APPENDICES

APPENDIX A

United States v. Poulo, No. 21-11425, 2023 WL 2810689 (11th Cir. April 6, 2023)

[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 21-10667

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GEORGE POULO,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:20-cr-00050-PGB-DCI-1

Before WILSON, BRANCH, and LAGOA, Circuit Judges.

LAGOA, Circuit Judge:

This appeal has been consolidated with *United States v. Dawson*, No. 21-11425. Like *Dawson*, this appeal asks us to determine whether an adult who films himself exposing his genitals and masturbating in the presence of a child where the child is the object of sexual desire in the film "uses" that child to engage in sexually explicit conduct for purposes of 18 U.S.C. § 2251(a). For the reasons discussed in *Dawson*, we hold that the above conduct fits squarely within the language of the statute.

I. FACTUAL AND PROCEDURAL HISTORY

A. Underlying Facts

In June 2020, a federal grand jury issued a superseding indictment, charging Poulo with five counts of sexual exploitation of a minor, in violation of 18 U.S.C. § 2251(a)[1] and (e) ("Counts One

[1] Section 2251(a) provides:

> (a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or

through Five"), and one count of distribution of child pornography, in violation of 18 U.S.C. § 2252A(a)(2) and (b)(1) ("Count Six"). Poulo pleaded not guilty and waived his right to a jury trial.

Before the bench trial, the parties stipulated to the following facts. On February 3, 2020, Investigator Michael Sewall, an undercover sheriff's office investigator in Wisconsin, observed Poulo and others conversing on Kik—an online social media application—in a chat room called "breeding no age limits." There, Poulo told the group that he had let a five-year-old girl come into his bedroom and touch his penis while he pretended to be asleep. At that point, Investigator Sewall and Poulo started chatting via private message on Kik, and Poulo told Investigator Sewall that he could get the girl to "jerk him off" and that he planned to masturbate after the woman living with him left the house.

A couple minutes later, Poulo sent Investigator Sewall a photo of his erect penis. He later sent Investigator Sewall two more photos of his erect penis with what appeared to be ejaculatory fluid on it. The two photos depicted a fully clothed girl who

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> facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

was about five years old and standing in the doorway of the room looking at Poulo as he lay naked on a bed with his penis erect. Those photos were the basis for Counts One and Two.

Later that day, Poulo sent Investigator Sewall three photos of himself masturbating while the same fully clothed, five-year-old girl watched from the doorway of the room. The first photo showed the girl with her back to Poulo but appearing to look over her shoulder toward him. In the other two photos, the girl was directly looking at Poulo while he masturbated. Those three images were the basis for Counts Three through Five.

After these conversations, FBI agents searched Poulo's home and interviewed him. Poulo admitted during the interview that he had used the Kik application and had used his cellphone to take the five photos as the five-year-old girl stood "in the doorway watching him." He also explained that he had taken the photos to "impress guys on the internet" and admitted that he "took the pictures of the five-year-old appearing to watch him masturbate because it was arousing to him and it was arousing to him to send them to other people." He admitted that he was sexually attracted to the five-year-old girl.

In the joint stipulation, the parties agreed that the photos are visual depictions of Poulo with an actual minor while he engaged in self-masturbation, which constituted sexually explicit conduct and lascivious exhibition of his genitals. Poulo took the five photos "for the purpose of photographing" the five-year-old girl. Poulo actually shipped, transported, and transmitted the photos using a

means and facility of interstate and foreign commerce, specifically via the Internet using the Kik application on his iPhone.

B. Procedural History

At the bench trial, the government and Poulo advanced essentially the same arguments as the parties in *Dawson*.[2] The government argued that the district court should find Poulo guilty of Counts One through Five because he violated § 2251(a) by using the child to engage in sexually explicit conduct in order to create a visual depiction of that conduct. The government argued that Poulo "used" the child to engage in sexually explicit conduct since he created the images and engaged in the masturbation only because of the child's presence. It further argued that Poulo's use of the child satisfied the expansive definition of the word "use" in the context of § 2251(a) as found by the Third and Eighth Circuits. *See United States v. Lohse*, 797 F.3d 515 (8th Cir. 2015); *United States v. Finley*, 726 F.3d 483 (3d Cir. 2013).

Poulo, on the other hand, asserted that the five images constituting the basis of Counts One through Five were legally

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[2] This case has been consolidated with *United States v. Dawson*, No. 21-11425 for purposes of oral argument. *Dawson* raises the same issue of statutory interpretation, namely, whether a defendant "uses" a minor to engage in sexually explicit conduct for the purposes of 18 U.S.C. § 2251(a) when the defendant makes a visual depiction of himself engaging in sexually explicit conduct nearby a fully clothed minor. The district court in that case, like the district court here, concluded that § 2251(a) criminalizes visual depictions of sexually explicit conduct where the minor is a passive participant.

insufficient to sustain convictions on those counts under § 2251(a). In doing so, he summarized the Seventh Circuit's holding in *United States v. Howard*, 968 F.3d 717, 718 (7th Cir. 2020), that a defendant who had made visual depictions of himself masturbating next to a fully clothed and sleeping child had not violated § 2251(a). Poulo argued that, based on the "striking similarity" between the stipulated facts and the facts in *Howard*, he had not violated § 2251(a) by creating the five photos in this case. During the bench trial, Poulo moved for a judgment of acquittal on Counts One through Five, which the government opposed.

The district court issued a memorandum opinion and order on the merits that adjudicated Poulo guilty of all six counts. The district court first noted that this Court had not yet been confronted with the specific issue of whether criminal liability under § 2251(a) requires the child to have been actively engaged in the sexually explicit conduct. The district court then summarized the cases from the Third, Seventh, and Eighth Circuits that address the meaning of "use" in § 2251. Thereafter, the district court explained that it was declining to follow the Seventh Circuit because its analysis in *Howard* "fails to accord the plain meaning to [the word] 'uses' and fails to properly construe the textual import of the words 'to engage in.'"

The district court began its own analysis by considering the comprehensive scheme that Congress created to combat child pornography and child exploitation. The district court determined that the absence of any requirement in § 2251(a) that the minor

actively perform a sexually explicit act reflected an intentional legislative decision to broadly cover instances of child sexual exploitation, including conduct that falls short of the traditional notion of child pornography.

The district court then narrowed in on the language of § 2251(a). Relying on the plain meaning of the verb "use"—which it understood as being "to put into action or service: avail oneself of: employ . . . to carry out a purpose or action by means of"—the district court determined that a defendant "uses" a minor to engage in sexually explicit conduct under § 2251(a) "by employing the minor as a prop or an object of desire while [the defendant] is engaged in sexually explicit conduct."

