

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JONATHAN MONSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 2251(a) of Title 18 criminalizes the use of a minor to engage in any sexually explicit conduct “for the purpose of producing any visual depiction of such conduct.” The crime also carries a jurisdictional element that requires “that [the] 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.” Does it satisfy this jurisdictional element if there is no evidence that a defendant sexually exploited a minor for the purpose of producing a visual depiction of the exploitation, and *that same visual depiction* was produced using materials that have an interstate-commerce nexus?

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OPINION BELOW

The Federal Reporter has published the opinion of the court of appeals at 72 F.4th 1 (2023). The text of the opinion is reproduced in the Appendix beginning on page 24.

JURISDICTION

On June 26, 2023, the First Circuit entered its judgment affirming Mr. Monson's convictions and sentence out of the U.S. District Court for the District of Massachusetts. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

I. 18 U.S.C. § 2251(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.

STATEMENT OF THE CASE

The case arises from the Government’s investigation and prosecution of Petitioner Jonathan Monson for various child pornography-related federal offenses. In a superseding indictment, the Government charged Mr. Monson with fifteen offenses. The following table outlines the charged offenses of the superseding indictment:

Counts	Description	Statute
1–4	Sexual Exploitation of Children	18 U.S.C. § 2251(a)
5–12	Distribution of Child Porn	18 U.S.C. § 2252A(a)(2)(A)
13–14	Receipt of Child Porn	18 U.S.C. § 2252A(a)(2)(A)
15	Possession of Child Porn	18 U.S.C. § 2252A(a)(5)(B)

The district court had original subject-matter jurisdiction over these alleged offenses against the United States under 18 U.S.C. § 3231.

This petition attempts to summarize the facts relevant to the appeal as found in the district court and court of appeals, supplemented with additional facts in the evidentiary record. Due to the sensitive nature of the charges and the age of the victim, this brief will use pseudonyms for the victim (“Minor A”) and the victim’s mother (“T.O.”).

I. FBI agents investigate Kik group “Taboo Train 2.0” for evidence of child exploitation.

In 2017, FBI agents in Atlanta initiated an investigation into a so-called “Kik” group named “Taboo Train 2.0” for evidence of child exploitation. Kik is a “cloud-based free software social media application designed for mobile devices.” Kik allows its users to send messages, as well as images and videos, to other Kik users. Kik users can create

named “groups” that other users can locate by name or keyword. The creator of a group has the authority to approve or reject other users’ access to the group. These groups function like private group chats. “Taboo Train 2.0” was one such private group, which Atlanta agents infiltrated on June 5, 2017.

After successful infiltration, an undercover agent observed that the topic of conversation in the Taboo Train 2.0 group was child pornography. She also observed one user in particular, whose user name “was emoticons and then the name Jon,” was distributing child pornography by “sending child pornography to the members in the group, in the group chat.” In total, agents observed emoticon Jon transmitting five images in total, two on June 6, 2017, and three on June 15, 2017.

The investigation of emoticon Jon eventually led the FBI to Mr. Monson. Agents obtained search warrants for Mr. Monson, his residence, and his vehicles.

II. Agents swarm to Monson’s home, take him to a public-safety complex, and interrogate him.

At around 1:20 PM on the afternoon of March 8, 2018, eight or nine agents arrived at Mr. Monson’s home in Granby to execute the search warrants for Mr. Monson’s home, vehicles, and person in Granby. That day, both Mr. Monson and T.O. were home, although that was atypical for that time of day due to their differing work schedules. Mr. Monson typically worked an evening custodial shift, waking around 11 AM, leaving for work around 4 PM, working from 5 PM to 1 AM, and getting home around 2 AM. T.O., who lived with Mr. Monson at the time, worked an early-morning shift, waking around 4 AM, leaving for work, and getting home from work around 3 PM.

Shortly after their arrival, the agents had Mr. Monson step out of the house. Special Agent Ian Smythe and at least one other agent spoke with Mr. Monson, explained the warrants, what the warrants were for, and what law enforcement would be doing.

Smythe told Mr. Monson that although he wasn't "in custody," they "need[ed] to go somewhere" to talk. Smythe proposed going to the Granby Public Safety Facility, and Mr. Monson agreed.

Two agents drove Mr. Monson to the Granby Public Safety Facility in a minivan. They told Mr. Monson that they would drive him back home after the questioning by Smythe.

Smythe and another agent sat Mr. Monson in a conference room in the public safety facility. The agents did not search or frisk Mr. Monson, and they conducted the interrogation in a non-aggressive manner.

Over the course of the next hour, Mr. Monson made several incriminating statements relating to his usage of Kik and abuse of Minor A. The agents then subjected Mr. Monson to a polygraph examination. Smythe seized Mr. Monson's phone, an iPhone 7 Plus, and searched it, recovering additional inculpatory material. At the same time, other agents conducted a post-polygraph interview of Mr. Monson, during which Mr. Monson made additional incriminating statements. By the time the post-polygraph interrogation ended, the clock in the interrogation room showed approximately 6:30 PM, more than five hours after agents first pulled Mr. Monson out of his home.

These interviews and the search of the iPhone 7 Plus yielded concrete evidence that Mr. Monson had on four separate occasions photographed or video-recorded his use of Minor A to engage in sexually explicit conduct.

These interviews also yielded admissions that Mr. Monson previously owned an Apple iPhone 6, which he subsequently traded in for the Apple iPhone 7 Plus.

At the conclusion of the interview, the agents arrested Mr. Monson.

III. At trial, the Government focuses on the iPhone 7 Plus.

At trial, the Government focused its presentation of evidence on the child pornography that it had received through Kik from Mr. Monson, the child pornography that it had located on Mr. Monson's iPhone 7 Plus, and the self-incriminating statements it had obtained during their interrogation of Mr. Monson.

Of particular import were the four sets of images that the Government presented pertaining to Minor A. These four images represented each of the first four counts of the superseding indictment, respectively.

The Government presented metadata for all four images, which they had extracted from the digital files the agents had found on Mr. Monson's iPhone 7 Plus. The metadata for the first of these images, showed that it had been created with the camera of an Apple iPhone 6 on April 9, 2017. It also showed that the image had "populated" to the iPhone 7 Plus on February 22, 2018, nearly a year after its initial capture by the iPhone 6 camera. The metadata for the other three images showed that they had been created with the iPhone 7 Plus.

To satisfy the jurisdictional element of the counts related to these images, the Government presented records from Apple Inc. showing that an iPhone 7 Plus bearing an international mobile equipment identity (IMEI) number of 355838087381707 and serial number of FCLTK0C2HFXW was manufactured in China and shipped to Pennsylvania. Smythe testified that IMEI was a unique identifier, and that the IMEI listed on the Apple records was the same as the IMEI of Mr. Monson's iPhone 7 Plus. However, neither Mr. Monson's iPhone 7 Plus nor its actual IMEI were in evidence. The color of the iPhone 7 Plus listed on the Apple records also did not match the color that Smythe recalled to be the color of Mr. Monson's iPhone 7 Plus.

