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OPINION, U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT (AUGUST 7, 2023)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSHUA JAMES DUGGAR,

Defendant-Appellant.

No. 22-2178

Appeal from United States District Court
for the Western District of Arkansas - Fayetteville

Before: SMITH, Chief Judge,
STRAS and KOBES, Circuit Judges.

STRAS, Circuit Judge.

Joshua Duggar challenges his conviction for receiving child pornography. *See* 18 U.S.C. § 2252A (a)(2), (b)(1). Although he seeks to suppress incriminating statements and get a new trial, we affirm.

I.

Duggar used a computer to download hundreds of child-pornography images. Law enforcement tracked

the images to a used-car dealership he owned by identifying the internet-protocol address of the computer.

Not long after, a team of federal agents arrived with a search warrant. Two walked "directly" up to Duggar, who pulled out a cell phone and said he "wanted to call his attorney." But before he could complete the call, they seized it because it "was considered evidence."

When asked whether he would like "to discuss further details" about the warrant, he said yes. Without waiting for an explanation, Duggar blurted out, "[w]hat is this about? Has somebody been downloading child pornography?" He then let it slip that he was "familiar with" file-sharing software and had installed it on "all of" his electronic devices, including "the computer in the office."

A grand jury indicted Duggar for possessing and receiving child pornography. *See* 18 U.S.C. § 2252A(a)(2), (a)(5)(B), (b)(1)-(2). Before trial, he filed a motion to suppress the statements he made at the scene without his lawyer present. The district court[1] denied the motion, concluding he was not in custody at the time. *See United States v. Griffin*, 922 F.2d 1343, 1349 (8th Cir. 1990).

Those statements took on a critical role at trial. And so did the metadata from his iPhone, which placed it at the dealership when the child pornography was downloaded.

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[1] The Honorable Timothy L. Brooks, United States District Judge for the Western District of Arkansas.

Duggar, for his part, tried to point the finger elsewhere. Looking to convince the jury that it faced "a classic, old-fashioned 'whodunit,'" he suggested that a former employee, who happened to be a convicted sex offender, was to blame. Duggar ultimately decided not to call him to the stand, however, because the district court ruled that any mention of the employee's prior conviction was off-limits. *See* Fed. R. Evid. 403, 609(a)(1)(A).

The jury found Duggar guilty as charged. After entering judgment on the receipt-of-child-pornography count, *see United States v. Soto*, 58 F.4th 977, 982 (8th Cir. 2023), the district court sentenced him to 151 months in prison.

II.

Duggar believes that the district court's decision to stop him from asking about the employee's prior sex-offense conviction deprived him of his right to present a complete defense. Our review is de novo. *See United States v. West*, 829 F.3d 1013, 1017 (8th Cir. 2016).

A.

The Fifth and Sixth Amendments "guarantee[ ] criminal defendants a meaningful opportunity to present a complete defense." *United States v. Clay*, 883 F.3d 1056, 1060 (8th Cir. 2018) (per curiam) (citation omitted); *see* U.S. Const. amends. V, VI. What it includes is subject to debate, but there seems to be little doubt that it applies to evidence "show[ing] that someone else committed the crime." *Holmes v. South Carolina*, 547 U.S. 319, 327 (2006). Nevertheless, the Supreme Court has struck a balance to

accommodate other "legitimate interests in the criminal trial process": ordinary evidentiary rules still apply, except when they "'infring[e] upon a weighty interest of the accused' and are 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Id.* at 324-26 (quoting *United States v. Scheffer*, 523 U.S. 303, 308-09 (1998)).

The district court, for its part, tried to strike a balance too. It recognized that Duggar should have an opportunity "to create reasonable doubt" by "call[ing]" the former employee to testify and asking whether he was "present on the car lot" when the downloads occurred. But he could not impeach him with a prior sex crime or introduce "speculative" testimony. *See* Fed. R. Evid. 609(a) (explaining that a prior felony conviction "must be admitted, subject to Rule 403" to attack "a witness's character for truthfulness"); *United States v. Thibeaux*, 784 F.3d 1221, 1226 (8th Cir. 2015). The reason, according to the court, was to prevent confusion: the jury might think he did it <u>because</u> he was a sex offender, even though the conviction was only potentially admissible as impeachment evidence. *See* Fed. R. Evid. 403 (allowing courts to "exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . confusing the issues"); *see also* Paul F. Rothstein, *Federal Rules of Evidence* 508-09 (3d ed. 2019) (explaining that "the similarity of the past crime" is "a factor militating against admission . . . because of the likelihood a juror might impermissibly use the conduct to suggest guilt rather than merely incredibility").

The court had no obligation under the Fifth and Sixth Amendments to do anything more. As the Supreme Court has put it, nothing in the Constitution

calls into question "well-established rules" that "permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes*, 547 U.S. at 326. The right to present a complete defense, in other words, does not trump a district court's discretion to keep out confusing or misleading evidence, even if it would be helpful to the defense. *See Crane v. Kentucky*, 476 U.S. 683, 689-90 (1986) (emphasizing that courts have "'wide latitude' to exclude evidence that is 'repetitive . . . , only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues'" (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986))).

In short, the district court had "unquestionably constitutional" discretion to exclude the conviction under Federal Rule of Evidence 403. *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996) (plurality opinion). It necessarily follows that the court's application of this "well-established rule[ ]" could not have violated Duggar's Fifth and Sixth Amendment rights. *Holmes*, 547 U.S. at 326; *see State v. Pass*, 832 N.W.2d 836, 842-43 (Minn. 2013) (concluding that the exclusion of alternative-perpetrator evidence under Minnesota's version of Rule 403 did not violate the defendant's right to present a complete defense).

B.

It is true, as Duggar points out, that the district court slipped up along the way. It mentioned "the strength of the prosecution's case" as a factor weighing against the admission of alternative-perpetrator evidence.

Although this statement was wrong, any error was harmless. *See* Fed. R. Crim. P. 52(a); *see also United States v. Herbst*, 668 F.3d 580, 585-86 (8th Cir. 2012). The district court later clarified that it had actually "relied on" the weaknesses in *Duggar's* evidence and the risk of confusion, not the strength of the government's case. *See Holmes*, 547 U.S. at 329 (emphasizing the need to "focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt"); *United States v. White Plume*, 847 F.3d 624, 630 (8th Cir. 2017) (affirming a ruling that limited the defendant's ability to impeach his wife with evidence that she had previously abused children when he "provid[ed] only speculation to connect" it to later abuse). Both were independently valid reasons for limiting the alternative-perpetrator evidence that Duggar could introduce.

III.

In his second argument, Duggar shifts his attention from what the district court kept out to what it let in: his incriminating statements during the search at the car dealership. He wanted them suppressed on the ground that the agents violated his right to counsel, which he tried to invoke by mentioning a lawyer and then attempting to call one. *See Miranda v. Arizona*, 384 U.S. 436, 473-75 (1966). We review any factual findings for clear error but consider de novo whether Duggar's right to counsel had attached. *See United States v. Parker*, 993 F.3d 595, 601 (8th Cir. 2021).

The right to counsel at issue "relat[es] to the Fifth Amendment guarantee" against self-incrimination. *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991); *see* U.S. Const. amend. V ("No person . . . shall be compelled in

any criminal case to be a witness against himself . . . ."). Under *Miranda*, certain protections attach, including a right to counsel, the moment a suspect is in custody. *See Davis v. United States*, 512 U.S. 452, 457-58 (1994); *see also United States v. Ferguson*, 970 F.3d 895, 901 (8th Cir. 2020) (stating that "whether a person is in custody dictates whether he is entitled to *Miranda* protections"). Here, the government argues that, even if the agents interrogated Duggar, they did not take him into custody before he incriminated himself.

Custody includes more than just formal arrest. It also covers situations in which "a reasonable person" in the suspect's shoes "would consider his freedom of movement restricted to the degree associated with formal arrest." *United States v. Muhlenbruch*, 634 F.3d 987, 995-96 (8th Cir. 2011) (citation omitted). Everyone agrees that there was no arrest that day, but we must still consider if someone in Duggar's shoes might have reasonably thought otherwise. Six factors guide our analysis:

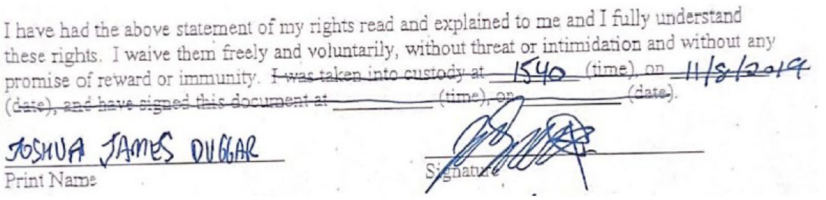
> (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong[-]arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or, (6)

> whether the suspect was placed under arrest at the termination of the questioning.

Griffin, 922 F.2d at 1349.

The first factor, which is "[t]he most obvious and effective means of demonstrating that a suspect has not been 'taken into custody,'" weighs heavily in the government's favor. *Id.* (quoting *Miranda*, 384 U.S. at 444). When the agents arrived, they told Duggar that they had "a federal search warrant, not an arrest warrant, and [that] he was free to leave if he chose to do so." Later, when the agents invited Duggar to speak with them, they reiterated that he "ha[d] the right to stop the questioning at any time." The agents, in other words, "clearly inform[ed] [Duggar] that [he] [was] free to leave or decline questioning." *United States v. Sanchez*, 676 F.3d 627, 631 (8th Cir. 2012).

It is true that the agents read him his *Miranda* rights, which ordinarily might leave someone with the impression they are in custody. But when Duggar signed a form acknowledging his rights, he had the agents "scratch . . . out" the portion saying that he was being "taken into custody." Modifying the form made it clear he was free to leave:


I have had the above statement of my rights read and explained to me and I fully understand these rights. I waive them freely and voluntarily, without threat or intimidation and without any promise of reward or immunity. ~~I was taken into custody at~~ 1540 (time), on 11/8/2019 ~~(date), and have signed this document at~~ _____ (time), on _____ (date).

JOSHUA JAMES DUGGAR
Print Name

Signature

TRANSCRIPTION

I have had the above statement of my rights read to me and I fully understand these rights. I waive freely and voluntarily, without threat or intimidation and without any promise of reward or immunity. ~~I was taken into custody at 1540 (time) on 11/8/2019 (date) and have signed this document at _____ (time) on (date)~~

Joshua James Duggar	/s/ [Illegible]
Print Name	Signature

The second and third factors also favor the government. Duggar sat in the front passenger seat of the agents' truck during the interview. They "did not handcuff him, the doors remained unlocked, and he entered and exited the front seat of the vehicle on his own," which means he "retained freedom of movement throughout the" encounter. *United States v. Johnson*, 39 F.4th 1047, 1051 (8th Cir. 2022); *see United States v. Soderman*, 983 F.3d 369, 377 (8th Cir. 2020). And although the agents "initiated contact with" Duggar, he still "voluntarily acquiesced" to the questioning. *Griffin*, 922 F.2d at 1349; *see United States v. Axsom*, 289 F.3d 496, 501-02 (8th Cir. 2002). Indeed, he began

the interview with a question of his own—"[h]as somebody been downloading child pornography?"—and "continued to converse" with them for about an hour. *United States v. Sandell*, 27 F.4th 625, 629 (8th Cir. 2022); *see Johnson*, 39 F.4th at 1052.

The fourth and fifth factors, by contrast, do not move the needle much in either direction. It is true that the agents failed to follow through on their promise to "alert" Duggar's lawyer to the search. Even so, it would not have "prevent[ed] a reasonable person from terminating the interview." *United States v. Laurita*, 821 F.3d 1020, 1026 (8th Cir. 2016) (citation omitted) (explaining that "[t]he use of deception is irrelevant unless it relates to a reasonable person's perception of his freedom to depart"). Nor does the fact that law enforcement "assume[d] control of the" dealership necessarily mean the interview was "police dominated." *Griffin*, 922 F.2d at 1352. At least not here, when Duggar and the agents were engaged in consensual, "two-way questioning." *Laurita*, 821 F.3d at 1027 (citation omitted); *see Johnson*, 39 F.4th at 1051 (describing the fifth factor as "mixed" when "the interviews were two-way discussions" but "occurred in the agents' vehicle").

Finally, Duggar was not "arrest[ed] at the termination of the questioning." *Griffin*, 922 F.2d at 1349. To the contrary, he ended the interview on his own and then left the dealership—hardly an option available to someone in custody. *See United States v. Treanton*, 57 F.4th 638, 642-43 (8th Cir. 2023) (Stras, J., concurring in the judgment) (emphasizing that the sixth *Griffin* factor "still counts").

Viewed through *Griffin*'s lens, we conclude that a reasonable person in Duggar's position would not

have thought "his freedom of movement" was "restricted." *Muhlenbruch*, 634 F.3d at 995 (citation omitted). It follows that the admission of his statements did not violate *Miranda*. *See id.* at 997.

IV.

The last issue deals with the metadata from Duggar's iPhone. Metadata can provide the who, what, when, and where of electronic files and records. *See United States v. Hager*, 710 F.3d 830, 832 n.2 (8th Cir. 2013); *see also The American Heritage Dictionary of the English Language* 1105 (5th ed. 2016) (defining metadata as "[d]ata that describes other data," including "the origin, structure, or characteristics of computer files"). Here, according to the government's forensic analyst, it revealed the where (at the dealership) and the when (at the same time as the child-pornography downloads) that connected Duggar to the crime. On appeal, he challenges the analyst's qualifications and methods as well as the limitations placed on the testimony of his own expert. Our review of both issues is for an abuse of discretion. *See Shipp v. Murphy*, 9 F.4th 694, 700 (8th Cir. 2021); *Russell v. Anderson*, 966 F.3d 711, 730 (8th Cir. 2020).

A.

The government's analyst explained in detail how he conducted his analysis. His examination began with photographs that Duggar had transferred from his iPhone to his laptop. They "contain[ed] a lot of EXIF information," including "the GPS coordinates of where" he took them. *See Hager*, 710 F.3d at 832 n.2 (explaining that EXIF metadata "provides identifying information about [a] file," like "when the . . . file was

produced" and "when it was last modified" (citation omitted)). The next step involved plotting the coordinates online, in programs like Bing and Google Maps, which placed the iPhone at the car lot at the same time as the downloads of child pornography.

The analyst was qualified to testify about what he found. To start, not everything he said required "scientific, technical, or other specialized knowledge." Fed. R. Evid. 701(c). For example, even if interpreting EXIF metadata takes some expertise, *see United States v. Natal*, 849 F.3d 530, 536–37 (2d Cir. 2017) (per curiam), the "process" of plotting coordinates on a map does not, *United States v. Mast*, 999 F.3d 1107, 1112 (8th Cir. 2021); *see United States v. STABL, Inc.*, 800 F.3d 476, 487 (8th Cir. 2015). Nor did the analyst have an obligation to explain how GPS technology works, given that its "accuracy and reliability" are "not subject to reasonable dispute." *United States v. Brooks*, 715 F.3d 1069, 1078 (8th Cir. 2013) (quoting Fed. R. Evid. 201(b)).

To the extent some of the testimony required "specialized knowledge," the district court did not abuse its discretion in concluding that he had it. Fed. R. Evid. 702(a). After all, he had examined "[t]housands" of electronic devices and written "[h]undreds" of forensic reports, many of which involved the analysis of EXIF metadata. *See United States v. Perry*, 61 F.4th 603, 606 (8th Cir. 2023) (affirming the admission of expert testimony by a firearms examiner with eight years of experience who had previously performed ballistics comparisons "a few dozen times").

The analyst also provided enough detail to conclude that his "methods" were "reliably applied." Fed. R. Evid. 702(d). First, he personally "examin[ed]" the

photographs himself. *See* Fed. R. Evid. 703 (allowing an expert to "base an opinion on facts or data" that he "personally observed"); *see also Klingenberg v. Vulcan Ladder USA, LLC*, 936 F.3d 824, 829 (8th Cir. 2019). Then he "look[ed] at the raw data" and "verif[ied] that it's basically accurate" by displaying "the GPS coordinate[s]" in online maps. *See Kozlov v. Associated Wholesale Grocers, Inc.*, 818 F.3d 380, 394 (8th Cir. 2016). Given that he had used these methods "in many cases" over "a long time" and that he doublechecked his work before reaching a conclusion, we cannot say the court abused its discretion in admitting his testimony.[2] *See Russell v. Whirlpool Corp.*, 702 F.3d 450, 457 (8th Cir. 2012).

B.

The same goes for the limitations on what Duggar's expert could say. Although the district court allowed her to speak generally about EXIF metadata, she could not suggest that the "dates and times" were wrong. She never "load[ed]" any of it "into [her] software." So, as she put it, her testimony consisted of a lot of "I don't know[s]."

It was not an abuse of discretion to limit her testimony to what she knew. After all, it would have been "pure conjecture" for her to suggest that there were errors in metadata she never examined. *J.B. Hunt Transp., Inc. v. Gen. Motors Corp.*, 243 F.3d 441, 444 (8th Cir. 2001); *see UnitedHealth Grp. Inc. v. Exec.*

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[2] The government satisfied its disclosure obligation by informing Duggar that its forensic analyst may discuss "digital photos . . . that contain metadata, including geolocation information." *See* Fed. R. Crim. P. 16(a)(1)(G); *see also United States v. Spotted Horse*, 914 F.3d 596, 601 (8th Cir. 2019).

Risk Specialty Ins. Co., 870 F.3d 856, 865 (8th Cir. 2017). Not to mention it had the potential to confuse and mislead the jury. *See* Fed. R. Evid. 403; *United States v. Coutentos*, 651 F.3d 809, 821 (8th Cir. 2011); *Fireman's Fund Ins. Co. v. Canon U.S.A., Inc.*, 394 F.3d 1054, 1060 (8th Cir. 2005).

It does not matter that the government cross-examined her about the EXIF time stamps on the photographs. She responded by "assuming the information" in the government's exhibits was "accurate," because she had "not personally" verified it. Given that qualification, she did not leave the jury with the "false impression" that she agreed with the government's analysis. *United States v. Midkiff*, 614 F.3d 431, 442-43 (8th Cir. 2010). There was, in other words, nothing for her to clarify. *See Valadez v. Watkins Motor Lines, Inc.*, 758 F.3d 975, 981 (8th Cir. 2014).

V.

We accordingly affirm the judgment of the district court.

JUDGMENT, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS (MAY 27, 2022)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA,

v.

JOSHUA JAMES DUGGAR,

Case No. 5:21-CR-50014

USM Number: 42501-509

Before: Hon. Timothy L. BROOKS,
United States District Judge.

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:

☒ was found guilty on count(s) One (I) of the Indictment on May 25, 2021. after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section
18 U.S.C. §§ 2252A(a)(2) and (b)(1)

Nature of Offense
Receipt of Child Pornography

Offense Ended 05/16/2019

Count 1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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.

May 25, 2022
Date of Imposition of Judgment

/s/ Timothy L. Brooks
Signature of Judge

Honorable Timothy L. Brooks,
United States District Judge
Name and Title of Judge

May 27, 2022
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: one hundred fifty-one (151) months.

☒ The court makes the following recommendations to the Bureau of Prisons:

1. That the defendant be designated to its facility in Seagoville or Texarkana, to the extent that there is bedspace available in the defendant's classification level; and
2. That the defendant be allowed to participate in the BOP's sex offender treatment program.

☒ The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: twenty (20) years.

MANDATORY CONDITIONS

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.

☒ 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 cooperate in the collection of DNA as directed by the probation officer. (check if applicable)

6. ☒ 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 the location where you reside, work, are a student, or were convicted of a qualifying offense. (check if applicable)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

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.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall have no unsupervised contact with minors, which shall include his own children. Contact with his children must be supervised by his wife, his parents, or another individual approved by the U.S. Probation Office. If there is a concern about the potential for inadvertent contact with a minor at a particular place, function, or event, then the defendant shall get approval from the U.S. Probation Office before attending any such place, function, or event.

