

APPENDIX A

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

FEB 7 2024

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

No. 21-10362

Plaintiff-Appellee,

D.C. No.

2:17-cr-01311-DGC-1

v.

ANTHONY ESPINOSA GONZALES, AKA
Anthony Espinoza Gonzales,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the District of Arizona
David G. Campbell, District Judge, Presiding

Argued and Submitted November 6, 2023
Phoenix, Arizona

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

Appellant Anthony Espinosa Gonzales appeals his jury trial conviction for eight counts of distribution of child pornography and one count of possession of

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

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

child pornography. As the parties are familiar with the facts, we do not repeat them here. Gonzales raises three issues on appeal. For the reasons below, we affirm the district court.

First, Gonzales argued that the district court abused its discretion by finding that the Government presented adequate foundation for (1) the reliability of Torrential Downpour, (2) the “mirror image” process used to clone the seized tablet, (3) the processes underlying the Forensic Tool Kit (FTK) tool, and (4) the processes underlying the Independent Evidence Finder (IEF) tool. We review the district court’s determinations about authentication and foundation for an abuse of discretion. *United States v. Estrada-Eliverio*, 583 F.3d 669, 672 (9th Cir. 2009); *United States v. Tank*, 200 F.3d 627, 630 (9th Cir. 2000). “To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Fed. R. Evid. 901(a).

First, the Government presented two witnesses, Detective Erdely and Special Agent Cullen, who testified to the accuracy and reliability of Torrential Downpour, the mirror image process, the FTK tool, and the IEF tool and explained how each electronic forensic tool functions. Because the testimony presented at trial adequately explained the reliability of the processes underlying all four categories of digital forensic evidence challenged by Gonzales, the Government satisfied its

burden of showing that Torrential Downpour, the mirror image process, the FTK program, and the IEF program were what the Government claimed they were. *See* Fed. R. Evid. 901(a). The district court did not abuse its discretion.

Second, Gonzales argued that the Government failed to prove he knew the images underlying Counts 4, 7, and 8 were child pornography because it presented no evidence that he opened or viewed those files. We review a forfeited challenge to the sufficiency of the evidence for plain error. *United States v. Lopez*, 4 F.4th 706, 719 (9th Cir. 2021). The crime of distribution of child pornography requires that a defendant knew that the image at issue depicted a minor engaged in sexually explicit conduct. 18 U.S.C. § 2252. But the Government need not present direct evidence that the child pornography files were accessed or opened in every case to establish knowledge. *See, e.g., United States v. Ruiz-Castelo*, 835 F. App'x 187, 189 (9th Cir. 2020) (explaining that “the government was required to prove Ruiz-Castelo’s knowledge that the video contained sexually explicit conduct with a minor, not that Ruiz-Castelo necessarily viewed the video before he distributed it”).

What is more, the fact that the forensic evidence did not show that the files containing the images underlying Counts 4, 7, and 8 had been opened does not undermine the convictions on those counts because circumstantial evidence of the number of child pornography files and their location may be sufficient to prove knowledge. *United States v. Hardrick*, 766 F.3d 1051, 1057 (9th Cir. 2014). Here,

Gonzales admitted that he used the tablet to search for child pornography during the relevant timeframe, he possessed many child pornography files in an unusual location on the device, and he successfully shared other child pornography files with the FBI that he viewed but that were no longer on his device. The Government therefore presented sufficient evidence at trial for a reasonable juror to conclude that Gonzales knew the images underlying Counts 4, 7, and 8 showed minors engaged in sexually explicit conduct.

Third, Gonzales argued that the district court improperly delegated the setting of his restitution payment schedule to the Bureau of Prisons (BOP). Because Gonzales did not object to the district court's order setting a restitution payment schedule at sentencing, his argument is reviewed for plain error. *See* Fed. R. Crim. P. 52(b); *United States v. Olano*, 507 U.S. 725, 732 (1993). To be sure, the district court cannot delegate the setting of a restitution payment schedule to the probation office or the BOP. *United States v. Gunning*, 401 F.3d 1145, 1150 (9th Cir. 2005). But the BOP nonetheless has “independent power to administer the [Inmate Financial Responsibility Program (IFRP)],” *Ward v. Chavez*, 678 F.3d 1042, 1046–47 (9th Cir. 2012), and may require inmates who participate in IFRP “to pay restitution to victims at a higher or faster rate than was specified by the sentencing court,” *United States v. Lemoine*, 546 F.3d 1042, 1044 (9th Cir. 2008). And although the district court's judgment here states that “payment shall be made through

[IFRP],” Gonzales fails to show that his subsequent participation in that program was not voluntary on his part. Thus, because Gonzales was a voluntary participant in IFRP, the BOP had the authority to adjust Gonzales’s restitution payment schedule. The district court therefore did not plainly err.

We therefore **AFFIRM** the district court.

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

United States of America

v.