IV. The district court rejects Monson’s Rule 29 challenges on the sufficiency of the evidence.

At the close of the Government’s evidence, Mr. Monson raised a Rule 29 challenge, arguing among other things that the Government had failed to meet its burden on the jurisdictional element of counts one through four of the superseding indictment. The argument had two parts. First, Mr. Monson highlighted how there was insufficient information to justify finding that the Apple records matched Mr. Monson’s iPhone 7 Plus. Second, Mr. Monson highlighted how there was no information about the nexus to interstate or foreign commerce of the iPhone 6, which produced the image related to count one.

The district court denied the Rule 29 motions. Although the district court agreed with Mr. Monson that there was no evidence he “knew or had reason to know that these visual depictions would be transported or transmitted ... essentially over the internet,” the court ultimately disagreed that the evidence was insufficient to show that the visual depictions were produced using materials that had a nexus to interstate or foreign commerce. For counts three through four, the district court found that the IMEI evidence sufficed to show that the iPhone 7 Plus had been manufactured in China. For count one, the district court found that the fact that the image ultimately appeared on the iPhone 7 Plus satisfied the jurisdictional element because mere copying of the image to the iPhone 7 Plus could constitute “production.”

V. The jury finds Monson guilty on all counts, and the district court calculates the sentencing guideline range to be 4,080 months.

The jury ultimately returned guilty verdicts on all charged counts.

Based on the facts presented at trial and summarized in the presentence investigation report, the district court grouped all fifteen counts together—even though only counts one through four related to the same victim—and found that Mr. Monson had

a total offense level of 51. From this offense level, the court calculated the guideline range to be 4,080 months. The district court imposed a total sentence for Mr. Monson of incarceration for forty years (480 months).

VI. The First Circuit affirms the judgment.

On August 4, 2021, the final amended judgment entered. The next day, Mr. Monson filed a timely notice of appeal. The First Circuit Court of Appeals pursuant to its jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

In a published decision, the First Circuit affirmed the judgment of conviction. *See infra* at 26. The Court rejected Mr. Monson's arguments concerning the sufficiency of the evidence, the trial court's order denying his motion to suppress statements, and his sentence. *Id.*

REASONS FOR GRANTING THE PETITION

I. Review is warranted to resolve a circuit split on the interpretation of the jurisdictional element of the statute criminalizing the sexual exploitation of children.

This Court should grant certiorari to resolve the circuit split that the First Circuit’s decision creates between itself and the Sixth Circuit over its interpretation of the jurisdictional element for violations of 18 U.S.C. § 2251(a). *See* Sup. Ct. R. 10(a) (indicating it to be a compelling reason for certiorari where “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter”).

Mr. Monson filed timely Rule 29 motions arguing that the evidence was insufficient to satisfy this jurisdictional element of the superseding indictment’s counts one through four. Criminal Procedure Rule 29 provides a way for defendants to challenge the sufficiency of the evidence after the Government closes its evidence, after the close of all evidence, and after a guilty verdict. *See* Fed. R. Crim. P. 29(a), (c). The rule provides that a court “must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.” *Id.*

Because Mr. Monson preserved the error by raising a Rule 29 challenge to the evidence in the district court, the standard of review is *de novo*. *United States v. Mendoza-Maisonet*, 962 F.3d 1, 11 (1st Cir. 2020). *De novo* review calls for the appellate court to review the evidence, “both direct and circumstantial, in the light most favorable to the prosecution and decide whether that evidence, including all plausible inferences drawn therefrom, would allow a rational factfinder to conclude beyond a reasonable doubt that the defendant committed the charged count or crime.” *Id.* at 11–12; *United States v. Lipscomb*, 539 F.3d 32, 40 (1st Cir. 2008).

Here, the Government failed to present sufficient evidence to satisfy the jurisdictional element of counts one through four, which charged Mr. Monson with the sexual exploitation of Minor A in violation of 18 U.S.C. § 2251(a). Section 2251(a) states, in relevant part, that “Any person who … uses any minor to engage in … any sexually explicit conduct for the purpose of producing any visual depiction of such conduct … shall be punished … 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” 18 U.S.C. § 2251(a). In interpreting this statute, the First Circuit has explained that the jurisdictional element requires that the “the materials used to produce the pornographic depictions” to have been “mailed, shipped, or transported in interstate or foreign commerce.” *United States v. Morales-de Jesus*, 372 F.3d 6, 9 (1st Cir. 2004) (quoting 18 U.S.C. § 2251(a)). The Sixth Circuit’s statement of the same principal is different: “to violate § 2251(a), a defendant must sexually exploit a minor for the purpose of producing a visual depiction of this exploitation, and *that same visual depiction* must be produced using materials that have an interstate-commerce nexus.” *United States v. Lively*, 852 F.3d 549, 561 (6th Cir. 2017) (emphasis in original). This Court should grant certiorari to resolve the split between the First and Sixth Circuits and to give Mr. Monson an opportunity to be resentenced without the offending § 2251(a) convictions.

A. The Government failed to establish the jurisdictional element for Count 1 with evidence of the iPhone 6’s nexus to interstate or foreign commerce.

The gap in the Government’s evidence on Count 1 was the interstate or foreign commerce connection of the iPhone 6 that was used to produce IMG_3099.jpg, the visual depiction at issue. There was no dispute at trial that an iPhone 6 produced the

digital image IMG_3099.jpg for count 1. There was also no dispute in the district court that the Government presented no evidence that any materials of the iPhone 6 had a nexus to interstate or foreign commerce. Instead, the question raised was whether the fact that IMG_3099.jpg was later found on an iPhone 7 Plus with a purported nexus to foreign commerce satisfies the jurisdictional element of § 2251(a).

The Sixth Circuit answers this question “no.” For example, in *Lively*, the Sixth Circuit found that the relevant “material” for the jurisdictional element of a § 2251(a) violation was the digital camera and the digital memory card inside the camera with which the visual depiction was produced, not the hard drive that the visual depiction was later transferred onto. *Lively*, 852 F.3d at 563–64. At trial, the Government presented evidence that the defendant sexually abused a minor, the act of which a codefendant captured with a digital camera. *Id.* at 553. The digital camera held a digital memory card on which federal agents located four of these visual depictions. *Id.* at 554–55. These four visual depictions were also found on a computer hard drive that the codefendant owned. *Id.* at 555. The Government argued that the parties’ stipulation that this hard drive had been manufactured in Thailand satisfied the jurisdictional element of the offense. *Id.* at 560. The Sixth Circuit disagreed. *Id.*

The Sixth Circuit pointed out that the language of § 2251(a) showed that the “visual depiction” from the jurisdictional element needed to be the same “visual depiction” that the defendant intended to create at the time he used the minor to engage in sexually explicit conduct. *Id.* at 561. In particular, the use of the word “that” in the statute inextricably linked the two appearances of the phrase of “visual depiction”:

The word “that” links the two parts of § 2251(a). As used here, “that” is an adjective. In the second part of § 2251(a), “that” modifies and restricts the noun “visual depiction,” which is also used in the first part of the statute. The most natural reading of § 2251(a) is clear: “that” clarifies that the “visual depiction” in the first half of § 2251(a) is the same “visual depiction” the second jurisdictional hook addresses. Thus, to violate § 2251(a), a defendant must sexually exploit a minor for the purpose of producing a visual depiction of this exploitation, and *that*

same visual depiction must be produced using materials that have an interstate-commerce nexus. Any other reading of § 2251(a)'s second jurisdictional hook would fail to give effect to each word of the statute.

