on which the
19 government contends there's at least probable cause that you
20 committed this offense. You are entitled to a preliminary
21 hearing at which the government would have to put on sufficient
22 evidence for me to find there is at least probable cause that
23 you committed this offense. And if I find that, the matter
24 then goes to the grand jury.

25 Now, under the Seventh Amendment, you cannot be

1 convicted or tried on this charge unless the grand jury reviews
2 your case and decides that there's probable cause to issue an
3 indictment.

4 Do you understand this?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: All right. So if you waive your right to
7 a preliminary hearing or just consent based upon the -- what's
8 in the complaint, you don't waive anything. It simply goes to
9 the grand jury.

10 Understanding that, Ms. Lee, how do you wish to
11 proceed as it relates to Mr. Gray on a preliminary hearing?

12 MS. LEE: Your Honor, if the government is requesting
13 detention, we would request a detention hearing right now.

14 THE COURT: Okay. And a preliminary hearing as well?

15 MS. LEE: Yes. Thank you.

16 THE COURT: All right. Ms. Cleary, what's going to
17 be the government's position as it relates to detention?

18 MS. CLEARY: We're requesting detention, Your
19 Honor.

20 THE COURT: All right. Are you ready to proceed now
21 with a preliminary and a detention hearing?

22 MS. CLEARY: Yes, Your Honor.

23 THE COURT: All right, very well.

24 All right. Call your first witness, please.

25 MS. CLEARY: Your Honor --

1 THE COURT: Everybody have the pretrial services
2 report that it's been docketed?

3 MS. CLEARY: Yes.

4 MS. LEE: Your Honor, I have to apologize for being
5 such a nuisance to your entire staff on so many of these, but I
6 do think that we -- especially with Ms. Falatic have figured it
7 all out now. She has started sending bond reports to an email
8 which we asked her to send them to, but that our parallels did
9 not know to check.

10 THE COURT: Right.

11 MS. LEE: So I do believe that we will be less of a
12 nuisance going forward on future -- future initial hearing
13 days. And thank -- please thank every relevant person for
14 their patience with me.

15 THE COURT: You would not do your job if you didn't
16 pursue the things that you thought were necessary. And I spoke
17 to -- Ms. Lee, just so you'll know, I spoke to Ms. Williams --

18 MS. LEE: You mean a week or two ago.

19 THE COURT: Well, whenever it was, and we agreed
20 that, you know, once the pretrial services report is made
21 available to me and to the government, it absolutely needs to
22 be made available to the defendant, and so I think it was going
23 to be mailed over. Because there is that problem that until
24 you're appointed you can't get into a --

25 MS. LEE: Docket.

Witt - Direct

11

1 THE COURT: -- sealed document, so...

2 MS. LEE: Right. Thank you. Thank you.

3 THE COURT: All right, thank you.

4 All right. Ms. Cleary?

5 MS. CLEARY: And Your Honor, I'm sorry, just to
6 clarify, are we proceeding with a preliminary hearing now or
7 the detention hearing?

8 THE COURT: Well, we'll put them together. It will
9 be a preliminary hearing and detention at the same time.

10 MS. CLEARY: Got it, okay. So we'll call Agent
11 Witt.

12 THE COURT: All right. Ms. Witt, if I can get you to
13 raise your right hand.

14 LYNNE WITT, CALLED BY GOVERNMENT, SWORN

15 THE WITNESS: I do.

16 THE COURT: All right. Thank you very much.

17 Go ahead, please, Ms. Cleary.

18 MS. CLEARY: Okay.

19 DIRECT EXAMINATION

20 BY MS. CLEARY:

21 Q Can you state your name for the Court, please.

22 A Lynne Witt. L-Y-N-N-E. W-I T-T.

23 Q And how are you employed?

24 A I'm a special agent with the FBI here in Roanoke.

25 Q And were you so employed and on duty and involved in the

Witt - Direct

12

1 investigation of Mr. Gray?

2 A Yes.

3 Q Can you tell us how you proceeded in that investigation?

4 A Information law enforcement became aware of, a
5 peer-to-peer network -- excuse me. A person utilizing a
6 particular IT address on a peer-to-peer file sharing network
7 that was requesting, downloading, information files that
8 represented child pornography.

9 Q And you became --

10 A So --

11 Q Sorry. You became aware of an IP address that was
12 requesting images of what law enforcement knew to be child
13 pornography.

14 A Yes.

15 Q Okay.

16 A And so we further researched the owner of that IP address.
17 It was owned by Lumos Network, and further administrative
18 subpoena that was served to that subscriber was listed as
19 Jerald Gray with an address of 610 East Cedar Street,
20 Covington, Virginia.

21 Q And is that within the Western District of Virginia?

22 A It is.

23 Q Okay. And how did you proceed?

24 A We then did further investigative steps to determine who
25 was indeed residing at 610 East Gray [sic] Street and

Witt - Direct

13

1 determined that Mr. Gray was the resident there, amongst
2 another adult person that did verify that that was his current
3 address.

4 Q And who all resided at that address?

5 A There is his adult daughter lives there. Would you like
6 me to name her?

7 Q No, it's okay. And anyone else?

8 A And two minor grandchildren, the children of his adult
9 daughter.

10 Q And how old are those children?

11 A Approximately eight and seven years of age.

12 Q And so when you arrived at that address, did Mr. Gray
13 indicate which computer was his?

14 A So when we -- we -- a federal search warrant was obtained
15 and we -- for the residence of 610 East Cedar Street, and that
16 was executed on December 8. And as a result of that execution
17 of the search warrant, Mr. Gray volunteered to an interview,
18 and in that interview identified his bedroom in the house and
19 that there was a computer system set up in there and he
20 described it to us during that interview.

21 Q As being his computer.

22 A Yes.

23 Q And what did your search return on Mr. Gray's computer?

24 A On scene the day of the search there were present two FBI
25 agent CART examiners, and through their analysis of that

Witt - Direct

14

1 computer system they were able to observe on the C drive the --
2 a file name with the peer-to-peer network that got us all
3 started for this where we had seen the user of this IP
4 requesting child pornography files. And so they saw that
5 folder. And so further into that was a downloads folder that
6 contained approximately 60 files. I believe they are all video
7 type files and most with names that are indicative of child
8 pornography, CSAM. Child Sexual Abuse Material. Names
9 indicative of that.