Anthony Espinosa Gonzales

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

No. CR-17-01311-001-PHX-DGC

Zachary Nathaniel Storrs (CJA)

Attorney for Defendant

USM#: 86779-408

THERE WAS A VERDICT OF guilty on 4/1/2021 as to Counts 1-9 of the Indictment.

ACCORDINGLY, THE COURT HAS ADJUDICATED THAT THE DEFENDANT IS GUILTY OF THE FOLLOWING OFFENSE(S): violating Title 18, U.S.C. §2252(a)(2), 18, U.S.C. § 2252(b)(1) and 18 U.S.C. 2256, Distribution of Child Pornography, a Class C Felony offense, as charged in Counts 1 through 8 of the Indictment and Title 18, U.S.C. §2252(a)(4)(b) and 18 U.S.C. § 2256, Possession of Child Pornography, a Class C Felony offense, as charged in Count 9 of the Indictment.

IT IS THE JUDGMENT OF THIS COURT THAT the defendant is committed to the custody of the Bureau of Prisons for a term of **ONE HUNDRED THIRTY-TWO (132) MONTHS**, which consists of **ONE HUNDRED THIRTY-TWO (132) MONTHS** on Counts 1 through 9, to be run concurrently. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **LIFE**.

CRIMINAL MONETARY PENALTIES

The defendant shall pay to the Clerk the following total criminal monetary penalties:

SPECIAL ASSESSMENT: \$900.00 FINE: WAIVED RESTITUTION: \$3,000.00

The Court finds the defendant does not have the ability to pay a fine and orders the fine waived.

The defendant shall pay a special assessment of \$900.00 which shall be due immediately.

The defendant shall pay a total of \$3,900.00 in criminal monetary penalties, due immediately. Having assessed the defendant's ability to pay, payments of the total criminal monetary penalties are due as follows: Balance is due in equal monthly installments of \$50.00 over a period of 78 months to commence 60 days after the release from imprisonment to a term of supervised release.

If incarcerated, payment of criminal monetary penalties are due during imprisonment at a rate of not less than \$25 per quarter and payment shall be made through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary

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payments shall be made to the Clerk of U.S. District Court, Attention: Finance, Suite 130, 401 West Washington Street, SPC 1, Phoenix, Arizona 85003-2118. Payments should be credited to the various monetary penalties imposed by the Court in the priority established under 18 U.S.C. § 3612(c). The total special assessment of \$100.00 shall be paid pursuant to Title 18, United States Code, Section 3013 for Count 1-9 and 9 of the Indictment.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTa assessment, (9) penalties, (10) costs, including cost of prosecution and court costs.

Any unpaid balance shall become a condition of supervision and shall be paid within 90 days prior to the expiration of supervision. Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the Clerk, U.S. District Court, of any change in name and address. The Court hereby waives the imposition of interest and penalties on any unpaid balances.

SUPERVISED RELEASE

It is ordered that while on supervised release, the defendant must comply with the mandatory and standard conditions of supervision as adopted by this court, in General Order 17-18, which incorporates the requirements of USSG §§ 5B1.3 and 5D1.2. Of particular importance, the defendant must not commit another federal, state, or local crime during the term of supervision. Within 72 hours of sentencing or release from the custody of the Bureau of Prisons the defendant must report in person to the Probation Office in the district to which the defendant is released. The defendant must comply with the following conditions:

MANDATORY CONDITIONS

- 1) You must not commit another federal, state or local crime.
- 2) You must not unlawfully possess a controlled substance. The use or possession of marijuana, even with a physician's certification, is not permitted.
- 3) You must refrain from any unlawful use of a controlled substance. The use or possession of marijuana, even with a physician's certification, is not permitted. Unless suspended by the Court, 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.

STANDARD CONDITIONS

- 1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of sentencing or 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.

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SPECIAL CONDITIONS

The following special conditions are in addition to the conditions of supervised release or supersede any related standard condition:

- 1) You must submit to substance abuse testing. You must not attempt to obstruct or tamper with the testing methods. You must contribute to the cost of testing in an amount to be determined by the probation officer.
- 2) You must provide the probation officer with 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) You are prohibited from making major purchases, incurring new financial obligations, or entering into any financial contracts without the prior approval of the probation officer.
- 4) You must participate in a mental health assessment and participate in mental health treatment as determined to be necessary by a medical or mental health professional and follow any treatment directions by the treatment provider. You must take medicine as prescribed by a medical professional providing mental health treatment, unless you object, in which event you must immediately notify the probation officer. You must contribute to the cost of treatment in an amount to be determined by the probation officer.
- 5) You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A, or any other statute authorizing a sentence of restitution.
- 6) You must notify the probation officer of any material change in your economic circumstances that might affect your ability to pay restitution, fines or special assessments.
- 7) The defendant's interest in the following property shall be forfeited to the United States: Microsoft Surface Tablet, serial number 024876150753
- 8) You must attend and participate in a sex offender treatment program and sex offense specific evaluations as approved by the probation officer. You must abide by the policies and procedures of all the treatment and evaluation providers. You must contribute to the cost of such treatment and assessment not to exceed an amount determined to be reasonable by the probation officer based on ability to pay.
- 9) You must attend and participate in periodic polygraph examinations as a means to determine compliance with conditions of supervision and the requirements of your therapeutic program, as directed by the probation officer. No violation proceeding will arise solely on the result of the polygraph test. A valid Fifth Amendment refusal to answer a question during a polygraph examination will not be used as a basis for a violation proceeding. You must contribute to the cost of such polygraph examination not to exceed an amount determined to be reasonable by the probation officer based on ability to pay.
- 10) You must reside in a residence approved, in advance, by the probation officer. Any changes in the residence must be pre-approved by the probation officer.

