

APPENDIX

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APPENDIX A

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAY 30 2023

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 21-50266

Plaintiff-Appellee,

D.C. No.

v.

2:19-cr-00495-DSF-1

VAHE SARKISS,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Argued and Submitted March 7, 2023
Pasadena, California

Before: WATFORD and COLLINS, Circuit Judges, and S. MURPHY,** District Judge.

Appellant Vahe Sarkiss appealed his one-count jury trial conviction for possession of child pornography under 18 U.S.C. §§ 2252A(a)(5)(B), (b)(2). After Sarkiss was previously convicted for possession of child pornography in 2013, a

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Stephen Joseph Murphy, III, United States District Judge for the Eastern District of Michigan, sitting by designation.

woman found a flash drive in the laundry room of Sarkiss's trailer park that contained images of Sarkiss, whom the woman recognized, and of naked young males. The flash drive was provided to the Los Angeles Sheriff's Department, which in turn gave it to Sarkiss' probation officer. Several probation officers searched Sarkiss's trailer and discovered a computer in the bed of his pickup truck and a hard drive in the trunk of his car; those both contained explicit images of children. At trial, the jury returned a verdict and convicted Sarkiss of one count of possession of child pornography under § 2252A. The district court sentenced Sarkiss to 135 months' imprisonment and a life term of supervised release. Sarkiss then raised six arguments on appeal. For the reasons below, we affirm the district court.

First, Sarkiss argued that the district court erred in admitting his prior conviction for possession of child pornography under Federal Rule of Evidence 414(a): "In a criminal case in which a defendant is accused of child molestation, the court *may* admit evidence that the defendant committed *any* other child molestation." *Id.* (emphasis added). The term "child molestation" includes the possession of child pornography under § 2252A. *See United States v. Hanson*, 936 F.3d 876, 881 (9th Cir. 2019). The district court admitted the prior conviction because it was relevant under Federal Rule of Evidence 403 and because it satisfied our court's five-factor test for determining whether to admit evidence of a

prior act of sexual misconduct. *See United States v. LeMay*, 260 F.3d 1018, 1028 (9th Cir. 2001). It therefore did not abuse its discretion by admitting the prior conviction. *See United States v. Halamek*, 5 F.4th 1081, 1087 (9th Cir. 2021).

Nor did the district court err in allowing the Government to use the prior conviction to make a propensity argument. Rule 414 explicitly provides, without limitation or exception, that a prior conviction “may be considered on any matter to which it is relevant.” Fed. R. Evid. 414(a). This use of propensity evidence does not violate due process, we have held, because “there is nothing fundamentally unfair about the allowance of propensity evidence under Rule 414” as long as the “protections of Rule 403 remain in place.” *LeMay*, 260 F.3d at 1026. What is more, we clarified in *LeMay* that the Government may make propensity arguments in cases involving child molestation so long as the evidence is not unfairly prejudicial under *LeMay*’s five-factor test. *Id.* at 1026–28. Since the district court correctly concluded that the prior conviction was admissible under the five *LeMay* factors, the district court did not err in allowing the Government to use Sarkiss’s prior conviction to make propensity arguments.

Second, Sarkiss argued that the district court erred in denying his motion to suppress evidence from the probation officers’ search of his trailer because the officers lacked reasonable suspicion for the search. *See United States v. Knights*, 534 U.S. 112, 121 (2001) (requiring “no more than reasonable suspicion to conduct

a search of [a] probationer’s house”). Reasonable suspicion requires “specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for particularized suspicion” that a person is violating the law. *United States v. Nault*, 41 F.4th 1073, 1081 (9th Cir. 2022) (citation omitted). Here, the district court properly found that the combination of the suspected child pornography on the flash drive and Sarkiss’s prior conviction for possession of child pornography was sufficient to establish reasonable suspicion.

Third, Sarkiss argued that the district court erred in denying Sarkiss’s motion to dismiss the superseding indictment and by incorrectly instructing the jury. Sarkiss argued that the superseding indictment failed to allege (and the jury was not instructed to find) that he had possessed child pornography and knew that the images were either transported through interstate commerce or produced using materials that had been transported through interstate commerce. *See* 18 U.S.C. § 2252A(a)(5)(B). The statute, however, does not require the Government to allege or prove that Sarkiss knew his crime had an interstate nexus. At most, the jurisdictional element serves to make the crime a federal one. *See Torres v. Lynch*, 578 U.S. 452, 457, 467–68 (2016).