The district court also reasoned that, if Congress had wanted to limit § 2251(a)'s reach to require a minor's active participation in the sexually explicit conduct, it would have "proscribed the use of a minor 'engaging in'—active participation—instead of use of a minor 'to engage in'—passive participation—sexually explicit conduct." The district court similarly reasoned that Congress could have borrowed language from other statutes to proscribe the use of a minor with knowledge that the minor would be portrayed engaging in sexually explicit conduct. Because Congress had done neither, the district court declined to construe § 2251(a) to disregard the plain meaning of "use."

The district court further noted that, because Congress had created other laws that criminalized conduct involving visual depictions of minors actively engaging in sexually explicit conduct, it

was unsurprising that § 2251(a) criminalized "a host of other means by which a minor is sexually exploited short of active participation in the proscribed sex acts."

For these reasons, the district court found Poulo guilty of all counts and denied his motion for a judgment of acquittal. The district court sentenced Poulo to a 2,040-month total sentence, consisting of 360 months on each of Counts One through Five and 240 months on Count Six, all running consecutively, to be followed by a life term of supervised release.

Poulo timely appealed his convictions for Counts One through Five.[3]

II. STANDARD OF REVIEW

We review *de novo* both the interpretation of a criminal statute as well as the denial of a motion for judgment of acquittal based on the sufficiency of the evidence. *United States. v. Pirela Pirela*, 809 F.3d 1195, 1198 (11th Cir. 2015).

III. ANALYSIS

On appeal, Poulo argues that he did not violate § 2251(a) because the images at issue depict an adult engaging in solo, adult-only sexually explicit conduct near a fully clothed minor who was not the focal point of the images, depicted as a sexual object, or

[3] Poulo did not contest below, and does not challenge on appeal, his conviction for Count Six under § 2252A(a)(2) and (b)(1) for distribution of child pornography.

otherwise involved in the sexual act. Poulo contends that the key phrases "uses" and "to engage in," as relied on by the district court to convict him under § 2251(a), require some sort of "action involving a minor (uses) with some logical relationship to the minor's participation (to engage in) in sexually explicit conduct." Those elements, according to Poulo, are not met here. We disagree.

Section 2251(a) makes it illegal for "[a]ny person 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 . . . ."

Poulo's interpretation of § 2251(a) to require the active participation of the child in the sexually explicit conduct for criminal liability is now foreclosed by this Court's decision in *United States v. Dawson*, No. 21-11425, at 15–22 (11th Cir. Apr. 5, 2023). There, we concluded that a minor does not need to be the one engaging in the sexually explicit conduct in order to be "used" under the plain meaning of the statute. Rather, an adult can "use" a child as the object of sexual desire while he records himself engaging in sexually explicit conduct, like masturbating to the child while in the child's presence. In light of that decision, Poulo's interpretive argument fails.

As a final matter, we note that Poulo has requested for the first time on appeal that we apply the rule of lenity to read § 2251(a) to exclude his conduct. But, as this Court concluded in *Dawson*, the rule of lenity does not apply to § 2251(a) because "the

traditional tools of statutory interpretation provide sufficient clarity on the meaning of § 2251(a)." *Dawson*, No. 21-11425, at 24. Therefore, Poulo's rule of lenity argument similarly fails.

IV. CONCLUSION

For the reasons expressed in *Dawson*, Poulo's conduct falls squarely within the scope of the conduct prohibited by 18 U.S.C. § 2251(a). Poulo used a child to engage in sexually explicit conduct for the purpose of producing a visual depiction of the conduct. We therefore affirm his convictions for sexual exploitation of a minor in violation of § 2251(a).

AFFIRMED.

APPENDIX B

United States v. Dawson, 64 F.3d 1227 (11th Cir. 2023)

64 F.4th 1227
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Edgar John DAWSON, Jr., Defendant-Appellant.

No. 21-11425

Filed: 04/05/2023

Synopsis

Background: Defendant was convicted, following a bench trial, in the United States District Court for the Middle District of Florida, No. 6:20-cr-00077-WWB-GJK-1, Wendy W. Berger, J., of sexual exploitation of a minor. Defendant appealed.

Holdings: The Court of Appeals, Lagoa, Circuit Judge, held that:

as a matter of first impression, to support a conviction under statute governing sexual exploitation of children, a minor must be involved in the offender's sexually explicit conduct, but the minor need not necessarily be actively engaging in his or her own sexually explicit conduct;

defendant's actions constituted use of minor to engage in sexually explicit conduct in violation of statute governing sexual exploitation of children; and

rule of lenity did not apply to statute governing sexual exploitation of children.

Affirmed.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection.

***1229** Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 6:20-cr-00077-WWB-GJK-1

Attorneys and Law Firms

Roberta Josephina Bodnar, U.S. Attorney's Office-FLM, Ocala, FL, David Paul Rhodes, U.S. Attorney Service-Middle District of Florida, U.S. Attorney, U.S. Attorney's Office, Tampa, FL, for Plaintiff-Appellee.

Adeel Bashir, Federal Public Defender's Office, Tampa, FL, Ali Kamalzadeh, Gurney Law, PLLC, Orlando, FL, Rosemary Cakmis, Rosemary Cakmis, Orlando, FL, James T. Skuthan, Federal Public Defender's Office Middle District of Florida, Orlando, FL, for Defendant-Appellant.

Before Wilson, Branch, and Lagoa, Circuit Judges.

Opinion

Lagoa, Circuit Judge:

***1230** This appeal asks us to determine whether an adult who films himself exposing his genitals and masturbating in the presence of a child where the child is the object of sexual desire in the film "uses" that child to engage in sexually explicit conduct for purposes of 18 U.S.C. § 2251(a). We hold that the above conduct fits squarely within the language of the statute.

I. FACTUAL AND PROCEDURAL HISTORY

A. Underlying Facts

In July 2020, a federal grand jury indicted Edgar Dawson, Jr. for two counts of distribution of child pornography, in violation of 18 U.S.C. § 2252A(a)(2) and (b)(1) ("Counts One and Two"), and five counts of sexual exploitation of a minor, in violation of 18 U.S.C. § 2251(a) [1] and (e) ("Counts Three through Seven").

1 Section 2251(a) provides:

> (a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual

> depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

The parties stipulated to the following facts related to Counts Three through Seven for the bench trial. In March 2020, FBI Special Agent Robert Schwinger was acting undercover in a Kik chatroom—an online social media application—called "Daugh Fun Time."[2] In that chatroom, Schwinger observed Dawson posting images, videos, and messages, including two images of a fully clothed eleven-year-old girl on an exercise mat.