Id. (emphasis in original). Put simply, the evidence must show that when the defendant sexually abused the minor, the defendant “did so for the purpose of producing” the visual depictions using materials with a nexus to interstate or foreign commerce. *Id.* at 562–63.

Applying this principle to the evidence, the Sixth Circuit found that the hard drive was irrelevant to the jurisdictional element because at the time the defendant sexually abused the minor, he did not abuse the minor for the purpose of producing the visual depictions on the hard drive. *See id.* For the jurisdictional element, only the provenance of the digital memory card inside the digital camera mattered because the defendant “sexually abused the boy for the purpose of producing the [digital memory card images], which [the codefendant] produced when he photographed [the defendant] and the boy with his Kodak digital camera,” which contained the digital memory card. *Id.* at 564.

The Sixth Circuit’s analysis is different from the First Circuit’s approach. For example, in *Poulin*, the First Circuit rejected a defendant’s sufficiency argument based on a lack of clarity about which device produced which visual depiction. *See United States v. Poulin*, 631 F.3d 17, 23 (1st Cir. 2011). The First Circuit noted that the Government had seized a plethora of equipment—including “pinhole cameras recovered from the cabin bathroom; wiring from the cameras that led to the bedroom closet; cables, transmitters, and recording devices that Poulin secreted in his mother’s attic; and DVDs evincing sexually explicit images of a minor,” all of which had been manufactured out of state. *Id.* at 23. This was sufficient to satisfy the jurisdictional element. *Id.*

Under the Sixth Circuit’s formulation—but not under the First Circuit’s—the Government’s jurisdictional evidence here fails to establish the interstate or foreign commerce nexus for the iPhone 6, which produced the visual depiction relevant to

Count 1. *Compare Lively*, 852 F.3d at 564, with *infra* at 34. The Government never disputed that an iPhone 6 produced IMG_3099.jpg: the Government itself elicited this evidence at trial. Even so, the Government never introduced any evidence of the iPhone 6’s provenance. Unlike the digital camera and digital memory card in *Lively*, the Government here never introduced the iPhone 6 itself into evidence such that a factfinder could examine the device for trade inscriptions of its country of manufacture. *Cf. Lively*, 852 F.3d at 564 (“The SanDisk memory card, and its “Made in China” trade inscription, were on full display at *Lively*’s trial.”). During its repeated arguments concerning the jurisdictional element, the Government never raised any evidence concerning the iPhone 6. These arguments reveal the fact that the Government had no evidence concerning the iPhone 6’s nexus to interstate or foreign commerce. Without such a nexus, the Government failed to satisfy the jurisdictional element on Count 1.

The Government’s reliance on the iPhone 7 Plus’s nexus to interstate or foreign commerce should be unavailing. The language of § 2251(a) requires the evidence to show that when the defendant sexually abused the minor, the defendant “did so for the purpose of producing” the visual depictions, and the production used materials with a nexus to interstate or foreign commerce. *Lively*, 852 F.3d at 562–63. Here, the evidence showed that Mr. Monson could not have had “the purpose of producing” the visual depiction of IMG_3099.jpg on the iPhone 7 Plus: the iPhone 7 Plus had yet to be even manufactured at the time of the exploitation of Minor A, and there was no evidence that Mr. Monson intended at the time of the abuse to transfer the images to future devices. The iPhone 7 Plus’s nexus to foreign commerce is thus irrelevant to the sufficiency of the evidence on count one. The evidence was therefore insufficient to support a conviction on count one, and the Court should grant certiorari to review the judgment.

B. There was insufficient evidence that the iPhone 7 Plus that contained or produced the child pornography had a nexus to interstate or foreign commerce.

The evidence was also insufficient to establish the jurisdictional element for the iPhone 7 Plus, which relates to counts one through four of the Superseding Indictment. Counts one through four charged Mr. Monson with sexual exploitation of children, in violation of 18 U.S.C. § 2251(a). *Id.* As discussed above, the jurisdictional element requires evidence that the “the materials used to produce the pornographic depictions” had been “mailed, shipped, or transported in interstate or foreign commerce.” *See Morales-de Jesus*, 372 F.3d at 9 (quoting 18 U.S.C. § 2251(a)). Here, the Government’s international mobile equipment identity (IMEI) evidence was insufficient to show beyond a reasonable doubt that Mr. Monson’s specific iPhone 7 Plus had a nexus to interstate or foreign commerce.

The Government’s evidence forced the jury to speculate unduly about a witness’s ability to recall a fifteen digit IMEI number. *See United States v. Spinney*, 65 F.3d 231, 239 (1st Cir. 1995) (“The appellate function, properly understood, requires the reviewing court to take a hard look at the record and to reject those evidentiary interpretations and illations that are unreasonable, insupportable, or overly speculative.”). The Government attempted to establish a foreign-commerce nexus for Mr. Monson’s iPhone 7 Plus by introducing records from the manufacturer Apple Inc. showing that a black iPhone 7 Plus bearing a specific IMEI and serial number was manufactured in China and shipped to the United States. Yet instead of introducing Mr. Monson’s iPhone 7 Plus into evidence for the jury to examine and compare with the Apple records, the Government chose to elicit testimony that Mr. Monson owned an iPhone 7 Plus that bore the IMEI listed in the Apple records. Notably, Mr. Monson’s iPhone 7 Plus was not in evidence; nor was the IMEI of Mr. Monson’s iPhone 7 Plus; nor was the serial number of Mr. Monson’s iPhone 7 Plus. Instead, there was simply testimony that the

IMEI number on the records from Apple was the IMEI “for the iPhone 7 Plus phone that belonged to Monson.” As a consequence, the Government forced the jury to speculate that the witness could recall the fifteen digit IMEI for Mr. Monson’s iPhone 7 Plus and accurately compare it to the IMEI listed on the Apple records, notwithstanding that the Apple records described the phone as “BLACK” and the witness recalled the phone to be “[n]ot black.” This kind of speculation cannot support a finding of guilt beyond a reasonable doubt.