10 Q And you reviewed one of those files?

11 A I did review one on scene that day, and I was subsequently
12 given a copy of -- a working copy of those approximate 60
13 files. And I watched a different video, which is the one
14 outlined in the complaint that was described.

15 Q Okay. And so you all now have possession of Mr. Gray's
16 computer; is that correct?

17 A Amongst other things, yes.

18 Q Okay. And those 60 files were downloaded in the folder
19 with the peer-to-peer network's name on his computer?

20 A They were located in a folder named "downloads".

21 Q Okay. And so have you had the chance to fully
22 forensically analyze Mr. Gray's computer?

23 A That has not been conducted by myself or others more
24 trained in that technique at this time.

25 Q And so to date, the only thing you've gone through is the

Witt - Direct

15

1 downloads file from that folder with the peer-to-peer network's
2 name?

3 A I've observed a few videos from that collection of 60
4 files.

5 Q Okay. And you said that those videos -- or the video that
6 you viewed on scene that day you would describe as CSAM?

7 A Yes, or child pornography, yes.

8 Q As child pornography, okay.

9 Now, on that day, December 8, did you all interview
10 Mr. Gray?

11 A Yes.

12 Q And what did Mr. Gray say during that interview?

13 A He confirmed he had Lumos Network. He confirmed where his
14 bedroom was in the house and described the computer set up
15 which matched with where the agents had viewed the peer-to-peer
16 network being used on that device. He said he's the primary
17 user of that computer system. He did admit to downloading
18 files from the peer-to-peer file sharing network that was
19 suspected of sharing those files at the very beginning that I
20 referenced. He and then admitted to reviewing files that
21 were -- that appeared to be child pornography CSAM material and
22 that -- and so he -- that's what he had -- some of the
23 statements that he made during that interview.

24 Q So following, was Mr. Gray offered a polygraph
25 examination?

Witt - Direct

16

1 A He was offered during that interview and the arrangements
2 for a polygraph interview -- and the arrangements were made for
3 him to have that occur on the following day there in Covington.
4 And so he arrived himself to the place of the polygraph, and at
5 that point I introduced him to the polygrapher, and he, you
6 know, takes over that part of the process.

7 Q And so following the polygraph, was another interview
8 conducted with Mr. Gray?

9 A The polygrapher conducted a post-polygraph interview.

10 Q Okay. And what did Mr. Gray state during that
11 interview?

12 A He admitted to -- first off, he -- he admitted to
13 having -- at first he admitted to having touched the breasts of
14 one of his daughter's friends, whose victim's -- whose name is
15 known to me, in approximately June of -- well, in 2005. And so
16 he admitted to that, touching of her breasts in the overnight
17 hours.

18 Q So let's talk a little bit more about that. So during --
19 so during the interview he was asked about an incident in 2005
20 with a friend of his daughter's, and she was a juvenile at the
21 time; is that right?

22 A Correct.

23 Q We can call her initials "S.S."

24 A Okay. In preparing for identifying everything about the
25 residence of 610 Cedar Street, obviously, we learned about

Witt - Direct

17

1 Mr. Gray and also learned about complaint filed with Covington
2 Police Department in 2005 by the then, you know, minor victim
3 S.S.. And so I was privy to -- I was able to review her
4 statement provided at the time to Covington Police Department.
5 The report read they were not able to -- nothing ever was
6 adjudicated or charged from that, and I believe it was in
7 November of 2005. It was put into an inactive status by
8 Covington Police Department. And so given the nature of why we
9 were searching at 610 East Cedar Street, I wanted -- that is
10 why that was brought up with Mr. Gray during the interview
11 about that time frame and that incident

12 Q Now, initially the statements that Mr. Gray has made to
13 the polygrapher, were those consistent with what you had read
14 in the report that was given by S.S. in 2005?

15 A It was not completely consistent. His first statement to
16 the polygrapher stated he had touched the victim's breasts.
17 And in reviewing the victim's statement at the time in 2005,
18 she had reported that he had kissed her breasts. And so the
19 polygrapher addressed this issue with Mr. Gray, and Mr. Gray
20 did then reveal to the polygrapher that, yes, I did kiss her
21 breasts.

22 Q All right. And at the time do we have an estimate of what
23 S.S.'s age might have been?

24 A I think roughly 12.

25 Q Okay. Now, was there another incident that Mr. Gray spoke

Witt - Direct

18

1 with with the polygrapher in terms of touching underage
2 women?

3 A He referenced that there was a babysitter that would come
4 to their house -- and this was prior to the 2005 incident.
5 That would come to their house, and he referenced like playing
6 on the floor with her, and in that playing his hand would --
7 would touch her breasts long enough, but not too long. And so
8 that is something else that he disclosed in his post-polygraph
9 interview to the polygrapher.

10 Q Now, in speaking with the polygrapher, did he indicate
11 sort of what ages of young girls he was most interested in?

12 A In the interview to us on December 8, he said, you know,
13 older teenage -- or not young children, but kind of that early
14 teen/preteenage is what he preferred.

15 Q And did he make other statements to you-all or to the
16 polygrapher about seeing women in street, seeing girls in the
17 street?

18 A He would describe incidences where he's out in a public
19 venue, such as a store or supermarket, and see an attractive
20 minor-aged female and then would later return home and
21 masturbate when thinking about that young female he had seen
22 previously.

23 Q And what statement did he make about masturbating
24 involving the incident with S.S. in 2005?

25 A I'd have to review the polygrapher's report to get more --

Witt - Direct

19

1 to be more specific with that.

2 Q Okay. Was there anything else during your investigation
3 that Mr. Gray stated about either this incident -- or that he
4 stated about this incident in 2005?

5 A Can you repeat your question? Sorry.

6 Q Was there anything else that Mr. Gray stated about the
7 incident in 2005 that we have not spoken about?

8 A We -- we discussed from the victim's statement that was
9 made in 2005, she recounted Mr. Gray returning into the room a
10 second time and I think touching her -- her buttocks area.
11 When Mr. Gray was asked about that, he -- he couldn't remember
12 clearly if that had happened or not.