2 According to the government, this is short for "Daughter Fun Time."

Dawson then posted a video of the same child in the chatroom. In that video, which formed the basis for Count Three, the child was kneeling on the exercise mat in a yoga pose, with her torso lowered over her knees, her forehead on the ground, and her feet under her buttocks. Dawson was filming her from behind, and he then panned the camera down to show that his penis was exposed and erect and that he was masturbating. He then panned the camera back up to the child.

After he posted this video in the chatroom, other members of the group chat asked who the child was. In response, Dawson posted three more videos, which formed the bases for Counts Four through Six. Count Four was based on a thirteen-second video showing the same fully clothed eleven-year-old child sitting at a dining room table with her face visible and voice audible. Dawson sat at the head of the table and panned the camera down to show himself masturbating under the table while he and the child talked.

***1231** Count Five was based on a six-second video showing the same fully clothed child as she continued to sit at the dining room table with the top of her head visible. Dawson panned the camera down to show himself masturbating as he stood inches behind her and then panned the camera back up to show the child's head as they continued to converse.

Count Six was based on a four-second video with Dawson standing directly behind the same fully clothed child and the camera pointed downwards to show he was masturbating. He then ejaculated onto the floor. The child was not in the camera frame at first, but eventually, the back of her head was shown on the video before Dawson panned the camera back down to show his penis. At the end of the video, both Dawson's penis and the child are visible. Later in the group chat, Dawson revealed that the child was his daughter and that he "love[d] jerking off in [her] panties."

Count Seven was based off a later interaction between Dawson and Metropolitan Department Detective Tim Palchak. Palchak, like Schwinger, was operating in an undercover capacity as an administrator of a Kik chatroom that Dawson entered. Palchak asked Dawson to verify his authenticity, and in response, Dawson sent Palchak a private message with a live image of his daughter. His daughter was fully clothed and lying on the floor. Palchak asked Dawson to hold up four fingers in a new picture to verify he had immediate access to the child, which Dawson then did. While Dawson and Palchak conversed, Dawson told Palchak that he was a forty-one-year-old male in the United States with a twelve-year-old daughter. When Palchak asked what Dawson did with the child, Dawson replied, "Cum on her when she is sleeping. But sometimes I cum on her from behind," and "I jerked off on the top of head [sic] this weekend while she was eating lunch. She never even noticed. ... Ill [sic] do it again for you soon."

That same day, Dawson sent Palchak a fourteen-second video that he took in the child's bedroom where she was seated at a desk while fully clothed. The top of the child's head, her forearm, and her hands were visible as she drew and spoke to Dawson. About one second into the video, Dawson panned the camera down to show his exposed and erect penis while he masturbated and spoke to the child. He then panned the camera back to the top of her head as she continued to speak. Dawson then panned the camera back down to his penis and continued to masturbate. About ten seconds into the video, his penis brushed up against the child's hair as she continued to draw, and moved as a result of the contact. This video formed the basis for Count Seven.

The FBI executed a search warrant on Dawson's residence and then interviewed him. In the interview, Dawson admitted to

using the Kik application to distribute child pornography to other Kik users. He also admitted to taking videos of himself masturbating in the presence of his daughter and including her in the videos. When asked if it was arousing to him to have his daughter sitting in his presence while he masturbated, Dawson admitted that it was, and he explained the purpose of the videos was to post them and "get off" on them. Dawson stated he never showed his penis to his daughter and later stated she never knew or understood what he was doing.

The FBI also interviewed the child. During that forensic interview, the child explained that nobody had ever taken pictures of her genitals or naked body. When asked if she had ever seen anyone masturbate or touch their genitals, the child shook her head.

*1232 B. Procedural History

After being indicted, Dawson moved to dismiss Counts Three through Seven, arguing that the evidence did not support those Counts. The district court denied this motion, noting that it was inappropriate to evaluate the merits of the evidence at the motion to dismiss stage.

Dawson waived his right to a jury trial, and the district court proceeded with a bench trial. After the parties moved to admit their evidence, Dawson argued that Counts Three through Seven were outside the scope of the conduct prohibited by 18 U.S.C. § 2251(a) and made an oral motion for judgment of acquittal on those Counts. Dawson argued that the videos did not show child pornography, that the child was not engaged in any sexually explicit conduct, and that the child was unaware of Dawson masturbating. Rather, Dawson argued, the videos showed an adult engaging in his own sexual act, and the child was not involved, citing the Seventh Circuit's decision in *United States v. Howard*, 968 F.3d 717 (7th Cir. 2020), for support. In that case, the Seventh Circuit, facing similar facts of an adult male masturbating over a fully clothed, sleeping child, found that the defendant's conduct was outside the scope of § 2251(a). *Id*. at 718. Dawson argued that Congress intended to criminalize the production and exploitation of children where the child was the focal point of the pornography, was actively engaged in the sexually explicit conduct, or was being used sexually with regard to the sexual activity. Here, he contended, that would require the child to be actively engaging in Dawson's masturbation.

The district court questioned Dawson about the part of the video that formed the basis for Count Seven where his penis touched his daughter's hair. Dawson's counsel argued that in *Howard*, the Seventh Circuit did not find prohibited conduct when the defendant's penis touched the child's lips, which was more egregious conduct than Dawson's penis touching his daughter's hair. The district court disagreed with this reading of *Howard*, noting that the Seventh Circuit never reached the issue of whether the defendant touching the child's lips with his penis was prohibited conduct because the government abandoned the issue on appeal in that case, and the district court mused that there may have been a different result if that issue was preserved. Dawson concluded his oral motion by arguing that this was a statutory construction case and that, under the principle of *noscitur a sociis*, [3] the term "uses" in § 2251(a) should be understood in context and accordance with the other verbs surrounding it: "employ[ ]," "persuade[ ]," "induce[ ]," "entice[ ]," and "coerce[ ]." That is, because all the neighboring verbs require the child's active engagement in the sexually explicit conduct, so too does "uses."

3 *Noscitur a sociis* is a Latin phrase that means "it is known from its associates."

The government countered that the phrase "child pornography" was not in § 2251(a) and should not be read into it. Additionally, according to the government, there are multiple ways for a person to violate § 2251(a), including the passive use of a child in sexually explicit conduct. The government argued that Dawson used the child to engage in sexually explicit conduct, the child was his sexual "muse," the presence of the child was the reason for making the videos, and the child was used as a prop in the videos. Addressing Dawson's *noscitur a sociis* argument, the government contended that each verb in the statute required different degrees of will, with "coerce" being the most forceful and "use" being the least forceful, and that each verb therefore had to be read differently.