Fourth, Sarkiss argued that the district court erred in ruling that Sarkiss opened the door to allow admission of a previously excluded sexually explicit anime image. Under the “opening the door” doctrine, “the government may

introduce otherwise inadmissible evidence when the defendant opens the door by introducing potentially misleading testimony.” *United States v. Osazuwa*, 564 F.3d 1169, 1175 (9th Cir. 2009) (internal quotation marks and citation omitted). The district court did not abuse its discretion in concluding that, in light of Sarkiss’s trial testimony specifically denying any sexual interest in children, the probative value of the anime image in rebutting that testimony outweighed any potential for unfair prejudice. *See* Fed. R. Evid. 403. Indeed, the district court’s decision was simply a follow-through on what it had previously stated it would do if Sarkiss “attempted to deny any sexual interest in children or claimed he did not view pornography.” At trial, Sarkiss did precisely that. Thus, Sarkiss’s attempt to deny any sexual interest in children opened the door for the Government to introduce the previously inadmissible anime image.

Fifth, Sarkiss argued that the district court violated Federal Rule of Criminal Procedure 32 by not ruling on some of his objections to the presentence report. But the district court did not err because it appropriately considered Sarkiss’s objections to the presentence report. Indeed, the district court reviewed the presentence report, provided the parties a chance to object at sentencing, considered the relevant sentencing factors under 18 U.S.C. § 3553(a), and expressly considered Sarkiss’s personal and health history before imposing a sentence. The district court also sufficiently resolved all factual objections when it

stated that it found “the [presentencing] report to be accurate and correct in all respects that would have an impact on the sentence” and explained that it was thereby “adopt[ing] the report and the calculation of the advisory guidelines.” *See United States v. Riley*, 335 F.3d 919, 931 (9th Cir. 2003).

Sarkiss’s other procedural objections also lack merit. The district court did not err in considering his prior conviction because a jury does not need to find this fact. *See Alleyne v. United States*, 570 U.S. 99, 111 & n.1 (2013). Nor did it err by double counting Sarkiss’s recidivism because his prior conviction affected the sentencing analysis only by raising his criminal history category while leaving his offense level unchanged. Sarkiss’s objections to his sentencing enhancements, including for possessing more than 600 images of child pornography, also fail because the district court properly found that a preponderance of the evidence supports these enhancements. *See United States v. Treadwell*, 593 F.3d 990, 1000 (9th Cir. 2010), *overruled on other grounds by United States v. Miller*, 953 F.3d 1095 (9th Cir. 2020).

Sixth, Sarkiss argued that the sentence imposed by the district court was unreasonable. But the sentence was at the low end of the guidelines. And the district court adequately considered the evidence, including Sarkiss’s personal and health history, along with the other § 3553(a) factors in determining the sentence. We therefore conclude that the district court did not abuse its discretion by

imposing the low-end sentence. *See United States v. Autery*, 555 F.3d 864, 871 (9th Cir. 2009).

AFFIRMED.

APPENDIX B

**United States District Court
Central District of California**

UNITED STATES OF AMERICA vs.

Docket No. CR 19-00495 (A) DSFDefendant VAHE SARKISSSocial Security No. 0 0 3 6akas: None

(Last 4 digits)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date.

MONTH	DAY	YEAR
11	22	2021

COUNSELShaun Khojayan, Appointed

(Name of Counsel)

PLEA☐

GUILTY, and the court being satisfied that there is a factual basis for the plea.

☐NOLO
CONTENDERE☒NOT
GUILTY**FINDING**There being a finding/verdict of **GUILTY**, defendant has been convicted as charged of the offense(s) of: Possession of Child Pornography 18 U.S.C. § 2252 – Count 1 of the First Superseding Indictment**JUDGMENT
AND PROB/
COMM
ORDER**

The Court asked whether there was any reason why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Vahe Sarkiss, is hereby committed on Count One of the First Superseding Indictment to the custody of the Bureau of Prisons for a term of 135 months.

