No. 23-

In the Supreme Court of the United States

KEVIN HEWLETT

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the use of an internationally-manufactured cellphone in criminal conduct is, by itself, a sufficient nexus to interstate commerce to satisfy the commerce clause;

2) Whether the trial court erroneously instructed the jury as to the *mens rea* required to produce child pornography in violation of 18 U.S.C. § 2251(a).

PARTIES

The caption of the case in this Court contains all the parties (petitioner Kevin Hewlett and respondent United States).

RELATED PROCEEDINGS

Counsel is not aware of any related proceedings according to Supreme Court Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kevin Hewlett respectfully petitions this Court for a Writ of Certiorari to review the order of the Fourth Circuit Court of Appeals.

OPINIONS BELOW

The District Court's order and memorandum opinion of June 16, 2020, regarding application of the commerce clause, is unpublished but reproduced at Pet. App. 1a, and the District Court's oral order of Oct. 7, 2020, regarding the substantive jury instructions for 18 USC 2251(a), is produced at Pet. App. 18a. The Fourth Circuit Court of Appeals order denying petitioner's appeal is unpublished but reproduced at Pet. App. 26a. And the Fourth Circuit Court of Appeals order denying Petitioner's petition for rehearing *en banc* is unpublished but can be found at Pet. App. 32a.

JUSRISDICTION

The order of the judgment of District Court was entered on June 25, 2021, a timely appeal was filed with the Fourth Circuit Court of Appeals. On April 27, 2023, the Fourth Circuit Court of Appeals denied Petitioner's appeal, and denied Petitioner's timely motion for rehearing *en banc* on August 18, 2023. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"The Congress shall have power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

U.S. Const. Art. I,§ 8, cl. 3.

Sexual Exploitation of Children (in pertinent part):

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.

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18 U.S.C. § 2251(a)

STATEMENT OF THE CASE

Mr. Hewlett was convicted of one count of Production of Child Pornography, in violation of 18 U.S.C. §§ 2251(a) & (e), and one count of Distribution of Child Pornography in violation of 18 U.S.C. §§ 2252(a)(2) & (b)(1). Both of these charges

require a federal nexus, but the evidence presented established only that Mr. Hewlett's actions were entirely intrastate. He recorded himself having sex with his minor girlfriend in Virginia where they both live. And, upon her request, he texted her the video, while he and she were both located within the same county. Even though the evidence was insufficient to establish a nexus to interstate commerce, the Court held that such a nexus can be met solely by virtue of the fact that a computer upon which the visual depiction resides had been manufactured out of state. But such a rule, in an age where everyone carries a smart phone, makes a mockery of the limitations on federal criminal jurisdiction.

Additionally, the trial court incorrectly instructed the jury on the *mens rea* required to produce child pornography in violation of 18 U.S.C. § 2251(a). Section 2251(a) requires that the Government prove that Defendant enticed a minor "to take part in sexually explicit conduct for the purpose of producing a visual depiction of that conduct." 18 U.S.C. § 2251(a). Reflecting this, Mr. Hewlett provided proposed instructions that stated the Government must prove that Mr. Hewlett, had a dominant motivating purpose of producing a visual depiction of sexually explicit conduct when engaging in sexual activity, and further that dominant in this context means that criminal motivations predominate over other, less powerful motivations

for conduct. But instead the trial court instructing that the desire to create a visual depiction need only be one of the motivating purposes for engaging in sexual activity with a minor. This was in error.

REASONS FOR GRANTING THE PETITION

Purely intrastate criminal conduct should not be subject to federal jurisdiction solely by use of an internationally-manufactured cellphone

Mr. Hewlett is alleged to have videotaped himself having sex with a 16-year-old girl and then texting that video to the minor girl. He was charged by Indictment with two offenses, production of child pornography and distribution of child pornography, both implicating federal jurisdiction.

Pertinent here, the first, production of child pornography, criminalizes the production of a visual depiction of sexually explicit conduct "… 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." 18 U.S.C. § 2251(a). The second, distribution of child pornography, criminalizes the distribution of any visual depiction "using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails." 18 U.S.C. § 2252(a)(2). Both of these charges require a federal nexus per their terms and the U.S. Constitution, *see*, U.S. Const. Art. I,§ 8, cl. 3, and the District Court as affirmed by the Fourth Circuit Court of Appeals held that such a nexus can be met solely by virtue of the fact that a computer upon which the visual depiction resides had been manufactured out of state. *See e.g.*, *United States v. Miltier*, 882 F.3d 81, 92 (4th Cir. 2018)(holding that § 2252A(a)(2)(A) criminalizes the purely intrastate receipt of child pornography based on the previous movement of a computer through interstate or foreign commerce).

Under the Fourth Circuit's precedent, an entirely local criminal affair becomes a federal crime, chargeable at the

Government's discretion, because Mr. Hewlett's mobile phone is not manufactured exclusively in Virginia (or anywhere for that matter). The exception of federal criminal jurisdiction has swallowed the rule of state criminal jurisdiction.

Mr. Hewlett's Petition is an ideal vehicle to address this encroachment onto state terrain. Mr. Hewlett's actions were entirely intrastate. He recorded himself having sex with his minor girlfriend in Virginia where they both live. And, upon her request, he texted her the video. There is no evidence he used the internet to upload the video to either the internet at large or to provide the video to the minor girl.

The circuit split regarding the *mens rea* necessary for criminal culpability under 18 U.S.C. § 2251(a) should be resolved

Mr. Hewlett was charged with producing child pornography in violation of 18 U.S.C. § 2251(a). Section 2251(a) requires that the Government prove that Defendant enticed a minor "to take part in sexually explicit conduct for the purpose of producing a visual depiction of that conduct." 18 U.S.C. § 2251(a). Mr. Hewlett presented the following jury instruction as to "purpose of producing."

> "Purpose of producing" means that Defendant must engage in the sexual activity with the specific intent to produce a visual depiction. It is not sufficient simply to prove that defendant purposefully took a picture or took his camera phone to the location of the sexually explicit conduct.

> ***
>
> it is sufficient for the Government to prove that Defendant had a dominant motivating purpose of producing a visual depiction of sexually explicit conduct when engaging in sexual activity with MINOR GIRL 1. Dominant in this context means that criminal motivations predominate over other, less powerful motivations for conduct.

The trial court denied Mr. Hewlett's proposed instruction, instead instructing the jury, in pertinent part, that "it is sufficient for the government to prove that one of the defendant's motivating purposes in engaging in sexual activity with minor girl 1 was to produce a visual depiction of sexually explicit conduct."