2. The defendant shall submit his person, residence, place of employment, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects to a search conducted by the U.S. Probation Office at a reasonable time and in a reasonable manner based upon any reasonable suspicion that a violation of any condition of supervised release might thereby be disclosed.

3. The defendant shall not possess, use, or have access to a computer or any other electronic device that has Internet or photograph storage capabilities without prior advance notice and approval of the U.S. Probation Office. Reasonable requests by the defendant for such approval should not be denied, provided that the defendant allows the U.S. Probation Office to install Internet-monitoring software, the defendant pays for the software, and the defendant submits to random searches of his computers, electronic devices, and peripherals. Reasonable requests to use an employer's computer on the employer's premises should be granted as well, provided that the employment is not

self-employment or employment with a person or entity that is closely affiliated with the defendant.

4. The defendant shall not purchase, possess, use, distribute, or administer marijuana or obtain or possess a medical marijuana card or prescription. If the defendant is currently in possession of a medical marijuana card, he will turn it over immediately to the probation office.

5. The defendant shall participate in a sex offense-specific treatment program. The defendant shall pay for the costs of the program if financially able.

6. The defendant shall not access or view pornography of any kind, including adult pornography.

7. The defendant shall be required to submit to periodic polygraph testing at the discretion of the probation office as a means to ensure that he is in compliance with the requirements of his supervision or treatment program. However, polygraph testing results shall not be admissible in a revocation proceeding.

CRIMINAL MONETARY PENALTIES

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

TOTALS	
Assessment	$35,100.00
Restitution	$-0-
Fine	$10,000.00
AVAA Assessment*	$-0-

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

JVTA Assessment** $5,000.00

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the

☒ fine

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 $ 50,100.00 due immediately, balance due

☒ in accordance with F below; or

F. ☒ Special instructions regarding the payment of criminal monetary penalties:

> If not paid immediately, any unpaid financial penalty shall be paid by the defendant during his term of imprisonment at a rate of up to 50% of the defendant's available funds, in accordance with the Inmate Financial Responsibility Program. During residential reentry placement, payments will be 0% of the defendant's gross monthly income. The payment of any remaining balance shall become a condition of supervised release and shall be paid in monthly installments of $500.00 or 15% of the defendant's net monthly household income, whichever is greater, with the

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

entire balance to be paid in full no later than one month prior to the end of the period of supervised release.

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.

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

[. . .]

ORDER VACATING COUNT TWO, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS (MAY 25, 2022)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSHUA JAMES DUGGAR,

Defendant.

Case No. 5:21-CR-50014

Before: Timothy L. BROOKS,
United States District Judge.

ORDER

Defendant Joshua James Duggar was convicted by a jury of one count of receipt of child pornography and one count of possession of child pornography. As the Court acknowledged on the record during the sentencing hearing today, the possession conviction, which is Count Two of the Indictment (Doc. 1), is a

lesser-included offense of the receipt conviction. Therefore, the jury's verdict on Count Two is VACATED, and Count Two is DISMISSED WITHOUT PREJUDICE.

IT IS SO ORDERED on this 25th day of May, 2022.

/s/ Timothy L. Brooks
United States District Judge

MEMORANDUM OPINION AND ORDER, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS (MAY 24, 2022)

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WESTERN DISTRICT OF ARKANSAS
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UNITED STATES OF AMERICA,

Plaintiff,

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JOSHUA JAMES DUGGAR,

Defendant.

Case No. 5:21-CR-50014

Before: Timothy L. BROOKS,
United States District Judge.

MEMORANDUM OPINION AND ORDER

On December 9, 2021, a jury convicted Defendant Joshua James Duggar of one count of receipt of child pornography and one count of possession of child pornography. Before the jury returned its verdict, Mr. Duggar's counsel made two oral motions for acquittal under Federal Rule of Criminal Procedure 29(a)—one at the conclusion of the Government's case-in-chief, and the other at the conclusion of the defense's case-

in-chief. The Court denied both motions from the bench.

Now, Mr. Duggar brings a post-trial Motion for Judgment of Acquittal Under Rule 29(c) (Doc. 131). He argues "there was no evidence of *mens rea* from which the jury could base its guilty verdict as to each count." *Id.* at p. 3. In the alternative, he requests a new trial under Rule 33(a) due to the Government's alleged failure to timely disclose certain evidence and the Court's rulings on witness testimony.

The Government filed a Response in Opposition to the Motion (Doc. 134), and Mr. Duggar filed a Reply (Doc. 142). For the following reasons, the Motion is DENIED.

I. Legal Standards

Rule 29(a) requires the Court, on a defendant's motion, to "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." However, "a district court has very limited latitude to do so and must not assess witness credibility or weigh evidence, and the evidence must be viewed in a light most favorable to the government." *United States v. Hassan*, 844 F.3d 723, 725 (8th Cir. 2016). When reviewing the sufficiency of the evidence to support a conviction, the Court must resolve evidentiary conflicts in the Government's favor and accept all reasonable inferences from the evidence that support the verdict. *See United States v. Weaver*, 554 F.3d 718, 720 (8th Cir. 2009). "A verdict will only be overturned if no reasonable jury could have found the defendant guilty beyond a reasonable doubt." *Id.*

Alternatively, Rule 33(a) states that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." "[T]he court has broad discretion in deciding motions for new trial, and its decision is subject to reversal only for a clear and manifest abuse of discretion." *Hassan*, 844 F.3d at 725. "Also in contrast to Rule 29, in considering a motion for new trial, the court need not view the evidence in the light most favorable to the verdict and it is permitted to weigh the evidence and evaluate the credibility of the witnesses." *Id.* at 725-26. "Nonetheless, motions for new trials based on the weight of the evidence generally are disfavored, and the district court's authority to grant a new trial should rarely be exercised." *Id.* at 726. "The district court will only set aside the verdict if the evidence weighs heavily enough against the verdict that a miscarriage of justice may have occurred." *United States v. Serrano-Lopez*, 366 F.3d 628, 634 (8th Cir. 2004) (internal quotation marks omitted) (quoting *United States v. Rodriguez*, 812 F.2d 414, 417 (8th Cir. 1987)).

II. Discussion

A. Request for Judgment of Acquittal Under Rule 29(c)

Mr. Duggar argues the Court should enter a judgment of acquittal as to both counts of conviction because the jury was not presented evidence sufficient to show he actually viewed any child pornography. He claims proof of viewing is necessary to establish the *mens rea* needed to support convictions for receipt and possession of child pornography. To be clear, he agrees the images presented at trial meet the definition of child

pornography. *See* Doc. 142, p. 2. His argument is that no reasonable jury could have found he knowingly received and possessed child pornography because there is insufficient evidence that he, or anyone else for that matter, viewed the images.

Mr. Duggar's argument lacks merit, as there is ample evidence he viewed the images of child pornography that had been downloaded to his business computer. The Government's first witness, Detective Amber Kalmer, testified that on May 14, 2019, she established an online, peer-to-peer connection with a computer associated with an IP address located in Northwest Arkansas. *See* Doc. 124, pp. 60-63; Gov. Ex. 1. This IP address shared a video on the peer-to-peer network, and Detective Kalmer downloaded it. The two-or three-minute video, titled mov_0216, depicted an adult male vaginally penetrating two prepubescent girls. The following day, May 15, Detective Kalmer made a connection with the same IP address and downloaded another file titled marissa.zip. *See* Doc. 124, pp. 64-67; Gov. Ex. 2. This file contained 65 still images of a prepubescent girl posing nude and displaying her genitals for the camera. The final frames of marissa.zip showed the same girl being locked in a dog kennel.

Both mov_2016 and marissa.zip were introduced into evidence at Mr. Duggar's trial and published to the jury. See Gov. Ex. 3. Detective Kalmer testified that she reported the illegal downloading activity to the Department of Homeland Security's office in Northwest Arkansas. *See* Doc. 124, p. 74. HSI Special Agent Gerald Faulkner was tasked with following up on Detective Kalmer's lead. He discovered that the target IP address was registered to Joshua James

Duggar at his business, Wholesale Motorcars, in Springdale, Arkansas. *See id.* at pp. 124-–25. Federal agents executed a search warrant on the business and seized Mr. Duggar's HP desktop computer for forensic analysis.

The Government's investigating computer expert, James Fottrell, testified in detail about his forensic analysis of an exact copy he made of the HP computer's hard drive. *See* Doc. 125, p. 129. He observed that the computer's user had partitioned the hard drive into two sections. One side of the hard drive was the "business side" of the computer; this side booted up to the Windows 10 operating system and contained business records and applications needed to operate Wholesale Motorcars. *See id.* at pp. 207–08. The Windows side also had an application installed called "Covenant Eyes," which monitored the user's internet searches for pornography and reported those searches to an "accountability partner."[1] (Doc. 125, p. 98).

The other side of the hard drive appears to have been set up for the purpose of downloading and viewing child pornography; this side booted up to Ubuntu, a Linux-based operating system, that was locally installed on the computer on May 13, 2019, at approximately 1:52 p.m. *Id.* at p. 230. Mr. Fottrell's forensic imaging of the computer revealed that child pornography was first downloaded on May 14, 2019,

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[1] The Vice President of Technology for Covenant Eyes, Jeffrey Wofford, testified that Mr. Duggar's "accountability partner" was his wife, Anna Duggar. (Doc. 125, p. 101). She would receive an emailed report generated by the software whenever it "caught" Mr. Duggar searching the internet for pornography. *Id.*

the day after the user installed the Linux operating system. *Id.* at p. 243.

Mr. Fottrell testified that the Linux operating system did not come pre-installed; the user purposely installed it on a partition of the computer's hard drive. *Id.* at pp. 210-11. Mr. Fottrell also explained to the jury that it would have been impossible for the user to boot up both operating systems at once. The default operating system was Windows, which was used to run the business. If the user wanted to boot up the Linux operating system, he would "have to bring up the boot menu" and press a function key. *Id.* at p. 210. In other words, the user needed to be physically present at the computer to boot up and access the Linux side of the hard drive. *Id.* at pp. 209-10.

Mr. Fottrell's forensic analysis first identified a number of thumbnail files depicting child pornography. He testified that the existence of a thumbnail file proved "that the full-sized version of that file did exist on that computer at that location at a particular point in time." *Id.* at p. 238, pp. 211-12.[2] The Government published to the jury multiple thumbnail images taken from the HP desktop. These images were of minors

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[2] Since all child pornography had been deleted from the computer by the time it was seized, Mr. Fottrell analyzed the hard drive to determine whether child pornography had, at one time or another, been downloaded and viewed by a user prior to deletion. Mr. Fottrell testified that he recovered thumbnail image files depicting child pornography and explained to the jury how and why such thumbnail images may remain on the hard drive after child pornography is deleted. He also explained the other investigative tools he used to determine how the user downloaded and then played child pornography videos before deleting them. *See* Doc. 125, pp. 253-59.

engaging in sexually explicit conduct, including the marissa.zip images that had been accessed on the peer-to-peer network by Detective Kalmer. *See* Gov. Exs. 31-34. Mr. Fottrell testified that the user of the HP computer downloaded child sexual abuse materials on May 14 and 15, then purposely navigated to the file folders containing those downloads and chose to view "large thumbnails" of the images in these folders. (Doc. 125, p. 246; Doc. 126, p. 92 (noting that a thumbnail file is created when a user "navigate[s] to that folder and display[s] the contents of the folder in large thumbnail view.") (emphasis added)).

Mr. Fottrell next testified that he located several "thumbnail images associated with the webcam-collections previews" file. (Doc. 125, p. 247). Those thumbnail images included a single frame from the mov_0216 video that Detective Kalmer downloaded from Mr. Duggar's IP address on May 14. *See id.* at p. 256. Mr. Fottrell's expert opinion was that the thumbnail images were created because the user "view[ed] those images or open[ed] a folder containing the images." (Doc. 126, p. 82).

In addition to the thumbnail files, Mr. Fottrell found evidence of child pornography in the unallocated space of the Linux side of the hard drive. He explained to the jury that files located in unallocated space "used to exist in the file system somewhere, but the user deleted them." (Doc. 125, p. 258). Government's Exhibit 35 is copy of 40 full-sized images that Mr. Fottrell recovered from unallocated space, all of which "exactly matched the thumbnail-size image[s] that [were] recovered" from other folders in the HP computer. *Id.* at p. 259. Mr. Fottrell testified that, based on his training and expertise, these explicit images of children

engaging in sex acts "previously existed on the computer in the file system with a particular file name." *Id.* For example, images from the marissa.zip series also appeared in unallocated space on the Linux side of the hard drive. *See id.* at pp. 260–61; Gov. Ex. 36.

Finally, Mr. Fottrell testified that the user of the HP computer utilized the VLC media player to watch at least seven videos containing child pornography. *See* Doc. 125, p. 281. First, Mr. Fottrell examined the Torrent files he located on the HP computer. According to his testimony, a Torrent file does not contain the video itself but instead "contains instructions . . . readable by the uTorrent program. . . . [that] tell [uTorrent] how to go out and fetch that [video] from the other computers on the internet that are sharing that file and making it available." (Doc. 125, p. 268). The Government introduced Exhibit 39, a list of the Torrent files located on the Linux partition, organized by the date the user downloaded each of the files. Next, Mr. Fottrell explained that he used a forensic tool called "Torrent File Editor" to view the contents of the Torrent files and display the file names and hash values of the videos that were referenced in those Torrent files. (Doc. 125, p. 271). The Government introduced Exhibit 44, a list of file names and hash values corresponding to the videos uTorrent had "fetched" using the "instructions" in the Torrent files. Mr. Fottrell testified he "was able to identify all of the images in those Torrent files and then get access to the underlying content." (Doc. 125, p. 282). That content—the full-length child pornography videos that

had been viewed using the VLC player—was downloaded to a thumb drive labeled Exhibit 45 and introduced into evidence at trial.[3]

Mr. Fottrell testified he was certain the user "actually viewed the content" of these videos on the HP desktop. (Doc. 125, p. 278).[4] Mr. Duggar's expert witness, Michele Bush, agreed with Mr. Fottrell that the computer's user actually viewed the downloaded images of child pornography. For example, Ms. Bush conceded during cross-examination that the marissa.zip images were unzipped, placed in a folder on the desktop, and then "opened in image viewer all at the exact same time and second. . . . " (Doc. 128, p. 39). She further testified that, according to her analysis of the HP desktop, the user of that computer "viewed" approximately 12 files of child pornography from May 14 to May 16, 2019. *Id.* at p. 51.

Evidence of child pornography was only found on the Linux side of Mr. Duggar's computer. The Covenant Eyes software is not compatible with Linux-based operating systems and was not installed or operating on the Linux side of the partition. See Docs. 125, p. 105 and 126, p. 23. Thus, viewed in the light most favorable to the jury's verdicts, there is a reasonable inference that Mr. Duggar is the user who installed and used the Linux partition for the purpose of searching and viewing internet content that would otherwise have been reported to his wife by Covenant Eyes.

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[3] The jury viewed these videos in "storyboard" format.

[4] Mr. Fottrell examined the VLC program's "streaming protocols," which confirmed that the user played the videos locally from the Linux side of the computer. *See* Doc. 125, p. 281.

The coup de grâce is Government's Exhibit 85. This exhibit, introduced through Mr. Fottrell's testimony, is a timeline summarizing 50 or 60 exhibits of forensic evidence recovered from Mr. Duggar's HP desktop, iPhone 11, iPhone 8, and MacBook. The evidence summarized in Exhibit 85 places Mr. Duggar at the car lot on May 13, 2019, during the local installation of the Linux partition and operating system, and during May 14-16, 2019, at the times child pornography was downloaded to the HP desktop. *See* Doc. 126, pp. 106-112.

Based on the Court's discussion of the trial evidence above, there is no merit to Mr. Duggar's argument in favor of acquittal. There was significant evidence presented at trial to convince a reasonable jury that Mr. Duggar was physically present during the offense conduct and that he had the mens rea to commit these crimes. Accordingly, his request for relief under Rule 29 is DENIED.

B. Request for New Trial Under Rule 33(a)

1. Alleged *Brady* and *Giglio* Violations

Mr. Duggar's first argument in favor of a new trial under Rule 33 is that he was materially prejudiced by the Government's delay in disclosing certain pre-trial communications with a possible defense witness named Caleb Williams. Mr. Williams was one of several individuals Mr. Duggar's attorney identified by name during opening statement as having had the motive and opportunity to commit these crimes. In fact, defense counsel told the jury the case was a "classic, old-fashioned 'whodunit'" and suggested they would "investigate this case together" because law

enforcement failed to do so. (Doc. 124, pp. 34 & 52). Counsel emphasized that case agents "bur[ied] their heads in the sand for their 30-month investigation, failing to investigate suspects with opportunity and access. . . ." *Id.* at p. 34. In the end, however, the defense's promise of an alternative perpetrator came to nothing, as the evidence at trial showed that Mr. Duggar—and only Mr. Duggar—was physically present at the car lot when child pornography was being downloaded.[5] See Government's Exhibit 85 and Doc. 126, pp. 106-112.

Several days prior to the start of trial, on November 24, 2021, Mr. Williams contacted AUSA Dustin Roberts and Special Agent Faulkner by telephone and made certain statements to them relevant to the case. Then, later that same day, Mr. Williams sent an unsolicited email to AUSA William Clayman, writing:

> I was completely mistaken about not being at the Wholesale Motorcars lot during the time I was in Arkansas (AR) between May 8,

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[5] The defense's theory of an alternative perpetrator did come with a potential twist: that someone may have remotely accessed the desktop from a different physical location and downloaded child pornography that way. To support this theory, the defense asked the computer experts whether it was theoretically possible for someone to have remotely accessed the desktop; or, said another way, they asked whether the experts could "rule out remote access." (Doc. 127, p. 197). The defense also pointed out that the password to the Linux partition was one that Mr. Duggar commonly used for online banking and other online applications, so a remote hacker might have known the password or been able to figure it out. Unfortunately for the defense, there was no forensic evidence to indicate the Linux side of the hard drive was ever remotely accessed—by anyone. *See* Doc. 128, p. 179.

> 2019–May 11, 2019. I do not know if I was on the lot computer or even if I ended up going there. It looks like during my time there, I did odd work for the guys and maybe even Josh Duggar. In the messages between Josh Duggar and I, while I was in AR, as attached in one of these screenshots I am providing, I tell Josh I was planning to come to the lot a couple of days. I apologize for the mistake; I had no intention to mislead you all.

(Doc. 131-1).

The Government disclosed the telephone communication and the November 24 email from Mr. Williams to the defense on November 30, 2021, the day before the evidentiary portion of the trial commenced.

Mr. Williams sent a second unsolicited email to the Government's counsel on November 30, 2021. This email was disclosed to the defense on the evening of December 5, which was towards the end of the Government's case-in-chief. This email stated:

> I've also found a few more passwords if you all want them. At some point several of the Duggar guys asked me to run the back ends of some of their social media to help them sell cars. Jed, Josiah, and Joseph I do believe. I still have access to Jed's fake account and Josiah's account.

(Doc. 131-4).

Mr. Duggar describes the November 24 and November 30 emails from Mr. Williams as "exculpatory

and/or impeachment evidence" and argues the Government had a duty to disclose them under *Brady*[6] and its progeny but did so too late to be useful to the defense. (Doc. 131, p. 8). Mr. Duggar's counsel also characterizes the emails as *Giglio*[7] material that could have affected how the jury viewed the reliability of the Government's testifying agents and the credibility of Mr. Williams (had he testified). "When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule." *Giglio*, 405 U.S. at 154.

a. November 24 Email

The evidence presented at trial showed that child pornography was downloaded on the HP desktop computer at Wholesale Motorcars during a three-day period in May 2019, specifically May 14, 15, and 16. The Court agrees with Mr. Duggar that Mr. Williams's potential physical presence at the car lot several days before the downloads occurred was relevant to the defense. The Government acted appropriately in disclosing the November 24 email.

Mr. Duggar does not explain or quantify the nature of any prejudice associated with the five or six day delay in the Government's disclosure of this email on November 30, 2021. The November 24 email states that Mr. Williams was possibly present at Wholesale Motorcars from May 8 to May 11, 2019, several days before any child pornography downloads took place.