The nature of IMEI compounds the problem. Notwithstanding the purported uniqueness of the IMEI for mobile devices, IMEI is not immutable. Members of Congress recognized this when U.S. Senator Charles Schumer sponsored, and six other U.S. senators co-sponsored, a bill to criminalize the alteration of a cell phone’s IMEI by non-exempt individuals. *See* Mobile Device Theft Deterrence Act of 2013, S. 1070, 113th Cong. § 2 (2013). The implication of such a bill is clear: there exist methods to change IMEI numbers. *Cf. also* Piyush Rai, *Five months on, Chinese mobile firm gets ‘clean chit’ in IMEI ‘cloning’ case*, Times of India, Nov. 3, 2020, *available at* <https://timesofindia.indiatimes.com/city/meerut/five-months-on-chinese-mobile-firmgets-clean-chit-in-imei-cloning-case/articleshow/78986399.cms> (recounting a 2020 investigation in India that revealed more than 13,500 cell phones manufactured in China shared the same IMEI due to a “technical glitch”). The evidence therefore could not support that Mr. Monson’s iPhone 7 Plus was, beyond a reasonable doubt, the very iPhone 7 Plus described in the Apple records. The Court should therefore grant certiorari to review the judgment.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to review the judgment of the U.S. Court of Appeals for the First Circuit entered in this case.

Respectfully submitted,

September 22, 2023



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APPENDIX

Court of Appeals opinion (June 26, 2023)	24
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I. Court of Appeals opinion (June 26, 2023)

United States Court of Appeals For the First Circuit

No. 21-1612

UNITED STATES OF AMERICA,

Appellee,

v.

JONATHAN MONSON,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Mark G. Mastroianni, U.S. District Judge]

Before

Barron, Chief Judge,
Lipez and Howard, Circuit Judges.

Jin-Ho King, with whom Milligan Rona Duran & King, LLC., was on brief, for appellant.

Mark T. Quinlivan, Assistant United States Attorney, with whom Rachael S. Rollins, United States Attorney, was on brief, for appellee.

June 26, 2023

HOWARD, Circuit Judge. A jury convicted Jonathan Monson on fifteen counts of an indictment charging sexual exploitation of children and distribution, receipt, and possession of child pornography. He was sentenced to 480 months' incarceration. On appeal, Monson challenges the admission of certain evidence against him at his trial, the sufficiency of the evidence against him, and his sentence. Concluding that each challenge is unavailing, we affirm.

I. BACKGROUND¹

In 2017, while participating in an undercover capacity in a Kik Messenger ("Kik")² group named "Taboo Train 2.0," an FBI agent observed not only that the group's discussion focused on child pornography but also that one of the group's members was distributing child pornography to the group. That user, whose screen name consisted of four emoticons followed by the name "john (daddauluv_r6n@talk.kik.com)," transmitted five images constituting child pornography to the group.³ Suspicious that

¹ In assessing the sufficiency claim, we recount the facts in the light most favorable to the verdict. United States v. Burgos-Montes, 786 F.3d 92, 98 (1st Cir. 2015). For the suppression of evidence claim, we offer a balanced account. Id.; United States v. Piper, 298 F.3d 47, 50 (1st Cir. 2002).

² Kik is a cloud-based social media application that permits users to anonymously share text and multi-media messages with one another, both one-on-one and in group chats.

³ Those five images formed the bases for Counts 5-9.

Monson was the user distributing the child pornography, agents obtained search warrants for Monson, his residence in Granby, Massachusetts, and his vehicles.

In March 2018, FBI agents and local law enforcement officers, armed and dressed in tactical gear, went to Monson's home to execute the search warrant. During the execution of the warrant, FBI Special Agent Ian Smythe expressed his desire to speak with Monson, told Monson "that they perhaps would be better off finding a place with less activity" to speak, and informed Monson that he was neither in custody nor under arrest. Monson agreed to accompany the agents to the Granby Public Safety Complex, a community building which housed both the Granby police station and fire station, and to speak with Smythe there. At the public safety complex, Smythe and Special Agent Michael Sheehan led Monson to a public conference room that was in the building's lobby -- not in the section of the building designated as the police station -- where they then interviewed him. Smythe advised Monson of his Miranda rights and Monson signed a form acknowledging that he understood those rights and was willing to answer questions without a lawyer present.

During the interrogation, Monson made a number of admissions including: that he had an eleven-year-old daughter; that he had installed Kik onto his iPhone and had used Kik to find groups associated with incest fantasy and child pornography; that

the Kik account with the username consisting of four emoticons and "john (daddauluv_r6n@talk.kik.com)" belonged to him; that "daddauluv" referred to "daddy-daughter love"; that he became active in the group "Taboo Train 2.0" over a year earlier using an iPhone 6 -- which he had since traded in for an iPhone 7 Plus -- and that he had posted images to that group; that he would frequently engage in "tickle fights" with his daughter and that he may have touched her groin area; and that he had, on one occasion, taken his iPhone into the bathroom while his daughter was showering and "accidentally" took pictures which might still be on his iPhone.

Following that interrogation, the agents seized Monson's iPhone 7 Plus. Monson then underwent a polygraph examination and a subsequent interview with a different agent, during which Monson made additional incriminating admissions. At the conclusion of the second interview the agents arrested Monson. Examination of Monson's iPhone 7 Plus revealed evidence of the sexual exploitation of children as well as child pornography.

In a superseding indictment the government brought fifteen criminal counts against Monson: the first four counts alleged Sexual Exploitation of Children (18 U.S.C. § 2251(a)); counts five through twelve alleged Distribution of Child Pornography (18 U.S.C. § 2252A(a)(2)(A)); counts thirteen and fourteen alleged Receipt of Child Pornography (18 U.S.C.

§ 2252A(a)(2)(A)); and count fifteen alleged Possession of Child Pornography (18 U.S.C. § 2252A(a)(5)(B)).

In advance of trial, Monson sought to suppress the statements that he had made during his initial interview at the Public Safety Complex on the basis that those statements were made during a custodial interrogation and that he had not waived his Fifth Amendment rights before making the incriminating statements.⁴ Finding that Monson was not in custody at the time of the interrogation, the district court denied the suppression motion. Trial spanning five days was had before a jury, and at the close of the evidence, Monson moved unsuccessfully for a judgment of acquittal, see Fed. R. Crim. P. 29(a), on the four child exploitation counts on sufficiency grounds.

The jury subsequently found Monson guilty on all fifteen counts, and the district court sentenced Monson to 480 months' incarceration.

II. DISCUSSION

On appeal, Monson brings three distinct challenges. First, he argues that the district court erred in denying his Rule

⁴ At the hearing on Monson's motion to suppress, Monson's counsel clarified that the motion concerned only the admission of statements made during the initial interrogation by Smythe (and not any statements made during his polygraph examination or the second interrogation -- conducted by a different FBI agent -- which followed that examination).

29(a) motion because the evidence at trial was insufficient to satisfy the jurisdictional element of the child exploitation counts. Second, Monson argues that the court erred in denying his suppression motion because he was interrogated while he was in custody but had not waived his Miranda rights. Finally, he challenges the procedural reasonableness of his sentence on the ground that the district court incorrectly determined his Guidelines sentencing range. We address each argument in turn.

A. THE SUFFICIENCY OF THE EVIDENCE

We begin with the challenge to the sufficiency of the evidence on counts one through four because his success on that score would render moot the other claims of trial and sentencing error on those counts. United States v. Ramirez-Rivera, 800 F.3d 1, 16 (1st Cir. 2015), abrogation on other grounds recognized by United States v. Leoner-Aguirre, 939 F.3d 310 (1st Cir. 2019).

i.