***1233** The district court took Counts Three through Seven under advisement but found Dawson guilty of Counts One and Two at the end of the bench trial. After the trial, the district court issued an opinion and order denying Dawson's oral motion for a judgment of acquittal on Counts Three through Seven. The district court held that the government proved beyond a reasonable doubt that an actual minor was depicted in the videos underlying Counts Three through Seven, and the videos were transported in interstate commerce through the internet. The district court then concluded that § 2251(a)

does not require the child to be actively engaged in sexually explicit conduct, and thus Dawson's conduct was prohibited by the statute.

Because § 2251(a) does not define "uses," the district court looked to the ordinary meaning of the word to construe its meaning. Mindful that it had to look at the context of the words surrounding "uses," the district court defined the word as "to put into action or service: avail oneself of" or "to carry out a purpose or action by means of." It explained that, even though "uses" is surrounded by more active verbs, there is an active component to the notion of "use" in that a perpetrator can "use" a minor to engage in sexually explicit conduct without the minor's conscious or active participation.

The district court explained that although the videos "depict[ed] a fully clothed child engaged in innocuous behavior," the "innocent depictions became ... lascivious when [Dawson] record[ed] himself masturbating in the child's presence [and] purposefully pann[ed] the camera from the child to his erect penis." The district court also stated that Dawson made it "apparent that the child [was] the object of his desire when he touch[ed] the child with his penis while masturbating in the video that formed the basis for Count Seven." The district court explained that Dawson's intent was clear from the videos, but even if his intent was unclear from the videos, his intent to exploit the child for a sexual purpose was shown by his exchanges with like-minded individuals in chat rooms and his admission that he was aroused by masturbating in the presence of his child. These exchanges confirmed that Dawson's conduct was not purely adult sexual behavior but was premised on the use of the child as a sexual object to help Dawson "get off." After construing § 2251(a) not to require the active participation of the minor and considering the evidence of the stipulated facts and other exhibits, the district court found Dawson guilty of Counts Three through Seven because he took videos of himself masturbating in the child's presence, and therefore, used a minor to engage in sexually explicit conduct to produce a visual depiction of such conduct in violation of § 2251(a).

The district court sentenced Dawson to a total of 600 months' imprisonment—240 months' imprisonment for Counts One and Two, to run concurrently with each other, and 360 months' imprisonment for Counts Three through Seven, to run concurrently with each other and consecutive to Counts One and Two—to be followed by five years of supervised release. Dawson did not challenge his conviction under Counts One and Two for violating 18 U.S.C. § 2252A(a)(2), but timely appealed his convictions for Counts Three through Seven. [4]

4 This case was consolidated with *United States v. Poulo*, No. 21-10667, for purposes of oral argument. *Poulo* raises the same issue of statutory interpretation—whether a defendant "uses" a minor to engage in sexually explicit conduct for the purposes of 18 U.S.C. § 2251(a) when the defendant makes a visual depiction of himself engaging in sexually explicit conduct nearby a fully clothed minor who is not herself actively engaging in any sexual conduct. The district court in that case, like the district court here, concluded that § 2251(a) criminalizes "visual depictions of sexually explicit conduct where the minor child is a passive participant." *United States v. Poulo*, 491 F. Supp. 3d 1244, 1252–53 (M.D. Fla. 2020). We address *Poulo*'s appeal in a separate opinion.

*1234 II. STANDARD OF REVIEW

We review *de novo* both the interpretation of a criminal statute and the denial of a motion for judgment of acquittal based on the sufficiency of the evidence. *United States. v. Pirela Pirela*, 809 F.3d 1195, 1198 (11th Cir. 2015).

III. ANALYSIS

On appeal, Dawson argues that he did not violate § 2251(a) because the videos underlying his convictions for Counts Three through Seven depicted an adult engaging in solo, adult-only, sexually explicit conduct near a fully clothed minor who was neither the focal point of the images, depicted as a sexual object, nor otherwise involved in the sexual act. He contends that the key verb in § 2251(a) for this case is "uses," and that the district court erred because he did not "use" his daughter. Dawson contends that the *noscitur a sociis* canon gives the word "uses" a contextual meaning much like its five companion words in the statute, "employs, persuades, induces, entices, or coerces," which require the minor, not merely the offender, to engage in the sexually explicit conduct. In support, Dawson notes that the word "uses" is limited by the adverbial prepositional phrase "to engage in." [5] Dawson relies primarily on the Seventh Circuit's decision in *Howard* to support his conclusions. In *Howard*, the Seventh Circuit reasoned that the government's

interpretation to punish offenders even when the minor is not engaged in sexually explicit conduct would result in punishing offenders when the minor is far away, such as "in a neighbor's yard or across the street." *See* 968 F.3d at 721–22. Dawson argues that without a proper textual limitation, the government's interpretation is absurd because it would lead to criminalizing sexually explicit conduct involving a faraway minor who does not appear in the images at all. Dawson further contends that his interpretation of § 2251(a) is correct because it aligns with the statutory scheme set forth by Congress, which prohibits only those images that depict minors engaging in sexually explicit conduct, not images where the minors are merely present while sexually explicit conduct occurs.

5 Dawson concedes, however, that the minor's engagement does not have to be active and that passive engagement suffices.

Additionally, in the event that this Court finds the statute to be ambiguous, Dawson requests, for the first time on appeal, that we apply the rule of lenity to read § 2251(a) to exclude his conduct. Finally, building on his prior arguments, Dawson argues that since he did not use his daughter to engage in sexually explicit conduct, these videos do not constitute a violation of the statute.

In response, the government relies on the ordinary meaning of the word "uses" to argue that Dawson "used" his eleven-year-old daughter to engage in sexually explicit conduct. It asserts that Dawson "used" the child since he "employed" her, "availed himself" of her, and "carried out a purpose or action by means of" the child because, by his own admission, he was sexually aroused to masturbate in the child's presence, and the child was the reason for his sexually explicit conduct and recordings. Thus, the government argues that, while Dawson's use of the child is not the typical § 2251(a) case, i.e., one involving the lascivious display of the minor's ***1235** own genitals, Dawson nonetheless used the child under the ordinary meaning of the term by making her the object of his sexual desires. In support, the government cites *United States v. Lohse*, 797 F.3d 515, 521 (8th Cir. 2015), where the Eighth Circuit held that the defendant who had photographed himself naked next to a sleeping child had "used" the child. To the extent that Dawson relies on *noscitur a sociis*, the government argues that the verbs in the statute prohibit a broad range of conduct with each verb connoting a different degree of will imposed on the child. The government contends that the word "use" implies a more passive involvement of the child in a way that the other verbs do not and covers the conduct at issue here.

