No. 24-

IN THE

Supreme Court of the United States

BERNHARD JAKITS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the district court's instructions to the jury regarding the statutory terms "sexually explicit conduct" and "lascivious exhibition" were consistent with 18 U.S.C. § 2256(2) and this Court's precedent.

2. Whether a defendant can be convicted of knowingly making or publishing "a notice or advertisement" seeking participation in an act of sexually explicit conduct by or with a minor for the purpose of producing a visual depiction of such conduct in violation of 18 U.S.C. § 2251(d)(1) based upon the exchange of private, direct person-to-person text messages with a single individual.

3. Whether a defendant can be convicted of knowingly persuading, inducing, enticing, or coercing a minor to engage in prostitution or any "sexual activity" for which any person can be charged with a criminal offense in violation of 18 U.S.C. § 2422(b) in the absence of any physical contact and where the defendant and minor were never even in each other's physical presence.

4. Whether Rule 412 bars, and/or the Fifth and Sixth Amendments require, the admission of *res gestae* evidence regarding the actions and statements of an alleged victim and her family, contemporaneous with her communications with the defendant, to the effect of seeking to profit from or take advantage of the defendant or other men where the meaning of and intent behind the communications between the defendant and victim is at issue.

PARTIES TO THE PROCEEDING

Petitioner Bernhard Jakits was the defendant in the district court and the appellant in the court of appeals.

Respondent the United States of America was the plaintiff in the district court and the appellee in the court of appeals:

LIST OF PROCEEDINGS

United States v. Jakits, No. 23-3870, U.S. Court of Appeals for the Sixth Circuit. Judgment entered Feb. 20, 2025.

United States v. Jakits, No. 2:22-CR-194, U.S. District Court for the Southern District of Ohio. Judgment entered Oct. 19, 2023.

United States v. Jakits, No. 23-3355, U.S. Court of Appeals for the Sixth Circuit. Judgment entered May 17, 2023.

United States v. Jakits, No. 23-3011, U.S. Court of Appeals for the Sixth Circuit. Judgment entered May 17, 2023.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Page

Page

Page

CONSTITUTIONAL PROVISIONS

Page

STATUTES

Page

RULES

Page

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Bernhard Jakits respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, 1a—29a) is reported at 129 F.4th 314 (6th Cir. 2024).

The district court issued a number of opinions. Those at issue in this Petition (Appendices B, C and D) are reported at Case No. 2:22-CR-194, 2023 WL 5443894 (S.D. Ohio Aug. 24, 2023) (App. B, 30a—55a); Case No. 2:22-CR-194, 2023 WL 3534612 (S.D. Ohio May 18, 2023) (App. C, 56a—76a); and Case No. 2:22-CR-194, 2023 WL 3191567 (S.D. Ohio May 2, 2023) (App. D, 77a—105a).

JURISDICTION

The Court of Appeals entered judgment on February 20, 2025. (Appendix A, App. 1a-29a.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND FEDERAL RULES INVOLVED

The constitutional provisions, statues, and rules involved are as follows:

U.S. Const., amend. V	18 U.S.C. § 2251
U.S. Const., amend. VI	18 U.S.C. § 2252
18 U.S.C. § 2246	18 U.S.C. § 2256

18 U.S.C. § 2422
18 U.S.C. § 2427
Fed. R. Evid. 412

Pursuant to Supreme Court Rules 14(f) and 14(i)(v), the relevant text of these provisions, statutes, and rules is set forth in Appendix E. (App. 106a-117a.)

STATEMENT OF THE CASE

This case illustrates the dangers that arise when, in a criminal prosecution under the federal child pornography and sexual exploitation statutes, the trial court does not carefully and precisely define for the jury the meanings of the key statutory terms "sexually explicit conduct," "lascivious exhibition," and "sexual activity." There are, of course, excellent policy reasons supporting the federal statutes prohibiting the production and dissemination of child pornography. Congress passed those statutes for good reasons and, in doing so, it employed these specific statutory terms and definitions to ensure adherence to the requirements of our Constitution, as interpreted by this Court. But if a jury is not told what these terms mean or require, then jurors are left to substitute their own personal views as to the morality or appropriateness of the conduct and communications before them. This is anathema to the principles of criminal law under our system. This case presents an example of what happens when statutory terms whose precise meaning is critical to the constitutionality of the statutory scheme, are, in application, left undefined and unexplained.

Bernhard Jakits is a 73-year-old man with no prior criminal history, no prior history of sexual misconduct of

any kind, and no prior history of sexual or other interest in minors. Despite extensive searches of all of his devices and accounts, the government found no evidence Mr. Jakits had ever been involved in any child pornography communities, searched for any such thing online, maintained a collection of such materials, or ever even interacted with minors (online or otherwise) apart from the January 2019 events which gave rise to the charges in this case. In short, there is nothing about Mr. Jakits or his history that fits the profile of the typical child pornography offender.

None of this, of course, precludes the possibility that Mr. Jakits could be guilty of a child pornography or child sexual exploitation offense. This background rather highlights the importance of enforcing the statutes as written and taking pains to be sure a jury makes its determination of guilt or innocence with a full understanding of what the law is and what the terms it employs mean. Without that, there is a high risk that a jury will render its verdict based upon its own disapproval of the conduct instead of an informed and considered application of the law to the facts. Criminal cases do not turn on the immorality of a defendant's actions; they instead turn on whether the defendant's conduct falls within the scope of a particular crime outlined by Congress. "Our commitment to equal justice and the rule of law requires the courts to faithfully apply criminal laws as written, … even when the conduct alleged is indisputably abhorrent[.]" *Fischer v. United States*, 603 U.S. 480, 499 (2024) (Jackson, J., concurring). To faithfully apply the laws though, a jury needs to know what those laws are and what their terms mean.

Mr. Jakits was charged with and convicted of eight federal offenses carrying statutory minimum sentences of

as much as 15 years imprisonment (and he was ultimately sentenced to 18 years) based upon his text and telephone communications with a 15-year-old girl over the course of about three weeks in January 2019. Mr. Jakits did not seek out this or any other minor. He had never communicated with her at all until he called her mother, an adult prostitute with whom Mr. Jakits had interacted online, and the teen answered her mother's phone (which had been left with her after her mother was incarcerated). The teenage girl ("Jae") ultimately sent Mr. Jakits a series of digital photos, some, but not all, of which were nude selfies. Mr. Jakits sent her money in return. In just six of those photos were Jae's genitals or pubic area visible. Over an exchange of text messages, Mr. Jakits proposed that Jae and her 13-year-old sister join a FaceTime call while naked. Mr. Jakits offered to send further money, but the FaceTime call never took place and Mr. Jakits never spoke with Jae or her mother again.

That is a brief summary of the facts underlying the charges on which Mr. Jakits was sentenced to prison for what, in all likelihood, will be the rest of his life. On these facts, therefore, the precise meaning of the statutory terms "sexually explicit conduct," "lascivious exhibition" of the genitals, and "sexual activity" become central to his guilt or innocence. This case did not involve depictions of sexual intercourse or the kind of graphic videos that clearly depict "sexually explicit conduct" or "sexual activity." This case instead involves closer calls regarding nude selfies, and requests for nudity. Yet in its instructions to the jury, the district court only purported to define *one* of these terms at all, and even then did not give the full definition set out in the statute. Further, the meanings of these very terms are subjects that have divided the courts

of appeal. There is, therefore, a need for this Court to step in both (1) to reiterate and/or clarify the meaning of these key terms, and (2) to make clear that it is essential to a fair trial and the reasoned application of the statutes that these terms be specifically defined for the jury.

There is one additional aspect to this case that warrants review by this Court. The idea of exchanging pictures of teens for money did not originate with Mr. Jakits. More than a week before Jae answered Mr. Jakits' call to her mother's phone, *the mother* had herself proposed to her daughter that they get money from Mr. Jakits by sending him pictures. Jae and her mother then proceeded to induce a neighbor girl to take a series of sexually suggestive photos for that very purpose. All of this occurred *before* Mr. Jakits had any communication with Jae. Moreover, in a series of recorded telephone calls with the mother while she was in jail, the family specifically discussed sending pictures to Mr. Jakits for money, ways in which they could "work" or get money from Mr. Jakits and other men, and how to "get one last generous payday" from Mr. Jakits and then "plaster this bitch all over the news."

The jury never heard any of this evidence. The district court excluded all of it under Federal Rule of Evidence 412. But none of this was evidence offered to prove the victim engaged in "other sexual behavior" or to prove a victim's "sexual predisposition." It was not even about *other* behavior—it reflected the full picture *of the behavior leading up to and underlying Jae's interactions with Mr. Jakits.* This case involved (a) a small number of nude selfies that did not clearly and indisputably depict "sexually explicit conduct," (b) testimony from Mr. Jakits

and *both* victims to the effect that Mr. Jakits *never asked that anyone engage in* anything that clearly and indisputably would qualify as "sexually explicit conduct," and (c) charges all premised on an inference of intent and intended (but not explicitly stated) meaning on the part of Mr. Jakits. Yet the district court excluded large swathes of evidence bearing upon the circumstances under which all of these communications took place. The exclusion of this evidence—the whole story—violated Mr. Jakits' right to a fair trial under the Fifth and Sixth Amendments.