Preserved challenges to the sufficiency of the evidence are reviewed de novo, see United States v. Ocean, 904 F.3d 25, 28 (1st Cir. 2018), and we will sustain the jury's verdict if the record evidence -- "evaluated in the light most favorable to the verdict . . . [and] including all plausible inferences drawn therefrom" -- would permit a rational factfinder to find the defendant guilty beyond a reasonable doubt. United States v. Torres Monje, 989 F.3d 25, 27 (1st Cir. 2021) (internal quotation

marks omitted) (quoting United States v. Santos-Rivera, 726 F.3d 17, 23 (1st Cir. 2013)).

ii.

18 U.S.C. § 2251(a) provides that "[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 . . . shall be punished . . . 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." As used in § 2251(a), Congress defined "producing" to include "producing, directing, manufacturing, issuing, publishing, or advertising." 18 U.S.C. § 2256(3). As have several other circuits, we have held that § 2251(a) is thus to be understood to criminalize both the initial recording or creation of child exploitation materials as well as the subsequent creation of copies or subsequent reproduction of those materials. See United States v. Poulin, 631 F.3d 17, 23 (1st Cir. 2011) ("Congress intended a broad ban on the production of child pornography and aimed to prohibit the varied means by which an individual might actively create it. As such, the government did not need to establish at what point 'production' occurred, nor produce in evidence a recording device." (internal citations omitted)); United States v. Burdulis, 753 F.3d 255, 262 (1st Cir. 2014) ("When

a person loads an image onto a thumb drive from the internet or another source, that person has created a new copy of the image in the digital memory of the thumb drive. As the Ninth Circuit put it, '[w]hen the file containing the image is copied onto a disk, the original is left intact and a new copy of the image is created, so the process "produces" an image.'" (alteration in original) (quoting United States v. Guagliardo, 278 F.3d 868, 871 (9th Cir. 2002) (per curiam)); United States v. Lacy, 119 F.3d 742, 750 (9th Cir. 1997); United States v. Dickson, 632 F.3d 186, 189-90 (5th Cir. 2011); United States v. Caley, 355 Fed. Appx. 760, 761 (4th Cir. 2009); United States v. Maxwell, 386 F.3d 1042, 1052 (11th Cir. 2004), vacated but later reinstated in relevant part, see 446 F.3d 1210, 1211 (11th Cir. 2006); United States v. Angle, 234 F.3d 326, 341 (7th Cir. 2000).

iii.

In contending that the evidence was insufficient to satisfy the jurisdictional element of the child exploitation counts, Monson takes two tacks. He first argues that the evidence did not establish that the image which formed the basis of count one was produced using materials that had travelled in interstate commerce, because that image was created with Monson's iPhone 6; neither that iPhone 6, nor any information regarding it, were admitted into evidence at trial; and the image was created before Monson's iPhone 7 Plus (which was part of the evidence) was

manufactured. Monson contends that this gap precludes any finding that the child exploitation occurred with the purpose of creating the reproduction of the image that was found on that iPhone 7 Plus. He separately argues that the evidence was insufficient to establish that his iPhone 7 Plus, which contained the four images underlying the child exploitation counts, had travelled in interstate commerce. Finding both arguments unavailing, for the reasons discussed below, we affirm the district court's denial of Monson's Rule 29 motion for acquittal.

The iPhone 6 Argument (Count One)

Monson's challenge to the sufficiency of the evidence underlying his conviction on count one focuses on the phrase "that visual depiction" in connection with the interstate or foreign commerce requirement in § 2251(a). The use of the word "that," Monson argues, links the conduct element (the use of a minor for the purpose of producing any sexually explicit visual depiction) with the commerce requirement such that the same visual depiction (that is, the same image file) constitute both the prohibited conduct and the commerce nexus. In making this argument, Monson relies on the Sixth Circuit's reasoning in United States v. Lively, 852 F.3d 549, 558 (6th Cir. 2017), that

The word "that" links the two parts of § 2251(a). As used here, "that" is an adjective. In the second part of § 2251(a), "that" modifies and restricts the noun "visual depiction," which is also used in the first

part of the statute. The most natural reading of § 2251(a) is clear: "that" clarifies that the "visual depiction" in the first half of § 2251(a) is the same "visual depiction" the second jurisdictional hook addresses. Thus, to violate § 2251(a), a defendant must sexually exploit a minor for the purpose of producing a visual depiction of this exploitation, and that same visual depiction must be produced using materials that have an interstate-commerce nexus.

A jury could not find that Monson violated § 2251(a) with respect to the image underlying count one, he argues, because his use of a minor and his initial creation of a visual depiction of that use occurred before the iPhone 7 Plus on which the image was discovered had even been manufactured. Accordingly, a jury could not find that he had "the purpose to produce" the visual depiction that was located on the iPhone 7 Plus at the time that he used the minor to create the initial visual depiction on his iPhone 6, preventing the requisite link between the conduct element and interstate commerce requirement. We reject this argument.

Even if we were to accept and apply Monson's narrowing construction of § 2251(a), when viewed in the light most hospitable to the verdict the evidence is nonetheless sufficient to permit a reasonable factfinder to conclude that Monson intended to create subsequent copies of the image (including, specifically, the copy that was discovered on his iPhone 7 Plus) at the time that he

created the initial depiction.⁵ There was evidence that, less than a year after Monson initially captured the image on his iPhone 6, he saved the image to his iCloud account, linked that iCloud account to his iPhone 7 Plus, populated the image onto his iPhone 7 Plus from his iCloud account, and then continued to store the image on his iPhone 7 Plus. From this evidence, a reasonable jury could conclude that Monson intended, at the time the initial depiction was created, to make and populate subsequent copies of that image on devices linked to his iCloud account including and especially any subsequent iPhones that he obtained to replace his iPhone 6. See Downs, 56 F.4th at 1321-22 (finding that a reasonable jury could conclude that the defendant had the requisite intent to create subsequent copies at the time of initial capture based on circumstantial evidence, including that subsequent copies were actually created).

On this point, the Sixth Circuit's decision in Lively does not suggest a contrary conclusion. In Lively, the court held that the jurisdictional element in § 2251(a) was not satisfied based on a co-defendant's subsequent copying of the images at issue onto a hard-drive because "there [was] no reason to believe that Lively had the purpose of producing -- or having [the co-defendant

⁵ To be clear, in assuming the narrow construction of § 2251(a) we do not mean to endorse it or to suggest that our prior precedent necessarily permits it.

produce] -- the Hard-Drive images." 852 F.3d at 554. Lively thus is properly viewed as a case in which an independent actor produced the hard drive image, and that conduct could not priorly be imputed to the defendant who created the previous image. Cf. Pattee, 820 F.3d at 511, n.8 ("[M]erely transferring or copying a pornographic image that was produced by someone else is [not] tantamount to 'producing' child pornography.").

The iPhone 7 Plus Argument (Counts One through Four)

Monson also argues that there was a lack of evidence that his iPhone 7 Plus travelled in interstate commerce, and thus that there was insufficient evidence to support a conviction for child exploitation based on the discovery of the images on that phone.