In response to Dawson's contention that the adverbial preposition phrase "to engage in" must be read to limit the word "use" and require the engagement of the minor in the sexually explicit conduct, the government first argues that the child was engaged in the sexually explicit conduct, although unknowingly, because she was made "a crucial component" of the videos and Dawson's conduct. The government then argues that it does not matter whether the child was engaged in the sexually explicit conduct because the relevant section of the statute does not require the minor to engage in the sexually explicit conduct, unlike other sections of the statute, and also because Congress defined sexually explicit conduct to cover the "lascivious exhibition of the anus, genitals, or pubic area of *any person*." 18 U.S.C. § 2256(2)(A)(v) (emphasis added). The government also argues that Dawson's concern that the government's interpretation imposes no limitation and would criminalize sexually explicit conduct involving faraway minors who do not appear in the image or video at all is unfounded because the government's interpretation requires the minor's presence to be the object of the offender's sexual desire, as it was in this case. As for Dawson's statutory scheme argument, the government contends that its reading of § 2251(a) furthers the statutory objective of protecting children against sexual exploitation and fits within the broader purpose of the statute to prevent the "sexual exploitation of children."

Finally, the government argues that Dawson failed to raise the issue of lenity below, so plain error review applies, and he cannot show plain error in the district court's failure to apply the rule of lenity.

We proceed by first interpreting the word "use" in the statute and hold that Dawson's conduct constitutes a "use" of his daughter in violation of the statute. Next, we consider the rule of lenity and hold that the rule is inapplicable here.

A. The Meaning of "Use" in 18 U.S.C. § 2251(a)

"Section 2251(a) is the 'production' section of a broad regulatory scheme that prohibits the production, receipt, distribution, and possession of child pornography." *United States v. Ruggiero*, 791 F.3d 1281, 1284 (11th Cir. 2015) (citing 18 U.S.C. §§ 2251–52, 2252A). Section 2251(a) makes it illegal for "[a]ny person [to] employ[ ], use[ ], persuade[ ], induce[ ], entice[ ], or coerce[ ] 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). Under the statute's definition section, sexually explicit conduct includes “masturbation” and the “lascivious exhibition of the ... genitals, or pubic area of any person.” *Id.* § 2256(2)(A)(iii), (v). A lascivious exhibition is that which “excites sexual desires” or is “salacious.” ***1236** *United States v. Grzybowicz*, 747 F.3d 1296, 1305–06 (11th Cir. 2014) (alteration adopted) (quoting *United States v. Williams*, 444 F.3d 1286, 1299 (11th Cir. 2006), *rev'd on other grounds*, 553 U.S. 285, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008)).

Here, we are asked to decide whether an offender “uses” a minor in violation of § 2251(a) only by having the minor engage in sexually explicit conduct, or whether an offender “uses” a minor when the minor's presence is the object and focal point of the offender's sexual desire as the offender, not the minor, engages in the sexually explicit conduct. This is an issue of first impression in our Circuit.

Before delving into the text of the statute, we highlight a few relevant principles of statutory interpretation that will aid in our analysis. The starting point for statutory interpretation is the language of the statute. *United States v. Aldrich*, 566 F.3d 976, 978 (11th Cir. 2009). “The ‘cardinal canon’ of statutory interpretation is that ‘courts must presume that a legislature says in a statute what it means and means in a statute what it says there.’ ” *Id.* (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)). If the language of the statute is clear and unambiguous, we will go no further and will employ that plain meaning. *Pirela Pirela*, 809 F.3d at 1199. Courts must give effect to every clause and every word of a statute, so that no clause or word is superfluous, void, or insignificant. *Aldrich*, 566 F.3d at 978–79. When a statute does not define a term, “[t]he plain meaning of the text ‘controls unless the language is ambiguous or leads to absurd results.’ ” *United States v. Vineyard*, 945 F.3d 1164, 1171 (11th Cir. 2019) (quoting *United States v. Carrell*, 252 F.3d 1193, 1198 (11th Cir. 2001)).

As an initial matter, “we look to the plain and ordinary meaning of the statutory language as it was understood at the time the law was enacted.” *United States v. Chinchilla*, 987 F.3d 1303, 1308 (11th Cir. 2021). And “one of the ways to figure out that meaning is by looking at dictionaries in existence around the time of enactment.” *Id.* (quoting *Equal Emp. Opportunity Comm'n v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1026 (11th Cir. 2016)). The applicable edition of *Black's Law Dictionary* defines the verb “use” as “[t]o make use of, to convert to one's service, to avail one's self of, to employ.” *Use*, *Black's Law Dictionary* at 1381 (5th ed. 1979). [6] An ordinary reading of § 2251(a) thus suggests that a minor is “used” if she is “ma[de] use of” in a sexually explicit videotape or if an adult “avail[s himself] of” the child's presence as the object of his sexual desire by masturbating in her presence.

6 Section 2251(a) was enacted in 1978 as part of the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95–225, 92 Stat. 7 (1978). The definition of “use” in the fourth edition of *Black's*, published in 1968, is identical to the 1979 definition. *See Use*, *Black's Law Dictionary* at 1710 (4th ed. 1968) (“To make use of, to convert to one's service, to avail one's self of, to employ.”).

As relevant here, we conclude that the adverbial prepositional phrase “to engage in,” which limits the word “use,” does not require the minor to be actively engaged in sexually explicit conduct for several reasons. First, comparing the language in § 2251(a) to the language in the neighboring 18 U.S.C. § 2252(a) makes evident that the adverbial prepositional phrase “to engage in” does not require the minor to be the one who is actively engaged in sexually explicit conduct. Section 2252(a) prohibits, among other things, the transportation or shipping of visual depictions that “involve[ ] the use of a minor engaging in sexually explicit conduct.” In § 2252(a), ***1237** Congress specifically used the phrase “use of a minor engaging in sexually explicit conduct,” whereas in § 2251(a), it used the phrase “uses ... any minor to engage in sexually explicit conduct.” That difference suggests that Congress intended to criminalize a more passive use of a minor when it came to the production of images that sexually exploit children under § 2251(a). Congress could have used the narrower “minor engaging in sexually explicit conduct” language it employed in the next section, but it chose to write § 2251(a) differently. That difference must be given significance, namely in establishing that the minor need not be the one engaging in sexually explicit conduct, and the minor's passive involvement in the offender's sexually explicit conduct is sufficient for the purposes of § 2251(a). Second, Congress defined sexually explicit conduct to cover the “lascivious exhibition of the anus, genitals, or pubic area of *any person*,” again indicating that the minor need not be the one engaged in sexually explicit conduct. 18 U.S.C. § 2256(2)

(A)(v) (emphasis added). Therefore, although the statute criminalizes an offender who uses a minor by lasciviously exhibiting the minor's genitals, it also criminalizes an offender who uses a minor to engage in the sexually explicit conduct of lasciviously exhibiting the offender's genitals.