On release from imprisonment, the defendant shall be placed on supervised release for a life term under the following terms and conditions:

1. The defendant shall comply with the rules and regulations of the United States Probation & Pretrial Services Office and Second Amended General Order 20-04.
2. The defendant shall not commit any violation of local, state, or federal law or ordinance.
3. During the period of community supervision, the defendant shall pay the special assessment in accordance with this judgment's orders pertaining to such payment.
4. The defendant shall cooperate in the collection of a DNA sample from the defendant.

Restrictions on Computer Use

5. The defendant shall possess and use only those computers and computer-related devices, screen usernames, passwords, email accounts, and internet service providers (ISPs), social media accounts, messaging applications and cloud storage accounts, that have been disclosed to the Probation Officer upon commencement of supervision. Any changes or additions are to be disclosed to the Probation Officer prior to the first use. Computers and computer-related devices include personal computers, internet appliances, electronic games, cellular telephones, digital

storage media, and their peripheral equipment, that can access, or can be modified to access, the internet, electronic bulletin boards, and other computers.

6. All computers, computer-related devices, and their peripheral equipment, used by the defendant shall be subject to search, seizure and computer monitoring. This shall not apply to items used at the employment site that are maintained and monitored by the employer.
7. The defendant shall comply with the rules and regulations of the Computer Monitoring Program. The defendant shall pay the cost of the Computer Monitoring Program.

Sex Offender / Mental Health Conditions

8. Within three (3) days of release from prison, the defendant shall register as a sex offender, and keep the registration current, in each jurisdiction where the defendant resides, is employed or is a student, pursuant to the registration procedures that have been established in each jurisdiction. When registering for the first time, the defendant shall also register in the jurisdiction in which the conviction occurred if different from the defendant's jurisdiction of residence. The defendant shall provide proof of registration to the Probation Officer within 48 hours of registration.
9. The defendant shall participate in a psychological counseling or psychiatric treatment or a sex offender treatment program, or any combination thereof as approved and directed by the Probation Officer. The defendant shall abide by all rules, requirements, and conditions of such program, including submission to risk assessment evaluations and physiological testing, such as polygraph and Abel testing. The defendant retains the right to invoke the Fifth Amendment. The Court authorizes the Probation Officer to disclose the Presentence Report, and any previous mental health evaluations or reports, to the treatment provider. The treatment provider may provide information (excluding the Presentence report), to State or local social service agencies (such as the State of California, Department of Social Service), for the purpose of the client's rehabilitation.
10. As directed by the Probation Officer, the defendant shall pay all or part of the costs of psychological counseling or psychiatric treatment, or a sex offender treatment program, or any combination thereof to the aftercare contractor during the period of community supervision. The defendant shall provide payment and proof of payment as directed by the Probation Officer. If the defendant has no ability to pay, no payment shall be required.
11. The defendant shall not view or possess any materials, including pictures, photographs, books, writings, drawings, videos, or video games, depicting or describing child pornography, as defined in 18 U.S.C. § 2256(8), or sexually explicit conduct depicting minors, as defined at 18 U.S.C. § 2256(2). This condition does not prohibit the defendant from possessing materials solely because they are necessary to, and used for, a collateral attack, nor does it prohibit the defendant from

possessing materials prepared and used for the purposes of the defendant's Court-mandated sex offender treatment, when the defendant's treatment provider or the probation officer has approved of the defendant's possession of the material in advance.

12. The defendant shall not own, use or have access to the services of any commercial mail-receiving agency, nor shall the defendant open or maintain a post office box, without the prior written approval of the Probation Officer.
13. The defendant shall not enter, or loiter, within 100 feet of school yards, parks, public swimming pools, playgrounds, youth centers, video arcade facilities, amusement and theme parks, or other places primarily used by persons under the age of 18, without the prior written authorization of the Probation Officer.
14. The defendant shall not associate or have verbal, written, telephonic, or electronic communication with any person under the age of 18, except: (a) in the presence of the parent or legal guardian of said minor; and (b) on the condition that the defendant notify said parent or legal guardian of the defendant's conviction in the instant offense and prior offense. This provision does not encompass persons under the age of 18, such as waiters, cashiers, ticket vendors, etc., with whom the defendant must interact in order to obtain ordinary and usual commercial services.
15. The defendant shall not affiliate with, own, control, volunteer or be employed in any capacity by a business or organization that causes the defendant to regularly contact persons under the age of 18.
16. The defendant's employment shall be approved by the Probation Officer, and any change in employment must be pre-approved by the Probation Officer. The defendant shall submit the name and address of the proposed employer to the Probation Officer at least ten (10) days prior to any scheduled change.
17. The defendant shall not view or possess any materials, including pictures, photographs, books, writings, drawings, videos, or video games, depicting or describing child erotica, which is defined as a person under the age of 18 in partial or complete state of nudity, in sexually provocative poses, viewed for the purpose of sexual arousal.
18. The defendant shall submit to a search, at any time, with or without warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computers, cell phones, other electronic communication or data storage devices or media, email accounts, social media accounts, cloud storage accounts, effects and other areas under the defendant's control, upon reasonable suspicion concerning a violation of a condition of