REASONS FOR GRANTING THE PETITION

I. The Court Should Resolve a Circuit Split and Require the Lower Courts to Instruct Juries Regarding the Meanings of "Sexually Explicit Conduct" and "Lascivious Exhibition" Consistent with this Court's Interpretation of Those Terms

To convict Mr. Jakits on each of Counts 1, 2, 3, 4, 7 and 8, the jury was required to find that the photos received by Mr. Jakits depicted "sexually explicit conduct" and/or that he intended to cause Jae or Nik to engage in "sexually explicit conduct." The district court, however, gave the jury only a portion of the statutory definition of "sexually explicit conduct" and gave the jury no definition at all of "lascivious exhibition." Without instruction on what those terms mean or what the government is required to prove to show them, the jury was left to speculate or (more likely) substitute their own personal distaste for the general tenor of the exchanges for the meanings of the key terms "sexually explicit conduct" and "lascivious exhibition."

The term "sexually explicit conduct" is defined by statute to mean "actual or simulated":

> (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
>
> (ii) bestiality;
>
> (iii) masturbation;
>
> (iv) sadistic or masochistic abuse; or
>
> (v) lascivious exhibition of the anus, genitals, or pubic area of any person[.]

18 U.S.C. § 2256(2)(A). In upholding the constitutionality of the statute's use of the term "lascivious exhibition," this Court has expressly equated the meaning of the word "lascivious" with that given in the Court's precedent to the word "lewd," with both terms interpreted to mean conduct performed in a manner that connotes the commission of a sexual act. *See United States v. Williams*, 553 U.S. 285, 296-97 (2008); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 74, 78-79 (1994); *New York v. Ferber*, 458 U.S. 747, 756-58, 764, 773 (1982); *Miller v. California*, 413 U.S. 15, 27 (1973).

In summary, in *Ferber* and *Miller* the Court construed the phrase "lewd exhibition of the genitals" to refer to "the hard core of child pornography." *Ferber*, 458 U.S. at 764–65.[1] In *X-Citement Video*, the Court then held that

1. *See also United States v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123, 130 n.7 (1973) ("If and when ... a 'serious doubt' is raised as to the vagueness of the words 'obscene,' 'lewd,'

the term "lascivious exhibition of the genitals" as used in 18 U.S.C. § 2256(2)(A)(v) has the same meaning as "lewd exhibition of the genitals," as that phrase was construed in *Miller* and *Ferber*. 513 U.S. at 78–79. And in *Williams*, the Court reaffirmed that § 2256(2)(A)'s definition of "sexually explicit conduct" means essentially the same thing as the definition of "sexual conduct" at issue in *Ferber*, except that the conduct defined by § 2256(2)(A) must be, if anything, more "hard-core" given that the federal statute prohibits "sexually *explicit* conduct" rather than merely "sexual conduct," as in the state law at issue in *Ferber*. *Williams*, 553 U.S. at 296.

Consistent with the express terms of 18 U.S.C. § 2256(2)(A) and this Court's precedent, in *United States v. Hillie*, 39 F.4th 674 (D.C. Cir. 2022), the D.C. Circuit held that "lascivious exhibition of the … genitals" must be construed to mean the display of the genitalia "performed in a manner that connotes the commission of a sexual act[.]" 39 F.4th at 685. This understanding is dictated by the plain language of the statute, which refers not just to "sexual conduct" but to "sexually *explicit* conduct" with the statute's use of "explicit" "connot[ing] actual depiction of the sex act rather than merely the suggestion that it is occurring." *Williams*, 553 U.S. at 297. It is not sufficient that a given visual depiction may elicit a sexual response in the viewer; rather, the display must be performed "in a lustful manner that connotes the commission of a sexual act." *Hillie*, 39 F.4th at 686. As the D.C. Circuit explained

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'lascivious,' 'filthy,' 'indecent,' or 'immoral' as used to describe regulated material" in federal statutes, "we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific '*hard core*' *sexual conduct* given as examples in *Miller v. California*.").

at length in *Hillie*, "this construction is consistent with the [Supreme] Court's repeated description of the conduct prohibited by the terms 'sexual conduct' and 'sexually explicit conduct' in child pornography statutes as 'hard core' sexual conduct[.]" *Id.* at 685.

In Mr. Jakits' case, however, the district court and the Sixth Circuit both refused to follow this Court's precedent regarding the meaning and application of the statutory term "lascivious exhibition." The district court instead gave the jury an instruction reproducing some, but not all, of the statutory definition of "sexually explicit conduct" and listing six "factors" for the jurors to "consider" in "deciding whether an exhibition is 'lascivious.'" (R. 174, Page ID # 2113.) But the district court never defined "lascivious" or instructed the jury as to what that term means or requires. In relevant part, the district court's instruction, which the Sixth Circuit affirmed, read as follows:

> ....
>
> The term "sexually explicit conduct" means actual or simulated:
>
> > (1) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; or
> >
> > (2) masturbation; or
> >
> > (3) lascivious exhibition of the genitals or pubic area of a person.

In deciding whether an exhibition is "lascivious," you may consider these six factors:

> (a) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
>
> (b) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
>
> (c) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
>
> (d) whether the child is fully or partially clothed, or nude, though nudity is not determinative;
>
> (e) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and
>
> (f) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

This list is not exhaustive, and an image need not satisfy any single factor to be deemed lascivious. Instead, you must determine whether the visual depiction is lascivious based on its overall content. It is for you to decide

> the weight or lack of weight to be given any of these factors.
>
> ....

(Instructions to the Jury, R. 174, Page ID # 2112-2114.)

These are the so-called *Dost* factors, drawn from a 1986 California district court opinion. *See United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986). For decades, however, the Sixth Circuit and others have been employing the *Dost* facts as a "definition" of "lascivious exhibition" and/or as a substitute for this Court's binding precedent regarding the meaning of "lascivious exhibition of the anus, genitals, or pubic area." *See United States v. Rivera*, 546 F.3d 245, 252–53 (2d Cir. 2008); *Salmoran v. Att'y Gen.*, 909 F.3d 73, 80 n.11 (3d Cir. 2018); *United States v. McCall*, 833 F.3d 560, 563 (5th Cir. 2016); *United States v. Hodge*, 805 F.3d 675, 680 (6th Cir. 2015); *United States v. Petroske*, 928 F.3d 767, 773 (8th Cir. 2019); *United States v. Perkins*, 850 F.3d 1109, 1121 (9th Cir. 2017); *United States v. Isabella*, 918 F.3d 816, 831 (10th Cir. 2019).

As detailed by the D.C. Circuit in *Hillie*, *Dost* is inconsistent with this Court's precedent in multiple respects. 39 F.4th at 686-90. First, the fundamental premise of *Dost* is that Congress's 1984 amendment of the definition of "sexually explicit conduct" to substitute the word "lascivious" for "lewd" demonstrated an intention "to broaden the scope of existing 'kiddie porn' laws." *Dost*, 636 F. Supp. at 831. But this Court directly rejected that reasoning in *X-Citement Video*, expressly holding that " '[l]ascivious' is no different in its meaning than 'lewd,' " *X-Citement Video*, 982 F.2d 1285, 1288

(9th Cir. 1992) (internal quotation marks and citations omitted); *X-Citement Video*, 513 U.S. at 78–79 (adopting the reasoning of the Court of Appeals).

Second, because of its erroneous premise that "lascivious" has a broader meaning than "lewd," the *Dost* court completely ignored the holdings of *Miller*, 413 U.S. at 27, and *12 200-Foot Reels of Super 8mm. Film*, 413 U.S. at 130 n.7, that "lewd exhibition of the genitals" refers to "hard core" sexual conduct. Instead, the *Dost* court inexplicably concluded "there are no cases interpreting the word 'lewd' as used in this statute," 636 F. Supp. at 831-32, and crafted its own course.

Third, the *Dost* court's list of factors was further premised on the erroneous conclusion that whether a photo or video depicts "a minor engaged in sexually explicit activity" depends in part on whether the photo or video "is designed to elicit a sexual response in the viewer, albeit perhaps not the 'average viewer,' but perhaps in the pedophile viewer." 636 F. Supp. at 832. The Court expressly rejected this line of reasoning in *Williams*. The Court explained the statute cannot "apply to someone who subjectively believes that an innocuous picture of a child is 'lascivious.' " 553 U.S. at 301. Instead, "[t]he defendant must believe that the picture contains certain material, and that material in fact (and not merely in his estimation) must meet the statutory definition." *Id.*

Writing for the Court in *Williams*, and placing emphasis on the word "explicit," Justice Scalia explained that " '[s]exually *explicit* conduct' connotes actual depiction of the sex act rather than merely the suggestion that it is occurring," 553 U.S. at 297 (emphasis in original), but the *Dost* factors stray too far from this basic teaching,

allowing a depiction that portrays sexually *implicit* conduct in the mind of the viewer to be caught in the snare of a statute that prohibits creating a depiction of sexually *explicit* conduct performed by a minor.

Consistent with *Hillie* and this Court's decisions, the Defense requested that the district court's instruction include the full statutory definition of "sexually explicit conduct" and that it incorporate the meaning this Court has ascribed to the term "lascivious," *i.e.*, a display of the genitals must be performed in a manner that connotes the commission of a sexual act. Specifically, the Defense requested that the instruction include the following:

> The term "sexually explicit conduct" does not include simple nudity or the mere display of the genitals or pubic area.
>
> The term "lascivious" means a patently offensive representation or description of specific hard core sexual conduct. A "lascivious exhibition" must be performed in a lustful manner that connotes the commission of a sexual act.

(Def. Proposed Jury Instructions, R. 146, PageID# 1686-1687.) The district court refused both requests. The district court, therefore, failed to include in its instructions the Supreme Court's own explanation of what "lascivious" means, indeed what it *must* mean in order for such statutory language to avoid constitutional infirmity.

