

APPENDIX

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United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

November 9, 2023

Lyle W. Cayce
Clerk

No. 23-30038

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ALEXANDER D. PENNINGTON,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 5:21-CR-130-2

Before JONES, BARKSDALE, and ELROD, *Circuit Judges*.

PER CURIAM:*

Alexander D. Pennington entered a conditional-guilty plea to conspiring to advertise the distribution of child pornography, in violation of 18 U.S.C. § 2251(d)(1), (e), reserving his right to contest the denial of his motion to suppress evidence. He contends his statements to law enforcement should have been suppressed because he: was in custody; did

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

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not waive his *Miranda* rights; and made a limited but unambiguous request for counsel. Pennington was not in the requisite custody. AFFIRMED.

I.

On the morning of 7 July 2021, law enforcement executed a search warrant based on an investigation into a private chat room dedicated to the advertisement and distribution of child pornography. The investigation led law enforcement to Pennington's residence in Las Vegas, Nevada. (He had recently been granted parole after serving ten years for sexually assaulting a child under 14 years old.)

Around 15 law-enforcement agents, some dressed in tactical gear and carrying AR-15-style rifles, surrounded the residence and, using a loudspeaker, ordered the occupants out. After no response, the agents forcefully opened the door with a ram and continued to order the occupants to exit. The three occupants were placed in handcuffs while agents conducted a five-minute protective sweep of the residence. The occupants were then released from their handcuffs, and Pennington's mother and uncle, but not Pennington, were allowed to re-enter the residence.

Agent Walch, not in uniform or displaying police insignia or visible firearm, approached Pennington and informed him: he was not under arrest (there was no arrest warrant for him); but wanted to speak with him about why a search warrant was being executed at his residence. After the Agent explained who he was, he and Pennington walked to the Agent's vehicle: an unmarked SUV without a "cage", parked about 15 to 20 yards away. The Agent sat in the driver's seat, Pennington in the front passenger's seat, and a detective with the Las Vegas Metropolitan Police Department behind Pennington.

Agent Walch told Pennington: he was not under arrest; the vehicle doors were unlocked; and he was free to leave at any time. The Agent

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removed a digital recorder from his pocket; but Pennington objected to its use and told the Agent that, if the interview was going to be recorded, he would want an attorney. After the Agent responded that the purpose of the recorder was so “neither party can claim the other one made any statements that aren’t true”, Pennington “agreed to allow [the Agent] to turn the recorder on”.

Pennington contests these facts, asserting he: was not released from handcuffs; requested an attorney before the Agent produced the recorder; was threatened with arrest if he did not speak; and was restricted from helping his panicking mother.

The recording captures a 30-minute interview. Pennington was advised of—and, when asked, stated he understood—his *Miranda* rights. The Agent then asked Pennington if he was willing to talk, and Pennington “paused for a moment”. The Agent continued: “with the understanding that if you change your mind later you can stop this conversation at any time”. The Agent testified Pennington nodded his head in affirmance.

A magistrate judge’s report and recommendation (R&R) recommended, and the district court concurred, that Pennington was willing to talk. Pennington asserts on appeal he was not and did not nod his head in affirmance.

Pennington then said: “now that we are on the record, if you can go ahead and explain to me what it is”. During the 30-minute interview, Pennington made several incriminating statements about his activities in the online chat room.

Following the interview, the Agent re-entered the residence to assist other agents and returned to his vehicle to conduct a separate, recorded three-minute interview with Pennington that is not the subject of the motion to suppress. Pennington and the Detective remained in the vehicle during

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the Agent's 25-minute absence. Pennington was not arrested at the conclusion of the search.