The distinction the trial court drew between "one… motivating purpose" on the one hand, and a "dominant motivating purpose," as propounded by Mr. Hewlett, on the other, was erroneous. By affirming the District Court's elaboration, the Fourth Circuit creates a circuit split between itself and the Second. *See e.g.*, *United States v. Sirois*, 87 F.3d 34, 39 (2d Cir. 1996)("holding "that a jury may find a violation of § 2251(a) so long as the evidence shows that illegal sexual activity for the production of visual depictions of that activity was one of the dominant motives for the interstate transportation of the minors".); see also *United States v. Miller*, 148 F.3d 207, 212 (2d Cir. 1998)(holding that

"'dominant' simply means that [criminal] motivations predominate over other, less powerful motivations for conduct.").

It is beyond cavil that § 2251(a)'s "for the purpose of" requires that the production of a visual depiction be more than merely incidental to the sexually explicit conduct; that is, not merely 'a purpose' that may happen to arise at the same instant as the conduct," *United States v. McCauley*, 983 F.3d 690, 695 (4th Cir. 2020). And, while a trial court need not demand that a jury rank "motivating purposes," per the statute, the culpable motive must be at least one of the dominative motives for the conduct lest the motivating purpose be merely incidental to other purposes. *Miller*, 148 F.3d at 212 ("'dominant' simply means that [criminal] motivations predominate over other, less powerful motivations for conduct).

Conclusion

For these reasons, Petitioner, through undersigned counsel, respectfully requests that the Court grant Petitioner's Petition for a writ of certiorari and consider whether the use of a ubiquitous cellphone is sufficient to create federal jurisdiction over an otherwise entirely local criminal matter. Additionally, Petitioner respectfully requests that the Court grant Petitioner's Petition to resolve a circuit split as to the

mens rea necessary for a conviction under 18 U.S.C. § 2251(a).

Respectfully submitted,

Kevin Hewlett
By Counsel

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_____
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APPENDIX

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

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	**Criminal No. 1:20-CR-64**
	)	
KEVIN HEWLETT,	)	
Defendant.	)	

ORDER

For the reasons stated in the Memorandum Opinion issued this same day,

It is hereby **ORDERED** that defendant's Motion to Dismiss the Indictment (Dkt. 37) is **DENIED.**

The Clerk is directed to send a copy of this Order to all counsel of record.

Alexandria, Virginia
June 16, 2020

/s/
T. S. Ellis, III
United States District Judge

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

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	**Criminal No. 1:20-CR-64**
	)	
KEVIN HEWLETT,	)	
Defendant.	)	

MEMORANDUM OPINION

On March 5, 2020, a federal grand jury returned a two-count Indictment charging defendant Kevin Hewlett with (1) sexual exploitation of a minor for the purpose of producing a visual depiction of a minor engaging in sexually explicit conduct in violation of §§ 2251(a) and 2251(e), and (2) distribution of a visual depiction of a minor engaging in sexually explicit conduct in violation of 18 U.S.C. §§ 2252(a)(2) and 2252(b)(1). In Count I, the Indictment alleges that on or about August 15, 2018, defendant used an Apple iPhone 7 Plus to produce and to attempt to produce a video file depicting defendant engaging in sexual intercourse with an unidentified underage female referred to as MINOR GIRL 1. In Count II, the Indictment alleges that on or about January 8, 2019, defendant used Instagram, a social media communication platform, to distribute and to attempt to distribute a video of defendant engaging in sexually explicit conduct with MINOR GIRL 1.

At issue now in this matter is defendant's Motion to Dismiss the Indictment. First, defendant argues that federal jurisdiction is lacking because any production or distribution of a visual depiction of a minor engaging in sexually explicit conduct as alleged in Counts I and II occurred entirely intrastate and did not result in knowing or intentional transmission of a visual depiction of a minor engaging in sexually explicit conduct across state lines. Second, defendant

argues that each of the two counts of the Indictment is duplicitous because each count charges defendant with both an attempt to commit a crime and the completed crime. The motion has been fully briefed and is now ripe for disposition.

I.

To begin with, it is necessary to confirm that each count of the Indictment is legally sufficient. In this respect, the standard an indictment must meet is found in Rule 7(c)(1), Fed. R. Crim. P., which provides that an indictment need only contain "a plain, concise, and definite written statement of the essential facts constituting the offense charged." Importantly, an indictment need not contain detailed factual allegations to satisfy this standard. *United States v. Resendiz-Ponce*, 549 U.S. 102, 110 (2007). Rather, the indictment is sufficient "(1) if it alleges the essential elements of the offense, that is, it fairly informs the accused of what he is to defend; and (2) if the allegations will enable the accused to plead an acquittal or conviction to bar a future prosecution for the same offense." *United States v. Rendelman*, 641 F.3d 36, 44 (4th Cir. 2011).[1] A review of the Indictment makes clear that it passes this test of legal sufficiency.

Count I of the Indictment charges defendant with sexual exploitation of a minor for the purpose of producing a visual depiction in violation of § 2251(a).[2] The offense of sexual

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[1] An essential element of the offense is defined as one "whose specification . . . is necessary to establish the very illegality of the behavior and thus the court's jurisdiction." *Hamling v. United States*, 418 U.S. 87, 117 (1974).

[2] Section 2251(a) of Title 18 of the United States Code provides:

> 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

exploitation of a minor for the purpose of producing a visual depiction in violation of 18 U.S.C. § 2251(a) contains three essential elements: (1) that the victim was less than 18 years old; (2) that the defendant used, employed, persuaded, induced, enticed, or coerced the minor to take part in sexually explicit conduct for the purpose of producing a visual depiction of that conduct; and (3) that the visual depiction was produced using materials that had been transported in or affecting interstate or foreign commerce. *See United States v. Malloy*, 568 F.3d 166, 169 (2009) (identifying essential elements of § 2251(a) under prior version of statute).

Count I of the Indictment alleges each essential element of the offense charged. Specifically, Count I alleges that on or about August 15, 2018, defendant

> attempted to and did . . . induce . . . a minor . . . to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct . . . and that visual depiction was produced and transmitted using materials that had been mailed, shipped, and transported in and affecting interstate . . . commerce by any means . . . .