The Sixth Circuit affirmed, ignoring the disconnect with this Court's precedent and justifying the *Dost* factors as "offer[ing] a framework to guide analysis, not

a checklist or substitute for the statutory text." (App. 11a.) The Sixth Circuit thus acknowledged that the *Dost* factors *are not* a substitute for the statutory text, yet nevertheless affirmed the district court's use of them *in lieu of* actually defining "lascivious exhibition" at all. The Sixth Circuit went on to rationalize the *Dost* factors' "utility" as lying "in their ability to assist courts and juries with engaging in the fact-intensive analysis necessary to separate innocent conduct from those depictions that lie at the 'hard core' of child pornography." (App. 11a (quoting *Ferber*, 458 U.S. at 773).) But the Sixth Circuit ignored that the jury is never told what the target even is. Presenting a jury with "factors" they may (or may not) consider in determining whether there was or was intended to be a "lascivious exhibition" is only helpful if the jury is told what a "lascivious exhibition" *is or means*. A list of factors can be helpful illustrations of the types of evidence that may play a role in a determination, but they are not especially helpful if one is not told what it is that one is being called upon to determine in the first place. Without appreciating what it is you are trying to determine at the end of the day, a mere list of factors becomes unmoored from any actual objective.

The Court should grant the Petition, resolve the current circuit split, and set out the manner in which all courts should define and explain the terms "sexually explicit conduct" and "lascivious exhibition" so that these terms are given the meaning and significance established by this Court's precedent.

II. The Court Should Resolve the Circuit Split Regarding What Can, and Cannot, Qualify as a "Notice or Advertisement" under 18 U.S.C. § 2251(d)

With respect to the FaceTime call Mr. Jakits proposed in his text exchange with Jae (but which never took place), the government charged him with *both* (1) two counts of attempting to employ, use, persuade, induce, entice, or coerce a minor to engage in "sexually explicit conduct" for the purpose of producing a visual depiction of that conduct in violation of 18 U.S.C. § 2251(a) (Counts 3 and 4), *and* (2) one count of making, printing, or publishing "any notice or advertisement seeking or offering … participation in" an act of "sexually explicit conduct" by or with a minor for the purpose of producing a visual depiction of that conduct in violation of 18 U.S.C. § 2251(d)(1)(B) (Count 7).

In addition to the issue as to the proper scope of "sexually explicit conduct" addressed previously in Section I, Count 7's notice or advertisement charge raises another issue on which there is a circuit split warranting the Court's review: whether a private, one-to-one communication is a "notice or advertisement" within the meaning of § 2251(d)(1)(B).

In *United States v. Caniff*, 955 F.3d 1183 (11th Cir. 2020), the Eleventh Circuit held that a private, person-to-person text message requesting sexually explicit photos was neither a "notice" nor an "advertisement" within the meaning of § 2251(d)(1)(B). *Id.* at 1188-191. The Eleventh Circuit relied on the ordinary meaning of these terms as reflected in dictionary definitions. Finding contrasting dictionary definitions for the word "notice" (some clearly indicating a public aspect to the communication with

others arguably suggesting a broader meaning), the Eleventh Circuit found either meaning plausible. *Id.* at 1187-89. Looking further at the statutory context though, the Eleventh Circuit detailed how the statute's verb phrasings to make, print, or publish the "notice or advertisement" also supported an understanding that making, printing, or publishing a notice entails placing an announcement or request to the public. *Id.* at 1189-91. The Eleventh Circuit held that, at the very least, the phrase "make[ ] … any notice" was ambiguous and the rule of lenity required that the doubt be resolved in the defendant's favor. *Id.* at 1191-92.

The Sixth Circuit and Ninth Circuit, however, have reached contrary conclusions. *United States v. Sammons*, 55 F.4th 1062 (6th Cir. 2022); *United States v. Cox*, 963 F.3d 915 (9th Cir. 2020). In this case, the Sixth Circuit found itself bound by its previous analysis in *Sammons*. (App. 21a-22a.) In *Sammons*, the Sixth Circuit held that one-to-one communications exchanged via an internet messaging application flowing from an online social media post fell within the scope of a "notice" under § 2251(d). 963 F.3d at 1066-72.

The Sixth Circuit's expansive interpretation and application of § 2251(d)(1)'s prohibition of making, printing, or publishing any notice or advertisement runs counter to this Court's precedent when it has been called upon to interpret similar terms. For example, in *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995), the Court interpreted the phrase "any … communication" to refer only to public communications, in part due to the adjacent inclusion of the terms "*notice*, circular, [and] *advertisement*" making it "apparent that the list refer[red] to documents of *wide dissemination*." *Id.* at 573-76 (emphasis added).

Further, if direct person-to-person communications via text message, email, or other private messaging applications constitute a "notice or advertisement" under § 2251(d)(1), then there is no distinction to be drawn between private communication in those forms versus any other form, including telephone calls or in person conversations, and § 2251(d)(1) becomes entirely redundant of and subsumed within § 2251(a)'s prohibition of, *inter alia*, persuading, inducing, enticing, or coercing a minor to engage in "sexually explicit conduct." It is the requirement of making, printing, or publishing a notice or advertisement that makes § 2251(d)(1) a distinct offense from the offense set out in § 2251(a). *United States v. Lee*, 29 F.4th 665, 673 (11th Cir. 2022) ("§ 2251(d) requires proof that a defendant "made, printed or published any notice or advertisement," whereas § 2251(a) does not."). But if "making" a "notice" extends to any type of communication, even if private and exclusively between two individuals, as the Sixth Circuit has held, then there would be no actual difference between the elements of the offenses (just the words used to set them out, which would be interpreted as synonymous).

"It is a 'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). For this very reason, the Court recently rejected an expansive interpretation of 18 U.S.C. § 1512(c)(2) because doing so would "largely obviate the need for" other obstruction-related statutes and "render superfluous the careful delineation of different types" of conduct set out by Congress. *Fischer*, 603 U.S. at 493-94.

Here, the government's position would render § 2251(d)(1)(B) redundant of § 2251(a), and entirely superfluous.

For these reasons, the Court should grant the petition and clarify the proper interpretation of "makes, prints, or publishes … any notice or advertisement" in 18 U.S.C. § 2251(d)(1).

III. The Court Should Resolve the Circuit Split Regarding the Meaning of "Sexual Activity" in 18 U.S.C. § 2422(b)

Counts 5 and 6 charged Mr. Jakits with attempting to violate 18 U.S.C. § 2422(b), which prohibits the knowing persuasion, inducement, enticement, or coercion of a minor "to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense." The government based these charges on Mr. Jakits' proposal of a nude FaceTime call with Jae and Nik. The superseding indictment alleged that this call, if it had occurred, would have violated Ohio Revised Code Section 2907.323, which makes it illegal to "create, direct, produce, or transfer any material or performance that shows [a] minor in a state of nudity[.]"

An essential element of these offenses was whether the proposed nude FaceTime call constituted "sexual activity" within the meaning of the statute. The district court, however, did not provide the jury with *any* definition of "sexual activity," strongly implied in its instructions that the alleged conduct *was* "sexual activity" in both fact and law, and refused to adhere to the definition of "sexual act" set forth in 18 U.S.C. § 2246(2) or the definition of "sexual activity" under the very Ohio law on which the government based the charge.

In relevant part, the district court's Jury Instruction No. 22 stated as follows:

> For you to find the defendant guilty of attempting to commit the crime of coercing or enticing a minor to engage in unlawful sexual activity, you must be convinced that the government has proved the following elements beyond a reasonable doubt:
>
> > First: That the defendant knowingly attempted to persuade, induce, entice, or coerce an individual under the age of 18 to engage in sexual activity
> >
> > Second: That the defendant used any facility or means of interstate or foreign commerce.
> >
> > Third: That the defendant believed that such an individual was less than 18 years old.
> >
> > Fourth: That if sexual activity had occurred, defendant could have been charged with a criminal offense under the laws of Ohio.
>
> Under Ohio law, it is illegal to posses [sic] or view any material or performance that shows a minor who is not the person's child in a state of nudity or to create, direct, produce, or transfer any material or performance that shows the minor in a state of nudity, unless both

> (1) the material or performance is for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose; and (2) the minor's parents, guardian, or custodian consents in writing.
>
> ....

(Instructions to the Jury, R. 174, PageID# 2120-2122.)

The district court's jury instruction thus included the terms "sexual activity" and "unlawful sexual activity," yet did not define either of them. Further, after reciting the elements of the offense using those terms, the district court directly proceeded to state that "[u]nder Ohio law, it is illegal to … view any material or preference that shows a minor … in a state of nudity" absent certain exceptions. The clear and obvious implication of the district court's instruction thus was that appearing nude in a video conference *was* "unlawful sexual activity." But that is not the case under either federal law or the express terms of the Ohio law on which the charges were premised.

The federal criminal code does directly define the term "sexual activity." However, it does define "sexual act," providing a four-pronged definition, each component of which expressly includes "contact," "penetration," or "intentional touching" of the genitalia of another person. 18 U.S.C. § 2246(2). In *United States v. Taylor*, 640 F.3d 255 (7th Cir. 2011) (Posner, J.), the Seventh Circuit held that "sexual activity" and "sexual act" are synonymous as used in Title 18 and, therefore, § 2246(2)(D)'s definition of "sexual act" also serves to define "sexual activity" as used in § 2422(b) and elsewhere. *Id.* at 259-60. Therefore, because "the defendant neither made nor, as far as appears,

attempted or intended physical contact with the victim," the Seventh Circuit reversed Mr. Taylor's conviction under § 2422(b) based upon his having masturbated in front of a webcam and invited an undercover officer whom he believed to be a 13-year-old girl to do the same in alleged violation of certain Indiana statutes. *See id.* at 257-60.