Approximately four months later, Pennington was indicted on nine counts: one for conspiracy to advertise the distribution of child pornography; one for conspiracy to distribute child pornography; and seven for distribution of child pornography, in violation of 18 U.S.C. §§ 2251(d)(1), (e), 2252A(a)(2), (a)(2)(A), (b)(1). Pennington moved to suppress the statements he made during the 30-minute interview, maintaining: law enforcement did not honor his request for a lawyer; and he did not knowingly and intentionally waive his *Miranda* rights. The Government responded that, *inter alia*, he was not in custody.

Following an evidentiary hearing before the magistrate judge, at which Agent Walch and Pennington testified, and at which the Government introduced into evidence the audio recordings of the 30- and three-minute interviews, the resulting R&R found the Agent's testimony was credible; Pennington's, not credible. The R&R stated the Agent's testimony was "consistent with what the recordings actually reveal[ed]", and recommended: the suppression motion be denied because Pennington was not in custody and therefore did not have the right to an attorney; he did not make an unequivocal and unambiguous request for an attorney and withdrew his objection after the Agent's explanation; and he "made a knowing and voluntary waiver of his *Miranda* rights and agreed to the recorded interview without counsel".

Pennington objected to the R&R. The district court, after "thoroughly review[ing] the record, including the written objections filed" against the R&R, "concurr[ed] with the findings of the Magistrate Judge under the applicable law" and denied the motion.

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II.

Pennington contests the denial of his motion to suppress his incriminating statements because he: was in custody, warranting constitutional protections; made a limited but unambiguous request for counsel; and did not waive his *Miranda* rights.

For the contested denial of a suppression motion, findings of fact are reviewed for clear error; legal conclusions, *de novo*. *E.g.*, *United States v. Nelson*, 990 F.3d 947, 952 (5th Cir. 2021). “A factual finding is not clearly erroneous as long as it is plausible in light of the record as a whole.” *United States v. Wright*, 777 F.3d 769, 773 (5th Cir. 2015) (citation omitted). “Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” *United States v. Harris*, 740 F.3d 956, 967 (5th Cir. 2014) (citation omitted). “The question of whether *Miranda*’s guarantees have been impermissibly denied to a criminal defendant, assuming the facts as established by the trial court are not clearly erroneous, is a matter of constitutional law, meriting *de novo* review.” *United States v. Harrell*, 894 F.2d 120, 122–23 (5th Cir. 1990). The evidence is viewed in the light most favorable to the prevailing party in district court—here, the Government. *E.g.*, *Wright*, 777 F.3d at 773, 777.

First at issue is whether Pennington was in custody. If so, we reach whether his request for counsel was sufficient and honored by Agent Walch. But, if not in custody, we need not reach the two other presented issues because “the *Miranda-Edwards* guarantee . . . relates only to custodial interrogation”. *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991).

Merely advising a suspect of his *Miranda* rights, as in this instance, does not convert the encounter into a custodial interrogation. *E.g.*, *United States v. Akin*, 435 F.2d 1011, 1013 (5th Cir. 1970) (“[A] custodial situation cannot be created by the mere giving of modified *Miranda* warnings”). And,

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“[w]hether a suspect is in custody is an objective inquiry that depends on the totality of circumstances”. *Wright*, 777 F.3d at 774 (citations omitted).

“A suspect is . . . in custody for *Miranda* purposes when placed under formal arrest or when a reasonable person in the suspect’s position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest.” *Id.* (alteration in original) (citation omitted). “Two discrete inquir[i]es are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave.” *United States v. Cavazos*, 668 F.3d 190, 193 (5th Cir. 2012) (citation omitted).

“The requisite restraint on freedom is greater than that required in the Fourth Amendment seizure context.” *Wright*, 777 F.3d at 774. “The critical difference between the two concepts . . . is that custody arises only if the restraint on freedom is a certain degree—the degree associated with formal arrest.” *United States v. Bengivenga*, 845 F.2d 593, 598 (5th Cir. 1988). Therefore, our court considers several factors—for which “no one fact is determinative”—in deciding custody *vel non* in the *Miranda* context: “the length of the questioning”; “the location of the questioning”; “the accusatory, or non-accusatory, nature of the questioning”; “the amount of restraint on the individual’s physical movement”; and “statements made by officers regarding the individual’s freedom to move or leave”. *Wright*, 777 F.3d at 775.