Indictment at 1, ¶ 1. By closely tracking § 2251(a)'s language, Count I provides defendant with sufficient notice of the charge against him. *United States v. Wicks*, 187 F.3d 426, 427 (4th Cir. 1999) ("Generally, an indictment is sufficient if it alleges an offense in the words of the statute . . . ."). Count I's factual allegations also enable defendant "to plead an acquittal or conviction to bar a future prosecution for the same offense." *Rendelman*, 641 F.3d at 44. Count I identifies the date the alleged offense occurred, August 15, 2018, and the means by which the offense was committed, namely "a video file depicting [defendant] engaging in sexual intercourse with MINOR GIRL 1, produced using an Apple iPhone 7 Plus." Indictment at 1–2, ¶ 1. The Indictment's allegations identify the facts and circumstances of the violation of § 2251(a)

> using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

18 U.S.C. § 2251(a). Section 2251(e) imposes penalties on "[a]ny individual who violates, or attempts or conspires to violate, this section . . . ."

charged in Count I adequately, thereby enabling defendant to plead double jeopardy in a subsequent prosecution for the same offense. Accordingly, Count I of the Indictment is legally sufficient.

Seeking to avoid this result, defendant argued in his Reply brief that the Indictment fails to allege and that the government cannot prove that the defendant possessed the requisite intent to violate § 2251(a) because "it is not sufficient simply to prove that the defendant purposefully took a picture." *United States v. Palomino-Coronado*, 805 F.3d 127, 131 (4th Cir. 2015) (holding that government adduced insufficient evidence that defendant acted for the purpose of producing a visual depiction). Defendant's argument fails. Here, the Indictment sufficiently alleges requisite intent by stating that defendant induced MINOR GIRL 1 "to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct." Indictment at 1, ¶ 1. Nothing more is required here because an indictment "need not set forth with detail the government's evidence; nor need it enumerate every 'every possible legal and factual theory of [the defendant's] guilt.'" *United States v. Le*, 310 F. Supp. 2d 763, 773 (E.D. Va. 2004) (quoting *United States v. Am. Waste Fibers Co.*, 809 F.2d 1044, 1047 (4th Cir. 1987)). As to defendant's argument that the government cannot establish that defendant possessed the requisite intent, this contention will be addressed on the basis of the evidence adduced at trial, not the Indictment's allegations. *See United States v. Critzer*, 951 F.2d 306, 307 (11th Cir. 1992) ("There is no summary judgment procedure in criminal cases. Nor do the rules provide for a pre-trial determination of the sufficiency of the evidence.").

Count II of the Indictment charges defendant with distributing a visual depiction of a minor engaging in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(2).[3] Section

[3] Section 2252(a)(2) applies to any person who:

2252(a)(2) prohibits any person from

> knowingly . . . distribut[ing] . . . any visual depiction using any means or facility of interstate commerce or that . . . has been shipped or transported in or affecting interstate . . . commerce . . . if . . . the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and . . . such depiction is of such conduct.

18 U.S.C. § 2252(a)(2). Therefore, the essential elements of a violation of § 2252(a)(2) are: (1) that defendant knowingly distributed a visual depiction of a minor engaging in sexually explicit conduct; (2) that defendant distributed this visual depiction using any means or facility of interstate commerce or using any device or instrumentality that has been shipped or transported in or affecting interstate commerce; and (3) that defendant knew that the production of this visual depiction involved the use of a minor engaging in sexually explicit conduct and that the visual depiction was of a minor engaging in sexually explicit conduct. *See United States v. Cedelle*, 89 F.3d 181, 184–86 (4th Cir. 1996) (noting error in district court's instructions under previous version of § 2252(a)(2) but concluding that conviction was inevitable).

Count II alleges all of the essential elements of a violation of § 2252(a)(2). Specifically, Count II alleges that defendant

> did knowingly distribute and attempt to distribute a visual depiction using any means and facility of interstate and foreign commerce and . . . had been shipped and transported in and affecting interstate and foreign commerce . . . , the production of which visual depiction involved the use of a minor engaging in sexually explicit conduct and which visual conduct was of such conduct . . . .

> knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails, if--
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
> (B) such visual depiction is of such conduct.

18 U.S.C. § 2252(a)(2). Section 2252(b)(1) provides for penalties for "[w]hoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) . . . ."

Indictment at 3, ¶ 2. As with Count I, Count II closely tracks the statute's language, thereby providing defendant with sufficient notice of the charge against him. *See Wicks*, 187 F.3d at 427 ("Generally, an indictment is sufficient if it alleges an offense in the words of the statute . . . ."). Count II's factual allegations thereby enable defendant "to plead an acquittal or conviction to bar a future prosecution for the same offense." *Rendelman*, 641 F.3d at 44. Count II alleges the date on which the alleged offense occurred, January 8, 2019, and the means by which defendant allegedly committed the offense, namely "a video of [defendant] engaging in sexually explicit conduct with a minor . . . distributed via a social media communication platform, Instagram." Indictment at 3, ¶ 2. The Indictment's allegations adequately identify the facts and circumstances of the violation of § 2252(a)(2) charged in Count II in a manner that enables defendant to plead double jeopardy in a subsequent prosecution for the same offense. Accordingly, Count II of the Indictment is legally sufficient.

II.

At issue now is defendant's Motion to Dismiss the Indictment. Specifically, notwithstanding the legal sufficiency of each count of the Indictment, defendant seeks dismissal of both counts of the Indictment on two grounds. First, defendant contends that because the defendant merely attempted to send a video file to MINOR GIRL 1 while both parties were present in Virginia, the requisite nexus to interstate commerce is lacking for both charges. In making this argument, defendant asserts that the Indictment fails to allege facts showing that defendant knowingly transmitted or intended to transmit a visual depiction of a minor engaging in sexually explicit conduct across state lines. Second, defendant argues that each count of the

Indictment is duplicitous because both counts charge defendant with an attempted violation and a completed violation of a criminal statute.

A.