As the Seventh Circuit noted in *Taylor*, "[o]ne possible inference from the absence of a statutory definition of 'sexual activity' is that the members of Congress (those who thought about the matter, at any rate) considered the terms 'sexual act' and 'sexual activity' interchangeable." 640 F.3d at 258. Further, as detailed in *Taylor*, the legislative history § 2422 confirms that Congress, in fact, understood "sexual act" and "sexual activity" to be synonymous and requiring physical contact. *Id.* Indeed, the Sentencing Guidelines provision referenced to § 2422(b)) itself expressly incorporates Chapter 109A's definitions of both "sexual act" and "sexual contact." U.S. Sentencing Guidelines § 2G2.3, Application Note 1.

All of this is consistent with the understanding and use of the term "sexual activity" in the legal context. *Black's Law Dictionary* has an entry for "sexual activity" which states "See SEXUAL RELATIONS." *Black's Law Dictionary* 1895 (11th ed. 2019). *Black's* then defines "sexual relations" as "sexual intercourse" or "physical sexual activity" involving "the touching of another's breast, vagina, penis, or anus." *Id.* at 1909. Further, Ohio law, on which Counts 5 and 6 are based, itself defines "sexual activity" to "mean[ ] sexual conduct or sexual contact, or both," Ohio Rev. Code § 2907.01(C), both of which are in turn expressly defined to require physical contact. Ohio Rev. Code § 2907.01(A) & (B).

In affirming Mr. Jakits' convictions under Counts 5 and 6, however, the Sixth Circuit disagreed with Judge Posner's lengthy and detailed analysis in *Taylor* and ignored the *Black's* definitions and the very Ohio law on which the charge was premised. Instead, the Sixth Circuit summarily found 18 U.S.C. § 2427 dispositive of the matter. (App. 18a.) At the time of the charged offenses and the trial in this matter, § 2427 stated that "[i]n this chapter, the term 'sexual activity for which any person can be charged with a criminal offense' includes the production of child pornography, as defined in section 2256(8)." 18 U.S.C. § 2427, Pub. L. 105-314, Title I, § 105(a), Oct. 30, 1998, 112 Stat. 2977. The Sixth Circuit reasoned that "since 18 U.S.C. § 2427 stipulates that 'sexual activity' is inclusive of the production of child pornography, and the production of child pornography does not require interpersonal physical contact, restricting the meaning of 18 U.S.C. § 2422(b) to sexual activity requiring interpersonal physical contact would contravene the express statutory text." (App. 19a (citation omitted).)

The Sixth Circuit's analysis got it exactly backwards. If Congress had understood the term "sexual activity" to be as broad as the government contends or if Congress did not understand the term "sexual activity" to be synonymous with "sexual act" as defined in § 2246,[2]

2. Which the legislative history shows Congress clearly did. As the Seventh Circuit summarized, "the committee report uses the terms 'sexual activity' and 'sexual act' interchangeably, indicating that the terms have the same meaning—that the purpose of the wording change from 'sexual act' to 'sexual activity' was merely to achieve semantic uniformity of substantively identical prohibitions, rather than to broaden the offense in (b)." *Taylor*, 640 F.3d at 258.

then there would be no need for Congress to pass a statute specially providing that the production of child pornography would count as "sexual activity" for purposes of § 2422(b). In fact, the legislative history makes clear that Congress passed § 2427 precisely because it believed and understood that such activity ***was not*** "sexual activity" under existing law. As the House Report explained:

> The production of child pornography *is not* encompassed within the statutes' definition of prohibited sexual activity, however. As a result, individuals who travel or use facilities of interstate commerce to persuade minors to engage in the production of child pornography have not been subject to federal prosecution. The addition of "production of child pornography" would allow federal prosecution in these circumstances.

H.R. Rep. No. 105-557, at 26, *reprinted in* 1998 U.S.C.C.A.N. 678, 694 (emphasis added). That Congress had to pass another statute to separately and expressly include the production of child pornography within the scope of "sexual activity" demonstrates that, without such express legislation, production of child pornography *would not* so qualify. And that is plainly because Congress understood "sexual activity" to be synonymous with "sexual act," and that both required interpersonal contact which the production of child pornography did not.

Accordingly, the basis of the Sixth Circuit's rejection of *Taylor*, the legislative history surrounding the language in §§ 2422(b) and 2427, *Black's Law Dictionary*, and the terms of the very Ohio law on which Counts 5 and 6 were

based was clear error as it gave an express statutory exception a meaning that *completely obviated the need for the exception to exist at all.* Indeed, the Sixth Circuit's approach is further undermined by the fact that, in December 2023, Congress *amended* § 2427 to expressly remove the requirement for interpersonal contact. *See* Pub. L. 118-31, Div. E, Title LI, § 5102(e), Dec. 22, 2023, 137 Stat. 935.

The Fourth and Eleventh Circuits also have disagreed with the Seventh Circuit in *Taylor* and applied a broad definition of the term "sexual activity." *United States v. Fugit*, 703 F.3d 248 (4th Cir. 2012); *United States v. Dominguez*, 997 F.3d 1121 (11th Cir. 2021). Neither case relied on any statute or dictionary defining the specific term "sexual activity." Instead, the central component of the analysis in both cases was to look to the separate definitions of the component words "sexual" and "activity" drawn from dictionaries of common usage, which of course are very general and broad. The courts then combined the broad, common connotations of both words to produce a composite term "sexual activity" that the courts then concluded must be interpreted as broadly in scope. *See Dominguez*, 997 F.3d at 1124-25; *Fugit*, 703 F.3d at 254-55. In doing so, both cases ignored (*Fugit*) or specifically disregarded (*Dominguez*) much narrower legal dictionary definitions of the terms "sexual activity" and "sexual relations." *Fugit* ignores the *Black's Law Dictionary* definition altogether, while *Dominguez* dismisses it in a footnote because the court simply disagreed with Mr. Garner and his team of editors that "sexual relations" is a term synonymous with "sexual activity." 997 F.3d at 1124 n.1.

Further, both cases involve facts and procedural situations that make them particularly poor vehicles for analyzing the meaning of "sexual activity." *Fugit* involved an actual innocence claim asserted in a habeas petition where the facts showed action directed toward physical contact between the defendant and one or both of the 10- and 11-year old girls with whom he communicated in online chats and phone calls. *See* 703 F.3d at 251. In *Dominguez*, the issue was raised by the application of U.S.S.G. § 2G2.2(b)(5)'s five-level enhancement where a defendant has engaged "in a pattern of activity involving the sexual abuse or exploitation of a minor" based upon uncharged conduct. 997 F.3d at 1123. The Eleventh Circuit vacated application of the enhancement and, on remand, the government argued for it instead based upon 18 U.S.C. § 2427, thus making the scope of the term "sexual activity" beside the point. The *Fugit* and *Dominguez* cases thus would produce the same outcome even if "sexual activity" were defined consistent with § 2246(2)(D).

Taylor, by contrast, turned specifically on whether a conviction under § 2422 could stand where the evidence did not show that an interpersonal conduct ever occurred or was sought, and the interactions were entirely online. Detailing why the structure of the statutes and their legislative history make clear that "sexual act" and "sexual activity" are synonymous, Judge Posner's analysis in *Taylor* is far more complete, thorough, and persuasive than the cursory and ultimately unnecessary analysis in *Fugit* and *Dominguez*.

The Court should grant the petition and vacate the convictions on Counts 5 and 6.

IV. The Court Should Review Whether the District Court's Exclusion of Evidence Under Rule 412 Violated Mr. Jakits' Fifth and Sixth Amendment Rights

The district court broadly precluded the Defense from introducing evidence of Jae and Ashley M.'s discussions and plan to seek money from Mr. Jakits in exchange for naked pictures (whether of Jae or someone else), to use as blackmail, and/or to get Ashley M. credit against her criminal sentence; evidence that Jae's mother and grandmother had full knowledge of, and may well have participated in, her efforts to obtain money from Mr. Jakits; and Ashley M., Janet S., Jae and Nik's broader efforts to manipulate or "work" men Ashley M. knew to obtain money. This evidence was necessary to the jury's evaluation of the essential element of Mr. Jakits' intent in his interactions with Jae.

The trial testimony of Jae, Nik and Mr. Jakits was broadly consistent that Mr. Jakits never asked Jae or Nik to engage in or simulate any sexual act or that they do anything beyond sending naked pictures and appearing on a FaceTime call naked. Further, Jae and Nik both testified that they never understood Mr. Jakits to be requesting anything more than that. To convict on the attempt charges—Counts 2, 3, 4, 5, and 6—the jury thus had to conclude that Mr. Jakits *specifically intended* to commit the crimes of using a minor to engage in "sexually explicit conduct" for the purpose of producing a visual depiction (Counts 2, 3 and 4) and unlawful "sexual activity (Counts 5 and 6), *and* that the evidence "strongly confirm[ed] that he intended" ultimately to do so. Further, to convict on Count 7, presupposing it can be applied to these facts, the

jury would have had to conclude that, despite not directly saying so in his text messages to Jae, Mr. Jakits actually sought, by those messages, Jae and/or Nik's participation in an act of "sexually explicit conduct" for the purpose of producing a visual depiction thereof.