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supervision or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

It is ordered that the defendant shall pay to the United States a special assessment of \$100, which is due immediately. Any unpaid balance shall be due during the period of imprisonment, at the rate of not less than \$25 per quarter, and pursuant to the Bureau of Prisons' Inmate Financial Responsibility Program.

Pursuant to Guideline § 5E1.2(a), all fines are waived as the Court finds that the defendant has established that he is unable to pay and is not likely to become able to pay any fine.

The Court recommends to the Bureau of Prisons that defendant be designated to a BOP facility that offers the 500-hour Residential Drug Abuse Program (RDAP).

The Court recommends that the defendant be designated to the Bureau of Prisons facility located at FCI Terminal Island.

The Court advised the defendant of the right to appeal this judgment.

SENTENCING FACTORS: The sentence is based on the factors set forth in 18 U.S.C. §3553, including the applicable sentencing range set forth in the guidelines, as more particularly reflected in the court reporter's transcript.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

November 22, 2021

Date



U. S. District Judge DALE S. FISCHER

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Clerk, U.S. District Court

November 22, 2021

Filed Date

By Renee A. Fisher

Deputy Clerk

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

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this judgment:

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1. The defendant must not commit another federal, state, or local crime;
2. The defendant must report to the probation office in the federal judicial district of residence within 72 hours of imposition of a sentence of probation or release from imprisonment, unless otherwise directed by the probation officer;
3. The defendant must report to the probation office as instructed by the court or probation officer;
4. The defendant must not knowingly leave the judicial district without first receiving the permission of the court or probation officer;
5. The defendant must answer truthfully the inquiries of the probation officer, unless legitimately asserting his or her Fifth Amendment right against self-incrimination as to new criminal conduct;
6. The defendant must reside at a location approved by the probation officer and must notify the probation officer at least 10 days before any anticipated change or within 72 hours of an unanticipated change in residence or persons living in defendant's residence;
7. The defendant must permit the probation officer to contact him or her at any time at home or elsewhere and must permit confiscation of any contraband prohibited by law or the terms of supervision and observed in plain view by the probation officer;
8. The defendant must work at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons and must notify the probation officer at least ten days before any change in employment or within 72 hours of an unanticipated change;
9. The defendant must not knowingly associate with any persons engaged in criminal activity and must not knowingly associate with any person convicted of a felony unless granted permission to do so by the probation officer. This condition will not apply to intimate family members, unless the court has completed an individualized review and has determined that the restriction is necessary for protection of the community or rehabilitation;
10. The defendant must refrain from excessive use of alcohol and must not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
11. The defendant must notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
12. For felony cases, the defendant must not possess a firearm, ammunition, destructive device, or any other dangerous weapon;
13. The defendant must not act or enter into any agreement with a law enforcement agency to act as an informant or source without the permission of the court;
14. The defendant must follow the instructions of the probation officer to implement the orders of the court, afford adequate deterrence from criminal conduct, protect the public from further crimes of the defendant; and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

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☐ The defendant must also comply with the following special conditions (set forth below).

STATUTORY PROVISIONS PERTAINING TO PAYMENT AND COLLECTION OF FINANCIAL SANCTIONS

The defendant must pay interest on a fine or restitution of more than \$2,500, unless the court waives interest or unless the fine or restitution is paid in full before the fifteenth (15th) day after the date of the judgment under 18 U.S.C. § 3612(f)(1). Payments may be subject to penalties for default and delinquency under 18 U.S.C. § 3612(g). Interest and penalties pertaining to restitution, however, are not applicable for offenses completed before April 24, 1996. Assessments, restitution, fines, penalties, and costs must be paid by certified check or money order made payable to "Clerk, U.S. District Court." Each certified check or money order must include the case name and number. Payments must be delivered to:

United States District Court, Central District of California
Attn: Fiscal Department
255 East Temple Street, Room 1178
Los Angeles, CA 90012

or such other address as the Court may in future direct.