Along that line, the parties contest whether the factual circumstances at hand are more like those in *Cavazos* or *Wright*. *Cavazos*, 668 F.3d at 195 (*affirming grant* of suppression motion); *Wright*, 777 F.3d at 777, 784 (*affirming denial* of suppression motion). Pennington concedes in his reply

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brief that the line between the two cases is a “fine one”. His comparison to *Cavazos* is unavailing; the facts at hand are almost indistinct from those in *Wright*, where our court weighed the above-described factors and held Wright was not in custody. *Wright*, 777 F.3d at 775–77. In addition, as noted in *Wright*, because Cavazos prevailed in district court, the evidence was viewed on appeal by the Government in the light most favorable to Cavazos; the opposite was applicable in *Wright*. *Id.* at 776.

In *Wright*, as here, defendants were removed from their home in the early morning by more than 12 officers. *Id.* at 777. In *Wright* and here, defendants were not forced to enter an officer’s unmarked vehicle located near the residence and were told several times they were not under arrest and free to leave. *Id.* at 771–77; *see also United States v. Michalik*, 5 F.4th 583, 589 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 910 (2022) (affirming district court’s finding defendant was informed he could leave; and, therefore, was not in custody); *United States v. Gonzalez*, 814 F. App’x 838, 845 (5th Cir. 2020) (defendant “not in *Miranda* custody when he made his unwarned statements”).

Additionally, and as discussed, Pennington was interviewed for only 30 minutes in the challenged interview. *See United States v. Coulter*, 41 F.4th 451, 459 (5th Cir. 2022) (noting 30-minute interview suggests defendant not in custody); *and United States v. Ortiz*, 781 F.3d 221, 233 (5th Cir. 2015) (noting 20-to-30 minute encounter “suggests [defendant] was not in custody”).

Pennington attempts to distinguish his case from *Wright* by noting Wright was never handcuffed and testified the officers told him he was free to leave and was not under arrest. In his reply brief, however, Pennington concedes that, viewing the evidence in the requisite light most favorable to the Government, his handcuffs were removed. In *Ortiz*, our court discussed

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the effect of handcuffing, stating: “[T]he fact that the agents eventually handcuffed him would suggest to a reasonable person that he was not free to leave”. 781 F.3d at 231. Although Pennington was temporarily handcuffed, he was not alone: he and the other two occupants were handcuffed at the same time, but only during the five-minute protective sweep of the residence. Additionally, he was not singled out, as in *Cavazos* or *Ortiz*.

Pennington also fails to show the requisite clear error in the district court’s concurring in the R&R’s findings that Pennington was told he was not under arrest and the doors to the vehicle were unlocked. *See Coulter*, 41 F.4th at 461 (“Informing a suspect he is not under arrest, [even without] explicitly tell[ing] him he [is] free to leave[,] would [also] suggest to a reasonable person that he [is] free to leave[.]” (alterations in original) (citation omitted)).

Viewing the totality of the circumstances in the requisite light most favorable to the Government, Pennington was not in custody. Accordingly, his motion to suppress was properly denied.

III.

For the foregoing reasons, the judgment is AFFIRMED.

UNITED STATES DISTRICT COURT

Western District of Louisiana

Shreveport Division

UNITED STATES OF AMERICA

v.