At trial, the government sought to prove the interstate commerce nexus for the child exploitation counts by introducing records from Apple Inc. showing that a black iPhone 7 Plus bearing a specific 15-digit international mobile equipment identity (IMEI) number was manufactured in Kunshan, China in 2017 before being shipped to the United States, and then eliciting testimony from Smythe that Monson's iPhone 7 Plus (which Smythe had examined on multiple occasions) bore the same IMEI number as listed in the Apple records and thus was the phone to which those records referred. Monson argues that this evidence was not sufficient to establish that his iPhone was the same iPhone referred to in the

Apple records because the evidence "forced the jury to speculate that [Smythe] could recall the fifteen digit IMEI for Mr. Monson's iPhone 7 Plus and accurately compare it to the IMEI listed on the Apple records, notwithstanding that the Apple records described the phone as 'BLACK' and the witness recalled the phone to be '[n]ot black.'"⁶ According to Monson, "[t]his kind of speculation cannot support a finding of guilt beyond a reasonable doubt." We reject the argument.

Generally, "[i]t is the responsibility of the jury -- not the court -- to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." Cavazos v. Smith, 565 U.S. 1, 2 (2011) (emphasis added). The jury supportably could have found the evidence to point to the iPhone 7 Plus described in the Apple records as the same iPhone that the agents seized from Monson. While a reasonable juror could have viewed Smythe's ability to recall the specific IMEI number or failure to accurately describe the color of the phone with skepticism, the record does not compel the conclusion that the testimony was insufficient to establish that the Apple records described Monson's iPhone 7 Plus. As we have often stated, "[w]hen

⁶ Smythe's report and testimony described the iPhone 7 Plus as dark gray.

the record is fairly susceptible of two competing scenarios, the choice between those scenarios ordinarily is for the jury." United States v. Dwinells, 508 F.3d 63, 74 (1st Cir. 2007); see also United States v. Seary-Colón, 997 F.3d 1, 11-12 (1st Cir. 2021) ("We need not conclude that 'no verdict other than a guilty verdict could sensibly be reached, but must only [be] satisf[ied] . . . that the guilty verdict finds support in a plausible rendition of the record.'" (alterations in original) (quoting United States v. Hatch, 434 F.3d 1, 4 (1st Cir. 2006))).

Concluding that the evidence presented at trial was sufficient to support Monson's convictions on each of the child exploitation counts, we affirm the district court's denial of Monson's Rule 29 motion for acquittal.

B. The Suppression Ruling

Monson also argues that the district court erred in denying his motion to suppress statements, because those statements were made during a custodial interrogation without there having been a valid waiver of his Miranda rights. Because we cannot upset the district court's finding that Monson was not in custody at the time that he made the statements at issue, we affirm the denial of the suppression motion.

i.

"In reviewing a district court's decision on a motion to suppress, we scrutinize findings of fact for clear error and

conclusions of law *de novo*." United States v. Miles, 18 F.4th 76, 78 (1st Cir. 2021) (citing United States v. Simpkins, 978 F.3d 1, 6 (1st Cir. 2020)).

"[T]he [Supreme] Court [has] made clear that the ultimate determination of custody is a mixed question of fact and law. The initial examination of the 'totality of the circumstances' is factual. The second inquiry, however -- whether, objectively, these circumstances constitute the requisite 'restraint on freedom of movement of the degree associated with a formal arrest' -- requires the 'application of the controlling legal standard to the historical facts.'" United States v. Ventura, 85 F.3d 708, 711 n.2 (1st Cir. 1996) (quoting Thompson v. Keohane, 516 U.S. 99, 112 & n.11 (1995)); see United States v. Mittel-Carey, 493 F.3d 36, 39 (1st Cir. 2007). Accordingly, we review for clear error the district court's findings as to the circumstances surrounding the interrogation, and review *de novo* the court's conclusion as to whether, under those circumstances, a reasonable person would have felt free to end the interrogation and leave. United States v. Infante, 701 F.3d 386, 396 & n.9 (1st Cir. 2012)

ii.

Statements made by a defendant during a custodial interrogation are inadmissible at trial unless, in advance of the interrogation, the defendant was advised that he "has a right to

remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed" and the defendant knowingly and voluntarily waived those rights. Miranda v. Arizona, 384 U.S. 436, 444 (1966); see also Dickerson v. United States, 530 U.S. 428, 432-33 (2000).

"Accordingly, the need for a Miranda warning 'turns on whether a suspect is in custody.'" United States v. Swan, 842 F.3d 28, 31 (1st Cir. 2016) (quoting United States v. Hughes, 640 F.3d 428, 435 (1st Cir. 2011)). A two-step inquiry is used to determine whether a suspect is in custody. See Howes v. Fields, 565 U.S. 499, 509 (2012); United States v. Melo, 954 F.3d 334, 340 (1st Cir. 2020). First, it must be determined whether, based on the objective circumstances surrounding the interrogation, a reasonable person would have felt free to terminate the interrogation and leave. Fields, 565 U.S. at 509. Second, if it is determined that a reasonable person would not feel free to do so, it must then be determined whether the environment in which the interrogation occurred "present[ed] the same inherently coercive pressures as the type of station house questioning at issue in Miranda." Id.

Factors that we have identified previously as relevant to the custody inquiry include the setting of the interrogation, "the number of law enforcement officers present at the scene, the

degree of physical restraint placed upon the suspect, and the duration and character of the interrogation." Swan, 842 F.3d at 31 (quoting United States v. Masse, 816 F.2d 805, 809 (1st Cir. 1987)). However, this is "by no means an exhaustive list" and a court must consider the totality of circumstances surrounding the interrogation to determine whether it was custodial. Mittel-Carey, 493 F.3d at 39. Further, those circumstances are to be evaluated objectively, "not [based] on the subjective views harbored by either the interrogating officers or the person being questioned." Stansbury v. California, 511 U.S. 318, 323 (1994).

iii.

Assessing the totality of the circumstances in light of the precedents above, we conclude that a reasonable person in Monson's position would have felt free to terminate the interrogation and leave and thus affirm the district court's suppression ruling.

To begin, the questioning of Monson took place in a conference room at the Granby Public Safety Facility. While it is true that the Granby police department was housed in that same complex, the record reflects that Monson did not enter the police station before or during the interrogation by Smythe, that "the police station really had no part in this interview other than that it was under the same roof inside this larger community building," and that the conference room "was not designed in any

way to be a law enforcement type room that was set up for police purposes" but "was just an open space with a table and some chairs and the door opened out into a common area within this building." Accordingly, although the location of the interrogation was unfamiliar to Monson, it was more akin to a neutral location than a police station interview room, a factor that weighs in favor of concluding that the interrogation was non-custodial. See Infante, 701 F.3d at 397 (questioning in a neutral setting -- a hospital room -- weighed in favor of interrogation being non-custodial); United States v. Jones, 187 F.3d 210, 218 (1st Cir. 1999) ("Although the location apparently was not familiar to [the suspect] and the area was not well-lit, a public highway is a neutral setting that police officers are not in a position to dominate."); United States v. Campbell, 741 F.3d 251, 267 (1st Cir. 2013) ("The defendants were questioned in a neutral location, a hotel parking lot.").