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[6] *Brady v. Maryland*, 373 U.S. 83 (1963).

[7] *Giglio v. United States*, 406 U.S. 150 (1972).

More to the point, this information was not substantively new to the defense. By at least November 11, 2021, Mr. Duggar had identified Mr. Williams as a potential witness and later subpoenaed him to testify at trial. A Court filing the day before explains why. *See* Doc. 84, p. 11. Mr. Duggar expressly identifies Mr. Williams as a potential alternative perpetrator that the Government had failed to thoroughly investigate. *Id.* Mr. Duggar states his knowledge that "Caleb Williams regularly used the desktop computer in the months and weeks leading up to May 2019, [and that] he also sold a car on behalf of Wholesale Motorcars on March 27, 2019, and used the HP desktop computer to print shipping labels." *Id.* For these reasons, the Government's disclosure of this email (before the trial began) may have bolstered what Mr. Duggar already knew, but the delay in disclosing it did not prejudice the defense in any material way nor violate Mr. Duggar's rights under *Brady* or *Giglio*.

b. November 30 Email

Assuming Mr. Williams's second email was discoverable under Brady, the Government had an obligation to disclose it "before it [was] too late for the defendant to use it at trial." *United States v. Szczerba*, 897 F.3d 929, 941 (8th Cir. 2018) (citing *United States v. Almendares*, 397 F.3d 653, 664 (8th Cir. 2005)). There is no constitutional requirement to disclose Brady evidence before the trial begins. *See id.* A Brady violation is only established when "the government's delay in disclosing the evidence deprived [the defendant] of its usefulness and . . . this deprivation materially affected the outcome of his trial." *Id.* To demonstrate materiality, a defendant must show a probability that if the evidence had been disclosed earlier during the

trial, "the result of the proceeding would have been different." *Id.* The burden to establish a *Brady* violation rests with the defendant. *Masten v. United States*, 752 F.3d 1142, 1146 (8th Cir. 2014).

For the sake of argument, the Court will assume the November 30 email contained information favorable to the defense. The Court draws the line, though, at finding the email "exculpatory," as Mr. Duggar contends. The email states that Mr. Williams knew "a few more passwords" for social media accounts used by Mr. Duggar's brothers, Jed, Josiah, and Joseph. It does not contain any information that would suggest Mr. Williams was physically present at the car lot when child pornography was downloaded, and the defense was unable to point the jury to any forensic evidence of remote access on the Linux side of the computer.[8]

Mr. Duggar argues that if his counsel had only known about the November 30 email on the first day of trial, he might have been able "to impeach [the case agents] with evidence that yet another person had access to passwords." (Doc. 131, p. 7). Mr. Duggar maintains he would have pointed out to the jury—if he had the email in hand—that the case agents failed to investigate all leads and seriously consider evidence of an alternative perpetrator like Mr. Williams.

Contrary to Mr. Duggar's assertions, defense counsel did, in fact, cross-examine the case agents and attempt to impeach them regarding the thoroughness

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[8] Mr. Duggar's expert, Ms. Bush, testified there was no evidence that anyone had ever remotely accessed the Linux side of the hard drive. Further, she was certain no one had ever remotely accessed the Windows side of the hard drive at any point during the relevant dates in May. *See* Doc. 128, pp. 70-73, 178-79.

of their investigation and their search for alternative perpetrators. During the Government's case-in-chief, Special Agent Faulkner testified that no agent followed up with Mr. Williams to ask him about passwords because Mr. Williams "was in the State of Illinois" when child pornography was downloaded at Wholesale Motorcars. (Doc. 125, p. 40). Mr. Duggar's counsel vigorously cross-examined Special Agent Faulkner on this point. *See id.* at pp. 40-49. Special Agent Faulkner also admitted on the stand that he first spoke with Mr. Williams approximately a month before trial began, around the time the Government confirmed that Mr. Williams was one of Mr. Duggar's proposed alternative perpetrators. *See id.* at p. 40. The Court concludes the November 30 email is not impeachment evidence with respect to the case agents. Their credibility could not have been impeached for "failing" to ask Mr. Williams to list all the Duggar-family passwords he knew because the evidence was clear that Mr. Williams could not have committed these crimes.

As for whether this email could have been used to impeach Mr. Williams, there is no dispute that the defense was in possession of the email two days before they planned to call Mr. Williams to the stand. *See* Doc. 128, p. 195. In addition, as will be explained in further detail below, Mr. Duggar's counsel made the strategic decision not to call Mr. Williams to the stand, though he could have done so. Accordingly, the Government's delayed disclosure of the November 30 email did not violate *Brady* or *Giglio*.

2. Defense's Ability to Call Caleb Williams as a Witness

Mr. Duggar's second argument in favor of a new trial is that he was constitutionally deprived of the ability to call Caleb Williams as a necessary witness. The Government moved prior to trial to bar Mr. Duggar from introducing evidence of an alternative perpetrator, arguing such evidence was too speculative, and, if introduced, would only confuse the jury. *See* Doc. 67. The Court denied the motion on November 17, 2021, noting:

> It is the Government's burden to prove that Defendant committed the crimes set forth in the indictment beyond a reasonable doubt, and Defendant is entitled to create reasonable doubt in the jury's minds by pointing the finger at others who may have possibly committed the crimes.

(Doc. 93, p. 7). At the same time, the Court cautioned Mr. Duggar's counsel that it would not "permit the defense to present speculative testimony or make purely speculative arguments to the jury." *Id.* at n.1. In other words, the Court's order placed Mr. Duggar's counsel on notice at least two weeks prior to trial that he would need to establish a non-speculative evidentiary foundation through witnesses with personal knowledge, consistent with Federal Rules of Evidence 602 and 403, before he could identify and argue that some particular person was an alternative perpetrator.[9]

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[9] The Court's ruling here was a straight-forward paraphrasing of the holding in *Holmes v. South Carolina*, 547 U.S. 319, 327 (2006), which both parties had cited in support of their respective liminal arguments. (Third-party guilt evidence may be excluded

On December 6, 2021, the Court met with counsel in chambers to discuss, among other things, Mr. Williams's expected testimony. The Court reiterated its liminal ruling that Mr. Duggar was free to suggest to the jury that someone else might have committed these crimes; however, the evidence needed to meet a certain minimum threshold of reliability and could not be tantamount to wild finger-pointing. *See* Doc. 127, p. 17. The Court advised the parties of the correct legal standard used to evaluate the introduction of third-party perpetrator evidence at trial:

> THE COURT: Well, so the third-party guilt issue, sometimes known as alternative perpetrator issue, is an issue that I'm sure you all are familiar with. The government made this the subject of a motion in limine. You all responded. The Court ruled that it would not prohibit Mr. Duggar to point the finger at someone else, but the Court also noted that that was not a license to offer speculative testimony. And there's some case law out there. There's the *Holmes* case that the government cited. That's a Supreme Court case. There's a Tenth Circuit case, *Jordan*. And then there's the Tenth Circuit case in the *Tim McVeigh* case, the Oklahoma City bombing case. And these cases all refer to this idea that there has to be some demonstrable nexus of proof that links the alternative perpetrator to the crime. And then there's also this concept that

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under Rule 403 "where it does not sufficiently connect the other person to the crime . . . [such as where it is] speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial." *Id.*).

> the greater the strength of the evidence of the government pointing to the defendant relative to the strength of this nexus, that that weighs into part of the Court's analysis as to whether it will include or permit or exclude that. I have no idea what Caleb Williams is going to say, so I'm not going to say that Caleb Williams can't be called as a witness. But I am going to say that I will not let him testify to anything speculative. And I will not allow him to testify to any facts without a 602 foundation.

Id. at pp. 17–18. Notably, Mr. Duggar's lead trial counsel responded, "And that's fully our intention, Your Honor"—indicating he both understood and agreed with the Court's recitation of the law on this point.

In that same meeting in chambers, the Government advised the Court that Mr. Williams had recently been convicted of a sex offense. According to the Government, the defense team possessed no non-speculative evidence that Mr. Williams was in Arkansas on the dates in question. Instead, the Government argued the only reason Mr. Duggar wanted to call Mr. Williams to the stand was to reveal to the jury the recent sex offense conviction and leave the false impression that he might be a viable alternative perpetrator. *Id*. at p. 18.

The Court inquired of defense counsel what facts he expected to introduce to show Mr. Williams was present at the car lot during the relevant downloading dates in May. The following colloquy ensued:

DEFENSE COUNSEL: Your Honor, as a practical matter, we have circumstantial evidence that he comes from Illinois to Arkansas towards the end of the week before. And he says he's going to, quote, "Watch the lot."

THE COURT: That's not good enough to place him on the lot.

DEFENSE COUNSEL: What I'm saying, Your Honor, is that we also have significant evidence, and the Court is going—I understand the Court is a little bit in the dark on this, to no fault of anyone, but the Court is going to hear significant evidence from Michele Bush today of the possibility of remote access, and in fact, the likelihood of remote access. So, this notion of being on the lot, other than at very discrete times, is really in our opinion a red herring. And as a practical matter, Caleb Williams regularly had access to the entire computer system related to Wholesale Motorcars. He controlled a lot. He sold his own eBay shipping stuff off of that computer, literally, within a month or so of the alleged crime. And he physically puts himself at the lot around that time period. This notion that he claims that he was away, he takes pictures of pictures.

THE COURT: We need to get out there [to the courtroom]. I can't make a speculative ruling based on testimony that I haven't heard. I will let it go forward and we'll take it one step at a time. And if the government believes that there's not appropriate 602 or 901 [foundations] or that any of the dominoes

> that would fall after that aren't there, you need to ask to approach the bench. Under no circumstances are you to get into any prior sex offense history that he has without approaching the bench.

Id. at pp. 19-20 (emphasis added).

The next day, December 7, Mr. Duggar's counsel requested a side bar to discuss further his intention of calling Mr. Williams as the defense's next witness. The Government's counsel asked the Court for an advisory opinion as to the foundational facts the defense needed to introduce before this witness could be asked about his sex offense conviction. The Court responded:

> Well, the Court stands by what it ruled earlier. And the big picture issue here is evidence of an alternative perpetrator. And the Court will not allow speculative testimony or speculative argument about alternative perpetrators. I don't know what this witness, I don't know what their knowledge was. I don't know what they are being called for, so all I can do is flag the issue based on what I know. And I can tell you that he's going to have to establish 602 personal knowledge.

(Doc. 128, p. 196, emphasis added).

Defense counsel then offered to proffer to the Court what Mr. Williams's expected testimony would be. *Id.* at p. 197. Counsel stated that Mr. Williams would testify he previously worked at Wholesale Motorcars in various capacities. He would authenticate a document showing he sold a car. He would testify about his involvement in "eBay sales" and "e-mails

and shipping labels that . . . are associated directly to him." *Id.* at p. 198. He would be asked to explain whether he used Mr. Duggar's parents' home address as his own during March and April of 2019. He would be asked whether he "watched the lot" during the "May 7th time period" and used the office computer then. *Id.* Finally, defense counsel planned to ask Mr. Williams whether he spent the night about a mile away from Wholesale Motorcars on May 9, 2019, and did "odd jobs for the Duggars or for the guys" around this time. *Id.* at p. 199. None of those topics were objectionable, and the Court did not prohibit counsel from calling Mr. Williams to ask those questions.

Counsel for the Government responded with its own proffer. The Government intended to offer proof that Mr. Williams left Arkansas on May 11, 2019, and traveled to St. Louis, where he "got a new iPhone." *Id.* at p. 201. The jury would be shown the receipt for the new iPhone, and the Apple representative would testify that Mr. Williams bought the phone. *Id.* The Government would then prove Mr. Williams "drove to his mother's house" in Illinois "on May 11th." *Id.* Mr. Williams's mother would testify that her son spent May 12 with her, and a video would be played for the jury showing Mr. Williams moving furniture in his mother's house that day. Then, the Government would introduce a video taken on May 13 that depicted Mr. Williams doing some engraving work on a large, identifiable engraving machine located in Illinois. *Id.* Lastly, the Government would present witness testimony that Mr. Williams was still in Illinois on May 16 and traveled with his family to a wedding that day.

The Court asked defense counsel directly whether the core purpose for calling Mr. Williams to the stand

was "to make an argument that he was an alternative perpetrator of the offense conduct on May 14 through 16, either in person or remotely." *Id.* at p. 202. Counsel responded, "Yes, but not exclusively." *Id.* The Court advised:

> So, to the extent that the overarching relevance and purpose of calling this witness is to establish so-called alternative perpetrator evidence, based on this proffer, the Court will not allow Caleb Williams to be associated with so-called alternative perpetrator evidence or argument.

Id. at pp. 203-04. The Court then expressly permitted Mr. Duggar's counsel to call Mr. Williams to the stand. The Court suggested asking him preliminary questions to establish a "background of who he is and what his connection is" to Mr. Duggar's case as well as "the dates of his employment." *Id.* at p. 205. The Court reserved ruling on whether defense counsel would be permitted to take his questions a step farther and suggest Mr. Williams may have committed these crimes. Before counsel could do this, the Court required that he lay an appropriate foundation:

> You must ask [Mr. Williams] whether or not he has knowledge or recollection of being present on the car lot on or about May 13 through May 16. Defense conduct is May 14 through 16, but there's evidence that the Linux partition was installed on the 13th. And you may inquire if he ever remoted into the office machine, and if so, the time periods in which he would have remoted in.

Id.

The defense now argues that the Court relied on the wrong legal standard when issuing these rulings at sidebar. That is incorrect. At the time, the undersigned had highlighted several passages from one of the relevant cases—*Holmes v. South Carolina*—and inadvertently read the wrong passage into the record during the sidebar conference. However, immediately after reading the *Holmes* passage, the Court read from two other leading cases, *United States v. Jordan*, 485 F.3d 1214 (10th Cir. 2007), and *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998), both of which correctly recited the legal standard the Court relied on when making its ruling:

> *U.S. v. Jordan*, 485 F.3d 1214, Tenth Circuit, 2007, "Courts may properly deny admission of alternative perpetrator evidence that fails to establish, either on its own or in combination with other evidence in the record, A)"— and here's the money quote—"nonspeculative nexus between the crime charged and the alleged perpetrator."
>
> There's a similar line of analysis from *United States v. Timothy McVeigh*, Oklahoma City bomber, Tenth Circuit 1998. "Although there is no doubt that a defendant has a right to attempt to establish his innocence by showing that someone else did the crime"—that was the basis of the Court's motion in limine ruling that was substantially in the defendant's favor—"a defendant still must show that his proffered evidence on the alleged alternative perpetrator is sufficient on its own or in combination with other evidence in the record to show a nexus between the

> crime charged and the asserted alternative perpetrator. It is not sufficient for a defendant merely to offer up unsupported speculation that another person may have done the crime. Such speculative blaming intensifies the grave risk of jury confusion and it invites the jury to render its findings based on emotion or prejudice."

(Doc. 128, pp. 204-05).

Defense counsel is well aware that the sidebar conference was at least the third time the Court had addressed on the record the evidentiary foundation that would be required before alternative perpetrator evidence could be argued to the jury. The defense team was not confused about this standard. Instead, they made the strategic decision not to call Mr. Williams to the stand because: (1) they knew they could not lay a non-speculative foundation for his testimony, and (2) any such attempt to do so would invite the Government's proffered rebuttal testimony.

Defense counsel's in-chambers proffer confirmed he was aware of no evidence placing Mr. Williams in Arkansas between May 14 and May 16, 2019—the dates that child pornography was downloaded in this case. *See* Doc. 127, p. 19. Further, Mr. Duggar's expert, Ms. Bush, testified at trial that someone who was physically present at the car lot on May 13 installed the Linux operating system by inserting a thumb drive into the HP desktop computer. *See* Doc. 128, pp. 22-25. The defense had no evidence that Mr. Williams was in Arkansas on May 13 or anytime thereafter. In fact, the only proffered evidence was that Mr. Williams was not present in Arkansas on May 13-16. *See* Doc. 128, p. 201. Since the defense

chose not to call Mr. Williams to the stand at all—not even to ask him about his employment history, his time spent working for Wholesale Motorcars, his eBay business, or the Duggar family passwords he knew—the Court surmises the only reason for calling him was to reveal his sex offense conviction to the jury.

Without proof of a non-speculative nexus between Mr. Williams and the offense conduct in this case, the jury's knowledge of his sex offense conviction was of little probative value and would have mislead the jury and likely created the danger of unfair prejudice—all which are legitimate grounds to exclude this evidence under Rule 403. Mr. Duggar is not entitled to a new trial on the basis of this argument.[10]

3. Alleged Rule 16 and Jencks Act Violations

Mr. Duggar's next argument is that a new trial is warranted due to the Government's failure to disclose certain demonstrative exhibits Mr. Fottrell used during his rebuttal testimony. The "exhibits" were screenshots Mr. Fottrell printed while working with Oracle VirtualBox, which was described as "a very popular piece of virtualization software." (Doc. 125, p. 193). As he explained during the Government's case-in-chief, Mr. Fottrell "converted the forensic image [of Mr. Duggar's HP desktop computer] into a format that Oracle Virtualbox [could] use" and then he "configured

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[10] The Court further observes that it never definitively ruled on whether Mr. Williams could be impeached with his prior conviction. Instead, the Court simply noted that Rule 403's balancing factors would apply to the decision on whether to admit evidence of Mr. Williams' conviction under Rule 609. (Doc. 128, pp. 202-203). Since the defense elected not to call Mr. Williams, the Court never had the opportunity to apply Rule 403.

a virtual machine . . . to match the configuration of the desktop computer." *Id.* "It's just a method to visualize what the computer looked like at the moment in time it was seized by law enforcement." *Id.* at 192. The software does not identify, reveal, or create substantive evidence. Mr. Fottrell explained that he uses the virtualization software "to demonstrate what the [computer] image looks like." *Id.* "One of the features of the software is, once you boot it up, and you're seeing something on the screen, you can just hit the print screen button and then it saves what the screen looks like to a file." *Id.* at 193. Fottrell explained that he saved numerous print screens as he was "navigating around on the computer looking at different things." *Id.* He went through this process multiple times: "I would go back periodically to create additional print screens for things I forgot to do the first time around. I rebooted the virtual machine multiple times to get to the point to illustrate the things that I thought were effective to illustrate." (Doc. 126, p. 188).

It is undisputed that the defense, through their expert, Michele Bush, had access during discovery to the actual substantive evidence: the forensic image of the HP desktop computer. Likewise, it is undisputed that the defense was aware of Mr. Fottrell's use of the VirtualBox software and its print screen feature. In fact, during the Government's case, pre-marked exhibits containing print screens from Mr. Fottrell's virtualization software were received into evidence without objection. *See*, *e.g.*, Gov. Ex. 28; Doc. 125, pp. 194-96.

Ms. Bush also testified with the aid of screenshots from her own virtualization software called VMware Workstation. *See* Def. Ex. 84; Doc. 127, pp. 116-19.

According to the defense theory, in direct response to Mr. Fottrell's opinions, Mr. Duggar could not have selected the username "dell_one" when creating the Linux partition. Ms. Bush testified that the underscore is not a permitted character for such purposes and that an error message would have been generated if a user attempted to include an underscore in the username. *Id.* To illustrate, the defense offered Defendant's Exhibit 84, which was a screenshot of the error message. The Court admitted this defense exhibit into evidence over the Government's objection that they had no notice of any such opinions. *Id.*

Afterwards, Mr. Fottrell was re-called by the Government as a rebuttal witness. Returning to the topic of whether Mr. Duggar could have used the "dell_one" username when creating the Linux partition,[11] Mr. Fottrell testified that the underscore character was problematic when naming the computer but was an accepted character in the username. To illustrate, the Government sought to introduce Government's Exhibits 86 and 87, which were identified as screenshots Mr. Fottrell saved during an installation of the Linux partition. Mr. Duggar objected because the Government had not previously provided notice of these particular screenshots. Counsel explained that the exhibits were made after Ms. Bush's testimony and were being offered in rebuttal to her testimony. The Court provisionally admitted the exhibits, subject to cross-examination and Mr. Duggar's ability to renew the objection if the exhibits were not in keeping with

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[11] More specifically, Ubuntu software, which is a Linux-based operating system.

counsel's description or objectionable for some other reason. *See* Doc. 128, pp. 213-17.