13 Q Okay. Okay, thank you.

14 MS. CLEARY: We'll pass the witness, Your Honor.

15 THE COURT: Before, Ms. Lee, you start
16 cross-examining, Ms. Witt, you testified that you reviewed a
17 video as described in the complaint. Is that described in
18 paragraph 11 of the complaint?

19 THE WITNESS: Yes, it is.

20 THE COURT: Ms. Lee, is there any objection to me
21 reviewing paragraph 11 for the nature of that video or would
22 you rather have that on the record so you can cross-examine?
23 Of course, if you allow me to review it, it's certainly
24 available to your cross-examination as well, but --

25 MS. LEE: I absolutely do not object to you reviewing

Witt - Cross

20

1 paragraph 11.

2 THE COURT: Okay. All right. Thank you very much.

3 Go ahead, Ms. Lee.

4 CROSS-EXAMINATION

5 BY MS. LEE:

6 Q When you first -- okay. What's the first contact you had
7 with Mr. Gray?

8 A Mr. Gray would have been on the morning of December 8.

9 Q Was it by phone or in person?

10 A It was in person.

11 Q So you knocked on his door?

12 A We executed a search warrant at his residence. As a part
13 of that execution he was called out of the house.

14 Q Okay. What was his demeanor?

15 A I would say calm. I think, you know, wondering what was
16 going on. And I would describe him as cooperative.

17 Q Okay. And you say you offered him a polygraph. What do
18 you mean by offer? Like normally when one offers something
19 it's for the other person's benefit. You mean you asked him to
20 take a polygraph?

21 A I did ask him if he would be willing to take a
22 polygraph.

23 Q And what did you tell him was the purpose of that
24 polygraph?

25 A The purpose was to be able to have the polygrapher derive

Witt - Cross

21

1 questions as it relates to any contact offenses that Mr. Gray
2 may have had with a minor, any sexual contact offenses he may
3 have had with any minor.

4 Q You told him that was the reason; we want to know if you
5 have had contact with minors?

6 A I believe that's what I told him, yes.

7 Q Okay. And he -- he agreed to do that.

8 A He agreed and came back on the subsequent day voluntarily
9 to the police department for that.

10 Q He never asked for an attorney or anything like that,
11 right?

12 A No, he did not.

13 Q Is it fair to say that if he had not told you about this
14 2005 situation you would not have known about it?

15 A If I understood your question, that is incorrect. I knew
16 about the 2005 incident from the police report made to
17 Covington Police Department. So I knew that prior -- I knew
18 that prior to talking to him on December 8, if that was what
19 your question was.

20 Q It was my question.

21 A Okay.

22 Q So you asked him about the 2005 incident?

23 A Yes.

24 Q And he told you an incomplete account. Well, it's still
25 an account of him engaging in wrongdoing, right?

Witt - Cross

22

1 A On doing the interview on December 8, he did not admit to
2 that contact, or to the allegations made in the report. He was
3 aware of the person's name as being a friend of his daughter's,
4 but he did not admit to the allegations that were in the police
5 report during his interview on December 8.

6 Q Did he deny the allegations in the police report?

7 A He did.

8 Q But then he admitted them during the polygraph?

9 A In a post-polygraph interview, yes.

10 Q Was he asked during the polygraph "did you touch -- did
11 you ever touch S.S.?"

12 A That was not -- that was not one of the -- he was given
13 two pertinent questions. That was not it. I would have to
14 look at the report to tell you the specific questions asked.

15 Q At some point, though, in the course of -- I'm sorry, what
16 day was the polygraph?

17 A The following day, December 9.

18 Q Okay. So between the 8th and the 9th, he admitted to the
19 conduct involving S.S.

20 A In his post-polygraph interview he did make that
21 admission.

22 Q Okay. Do you know when in relation -- okay, let me back
23 up.

24 From what you know, S.S. was a guest at his house,
25 right?

Witt - Cross

23

1 A Yes.

2 Q She was visiting his daughter, who was at that time a
3 minor.

4 A Yes.

5 Q And let me just ask you another question: Ms. Cleary
6 asked you whether he said -- what he said about ages that he
7 has felt sexually disposed towards. And you used the word
8 "preteen". He did not use that word, right?

9 A I can't recall the exact wording that he used at this
10 time.

11 Q He gave -- did he give specific ages to you? Numbers?

12 A I could -- I'd have to -- I think that came up in the
13 interview. Without reviewing the notes or the interview, I
14 wouldn't want to say on the record without being able to
15 refresh my memory, but I do --

16 Q Could you please look at your notes and refresh your
17 memory?

18 A Yes.

19 Q Thank you.

20 A Within the notes I see that he referenced he's trying to
21 watch young teen girls.

22 Q Okay. So he didn't use the word "preteen".

23 A That's not what was written in the notes by the
24 notetaker.

25 Q Okay. Were you present for that interview?

Witt - Cross

24

1 A I was.

2 Q Okay. So the notetaker and you were both present.

3 A Yes.

4 Q Okay, thank you.

5 Could you please tell the Court -- and this is relevant to
6 the detention hearing part of it. What kind of house does
7 Mr. Gray live in?

8 A A modest house, two-story if you count maybe -- there's a
9 top level entry level story and then a basement level. I would
10 describe the upper main entry level as where the bedrooms and
11 living area is and down below is a kitchen area. I believe
12 that's where the rest room, the bathroom, is for the home and
13 some other storage type rooms.

14 Q Do you know if he owns the home?

15 A I do believe he owns the home.

16 Q Do you know --

17 A In comparison to like renting it, ma'am? Is that --

18 Q Yes. Yes.

19 A Owning, uh-huh.

20 Q Okay. Do you remember there was a dog there?

21 A I don't recall a dog.

22 Q Okay. Did you find -- did you find any firearms on the
23 premises?

24 A There was no firearms found.

25 Q Was his adult daughter home at the time?

Witt - Cross

25

1 A She was. Of the search, yes.

2 Q Did you interview her?

3 A I spoke to her very briefly, but I would say I didn't --
4 you know, I did not interview her. And that was sort at the
5 end of things when she I think was going to be going off to get
6 food or, you know, sort of leaving -- leaving the area.