Because there was no direct evidence (either in the form of a text message, email, or statement to which a witness testified) that Mr. Jakits requested Jae or Nik engage in "sexually explicit conduct" or "sexual activity," any conviction necessarily had to be based upon an inference, through circumstantial evidence, that, despite not saying or requesting as much, Mr. Jakits, in fact, specifically intended to cause Jae or Nik to engage in "sexually explicit conduct" or "sexual activity." While the government may rely on circumstantial evidence, even circumstantial evidence alone, where it attempts to do so all evidence bearing upon the question of what was meant or intended must be available to the jury for it to determine what inferences, if any, are warranted. *See United States v. Parkes*, 668 F.3d 295, 301-07 (6th Cir. 2012) (reversing conviction where district court improperly excluded defense evidence and government's theory rested upon a "pathway of inferences"). Here, the district court's rulings denied the jury evidence critical to its understanding of what happened in December 2018 and January 2019, and what inferences could reasonably be made from what Mr. Jakits said and did not say.

"[B]ackground or res gestae evidence consists of those other acts that are inextricably intertwined with the charged offense or those acts, the telling of which is necessary to complete the story of the charged offense." *United States v. Hardy*, 228 F.3d 745, 748 (6th Cir. 2000).

"Typically, such evidence is a prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense, forms an integral part of a witness's testimony, or completes the story of the charged offense." *Id.*

Jae, Nik, and their various family members' actions, statements, and communications with, regarding, directed at, or otherwise relating to Mr. Jakits and/or the images sent to him or sought, collected, and/or considered to be sent to him are all a prelude to the alleged offense, integral parts of the witness's testimony, and absolutely necessary to tell the story of the events that gave rise to the charged conduct. The witness statements made clear that the episode with the neighbor girl was conceived by Ashley M. as a means of obtaining something to provide specifically *to Mr. Jakits*, and it took place just before the events on which the charges against Mr. Jakits were based. This is not some long past and separate incident; it was specifically undertaken with Mr. Jakits in mind. This evidence was integral to the witness testimony by Jae and Nik, and would have been to testimony by Ashley M. and Janet S. (the girls' grandmother) as well. The story presented at trial was not even remotely complete without it.

"[N]ot all evidence implicating a victim's past sexual activity falls within Rule 412(a)." *United States v. Kettles*, 970 F.3d 637, 642 (6th Cir. 2020). Rule 412 "excludes only two narrow categories of evidence: (1) 'evidence offered to prove that a victim engaged in other sexual behavior,' and (2) 'evidence offered to prove a victim's sexual predisposition.'" *Id.* at 643 (quoting Fed. R. Evid. 412(a)). The Defense would have presented evidence that

other men also were contemplated as potential targets from whom Jae and/or Nik could get money by sending them pictures as part of the exact same scheme at the same time as Mr. Jakits was targeted not as evidence of "other sexual behavior" (it is actually the same behavior, at the same time, just viewed in full context) or "sexual predisposition," but as evidence of Jae and Nik's actual motivation and purpose, the credibility of their versions of the communications with Defendant, and their motives in testifying and in deleting evidence. *See United States v. Willoughby*, 742 F.3d 229, 234 (6th Cir. 2014) (holding that "by its terms, [] Rule [412] does not apply" to exclude evidence of false accusations of sexual abuse because the testimony was not offered to prove sexual predisposition of witness), *overruled on other grounds by Johnson v. United States*, 576 U.S. 591 (2015); *United States v. Smith*, No. CR 19-324 (BAH), 2020 WL 5995100, at *23 (D.D.C. Oct. 9, 2020) (recognizing that in other potential uses of evidence involving sexually explicit material, "the evidence is not 'offered to prove' [witness's] sexual behavior or predisposition" and are not barred by Rule 412); *United States v. Davis*, No. CR 13-589-CAS, 2015 WL 519455, at *7 (C.D. Cal. Feb. 5, 2015) (denying government motion in limine and recognizing defendant's "right to explore key witness' possible biases and motives to testify and lie"). "[A] defendant has the right to explore fully each potential motive or source of bias" of a witness. *Sussman v. Jenkins*, 636 F.3d 329, 356 (7th Cir. 2011).

Additionally, Rule 412 has three enumerated exceptions in criminal cases. Fed. R. Evid. 412(b)(1). The third exception states that a court may admit any "evidence whose exclusion would violate the defendant's constitutional rights." Fed. R. Evid. 412(b)(1)(C).

Excluding the broad categories of evidence the district court excluded violated defendant's Constitutional rights.

The Sixth Amendment to the Constitution guarantees the right of a criminal defendant "to be confronted with the witnesses against him." U.S. Const. Amend. VI; *see also Davis v. Alaska*, 415 U.S. 308, 315 (1974). "Our cases construing the (confrontation) clause hold that a primary interest secured by it is the right of cross-examination." *Davis*, at 315 (alteration in original); *see also Sussman*, 636 F.3d at 361 (exclusion of evidence of minor's prior allegation of sexual abuse would have violated defendant's rights under the Confrontation Clause). "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis*, 415 U.S. at 316.

Additionally, the Fifth and Sixth Amendments together provide defendants with the right to present a complete defense. *Smith*, 2020 WL 5995100 at *21 ("Among a defendant's rights is the Constitution's guarantee of 'a meaningful opportunity to present a complete defense.'"); ; *United States v. Parrish*, No. 2:16-CR-243, 2017 WL 1410821, at *4 (S.D. Ohio Apr. 19, 2017) ("The United States Constitution 'guarantees criminal defendants a meaningful opportunity to present a complete defense.'"). Exclusion of evidence under Rule 412 can violate defendant's right to present a defense. *See, e.g.*, *Lewis v. Wilkinson*, 307 F.3d 413, 416 (6th Cir. 2002) (exclusion of victim's diary under Rule 412 violated defendant's constitutional right to present a defense).

The district court precluded the Defense from presenting witnesses whose testimony was central to the

defense theory that Mr. Jakits had not intend to overcome the will of a minor and that he did not intend to overcome the will of Jae or Nik, but that the teens' mother concocted the plan to take advantage of Mr. Jakits. The excluded evidence was necessary to present a complete defense. As the Supreme Court has stated, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

Additionally, as discussed above, there was significant information in the jail calls that would have allowed the Defense to cross-examine Jae and Nik which would have provided the jury information calling into question the validity of the charges against him. It would also have cast considerable doubt on the narrative the government presented at trial. Mr. Jakits should have been permitted to provide an alternative explanation for the prosecution's evidence.

While the district court prevented the Defense from offering evidence of Jae and her mother's plan to send Mr. Jakits pictures to get money, blackmail material, and/or leniency for Ashley M., including their own targeting of a neighbor girl to obtain pictures to send to Mr. Jakits, the government was allowed to elicit testimony from Jae broadly declaring she had never done anything like this before and claiming she did not even know what kind of pictures to take or send. The government thus posited Jae as a wholly unaware and inexperienced participant in her communications with Mr. Jakits when, in fact, she and her mother had specifically targeted Mr. Jakits for exactly this kind of thing and affirmatively sought to leverage the situation to their advantage.

The government thus took extraordinary advantage of the one-sided playing field the district court provided it, directly painting for the jury a narrative of a naïve girl who did not even know what naked pictures should look like or how they should be taken. Yet the Defense was barred from introducing the evidence showing this was not something that was entirely driven by Mr. Jakits, but rather an idea that had been formulated as much as *a week before* Jae ever even communicated with Mr. Jakits.

At the very least, Mr. Jakits should have trial in which *all* of the evidence is considered by the jury before it makes any inferences regarding his intent or the intended meaning of his words. The Court should gran the Petition for this reason as well.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Dated: May 21, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED FEBRUARY 20, 2025

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-3870
File Name: 25a0036p.06

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BERNHARD JAKITS,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Ohio at Columbus.
No. 2:22-cr-00194-1—Edmund A. Sargus, Jr., District Judge.

Before: COLE, MATHIS, and BLOOMEKATZ, Circuit Judges.

Argued: October 31, 2024

Decided and Filed: February 20, 2025

OPINION

COLE, Circuit Judge. A jury convicted Bernhard Jakits of eight counts of child-exploitation-related crimes.

On appeal, Jakits argues that there is insufficient evidence to support the convictions on all eight counts, that the district court incorrectly instructed the jury on elements of the charged offenses, and that the district court excluded evidence in violation of his constitutional rights. We affirm his convictions on all eight counts.

I.

In late 2018, Bernhard Jakits began corresponding online with "Ashley" through a prostitution website. At the time, Jakits lived in Maryland, and Ashley lived in Martins Ferry, Ohio. Pregnant and addicted to drugs, Ashley performed sex acts for Jakits on live videocalls for money.

Ashley has two teenage daughters: fifteen-year-old "Jae" and thirteen-year-old "Nik."[1] In late December 2018, Ashley reported to a local jail and began a period of incarceration. She left her phone at the apartment where Jae, Nik, and their grandmother were living. Jae knew that Ashley engaged in sex work to make money. She also knew that Jakits was one of the men with whom her mother corresponded, though she knew him only under the moniker in her mother's phone: "Mr. Wow."

In early January 2019, while her mother was in jail, Jae heard her mother's phone ring. Jae picked up the phone

1. "Jae" and "Nik" were nicknames used at trial and are now used on appeal to protect the minors' identities. Additionally, the stated ages were the minors' ages at the time of the events at issue.

and found a message from "Mr. Wow." Jae responded, letting him know that she was Ashley's daughter and that her mother was in jail. Jakits and Jae began texting.