ALEXANDER D PENNINGTON

JUDGMENT IN A CRIMINAL CASE

Case Number: 5:21-CR-00130-2

USM Number: 76544-509

Brent M Stockstill

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 of the Superseding Indictment☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18:2251(d)(1) & (e)	Sexual Exploitation Of Children - Conspiracy To Advertise The Distribution Of Child Pornography With Forfeiture Notice	07/07/2021	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____☒ Count(s) 2 ☒ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

January 4, 2023

Date of Imposition of Judgment

Signature of Judge

S. MAURICE HICKS, JR., United States District Judge

Name of Judge

Title of Judge

Date

DEFENDANT: ALEXANDER D PENNINGTON
CASE NUMBER: 5:21-CR-00130-2

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 360 months as to Count 1. Pursuant to U.S.S.G. §5G1.3, this sentence shall run consecutively with any potential sentence imposed upon revocation of the parole supervision in Nevada. The defendant has been in custody of the U.S. Marshal since January 9, 2020. Should defendant be entitled to credit for any of the time he has already spent in custody, the Federal Bureau of Prisons will make that determination.

- ☐ The court makes the following recommendations to the Bureau of Prisons:
- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at _____ ☐ a.m. ☐ p.m. on _____.
- ☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on _____
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ALEXANDER D PENNINGTON
CASE NUMBER: 5:21-CR-00130-2

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: LIFE

MANDATORY CONDITIONS (MC)

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
4. ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
5. ☒ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
6. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
7. ☒ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside; work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
8. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*
9. ☐ The passport restriction imposed at the time of initial release is hereby suspended, and defendant's passport is ordered released to defendant's attorney. *(check if applicable)*
10. ☐ The passport restriction imposed at the time of initial release is continued, and defendant's passport is ordered transferred to the U. S. Department of State. *(check if applicable)*
11. You must comply with the standard conditions that have been adopted by this court as well as any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION (SC)

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U. S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

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SPECIAL CONDITIONS OF SUPERVISION (SP)

1. The defendant shall pay any unpaid portion of restitution in monthly payments of no less than 10% of his gross monthly income. Payments shall begin within 60 days of the commencement of supervised release. The defendant shall also notify the Court of any changes in economic circumstances that might affect the ability to pay this financial penalty.
2. The defendant shall provide the probation officer access to any requested financial information and authorize the release of any financial information. The probation office may share financial information with the U.S. Attorney's Office.
3. The defendant shall not incur new credit charges or open additional lines of credit without prior approval of the U.S. Probation Office.
4. The defendant shall surrender his annual federal and state income tax refunds received during the period of supervision, to be applied to any unpaid court ordered monetary obligation.
5. Defendant shall not have direct contact with any child he knows or reasonably should know to be under the age of 18, not including his own children, without the permission of the probation officer. If defendant has any direct contact with any child, he knows or reasonably should know to be under the age of 18, not including his own children, without the permission of the probation officer, he shall report this contact to the probation officer within 24 hours. Direct contact includes written communication, in-person communication, or physical contact. Direct contact does not include incidental contact during ordinary daily activities in public places.
6. Defendant shall not go to, or remain at, any place primarily used by children under the age of 18, unless he has the express prior permission of his probation officer. Examples of such prohibited places include parks, schools, playgrounds and childcare facilities.
7. Defendant shall submit his person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. §1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. Defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when reasonable suspicion exists that defendant has violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search shall be conducted at a reasonable time and in a reasonable manner.
8. The defendant shall not view or possess any "visual depiction" or any photograph, film, video, picture, or computer or computer-generated image or pictures, whether made or produced by electronic, mechanical or other means, depicting and/or describing "sexually explicit conduct" involving children or "actual sexually explicit conduct" involving adults. These restrictions do not apply to materials necessary to, and used for, any future appeals, or materials prepared or used for the purposes of sex-offender treatment. "Visual depiction (as defined in 18 U.S.C. 2256(5)) includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format. "Sexually explicit conduct" (as defined by 18 U.S.C. 2256(2)) involving children means actual or simulated (i) sexual intercourse, including genital-genital, oral-genital, or oral-anal, whether between the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person. "Actual sexually explicit conduct" (as defined by 18 U.S.C. 2257(h)(1) involving adults means actual, but not simulated, conduct as defined in clauses (i)-(v) above.
9. The defendant shall participate in a sex offense specific treatment program and follow the rules and regulations of that program. The probation officer will supervise defendant's participation in the program (provider, location, modality, duration, intensity, etc.) The defendant shall pay the costs of the program.
10. The defendant shall submit to periodic polygraph testing, at the direction of the U.S. Probation Officer, as a means to ensure that he is in compliance with the requirements of supervision or treatment programs.
11. The defendant shall not work in any type of employment without the prior approval of the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$100.00	\$10,000.00	\$.00	\$.00	\$.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Carol L. Hepburn in trust for the "Lily" of the "Vicky" series	
P.O. Box 17718	\$10,000.00
Seattle, WA 98127	