The Constitution delegates to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. I, § 8, cl. 3. It is well-settled that Congress may regulate three broad categories of activity under its commerce power. First, Congress may regulate the channels of interstate commerce. *See Gonzalez v. Raich*, 545 U.S. 1, 16 (2005). Second, Congress has the authority to regulate and protect the instrumentalities of interstate commerce and persons or things in interstate commerce. *Id.* at 16–17. Third, Congress has the power to regulate activities that substantially affect interstate commerce. *Id.* at 17. With respect to the third category, "Congress has the authority to regulate purely intrastate activities, as long as a rational basis exist[s] for concluding that a regulated activity sufficiently affect[s] interstate commerce." *United States v. Miltier*, 882 F.3d 81, 89 (4th Cir. 2018) (quoting *United States v. Lopez*, 514 U.S. 549, 557 (1995)). In this regard, the Fourth Circuit has noted that Congress has made specific findings that the regulation of intrastate child pornography sufficiently affects the interstate child pornography market and hence falls within the ambit of Congress' power to regulate interstate commerce. *Miltier*, 882 F.3d at 89.[4]

With respect to Count II, defendant contends that § 2252(a)(2)'s interstate commerce element cannot be satisfied in this case because defendant never transmitted a visual depiction

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[4] *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, § 501(1)(F), 120 Stat. 587, 624 (codified as amended at 18 U.S.C. § 2251) (finding that federal control of intrastate incidents of child pornography is "essential to the effective control of the interstate market in child pornography"); Child Pornography Prevention Act of 1996, Pub. L. 104–208, § 121(12), 110 Stat. 3009–26, 3009–27 (codified as amended at 18 U.S.C. § 2251) ("[P]rohibiting the possession and viewing of child pornography will ... help[ ] to protect the victims of child pornography and to eliminate the market for the sexual exploitative use of children....").

outside of Virginia. Defendant's argument fails, for as the government correctly notes, the Indictment alleges two ways that § 2252(a)(2)'s interstate commerce element may be satisfied here. First, the Fourth Circuit has made clear that "use of the internet in the transmission of child pornography satisfies the interstate commerce element of the offense." *Miltier*, 882 F.3d at 87 (affirming conviction for receipt of child pornography in violation of § 2252A(a)(2)(A) based on evidence that defendant downloaded pornography from internet) (citing *United States v. Ellyson*, 326 F.3d 522, 533 (4th Cir. 2003)). Accordingly, the interstate commerce element of § 2252(a)(2) is fully satisfied where, as the Indictment here alleges, the defendant used the internet to transmit visual depictions of a minor engaging in sexually explicit conduct. *See id.*[5] And this conclusion is not altered by the fact that defendant sent or attempted to send the video file to a recipient located in the same state as defendant.

Second, the interstate commerce element is satisfied where, as here, the defendant distributed child pornography from a device that previously moved in interstate commerce. In this respect, the Fourth Circuit has made clear that § 2252A(a)(2)(A)'s jurisdictional element may be met in a case involving "purely intrastate receipt of child pornography based on the previous movement of a computer through interstate or foreign commerce." *Miltier*, 882 F.3d at 92. The Fourth Circuit grounded its holding in *United States v. Miltier* on the statute's use of the term "affecting interstate . . . commerce." 18 U.S.C. § 2252A(a)(2)(A). The Fourth Circuit concluded that the statute's expansive jurisdictional language "criminaliz[ed] the receipt of all

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[5] The jurisdictional language used in the two statutes is substantially similar. *Compare* 18 U.S.C. § 2252(a)(2) (prohibiting receipt or distribution of a visual depiction "using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer . . . ."), *with* 18 U.S.C. § 2252A(a)(2)(A) (prohibiting receipt or distribution of child pornography "using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate commerce by any means, including by computer.").

child pornography that has any connection to interstate commerce." *Miltier*, 882 F.3d at 91; *Russell v. United States*, 471 U.S. 858, 859 (1985) (explaining that the term "'affecting interstate . . . commerce' expresses an intent by Congress to exercise its full power under the Commerce Clause") (quoting 18 U.S.C. § 844(i)). Although *Miltier* focuses on receipt of child pornography in violation of § 2252A(a)(2)(A), the Fourth Circuit's reasoning applies with equal force to cases involving a defendant's transmission or attempted transmission of a visual depiction of a minor engaging in sexually explicit conduct using a device that had previously moved in interstate commerce. This is so because the statute at issue in Count II, § 2252(a)(2), contains the same expansive "affecting interstate . . . commerce" language that appears in § 2252A(a)(2)(A), and both statutes criminalize receipt and distribution of child pornography. Accordingly, § 2252(a)(2)'s interstate commerce element is fully satisfied where, as the Indictment here alleges, the defendant distributes a visual depiction of a minor engaging in sexually explicit conduct using a device that previously moved in interstate commerce. *See Miltier*, 882 F.3d at 91–92.

Seeking to avoid this result, defendant relies chiefly on *United States v. Flyer*, 633 F.3d 911 (9th Cir. 2011), to argue that no nexus to interstate commerce has been alleged because the video file at issue "never crossed state lines." *Id.* at 917–18 (holding that movement of child pornography from one computer in Arizona to another computer in Arizona was insufficient to sustain conviction for transportation and shipment of child pornography) (citing *United States v. Wright*, 625 F.3d 583, 594 (9th Cir. 2010), *superseded by statute as stated in United States v. Brown*, 785 F.3d 1337, 1351 (9th Cir. 2015)). *Flyer* is inapposite. There, the Ninth Circuit interpreted a prior version of § 2252(a)(1), which imposed penalties on a defendant who "knowingly transports or ships in interstate or foreign commerce by any means including by

computer or mails, any visual depiction" of child pornography. *Flyer*, 633 F.3d 911, 917 n. 4 (9th Cir. 2011). As the Ninth Circuit has made clear, the phrase "in interstate or foreign commerce" interpreted in *Flyer* has "a more limited jurisdictional reach" than the phrase "using any means or facility of interstate . . . commerce or in or affecting interstate . . . commerce," which extends jurisdiction to "the outer limits of [Congress'] Commerce Clause authority." *Brown*, 785 F.3d at 1351 (analyzing § 2252A(a)(1)'s jurisdictional language) (quoting *Wright*, 625 F.3d at 600).[6] The Ninth Circuit's analysis of the phrase "affecting interstate . . . commerce" is thus fully consistent with the Fourth Circuit's analysis in *Miltier*, and the government here is not required to show interstate transmission of the video file in order to satisfy the requisite interstate nexus.

Defendant also argues that Count II must be dismissed because the video file was never successfully transmitted to a person other than defendant, and, therefore, there can be no satisfaction of the interstate commerce element. Even assuming *arguendo* that defendant has accurately forecasted the evidence that will be adduced at trial, defendant's argument fails. The connection between defendant's conduct and interstate commerce would not be eliminated because defendant is alleged to have used a device that previously moved in interstate commerce in an effort to send a video file using the internet. To be sure, whether the video file was successfully transmitted may affect the sufficiency of the evidence that defendant committed the completed crime alleged in Count II. But defendant's failure to transmit the video file would not prevent defendant from being convicted of the attempted crime alleged in Count II. In any event,

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[6] *See also United States v. Lewis*, 554 F.3d 208, 216 (1st Cir. 2009) ("For the sake of completeness, we should note that Congress recently amended the child pornography statutes, including [§ 2252(a)(2)], to expand the jurisdictional coverage."); *United States v. Schaff*, 454 F. App'x 880, 883 (11th Cir. 2012) ("Because the internet is a means or facility of interstate commerce, evidence that the defendant used the internet to obtain child pornography is sufficient to obtain a conviction under the new version of the statute, even without proof of an actual interstate transmission.").

whether defendant's transmission of the video file was successful must be evaluated based on the evidence adduced at trial, not the Indictment's allegations. *See Critzer*, 951 F.2d at 307 ("There is no summary judgment procedure in criminal cases. Nor do the rules provide for a pre-trial determination of the sufficiency of the evidence.").