According to Jae, Jakits eventually asked whether Jae "wanted to make some extra cash" and offered her $500 for nude pictures. (Sealed Trial Tr., R. 195, PageID 2616–17.) At first, Jae sent him photos she had previously taken of herself wearing underwear, but Jakits was not satisfied. So, Jae took and sent him nude photographs. Jakits requested various poses: a photo of Jae with her school transcript, to prove her age and her identity, and a photo of her "ben[t] over something." (*Id.* at PageID 2642–44, 2653.) Jae sent Jakits a photo of her posed "bent over a bed." (*Id.* at 2653.) Jakits sent the money to Jae.

On January 14, Jakits texted Jae and asked whether Nik "want[ed] to earn $500." (Government Ex. 2B, R. 226, PageID 4225.) Between increasingly insistent texts that Jae solicit her sister, Jakits informed Jae that he had sent Ashley "more money to make her stay [in jail] a little more pleasant." (*Id.* at PageID 4228, 4231.) Jakits said he "was just trying to help make [Jae's] life a little better" and told Jae that once Ashley was released, he was "going to help [Ashley] to get her own nice place" and fly them out "for a holiday to [his] oceanfront California home." (*Id.* at PageID 4229.) With Jae slow to respond, Jakits increased his offer: $1,000 for Jae and $500 for Nik. Both girls agreed.

First, Jakits asked for a photograph of Nik. Jae sent him clothed photos. After asking Jae to promise that the

exchange remain their "secret," Jakits requested "one naked picture" of Nik. (*Id.* at PageID 4236.) Nik took the photo, and Jae sent it to Jakits. Jakits asked that Nik "also show her school transcript." When Jae told him that Nik did not have a transcript yet, Jakits asked for a photo of Nik holding something else with her name on it.

After receiving the photos, Jakits requested a live videocall, where he said he would ask Nik to "model and do certain things" and to take "a couple of pictures that [he] want[ed] her to take of how [he] want[ed] it." (*Id.* at PageID 4240.) He promised it would be "[n]othing nasty." (*Id.*) When Jae asked him instead to send the desired poses over text, Jakits said he did not want "to write/text it." (*Id.* at PageID 4243–44.) And when he failed to persuade Jae by reminding her of the value of his offer, he reiterated that he wanted "[n]othing nasty" and requested a "close-up of both of [their] bottoms." (*Id.* at PageID 4250.) Jae expressed the girls' discomfort and stopped responding. Still, he tried to change her mind: he offered $1,000 for each sister, a car, a scholarship, then $2,000 for each sister, and two round trip airline tickets to Jacksonville plus $1,000 of spending money. But Jae never responded.

Nik informed Ashley on January 10, over a recorded jail telephone call, that Jakits had asked for a "bra" or "underwear picture" from Jae and Nik. (Sealed Jail Telephone Calls Tr., R. 152, PageID 1862–64.) Ashley told Nik to "promise" to "never feel that tempted" by the money. (*Id.* at PageID 1864.) Later, Ashley raised her concerns with the local sheriff's office. Law enforcement uncovered the communications between Jakits and Jae

and photographs of Jae and Nik, including several nude and semi-nude photos. They also recovered images and videos of Ashley.

The investigation also revealed text messages between Jakits and another man. Jakits had sent the man several photos of Jae, including a photo of her genitals, though he told the man that Jae was eighteen. In the texts, both men discussed Jae in sexually suggestive terms. For example, after sending the man two photos of Jae, Jakits texted, "Money doesn't buy happiness, but it can and will buy this." (Government Ex. 6B, R. 226, PageID 4266–67.)

A grand jury indicted Jakits on eight counts on October 11, 2022. The original indictment was superseded on January 17, 2023, by a nine-count indictment. Counts One (regarding Jae) and Two (regarding Nik) alleged Jakits induced the minors to engage in sexually explicit conduct for the purpose of producing digital image files that depicted the lascivious exhibition of the minors' genitals and pubic area, in violation of 18 U.S.C. §§ 2251(a) and (e). Counts Three (regarding Jae) and Four (regarding Nik) alleged Jakits attempted to induce the minors to engage in sexually explicit conduct during a live videocall for the purpose of producing a visual depiction of such conduct, in violation of 18 U.S.C. §§ 2251(a) and (e). Counts Five (regarding Jae) and Six (regarding Nik) alleged Jakits attempted to coerce or entice the minors to engage in sexual activity using a means or facility of interstate commerce, in violation of 18 U.S.C. § 2422(b). Count Seven alleged Jakits made an interstate notice seeking child pornography by sending statements via cell phone and

the internet to Jae seeking such content, in violation of 18 U.S.C. §§ 2251(d)(1)(B) and (e). Count Eight alleged Jakits received child pornography in the form of digital image files depicting Jae engaged in the lascivious exhibition of the genitals and pubic area, in violation of 18 U.S.C. §§ 2252(a)(2) and (b)(1). Finally, Count Nine alleged that Jakits knowingly received, via an interactive computer service, an obscene live-streamed visual depiction of Ashley, in violation of 18 U.S.C. § 1462(a).

Before trial, the district court granted Jakits's motion to sever Count Nine from the other charges. Relevant to this appeal, pursuant to Federal Rules of Evidence 403 and 404(b), the district court also granted the government's motion to exclude evidence or reference to any minors other than Jae and Nik, relating specifically to evidence that another teenager may have taken sexually suggestive images of herself to obtain money from Jakits on behalf of Ashley or Jae. The district court also granted a separate government motion to exclude, pursuant to Federal Rule of Evidence 412, any evidence related to Jae's and Nik's sexual activities or predispositions involving any individual other than Jakits, relating primarily to certain comments in Ashley's recorded jail calls about Nik and Jae receiving money from other men. Jakits opposed both motions, arguing that excluding such evidence—which he sought to use to show that he was the target of a wider scheme by Ashley and the minors to obtain money from and blackmail men—would violate his rights under the Sixth Amendment's Confrontation Clause.

A jury trial on the first eight counts proceeded. The jury convicted Jakits of all eight counts apart from

Count Two, finding him guilty only of Count Two's lesser-included attempt charge. Jakits moved for a judgment of acquittal. The district court denied the motion and sentenced Jakits to a 216-month prison term.

On appeal, as at trial, Jakits does not dispute his communications with Jae, that he received the photos of Jae and Nik, or that he requested a live videocall with Jae and Nik. He maintains, however, that his conduct was legal. And he argues that the district court improperly instructed the jury about elements of the offenses and improperly excluded evidence. He asks this court to reverse the convictions on all eight counts and direct the district court to enter a judgment of acquittal or, in the alternative, remand for a new trial.

II.

We review challenges to the sufficiency of the evidence de novo. *United States v. Farrad*, 895 F.3d 859, 871 (6th Cir. 2018). "To test the sufficiency of the evidence, we 'must determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Crump*, 65 F.4th 287, 294 (6th Cir. 2023) (quoting *United States v. Washington*, 702 F.3d 886, 891 (6th Cir. 2012)). In doing so, we view the evidence in the light most favorable to the government and do not "'weigh the evidence, assess the credibility of the witnesses, or substitute our judgment for that of the jury.'" *United States v. Hendricks*, 950 F.3d 348, 352 (6th Cir. 2020) (quoting *United States v. Wright*, 16 F.3d 1429, 1440 (6th Cir. 1994)). Defendants challenging a jury

verdict thus face an "uphill climb," as we must affirm "if any rational juror could have voted to convict." *United States v. Latimer*, 16 F.4th 222, 225 (6th Cir. 2021).

Jakits argues that insufficient evidence supports all eight counts, contending that (A) the images and video he received and sought from the victims did not depict the minors engaging in "sexually explicit conduct" in violation of 18 U.S.C. §§ 2251(a) and (e); (B) he did not attempt to have the minors engage in "sexual activity" in the requested live videocall, in violation of 18 U.S.C. § 2242(b); and (C) his text messages to Jae did not qualify as notices seeking child pornography in violation of 18 U.S.C. § 2251(d).

A.

To obtain a conviction under 18 U.S.C. § 2251(a), the government must show that, in or affecting interstate commerce, the defendant "employed, used, persuaded, induced, enticed, or coerced any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct[.]" 18 U.S.C. § 2251(a) (verb tense altered). Section 2251(e) criminalizes the violation of or attempted violation of § 2251(a). The statutory definition of "sexually explicit conduct" is actual or simulated "(i) sexual intercourse []; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the anus, genitals, or pubic area []." 18 U.S.C. § 2256(2)(A). Only the final category is at issue here. A visual depiction of a minor engaged in the lascivious exhibition of the genitals or pubic area also meets the definition of child

pornography, and the receipt of such a depiction supports a conviction for receipt of child pornography under 18 U.S.C. §§ 2252(a)(2) and (b)(1). *Id.* § 2256(8) (defining "child pornography" as "any visual depiction" of a minor engaging in "sexually explicit conduct").

The statute does not define the term "lascivious." We have, therefore, adopted a six-factor test from *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986) as "a rubric for analyzing whether a particular image is lascivious." *United States v. Hodge*, 805 F.3d 675, 680 (6th Cir. 2015); *see also United States v. Daniels*, 653 F.3d 399, 407 (6th Cir. 2011).