- 11) You must not knowingly possess, view, or otherwise use material depicting sexually explicit conduct involving children, as defined by 18 USC 2256(2), and material depicting "sexually explicit conduct" involving adults, defined as explicit sexually stimulating depictions of adult sexual conduct that are deemed inappropriate by your probation officer.
- 12) You must register as a sex offender in compliance with all federal, state, tribal or other local laws or as ordered by the Court. Failure to comply with registration laws may result in new criminal charges.
- 13) You must submit your person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct, and by any probation officer in the lawful discharge of the officer's supervision functions. You must consent to and cooperate with the seizure and removal of any hardware and/or data storage media for further analysis by law enforcement or the probation officer with reasonable suspicion concerning a violation of a condition of supervision or unlawful conduct. You must warn any other residents that the premises may be subject to searches pursuant to this condition.
- 14) You must not be in the company of or have contact with children who you know are under the age of 18, with the exception of your own children. Contact includes, but is not limited to, letters, communication devices, audio or visual devices, visits, or communication through a third party. The defendant may have contact with his siblings or stepsiblings with adult supervision and as approved by the probation officer.
- 15) You are restricted from engaging in any occupation, business, volunteer activity or profession where you have the potential to be alone with children under the age of 18 without prior written permission. Acceptable employment shall include a stable, verifiable work location and the probation officer must be granted access to your work site.
- 16) You must not go to, or remain at, any place where you know children under the age of 18 are likely to be, including parks, schools, playgrounds, and childcare facilities. You must not go to, or remain at, a place for the primary purpose of observing or contacting children under the age of 18.
- 17) You must not utilize, by any means, any social networking forums offering an interactive, user-submitted network of friends, personal profiles, blogs, chat rooms or other environment which allows for interaction with others without prior written permission from the probation officer.
- 18) You must not possess any device capable of capturing and/or storing an image, or video recording device without the prior written permission of the probation officer.
- 19) You must submit your computers (as defined in 18 U.S.C. § 1030(e)(1)) or other electronic communications or data storage devices or media, to a search. You must warn any other people who use these computers or devices capable of accessing the Internet that the devices may be subject to searches pursuant to this condition. Failure to submit to a search may be ground for

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revocation of release. A probation officer may conduct a search pursuant to this condition only when reasonable suspicion exists that there is a violation of a condition of supervision and that the computer or device contains evidence of this violation. You must consent to and cooperate with the seizure and removal of any hardware and/or data storage media for further analysis by law enforcement or the probation officer with reasonable suspicion concerning a violation of a condition of supervision or unlawful conduct. Any search will be conducted at a reasonable time and in a reasonable manner.

- 20) You must not possess or use a computer (including internet capable devices) with access to any 'on-line computer service' at any location (including place of employment) without the prior written permission of the probation officer. This includes any Internet service provider, bulletin board system, or any other public or private network or e-mail system. You must consent, at the direction of the probation officer, to having installed on your computer(s) (as defined at 18 U.S.C. § 1030(e)(1), including internet capable devices), at your own expense, any hardware or software systems to monitor your computer use.
- 21) You must cooperate in the collection of DNA as directed by the probation officer.

THE DEFENDANT IS ADVISED OF DEFENDANT'S RIGHT TO APPEAL BY FILING A NOTICE OF APPEAL IN WRITING WITHIN 14 DAYS OF ENTRY OF JUDGMENT.

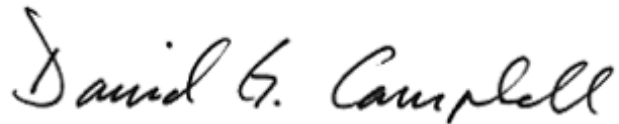
The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

The Court orders commitment to the custody of the Bureau of Prisons.

The defendant shall self-surrender for service of sentence at the Sandra Day O'Connor Courthouse by 2:00 PM on November 29, 2021.

Date of Imposition of Sentence: **Monday, November 22, 2021**

Dated this 24th day of November, 2021.



David G. Campbell
Senior United States District Judge

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RETURN

I have executed this Judgment as follows:

_____ , the institution
defendant delivered on _____ to _____ at _____
designated by the Bureau of Prisons with a certified copy of this judgment in a Criminal case.

United States Marshal

By:

Deputy Marshal

CR-17-01311-001-PHX-DGC- Gonzales 11/23/2021 - 1:44 PM