Defendant next argues that dismissal of Count II is required because the government cannot establish that defendant knew he was transmitting child pornography across state lines. Defendant's argument fails for two reasons. First, as discussed above, the government is not required to prove that any visual depiction was transmitted across state lines. Second, the government is not required to show defendant's knowledge as to the satisfaction of § 2252(a)(2)'s interstate nexus element. To be sure, there is a "longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.'" *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019). But importantly, "[b]ecause jurisdictional elements normally have nothing to do with the wrongfulness of the defendant's conduct, such elements are not subject to the presumption in favor of scienter." *Id.* at 2196; *see also United States v. Cooper*, 482 F.3d 658, 664 (4th Cir. 2007) (observing that "mens rea requirements typically do not extend to the jurisdictional elements of a crime") (citing *United States v. Feola*, 420 U.S. 671, 677 n. 9 (1975)). Accordingly, § 2252(a)(2)'s jurisdictional element does not require the government to show that the defendant knew that the defendant's conduct possessed the requisite nexus to interstate commerce.

The Supreme Court's decision in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), is not to the contrary. There, the Supreme Court "conclude[d] that the term 'knowingly' in § 2252 extends both to the sexually explicit nature of the material and to the age of the

performers." *Id.* at 78.[7] As the Eleventh Circuit has observed, the Supreme Court "did not suggest that the 'knowingly' term extended to the jurisdictional terms of the statute." *United States v. Smith*, 459 F.3d 1276, 1289 (11th Cir. 2006).[8] Contrary to defendant's argument, *X-Citement Video* does not require the government to prove that the defendant knew that his conduct satisfied the interstate commerce element to prove a violation of § 2252(a)(2).

Defendant also contends that defendant's lack of knowledge of interstate transmission precludes the government from establishing a violation of § 2251(a), the crime charged in Count I of the Indictment. Here, too, defendant's argument fails. Under 18 U.S.C. § 2251(a), the government must prove (1) that the defendant employed, used, persuaded, induced, enticed, or coerced a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct; and (2) a jurisdictional nexus to interstate or foreign commerce. *United States v. Terrell*, 700 F.3d 755, 758 (5th Cir. 2012). The jurisdictional nexus element may be satisfied in three ways:

> [(i)] 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,
>
> [or (ii)] 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 [(iii)] if such visual depiction has actually been transported or transmitted using any

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[7] In concluding that the government must prove a defendant's knowledge of age of minority to prove a violation of § 2252(a), the Supreme Court made clear that "age of minority is not a 'jurisdictional fact' that enhances an offense otherwise committed with an evil intent." *Id.* at 72 n. 3 (citing *United States v. Feola*, 420 U.S. 671, 677 n. 9 (1975) (declining to require knowledge of jurisdictional facts to sustain conviction for assault of a federal officer)).

[8] Nor does it appear that the Fourth Circuit has interpreted *X-Citement Video* to extend § 2252's knowledge requirement to the statute's interstate commerce element. *See United States v. Matthews*, 209 F.3d 338, 350–51 (4th Cir. 2000) ("[T]he Supreme Court concluded in *X-Citement Video* that § 2252 requires the government to prove that a defendant knew that the was transporting or receiving depictions of a sexually explicit nature and that the individuals depicted were minors.").

> means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

18 U.S.C. § 2251(a).

Defendant contends that a knowledge requirement—that defendant "knows or has reason to know"—applies to each of the three above-stated ways of satisfying § 2251(a)'s jurisdictional element. Defendant's argument conflicts with § 2251(a)'s plain language and the interpretations of several circuit courts of appeals, which point persuasively to the conclusion that "knowledge must be proven only as to the first jurisdictional hook." *Terrell*, 700 F.3d at 759.[9] Here, the government has alleged all three bases for jurisdiction, and the latter two do not require the government to show the defendant's knowledge. *See* Indictment at 1, ¶ 1. Notwithstanding defendant's arguments that he did not know or intend for the files to cross state lines and that he never successfully transmitted the files, the government may satisfy § 2251(a)'s interstate commerce element by showing 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." 18 U.S.C. § 2251(a). Accordingly, defendant's interstate commerce argument for dismissal of Count I fails.

In sum, defendant's Motion to Dismiss the Indictment for failure to satisfy the interstate commerce elements of §§ 2252(a)(2) and 2251 must be denied. The Indictment sufficiently alleges that the defendant's conduct had the requisite nexus to interstate commerce.

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[9] *See also United States v. Smith*, 459 F.3d 1276, 1289 (11th Cir. 2006) (interpreting § 2251(a) and concluding that "[o]nly the first basis for jurisdiction requires any proof of mental state"); *United States v. Sheldon*, 755 F.3d 1047, 1050 (9th Cir. 2014) (same); *United States v. Warner*, 614 F. App'x 575, 577 (3d Cir. 2015) (same); *United States v. Lively*, 852 F.3d 549, 563 (6th Cir. 2017) (noting that defendant need not know of interstate or foreign nature of materials used to produce child pornography).

B.

Defendant contends that Counts I and II of the Indictment must also be dismissed as duplicitous as both counts charge defendant with an attempt to commit a crime and a completed crime in a single count.[10] This argument fails. To be sure, the Fourth Circuit has explained that "an indictment is duplicitous if it charges two offenses in one count, creating the risk that a jury divided on two different offenses could nonetheless convict for the improperly fused double count." *United States v. Robinson*, 855 F.3d 265, 269 (4th Cir. 2017) (internal quotation marks and citation omitted). A jury divided in this manner "would not unanimously agree on the offense that the defendant committed, violating the defendant's Sixth Amendment right to a unanimous verdict." *Id.* at 269–70 (citing *United States v. Kakos*, 483 F.3d 441, 444 (6th Cir. 2007)). This is the defect of a duplicitous indictment.