The *Dost* factors consider whether (1) "the focal point of the visual depiction is on the child's genitalia or pubic area"; (2) "the setting of the visual depiction is sexually suggestive"; (3) "the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child"; (4) "the child is fully or partially clothed, or nude"; (5) "the visual depiction suggests sexual coyness or a willingness to engage in sexual activity"; or (6) "the visual depiction is intended or designed to elicit a sexual response in the viewer." *Daniels*, 653 F.3d at 407 (internal citation and quotation marks omitted). To assess whether a visual depiction is intended or designed to elicit a sexual response pursuant to the sixth *Dost* factor, we also consider "the context in which the images were taken, but limit[] the consideration of contextual evidence to the circumstances directly related to the taking of the images." *United States v. Brown*, 579 F.3d 672, 683 (6th Cir. 2009). Relevant contextual factors include "evidence

about (1) where, when, and under what circumstances the photographs were taken, (2) the presence of other images of the same victim(s) taken at or around the same time, and (3) any statements a defendant made about the images." *Id.* at 683–84.

Before reaching the depictions at issue here, we address Jakits's contention that the *Dost* factors are inconsistent with the Supreme Court's line of obscenity cases, including *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982), *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994), and *United States v. Williams*, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008). Those cases examined statutory provisions like those at issue here to ensure they did not inadvertently capture speech protected by the First Amendment. *See, e.g.*, *Williams*, 553 U.S. at 296–97, 307 (holding that 18 U.S.C. § 2252A(a)(3)(B) is not overbroad and discussing "sexually explicit conduct" in the context of "simulated sexual intercourse"). Jakits argues that these cases should persuade us to follow the D.C. Circuit in rejecting the *Dost* factors and construing "lascivious exhibition" to require a display of a minor's "anus, genitalia, or pubic area in a lustful manner that connotes the commission of a sexual act." *See United States v. Hillie*, 39 F.4th 674, 686, 457 U.S. App. D.C. 333 (D.C. Cir. 2022).

The D.C. Circuit's rejection of the *Dost* factors in *Hillie*, however, is incompatible with our precedent expressly adopting them. *See Hodge*, 805 F.3d at 680;

Daniels, 653 F.3d at 407; *Brown*, 579 F.3d at 680. Other circuits, too, have declined to follow *Hillie*. *See, e.g., United States v. Donoho*, 76 F.4th 588, 599–600 (7th Cir. 2023); *United States v. Boam*, 69 F.4th 601, 613 (9th Cir. 2023); *United States v. McCoy*, 108 F.4th 639, 643–44 (8th Cir. 2024) (en banc); *United States v. Sanders*, 107 F.4th 234, 263–64 (4th Cir. 2024).

We are unpersuaded by *Hillie*'s reasoning that application of the *Dost* factors is incompatible with Supreme Court precedent. *See Donoho*, 76 F.4th at 600. The *Dost* factors offer a framework to guide analysis, not a checklist or substitute for the statutory text. Indeed, we have noted that the *Dost* factors are not "exhaustive" and that "an image need not satisfy every factor to be deemed lascivious." *Brown*, 579 F.3d at 680 (internal citations and quotation marks omitted); *United States v. Sweeney*, 711 F. App'x 263, 268 (6th Cir. 2017). The factors' utility instead lies in their ability to assist courts and juries with engaging in the fact-intensive analysis necessary to separate innocent conduct from those depictions that lie at the "hard core" of child pornography. *See Ferber*, 458 U.S. at 773. This is consistent with *Miller* and its progeny.

Declining Jakits's invitation to disturb our settled precedent, we therefore assess the visual depictions or requested visual depictions underlying Jakits's convictions in light of the *Dost* factors.

Counts One and Eight. Based on our review of the images supporting Jakits's convictions on Counts One and Eight, a rational juror could find that several of the images depict the "lascivious exhibition" of Jae's genitals.

We need not describe the images in detail; they clearly satisfy several of the *Dost* factors. For example, two of the images Jakits received depict nude close-ups of Jae's vagina. The focal point of those depictions is the genitals or pubic area. *See Daniels*, 653 F.3d at 407. Another image depicts Jae posed and nude on a bed. The bedroom setting of that image is sexually suggestive. *See United States v. Nichols*, 527 F. App'x 344, 347 (6th Cir. 2013) ("The photographs were taken in a bedroom, including several images taken while the victim was lying in a bed—a place that is generally associated with sexual activity."). And Jae is posed in a manner inappropriate for her age, as it is unnatural for a child to pose nude on a bed, with her legs slightly spread in a manner that displays her genitals. *See, e.g., Daniels*, 653 F.3d at 407–08. Her pursed lips in that image and another indicate that she posed for the camera, precluding any conclusion that these images arose from some natural or medical context. *See, e.g., United States v. Campbell*, 81 F. App'x 532, 536–37 (6th Cir. 2003).

Looking beyond the four corners of the images to the circumstances in which Jae captured them confirms that the images are designed to elicit a sexual response. *See Brown*, 579 F.3d at 683. Jakits gained access to Jae through his contact with her mother, and both parties knew that Jae's mother sent depictions of live sex acts to Jakits for money. And when Jakits offered Jae money for photographs and she sent him nude close-ups of her genitals, he likewise paid her.

Collectively viewing the photographs Jakits received from Jae—which depict the "same victim[] [and were]

taken at or around the same time"—is also instructive. *Id.* at 684. While a close-up of a vagina may not alone equate to the "lascivious" exhibition of the genitals, *see id.* at 681–82, viewing the image beside other images of Jae posing "bent over a bed" because Jakits "told [her] to bend over something" and reclining on a bed reveals the image's intent to elicit a sexual response. (Sealed Trial Tr., R. 195, PageID 2653 (describing Image 2A22); *id.* at PageID 2653–54 (describing Image 2A23).) We can also consider Jakits's statements about the images. *See Brown*, 579 F.3d at 684. After sending a friend a photo of Jae's nude torso and a close-up of Jae's genitals, he boasted that Jae was an eighteen-year-old girl he spent the night with and described how "sweet" she "tastes and feels." (Government Ex. 6B, R. 226, PageID 4271.) Using the images to bolster his misrepresentations about a sexual encounter shows that Jakits understood that the images were intended to elicit a sexual response in the viewer.

Resisting the jury's finding, Jakits contends that the images he received "are unremarkable aside from the fact of the nudity," noting that "[i]n none of the images was Jae touching her genitals, using (or even holding) a sex toy or other sexual item, or simulating any sexual act." (Appellant Br. 23.) Images of Jae "touching her genitals," using a "sex toy," or "simulating any sexual act" would plainly fall within the definition of "sexually explicit conduct" as depictions of actual or simulated sexual intercourse or masturbation. *See* §§ 2256(2)(A)(i) and (iii). But the images supporting Jakits's conviction under Counts One and Eight are nonetheless depictions of sexually explicit conduct because they depict the

lascivious exhibition of the genitals or pubic area under § 2256(2)(A)(v). And Count Eight specifically charged Jakits with receiving such depictions, not depictions of masturbation or simulated sexual intercourse. Requiring that images depict masturbation or actual or simulated sexual intercourse to be deemed to depict sexually explicit conduct would make § 2256(2)(A)(v) redundant, and we "avoid constructions of statutes that would render Congress's chosen words superfluous." *United States v. Wilkes*, 78 F.4th 272, 280 (6th Cir. 2023).

Jakits also emphasizes the limited number of images, describing them as only a "handful of digital photos." (Appellant Br. 5.) Insofar as Jakits attempts to argue that the number of photographs supports his sufficiency argument, his argument is unavailing. There is no minimum number of images required to be convicted under the statute, and we have previously affirmed a conviction under § 2251(a) for possession of "a single nude photograph." *See Daniels*, 653 F.3d at 407–08.

When assessing the images, a rational juror could therefore conclude that Jakits persuaded, induced, or enticed Jae to create images depicting sexually explicit conduct and send them to him in violation of 18 U.S.C. §§ 2251(a) and (e). In receiving the photographs, he received images depicting a minor engaged in sexually explicit conduct in violation of 18 U.S.C. §§ 2252(a)(2) and (b)(1). We accordingly affirm his convictions on Counts One and Eight.

Count Two. The jury did not find that Jakits received an image depicting Nik engaged in sexually explicit

conduct and instead convicted him of attempting to receive such an image in violation of 18 U.S.C. §§ 2251(a) and (e). To convict a defendant of attempted production of a lascivious image of a minor's genitals, the government must show that the defendant "specifically intended" to create a lascivious image and that the defendant took a "substantial step" toward its creation. *United States v. Sims*, 708 F.3d 832, 835 (6th Cir. 2013).

Having established that the images that Jakits enticed Jae to take depicted sexually explicit conduct, a reasonable juror could infer that Jakits sought to receive similar photos of Nik. First, he offered the same sum of money—$500—for both sets of photos. Second, he asked for Nik to pose for similar photos; for example, he asked Nik to pose with a transcript, just as he had asked Jae to do. Third, like he was unsatisfied with photos of Jae wearing her underwear, he was also unsatisfied with the clothed photos he received of Nik and asked specifically for a "naked picture." (Government Ex. 2B, R. 226, PageID 4236.) Jae sent him a nude photo of Nik, but it did not constitute a close-up of her genitals, nor prominently exhibit her genitals. He subsequently requested a call where he said he would ask Nik to "model and do certain things" and to take "a couple of pictures that [he] want[ed] her to take of how [he] want[ed] it." (*Id.* at PageID 4240.)

Jakits argues no evidence supports a finding that he specifically asked Nik to engage in sexually explicit conduct and that he only asked for a "naked picture." (Appellant Br. 28–29.) The texts, however, contradict his characterization. When Jae asked that he send the

desired poses over text, Jakits did not say that he only sought a nude photo of the kind they had already sent him. Instead, he said he did not want "to write/text" about the poses he wanted Nik to do. (Government Ex. 2B, R. 226, PageID 4244.) A rational juror, therefore, could draw a reasonable inference that he was unsatisfied with the nude photograph he received from Nik and sought images like those he received from Jae. And circumstantial evidence alone may sustain a conviction. *Hendricks*, 950 F.3d at 352 (internal citation omitted). Accordingly, we affirm Jakits's conviction for attempt on Count Two.