On cross-examination Mr. Fottrell testified that he created these screenshots on November 24 or 25, 2021, less than a week before trial began. *See id.* at p. 239. After the jury recessed, the defense renewed their objection to Government's Exhibits 86 and 87, arguing that the screenshots were created prior to trial, but not disclosed to the defense, in violation of Rule 16 and the Jencks Act. *Id.* at pp. 249-50. Counsel for the Government explained that while the screenshots were apparently created prior to trial, the culling of particular screenshots into exhibits to illustrate Mr. Fottrell's anticipated rebuttal testimony was only done after Ms. Bush's testimony. *Id.* at pp. 253-54.

Although both sides had earlier introduced screen shots as substantive evidence, the Court observed that the screenshots were more akin to demonstrative aids. The substantive evidence resided on the hard drive of the HP desktop, as interpreted by expert opinion. Each expert orally testified as to what they found and observed while forensically analyzing the hard drive. Both experts used visualization software for the purpose of illustrating their testimony. Ultimately, the Court sustained the objection to the extent that Exhibits 86 and 87 were not received as substantive evidence. The Court re-marked the exhibits as Court's Exhibits 4 and 5 and then instructed the jury as follows:

> Members of the Jury, I did want to explain a correction that I have made with regard to Government's Exhibits 86 and Government's Exhibit 87 that Mr. Clayman introduced a few minutes ago through Mr. Fottrell. You'll

> recall that he described these as screenshots that he had made using the virtualization software. In the moment, I received those as actual exhibits, which would mean that they would be actual evidence and that they would be available to you in the jury room. I should have, and I now do find it proper to treat these two exhibits as demonstrative aids. And I find that what was marked as Government's 86 and Government's 87 will be received as Court's Exhibit 4 and 5 respectively. You may use these screenshots as an aid to this witness's testimony to the extent that you believe it is useful to do so. There will be more instructions about how to use demonstrative aids in the final set of jury instructions, but for now, I just wanted to clarify for the record that those were for demonstrative use to aid the witness's testimony and they are not being received into evidence.

Doc. 128, pp. 256-57.[12]

Under Federal Rule of Criminal Procedure 16(a)(1)(E), the defense is entitled to copies of any documents that are in the Government's possession if they are material to preparing the defense. A new trial is an appropriate remedy for the government's failure to disclose Rule 16 evidence if the remedy offered by the Court during trial was inadequate to afford the defendant a fair trial. *United States v. Miller*, 199 F.3d 416, 420 (7th Cir. 1999).

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[12] *See also* Final Jury Instruction Number 4, Doc. 118, p. 6.

After considering Mr. Duggar's Rule 16 argument, the Court finds the screenshots in question were not material to the defense. Mr. Fottrell did not refer to these screenshots when he originally testified on direct that the user of the HP desktop manually inputted a username during installation of the Linux partition. Ms. Bush disagreed with Mr. Fottrell and testified on direct that the username for the Linux side of the hard drive, "dell_one," was autogenerated. *See* Doc. 128, p. 63. Ms. Bush was asked on cross-examination whether she agreed with Mr. Fottrell that it was possible to create a Linux username that contained an underscore. She replied in the negative. She was then asked, "If a user could create a username with an underscore, would that change your opinion at all that the individual who set up this account had an auto-generated dell_one username?" Again, she replied, "No." *Id.* at p. 66.

Given Ms. Bush's unequivocal testimony, it is difficult to understand why Mr. Fottrell's screenshots of his virtual computer would have changed her mind or altered the defense's trial strategy. The screenshots were merely a visual aid to Mr. Fottrell's oral testimony on direct that it is possible for a user to create a Linux username containing an underscore. Accordingly, Mr. Duggar's assertion that possessing these screenshots during Ms. Bush's testimony would have caused her to "form[ ] a different opinion" is singularly unpersuasive. (Doc. 142, p. 18).

Moreover, Mr. Fottrell testified during the Government's case that while using his VirtualBox software he would "hit 'print screen' like a mad fool every couple of minutes," not knowing at that time which particular printscreens would later be effective

to illustrate his testimony. (Doc. 126, p. 188). Thus, the production of every such screenshot, without any further context, would not have been materially helpful to the defense. More to the point, then knowing Mr. Fottrell's methodology, Ms. Bush could have tested her underscore-not-accepted-in-the-username theory using the widely available VirtualBox software, but she elected not to do so.

In any event, if the Government's failure to disclose the screenshots used by Mr. Fottrell in rebuttal did violate Rule 16, a new trial would only be appropriate if the remedy the Court offered during trial was inadequate to afford Mr. Duggar a fair trial. *Miller*, 199 F.3d at 420. During trial, the Court ultimately sustained the defense objection, in part, and instructed the jury that the exhibits would not be received as substantive evidence, but were presented as a demonstrative aid to the testimony, which the jury could use to that extent. The screenshots were only viewed by the jury during Mr. Fottrell's rebuttal testimony. The Court finds that its remedy was appropriate and did not prejudice Mr. Duggar for a variety of reasons. First, the content of the screenshots should not have been a surprise to Mr. Duggar, as they merely confirmed through a visual depiction Mr. Fottrell's prior testimony on direct. Second, Mr. Duggar was aware of Mr. Fottrell's virtualization software and could have had Ms. Bush use the same software when performing her analysis. Third, Mr. Duggar never otherwise explained why reviewing these screenshots before Mr. Fottrell's rebuttal hindered the defense's ability to prepare. Fourth, a new trial would be an extreme and unwarranted remedy for this type

of discovery violation, especially in light of the overwhelming evidence of Mr. Duggar's guilt.

If the Government's disclosure of the screenshots violated the Jencks Act,[13] a new trial would only be justified if the screenshots were withheld by the Government in bad faith and resulted in prejudice to Mr. Duggar. *United States v. Vieth*, 397 F.3d 615, 619 (8th Cir. 2005). It is clear Mr. Duggar failed to establish the screenshots were withheld in bad faith. He concedes in his brief that the Government was "unaware that the screenshots occurred prior to [Mr. Fottrell's] testimony" the previous week. (Doc. 131, p. 19). Mr. Duggar also failed to prove he was prejudiced. As previously explained, Mr. Fottrell orally testified about the creation of the "dell_one" username on direct, and he testified similarly on rebuttal. He used the screenshots in rebuttal to aid the jury's understanding of his testimony. The substance of his rebuttal testimony had already been disclosed to the jury during the Government's case. It follows that Mr. Fottrell's use of the screenshots as a demonstrative rebuttal exhibit did not result in the kind of prejudice that would warrant a new trial.

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[13] The Jencks Act provides:

> After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to Produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.

18 U.S.C. § 3500(b).

4. Mr. Fottrell's Testimony on Geolocation

Mr. Duggar's fourth and final argument is that Mr. Fottrell's testimony on the geolocation of certain photographic evidence was improper and should have been stricken from the record. Mr. Fottrell testified that he reviewed EXIF data taken from photographs on Mr. Duggar's iPhone. The EXIF data disclosed GPS coordinates indicating where the photographs were taken. Mr. Fottrell then plugged the coordinates into Google Maps and testified about the locations. *See* Doc. 126, p. 62.

This same objection was raised by Mr. Duggar's legal team during trial. *See id.* at p. 58. Mr. Duggar's counsel addressed the Court outside the jury's hearing and argued Mr. Fottrell was not qualified to offer testimony as to geolocation. Counsel also suggested there was "an abundance of case law" indicating that "this kind of EXIF data related to geolocation in particular is unreliable." *Id.* After hearing from the Government, the Court ruled that Mr. Fottrell's investigative act of plugging coordinates from EXIF data into Google Maps and then testifying about the results was lay testimony under Rule 701. *See id.* at pp. 59-60, 67-69.[14] The Court further ruled that to the extent some portion of the testimony fell under Rule 702, Mr.

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[14] Mr. Fottrell works for the United States Department of Justice. He is the director of the High Technology Investigative Unit. He is a federal investigator of child exploitation crimes. (Doc. 125, pp. 182-183). An investigator's testimony about the course of an investigation and the meaning of investigative clues along the way is fact testimony. This is true even if the testimony takes the form of a Rule 701 lay opinion, provided that it is rationally based on facts perceived by the investigator and does not qualify as an expert opinion under Rule 702.

Fottrell was qualified to offer expert testimony about the EXIF data he harvested from Mr. Duggar's devices. *Id.* The defense team was on notice that Mr. Fottrell would be opining at trial about the metadata gleaned from the photographic exhibits. Furthermore, Ms. Bush had access to the same EXIF data and Google Maps application that Mr. Fottrell did, and she never contradicted his testimony about the various locations where the photographs were taken.

Mr. Duggar's reliance on *United States v. Crawford*, 2021 WL 2367592, at *2 (W.D.N.Y 2021), and *United States v. Boyajian*, 2012 WL 4094977, at *16 (C.D. Cal. 2012), is misplaced. *Crawford* involved a dispute about the accuracy of cell-site location information, satellite geolocation, and historical Wi-Fi location data to track the location of an individual's cell phone. Obviously, the technology at issue in *Crawford* is dissimilar to the low-tech "geolocation" testimony Mr. Fottrell offered at Mr. Duggar's trial, which consisted of plugging coordinates into Google Maps. In the *Boyajian* case, the defendant objected that EXIF data corresponding to certain photographs on his camera did not match the precise location where the photographs were taken. Mr. Duggar made no such objection at trial. Accordingly, the Court finds no merit in Mr. Duggar's request for a new trial based on Mr. Fottrell's testimony.

III. Conclusion

IT IS THEREFORE ORDERED that the Motion for Judgment of Acquittal Under Rule 29(c), or in the

Alternative, Motion for New Trial Under Rule 33 (Doc. 131) is DENIED.[15]

IT IS SO ORDERED on this 24th day of May, 2022.

/s/ Timothy L. Brooks
United States District Judge

[15] However, with respect to Count 2 of the Indictment, the parties stipulated, and the Court agreed, that the possession count in this case is a lesser-included offense to the receipt offense charged in Count 1. Consequently, it is the Court's intention to vacate the jury's conviction for the possession offense and formally dismiss Count 2 during the sentencing hearing tomorrow.

ORDER CONCERNING PARTIES' MOTIONS IN LIMINE, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS (NOVEMBER 17, 2021)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSHUA JAMES DUGGAR,

Defendant.

Case No. 5:21-CR-50014

Before: Timothy L. BROOKS,
United States District Judge.

ORDER

Defendant Joshua James Duggar was indicted on April 28, 2021, on one count of receipt of child pornography, one count of possession of child pornography, and a forfeiture allegation. *See* Doc. 1. This case is scheduled for a jury trial to commence on November 30, 2021. Pending before the Court are the following ripe motions in limine, which the Court will rule on in turn:

(1) the Government's Motion in Limine Concerning Trademark Inscriptions (Doc. 65);

(2) the Government's Motion in Limine to Admit Prior Statements Made by Defendant (Doc. 66) and Defendant's Motion in Limine to Exclude Evidence of Allegations Concerning Adultery or a Prior So-Called "Addiction" to Adult Pornography (Doc. 71);

(3) the Government's Motion in Limine to Exclude Third-Party Guilt Evidence (Doc. 67);

(4) Defendant's Motion in Limine to Exclude Improper Opinion Testimony (Doc. 70);

(5) Defendant's Motion in Limine to Sequester Witnesses Pursuant to Federal Rule of Evidence 615 (Doc. 73); and

(6) Defendant's Motion in Limine to Exclude Any Reference to Defendant's Stated Decision Declining to Answer Certain Questions Posed by Law Enforcement (Doc. 74).

I. Government's Motion Concerning Trademark Inscriptions

The Government seized an HP desktop computer from Defendant's business, Wholesale Motorcars, and intends to introduce this computer as evidence in the case. A trade inscription on the computer indicates that it was made in China. The Government contends that the computer is self-authenticating as to its origin and no additional evidence of authenticity should be required per Federal Rule of Evidence 902 (7). Defendant agrees. *See* Doc. 86, p. 1. Further, Defendant agrees that the trade inscription does not

constitute inadmissible hearsay under Rule 801(a). *Id.* at p. 2. However, Defendant asks that the Court withhold ruling on the ultimate admissibility of this evidence at trial, pursuant to any ground for objection other than authentication or hearsay. This is a reasonable request, and the Court agrees that Defendant may lodge other objections to the admissibility of this evidence, if appropriate, at trial.

Accordingly, IT IS ORDERED that the Government's Motion in Limine Concerning Trademark Inscriptions (Doc. 65) is GRANTED, and the trademark inscription on the HP desktop computer described in the Motion is found to be both self-authenticating under Rule 902(7) and non-hearsay under Rule 801(a).

II. Government's Motion to Admit Prior Statements and Defendant's Motion to Exclude Allegations Concerning Adultery or a Prior So-Called "Addiction" to Adult Pornography

The Government and Defendant each filed a motion concerning similar subject matter. The Government's Motion asks the Court to find certain prior statements Defendant made in a 2015 social media posting to be admissible. Defendant allegedly stated:

> I have been the biggest hypocrite ever. While espousing faith and family values, I have secretly over the last several years been viewing pornography on the internet and this has become an addiction.

(Doc. 66, pp. 1-2).

According to the Government, Defendant's statement regarding his addiction to adult pornography is admissible under Rule 404(b)(2) because it tends to

show his motive, intent, knowledge, or plan to commit the crimes charged. In the Government's view, this addiction to adult pornography is the only possible reason why a program called "Covenant Eyes" was installed on the HP desktop computer at Defendant's workplace. The Government describes Covenant Eyes as "a computer program designed to help an individual overcome 'pornography addiction' with the assistance of the individual's friends, family, and even their church. . . . " (Doc. 66, pp. 4-5). The child sexual abuse materials that are the subject matter of the charged conduct in this case were located on a portion of the HP desktop's hard drive that could not be detected by Covenant Eyes. The Government reasons that "the defendant's motive for creating the Linux partition on the HP computer was to mask the downloading and viewing of [child sexual abuse materials] from being detected and reported by Covenant Eyes." (Doc. 66, p. 4). Therefore, in the Government's estimation, Defendant's admission that he was addicted to adult pornography is a necessary piece of evidence in a chain of events that prove his "motive, opportunity, intent, preparation, [or] plan" to download child pornography on the HP desktop at work, pursuant to Rule 404(b)(2). Further, the Government believes that all of these facts in combination—the adult pornography addiction, the installation of Covenant Eyes, and the location of the child sexual abuse materials on a partitioned section of the hard drive—establishes under Rule 404(b)(2) Defendant's "identity" as the person who committed the crimes charged.

Unsurprisingly, Defendant moves to exclude all statements or allegations that he was or is addicted to viewing adult pornography; he also moves to exclude

any mention of the fact that he might have committed adultery in the past. *See* Doc. 71. He explains that he posted the 2015 social-media statement about being addicted to adult pornography "to minimize the public relations fallout from the embarrassing revelation that [he] was allegedly a member of the website" called "Ashley Madison," "which purported to cater to consenting adults seeking to engage in extra-marital affairs." *Id.* at pp. 1-2. He contends that his alleged involvement with the Ashley Madison website and subsequent admission that he might have been unfaithful to his wife are facts that are irrelevant to the crimes charged.

The Government generally agrees that facts about Ashley Madison and adultery/infidelity are irrelevant here. The Government also agrees that it will not mention this website or Defendant's alleged infidelity in its case-in-chief. *See* Doc. 79, p. 2. As for Defendant's so-called pornography addiction, however, the Government is adamant that the jury must be informed of this admission, or else the jury will not understand why Covenant Eyes was installed on the workplace computer. Defendant responds that Covenant Eyes could have been installed for any number of reasons—not necessarily to address a pornography addiction. Defendant refers the Court to the Covenant Eyes website, which states that the application can be used to help a family generally "avoid inappropriate search results" and "prevent accidental access to certain materials" online. (Doc. 83, p. 3).

In Defendant's view, any reference to his alleged adult pornography usage and/or addiction is irrelevant under Rule 401 because this evidence does not tend to show he committed the crimes charged. Further, he

contends that if this evidence were disclosed to the jury, the result would be more prejudicial than probative under Rule 403, since some jurors who are morally offended by adult pornography may jump to the conclusion that Defendant must have committed some sort of crime, while other jurors might assume that a person who is addicted to viewing adult pornography is more likely to be interested in viewing child pornography.

The Court, having considered both sides' arguments, finds the Government's Motion should be denied and Defendant's Motion should be granted. Defendant's 2015 public statement that he developed an addiction to adult pornography is irrelevant to this case under Rule 401. The Government admits that viewing adult pornography is not illegal and that a so-called addiction to adult pornography is not a recognized medical condition. The only logical conclusion to be drawn from the Government's briefing is that it seeks to improperly introduce this evidence "to prove [Defendant's] character in order to show that on a particular occasion [he] acted in accordance with the character." Fed. R. Evid. 404(b)(1). The Court rejects the notion that an addiction to adult pornography could tend to show Defendant's motive, intent, or knowledge to commit the crimes he has been charged with, pursuant to Rule 404(b)(2). The Court also rejects the notion that the existence of Covenant Eyes on Defendant's work computer "is itself explicable only by reference to the defendant's pornography addiction." (Doc. 66, p. 4) (emphasis added). Covenant Eyes may be installed to deter or prevent a number of behaviors. The Government can present evidence

about the configuration of the hard drive, the applications that were running on the hard drive (including Covenant Eyes), the names of the individuals who purchased, registered, and used Covenant Eyes, and the possible reasons why a user might wish to install Covenant Eyes without having to disclose the fact that Defendant previously admitted to an adult pornography addiction. That fact is irrelevant to the crimes charged and, contrary to the Government's position, is not needed to "complete the story" or "provide a total picture of these crimes." *Id.* at p. 3.

The Court also agrees with Defendant that even if his admission about adult pornography were relevant under Rule 404(b), it would nevertheless merit exclusion under Rule 403. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . . " Fed. R. Evid. 403. Knowing that Defendant is or was addicted to adult pornography may mislead the jury into assuming he is likely to have downloaded child pornography. That said, the Court can also imagine scenarios where the defense might open the door to the introduction of such evidence. For example, If Defendant takes the stand and testifies that he did not view adult pornography or was not addicted to pornography, or if he otherwise contradicts any statement he made in the social media post in 2015, the Government may seek leave to introduce the statement to impeach his credibility.

Accordingly, IT IS ORDERED that the Government's Motion in Limine to Admit Prior Statements Made by Defendant (Doc. 66) is DENIED pursuant to Rules 401, 404(b), and 403, and Defendant's Motion in

Limine to Exclude Evidence of Allegations Concerning Adultery or a Prior So-Called "Addiction" to Adult Pornography (Doc. 71) is GRANTED.

III. Government's Motion to Exclude Third-Party Guilt Evidence

The Government's next Motion asks the Court to bar Defendant from suggesting to the jury that someone else might have committed these crimes. The Government identifies three possible individuals whom Defendant is likely to accuse of having down-loaded child sexual abuse materials on the HP desktop. The Government then proceeds to explain in detail why it believes none of these men could have committed the crimes alleged on the dates and times specified in the indictment.

It is the Government's burden to prove that Defendant committed the crimes set forth in the indictment beyond a reasonable doubt, and Defendant is entitled to create reasonable doubt in the jury's minds by pointing the finger at others who may have possibly committed the crimes.[1] The Court will not pre-judge that evidence and in the process violate Defendant's right to a jury trial. IT IS THEREFORE ORDERED that the Government's Motion to Exclude Third-Party Guilt Evidence (Doc. 67) is DENIED.

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[1] This does not mean the Court will permit the defense to present speculative testimony or make purely speculative arguments to the jury.