But this defect is easily cured, for, as the Fourth Circuit has recognized, "[i]t is black letter law that duplicitous indictments can be cured through appropriate jury instructions." *United States v. Robinson*, 627 F.3d 941, 958 (4th Cir. 2010). Thus, even assuming *arguendo* that the Indictment is duplicitous, any risk of a jury convicting the defendant for an improperly fused double count may be cured by an instruction that requires the jury to be unanimous as to whether defendant is guilty of an attempt to commit a crime and as to whether defendant is guilty of a completed crime for each count. *See, e.g., United States v. Ramirez-Martinez*, 273 F.3d 903, 915 (9th Cir. 2001) (observing that a defendant may be prosecuted and convicted pursuant to a duplicitous indictment where "the court provides an instruction requiring all members of the jury

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[10] Both §§ 2251 and 2252(a)(2) criminalize attempted violations and completed violations. *See* § 2251(e) (imposing penalties on "[a]ny individual who violates, or attempts or conspires to violate this section"); § 2252(b)(1) (imposing penalties on "[w]hoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a)"); *see also* Rule 31(c)(2), Fed. R. Crim. P. (providing that "[a] defendant may be found guilty of . . . an attempt to commit the offense charged").

to agree as to which of the distinct charges the defendant actually committed"), *overruled on other grounds by United States v. Lopez*, 484 F.3d 1186, 1188 & n. 2 (9th Cir. 2007).

Persuasive authority from other circuits confirms this result. In *United States v. Smith*, 910 F.3d 1047 (8th Cir. 2018), an indictment charged in one count that the defendant "did knowingly receive, and attempt to receive, child pornography" and in another count that the defendant "did knowingly possess, and attempt to possess, at least one other matter which contains . . . a visual depiction of a prepubescent minor and a minor who had not attained the age of 12 years." *Id.* at 1051. After a jury convicted the defendant of both counts, the defendant argued that the district court's jury instructions "blurred the requirements for the completed offense versus attempt." *Id.* at 1052. In analyzing the defendant's argument, the Eighth Circuit made clear that an attempt and the completed offense need not be charged separately in an indictment. *Id.* at 1052. The Eighth Circuit further explained that "any risk of unfair duplicity to the defendant can be cured in various ways, for example, by the government electing to pursue only one of the alternatives charged, or by jury instructions and a verdict form that protect the defendant's right to a unanimous jury." *Id.* at 1052–53. The Eighth Circuit's analysis in *Smith* persuasively points to the conclusion that defendant's duplicitousness argument must be rejected here. As with the indictment in *Smith*, the Indictment in this case permissibly joins charges for an attempt and a completed offense in a single count because a jury instruction will require the jury to render a unanimous verdict with respect to the attempt to commit a crime and with respect to the completed crime. *See id.* at 1052. In this regard, *Smith* underscores the settled principle that any risk of duplicitousness in an Indictment charging an attempt to commit a crime and a completed crime in the same count may be addressed through appropriate jury instructions. *See id.* at 1052–53.

In sum, defendant's Motion to Dismiss the Indictment on the ground of duplicitousness must be denied because any risk of duplicity is curable through appropriate jury instructions.

* * * *

For these reasons, defendant's Motion to Dismiss the Indictment must be denied.

An appropriate Order will issue separately.

The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of record.

Alexandria, Virginia
June 16, 2020

/s/
T. S. Ellis, III
United States District Judge

THE COURT: So, I will strike that, and it will simply say "that the visual depiction."

Next, Ms. Bills.

MS. BILLS: Nothing further on this section from the government.

THE COURT: All right. Mr. Kiyonaga, on the substantive section, do you have any objections or corrections or omissions?

MR. KIYONAGA: Yes, Your Honor.

THE COURT: All right.

MR. KIYONAGA: Your Honor, I'm concerned about your choice of instruction on page 30, second element for the first count.

I submitted --

THE COURT: Tell me what's wrong with this one. Because I've, obviously, looked at yours and hers, and this is what I've come up with. So if you think something is missing or wrong, refer to mine, please, and then you can use yours and tell me how you think it would be better to use yours.

MR. KIYONAGA: Your Honor, I'm looking at the last paragraph that begins on page 30.

THE COURT: Yes.

MR. KIYONAGA: I do not object to the first sentence. However, I don't believe it is appropriate to specifically

refute the "but for" standard that I articulated in opening argument for a couple of reasons.

First of all, the "but for" standard can logically and very reasonably be inferred from -- not only from *Palomino*, put from the cases that I cited in my response to the government's submission, which would be the Second Circuit cases of *Sirois*, out of the Second Circuit, *U.S. v. Sirois,* and *U.S. v. Miller*, also out of the Second Circuit.

Your Honor, they both make it clear --

THE COURT: Neither of those uses specifically, explicitly a "but for" clause.

MR. KIYONAGA: I understand that, Your Honor, but they both make clear that it is not sufficient that the purpose of producing a video be merely a purpose of engaging in the sex. It has to be a predominant motive --

THE COURT: I don't agree with that as the law in this circuit.

MR. KIYONAGA: Well, Your Honor, I believe it's the only logical --

THE COURT: Go ahead and finish your sentence.

MR. KIYONAGA: All right. Your Honor, I understand the precedent of the Second Circuit is not binding here. I submit it all to be persuasive because *Palomino* implies that the intent to produce has to be preeminent. Otherwise, the simple volitional act of turning on a recorder would suffice

for a conviction under *Palomino,* and it does not, because *Palomino* specifically says, "The simple act purposefully of recording or taking a photograph is not sufficient." So we're left by the Fourth Circuit with the task of logically surmising what area of intent is actually comprised by *Palomino*. And I would submit that that area of intent, the only logical inference to be drawn from Palomino is that it has to be a preeminent, a dominant motive, purpose. And accepting that premise, a "but for" standard would be appropriate.

That said, while the use of the "but for" standard may be something about which reasonable people can differ, I maintain that it is a logical and reasonable inference drawn from *Palomino,* especially as informed by the two Second Circuit cases.

More importantly, Your Honor, I think the -- if the Court's going to decide on its instruction -- and I will tailor my closing accordingly -- specifically to refute the "but for" unnecessarily and unfairly, without proper basis for doing so, is going to detract from my credibility before the jury. I don't think that's necessary, and I don't think it's called for because I think "but for" is a reasonable inference drawn in good faith from the caselaw.

If the Court decides that "but for" is not appropriate, it certainly won't be mentioned again, and I

will hew to whatever standard the Court decides to put in its instructions.