7 Q Okay. Where does Mr. Gray work, if you know?

8 A He's employed by Waco, Inc., and as I understand it he
9 does railroad type work for the large -- I think it's a paper
10 plant or mill that is there in Covington.

11 Q Did you arrest him today?

12 A I did.

13 Q Okay. And he was at work, right?

14 A When I -- I arrested him in the parking lot of the
15 Covington Police Department.

16 Q Okay. Could you tell the Court how that went. Did you
17 call him from the parking lot?

18 A I did call him from the parking lot.

19 Q And what did you say --

20 A And told him that I was -- I told him that I was there and
21 that I had a phone to return to him.

22 THE COURT: You broke up there for a second there,
23 Ms. Witt. You said you had a federal -- and then you broke up.

24 THE WITNESS: So starting back, I said I called him
25 from the parking lot, the Covington Police Department parking

Witt - Cross

26

1 lot, and told him that I had a phone that I could return to him
2 there. Did that answer your question?

3 THE COURT: It did, thank you.

4 BY MS. LEE:

5 Q Was that -- that was untrue?

6 A I did not have a phone that I was going to be returning to
7 him, no.

8 Q And I'm going to guess that you said that because if you
9 say we're here to arrest you he might not come outside; is that
10 right?

11 A Agree to meet me.

12 Q I'm sorry?

13 A I said or agree to meet with me.

14 Q Okay, I got it. But in fact, when he came outside and you
15 made moves to arrest him, he did not run, correct?

16 A He did not run, no.

17 Q Okay. I have one more question, if I can just remember
18 it.

19 The incident in 2005, it was reported --

20 A I'm sorry.

21 Q You're fine. It was reported to the police, but Mr. Gray
22 was never charged with anything?

23 A It's not reflected in the file, and nor did I see anything
24 of that on his criminal history in the Covington Police
25 Department. I'm not aware --

Witt - Cross

27

1 Q Did you -- go ahead.

2 A I'm not aware of him being charged for that based on
3 that --

4 Q Did you talk to the Covington police about it?

5 A I did.

6 Q And they told you that they closed the case?

7 A It just reflects that in November of that year it was put
8 into an inactive status, as they could not locate Mr. Gray, and
9 that's all I know.

10 Q So the Covington records state that they closed the case
11 because they could not locate Mr. Gray, right?

12 A I see the phrase "inactive status". I don't know if that
13 means closed case in their language. So inactive status.

14 Q According to the Covington police, they placed the case in
15 inactive status because they could not locate him, right?

16 A Yes.

17 Q But from your search he's actually lived in Covington for
18 30 years, right?

19 A I don't -- I think he's referenced living at that
20 particular address for 20. Prior to that I'm not aware if it
21 was all in Covington to make 30 years.

22 Q Okay. So he's lived at the house since before 2005, and
23 he lives there now, right?

24 A Yes.

25 MS. LEE: That's all I have of this witness. Thank

1 you.

2 THE COURT: I don't believe I have any questions.

3 Actually, Ms. Witt, let me -- let me ask this:

4 Either through your interview or the polygrapher's
5 interview, was Mr. Gray asked any questions as to whether he
6 had had any contact with juveniles other than what was laid out
7 in the 2005 incident or what I'll call the babysitter incident?

8 THE WITNESS: Without -- I could look at the report
9 and tell the Court the exact statements that I do believe
10 represented a broad question to sexual contact with minors. So
11 he was asked about that through the polygraph questions. I
12 do -- I will say that he denied any sexual contact offenses on
13 his grandchildren and on his daughter.

14 THE COURT: Okay. And the grandchildren are eight
15 and seven. What sexes are those? Male, female.

16 THE WITNESS: They are female.

17 THE COURT: Both females, okay. Do you know whether
18 the daughter is aware of the 2005 incident or the babysitter
19 incident that Mr. Gray has discussed in his interviews?

20 THE WITNESS: I have not reviewed a report yet of the
21 conversations that she had the morning of the search with that
22 particular group. I don't think that she talked about the 2005
23 incident. And she briefly -- and previously when I mentioned I
24 spoke to her, very briefly before she departed she had vaguely
25 said something -- I remember something about a babysitter and I

Witt - Redirect

29

1 knew nothing more than that.

2 THE COURT: All right. Thank you. That's all the
3 question I have.

4 Ms. Cleary, does my question or Ms. Lee's questions
5 prompt any redirect?

6 MS. CLEARY: Yes, Your Honor.

7 REDIRECT EXAMINATION

8 BY MS. CLEARY:

9 Q Special Agent Witt, can you describe -- so when you were
10 talking about the bedroom -- or, I'm sorry, the home, I think
11 you said that downstairs, the basement level, there is a
12 bathroom and storage. So are all of the bedrooms on the same
13 level of the home?

14 A That's how it appeared to me, yes.

15 Q So there's no bedroom in the basement level.

16 A Not that I observed. I did not observe every room in the
17 house. My primary time was spent with Mr. Gray. But the two
18 bedrooms of the home were on the main -- main level, not the
19 basement level.

20 Q And the grandchildren's date of births were in the years
21 2013/2014; is that right?

22 A I believe that's correct.

23 Q So they are somewhere in the seven, eight, nine range?

24 MS. CLEARY: Okay. Okay. That's all, Your Honor.

25 THE COURT: All right, thank you very much. Thank

Falatic - Direct

30

1 you, Ms. Witt.

2 All right. Any other evidence, Ms. Cleary, other
3 than for me to take notice of the pretrial services report?

4 MS. CLEARY: Just that, Your Honor.

5 THE COURT: All right. Thank you very much.

6 Ms. Lee?

7 MS. LEE: Your Honor, I would like to ask just a few
8 questions of Ms. Falatic.

9 THE COURT: All right. Ms. Falatic, let me get you
10 sworn, if I could, please.

11 KIMBERLY FALATIC, CALLED BY DEFENDANT, SWORN

12 THE WITNESS: I do.

13 THE COURT: All right. Go ahead, please, Ms. Lee.

14 DIRECT EXAMINATION

15 BY MS. LEE:

16 Q I know we've worked with compressed time, so you -- I'm
17 sorry. Could you state your name and your job for the
18 record?