IV. Defendant's Motion to Exclude Improper Opinion Testimony

Defendant seeks to exclude under Rules 401 and 403 any opinion by law enforcement officers that certain child pornography images are considered "worse" than others. Defendant cites specifically to the testimony of Special Agent Faulkner, who at Defendant's detention hearing testified that a particular video was "in the top five of the worst-worst that I've ever had to examine." (Doc. 70, p. 1). The Government responds that it "does not intend to elicit any testimony in its case in chief suggesting that the [child sexual abuse material] recovered from the defendant's computer is 'worse' than any other [child sexual abuse material]." (Doc. 80, p. 2). Therefore, IT IS ORDERED that Defendant's Motion in Limine to Exclude Improper Opinion Testimony (Doc. 70) is GRANTED.

V. Defendant's Motion to Sequester Witnesses Pursuant to Federal Rule of Evidence 615

Rule 615 provides that, upon one party's request, "a court must order witnesses excluded so that they cannot hear other witnesses' testimony." Defendant's Motion invokes Rule 615 in a specific way, asking the Court in advance of trial to "prohibit the Government and/or its witnesses from talking to witnesses who are sequestered about the trial or other witnesses/testimony prior to or during their testimony." (Doc. 73, p. 1).

It is not at all uncommon for one party to invoke Rule 615 prior to the start of trial; it is unusual for a party to ask the Court to explain the contours of the Rule and impose specific prohibitions on the parties' conduct. "The purpose of sequestration is to prevent

witnesses from tailoring their testimony to that of prior witnesses and to aid in detection of dishonesty." *United States v. Engelmann*, 701 F.3d 874, 877 (8th Cir. 2012) (internal quotation marks and citation omitted). The Court in its discretion may control "the mode and order of examining witnesses and presenting evidence" at trial pursuant to Rule 611 and has "wide latitude" to fashion an appropriate sequestration order for each case. *Engelmann*, 701 F.3d at 877.

At the trial of this matter, the Court will permit the Government's case agent to sit at counsel table as the Government's designated representative. This same case agent may be called as a witness during the Government's case-in-chief. *See United States v. Sykes*, 977 F.2d 1242, 1245 (8th Cir. 1992) ("The decision whether to allow the government's agent to testify even though the agent sits at the counsel table throughout the trial is left to the trial court's discretion."). This case agent—and indeed any witness who gives testimony at trial—will not be permitted to discuss the substance of his or her own testimony with any witness who has not yet testified.

If a case agent sitting at counsel table were permitted to discuss the substance of his trial testimony or another witness's trial testimony with a witness who had not yet testified, this would defeat the purpose of the sequestration rule. This exact scenario occurred in *United States v. Engelmann*, where the government's designated representative, Agent Huber, spoke to a sequestered agent named McMillan about the substance of Huber's testimony at trial. *Id.* at 875. The Eighth Circuit opined that "it would be illogical to hold that Agent McMillan, excluded from the courtroom pursuant to a sequestration order, could wait outside

the courtroom doors and then discuss with Agent Huber the testimony which Agent Huber had just given." *Id.* at 878.

Given the Court's reasoning above, IT IS ORDERED that Defendant's Motion in Limine to Sequester Witnesses Pursuant to Federal Rule of Evidence 615 (Doc. 73) is GRANTED to the extent that any witness who has testified—including the Government's designated case agent sitting at counsel table—is prohibited from discussing the substance of his or her own testimony with any witness who has not yet testified and been formally excused from their obligations as a witness. Defendant and his witnesses will be subject to the same sequestration rule. The Court's rule does not limit counsel from conferring with their own witnesses and preparing them to testify; however, counsel are cautioned that when an attorney conveys the substance of a witness's trial testimony to a witness who has not yet testified, this contravenes the purposes of Rule 615. To the extent any relief requested in the Motion is not specifically discussed herein, it is DENIED.

VI. Defendant's Motion to Exclude Any Reference to Defendant's Stated Decision Declining to Answer Certain Questions Posed by Law Enforcement

In this Motion, Defendant asks the Court to prohibit the Government from referring at trial to the fact that he refused to answer certain questions posed to him by law enforcement during a non-custodial interview on November 8, 2019. Specifically, Defendant seeks to exclude ten separate statements he made invoking his Fifth Amendment right to remain silent.

See Doc. 74, p. 9. The Government responds that it "does not intend to introduce in its case in chief any of the ten portions of the defendant's recorded interview identified in his motion" but "reserves the right to introduce any portions of the defendant's non-custodial interview during cross-examination or in its rebuttal case as those portions may be relevant. . . . " (Doc. 81, p. 2).

Disclosing to the jury the fact that Defendant invoked his Fifth Amendment right by refusing to answer certain questions is both irrelevant to the issues in this matter under Rule 401 and more prejudicial than probative under Rule 403. As to the Government's reservation of its right to introduce any portion of these statements during cross-examination or rebuttal, the Court reserves its ruling for trial and instructs the Government—if the need arises—to request a sidebar and make its argument outside the presence of the jury.

IT IS THEREFORE ORDERED that Defendant's Motion in Limine to Exclude Any Reference to Defendant's Stated Decision Declining to Answer Certain Questions Posed by Law Enforcement (Doc. 74) is GRANTED, subject to the Court's instruction above.

IT IS SO ORDERED on this 17th day of November, 2021.

/s/ Timothy L. Brooks
United States District Judge

ORDER DENYING PETITON FOR REHEARING, U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT (SEPTEMBER 28, 2023)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

JOSHUA JAMES DUGGAR,

Appellant.

No. 22-2178

Appeal from United States District Court
for the Western District of Arkansas-Fayetteville
(5:21-cr-50014-TLB-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

September 28, 2023

INDICTMENT
(APRIL 28, 2021)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA,

v.

JOSHUA JAMES DUGGAR,

Case No. 5:21-CR-50014-001

18 U.S.C. § 2252A(a)(2)
18 U.S.C. § 2252A(b)(1)
18 U.S.C. § 2252A(a)(5)(B)
18 U.S.C. § 2252A(b)(2)

INDICTMENT

The Grand Jury Charges:

COUNT ONE
(Receipt of Child Pornography)

Between on or about May 14, 2019, and on or about May 16, 2019, in the Western District of Arkansas, Fayetteville Division, the Defendant, JOSHUA JAMES DUGGAR, knowingly received child pornography, as that term is defined by 18 United States Code Section 2256(8)(B), using any means and facility of interstate and foreign commerce and that

had been mailed, and had been shipped and transported in and affecting interstate and foreign commerce by any means, including computer, and attempted to do so.

All in violation of Title 18, United States Code, Sections 2252A(a)(2) and (b)(1).

COUNT TWO

(Possession of Child Pornography)

Between on or about May 14, 2019, and on or about May 16, 2019, in the Western District of Arkansas, Fayetteville Division, the Defendant, JOSHUA JAMES DUGGAR, knowingly possessed material that contained images of child pornography, as that term is defined in Title 18, United States Code, Section 2256(8)(B), including images of minors under the age of 12, that had been mailed, and shipped and transported using any means and facility of interstate and foreign commerce and in and affecting interstate and foreign commerce by any means, including by computer, and that was produced using materials that had been mailed, and shipped and transported in and affecting interstate and foreign commerce by any means, including by computer, and attempted to do so.

All in violation of Title 18, United States Code, Sections 2252A(a)(5)(B) and (b)(2).

FORFEITURE ALLEGATION

The Grand Jury re-alleges and incorporates by reference herein all Counts of this Indictment.

Upon conviction of any Count of this Indictment, the defendant shall forfeit to the United States pursuant to 18 United States Code, Section 2253 the defendant's interest in:

1. any visual depiction described in 18 United States Code, Sections 2251, 2251A, or 2252, 2252A, 2252B, or 2260, or any book, magazine, periodical, film, videotape, or other matter, which contains any such visual depiction, which was produced, transported, mailed, shipped or received in violation of the offenses in the Indictment;

2. any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from the offenses in the Indictment; and

3. any property, real or personal, i<u>ncluding any and all computer equipment</u>, used or intended to be used to commit or to promote the commission of the offenses in the Indictment, or any property traceable to such property, including, but not limited to computer equipment used in the commission of the offenses in the Indictment.

If any of the property subject to forfeiture, as a result of any act or omission of the defendants:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third person;

c. has been placed beyond the jurisdiction of the Court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 18 United States Code, Section 2253(b), incorporating by reference Title 21 United States Code, Section 853 to seek forfeiture of any other property of said defendants up to the value of the above forfeitable property.

A True Bill.

/s/ Grand Jury Foreperson
Foreperson

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For: /s/ Carly Marshall
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VERDICT FORMS
(DECEMBER 9, 2021)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSHUA JAMES DUGGAR,

Defendant.

Case No. 5:21-CR-50014-001

VERDICT FORM – COUNT ONE

On the crime of Receipt of Child Pornography, as charged in Count One of the Indictment, we, the jury, find the Defendant, Joshua James Duggar:

Guilty
(GUILTY OR NOT GUILTY)

/s/ [redacted]
Foreperson

12/9/21
Date

VERDICT FORM - COUNT TWO

On the crime of Possession of Child Pornography, as charged in Count Two of the Indictment, we, the jury, find the Defendant, Joshua James Duggar:

Guilty
(GUILTY OR NOT GUILTY)

/s/ [redacted]
Foreperson

12/9/21
Date

JURY TRIAL, VOLUME TWO,
RELEVANT EXCERPTS
(DECEMBER 1, 2021)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSHUA JAMES DUGGAR,

Defendant.

Case No. 5:21-CR-50014

VOLUME 2 of 8

Before: The Honorable Timothy L. BROOKS,
United States District Judge.

December 1, 2021 Fayetteville, Arkansas

[. . .]

[Opening Statement by Defense Counsel Mr. Gelfand, pp. 58-59]

. . . on a recording, by the way, told them, "I didn't even start working at this car lot until June of 2019." The agents investigating said, "Great, couldn't have been you, weren't there." The pay

records clearly revealed that he was there in May of 2019 at the earliest. Agents go back to him. And he says, "All right, May 20th, that's the date," on a recording, by the way. Members of the Jury, you are going to see in evidence a picture time-stamped of Randall Berry at the car lot on May 16th of 2019, squarely within the window of time that matters.

William Mize, he told agents, "I'm just a homeless guy with no computer sophistication." They said, "Great, we don't need to hear anymore, thanks for your time." You're going to learn over the course of this trial he bought eight cars, approximately five to eight cars, from Wholesale Motorcars, that he was regularly at the car lot, that he worked there on occasion to make extra cash. And you are going to hear from a witness who is going to testify from that witness stand that he personally observed Mr. Berry sitting in a van regularly outside a McDonald's accessing the McDonald's Wi-Fi. It was so remarkable to this witness that they literally gave him a nickname, "McLoiterer." You can't make this up.

Caleb Williams. You're going to see evidence that he sold a car as a salesperson at the lot in March of 2019, that he regularly printed shipping labels from the HP computer at the center of this case for his own eBay business that had nothing to do with Josh and nothing to do with Wholesale Motorcars. You are going to hear that he's so tech savvy that he runs his own e-commerce business where he accepts Bitcoin, in addition to other forms of payment. Investigators first interviewed him 30 months into this investigation several

weeks ago. To this day, they have never looked at his devices. He sends a text message we're going to introduce into evidence in this case to Josh on May 7th of 2019, just before this time period that matters. And he says he's available to, quote, "Watch the lot," end quote, in the upcoming week.

Members of the Jury, there's so much more to this case than the prosecution wants you to believe. All I'm asking you at this point is to keep an open mind, because we are going to investigate this case together because they didn't. We're going to ask important questions that they chose not to ask. We're going to bring out reasonable doubts that exist.

Thank you for your time. Thank you for your attention. There's nobody who appreciates it more than Josh. Thank you.

THE COURT: Thank you, Mr. Gelfand.

[. . .]

JURY TRIAL, VOLUME THREE,
RELEVANT EXCERPTS
(DECEMBER 2, 2021)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSHUA JAMES DUGGAR,

Defendant.

Case No. 5:21-CR-50014

JURY TRIAL

VOLUME 3 of 8

Before: The Honorable Timothy L. BROOKS,
United States District Judge.

December 2, 2021 Fayetteville, Arkansas

[. . .]

[Special Agent Gerald Faulkner
Cross-Examination by Defense Counsel
Mr. Gelfand; pp. 302-306]

[Prosecutor] MR. ROBERTS: He already testified that he interviewed him and factually cleared him. He's trying to explain something he's already covered by introducing what otherwise would be hearsay under the guise of, this is to explain his course of conduct, which he's covered.

THE COURT: Well, I understand the purpose of the question to be, what was Agent Faulkner's understanding of the times that he would have potentially been at the car lot and how what he understood played into his subsequent investigation. And I think that's fair grounds for cross, so your objection is overruled.

MR. ROBERTS: Understand.

Q. (BY MR GELFAND.) You can answer the question.

A. And without—I have to tow the line. Not what he told us, but it was our understanding based on the conclusion of our interview with Mr. Berry that he began working for Wholesale Motorcars in early June of 2019.

Q. Specifically June 11th, correct?

A. Yes, sir.

Q. And when you left the car lot on that day, November 8th of 2019, you believed that, correct?

A. Correct.

Q. Now, after that date, when is the next time, just date, approximately, that you spoke with Mr. Berry?

A. I don't recall the exact date, but it would have been within the last couple of months.

Q. After charges were filed in this case?

A. Correct.

Q. Now, Agent Faulkner, just approximate date, when is the first time you spoke with an individual named Caleb Williams?

A. We're in December now, so last month.

Q. I'm sorry. You said December now, so last month, meaning, without looking at the calendar, November of—

A. Of 2021.

Q. I'm sorry. We were talking over each other and that's my fault. But it's November of this year, correct?

A. November of 2021, yes, sir.

Q. So within the last couple of weeks, correct?

A. Correct.

Q. Over the course of your entire investigation, your team did not search a single one of Caleb Williams' electronic devices, correct?

A. No, sir. Throughout the entire course of our investigation, through all the witness interviews, witness statements, and more importantly, forensic examinations, Caleb Williams has not come up. It wasn't until defense counsel filed paperwork

about Caleb Williams that we knew who he was, and then we followed up with Caleb Williams and have determined that he was in the State of Illinois at the time frame that we're focusing on in May of 2019.

Q. Agent, I understand that you want to say a lot. My question was simple and I'm going to ask it again. Over the course of your investigation, did you search a single one of Caleb Williams' electronic devices, phones, computers, anything along those lines?

A. No, sir.

Q. Over the course of your investigation, did you investigate Caleb Williams' e-commerce business?

A. No, sir.

Q. Are you aware that he accepts Bitcoin?

A. No, sir.

Q. Did you investigate Caleb Williams' graphic design company?

MR. ROBERTS: Your Honor, at this point, I'm going to object to relevance. The witness has clearly stated that he was not in the State of Arkansas during the time frame we're looking at. He has not connected this in any way.

MR. GELFAND: We will, Your Honor. And we can recall this witness, but I was taking the Court's instruction pretrial to cover territory.

THE COURT: Well, and that's fine. But we're running into 602 issues here. I mean, if you have a good faith belief that he knows, that he has personal knowledge of the questions that you're asking

him, that's fine. But if you haven't established that he has 602 knowledge, then it's not. So you need to first make sure we have a foundation, but then you may inquire if you can do that.

MR. GELFAND: Okay.

Q. (BY MR. GELFAND.) Did you investigate, over the course of your entire investigation, Caleb Williams' employment history?

A. Employment history? No, sir.

Q. Did you investigate, over the course of your investigation, what, if any, electronic devices Caleb Williams had in 2019?

A. Yes and no. Again, we haven't spoken, or we just spoke to Mr. Williams last month. And during our conversation—without getting into hearsay—we are aware that he was—he had an electronic device at the time that was actually active on the internet during our times in question, so he had a device. A cellular device, I'm sorry.

Q. During your investigation, did you determine evidence that Caleb Williams sold a car at Wholesale Motorcars as the car salesperson in March of 2019?

MR. ROBERTS: Your Honor, I'm going to object to relevance.

THE COURT: And here's where we're getting a 602 problem. You can't, through the predicate of your question, attempt to get in evidence unless you have a good faith reason to know that he would know that one way or the other. So you need to

ask him questions and not testify through your questions.

MR. GELFAND: Your Honor, that's fair. I do have a good faith basis.

THE COURT: Well, you need to ask him what he knows as opposed to you trying to get into evidence facts. And the Jury is instructed to remember the Court's instructions that the questions of the lawyers are not evidence.

Q. (BY MR. GELFAND.) What, if any, evidence did you come across over the course of your investigation involving whether or not Caleb Williams sold cars?

A. I did not come across any of that information.

Q. That's your testimony under oath?

A. That I did not come across any information during the course of our investigation that Caleb Williams —again, me, personally—sold any vehicles in March of 2019 at the Wholesale Motorcars lot. That information was not revealed to myself until, again, last month when the filings were made.

Q. Did you, in fact, ask Caleb Williams any questions about that topic?

A. Yes, sir, last month.

Q. Did you show Mr. Williams any documents in connection with that topic?

A. I don't believe I showed him any documents, no, sir.

[. . .]

JURY TRIAL, VOLUME FOUR,
RELEVANT EXCERPTS
(DECEMBER 3, 2021)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSHUA JAMES DUGGAR,

Defendant.

Case No. 5:21-CR-50014

VOLUME 4 of 8

Before: The Honorable Timothy L. BROOKS,
United States District Judge.

December 3, 2021 Fayetteville, Arkansas

[. . .]

[James Fottrell
Cross Examination by Mr. Gelfand; pp. 727-731]

A. Yes.

Q. Is that fair?

A. Yes.

Q. So I presume during your computer forensic investigation, you also reviewed e-mails prior to May of 2019 that were on this device?

A. Yes.

Q. And in particular, you reviewed e-mails, did you not, that included shipping labels from Caleb Williams, correct?

A. I'm sure I did review all e-mail messages, yes.

Q. If I could direct your attention—do you have the defense exhibit binder right next to you?

A. Yes, I do.

Q. To Defendant's Exhibit 48.

A. Okay.

Q. Please take a look at that and tell me if those are e-mails that were found on this same device in the same wholesaleNWA@gmail.com?

A. Yes, they appear to be.

Q. I'm sorry. Did you say yes?

A. Yes.

MR. GELFAND: Your Honor, at this point, I move Defendant's 48 into evidence.

MR. CLAYMAN: Your Honor, we're going to object on hearsay grounds. These are not, according to the defense attorney, e-mails from Mr. Duggar.

MR. GELFAND: Your Honor, this goes directly to what the witness testified about, identifying the identity and tieing it to Mr. Duggar. I think it's fair for impeachment purposes, at the very least right now.

THE COURT: Well, Mr. Gelfand, you're not trying to prove the truthfulness of any of the statements, declarations, inside these documents?

MR. GELFAND: Correct. It's identity.

THE COURT: Mr. Clayman?

MR. CLAYMAN: I'm going to object on, really, relevance.

THE COURT: Well, if it's relevance, it's overruled. You may inquire.

MR. GELFAND: Thank you. May I publish portions of Defendant's 48, please?

THE COURT: You may. Defendant's Exhibit 48 is received.

(Defendant's Exhibit 48 Received)

MR. GELFAND: Thank you.

Q. (BY MR. GELFAND.) Mr. Fottrell, you can either look on the screen or at the exhibit in front of you. It's the same. Whatever is easiest for you, okay?

A. Okay.

Q. Just to be clear, do you have Defendant's Exhibit 48 in front of you?

A. Yes, I do.

Q. Does this appear on the top page to be an e-mail from Caleb Williams to wholesaleNWA@gmail.com?

A. It does.

Q. Referencing an eBay shipping label?

A. It does.

Q. And I'm going to quickly just go through these. Just tell me, and just so we can make it clear for dates, was that March 24th, 2019, at 4:42 p.m.?