The plain meaning of a statutory term, however, does not turn solely on dictionary definitions of its component words in isolation. "Rather, '[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole.' " *Yates v. United States*, 574 U.S. 528, 537, 135 S.Ct. 1074, 191 L.Ed.2d 64 (2015) (alterations in original) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997)). Under the canon of *noscitur a sociis*, "a word is known by the company it keeps." *Id.* at 543, 135 S.Ct. 1074; *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 31, at 195 (2012). Put differently, *noscitur a sociis* "counsels that a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008).

Despite Dawson's insistence, however, our reading of § 2251(a) is not undermined by the doctrine of *noscitur a sociis*. The Seventh Circuit held that the other five verbs in the statute "require some action by the offender to cause the *minor*'s direct engagement in sexually explicit conduct," indicating that the word "use" in the statute requires some direct, active engagement by the minor. *Howard*, 968 F.3d at 722 (emphasis in original). But, when read together, these verbs suggest a continuum of participation by the minor covering a broad range of criminal conduct. On the passive end of the spectrum are the verbs "employs" and "uses," suggesting the passive involvement of the minor, rather than the active engagement of the minor, in the offender's sexually explicit conduct. In the middle of the spectrum are the verbs "persuades," "induces," and "entices," suggesting a more active role of the minor in the sexually explicit conduct. And at the very active end of the spectrum is the verb "coerces," suggesting the offender exerting considerable influence on the minor to cause the minor to engage in the sexually explicit conduct. Importantly, these verbs do not all require the same level of either external force imposed on the minor or active engagement on the part of the minor in the sexually explicit conduct. To read an active participatory role of the child into each verb renders ***1238** their differences superfluous. Instead, it appears Congress intended to penalize a broad spectrum of activities in this statute, with varying levels of involvement by the minor. Thus, our construction of § 2251(a) establishes that a minor must be involved in the offender's sexually explicit conduct, but that the minor need not necessarily be actively engaging in his or her own sexually explicit conduct. This reading aligns with both the *noscitur a sociis* canon and the surplusage canon by under-standing the companion words in context and also in relation to one another. This reading is also in step with our case law, as we have concluded that "the actus reus element of § 2251(a) is broad." *United States v. Lee*, 29 F.4th 665, 673 (11th Cir. 2022).

Here, Dawson's daughter is not merely present in the videos where Dawson happens to be exposing his penis and masturbating. Rather, Dawson's daughter—or to be more precise, her presence—is being used as the object of Dawson's sexual desire as he engages in sexually explicit conduct. Dawson panned the camera from the child to himself masturbating and back to the child, recording his exposed and erect penis in close proximity to the child—even going so far as to touch her hair with his penis in one video. Dawson further admitted that having his eleven-year-old in his presence while he masturbated was arousing. Because Dawson's daughter was passively involved in Dawson's sexually explicit conduct by serving as the object of Dawson's sexual desire, Dawson's actions constituted the use of a minor to engage in sexually explicit conduct in violation of the statute. [7]

7 Even if we were to adopt Dawson's interpretation of the statute to require the minor, not the offender, to engage in the sexually explicit conduct, the record establishes that Dawson's daughter unknowingly engaged in sexually explicit conduct by virtue of her presence serving as the object of Dawson's sexual desire. Put differently, interpreting for the sake of argument that the adverbial preposition phrase "to engage in" sexually explicit conduct requires the minor to engage in sexually explicit conduct, Dawson still "used" his daughter in violation of § 2251(a) because he made her unwittingly and passively engage in sexually explicit conduct when he used her presence as the object of his sexual desire during filmed masturbation. And, as noted above, Dawson concedes that the minor's engagement does not

> have to be active and that passive engagement suffices.

Contrary to the Seventh Circuit in *Howard*, we do not believe this interpretation poses a slippery slope problem. *See* 968 F.3d at 721. The Seventh Circuit warned that the passive interpretation of the term "uses" may make the statute too broad: "The crime could be committed even if the child who is the object of the offender's sexual interest is in a neighbor's yard or across the street." *Id.* But the statute ultimately requires fact-specific determinations. In the above hypothetical, the child across the street is not being "used" to engage in sexually explicit conduct in the same way Dawson "used" his daughter. Here, unlike in the *Howard* hypothetical, Dawson admitted that he found the act of masturbating to his daughter *in her presence* sexually arousing. In other words, it was the child's presence that Dawson found sexually arousing, which is a circumstance entirely different from the *Howard* hypothetical where the child is not immediately present.

With the law settled, the outcome is clear. The statutory elements for an offense committed in violation of § 2251(a) are: "(1) employing, using, persuading, inducing, enticing, or coercing a minor to engage in any sexually explicit conduct to produce any visual depiction of such conduct (or for transmitting a live visual depiction of such conduct); and (2) a jurisdictional nexus—i.e., a nexus to interstate ***1239** commerce." *Lee*, 29 F.4th at 671 (citing § 2251(a)).

Here, Dawson used the presence of his eleven-year-old daughter as the object of his sexual desire as he engaged in sexually explicit conduct by masturbating in her presence. He recorded this conduct and distributed it over the internet. He does not challenge the district court's finding that the child was under eighteen years old, or that the visual depictions were transported or transmitted in interstate commerce. Therefore, the district court did not err in denying the motion for judgment of acquittal.

B. The Rule of Lenity

For the first time on appeal, Dawson requests that we apply the rule of lenity to read § 2251(a) to exclude his conduct. The government responds that plain error review should apply to this argument because Dawson failed to raise it below.

As an initial matter, the government's contention that plain-error review applies is unavailing. "[P]arties cannot waive the application of the correct law or stipulate to an incorrect legal test." *Jefferson v. Sewon Am., Inc.*, 891 F.3d 911, 923 (11th Cir. 2018); *accord Lee*, 29 F.4th at 669 n.2 (finding that a defendant could not waive the application of the *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), test in connection with asserting a violation of the Double Jeopardy Clause). Indeed, a party cannot waive lenity any more than it can waive the plain meaning of a word or the canon of *noscitur a sociis*.