19 A Kimberly Falatic, and I'm a supervising U.S. probation
20 officer here in the Roanoke office.

21 Q Did you personally interview Mr. Gray on the phone for
22 this --

23 A I did.

24 Q -- presentence report? Okay.

25 But you were unable to speak to anybody else about him

Falatic - Direct

31

1 because --

2 A Yes, I left a message for his daughter, and she literally
3 just called about ten seconds ago.

4 Q Okay. You were able to learn that she herself has an open
5 criminal case, correct?

6 A Yes, ma'am.

7 Q And what's that for?

8 A Possession of a Schedule I or II controlled substance.

9 Q That's personal use possession, from what you can see?

10 A I do not know that.

11 Q Well, it's possession. It's not possession with intent to
12 distribute, okay.

13 A Yes.

14 Q Okay. And do you know her age?

15 A She is 28.

16 Q 28 years old. And works at Wendy's, to the best of your
17 knowledge?

18 A Yes, that's what Mr. Gray indicated.

19 MS. LEE: Okay. Court's indulgence.

20 BY MS. LEE:

21 Q Did you find Mr. Gray cooperative and forthcoming in your
22 interview with him?

23 A Yes, he was.

24 MS. LEE: That's all the questions I have.

25 THE COURT: Go ahead, Ms. Cleary.

1 MS. CLEARY: No questions, Your Honor.

2 THE COURT: Ms. Falatic, it appears as though -- you
3 were the interview officer. You made a recommendation of
4 release?

5 THE WITNESS: Yes, sir.

6 THE COURT: I'm going to ask a compound question. If
7 I was a lawyer I would object to it, but I'm going to ask it
8 just so we can -- and that is: First of all, can you tell me
9 why you recommended release? Secondly, did you know about the
10 polygraph interviews and the contact? And does that
11 information change your recommendation?

12 THE WITNESS: I recommended release because he owns
13 his own home, he's been a resident of Covington for over 20
14 years, I think he's owned his home, and he's been in Virginia
15 for over 30 years, and he's employed full-time doing the same
16 work. He was with one company, but that contract ended, and
17 that's why he transferred over to Waco, is because they
18 received a contract.

19 THE COURT: Okay. Secondly, did you -- you've heard
20 Special Agent Witt testify. Did you know anything at all about
21 the polygraph interview and the 2005 and the babysitter
22 incident that she's discussed in her testimony?

23 THE WITNESS: I was not aware of that prior to
24 writing and recommending bond in this case.

25 THE COURT: How, if at all, does that affect your

1 recommendation in this case?

2 THE WITNESS: Our concern would be the safety of his
3 grandchildren and the safety of the community at large for what
4 he has admitted during his polygraph interview, and I'm not
5 sure what conditions the Court could fashion to reduce that
6 risk now.

7 THE COURT: Because the grandchildren live there
8 and -- in large part or --

9 THE WITNESS: With his daughter working, there would
10 be no adult there to supervise him with contact with his
11 granddaughters.

12 THE COURT: Okay. Any questions -- we don't know
13 anything at all about -- all we know is what Ms. Witt has
14 testified to that he has denied any contact with his daughter
15 or granddaughters, correct.

16 THE WITNESS: Yes, Your Honor.

17 THE COURT: Okay. I think that's all the questions I
18 have.

19 Ms. Lee, it was your witness. Any further questions
20 of Ms. Falatic?

21 BY MS. LEE:

22 Q In fashioning your initial recommendation, you also took
23 into account that he does not have a serious criminal history,
24 right?

25 A Yes.

1 Q And there was no evidence of failure to appear or anything
2 like that, right?

3 A Correct.

4 MS. LEE: That's all I have of -- everything else is
5 argument, and I think there's enough in the pretrial services
6 report to inform my argument.

7 THE COURT: Okay. Ms. Cleary, do my questions of
8 Ms. Falatic prompt any questions from your perspective?

9 MS. CLEARY: No, Your Honor.

10 THE COURT: All right, thank you.

11 All right. Any other evidence, Ms. Lee?

12 MS. LEE: No, Your Honor, thank you.

13 THE COURT: All right. Ms. Cleary, argument?

14 MS. CLEARY: Your Honor --

15 THE COURT: Let me ask one question just real quick.

16 Ms. Lee, do you submit on probable cause or do you
17 want me --

18 MS. LEE: Yes. Yes, I submit on probable cause.

19 Yes, I do.

20 THE COURT: Okay. All right. Go ahead, Ms. Cleary.
21 Focus on just detention.

22 MS. CLEARY: Right, so just for detention.

23 So Your Honor, the government is going to ask that he
24 be held in this case, and this is exactly for the reasons that
25 were stated previously, which is that the government is not

1 concerned that Mr. Gray is a flight risk. It's true that he's
2 owned his home, that he stayed in the same community for this
3 many years. The biggest concern for the government is that he
4 is a danger to the community because of this 2005 incident.
5 This is something that was reported in 2005 by this minor, who
6 was a friend of his daughter's, who was at the house for a
7 sleepover. That police report, which he was ultimately
8 confronted with after not one but two but the third time,
9 Mr. Gray did ultimately admit that this has happened; that this
10 was not just a casual touching. This goes far beyond this. He
11 is ultimately kissing a prepubescent girl's breasts. Now, this
12 is consistent with what he's told law enforcement in terms of
13 what he's -- quote, unquote -- attracted to. He said that he's
14 attracted to prepubescent girls. So in this, you know, 13, 14,
15 15 age range. And given that his daughter lives in the home
16 with him and that his granddaughters both live in the home with
17 them and that they are quickly approaching that range and that
18 he frequently will be out in public and he'll see women of
19 that -- young girls of that age range and continue to be
20 attracted to them, the government just believes that given all
21 of this he is a risk to the community. He's in a home with two
22 young girls. They are all in bedrooms that are on the same
23 floor and very close together, and the government believes that
24 it would be best that he's detained until his trial.