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and/or penalties and it is ordered that:

☐ the interest and/or ☐ penalty requirement is waived for the ☐ fine ☐ restitution.

☐ the interest and/or ☐ penalty requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299..

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of \$ 10,100.00 due immediately, balance due
- ☐ not later than _____, or
- ☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties: Defendant shall pay any unpaid portion of restitution in monthly payments of no less than 10% of his gross monthly income. Payments shall begin within 60 days of the commencement of supervised release.

The Court orders that any federal income tax refund payable to the defendant from the Internal Revenue Service will be turned over to the Clerk of Court and applied toward any outstanding balance with regard to the outstanding financial obligations ordered by the Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, or, unless ordered otherwise, criminal debt payments may be made online at www.lawd.uscourts.gov/fees.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- ☐ Joint and Several
- ☐ Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
- ☐ The Court gives notice this case involves other defendants who may be held jointly and several liable for payment of all or part of the restitution ordered herein and may order such payment in the future.
- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA

CASE NO. 21-cr-00130-02

VERSUS

CHIEF JUDGE HICKS

ALEXANDER D PENNINGTON (02)

MAGISTRATE JUDGE HORNSBY

REPORT AND RECOMMENDATION

Introduction

Alexander Pennington (“Defendant”) is charged with conspiracy to advertise the distribution of child pornography, conspiracy to distribute child pornography, and seven counts of distribution of child pornography. Doc. 26. The charges arise from Defendant’s alleged involvement in private Kik chat groups that were dedicated to the advertisement and distribution of child pornography.

Agent Tyson Walch of Homeland Security obtained a search warrant for Defendant’s residence in Las Vegas, NV. During the execution of that search warrant, Agent Walch conducted two recorded interviews with Defendant.

Before the court is **Defendant’s Motion to Suppress. Doc. 55**. Defendant argues that he invoked his right to counsel at the beginning of a custodial interrogation, but Agent Walch failed to honor his request. For the reasons set forth below, it is recommended that Defendant’s Motion to Suppress be denied.

Facts

An evidentiary hearing was held on April 12, 2022. The evidence at the hearing, along with the two audio recordings of Defendant's interviews, established the following facts. During an investigation of private chat groups on Kik that were dedicated to the advertising and distribution of child pornography, agents identified a member of the Kik groups. That member gave agents consent to assume his online identity in the groups.

The Kik groups were managed by a master administrator and several sub-administrators. The master administrator's profile avatar is a green circle with a picture of a crown. Sub-administrators' profile avatars are an orange circle with a picture of a crown. New members were admitted to the groups by invitation only. Users who did not post child pornography were removed from the groups.

Agents identified a user going by the name of grimka00 as a sub-administrator of the Kik groups. Grimka00 stated she was a single female who engaged in regular sexual activities with her infant daughter. An examination of the Kik groups showed grimka00 soliciting, receiving, and distributing child pornography.

Further investigation revealed that the IP address used by grimka00 was assigned to Defendant's residence in Las Vegas. Agents procured a search warrant for the residence. The agents breached the front door of Defendant's residence and, using a bullhorn, called for all occupants to come outside. Defendant, his mother, and his uncle exited. The three were placed in handcuffs for about five minutes during a protective sweep of the residence. After that, the handcuffs were removed.