But the instruction is written that it need merely be a purpose is clearly not in conformity with *Palomino*. It became a purpose when -- it becomes a purpose when somebody turns on an iPhone or snaps a picture. Unless it is done inadvertently, then the intent to record is formulated and acted upon at that point. The whole point of *Palomino* is that that is not enough. So, clearly, a purpose is not sufficient. It's got to have a higher place in the hierarchy of purposes. It has to have a dominant place in the hierarchy of purposes.

If the Court is unwilling to say "but for," it should at least add the word "dominant" to the last sentence of that paragraph. The third-from-the-last line of the instruction, "The government, to prove that one of the defendant's motivating purposes" -- it should say, "One of the defendant's dominant motivating purposes."

THE COURT: All right. I understand your argument.

"Motivating," by the way, is the word I inserted because it came from your instructions. But anyway, let me give Ms. Bills an opportunity to respond.

MS. BILLS: Your Honor, first, I think to say that saying that it has to be a purpose doesn't comport with *Palomino*, just can't be squared with *Palomino*, where that

sentence comes from, but I also think the Fourth Circuit has spoken more recently than *Palomino* on this issue. It was an unpublished case.

THE COURT: Yes, you're talking about *Thompson*, *United States v. Thompson*.

MS. BILLS: Yes, Your Honor.

THE COURT: And that's a 807 F. App'x 251.

MS. BILLS: I believe so. I think I still have --

THE COURT: I have it right in front of me.

MS. BILLS: Thank you, Your Honor.

THE COURT: And in that case, so we are clear, the Court there rejected an argument that the government must prove that defendant's prevailing or most influential purpose was to produce a visual depiction of the sexually explicit conduct. That's what the proposed defendant instruction was. And there what the Court says, clearly, Thompson's proposed instruction did not correctly state the law.

Do you think there should be any change to the -- I take your point. You don't think it should be "dominant motivating," and you don't think it should be "but for." There isn't any case that says "but for." Mr. Kiyonaga argues that it logically follows from the cases.

Do you agree with that?

MS. BILLS: No, Your Honor.

THE COURT: What do you think the last sentence

should say? Rather, it is sufficient for the government to prove what?

MS. BILLS: I think the last sentence is sufficient. I think, based on *Thompson*, which did approve of an instruction that had motivating purpose, the government won't object to the instruction as written.

THE COURT: Was motivating purpose in *Thompson* or one of the Second Circuit cases?

MS. BILLS: It was in *Thompson*. In *Thompson*, they were instructed that it was -- omitting some words -- a motivating purpose. So I think it is a sufficient statement of the law in the Fourth Circuit.

THE COURT: I thought I also got "motivating" from something Mr. Kiyonaga said or from one of his cases.

Do you know where I got it from, Mr. Kiyonaga?

MR. KIYONAGA: I'm about to tell you, Your Honor.

I see it in quotes here. I believe it comes from *Palomino*. I didn't draft it; my associate did, Your Honor. So he puts it in quotes right after citing to *Palomino*. So I believe a "motivating purpose" is out of *Palomino*.

THE COURT: All right. Anything further, Ms. Bills?

MS. BILLS: If I could just for the record say that the government agrees with the use of the instruction regarding "but for" not being a correct statement of the law because it is not a correct statement of the law and the jury

can't be left to speculate as to whether it is.

THE COURT: Especially since it was mentioned in argument.

MS. BILLS: Yes, sir.

THE COURT: Mr. Kiyonaga argues that this will diminish his credibility. Life is making choices and living with the consequences. He made the choice to mention it in his opening statement because he believed that it accurately stated the law. If he had been right, he would have won that bet. He wasn't. And I could tell, when he said it, you were thinking of objecting.

MS. BILLS: Yes, Your Honor.

THE COURT: I saw you rise, and you stopped.

And I did not interrupt his opening statement because I will tell the jury in the end that it is not what the lawyers say the law is, it is what the Court tells you the law is. And I did not want to diminish his credibility because I wasn't sure at that point, and he had not had an opportunity to address it, nor had you.

All right. So the bottom line is, Mr. Kiyonaga objects to the final paragraph on page 30. He says that it shouldn't say that it's not necessary to prove "but for" and that it shouldn't say "a motivating factor," it should say "a dominant factor" or something similar to that.

I overrule that objection for the reasons I have

already stated. I think what I've said is consistent with *Palomino*, and it is certainly consistent with the *Thompson* case.

Now, Mr. Kiyonaga, any other objections to 26 through the end of the substantive instructions?

MR. KIYONAGA: None, Your Honor.

THE COURT: All right. So that's how we will proceed.

Now, I have to do the final closing instructions. They start on 51, I believe. 50.

Any objections or additions or omissions, Ms. Bills, on 50 through to the end?

MS. BILLS: No, Your Honor.

THE COURT: Mr. Kiyonaga?

MR. KIYONAGA: No, Your Honor.

THE COURT: Now, I also prepared a jury verdict form. Did you all receive that?

MR. KIYONAGA: I did not, sir.

MS. BILLS: Yes, Your Honor.

THE COURT: It was at the end of the instructions.

MR. KIYONAGA: I stand corrected, Your Honor.

THE COURT: Any objection to that, Ms. Bills?

MS. BILLS: No, Your Honor.

THE COURT: Mr. Kiyonaga?

MR. KIYONAGA: No, Your Honor.

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4364

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KEVIN HEWLETT,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. T. S. Ellis, III, Senior District Judge. (1:20-cr-00064-TSE-1)

Submitted: April 18, 2023 Decided: April 27, 2023

Before WILKINSON, AGEE, and HARRIS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ON BRIEF: John C. Kiyonaga, LAW OFFICE OF JOHN C. KIYONAGA, Alexandria, Virginia, for Appellant. Jessica D. Aber, United States Attorney, Richmond, Virginia, Zoe Bedell, Assistant United States Attorney, Jacqueline Bechara, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

A jury convicted Kevin Hewlett of one count of production of child pornography in violation of 18 U.S.C. § 2251(a), (e), and one count of distribution of child pornography in violation of 18 U.S.C. § 2252(a)(2), (b)(1). The district court sentenced him to 228 months' imprisonment. After considering the various issues raised on appeal, we affirm.

On August 15, 2018, Hewlett engaged in sexually explicit conduct with a 16-year-old minor and produced a video of the interaction using his iPhone. Prior to filming that video, Hewlett created a 13-second test video. On that clip, Hewlett is seen positioning the camera, walking over behind the girl, and pressing his naked body against her. Hewlett then looks back at the camera to ensure that both he and the girl are in the frame. Then he ends the recording. Following that test video, Hewlett recorded a two-minute video depicting him engaging in sexual conduct with the minor girl. Approximately two months later, the minor girl asked Hewlett to share the video with her. After a couple failed attempts to send the video via Instagram, Hewlett shortened the video and sent it to her by text message.