25 THE COURT: Thank you, Ms. Cleary.

1 Ms. Lee?

2 MS. LEE: Your Honor, what would be best is not a
3 test. This is not a presumption case. It's a presumption of
4 release unless no combination of conditions could be
5 established to assure the safety of the community.

6 The government is hanging its hat on an uncharged
7 conduct that occurred 16 years ago but is suddenly concerned --
8 I mean, the police who investigated it were not concerned
9 apparently at all. After three months they said they couldn't
10 find the subject. And honestly, that's the craziest thing I've
11 ever heard. I've never heard of the police dismissing a case
12 because they can't find the culprit. Especially when he's not
13 even anywhere -- right in front of them. I'm not saying that
14 the 2005 incident didn't happen and should not give the Court
15 some concern that should translate into the Court's imposing
16 conditions designed to protect the community, but --

17 THE COURT: Help me understand what those conditions
18 are, because I think that's what Ms. Falatic said was her
19 concern.

20 MS. LEE: Yes.

21 THE COURT: Was how do we protect the
22 grandchildren.

23 MS. LEE: Okay. I'm going to be candid. I told
24 Mr. Gray "Judge Ballou is not going to want you living with
25 your children pretrial". I could sit here and argue, no, they

1 are outside of his, you know, apparent preferred range, but,
2 you know, the Court has to be concerned, and I'm not going to
3 deny that.

4 Mr. Gray I can proffer does own his home outright.
5 He is not paying a mortgage on it, and he has an excellent job
6 that provides him with an income. And there's a subplot here
7 which is that he supports -- he financially supports his
8 daughter and granddaughters at the home. She works at Wendy's,
9 but it's hard to make a living at Wendy's. So I would grant
10 that the Court -- it would be reasonable for the Court to want
11 to ensure a separation between -- even though there's been no
12 allegations of anything for 15 years, and there has not been --
13 and he was polygraphed. I wish I could do it over and tell my
14 clients don't ever, you know, submit to a random polygraph,
15 especially when they are executing a search warrant on your
16 home. But the facts are what they are, and he did submit to a
17 polygraph and he was confronted with events from his past. But
18 even that polygraph did not yield any information regarding any
19 conduct occurring in the last 16 years. And that's a huge
20 period of time. So whatever --

21 THE COURT: We don't know -- and what we don't
22 know -- we know what his answers were, and Ms. Cleary
23 rightfully did not ask what the polygraph results were because
24 I don't think that's --

25 MS. LEE: Yes.

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THE COURT: -- something I can consider. So we know what his answers were, but I don't know what the polygraph revealed.

MS. LEE: Right. But we have the post polygraph --

THE COURT: Interview, right.

MS. LEE: -- confrontation that yielded this information.

THE COURT: Correct.

MS. LEE: So where we are is that we do not have any information regarding any contact offense for 16 years. We have him charged with an offense that does not create a presumption of detention, and we have all the traditional indicia of dangerousness and risk of flight in his favor. He's got the stable job of many years. He's got the home that's paid off. He's got an absence of committing offenses on release. He's got an absence of failing to appear.

I would respectfully -- and I -- I'm not being as zealous on his behalf as I could be, but I'd respectfully ask that the Court release him, and I would not object to the Court's imposing a requirement that he not have any unsupervised conduct with any children, including those in his own family, or any other children, obviously, which are not -- which are not -- I mean, that's a gimme, but the Court would have to give to provide that condition.

I don't think there's any reason to believe or to

1 question that he would be able to sustain that in this pretrial
2 period. He would go to work. I believe that he would have to
3 get himself an apartment or similar for this pretrial period.
4 I believe he'd have to move out of his home for this pretrial
5 period, or his daughter and children would have to move out,
6 but I don't think that would be fair to them. And I've warned
7 him that I was going to suggest that in an effort to allow the
8 Court to fashion conditions that would agree -- reasonably
9 show -- again, the test does not guarantee the safety of the
10 community. The test is reasonably sure. But if he were to
11 move out of his home, and given the age of the allegations, I
12 would -- I would respectfully request that as a condition.

13 THE COURT: All right. Thank you, Ms. Lee.

14 Ms. Cleary? And I think you can address your -- your
15 comments to the issue of if -- and I'll put it this way:
16 Whether he moves out or his daughter and children move out, if
17 Mr. Gray lives in a place by himself free of the internet, free
18 of anything along those lines, what is the government's
19 position then? In other words, with electronic monitoring and
20 no contact with children, what is -- what's the government's
21 position at that point?

22 MS. CLEARY: Your Honor, the first thing the
23 government is going to point out is that presently -- and I
24 think that this has come up very quickly, but there seems to be
25 no plan for Mr. Gray to move out. It would be difficult to

1 figure out a way in which, you know, his adult daughter who is
2 raising two minor children to be able to all of a sudden leave
3 and be someplace else. Either they live someplace else or he
4 lives someplace else on simply his meager salary.

5 And in the midst of this keeping in mind that -- and
6 I don't know what their custody status would be, but certainly
7 keeping in mind that his daughter does have this pending court
8 date in January of this year for her felony charges as well.

9 But in terms of Mr. Gray living by himself, and what
10 the government wanted to address in regards to Ms. Lee's
11 argument as to the fact that this is not a presumption case,
12 currently, just to situate this case into kind of larger
13 statute and case law here, currently Mr. Gray is only charged
14 with one count of possession of child pornography. However,
15 given what Special Agent Witt has testified to today, there
16 were 63 downloads that were found on Mr. Gray's computer.

17 Now, so I think technically -- you know, he could
18 have been charged with 63 counts of possession of child
19 pornography. But in addition to that, the vast -- or however
20 many images or videos that are actually on his computer are
21 presently unknown. So the only thing that we're aware of at
22 this moment is this very brief interview with the -- with
23 the -- with the person who conducted the polygraph, the
24 polygrapher, in addition to these 63 images.

25 Now, technically -- I'm sorry.

THE COURT: But from a -- from my perspective and your burden of establishing that clear and convincing evidence, is it all that I can go on either -- not either, but what he's been charged with, not with what's possible.