Next, the record reflects that two members of law enforcement travelled with Monson to the community center and that only two law enforcement agents were present during his questioning. In arguing that the interrogation was custodial, Monson highlights the fact that eight or nine agents and police officers arrived at his home to carry out the search warrant, and he contends that this number supports a finding that he was in custody. However, because the focus of our inquiry is on Monson's

interrogation, see Swan, 842 F.3d at 31 ("[I]n conducting the Miranda analysis, we focus on the time that the relevant statements were made"), the number of agents present when Monson made the statements that he seeks to suppress is the relevant number for us to consider, not the total number of agents and police officers who participated in the investigation or search of Monson's property. See Hughes, 640 F.3d at 436 ("[A]lthough four officers trekked to the island, only two of them participated in the questioning."); United States v. Crooker, 688 F.3d 1, 12 (1st Cir. 2012) ("[A]lthough [numerous] officers were present inside and around [the suspect's] house, no more than two agents were in direct conversation with [the suspect] at one time."); cf. Mittel-Carey, 493 F.3d at 40 (presence of eight officers in suspect's home weighed towards custodial nature of interrogation because interrogation took place at the home with all eight officers present). That only two agents were present for Monson's interrogation weighs in favor of a conclusion that the interrogation was non-custodial. See Hughes, 640 F.3d at 436; Crooker, 688 F.3d at 12; Swan, 842 F.3d at 32; see also United States v. Quinn, 815 F.2d 153, 157 (1st Cir. 1987) ("[W]e do not believe the physical presence of two more officers, besides the three who were there when the two suspects first arrived, could have led to a reasonable inference that a de facto arrest had occurred.").

Third, the record reflects that there was no physical restraint placed upon Monson at any time during the interrogation. The district court found that Monson "was not restrained in any way," and that "[the interrogation] occurred in this community room that clearly was not confining him. . . . There was no degree of restraint. There was no indication that he was put in a corner and an agent sat next to him and he couldn't move. There was no indication of locking doors or any type of other restraint." We have previously explained that among the factors relevant to the custodial inquiry, "the element that carries the most weight is the level of physical control that the agents exercised over the defendant during the search and interrogation," Mittel-Carey, 493 F.3d at 40, and that a lack of any physical control, contact or restraint weighs heavily in favor of a conclusion of no-custody. See United States v. Nishnianidze, 342 F.3d 6, 14 (1st Cir. 2003); Swan, 842 F.3d at 33; Infante, 701 F.3d at 398; Hughes, 640 F.3d at 436 ("[W]e think it significant that no meaningful physical restraint was applied to the defendant.").

Monson argues that, despite the absence of any physical restraint, he lacked "true freedom of movement" because "the agents dictated when and how [he] moved." In support, Monson highlights that he was transported to the public safety complex by the agents and told that they would drive him back home when they were finished. But the force of this point is undermined by the fact

that Monson went to the police station with the agents voluntarily. See Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (no custody where, inter alia, the suspect "came voluntarily to the police station"); McCown v. Callahan, 726 F.2d 1, 6 (1st Cir. 1984) (explaining that "we d[id] not see how one could say, as a matter of law, that [the suspect] was in custody when he was questioned" because, in addition to other factors, he "c[a]me to the station voluntarily"); Quinn, 815 F.2d at 160 ("Even when questioning occurs in the stationhouse, a suspect need not be given Miranda warnings if he went there voluntarily and there was no such restriction on his freedom as to render him in 'custody.'") (emphasis added) (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983))); United States v. Ellison, 632 F.3d 727, 730 (1st Cir. 2010) (Souter, J.) (fact that suspect was the one who suggested the interview was a relevant factor to our conclusion of no-custody). Indeed, we have previously explained that where a suspect was "not ordered to ride with [the officers]" but that instead transportation by the police "was merely a suggestion to which [the suspect] agreed," this further undermines any suggestion of custody or a lack of freedom of movement. Swan, 842 F.3d at 31.

Fourth, the duration and character of the interrogation suggest that Monson was not in custody. The interrogation lasted

for approximately one hour,⁷ a factor which weighs against the custodial nature of the interrogation. We have previously characterized interrogations that were ninety minutes as "relatively short" and held that the length of those interrogations did not suggest custody. Hughes, 640 F.3d at 437; Swan 842 F.3d at 33. Further, the district court found that the "[t]he character of the questioning was conversational," and that it "was not aggressive at all or adversarial." These too are findings which suggest that the interrogation was non-custodial. See Swan, 842 F.3d at 33; Infante, 701 F.3d at 397 ("The atmosphere was non-confrontational."); Hughes, 640 F.3d at 437 ("[T]he ambiance was relaxed and non-confrontational throughout the interview. The

⁷ Monson argues that we should consider the time that he spent undergoing the post-interrogation polygraph examination and the second, post-polygraph, round of questioning when assessing the total length of his interrogation and, accordingly, that we should consider the over five total hours Monson spent at the complex to constitute a "lengthy" interrogation. However, to the extent that Monson means to suggest that the district court's factual finding that the interrogation lasted one hour was clearly erroneous, this argument is undeveloped and thus waived. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."). Moreover, as discussed above, supra note 4, Monson explicitly represented to the district court that his motion to suppress focused solely on the initial interrogation by Smythe, precluding Monson from now arguing that the motion concerned the whole of his interactions with law enforcement on the date he was arrested. See United States v. Chen, 998 F.3d 1, 6 (1st Cir. 2021) ("An issue may be waived when a party purposefully abandons it, either expressly or by taking a contrary position at trial. A party who waives an issue at trial cannot later complain on appeal by pressing a position that was not taken at trial." (internal citations omitted))).

troopers' demeanor remained calm. . . . The troopers were polite and never hectored the defendant.").

Finally, among the totality of the circumstances surrounding the interrogation are additional factors that support the conclusion that the interrogation was non-custodial. These include the facts that (1) the agents informed Monson that he was neither in custody nor under arrest, see Infante, 701 F.3d at 398 (emphasizing such statements as relevant to conclusion that suspect was not in custody); (2) Monson was never pat frisked or physically searched and maintained his cell phone on him throughout the interrogation, see Swan, 842 F.3d at 33 (suspect's ability to access her cell-phone during the interrogation weighed against finding of custody); (3) the interrogation took place in the middle of the afternoon,⁸ see Infante, 701 F.3d at 398 (questioning of suspect "occurred in the late morning and early afternoon, as opposed to a time that might have appeared more menacing," weighing in favor of no-custody); and (4) although the law enforcement representatives were armed, their weapons were holstered and were

⁸ Monson argues that, because he worked evenings, "the time was effectively an early hour" and we should treat it as such when assessing whether he was in custody. This argument, however, runs directly contrary to our obligation to evaluate the circumstances objectively and "not [based] on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury*, 511 U.S. at 323. Objectively, a reasonable person would not consider the early afternoon to constitute an early hour and would not view the decision to conduct the search and interrogation at that time as particularly menacing.

not pointed at Monson. See Hughes, 640 F.3d at 435-36 (no custody where visible weapons remained holstered throughout the interaction); cf. Crooker, 688 F.3d at 11 (no custody where the "officers holstered their guns after the entry team cleared the house and left them holstered throughout the afternoon-long search").