Hewlett first argues that the evidence was insufficient to establish a nexus to interstate commerce sufficient to create federal jurisdiction, claiming that all of the conduct giving rise to these offenses occurred within the Commonwealth of Virginia. We have previously held that the use of a computer to create and or to send child pornography satisfies the interstate nexus requirement for federal jurisdiction. *See United States v. Miltier*, 882 F.3d 81, 92 (4th Cir. 2018) (upholding conviction based on purely intrastate receipt of child pornography where evidence established previous movement of a computer

through interstate or foreign commerce). The evidence showed that Hewlett sent the video to the minor using the Internet. *See United States v. Ellyson*, 326 F.3d 522, 533 (4th Cir. 2003) (finding "substantial evidence to satisfy the interstate commerce component" based on images of child pornography that defendant downloaded from the Internet). To the extent that Hewlett suggests that we revisit these precedents; we note that one panel of this court cannot overrule a decision issued by another panel. *United States v. Williams*, 808 F.3d 253, 261 (4th Cir. 2015).

Hewlett next contends that the district court erred in instructing the jury as to the mens rea required to produce child pornography. The statute requires the Government to prove that the "defendant used, employed, persuaded, induced, enticed, or coerced the minor to take part in sexually explicit conduct for the purpose of producing a visual depiction of that conduct." *United States v. Malloy*, 568 F.3d 166, 169 (4th Cir. 2009). Thus, the Government must prove that creating a visual depiction is more than "merely incidental" to other, more important purposes. *United States v. McCauley*, 983 F.3d 690, 695 (4th Cir. 2020) (rejecting instruction that the creation of a visual depiction be "a purpose"). "Whether an instruction reads 'the purpose,' 'the dominant purpose,' 'a motivating purpose'—or some other equivalent variation—may not be crucial, but the statute plainly requires something more than 'a purpose.'" *Id.* at 697. We conclude that the district court's instruction accurately stated the law, and we find no abuse of discretion by the district court in declining to use the instruction Hewlett requested. *See id.* at 694 (providing standard).

Hewlett also challenges the district court's denial of his request for a missing witness jury instruction. Hewlett asserted that the minor girl was a key witness who could testify to the nature of their relationship and whether he engaged in the sexual conduct with her for the purpose of producing a visual depiction. The district court correctly determined that the minor girl was not unavailable to Hewlett and that he could have subpoenaed her to testify and did not.[1] *See United States v. Brooks*, 928 F.2d 1403, 1412 (4th Cir. 1991) (explaining circumstances necessary to warrant missing witness instruction).

Hewlett further contests the district court decision prohibiting him from referring, during closing arguments, to the girl's absence and in asking the jury to consider what she would have said if she had testified. The court ruled that counsel was not permitted to invite the jury to speculate as to what the minor victim would have said.

"The district court is afforded broad discretion in controlling closing arguments and is only to be reversed when there is a clear abuse of its discretion." *United States v. Baptiste*, 596 F.3d 214, 226 (4th Cir. 2010) (cleaned up). We find no abuse of discretion in the district court's ruling prohibiting counsel from asking the jury to draw a negative inference from the witness' absence. *See United States v. Crawford*, 317 F. App'x 303, 306 (4th Cir. 2008) (No. 07-5096(L)) (upholding district court's ruling prohibiting defense counsel from mentioning an indicted coconspirator as a missing witness when defendant failed to show that he could not have subpoenaed the witness to testify). Because Hewlett could have subpoenaed the minor girl to testify and did not, he was not "entitled to argue

[1] We also agree with the district court's determination that the minor girl's testimony as to the nature of the relationship was not relevant.

to the jury the absence of [the witness] or to draw any inferences from [her] absence." *Brooks*, 928 F.2d at 1412.

Next, Hewlett argues that the district court abused its discretion by denying his requests for a continuance of sentencing and for funds to allow him to retain an expert witness to re-examine the content of his cell phone for possible mitigating evidence.[2] We agree with the district court that the proffered evidence was not relevant to Hewlett's sentencing and therefore not necessary. Accordingly, we find no abuse of discretion by the district court in denying Hewlett's request. *See United States v. Hartsell*, 127 F.3d 343, 349 (4th Cir. 1997) (providing standard).

Lastly, Hewlett contests the district court's ruling prohibiting him from introducing, during his sentencing hearing, evidence of the victim's conduct and character. Hewlett's contention that the victim's character is relevant to the nature of his offense is incorrect, and we find no abuse of discretion by the district court in ruling that such evidence was not relevant to sentencing. *See Pepper v. United States*, 562 U.S. 476, 480 (2011) (recognizing that "sentencing judges exercise wide discretion in the types of evidence they may consider when imposing sentence") (internal quotation marks omitted).

Hewlett, who is represented by counsel, also seeks to file a pro se supplemental brief. However, "an appellant who is represented by counsel has no right to file pro se briefs or raise additional substantive issues in an appeal." *United States v. Cohen*, 888 F.3d

[2] We note that the district court authorized funds for a computer forensic expert to examine Hewlett's iPhone prior to his trial.

667, 682 (4th Cir. 2018). We therefore deny Hewlett's motion to file a supplemental pro se brief. We affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: August 18, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4364
(1:20-cr-00064-TSE-1)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KEVIN HEWLETT,

Defendant - Appellant.

O R D E R

Kevin Hewlett, by counsel, has filed a petition for rehearing en banc. Hewlett has filed a waiver of the right to counsel and a pro se petition for rehearing en banc. We decline Hewlett's request to dismiss counsel at this juncture, and we deny the petitions for rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petitions for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Agee, and Judge Harris.

For the Court

/s/ Patricia S. Connor, Clerk

No. 23-_____

IN THE UNITED STATES SUPREME COURT

KEVIN HEWLETT

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CERTIFICATE OF SERVICE

I, John C. Kiyonaga, hereby certify that on 15th day of November 2023, as required by Supreme Court Rule 29, I have served the enclosed Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari on opposing counsel by depositing an envelope containing the above documents in the United States mail properly addressed with first class postage prepaid on the following:

GWENDELYNN BILLS, AUSA
NATHANIEL SMITH, AUSA
U.S. Attorney's Office
2100 Jamieson Avenue
Alexandria, Virginia 22314

/s/John Kiyonaga
_____
John C. Kiyonaga
Counsel for Petitioner