Turning to the rule of lenity itself, the rule "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008). The rule of lenity applies only when, after consulting traditional canons of statutory interpretation, the court is left with an ambiguous statute. *Shular v. United States*, —— U.S. ——, 140 S. Ct. 779, 787, 206 L.Ed.2d 81 (2020). "To invoke the rule of lenity, the court 'must conclude that there is a grievous ambiguity or uncertainty in the statute.' " *United States v. Baldwin*, 774 F.3d 711, 733 (11th Cir. 2014) (quoting *Muscarello v. United States*, 524 U.S. 125, 138–39, 118 S.Ct. 1911, 141 L.Ed.2d 111 (1998)). The simple existence of some statutory ambiguity is not sufficient to warrant the application of the rule of lenity because most statutes are ambiguous to some degree. *Muscarello*, 524 U.S. at 138, 118 S.Ct. 1911. It applies only when, after seizing everything the court can from which aid can be derived to determine the meaning of a statute, the court can "no more than guess as to what Congress intended." *Id.* (quoting *United States v. Wells*, 519 U.S. 482, 499, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997)).

As discussed above, the traditional tools of statutory interpretation provide sufficient clarity on the meaning of § 2251(a). Moreover, while we recognize that there is a division of judicial authority between the Seventh Circuit and the Eighth and Third Circuits, a statute is not " 'ambiguous' for purposes of lenity merely because there is 'a division of judicial authority' over its proper construction." *Reno v. Koray*, 515 U.S. 50, 64–65, 115 S.Ct. 2021, 132 L.Ed.2d 46 (1995) (quoting *Moskal v. United States*, 498 U.S. 103, 108, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990)). Rather, there must be a "grievous ambiguity" in the statute, which is not the case here. Accordingly, the rule of lenity does not apply.

***1240 IV. CONCLUSION**

For the reasons discussed, we hold that Dawson's conduct falls within the scope of the conduct prohibited by 18 U.S.C. §

2251(a). Dawson used his eleven-year-old daughter to engage in sexually explicit conduct by masturbating in her presence, which he found sexually arousing. We therefore affirm his convictions for sexual exploitation of a minor in violation of § 2251(a).

AFFIRMED.

All Citations

64 F.4th 1227

APPENDIX C

Doc. 40, Stipulated Facts

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 6:20-cr-50-Orl-40DCI

GEORGE POULO

STIPULATION OF THE PARTIES FOR BENCH TRIAL

The United States of America, by Maria Chapa Lopez, United States Attorney for the Middle District of Florida, and the defendant, GEORGE POULO, and the attorney for the defendant, Joshua R. Lukman, Esquire, hereby enter into the following stipulation of facts for a bench trial in this matter. The parties agree that the stipulated facts are true and correct.

Charges and Elements

A federal grand jury has returned a Superseding Indictment charging the defendant, GEORGE POULO ("POULO"), with five counts (Counts One through Five) of sexual exploitation of a child, in violation of 18 U.S.C. § 2251(a) and one count of distribution of child pornography, in violation of 18 U.S.C. § 2252A(a)(2). Doc. 28.

The elements of Counts One through Five, sexual exploitation of a child, are:

First: an actual minor, that is, a real person who was less than 18 years old, was depicted;

Second: the defendant employed, used, persuaded, induced, enticed or coerced the minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of the conduct; and

Third: the visual depiction was produced using materials that had been mailed, shipped or transported in interstate or foreign commerce by any means, including by computer.

The elements of Count Six, distribution of child pornography, are:

First: the defendant knowingly distributed material containing an item of child pornography;

Second: the item of child pornography had been transported in interstate or foreign commerce using a facility or means of interstate commerce, or in or affecting interstate of foreign commerce, including by computer, or was produced using materials that had been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

Third: when the defendant distributed the child pornography he believed the item was child pornography.

Child pornography means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; such visual

depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct. 18 U.S.C. § 2256(8).

Sexually explicit conduct means actual or simulated sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; bestiality; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area of any person. 18 U.S.C. § 2256(a)(2)(A).

Stipulated Facts

On or about February 3, 2020, the defendant, GEORGE POULO, utilizing the username "georgep52" was in a group chat on KiK titled "breeding no age limits." Winnebago Sheriff Investigator Michael Sewall, a law enforcement officer in Wisconsin, acting in an undercover capacity, was also in this group chat. In this group chat, the defendant discussed a five-year-old girl, his interactions with her, and commented on pictures of young children that were posted by others in the group chat. The defendant told the group that he let the five year old girl come into his bedroom while he pretended to sleep. As the defendant "slept" the five year old girl would

touch his penis.

At that point, Investigator Sewall, sent the defendant a private message on KiK asking "asl?"[1] The defendant responded, "24 m Florida." At approximately 4:30 p.m. on February 3, 2020, the defendant and Investigator Sewall began chatting via private message on KiK. The defendant told Investigator Sewall that he could get the five year old girl to "jerk him off" and told Investigator Sewall that he was going to "stroke it" after the adult female residing with him left the house. At approximately, 4:32 p.m. on the same day, February 3, 2020, the defendant sent Investigator Sewall an image of his erect penis via the KiK application. Then, the defendant sent Investigator Sewall two additional pictures of his erect penis with what appeared to be ejaculatory fluid on it. In the background of both of these images Investigator Sewall observed a female child who appeared to be approximately five years old. The female child was fully clothed, standing in the doorway of the room and appears to be looking at the defendant who is laying naked on a bed with an erect penis. Then, the defendant commented to Investigator Sewall, "I want her to touch it so bad. How should I do it?" These images represent Counts One and Two of the Superseding Indictment. These images are Government's Exhibits 1 and 2. The chat log from the defendant's chats with

[1] "asl" is Internet shorthand for "age, sex, location."

Investigator Sewall is Government's Exhibit 7.

Later, again, during this private message chat, between approximately 4:48 p.m. and 7:13 p.m., the defendant sent three more images of himself masturbating while an approximately five year old, fully clothed child watched from the doorway of the room. The first image shows the child with her back to the defendant and appearing to begin to look over her shoulder toward the defendant, while the next two show her appearing to look at the defendant while he masturbated. These images represent Counts Three through Five of the Superseding Indictment. These images are Government's Exhibits 3 through 5.

On February 4, 2020, Investigator Sewall invited FBI SA Kevin Kaufman and the defendant into a private chat room on KiK titled "Fam Love." In this private chat room, SA Kaufman posed as a father who had a nine-year-old daughter and a son with whom he engaged in sexual activity. Investigator Sewall posed as "Marissa"[2], the mother of a young child who had a previous sexual relationship with SA Kaufman's online persona, which also involved sexual activity with their "children." During this private chat, SA Kaufman asked the defendant if he was active with any "pretty young thangs." The defendant responded that he was active with a five-year-old

[2] In the chats she is also referred to as "Mari."

child and that he had fantasized about his twelve-year-old niece.