A. Yes.

Q. Is the next page March 24th, 2019, at 4:38 p.m.?

A. Yes.

Q. Is the next page March 24th, 2019, at 4:36 p.m.?

A. Yes.

Q. Is the next page March 24th, 2019, at 4:30 p.m.?

A. Yes.

Q. Is the next page March 27th, 2019, at 2:22 p.m.?

A. Yes.

Q. All referencing shipping labels, correct?

A. Yes.

Q. And then the following pages, do they include essentially the attachments, the shipping labels?

A. Yes, the shipping labels.

Q. Does that appear to read "Caleb?"

A. Yes, it does.

Q. Just so the Jury sees it, can you just identify the shipping labels by date. Does this appear to be March 25th of 2019?

A. I'm sorry. Could you say that a little bit louder?

Q. Yeah. Does this appear to be dated March 25th, 2019?

A. Yes, it does.

Q. Same date on the next page?

A. Yes.

Q. Same date on the next page?

A. Yes.

Q. Same date on the following page?

A. Yes.

Q. Same date on the next page?

A. Yes.

Q. March 26th, 2019, on the following page?

A. Yes.

Q. And April 11th, 2019, on that last page?

A. Yes.

Q. I'm sorry, on the second to last page. And March 25th, 2019, on the last page, correct?

A. Yes.

Q. And we don't need to read them into the record, but all to different recipients, correct?

A. Correct.

Q. Now, you testified to the downloads folder, going back to Exhibit 28 for record purposes. Do you recognize what's on the screen as a portion of Exhibit 28?

A. I do.

Q. Again, this is that same Windows partition that we've been talking about for the last few minutes?

A. Yes.

Q. And here what you testified or are identifying is that on May 11th, 2019, the Ubuntu desktop file, if you will, is downloaded onto the Windows side of the HP, correct?

A. That is correct.

Q. And so just to be crystal clear, this is not the date that Linux—also known as Ubuntu—was installed, correct?

A. Correct. It was installed two days later on the 13th.

Q. So let's be crystal clear for a second so that there's no confusion. You agree that Linux is downloaded on the Windows side on May 11th of 2019?

A. Yes.

Q. As reflected on the exhibit in front of you, correct?

A. Yes.

Q. And then as you later testified—and we'll get to . . .

[Cross Examination by Mr. Gelfand; pp. 790-798]

[. . .]

A. There's forensic evidence that the videos were played locally through the streaming protocol. I'm not sure if I understand your question comprehensively.

Q. Can you rule out, from a computer forensic standpoint from the evidence, that these videos were not accessible—meaning streamed—to another device?

A. The answer to that question is, by default, the Ubuntu operating system doesn't come with the streaming service to stream videos. So I would—without having perfect information, I would say that's false. In order for that to happen, there would need to be streaming software installed on the Ubuntu Linux partition in order for it to stream movies. So that doesn't happen for free. It may happen built in, but there needs to be software that provides that streaming service. It's not just magical. There has to be a service that's running to stream videos.

Q. UTorrent streaming?

A. Say that again.

Q. UTorrent streaming?

A. UTorrent streaming.

Q. That streams the videos, according to your testimony?

A. Yes.

Q. Can you rule out the possibility that those streamed videos were accessible by another device?

A. Yeah, I have no evidence to show that. I have no evidence about that.

Q. Do you have evidence that rules out that possibility?

A. I have no evidence that those videos were streamed to another device. I think that's what I'm trying to say. No evidence that I was able to see that those videos were streamed outside of this device.

Q. I'm not trying to be difficult, but you're answering kind of the opposite of the question I'm asking you. You're saying, I have no evidence that it was streamed to another device. I'm asking you whether you have evidence that it wasn't?

A. No, I don't have perfect information. I don't have evidence associated with that.

Q. Now, is it possible to restart a computer remotely?

A. Yes, it is.

Q. Is it possible to restart a computer remotely and get back into the operating system that was last running?

A. Yes.

Q. The point here is, one does not need a physical button to restart a dual-booted computer, correct?

A. When you restart a dual-booted computer, you hit the restart command, the computer reboots. Now the operating system is no longer running. You're relying on the BIOS. The BIOS on the computer tells the computer what operating system to boot. That is either the Windows partition or the Linux partition. Whatever the machine was configured to boot, that's the one that it's going to boot by default. I'm not familiar with the ability to remotely reboot a computer and tell it to boot off of another partition. I'm just probably not familiar with that.

Q. You said BIOS. That's the Basic Input/Output System, correct?

A. Yes.

Q. The BIOS would tell us whether it would default to Windows or Linux on a reboot, correct?

A. Yes.

Q. Did you check the BIOS here?

A. No.

Q. What that means is, you don't know what the boot order is for the BIOS, correct?

A. The evidence that I have, the multiple times the computer was rebooted, it's booting up under the Windows environment.

Q. That wasn't my question. You don't know what the boot order is if you don't check the BIOS, correct?

A. Correct.

Q. As a computer forensic analyst, you have access to the BIOS?

A. Well, BIOS is on the physical computer itself. I did not have access to the physical computer. I only had access to the forensic image that was created.

Q. Now, we have used this term "reboot," kind of a fancy way of saying turning an operating system off and restarting it again?

A. Yes.

Q. Sometimes users are essentially prompted to reboot to install an update or something like that, correct?

A. Yes.

Q. Operating systems, including Linux, can be rebooted remotely, correct?

A. Yes.

Q. Now, you testified this morning about various thumbnail images, correct?

A. Yes.

Q. The thumbnails in this case you testified you went to because the files themselves, the alleged child pornography files, were deleted, correct?

A. Yes.

Q. When were they deleted?

A. I don't have the forensic artifacts to reflect that.

Q. You don't know when the files were deleted?

A. Yes.

Q. When was the trash emptied?

A. I don't recall.

Q. You don't know?

A. Don't know.

Q. Would you agree with me that that's important information, evidence, to find in a computer forensic analysis?

A. No, not particularly. I don't agree with you.

Q. So you're investigating a case where everything happens, based on your testimony, over about two and a half, three days, correct?

A. Yes.

Q. Your testimony is that files are downloaded, for lack of a better way of saying it, on the TOR network and BitTorrent, correct?

A. Correct.

Q. And then they are totally gone when the device is seized, correct?

A. Yes.

Q. But you don't want to know, from a computer forensic analysis standpoint, when they are deleted?

A. No. So they're deleted. And so the answer is, like, the recycle bin is a constraint. It's not really a recycle bin. When files are deleted, they are just moved into the recycle bin, so they are still in a file, in a file system that exists completely, and I would have found them if they were in the recycle bin. So they are not in the recycle bin. And the fact that the recycle bin has been emptied doesn't give me any more forensically useful artifact. The file either exists at the time it was seized or it doesn't exist at the time that it was seized. And it was not in the recycle bin at the time it was seized.

Q. Wouldn't the records of when a file is deleted provide information that we don't have?

A. So the reason I don't really focus on that is because it's going to keep track of other things that are deleted and other things that are not really significant to me. So I just don't really spend much time worrying about dates and times in the recycle bin.

Q. Now, you testified about remote access. And you were asked whether it fits the pattern in this case, correct?

A. Yes.

Q. Let's start simple for a second. You didn't personally author any expert reports in this case, correct?

A. No.

Q. You essentially adopted or supervised a couple of expert reports written by someone, Bradley Gordon, who worked under you, correct?

A. Yes.

Q. You have reviewed those expert reports, correct?

A. Yes, I did.

Q. You would agree with me that there's not a single reference in any of your expert reports to remote access, correct?

A. Correct.

Q. You testified that in your expert opinion this morning, that what we see here in this case doesn't fit the pattern of remote access, correct?

A. Yes.

Q. Would you agree with me that having a desktop tool on the Ubuntu Linux side of the partition called Remmina is consistent with a pattern of remote access?

A. It possibly could be. Possibly could be, but there would be forensic log records associated with that.

Q. You testified a few minutes ago you didn't know what this is?

A. Correct, but there would be—I certainly look in the log folder and all of the log files that were created. That's where the operating system stores log files. I certainly reviewed them. I didn't see Remmina, whatever the name, Remmina logs in there. That's why it was not familiar with me.

Q. So let's back up for a second. I just asked you whether—and I think you said yes—whether having a remote access app would be consistent with remote access?

A. Say that again.

Q. I asked you whether having a remote access app would be consistent with remote access. And I believe you said yes.

A. Yes.

Q. Would having UPnP enabled be consistent—meaning Universal Plug and Play—be consistent with remote access?

A. I don't know the answer to that.

Q. Would evaluating the router and determining, like you testified this morning, whether any other devices were on the network that this device was on help you answer questions about remote access?

A. It might provide more information, but—it might provide more information, yes.

Q. Would choosing to have an extremely small partition, meaning you can't save a lot of files, meaning video, big data, heavy files, be consistent with a remote access user?

A. I don't know the answer to that.

Q. Would streaming as opposed to just double-clicking and opening it be consistent with remote access?

A. I don't think so, because what's the point of streaming it if I'm not really there? The point of viewing the video is if I'm sitting in front of the computer screen. What would be the point of remotely streaming the video? That's a very inefficient way to watch a movie. That would be slow. When you're using VLC, you are sitting at the computer viewing a video.

Q. Would deleting all of these files less than a minute after the last one is streamed be consistent with remote access?

A. I don't think so, no. I'm not sure what the correlation is.

Q. Do you recall this morning testifying about some passwords that you were able to identify off of your computer forensics?

A. Yes.

THE COURT: Mr. Gelfand, I've been looking for an opportunity to take the afternoon recess. I don't want to interrupt your flow. Is this a good point?

MR. GELFAND: It is, Your Honor.

THE COURT: We will take our afternoon recess at this time for 20 minutes. So if you would be ready to come back out at 3:40, that's when we will call for you.

Would everyone please stand as the Jury is in recess. As the Jury is filing out, I will remind you

of the recess instruction. Do not talk about the case with your fellow jurors or with anyone else.

(Jury out at 3:19 p.m.)

[Cross Examination by Mr. Gelfand; P. 817]

Q. Mize.

A. No.

Q. Did you ever analyze any devices belonging to Caleb Williams or anyone—well, Caleb Williams first.

A. No.

Q. Did you ever analyze any devices belonging to anyone on earth in this case other than Josh Duggar and Wholesale Motorcars?

A. No. Those are the devices that I—the devices I analyzed were the HP desktop, the MacBook, and the iPhone.

Q. So sitting here today, can you tell us one way or the other whether the UK Cardiff PowerPoint is on a device belonging to any of those people?

A. I can't tell you that.

Q. Because you didn't look, correct?

A. I didn't have access to that, correct.

Q. Now, let me ask you this. This phone, Defendant's Exhibit 29, does this appear to be in a drawer?

A. Yes, it does.

Q. Are you aware that this was a drawer literally next to the HP?

A. Next to the HP? No, I'm not aware of that.

Q. If you were on site on November 8th of 2019, would you have imaged this?

A. I would have certainly previewed it. I would have . . .

[. . .]

[Recross Examination by Mr. Gelfand; P. 879]

. . . anyone other than somebody behind the HP keyboard? Can you say for sure? Can you answer my question; yes or no?

A. Could you repeat the question a little slower?

Q. Yes. When this file was streaming as opposed to just double-clicked like the Planes, Trains, whatever thing, that you testified earlier, was it accessible to somebody anywhere on earth other than sitting behind the keyboard of the HP computer?

A. I mean, what this is telling me, it's being streamed from local host. It's being streamed from the computer itself. You're asking me if now somebody else on the planet in some other location could be accessing this video from this computer, if I understand your question correctly.

Q. Yes. Can you rule that out?

A. I think the answer to that is that it's extremely unlikely that that would happen, because it would take a number of things for that to happen. This computer, the VLC player, or the uTorrent thing, would have to be streaming. The router would have to be configured to allow that streaming to occur. There's just a number of steps

that would need to occur. While it is possible, I don't think it's likely.

Q. So the answer is, it is possible, correct?

A. It's possible, but not likely.

[. . .]

JURY TRIAL, VOLUME FIVE,
RELEVANT EXCERPTS
(DECEMBER 6, 2021)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSHUA JAMES DUGGAR,

Defendant.

Case No. 5:21-CR-50014

VOLUME 5 of 8

Before: The Honorable Timothy L. BROOKS,
United States District Judge.

December 6, 2021 Fayetteville, Arkansas

[December 6, 2021 Transcript, p. 898]

(In-Chambers Hearing)

THE COURT: Mr. Gelfand first.

[Defense Counsel] MR. GELFAND: Thank you. Judge, as I think the Court is aware, one of the witnesses we intend to call at this trial is Caleb Williams.

Caleb Williams, by way of context, some of the stuff we anticipate proving through his testimony, some of the stuff is already in evidence.

THE COURT: Caleb Williams is the brother of Josh Williams?

MR. GELFAND: Correct.

THE COURT: Josh Williams was one of the people that ya'll said he was kind of lumped in there with Mize and Berry at one point?

MR. GELFAND: Correct. But Caleb independently was using the Wholesale office motor account to send e-mail correspondence for shipping labels and eBay, things like that. He actually sold a car as the salesperson from Wholesale in March. That's not in evidence yet, but I anticipate Caleb will authenticate that.

THE COURT: And he's the guy that Faulkner testified about?

MR. GELFAND: Yes, correct.

[Prosecutor] MR. ROBERTS: Yes, sir.

MR. GELFAND: He claimed that they "confirmed," quote, unquote, that he was out of state. We challenge that factually, but that's neither here nor there.

Last night, we got an e-mail from the government that Caleb Williams had apparently sent to the government on November 30th, the first day of trial, the jury selection day, at night. For whatever reason, we didn't get that until last night. In that e-mail, Caleb Williams expressly mentions, among other things, quote, "I've also found a few more

passwords if you all want them," end quote. And Caleb is referring—Caleb Williams—is referring in that e-mail to, among other contexts, "Controlling Duggar social media accounts" and things along those lines.

Mr. Williams also provides bizarre photos, just to give the Court context. We don't have any metadata based on any of this, but there's a photo of checks that he apparently took for whatever purpose, apparently attempting to reflect payments from the Duggars. He provides a non-date or time-stamped photograph, Your Honor, this one in particular, of him apparently at the Wholesale Motorcars' office reflecting, what appears to reflect Mr. Duggar—Josh Duggar, that is—using the MacBook laptop that's at issue in this case.

By way of context, we have been attempting through an investigator to speak with Mr. Williams for months. Mr. Williams has, with the exception of a very short conversation with our investigator, Kevin McClain, has essentially refused to speak to the defense. We can't control that, obviously. But to learn now when things like access to passwords, when he's in our opinion front and center as a significant witness, to learn now that the government has been sitting on this for the entirety of its case-in-chief, and to get this e-mail last night after Mr. Williams—and the government knew this—he resides out of state, after he left and came here, we e-mailed the government last night asking—Mr. Williams says, "I've also found a few more passwords if you all want them." We have no disclosure as to any passwords

that Mr. Williams has, if he previously provided them.

Mr. Williams also, in a separate e-mail that we got just before trial that was sent to the government at about 11:40 p.m., plus or minus, the night before Thanksgiving to Mr. Clayman, he essentially acknowledges, among other things, potentially being at the car lot when he was in town around—Mr. Williams' way of phrasing it—May 9th to May 11th. There's a text message from Mr. Williams that we intend to introduce into evidence, assuming Mr. Williams authenticates it—he gave it to the government—that offers to "Watch the lot," end quote, that he sends to Josh Duggar on May 7th referencing that week. This is front and center at the heart of this case and we were stunned to get this last night.

Two things, among others. Number one, if Mr. Williams provided passwords that he had access to the government, that's a very big deal in light of the government's theory as to the password being a big part of their case-in-chief, essentially mocking the defense for suggesting that anyone would have access to these passwords over the course of this trial.

And second of all, the government had in their possession evidence that a third party clearly had access to Duggar family social media passwords, et cetera, which clearly, at least circumstantially, gives rise to the argument that others had access to the Intel 1988 password, perhaps among others. And so to make a long story short, a lot of what we intend to ask Mr. Williams will be the first time we've ever had a chance to speak

directly with Mr. Williams. He did speak, just full disclosure, to our investigator. He wouldn't let our investigator record anything. And he spoke to the investigator in a way that he was very anxious, very nervous, wouldn't, according to the investigator—obviously, I wasn't there—wouldn't—was worried that the Ring doorbell system on Caleb Williams' own patio would somehow capture what they were talking about. He was very paranoid. He's been sending these unsolicited e-mails to the government. He's apparently been tracking the case. And there's more evidence, and I don't think—I hate to phrase this, but I'm happy to show as many of our cards as we need to, but I don't think we should have to show all of our cards.

THE COURT: What relief are you asking for? Is this just a heads-up or what?

MR. GELFAND: It's a tough situation because there's no relief directly related to Caleb Williams that would make any sense. The government never really investigated Caleb Williams. It's not like they want to put Caleb Williams on the witness stand. And so we intend to. We would seek some sort of relief as far as exclusion of government evidence or something along those lines that's not related to Caleb Williams.

THE COURT: Do you think that this is *Brady*?

MR. GELFAND: I do. I think it's unambiguously *Brady*.

THE COURT: And how is it *Brady*?

MR. GELFAND: Access to passwords when the government's entire—they literally—when one of the witnesses, Matthew Waller testified, Your Honor, as the Court may recall, the prosecutor literally essentially mocked the notion that Josh Duggar would have given his private passwords to a third party, when they had in their possession literally from the night before, because that's when Mr. Waller testified—

THE COURT: I mean, I understood the evidence, at least from Mr. Fottrell was that this password, the one involving Intel 1988 and various deviation or derivatives of that, was a password that had been used for four or five years on various accounts that are associated with Josh Duggar, which I took to be circumstantial evidence that points to Josh Duggar as the person that created the accounts where a similar password is used. I don't know that—I don't know what passwords that this witness, Caleb Williams, claims to know. And I don't know whether the fact that even if he knew that Intel 1988 was a password, that that is necessarily exculpatory of Josh Duggar. I mean, in a metaphysical sense, I can understand where you might say, at the extreme, anyone who knows that password could be responsible for it.

But in any event, is this the issue that you're wanting is for the Court to declare this to be exculpatory evidence and a *Brady* violation?

MR. GELFAND: Yes, Your Honor. And just to be crystal clear, the government's theory as to the password is essentially, "No one else could have done this." I'm going to phrase it my way, but the

government's theory, as they have said it to the Jury is basically, "Give me a break, Josh used his personal password on the Linux partition." Mr. Williams—

THE COURT: Well, I recall some evidence that he was sharing this with a vice presidential candidate. So obviously—

MR. GELFAND: Which we brought out.

THE COURT: Obviously, others knew it. So I don't—

MR. GELFAND: There's a picture, Your Honor, of Caleb Williams at the Wholesale office.

THE COURT: A picture of Caleb Williams at the Wholesale office?

MR. GELFAND: I'm sorry. There's a picture taken by Caleb Williams of Josh Duggar at the Wholesale office. We have no metadata. We have no way of time-stamping that. It was given to us last night. There is pictures—

THE COURT: Hang on. Does the government have metadata?

MR. ROBERTS: No, Your Honor. We have none of these things that he's asking for. We have not spoken to Caleb since the beginning of this trial.

THE COURT: Hang on.

MR. ROBERTS: Yes, Your Honor.

MR. GELFAND: The point, though, Your Honor, and I say this to some extent wearing my old hat as a federal prosecutor. When you get an e-mail that says, "I have more passwords," you ask. You don't bury your head in the sand. You don't pretend not

to see it. You don't hold it back from the defense until the defense's case-in-chief. It's so obvious to me that you immediately say, "What passwords do you have?" I mean, it's the classic old Supreme Court case; you can strike hard blows, but not foul ones. And this is exculpatory any way you see it.

THE COURT: So we're going to go forward with the trial. We'll use the record that we're making now as a placeholder for the fact that you raised this *Brady* issue. And I think that at some other point when the Jury is not waiting for us you can collect your thoughts and we can mark exhibits to your motion so that we have a better understanding and you can perhaps lay out your argument in a little bit better detail for the record.

But what is the government's position as to why it waited several days to disclose this?

MR. ROBERTS: Your Honor, one, these were unsolicited e-mails. We didn't ask Mr. Williams to send these e-mails. We got it in the middle of a trial. We've been in trial all week. We honestly did not review it until Sunday. That's when we met to discuss, okay, this is what we're going to do for the rest of our case. What are they going to do? And, okay, they are going to try to call Caleb Williams. Let's look at that e-mail.