MS. CLEARY: Yes. No, no, I understand. I understand. But I will just point out -- you know, since technically Mr. Gray wasn't charged -- wasn't ever fully charged -- or wasn't ever charged period with that 2005 incident, but what I was just going to point out was that if Mr. Gray had been charged with a download, which is -- or with receipt of child pornography which can be shown through these downloads, there is a presumption against bond in that case.

THE COURT: Right.

MS. CLEARY: And so that's -- that's what I was going to say, and that's what I was going to point out. I believe that given the posture of child pornography cases that there is a difference when somebody is willing to cross the line and physically touch a young child, and I think that Mr. Gray has shown that he is capable of doing that and that he has this pattern. And again, we just have these 61 images, but that certainly doesn't mean that there could be more. And he's only been charged with one. And I understand that that's all that's before the Court today, but what the Court knows is that he is somebody who has openly admitted in the last couple of weeks to spending the last 15 years sexually attracted to young women,

1 to seeing young women or young girls out in public to see -- to
2 being -- to masturbating to the thought of prepubescent girls
3 and then ultimately to, you know, creating and constructing
4 interactions where he can touch them, including, you know, when
5 they are asleep. So given that we know that this happened in
6 2005, and we know that he admitted to, you know, the babysitter
7 incident as we're calling it and we know that he has access to
8 children, I believe that he's still a danger to the community
9 given all of this information and that he should be detained.

10 THE COURT: All right. Thank you very much,
11 Ms. Cleary.

12 MS. LEE: Your Honor, to be clear, I am not asking
13 the Court to release him and requiring the daughter to move
14 out. I am saying he could --

15 THE COURT: He could move out.

16 MS. LEE: He would need to find a place. He would
17 need to move out effective the minute he were released,
18 including temporary lodging until he could find a suitable
19 apartment.

20 THE COURT: Right.

21 MS. LEE: And I'm not going to address Ms. Cleary's
22 argument that the Court should treat it like a presumption case
23 because they could have charged it differently, because I think
24 that's --

25 THE COURT: I can't do that.

1 MS. LEE: -- not valid.

2 THE COURT: Yeah, I cannot do that.

3 So here's where I am, Mr. Gray. First of all, in the
4 bond cases there are really only two questions in front of me.
5 One is are you a flight risk, and, secondly, are you a danger
6 to the community. There's not any issue here, and the
7 government does not argue, that you are a flight risk. And so
8 the issue is whether you're a danger to the community. That's
9 something that the government must prove by clear and
10 convincing evidence.

11 In that regard, there's been a lot of bantering back
12 and forth as to whether there's a presumption that you are to
13 be detained. Given the way which you are presently charged,
14 that you're -- there is not a presumption that you are to be
15 detained. You're charged with one count of possession of child
16 pornography as laid out in paragraph 11 of the complaint. As
17 it relates to that, there is evidence -- there is probable
18 cause that you committed this offense. I'm going to send that
19 to the grand jury

20 With respect to the conditions of detention versus
21 release, the factors I consider are this: One is the nature of
22 the offense, and that is that you had in your possession child
23 pornography. They were in a file folder with many -- and I'll
24 say many because I don't believe Ms. Witt testified that every
25 I guess file name was consistent with child pornography, but

1 many of them were. She has reviewed one video that she didn't
2 describe in detail on scene and then one video that was
3 provided to her that's described inside the criminal complaint.
4 But the circumstantial evidence would suggest it is consistent
5 with possession of much child pornography. And with thorough
6 forensic evaluation of the evidence that was seized will
7 yield -- will yield an answer to that.

8 The evidence further consists that you are employed.
9 You own your home. You have a good job. You do not have a bad
10 criminal record. I think there was -- I've got the criminal
11 record up here. It shows that you had one prior felony in 2013
12 in which you were on supervised probation. Are you off
13 supervised probation at this time?

14 THE DEFENDANT: Yes, sir. It was only three year
15 probation.

16 THE COURT: All right. So three years suspended and
17 three years probation. All right. And you had one other
18 charge in 2000 and another one in 1993 when you were much --
19 much younger.

20 The evidence that is -- and based upon that evidence
21 the government -- not the government, but probation had
22 recommended your release upon condition.

23 The evidence before me is what was yielded in this
24 post-polygraph interview and the interview at the time of the
25 search with Ms. Witt that suggests that there are two

1 incidences in which there is conduct with a minor and -- and
2 that you have remained sexually attracted and have at least
3 acted with yourself in response to that attraction of sexual
4 minors -- of minors.

5 Based upon that and the evidence of going forward and
6 the number of files that were found, I do find you to be a
7 danger to the community. I don't -- and what I would want to
8 consider, Ms. Lee, is whether there is a separate home plan.
9 Rather than simply release Mr. Gray and say you've got to go
10 live somewhere else, whether there is a separate home plan that
11 can be -- that can be fashioned in that regard. But I also --
12 Ms. Witt, how long will this forensic evaluation be?

13 AGENT WITT: I can't speak to that. There were two
14 sort of computer hard drive towers, if you will, that will need
15 to be sent to Richmond to be evaluated by the CART agents, and
16 I'm hoping to be able to review some of the more external
17 storage datas that were seized here locally.

18 THE COURT: Okay. Well, so my ruling at this time,
19 Ms. Lee, is that the evidence before me establishes by clear
20 and convincing evidence that Mr. Gray is a danger to the
21 community, but the present home plan of either living with his
22 daughter and grandchildren -- which is not exactly what you're
23 saying, I recognize that -- is not acceptable and nor is it --
24 nor is a home plan of I'm going to release you and you've got
25 to find out -- figure out a place to live that's -- that does

1 not have minors there is likewise not acceptable.

2 I will allow you to come back and consider another
3 home plan, but I -- I am -- I'm also concerned about the extent
4 to which there is information if there are 60 files. There is
5 no evidence right now in front of me as to the timing of when
6 that -- when that came back and when it was -- when they were
7 obtained. I'll use those terms. I don't draw any conclusions
8 one way or the other.