Later, SA Kaufman asked the defendant what he did with the five year old. The defendant responded that he pretends that he is asleep and she will come into his bedroom and touch his penis. SA Kaufman asked the defendant if the five year old ever performed oral sex on him and the defendant responded "I wish she would." SA Kaufman asked the defendant had any pictures of the five year old. The defendant responded that he did not have any pictures because he was afraid to save them on his phone. After further discussion, the defendant stated that he had previously been with a nine year old girl that he used to babysit. SA Kaufman responded, "perfect age. My daughter loves her daddy." The defendant responded, "Mmm I bet..I'd love to see that."

As the conversation continued, SA Kaufman explained how he missed playing with Investigator Sewall's notional daughter. The defendant responded, "I bet! I would love to play with them." Then, SA Kaufman asked the defendant if he preferred to play with his notional son or daughter. The defendant responded, "Girl and Mari girl." At that point, SA Kaufman asked the defendant what he would do to them and the defendant responded, "Everythingggggggggg" and included monkey emoji covering his face.

Then, SA Kaufman asked the defendant when he last played with the

five year old. The defendant responded, "last night." The defendant told SA Kaufman that "she grabbed it and squeezed and rubbed it." SA Kaufman asked the defendant, "You cum." The defendant responded, "almost did" and then stated, "I did one time." When SA Kaufman asked the defendant to "tell me about it", the defendant responded, "It was really thick and sticky and the next day when it was just me and her asked if white putty can come out of my penis."

Later, the defendant asked SA Kaufman, "so she's sucked your dick?" SA Kaufman responded, "yes. That's child's play. Lol." Then, the defendant responded, "Mmmm I want my dick in some young pussy I'm jealous." A short time later, SA Kaufman asked the defendant what he was going to do tonight. The defendant responded, "I'm jerking off in my bathroom rn[3]." SA Kaufman asked, "to what?" The defendant responded, "Whatever cp I can find." SA Kaufman inquired, "Any examples." At that point, the defendant sent, over the Internet via the Kik mobile application, a video containing child pornography that depicts an eight to nine-year-old child sitting on a naked adult male who had an erect penis. The adult male appears to be attempting to put his erect penis into the child's vagina as the child moves up and down. Then, the video shows the child performing oral sex on the adult male. The

[3] Rn is Internet shorthand for "right now."

video ends when the adult male ejaculates in the child's mouth and on the child's face. This video forms the basis of Count Six of the Superseding Indictment. This video is Government's Exhibit 6. The chat log from the defendant's chats with Investigator Sewall and SA Kaufman is Government's Exhibit 8.

Later, FBI executed a search warrant on the defendant's residence and interviewed[4] the defendant. The defendant admitted that he used the KiK mobile application and that he took several pictures of himself with an erect penis with a fully clothed five year old girl standing in the doorway watching him. There were five images in total. These images form the basis for Counts One through Five of the superseding indictment. When questioned by the agents, the defendant agreed that he took the pictures of the five-year-old appearing to watch him masturbate to "impress guys on the internet." He also admitted he took the pictures of the five-year-old appearing to watch him masturbate because it was arousing to him and it was arousing to him to send them to other people.

The defendant admitted that he talked to at least three people on KiK about sexually abusing children. The defendant stated that he only used the stories of the five year old child because he was "stupid" and that he never

[4] The defendant initially asked for an attorney but voluntarily re-initiated the interview.

touched the five year old or his nine year old niece as he stated in the KiK chats. However, the defendant admitted that he was sexually attracted to the five year old. The recording of the defendant's interview with the agents is Government's Exhibit 9.

The photographs that serve as the basis for the offenses alleged in Counts One through Five of the Superseding Indictment, identified as Government's Exhibit 1 through 5, are visual depictions of an actual minor, that is, a real person who was less than 18 years old.

The photographs that serve as the basis for the offenses alleged in Counts One through Five of the Superseding Indictment, identified as Government's Exhibit 1 through 5, depict the defendant engaging in self-masturbation, which is sexually explicit conduct and lascivious exhibition of the genitals of the defendant, as defined in 18 U.S.C. § 2256(2)(A).

The photographs that serve as the basis for the offenses alleged in Counts One through Five of the Superseding Indictment, identified as Government's Exhibit 1 through 5, were taken by the defendant for the purpose of photographing a minor, that is, a five-year-old child, who appeared to watch the defendant masturbate from the doorway of the room where the defendant was masturbating. The defendant took the photos because he found them arousing and because he intended to share them with others who would

also find them arousing.

The photographs that serve as the basis for the offenses alleged in Counts One through Five of the Superseding Indictment, identified as Government's Exhibits 1 through 5, were recorded within the Middle District of Florida, by the defendant, using an Apple iPhone 11X, serial number DNQXN6PEKX, which was not manufactured in the United States. Therefore, the visual depictions were actually shipped and transported using a means and facility of interstate and foreign commerce, including by computer.

The photographs that serve as the basis for the offenses alleged in Counts One through Five of the Superseding Indictment, identified as Government's Exhibits 1 through 5, were sent by the defendant on February 3, 2020, via the Internet using the KiK application on his Apple iPhone. Therefore, the visual depictions were actually transported and transmitted using a means and facility of interstate and foreign commerce, that is, the Internet.

On February 4, 2020, the defendant sent SA Kaufman a video via the Internet using the KiK application on his Apple iPhone 11X, serial number DNQXN6PEKX. The video, described in detail previously, constitutes child pornography and the defendant knew that it was child pornography when he sent it to SA Kaufman. This video is marked as Government's Exhibit 6, and

constitutes the basis for Count Six of the Superseding Indictment.

At all relevant times, the defendant was located in the Middle District of Florida.

So stipulated this 24 day of September, 2020.

Respectfully submitted,

JAMES T. SKUTHAN
Acting Federal Defender

Joshua R. Lukman
Assistant Federal Defender
Florida Bar. No. 0088213
201 S. Orange Avenue,
Suite 300
Orlando, FL 32801
Telephone: 407-648-6338
Fax: 407-648-6095
E-Mail: joshua_lukman@fd.org

George Poulo
Defendant

Respectfully submitted,

MARIA CHAPA LOPEZ
United States Attorney

Shawn P. Napier
Assistant United States Attorney
USA No. 132
400 W. Washington Street, Suite 3100
Orlando, Florida 32801
Telephone: (407) 648-7500
Facsimile: (407) 648-7643
E-mail: shawn.napier@usdoj.gov