We looked at the e-mail. We do not have metadata. We have not discussed passwords as he's requesting.

THE COURT: Who were the e-mails directed to?

MR. ROBERTS: I think Mr. Clayman. How he chose Mr. Clayman, we don't know. This is a defense witness. This was never our witness. And that's the issue I wanted to bring before the Court regarding third-party guilt. It kind of dovetails into that. When the investigator, defense investigator, went out—again, we didn't look at Caleb Williams at all, because there was nothing pointing that he was on the car lot or had access to this computer during the time frame in question. When the defense investigator went out there, he notes—and this is part of the defense exhibits—that Mr. Williams told him that he was not in the state during this time frame.

Going forward, when he sees his name or whoever alerts him—actually, I think it's a member of the Duggar family—sees his name in a filing regarding third-party guilt, he contacts an attorney to reach out to the government and offers to provide, "Hey, I wasn't here." We generically told him through his attorney, "Provide any pictures, any documentation." And every time we get that, even though it's not our witness, we are sending it to the defense. That's exactly what we were doing.

But the point of my issue with third-party guilt, if they have something connecting him, placing him in Arkansas, they have not disclosed it. We have disclosed overwhelming, including pictures taken of him in Illinois on November (sic) 12th, 13th, 14th, 15th, 16th, 17th.

THE COURT: Of this year?

MR. ROBERTS: Of 2019.

THE COURT: When the search warrant was executed?

MR. ROBERTS: No. Excuse me, I said November. May. Yes, sir. So the entire time frame—

THE COURT: You have pictures of Williams with metadata that shows that he was in Illinois during May 14 to 16?

MR. ROBERTS: Yes.

MR. GELFAND: Not with metadata. Not with metadata.

MR. ROBERTS: We have—showing time-stamps, and then we have a witness who will say, "I took this picture of him on November (sic) 12th."

THE COURT: A witness on rebuttal?

MR. ROBERTS: Yes, Your Honor. And then separately, he does a live-stream. He does some kind of engraving, this huge, like glass engraving. He does live-streams. We have turned this over to the defense. He does live-streams of his engraving and we turned over screenshots on May 13th, on May 14th, on May 15th. That engraving machine, this huge machine, is in Illinois. So that's why we are saying, if you have a good faith basis to call him, just let us know. But right now, we are unaware through the defense's own exhibits and anything we produced that places him anywhere outside of Illinois during the time frame at issue. And Mr. Gelfand has now—we have been waiting for it—but in opening, he locked himself in, he says May 13th, you have to be behind the computer.

THE COURT: The day that it was—that the partition was downloaded, or set up?

MR. ROBERTS: Yes, Your Honor.

MR. GELFAND: May I respond, Your Honor?

THE COURT: Just a second. Back on the *Brady* issue, Mr. Clayman, this e-mail that you disclosed last night that came in several days ago, my understanding is that you just realized that you had this e-mail and viewed its contents last night?

MR. CLAYMAN: We reviewed its contents together last night, yes.

THE COURT: And within what period of time did you forward that on to the defendant?

MR. CLAYMAN: Did that last night at around 6:00 p.m. after we had reviewed it together.

THE COURT: So between the time ya'll opened it and discussed it and sent it was how long?

MR. CLAYMAN: If I could confer. I don't recall exactly.

MR. ROBERTS: Hours, generally. An hour at best. We also looked for metadata. There was none there.

MS. MARSHALL: Your Honor, we were able to fully sit down and talk about everything.

THE COURT: And the e-mail attached some of the pictures that you were showing?

MS. MARSHALL: Yes, Your Honor.

MR. ROBERTS: Not all the pictures. There's one there with the date and time-stamps that I was referring to regarding third-party guilt. He's in Illinois on May 12th. That came from the witness, rebuttal witness.

MR. GELFAND: There's no metadata. Caleb Williams claims to be in Illinois at the time. That's a

factual dispute. I'm reading verbatim from Caleb Williams himself. That's not metadata.

MR. ROBERTS: That is exactly metadata.

MR. GELFAND: We can agree to disagree on that. But Caleb Williams says, quote, to the government, "I was completely mistaken about not being at the Wholesale Motorcars' lot during the time I was in Arkansas between"—and he says—"May 8th, 2019, to May 11th, 2019. I do not know if I was on the lot computer or even if I ended up going there. It looks like during my time there I did odd work for the guys and maybe even Josh Duggar."

And then there's a text message from Caleb Williams that week saying that he's going to, "Watch the lot," meaning Wholesale Motorcars' lot. The point is, there's a factual dispute here. If the government wants to factually argue with that, so be it.

THE COURT: Well, so the third-party guilt issue, sometimes known as alternative perpetrator issue, is an issue that I'm sure you all are familiar with. The government made this the subject of a motion in limine. You all responded. The Court ruled that it would not prohibit Mr. Duggar to point the finger at someone else, but the Court also noted that that was not a license to offer speculative testimony. And there's some case law out there. There's the *Holmes* case that the government cited. That's a Supreme Court case. There's a Tenth Circuit case, *Jordan*. And then there's the Tenth Circuit case in the *Tim McVeigh* case, the Oklahoma City bombing case. And these cases all refer to this idea that there has to be some

demonstrable nexus of proof that links the alternative perpetrator to the crime. And then there's also this concept that the greater the strength of the evidence of the government pointing to the defendant relative to the strength of this nexus, that that weighs into part of the Court's analysis as to whether it will include or permit or exclude that.

I have no idea what Caleb Williams is going to say, so I'm not going to say that Caleb Williams can't be called as a witness. But I am going to say that I will not let him testify to anything speculative. And I will not allow him to testify to any facts without a 602 foundation.

MR. GELFAND: And that's fully our intention, Your Honor.

THE COURT: So if he says he wasn't there, you can't talk about what happened.

MR. ROBERTS: May I add one layer to that?

THE COURT: Yes.

MR. ROBERTS: Mr. Williams', a long-time friend of the Duggars, is also a sex offender. If they bring that up prior to connecting him to the possibility, doing this nonspeculative nexus, then the whole point of not calling him is shot.

THE COURT: Yeah. Well, you are not going to get into that until you ask permission from the bench.

MR. GELFAND: Fair enough, Your Honor. But just to be clear, our full intention is to walk him through a document trail that links him through facts.

THE COURT: Well, you've got to establish 901 foundation on the documents as well.

MR. GELFAND: Absolutely. And some of these documents, to be blunt, he provided to the government. And so, like, a text message from him.

THE COURT: What is your evidence that he's present between May 13th and May 16th?

MR. GELFAND: Your Honor, as a practical matter, we have circumstantial evidence that he comes from Illinois to Arkansas towards the end of the week before. And he says he's going to, quote, "Watch the lot."

THE COURT: That's not good enough to place him on the lot.

MR. GELFAND: What I'm saying, Your Honor, is that we also have significant evidence, and the Court is going—I understand the Court is a little bit in the dark on this, to no fault of anyone, but the Court is going to hear significant evidence from Michele Bush today of the possibility of remote access, and in fact, the likelihood of remote access. So this notion of being on the lot, other than at very discrete times, is really in our opinion a red herring. And as a practical matter, Caleb Williams regularly had access to the entire computer system related to Wholesale Motorcars. He controlled a lot. He sold his own eBay shipping stuff off of that computer, literally, within a month or so of the alleged crime. And he physically puts himself at the lot around that time period. This notion that he claims that he was away, he takes pictures of pictures.

THE COURT: We need to get out there. I can't make a speculative ruling based on testimony that I haven't heard. I will let it go forward and we'll take it one step at a time. And if the government believes that there's not appropriate 602 or 901 or that any of the dominoes that would fall after that aren't there, you need to ask to approach the bench. Under no circumstances are you to get into any prior sex offense history that he has without approaching the bench.

MR. GELFAND: Can I ask the government to clarify for the record whether—Caleb Williams says more passwords. That implies that he provided passwords. We have asked them via e-mail—we got no response—whether he provided any passwords.

MR. ROBERTS: We have not spoken to him since he sent that e-mail. We have provided you everything that he has—again, not our witness. Unsolicited e-mails, we keep sending their way. He reached out to us through an attorney. The extent that we ever discussed passwords, Agent Faulkner asked him if he knew the defendant's banking password and he said no. That's the extent I've ever spoken to him about that. That was a non-leading way, a non-telling way, to ask him if he knew Intel 1988 because they are the same password. But we didn't tell him the password.

Your Honor, one thing I think will help the Court when gauging this testimony. Are we all in agreement that even your witnesses claim you have to be there May 13th?

MR. GELFAND: I'm not sure exactly what you're asking. Ms. Bush is going to testify that somebody who plugged in a thumb drive had to be there on May 13th, but she's going to explain in a lot more detail what the computer forensics actually show.

MR. ROBERTS: Well, your theory is that Caleb Williams was the person that plugged in that thumb drive on May 13th, is that correct?

MR. GELFAND: Our theory is Caleb Williams—our theory is a lot of things with Caleb Williams, but I don't think we need to—I'm happy to address it if the Court wants to, but I don't think we need to spar over this in chambers.

THE COURT: What is she going to testify about whether you can boot to the Linux partition?

MR. GELFAND: That you can do it remotely, yes.

THE COURT: And what if it normally comes up in Windows, how would you—

MR. GELFAND: She's going to say that to even answer that question—this is what I anticipate she's going to say—that you would have to access the BIOS. And there's either default settings or there's a number of different settings. She's going to disagree with Mr. Fottrell on that.

THE COURT: As to what the BIOS settings were?

MR. GELFAND: No. As to whether it was possible to essentially reboot or get into the Linux system remotely.

THE COURT: All right. Let's go.

(End of In-Chambers Hearing)

(Jury in at 8:52 a.m.)

THE COURT: Good morning, Members of our Jury. Everyone have a reasonably good weekend? Fairly nice weather. Just wanted you to know that the attorneys and I have been working on some evidence issues since about 8:00 morning. We weren't just lollygagging while ya'll were waiting to come out. And I, once again, appreciate your continued patience with us when these issues arise.

This is the second week of our trial. The . . .

[. . .]

DIRECT EXAMINATION

BY MR. GELFAND:

[Michele Bush Direct Examination by Defense Counsel Mr. Gelfand; pp. 1080-1090]

. . . my computer and it shows everything I ran, including the ones that weren't actual commands and the ones that didn't execute because I misspelled install and I included VLC in all caps. So you can just see, this is a really good depiction of a user's abilities, and like I said before, the kind of trial and error. If you look at this bash history and you see a bunch of different commands that aren't actual commands, it could tell you this is not a well-versed user in Linux versus if you have a pretty clear-cut, these commands were executed and they executed properly, you've got a pretty sophisticated user.

Q. Thank you. Does that wrap up this demonstrative?

A. Yes, it does.

MR. GELFAND: We can take this down, Mr. Story. Thank you.

Q. (BY MR. GELFAND.) Now, were you able to determine how alleged child pornography video files were played through the VLC system?

A. Yeah, they were streamed through a network URL.

Q. Let's pause for a second. What does streaming mean as it applies to what happened on the VLC system based on your computer forensic analysis?

A. Streaming means viewing content on the fly. And, typically, it means the content that you're viewing is in one physical location and where you are doesn't have that actual data. So think of Netflix or Hulu. The reason you stream on Netflix is because you don't have all seasons of The Office, and so you actually pull it from the service host, whether that's Hulu or Netflix or now Peacock, and then you're viewing it on the fly on your T.V. So it's actually broadcasting that information live to your device, which is why sometimes you have issues with buffering and maybe it's a little pixilated because it's trying to decode the material from one server and provide it on a different device.

Q. Based on your analysis—first of all, were all of the video files that were downloaded actually played?

A. Well, they were—not all of the Torrent files were streamed, but all of the files that there was evidence that they were opened in VLC were all streamed.

Q. So let's break that down for a second. Let me even back up one more step. What's a Torrent file as opposed to a video?

A. A Torrent file is just a metafile. It provides information about files on the BitTorrent network. So in some instances, it can be analogized as a recipe to a cake that you're baking. Sometimes I use an analogy, it's kind of old school, but like a library index card. It tells you that a book exists out in the library and where to go get it. So it doesn't actually contain the contents that you're looking for, but it helps you go find it.

Q. Using the BitTorrent network, for example Transmission or uTorrent or qBittorrent or countless other applications, can you ultimately attempt to get the file when you have the Torrent? In other words, can you get the cake when you have the recipe?

A. Yes.

Q. Does having the recipe necessarily mean you have the cake?

A. No.

Q. Explain that to the Jury.

A. Just because you have the means to go find these files doesn't necessarily mean that they were downloaded. For instance, with what you could call Torrenting, what we see often is Torrents will contain other Torrents to try to promote data. So you can download, let's say, a Torrent for a music album and that Torrent will go and fetch the full music album, but maybe it also says, well, because you downloaded this, we think you're also

going to want this. It will give you the Torrent for the next music album. It doesn't necessarily mean you downloaded it, but now you have the means to go find it. So just because there's the existence of a Torrent doesn't necessarily mean the contents ever existed.

Q. So of the Torrents that were played, the video files that were played on this HP Linux partition between May 14th and May 16th, 2019, were you able to determine how each and every one of those was played?

A. Yes. They were all streamed using a network URL.

Q. I'm going to show you what's been admitted, if I may publish it, Your Honor, as Government's Exhibit 43.

THE COURT: That's fine.

Q. (BY MR. GELFAND.) Do you see Exhibit 43 in front of you, Ms. Bush?

A. Yes, I do.

Q. Can you tell me if you recognize what this Government exhibit is?

A. Yes. It's a VLC system file that's created by the application that existed on the Linux partition.

Q. And were you also able to independently, just as Mr. Fottrell did, access this from the forensic file?

A. Yes, I was.

Q. What is this? Before we get into some of the details, kind of in common English, what are we looking at?

A. We're looking at a configuration file. So it's containing data that's used by VLC, so it's the underlying data. Where a user sees the pretty graphical user interface, this is the actual source of where it's pulling some of the information to run properly.

Q. I want to direct your attention to each of these entries that begin with http: and end with streaming. What do each of those, just broadly speaking, reference?

A. References a Uniform Resource Locator. It's a URL for content that exists.

Q. So let's back up for a second. Is each of these entries, if we kind of oversimplify—and there may be multiple for one—but reference streaming of a particular video file?

A. A particular Torrent, yes.

Q. And, specifically, do these reflected in here reference all of those files that were streamed on VLC between May 14th and May 16th?

A. Yes.

Q. Can you walk us through what this means to those of us that don't read that?

A. Yeah. So just like if you were to go to a website and you would type in potentially http:\\www.google.com, that is a Uniform Resource Locater, a URL, so you can go communicate with Google servers and access their content. In the same manner, this is using an http protocol, which is a network protocol to communicate online, and it is pairing with an info hash value that we were able

to track back to a particular Torrent. And it's communicating at a local IP address, here, 127.0.1, at a very specific port, 63835. And then it lists—it's using it as a proxy, and then it identifies it as file number four. And the token is, again, the info hash value and then it just indicates that the information is being streamed.

Q. Cut to the chase. What does that tell you?

A. It tells me that when a file was opened with VLC, rather than just double-clicking or even hitting control S, somebody actually had to enter in this network URL in order for VLC to go find the content and then stream it, meaning on the fly, decoding the contents so that it can be viewed.

Q. Does this mean that the file had to actually leave the device?

A. In my experience, yes. Because it's communicating over a network, it doesn't necessarily go to a different device—it could—but what it's saying is it's using a network protocol through IP addresses to kind of go in a circle. So it's leaving the computer, to the router, and then coming back based on this local IP address.

Q. So does this tell you, at a minimum, that each of these files had to travel, digitally, of course, from the HP computer on the Linux partition to the router?

A. Yeah. It's going through some sort of network which would be provided by or provided through the router.

Q. And then once it's at the router, what is that file accessible to, based on your expert opinion?

A. I mean, any device that's connected.

Q. So to be clear, is it possible that this device was streamed in the sense of went from—this video was streamed in the sense that it went from the router and then back to the HP?

A. Potentially, yes.

Q. Is it equally possible that this was streamed from the HP to the router and went to a different device?

A. Potentially, yes, because this 127 IP address, it's just an internal IP. It doesn't uniquely identify anything. It's just identifying software. So, yes, I don't necessarily know what device was actually viewing the streamed material. I just know that it was streamed through that protocol.

Q. So let's talk about this for one second. Is there any computer forensic tool, without having the router itself, that can tell you what other devices, if any, had access to this particular file that was streaming at the time that it was streaming?

A. The best source of evidence would be the router.

Q. And is it fair to say you have not had access to that because it was not seized?

A. Correct.

Q. Now, is streaming an option on VLC, and in particular—let me back up for a second. During your analysis, were you able to determine—did you look at the specific VLC program that was used in this particular case in May of 2019?

A. Yes, I did.

Q. Were you able to familiarize yourself with the options that were available as to how one can play a video if a Torrent received a file and was ultimately downloaded?

A. Yes.

Q. What were the options of how a video could be played using this VLC version and build that was on the HP computer in May of 2019?

A. There's a lot of different possibilities, one of which would just be double-clicking the file and the Ubuntu operating system would prompt you, kind of like we saw in the first demonstrative video, to select which application you want to open that file with. The other thing is within VLC itself, you could click to open file and then go browse to it. You can also hit stream file, or control S, but it would still pop up a prompt to say, how do you want to stream it. And the first option would be stream a local file, stream a file. And you can go and click on the file that you want to stream. And if you do that, the path here would still indicate the local device.

So, for instance, it would say, file\home\delloneuser\documents, or downloads, so it would actually give me the local path of the computer, even though it's streaming. But in order to stream it and get this exact forensic evidence, you would actually have to specifically go into the network URL setting and put that network URL in for it to stream over this http protocol.

Q. So is it your testimony based on the actual computer forensics that this was not just double-clicked?

A. Correct.

Q. If it was double-clicked, would the forensic trail just look different?

A. Yes. Again, it would give me a local file path, even if it was a streamed file.

Q. Ms. Bush, each of these entries reflects streaming. And I skipped over a couple, but do each of those reflect the streaming of a different file?

A. A different Torrent, yes.

Q. And so if we look at the next page, for example, this VLC interface references that every single one of these Torrents was streamed as opposed to double-clicked on, correct?

A. Correct.

Q. Ms. Bush, in your entire career, have you ever seen a case where videos of this nature were streamed instead of just played locally on VLC?

A. No. I have worked on hundreds of cases involving VLC and I have not seen that particular forensic evidence where somebody entered in a network URL.

Q. Did this jump off the page to you?

A. Yes, it did.

Q. Explain to the Jury why.

A. Just because, again, it shows a level of complexity with the evidence. If this was just a generic user creating this partition to quickly get in and access content, you would think that it would just be in the normal course of action to double-click a file. You have to go through so many extra steps to

create this forensic evidence, and that's why it stood out, because in combination with everything else, it's again showing me another advanced level for this user to have streamed the files rather than just opened them.

Q. What, if any, significance is there to the combination of Universal Plug and Play, as you previously testified about, and streaming?

A. Well, because streaming is specifically going over the network and following that protocol and you can see using an IP address and a specific port, part of the vulnerabilities with UPnP is port forwarding, meaning ports are open to any device on the network. So for the fact that this information to be utilizing that network traffic where it's already vulnerable to UPnP tells me, this should probably be looked into a little further.

Q. Now, let's back up for a second. Let's talk dates. Based on your computer forensic investigation, was Linux installed on May 13th and was the TOR browser installed on May 13th of 2019?

A. Yes.

Q. What, if anything, happened on May 13th that in your opinion had to have happened physically at the computer as opposed to remotely?

A. The attaching a thumb drive to the physical HP machine and opening those files.

Q. Could the TOR browser, in your opinion, have been installed either by someone sitting at the desktop computer at Wholesale Motorcars or accessing the device remotely?