To be sure, not all of the facts weigh in favor of a conclusion that the interrogation was not custodial. The record reflects that the agents made it clear to Monson that he was the focus of their investigation, and that they never told Monson that he was free to leave. However, neither of these facts are determinative, nor do they outweigh the many facts suggesting that Monson was not in custody. See United States v. Lanni, 951 F.2d 440, 443 (1st Cir. 1991) (holding that the district court did not commit clear error in finding that the suspect was not in custody despite fact that officers never told suspect he was free to leave or terminate the interrogation); Mathiason, 429 U.S. at 494-95 (holding suspect was not in custody despite fact that he was told he was a suspect in a theft and, falsely, that the officers had evidence incriminating him).

Accordingly, considering the totality of the circumstances attending the interrogation, we uphold the district court's determination that Monson was not in custody, and thus that a Miranda warning was not required, at the time of his

interrogation by Smythe because a reasonable person in Monson's position would have felt free to terminate the interrogation and leave.

C. THE SENTENCE

Finally, Monson levies two challenges against the district court's calculation of his Guidelines sentencing range, contending that, because of the alleged miscalculation, his incarcerative sentence of 480 months is procedurally unreasonable. Because we conclude that any error in calculating the Guidelines range did not affect the district court's sentencing and thus was harmless, we affirm the sentence imposed.

i.

Because Monson did not raise an objection to either the Guidelines calculation or to the sentence in the district court, we review his challenge only for plain error. United States v. Taylor, 848 F.3d 476, 496 (1st Cir. 2017). To succeed under that standard, Monson must show "(1) that an error occurred (2) which was clear or obvious and which not only (3) affected the defendant's substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings." United States v. Duarte, 246 F.3d 56, 60 (1st Cir. 2001).

ii.

"' [F]ailing to calculate (or improperly calculating) the Guidelines range' is a 'significant procedural error.'" United States v. Tavares, 705 F.3d 4, 25 (1st Cir. 2013) (alteration in original) (quoting Gall v. United States, 552 U.S. 38, 51 (2007)). That said, in order to succeed on a plain-error challenge to sentencing, it is the defendant's burden to demonstrate a reasonable likelihood that, absent the court's error, the district court would have imposed a more favorable sentence than it did. See United States v. Marchena-Silvestre, 802 F.3d 196, 200 (1st Cir. 2015). "In most cases a defendant who has shown that the district court mistakenly deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome." Molina-Martinez v. United States, 578 U.S. 189, 200 (2016). However, "[t]here may be instances when, despite application of an erroneous Guidelines range, a reasonable probability of prejudice does not exist" such as when the record demonstrates "that the district court thought the sentence it chose was appropriate irrespective of the Guidelines range" or where the district court's explanation "make[s] it clear that the judge based the sentence he or she selected on factors independent of the Guidelines." Id. Accordingly, the government is permitted to counter the presumption that a Guidelines calculation error was prejudicial by pointing to a clear statement from the sentencing

court providing "an indication that the trial court 'intended to untether' the sentence from the Guidelines range." Taylor, 848 F.3d at 498 (quoting United States v. Hudson, 823 F.3d 11, 19 (1st Cir. 2016)).

iii.

Monson's procedural challenge to the district court's calculation of the applicable Guidelines range at sentencing is two-fold: first, he contends that the district court incorrectly determined his total offense level due to a grouping error; second, he argues that the district court incorrectly calculated his Guidelines sentence due to the court's misapplication of U.S.S.G. §5G1.1. However, both of these challenges fail for the same reason: the record demonstrates that the sentence imposed by the district court was independent of, and based on factors unrelated to, the Guidelines sentence and that the district court explicitly stated its intent to uncouple the sentence from the Guidelines by noting that they were inapplicable in a case such as this. Because the district court's sentence was not based on a Guidelines range, any error that the court may have made in calculating that Guidelines range (through either its determination of Monson's total offense level or its application of U.S.S.G. §5G1.1) had no effect. Each of Monson's challenges thus fails on the third prong of our plain error review, because he cannot demonstrate that he

would have received a lesser sentence but for the district court's alleged errors.

The district court opened Monson's sentencing hearing by stating "the Court accepts the presentence report guideline calculation as being accurate" but noted that it "recognized that the numbers are extraordinarily high and generally inapplicable in a situation like this because of how the numbers come out." The court thus clarified that its acceptance of the Guidelines range was a mere technicality, indicating that its sentencing determination was independent of that Guidelines calculation. The court discussed at length the various factors that it considered in determining an appropriate sentence including the seriousness of the offense, the impact of the offense on the victims, and Monson's background (including his lack of prior criminal history, his military service, his steady record of employment, and his amenability to rehabilitation). The record thus reflects that it was these factors, and not the Guidelines calculation (which the court expressly indicated was inapplicable here) that drove the court's sentencing determination.

Monson argues that the court nonetheless used the Guidelines as a starting point to determine his sentence, and thus its erroneous calculation of the applicable Guidelines range led to a higher sentence than would have been imposed but for the errors. In support of this argument, he points to the fact that

the court mentioned the higher Guidelines range that was applied in a different case concerning similar conduct as a means of differentiating the defendant in that other case from Monson. However, read in the context of the sentencing hearing as a whole, we do not view the court's brief mention of that higher Guidelines range as demonstrating that the court used Monson's Guidelines range as a starting point in determining an applicable sentence. The court discussed the other case -- United States v. Deordio, No. 3:18-cr-30056-MGM (D. Mass. Feb. 4, 2021) -- in response to the government's recommendation that the court impose the same sentence on Monson that it had imposed on the defendant in Deordio (720 months). The court responded to this suggestion by noting that there was "a much different criminal history between [Monson and Deordio], much different in life circumstances, and much different in amenability to rehabilitation, but very different with respect to prior criminal history." The court then proceeded to note the different Guidelines ranges in the two cases -- 5,040 months for Deordio compared to 4,080 months for Monson -- while again explaining that "the use of the Guidelines in these types of cases . . . falls by the wayside a little." Read in this context, we construe the district court's mention of the Guidelines ranges as merely intended to further illustrate that the very different backgrounds and criminal histories of the two defendants rendered them differently situated at sentencing. We do not, however, read

that reference to the Guidelines as indicating that the court used either defendant's Guidelines range as a starting point in determining the applicable sentence for Monson, especially given that the court repeatedly and explicitly disclaimed the applicability of the Guidelines to its sentencing determination.

Because we conclude that the sentence imposed by the district court was not tethered to the Guidelines range, any error that the district court may have made in calculating that range did not affect Monson's rights or result in a higher sentence than would have been imposed in the absence of the alleged errors.

III. CONCLUSION

For the foregoing reasons, the convictions and sentence are **affirmed**.