Defendant's mother and uncle remained in or near the residence. Agent Walch asked Defendant if he would speak with him. The temperature was warm outside, so Agent Walch asked Defendant to sit in his Toyota Highlander so that they would have the benefit of air conditioning. Walch did not want Defendant in the residence while the search was being conducted because he feared evidence might be destroyed.

Agent Walch told Defendant he was not under arrest and that his vehicle doors were unlocked. Defendant sat in the front passenger seat, Walch was in the driver's seat, and Detective Chen, an employee of the Las Vegas Police Department, sat in the rear seat.

Agent Walch produced from his pocket a digital recorder, and Defendant expressed concern. Defendant told Walch that if Walch was going to record the interview, Defendant wanted an attorney. Walch explained to Defendant why he records his interviews (so no one can say the person being interviewed said something that he or she did not really say). With the benefit of that explanation, Defendant withdrew his objection to being interviewed without an attorney.

Agent Walch turned on the recorder and advised Defendant of his Miranda rights. Defendant stated that he understood his rights and was willing to talk. Defendant never said anything else about an attorney until the end of the second interview when Defendant asked if he could look through his phone to find a telephone number for an attorney. The second, brief interview concerned a letter found during the search and is not relevant to this motion.¹

¹ The Government did not produce the audio of the second interview until just before the suppression hearing. However, after listening to the recording, defense counsel graciously agreed

Defendant testified that the recordings are not true and accurate recordings, because the recordings do not capture his numerous requests for an attorney. Defendant contends that Agent Walch turned the recorder off and on to conceal his requests for an attorney. The undersigned finds Defendant's testimony not credible. Agent Walch's testimony, which the undersigned finds very credible, is consistent with what the recordings actually reveal.

Law and Analysis

A. Was Defendant in Custody?

In Miranda v. Arizona, 374 U.S. 436 (1963), the Supreme Court established rules of police procedure applicable to custodial interrogation. These rules require that a defendant be given a "full and effective warning of his rights at the outset of the interrogation process." Id. at 445. If a suspect waives his right to counsel after receiving Miranda warnings, officers are free to question him, but if the suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation. Edwards v. Arizona, 101 S.Ct. 1880 (1981).

Miranda only applies to custodial interrogation. Custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Id. at 444. When a person is not under arrest prior to questioning, the appropriate inquiry is whether, at the

that the hearing could go forward as scheduled. The belated production of new audio/video has become a recurring problem in this division. If it continues, sanctions will be imposed.

time of the questioning, the person was subject to a “restraint on freedom of movement of the degree associated with a formal arrest.” California v. Beheler, 463 U.S. 1131, 1125 (1983), quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977). This inquiry is determined from the view of “how a reasonable man in the suspect’s position would have understood his situation.” Berkemer v. McCarty, 468 U.S. 420, 442 (1984). The Fifth Circuit has identified being “isolated, physically restrained, or coercively questioned” as “the hallmarks of a custodial interrogation.” United States v. Hendler, 821 Fed. App’x 365, 366 (5th Cir. 2020).

Defendant was not in custody during either interview. He was handcuffed for only about five minutes while the agents conducted a protective sweep of the residence. Once that was done, the handcuffs were removed, and Defendant was not handcuffed again. Walch explained to Defendant that he was not under arrest, he was free to get out of the vehicle at any time, and the doors to the vehicle were unlocked. Additionally, both Agent Walch and Detective Chen were dressed in plain clothes, their duty weapons were hidden underneath their clothes, and the interviews took place inside an unmarked Toyota Highlander. District courts in this circuit have often found that similar questioning in a police vehicle was not a custodial interrogation. U.S. v. Jin, 2021 WL 6137594, *4 (E.D. Tex. 2021) (collecting cases).