If all or any portion of a fine or restitution ordered remains unpaid after the termination of supervision, the defendant must pay the balance as directed by the United States Attorney's Office. 18 U.S.C. § 3613.

The defendant must notify the United States Attorney within thirty (30) days of any change in the defendant's mailing address or residence address until all fines, restitution, costs, and special assessments are paid in full. 18 U.S.C. § 3612(b)(1)(F).

The defendant must notify the Court (through the Probation Office) and the United States Attorney of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine or restitution, as required by 18 U.S.C. § 3664(k). The Court may also accept such notification from the government or the victim, and may, on its own motion or that of a party or the victim, adjust the manner of payment of a fine or restitution under 18 U.S.C. § 3664(k). See also 18 U.S.C. § 3572(d)(3) and for probation 18 U.S.C. § 3563(a)(7).

Payments will be applied in the following order:

1. Special assessments under 18 U.S.C. § 3013;
2. Restitution, in this sequence (under 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid):
 - Non-federal victims (individual and corporate),
 - Providers of compensation to non-federal victims,
 - The United States as victim;
3. Fine;
4. Community restitution, under 18 U.S.C. § 3663(c); and
5. Other penalties and costs.

CONDITIONS OF PROBATION AND SUPERVISED RELEASE PERTAINING TO FINANCIAL SANCTIONS

As directed by the Probation Officer, the defendant must provide to the Probation Officer: (1) a signed release authorizing credit report inquiries; (2) federal and state income tax returns or a signed release authorizing their disclosure and (3) an accurate financial statement, with supporting documentation as to all assets, income and expenses of the defendant. In addition, the defendant must not apply for any loan or open any line of credit without prior approval of the Probation Officer.

When supervision begins, and at any time thereafter upon request of the Probation Officer, the defendant must produce to the Probation and Pretrial Services Office records of all bank or investments accounts to which the defendant has access, including any business or trust accounts. Thereafter, for the term of supervision, the defendant must notify and receive approval of the Probation Office in advance of opening a new account or modifying or closing an existing one, including adding or deleting signatories; changing the account number or name, address, or other identifying information affiliated with the account; or any other modification. If the Probation Office approves the new account, modification or closing, the defendant must give the Probation Officer all related account records within 10 days of opening, modifying or closing the account. The defendant must not direct or ask anyone else to open or maintain any account on the defendant's behalf.

The defendant must not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of \$500 without approval of the Probation Officer until all financial obligations imposed by the Court have been satisfied in full.

These conditions are in addition to any other conditions imposed by this judgment.

USA vs. Vahe SarkissDocket No.: CR 19-00495 DSF**RETURN**

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____

Defendant noted on appeal on _____

Defendant released on _____

Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on _____ to _____

at _____

the institution designated by the Bureau of Prisons, with a certified copy of the within Judgment and Commitment.

United States Marshal

Date

By _____
Deputy Marshal

CERTIFICATE

I hereby attest and certify this date that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

Clerk, U.S. District Court

Filed Date

By _____
Deputy Clerk

FOR U.S. PROBATION OFFICE USE ONLY

Upon a finding of violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____
Defendant

Date

U. S. Probation Officer/Designated Witness

Date

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

AUG 2 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

VAHE SARKISS,

Defendant-Appellant.

No. 21-50266

D.C. No. 2:19-cr-00495-DSF-1
Central District of California,
Los Angeles

ORDER

Before: COLLINS, Circuit Judge, and S. MURPHY,* District Judge.**

Judges Collins and Murphy have voted to deny Appellant's petition for panel rehearing. Judge Collins voted to deny Appellant's petition for rehearing en banc, and Judge Murphy so recommends. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote. *See* FED. R. APP. P. 35(f). Accordingly, the petition for panel rehearing and rehearing en banc (Dkt. Entry 37) is **DENIED**.

* The Honorable Stephen Joseph Murphy III, United States District Judge for the Eastern District of Michigan, sitting by designation.

** This matter is decided unanimously by a quorum of the panel. *See* 28 U.S.C. § 46(d); Ninth Cir. Gen. Order 3.2(h).