9 MS. LEE: I have to gently object to the Court's sort
10 of taking an interest to when the evidence is going to be
11 available. The government has -- the rest -- the government
12 decides when he gets arrested and the government --

13 THE COURT: I agree with that.

14 MS. LEE: -- goes forward on the evidence that it has
15 that day. There's no provision to like let's see what else the
16 government can get.

17 THE COURT: I'm not -- I'm not waiting for that.

18 MS. LEE: Okay.

19 THE COURT: What I'm concerned about is the fact that
20 there is -- there are a number of files. There's evidence of
21 ongoing sexual interest between 2005 and 2021 of young -- young
22 girls and acting on that with himself after seeing young girls
23 and that there was contact in 2005 and maybe before. And so
24 that concerns me a lot, that -- and so I'm not sure that even
25 living alone takes care of that issue. So, you know, I'm not

1 asking the government to produce more evidence. I think
2 you're -- you're right about that. And that would be
3 inappropriate for me to do that.

4 MS. LEE: The problem is the loss of his job, Your
5 Honor. The loss of his job is going to have direct
6 consequences for him, obviously, but also his daughter and
7 grandchildren who are not currently involved in this case in
8 any way. And I -- it just -- I think that that's -- it's not
9 helpful to us as a society to take somebody who has not been --
10 I mean, with all -- we all get sick listening to this type of
11 evidence, but we still have to separate what's illegal and
12 what's not illegal. And masturbating is not illegal in any
13 universe. The Court can only consider it to the extent that he
14 may act on it, and there's no evidence before this Court going
15 back 16 years of him ever acting on it. So to say you're
16 losing your job, you're going to sit in jail, even though
17 you're ostensibly presumed innocent of the criminal charges, is
18 a net loss in this kind of -- you know, this economic crisis
19 that we're all in because of COVID, but he's -- his children,
20 his daughter and his grandchildren, especially if his daughter
21 has an addiction problem that she's struggling with and we're
22 just sort of -- we're making things worse for the world,
23 including the very people we're supposed to be protecting,
24 which is his daughter and his grandchildren.

25 I don't see any limitation on the Court's ordering

1 him to not go home. That happens all the time in domestic
2 abuse cases, yes, I'm releasing you but you can't go home. The
3 person goes and takes their credit card and goes to a motel
4 until they find themselves a suitable studio apartment.

5 THE COURT: I can tell you in the time that I've been
6 here, I've not released somebody without an established home
7 plan.

8 MS. LEE: That's true. This Court has not. But in
9 other -- in a non -- I can certainly say that from other
10 districts in a nonpresumption case it happens all the time. I
11 do agree that this Court has not done that.

12 THE COURT: Correct.

13 MS. LEE: But also we're putting this gentleman in
14 this ridiculous position of having to fashion a home plan
15 without having -- you know, we can see from his pretrial
16 services report he does not have family members he is close
17 with nearby. He can't go live with his mother or whatever one
18 normally does in this situation. So he's in a position where
19 from jail he's supposed to be arranging new homes that I can
20 present it to the Court, and I just --

21 THE COURT: His daughter -- his daughter may be able
22 to help him to do that. I mean --

23 MS. LEE: That's true. That is true. That is true.
24 And I'm going to reach out to her. Okay, thank you.

25 THE COURT: Okay, all right. Thank you.

1 MS. LEE: So the Court is saying "no home plan, I
2 can't reject him, but you come up with a home plan you can at
3 least file a motion" --

4 THE COURT: I'll consider --

5 MS. LEE: Okay, thank you.

6 THE COURT: You don't need to file a motion. Just
7 ask -- ask Ms. Davis or Ms. Ayersman. Ms. Brown is out this
8 week. I'm here this week and next week, and then I've got two
9 weeks that are going to be -- that I'm going to be
10 unavailable.

11 MS. LEE: Which is richly -- your unavailability will
12 be richly deserved by you. And if Ms. Brown is in like Hawaii
13 right now, then God bless her, because she works too hard.

14 THE COURT: My unavailability may be more appreciated
15 by others than most.

16 Mr. Gray, in all seriousness, if you disagree with my
17 decision, you do have a right to appeal any decision to a
18 presiding district judge, we'll assign it. Since it's a
19 criminal complaint at this time it does not have a judge
20 assigned, but we would assign it to a judge if you wish to
21 address it, so...

22 MS. LEE: Oh, we just lost the judge.

23 THE CLERK: I probably clicked a wrong button.

24 MS. LEE: That's a first.

25 Brittany, will it be possible if we could talk to him

1 briefly after court adjourns?

2 THE CLERK: Sure.

3 MS. LEE: Thank you.

4 PROBATION: Christine, do you need his daughter's
5 phone number?

6 MS. LEE: Oh, yeah. That's actually what I was going
7 to ask him for, but I don't want it on the --

8 PROBATION: I was going to say, well, I have to wait
9 until the public line goes off.

10 MS. LEE: You can even email it to me.

11 PROBATION: I'll email it to you.

12 MS. LEE: Okay, thank you.

13 THE COURT: I'm sorry I got disconnected. I was
14 saying, Mr. Gray, you do have a right to appeal my decision to
15 the presiding district judge. We will assign a judge if you
16 wish to do so, but that will be my decision.

17 All right, very well. Anything else we need to
18 address, Ms. Cleary?

19 MS. CLEARY: No, Your Honor.

20 THE COURT: All right. Ms. Lee?

21 MS. LEE: No. Mr. Gray, if you can just call my
22 office Monday morning, I'd be grateful.

23 THE DEFENDANT: All right. How do I get ahold of
24 you?

25 MS. LEE: You tell them it's a Federal Public

1 Defender and they will put you through, and they should make it
2 free for you.

3 THE DEFENDANT: All right, thank you.

4 MS. LEE: Thank you.

5 THE COURT: All right, thank you.

6 We'll stand in recess. Thank you.

7 MS. LEE: Thank you.

8 MS. CLEARY: Thank you.

9 (The proceedings concluded at 4:19 p.m.)

10 **CERTIFICATE**

11 I, Mary J. Butenschoen, do hereby certify that the
12 foregoing is a correct transcript of the electronic recording
13 in the above-entitled matter.

14

13 /s/ 1/10/2022
Mary J. Butenschoen, Transcriber