A. Yes.

Q. Explain to the Jury why it is you conclude that.

A. Because one of the things I'm looking for in this analysis is to rule out remote access. If part of the issue in this case is who had access to the computer and who could have conducted this activity, I'm looking for how is this system configured, who would have had access to the system. And with Linux, one of the things it does . . .

[. . .]

[Direct Examination by Defense Counsel Mr. Gelfand pp.1092-1093]

. . . in place. We're in recess until 10 minutes after 3:00.

(Jury in at 3:16 p.m.)

THE COURT: Mr. Gelfand, you may resume your examination.

MR. GELFAND: Thank you, Your Honor.

Q. (BY MR. GELFAND.) Ms. Bush, before we just took a brief recess, you were testifying about May 13th of 2019, correct?

A. Yes.

Q. Based on your forensic examination, did the Linux partition have any software applications on it that enable remote access if a user wants to use it for remote access?

A. Yes, it did.

Q. I'm going to show you a portion, if I may publish it, Your Honor, of Government's Exhibit 30. It's page 6. Can you see that in front of you?

A. Yes.

Q. What is Remmina? R-E-M-M-I-N-A.

A. It's remote desktop software.

Q. What does that mean?

A. It means it allows the user to easily configure remote access through that application.

Q. Just to be clear, is that the only way one can remote access into a device?

A. No.

Q. What are other ways that one can remote access into a device?

A. I mean, again, using command line. Using other third-party tools. There's several ways.

Q. I want to direct your attention back to Government's Exhibit 43. Before we get there for a second, I want to direct your attention to May 14th. On May 14th, were you able to determine alleged child pornography activity for the first time on this device?

A. Yes.

Q. Now, I want to direct your attention first to Government's Exhibit 38. Can you tell us what Exhibit 38 is, if you know?

A. Yeah. It's the recently used file that's created by the Linux operating system and TOR browser

storing the recent history for the TOR browser application.

Q. So is it fair to say that this file references a file—well, this document references a file referred to as the webcam collection in short?

A. Yes.

Q. What is 7Z?

A. It's an archive file, so it's a file format that allows a single file to hold a bunch of files. So it's really convenient for downloads or transferring files, because rather than having to download all individual . . .

[Direct Examination by Defense Counsel Mr. Gelfand pp.1101]

. . . those Torrents were downloaded.

Q. Now, is it fair to say, then, that on May 15th, all of the alleged child pornography activity at issue happens essentially in this 10 to 15-minute period in the morning, and then in this approximately plus or minus 40-minute period, or 36-minute period in the afternoon?

A. Correct.

Q. Evening. I'm sorry. Yes?

A. Yes.

Q. Did anything related to this that happened on May 15th have to happen by somebody physically at the HP computer behind the keyboard?

A. No.

Q. Is there any reason to believe that what happened on this day was done remotely?

A. For the same reasons as the other day, because the files were streamed, because we know UPnP was enabled, because the ports were changing, yes, I think there's evidence to suggest this was remote.

Q. Now, you referred to some term "thumbnail." Can you tell the Jury what a thumbnail is in your expert opinion?

A. It's a small image file that corresponds to a media file, whether that's an image or a video, that can be displayed to the user so they don't actually have to physically open the file. So, for instance, on an iPhone, . . .

[. . .]

[Direct Examination by Defense Counsel Mr. Gelfand pp. 1108-1111]

A. That's correct.

Q. What, if any, significance did that have to you in conducting your forensic analysis, meaning the timing of the deletion?

A. It tells me that whoever streamed that file, at least, or at most, 29 seconds later deleted it and hadn't viewed the full file.

Q. To what extent, if any, does the timing of the deletion of the entire trash folder impact or affect your analysis as to the possibility or likelihood of a remote user using this device as opposed to sitting behind it?

A. It kind of follows the patterns and characteristics. This tells me that this is potentially somebody with intermittent access to the computer. And with remote users, that's one huge indicator. We call it kind of a hit-and-run. When somebody finds a computer that they can attack or use for their own purposes, they are not going to sit there for years or months because the chances of them getting caught or their identify being revealed is greater. So they get in, they get the material they want, and then they get out.

Q. Let's talk about remote access for a second. If somebody is remotely accessing a computer at a particular location, just generally speaking, does the person, if there is a person, behind that computer necessarily see what the person controlling that device remotely is doing?

A. Not necessarily. You would see it if it was happening through the Gnome application interface. So remember we talked about how Linux does have a GUI. There is an ability to see things on the screen like you would with a Mac or Windows computer, but, again, there's also the possibility of running command line behind the scene which is operations that the user wouldn't necessarily see on the screen. So if it had been conducted kind of through a back door or on the back end, you wouldn't necessarily see the actual content on the screen as if you were using the graphical user interface.

Q. Have you formed an opinion—well, first of all, is it consistent with your individual forensic examination that there was no alleged child pornography activity after May 16th at 11:33 a.m.?

A. Yes. No evidence material had been streamed or downloaded, nothing.

Q. So are we talking about essentially a three-day period with the last day being approximately 12 minutes?

A. Yes.

Q. Have you formed an opinion as to whether all of the alleged child pornography activity could have been conducted by someone physically outside the office at Wholesale Motorcars?

A. Yes. As far as the suspected child pornography, I can't rule out remote access.

Q. Have you formed an opinion as to the extent to which remote access is likely?

A. Yes. The activity that I have seen so far seems to meet the patterns and characteristics of a remote user, because when you look at it all as a collection, so if you take each individual piece and analyze it solely based on that one artifact, maybe it doesn't suggest remote access. But when you take the whole collection of the evidence and you compile that, you've got UPnP enabled on a network which means it's highly vulnerable. You've got a very short time frame of activity, kind of a hit-and run, so to speak. You have a very small Linux partition, which tells me this wasn't a partition created to store data over time. It was kind of used for a very specific purpose at a very short interval. And then you also have the immediate deletion of these files. Well, before that, you also have the streaming of the files. Rather than just double-clicking and opening, they are going through

the internet, essentially going through a protocol to stream the material. And then you have the almost immediate deletion of at least one of the files which tells me the user didn't actually open or view the full file.

Q. If you had the router, could you answer more questions?

A. It would certainly give me a lot more clarity, yes.

Q. Were you able to determine whether this particular HP device was connected to Wi-Fi at any given time?

A. Yes, through the Windows registry.

Q. So to be clear, is there actual computer forensic evidence that this device was connected to the internet, meaning to the router, wirelessly perhaps in addition to or at separate times to wired ethernet cable?

A. Yeah. The Windows registry has its own key to store all the different Wi-Fi networks so that if you go back to a particular location, it can auto-add that wireless network. So if you, for instance, look at my computer, there's probably 50 different wireless networks that you could go back and track and see my location at this airport or this office. And with this computer, I did the same thing to see what different wireless networks had been connected to this computer.

Q. And just generally speaking, what were you able to conclude?

A. That it was connected to a Wholesale, I think, or over the river, I think network account, that I was

able to match back to the actual router in this case based on the Mac addresses. And that it was also accessed by at least one other internet access point during the dates and . . .

[. . .]

JURY TRIAL, VOLUME SIX,
RELEVANT EXCERPTS
(DECEMBER 7, 2021)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSHUA JAMES DUGGAR,

Defendant.

Case No. 5:21-CR-50014

VOLUME 6 of 8

Before: The Honorable Timothy L. BROOKS,
United States District Judge.

December 7, 2021 Fayetteville, Arkansas

[. . .]

[December 7, 2021 Transcript, pp. 1353-1365]

[Defense Counsel] MR. GELFAND: No further questions, Your Honor.

THE COURT: May this witness be excused?

MR. GELFAND: Yes, Your Honor.

[Prosecutor] MR. ROBERTS: Yes, Your Honor.

THE COURT: Thank you for your time in being here. You're excused, free to go.

MR. GELFAND: May we have a brief side bar, Your Honor?

THE COURT: Yes.

(Bench Conference)

MR. GELFAND: Our intention was to call Caleb Williams as our next witness. Two things that are unrelated. One, Mr. Roberts told me in advance of the trial reconvening after lunch that he wanted to raise an issue with the Court, so I wanted to give him that opportunity.

Number two, I was hoping we could, at risk of inconveniencing everyone, have two minutes with our client to determine whether we're going to call the witness based on what Michele Bush testified to.

THE COURT: All right. So let's take up Mr. Roberts' issue, but certainly you may, and if you want, you can step out into the vestibule hallway to chambers and do that.

MR. GELFAND: Thank you.

MR. ROBERTS: Your Honor, based on our previous conversation and what I understand the Court's order to be is that, in order for him to get into any facts in evidence that Mr. Williams, Caleb Williams knows, he's going to have to establish, and Ms. Bush has already testified, you've got to be there May 13th. If he's not, I don't see any

relevance. And that's—I mean, is that a precondition?

THE COURT: Well, the Court stands by what it ruled earlier. And the big picture issue here is evidence of an alternative perpetrator. And the Court will not allow speculative testimony or speculative argument about alternative perpetrators. I don't know what this witness, I don't know what their knowledge was. I don't know what they are being called for, so all I can do is flag the issue based on what I know. And I can tell you that he's going to have to establish 602 personal knowledge. And to the extent that he tries to introduce documents or to the extent documents are attempted to be introduced, you will have to be in a position to establish 901 and 602 basis to admit documents. Other than that, I can't make an advisory opinion.

MR. ROBERTS: Your Honor, can we ask the defense attorney to at least verify he has a good faith belief this guy, some evidence indicating that he was here during that time frame?

MR. GELFAND: Can I proffer what I anticipate the testimony to be?

THE COURT: Yes, that would be helpful.

MR. ROBERTS: That would be very helpful.

MR. GELFAND: With one caveat, Your Honor, and that's that—we have not—Mr. Williams exercised his right not to speak to our investigator, and so all we can do is issue a subpoena to a witness just as a due process matter.

We anticipate that he will testify that he has previously worked at Wholesale Motorcars in various capacities. We anticipate that he will authenticate a March 27th, 2019, sales contract listing him as the—

THE COURT: March 29?

MR. GELFAND: March 27 of 2019, so basically six weeks before this, listing him as the salesperson. He signed it. My understanding—correct me if I'm wrong—is the government actually showed him that and he verified.

MR. ROBERTS: I did not show him that, no.

MR. GELFAND: I believe your agents. It's in your ROI. Well, whatever. Doesn't matter. He'll either authenticate that or not. He'll identify Frazer computing at the bottom of that document, which references Frazer on the HP computer. That he had involvement with eBay sales. There's already in evidence, Defendant's Exhibit 48, which are e-mails and shipping labels that he'll testify, I anticipate, are associated directly to him. He's used the Duggars' parents—meaning Jim Bob and Michelle's—address as his home in that March and I think April 2019 time period.

And then critically, March 7th of 2019, he sends a text message that he turns over to the government, the government then turns over to us. That's where we got it from. And the text message that he sends to Josh Duggar on May 7th of 2019 says, "Should be able to help you a couple days this week, happy face, watch the lot." The lot we believe refers to Wholesale Motorcars' lot and that's the May 7th time period.

THE COURT: Did he watch the lot?

MR. GELFAND: He has, in response in discovery provided by the government, he said he—initially, he denied going to the lot, and then he took—he said he didn't mean to mislead anyone, he may have watched the lot. He may have used the computer. He says he doesn't remember, according to the government.

THE COURT: That's not 602.

MR. GELFAND: This is all according to what the government disclosed in discovery.

MR. ROBERTS: Your Honor, there's more that—I'm sorry. I didn't mean to cut you out.

MR. GELFAND: On May 9th of 2019, according to the government's ROI, he spends the night at Champion Motorcars.

THE COURT: And where is Champion Motors?

MR. GELFAND: A mile or—

MR. ROBERTS: It's where the fire truck was at, Your Honor.

THE COURT: And Champion is a parent company to—

MR. ROBERTS: It's his brother's company.

THE COURT: His brother's company.

MR. GELFAND: Jed Duggar's company. Ownership might technically be different, but essentially, it's Jed's car lot. So he spends the night there on May 9th. He said he might have done odd jobs for the Duggars or for the guys.

MR. ROBERTS: No, he said Jed, specifically. But go ahead.

MR. GELFAND: We're going, again, based on government discovery. And then he, in what we got with what we believe was disclosure of Brady, he turns over an undated, un-time-stamped photo that presumably he took from an iPhone 8, it appears, in the Wholesale Motorcars' lot of Josh using the MacBook laptop that was seized in this case.

THE COURT: Taken when?

MR. ROBERTS: How on earth did you say it was an iPhone 8? There's no metadata.

MR. GELFAND: Oh, I'm sorry. It's on a different—Your Honor, I misspoke. It's on a different photo that he turned over that shows he has an iPhone 8. I don't know if that photo was taken on an iPhone 8. We have no metadata for anything.

He has denied being at the lot to the government. He's provided information, which the government has not asked him for follow-up on, that's impossible to verify any metadata on. They are literally pictures of pictures, like pictures of a computer screen. And as a practical matter—

THE COURT: When you say he's denied being on the lot, does that mean denied being on the lot May 14 through 16? Is that what you mean?

MR. ROBERTS: He told our investigator that too.

MR. GELFAND: He said that to our investigator when he didn't know what he was being asked and the investigator didn't ask him specifically about

that. And as a practical matter, he made a statement to the government readily acknowledging that he has had access to passwords in connection with the Duggars, including Josh, and that he's done some social media work selling cars for the various car lots, I believe including Wholesale and possibly Jed's lot.

MR. ROBERTS: Your Honor, may I add to?

THE COURT: Yes.

MR. ROBERTS: We have also turned over unsolicited e-mails when he reached out through his attorney that he left Jed Duggar's car lot on May 11th, stopped in St. Louis and got a new iPhone, which we have the receipt and the Apple representative here verifying that he was there. He then drove to his mother's house on May 11th. On May 12th, Mother's Day, we have his mother here who said, "By the way, I took a video of him," which we turned over the stills, "moving furniture," which she will identify. And then on May 13th, he does engraving, I mentioned, and this is a huge machine that his mom will verify also that he is in Illinois this entire time frame. It corroborates exactly what he said all the way up to the 16th where they left, as a family, in a van for a wedding.

I mean, this is a rabbit trail. And, Your Honor, I mean, the only obvious reason why the defense is wanting to call him is because he's a sex offender. I mean, this has been the reason why—

THE COURT: Does he have a conviction?

MR. ROBERTS: After this conduct.

THE COURT: He has a 609 applicable conviction?

MR. ROBERTS: Yes, Your Honor. He was convicted in early 2020 of having sex with his, whatever they call girlfriends in this belief system.

THE COURT: Is the relevance—I mean, is the core relevance purpose, overriding purpose for which you're calling or would seek to call Mr. Williams to be able to make an argument that he was an alternative perpetrator of the offense conduct on May 14 through 16, either in person or remotely?

MR. GELFAND: Yes, but not exclusively, because he also has circumstantial evidence that shows, for example, even just the fact that he sold a car as a salesperson at the car lot shows that there were other sales people other than is reflected in the employment records.

THE COURT: Okay.

MR. ROBERTS: Your Honor, may I add a layer to that?

THE COURT: Yes.

MR. ROBERTS: If they are wanting to call him solely for that, then I would move under 403 just to exclude the prior conviction and then we're good.

THE COURT: I'm not sure that we can.

MR. ROBERTS: Your Honor, the reason, Mr. Gelfand has already represented to the defense, or to the Jury that he is blaming this guy. You can't walk that back and then try to put him up as, "Oh, we're just calling him to see about passwords." It's already out there.

MR. GELFAND: We said he wasn't investigated, which is true.

MR. ROBERTS: It accomplishes the same thing you are trying to in that case.

THE COURT: "Must be admitted subject to 403 in a civil case, or in a criminal case in which the witness is not a defendant." So 403 does overlay on top of 609, correct? If he were a defendant, then the 403 balancing test is worded differently, and that's in 609(a)(1)(B). But here, he is a witness in a criminal case. 609(a)(1)(A) applies and 403 lies on top of that.

MR. GELFAND: I don't have any reason to disagree with that, Your Honor. But I do think that, as a practical matter, to the extent to which impeachment, any grounds, including 609, would be appropriate, I would assume that even any application of 403 would have to be based on consideration of how he testifies, what he says, how the Court observes him.

THE COURT: Right, yeah. So to the extent that the overarching relevance and purpose of calling this witness is to establish so-called alternative perpetrator evidence, based on this proffer, the Court will not allow Caleb Williams to be associated with so-called alternative perpetrator evidence or argument.

Holmes v. South Carolina, 547 U.S. 319, "The critical inquiry concerns the strength of the prosecution's case. If the prosecution's case is strong enough, the evidence of third-party guilt is excluded, even if that evidence, if viewed independently, would have great probative value, and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues."

U.S. v. Jordan, 485 F.3d 1214, Tenth Circuit, 2007, "Courts may properly deny admission of alternative perpetrator evidence that fails to establish, either on its own or in combination with other evidence in the record, A)"—and here's the money quote—"nonspeculative nexus between the crime charged and the alleged perpetrator."

There's a similar line of analysis from *United States v. Timothy McVeigh*, Oklahoma City bomber, Tenth Circuit 1998. "Although there is no doubt that a defendant has a right to attempt to establish his innocence by showing that someone else did the crime"—that was the basis of the Court's motion in limine ruling that was substantially in the defendant's favor—"a defendant still must show that his proffered evidence on the alleged alternative perpetrator is sufficient on its own or in combination with other evidence in the record to show a nexus between the crime charged and the asserted alternative perpetrator. It is not sufficient for a defendant merely to offer up unsupported speculation that another person may have done the crime. Such speculative blaming intensifies the grave risk of jury confusion and it invites the jury to render its findings based on emotion or prejudice."

Against that background, you may ask, you may call Mr. Williams and you may establish background of who he is and what his connection is. You may discuss the dates of his employment. You must ask him whether or not he has knowledge or recollection of being present on the car lot on or about May 13 through May 16. Defense conduct

is May 14 through 16, but there's evidence that the Linux partition was installed on the 13th. And you may inquire if he ever remoted in to the office machine, and if so, the time periods in which he would have remoted in. If he establishes that he was present or that he had remoted in, then we can take this one step further and you can ask these other questions and the Court wouldn't have enough information to make an analysis against these cases that I discussed a moment ago until I hear that.

However, assuming, as the government seems to be indicating, that he wasn't present on the lot—and I don't know whether they know whether he's ever remoted in or not—but assuming he testifies that he's never remoted in, that's as far as you are going to get and the Court would find in that instance under 403 that the 609 conviction that you have discussed should not be allowed, because at that point, the primary purpose or objective of calling the witness will have failed, and the Court is not going to allow speculative testimony that he was the alternative perpetrator. And so under 403, it would not be allowed because of confusing the issues and the balance and test considerations. So you may have a few minutes to discuss it.

MR. GELFAND: Sure. Can I make a suggestion? I don't want to control the Court's docket.

THE COURT: I appreciate that.

MR. GELFAND: If we don't call Mr. Williams, subject to a consultation with our client, I anticipate that we're going to rest. And this may also be a time

to take a recess and have the Court do the colloquy with our client.

THE COURT: Let's take it one step at a time. Let's find out the answer to question one, whether you are going to call Caleb Williams. How long will that take?

MR. GELFAND: Just a few minutes.

THE COURT: We'll wait.

MR. GELFAND: You said it was okay to step into the hallway?

THE COURT: Yes, it is.

(pause, 2:20 p.m. to 2:23 p.m.)

MR. GELFAND: Thank you for the opportunity to consult privately with our client. Based on the Court's ruling, excluding the anticipated testimony that we were intending to attempt to elicit and with the understanding of that record of what was previously filed in advance of trial, we will not call Caleb Williams for the very limited purpose that the Court would allow us to.

Furthermore, Mr. Duggar has elected not to testify in his defense. And my plan at this point is to rest the defense's case-in-chief.

THE COURT: All right. Thank you. That helps me understand.

(Bench Conference Concluded)

THE COURT: Members of the Jury, thank you for your patience. There is one more issue that I need to take up not just at side bar, but out of the Jury's presence. And I would like to give you an

option of how you would like to handle this. We could take a 10 to . . .

[. . .]