The fact that Walch advised Defendant of his Miranda rights does not convert a non-custodial interview into a custodial interrogation. In United States v. Akin, 435 F.2d 1011, 1013 (5th Cir. 1970), the Court explained:

To rule that an FBI agent's extra-caution efforts to inform a person of his constitutional rights converts an otherwise non-custodial situation into a "custodial interrogation" could easily work to defeat one of the Supreme Court's main objectives in *Miranda*, the objective of encouraging law enforcement agencies to develop ways of protecting individual rights that are in harmony with effective law enforcement.

B. Did Defendant Unambiguously Request Counsel?

Even if Defendant was in custody during the interviews, which he was not, Defendant did not unequivocally invoke his right to counsel. In *Davis v. United States*, 512 U.S. 452 (1994), the Supreme Court held that law enforcement officers are not required to cease questioning when a suspect makes an ambiguous or equivocal request for counsel. The Supreme Court explained that "[i]f a suspect makes a reference that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning." *Id.* The Supreme Court iterated that "the suspect must unambiguously request counsel. As we have observed, 'a statement either is such an assertion for the right to counsel or it is not.'" *Id.*, quoting *Smith v. Illinois*, 469 U.S. 91, 97-98 (1984).

Defendant initially requested an attorney if the interview was going to be recorded, but after hearing Agent Walch's explanation about the benefits of recording interviews, Defendant agreed to talk. Indeed, after the recording was turned on and the preliminary details such as date and time were mentioned, Walch read the *Miranda* warnings (including the right to an attorney) to Defendant, who stated that he understood his rights and agreed to talk. Walch then immediately emphasized to Defendant, "If you change your mind, you

can stop this conversation at any time.” Defendant then asked, “Now that we are on the record, can you go ahead and tell me what it is?” Walch then explained that the agents had received a report about someone on an online platform claiming to be a single mom who was having sex with her baby, and the agents were trying to verify if there was a real baby being molested or whether the mom/baby scenario was just someone’s fantasy.

Based on the foregoing, the undersigned finds that Defendant did not make an unequivocal and unambiguous right to an attorney. Instead, Defendant made a knowing and voluntary waiver of his Miranda rights and agreed to the recorded interview without counsel.

Conclusion

Defendant was never in custody and had no right to an attorney during the two voluntary interviews conducted by Agent Walch and Detective Chen. Defendant’s equivocal and ambiguous request for an attorney was predicated on the interview being recorded, but when Agent Walch explained the reason why he wanted to record the interview, Defendant withdrew his objection and voluntarily participated in the interviews.

Accordingly,

It is recommended that Defendant’s Motion to Suppress (Doc. 55) be denied.

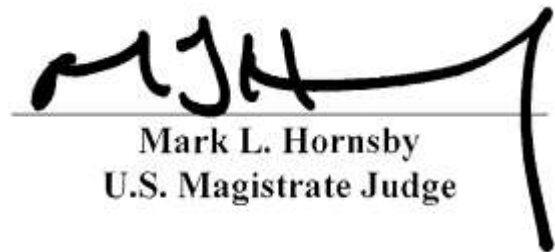
Objections

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Fed. R. Crim. P. 59(b)(2), parties aggrieved by this recommendation have **fourteen (14) days** from the date of this report and recommendation to file specific, written objections with the Clerk of Court, unless an extension of time is granted under Fed. R. Crim. P. 45(b). A party may respond

to another party's objections within **fourteen (14) days** from the filing of the objections. Counsel are directed to furnish a paper copy of any objections or responses to the District Judge at the time of filing.

A party's failure to file timely written objections to the proposed findings, conclusions and recommendation set forth above shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. See Douglass v. U.S.A.A., 79 F.3d 1415 (5th Cir. 1996) (en banc).

THUS DONE AND SIGNED in Shreveport, Louisiana, this 22nd day of April, 2022.



Mark L. Hornsby
U.S. Magistrate Judge