Counts Three and Four. Jakits's request for a live videocall with the minor victims supports his convictions on Counts Three and Four. As discussed above, after receiving a non-lascivious image of Nik, Jakits requested a videocall where he said he would ask her to "model and do certain things" and to take "a couple of pictures that [he] want[ed] her to take of how [he] want[ed] it." (Government Ex. 2B, R. 226, PageID 4240.) But Jakits also sought Jae's involvement, offering her money and requesting a "close-up of both of [their] bottoms." (*Id.* at PageID 4250.) A rational juror could infer that the videocall, at minimum, would have involved the minors posing in a similar manner as Jae posed in the images that she sent to Jakits. The resulting visual depiction would have lasciviously exhibited the minors' genitals and pubic areas. Consequently, we affirm Jakits's convictions on Counts Three and Four.

B.

Jakits's request for a live videocall with the minor victims also supports his convictions on Counts Five and Six for violating 18 U.S.C. § 2422(b). A defendant violates 18 U.S.C. § 2422(b) when he "knowingly persuades, induces, entices, or coerces" a minor to engage in "any sexual activity for which any person can be charged with a criminal offense." To obtain a conviction for attempt under 18 U.S.C. § 2422(b), the government must have presented evidence of "objective, overt acts that would allow a reasonable jury to find [Jakits] had taken a substantial step toward persuading, inducing, enticing, or coercing a minor to engage in illegal sexual activity." *See United States v. Bailey*, 228 F.3d 637, 640 (6th Cir. 2000); *see also United States v. Hart*, 635 F.3d 850, 854 (6th Cir. 2011). The statute "criminalizes both the enticement and the attempted enticement, but not the actual performance of the sexual activity." *United States v. Fuller*, 77 F. App'x 371, 378 (6th Cir. 2003).

Jakits does not dispute his knowledge of the minors' ages. And the government argued that, had the videocall occurred, Jakits could have been charged with violating Ohio Revised Code § 2907.323, which prohibits the use of minors in a performance that shows them in a state of nudity. Jakits's conviction thus turns on whether a rational juror could have determined that Jakits attempted to knowingly persuade Jae and Nik to engage in "sexual activity" when he requested the videocall with both minors. Upon our review of the record, a reasonable juror could have done so.

Appendix A

The term "sexual activity" is not defined by the statute. However, 18 U.S.C § 2427 (2020) stipulates that "the term 'sexual activity for which any person can be charged with a criminal offense'... includes the production of child pornography, as defined in section 2256(8)." That section defines child pornography as a visual depiction of a minor engaged in "sexually explicit conduct." 18 U.S.C § 2256(8)(A). Its definition of sexually explicit conduct includes the lascivious exhibition of a minor's genitals or pubic area. *Id.* § 2256(2)(A)(v). The production of visual depictions containing the lascivious exhibition of a minor's genitals or pubic area would, therefore, constitute "sexual activity" for purposes of 18 U.S.C. § 2422(b).

A rational juror could have concluded that Jakits's intended videocall would have involved the minors engaging in sexually explicit conduct through the lascivious exhibition of their genitals. Given that Jakits offered larger and larger sums of money, coupled with his reluctance to tell the minors what he wanted them to do in the photographs and on the call, a juror could also infer Jakits sought something beyond what he had already received from Jae, notwithstanding his insistence that he was requesting "[n]othing nasty." (Government Ex. 2B, R. 226, PageID 4250.) A rational juror could therefore determine that the video call that Jakits repeatedly tried to persuade the minor victims to participate in would have involved sexual activity. And as Jakits could have been charged with violating Ohio Revised Code § 2907.323 had the call materialized, his efforts to persuade the minors to participate in the videocall qualified as "any sexual activity for which any person can be charged with a criminal offense" under 18 U.S.C. § 2422(b).

Relying on a decision from the Seventh Circuit, Jakits instead argues that "sexual activity" requires interpersonal physical contact.[2] *See United States v. Taylor*, 640 F.3d 255, 259–60 (7th Cir. 2011). But since 18 U.S.C § 2427 stipulates that "sexual activity" is inclusive of the production of child pornography, and the production of child pornography does not require interpersonal physical contact, *see United States v. Wright*, 774 F.3d 1085, 1092 (6th Cir. 2014), restricting the meaning of 18 U.S.C. § 2422(b) to sexual activity requiring interpersonal physical contact would contravene the express statutory text. We, therefore, join other circuits in holding that "sexual activity" under 18 U.S.C. § 2422(b) does not require interpersonal physical contact. *See United States v. Fugit*, 703 F.3d 248, 256 (4th Cir. 2012); *United States v. Dominguez*, 997 F.3d 1121, 1125 (11th Cir. 2021).

Jakits further argues that, since "sexual activity" requires physical contact under Ohio law, it was improper for the government to "allege [that the] unlawful 'sexual activity' in this case can be conduct that allegedly violates an Ohio law, but which Ohio itself does not define as 'sexual

2. In 2023, Congress amended 18 U.S.C. § 2427 to specify that "the term 'sexual activity for which any person can be charged with a criminal offense' does not require interpersonal physical contact, and includes the production of child pornography []." National Defense Authorization Act for Fiscal Year 2024, Pub. L. 118-31, § 5102, 137 Stat. 136, 935 (2023). We do not view this amendment as a change to the law, but a clarification of the statute's plain meaning given conflicting circuit court decisions. Therefore, the statute's amendment after the offense conduct here has no bearing on the validity of Jakits's conviction.

activity.'" (Appellant Br. 35 (emphasis in original omitted).) Ohio law, however, does not constrain the definition of "sexual activity" under federal law. Ohio law is relevant to whether Jakits violated § 2422(b) with respect to only the separate element that "any person can be charged with a criminal offense." Since Jakits could have been charged with violating Ohio Revised Code § 2907.323, which does not require any physical contact, and the underlying conduct qualifies as sexual activity under federal law, Jakits's convictions were proper.

Accordingly, we affirm Jakits's convictions on Counts Five and Six.

C.

Title 18 U.S.C. § 2251(d)(1) criminalizes the creation or publication of "any notice" seeking to receive visual depictions of minors "engaging in sexually explicit conduct" or seeking or offering "participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct." The government argued, and the jury determined, that Jakits's texts to Jae qualified as such notices.

Jakits argues that he did not expressly request photos depicting sexually explicit conduct because he asked for only "naked picture[s]," and the minor victims' understood his request as one for only naked images. (Appellant Br. 28-29, 37–38.) In describing at trial why and how she took the photos, Jae acknowledged that Jakits did not use terms like "boobs" or "vagina" while requesting these images.

(Sealed Trial Tr., R. 195, PageID 2638–39.) Instead, he would request "a close-up." (*Id.*) If "he said no," Jae said that she would "send him a different body part." (*Id.*) She ultimately sent him photos that she believed he asked of her, and these photos lasciviously exhibited Jae's genitals.

Even if Jakits did not request sexually explicit photos in exact terms, circumstantial evidence supports Jakits's intention to receive them. *See Hendricks*, 950 F.3d at 352. His correspondence with Jae reveals no reluctance, reticence, or revulsion at the images he received. Rather than reject the images Jae sent him, he paid her for them and saved them to his devices. Then, after receiving these images from Jae, he sought further content from Nik, raising the payout and incentives offered. A reasonable juror could thus determine that Jakits's texts requested that Jae send him images depicting her engaged in the lascivious exhibition of her genitals.

Citing an Eleventh Circuit case, Jakits further argues that, even if his text messages to Jae specifically sought the minor victims' participation in "sexually explicit conduct," the texts would still not violate § 2251(d)(1)(B) because, as private person-to-person text messages, they are not "notice[s]" or "advertisement[s]" as contemplated by the statute. *See United States v. Caniff*, 955 F.3d 1183, 1188–92 (11th Cir. 2020). He concedes that this court took the opposite view in *United States v. Sammons*, 55 F.4th 1062, 1067–68 (6th Cir. 2022), which held that one-to-one messages may amount to notices inviting child pornography.

Jakits suggests that *Sammons* may be distinguishable on the facts, as that case involved private chat messages in an online forum as opposed to text messages. *Sammons*, 55 F.4th at 1065. But *Sammons* does not limit its discussion to private online chats; it engages with the broader issue of whether "non-public, one-on-one messages" can amount to notices. 55 F.4th at 1066. Text messages are non-public, one-on-one messages. So *Sammons* applies and remains our controlling authority. *See Salmi v. Sec'y of Health & Hum. Servs.*, 774 F.2d 685, 689 (6th Cir. 1985) ("A panel of this Court cannot overrule the decision of another panel.") (internal citation omitted).

Consequently, a reasonable juror could have found that Jakits's text messages requested that the minor victims engage in sexually explicit conduct and that those text messages constituted notices under 18 U.S.C. § 2251(d)(1). We affirm Jakits's conviction on Count Seven.

Sufficient evidence, therefore, supports Jakits's convictions on all eight counts.

III.

Jakits also contends the district court failed to instruct or incorrectly instructed the jury on the meaning of "sexually explicit conduct" and "lascivious exhibition" under 18 U.S.C. §§ 2251(a) and 2256(2)(A)(v), and "sexual activity" under 18 U.S.C. § 2422(b). He argues that the district court should have used his proposed instructions. We are unpersuaded.

We review the legal accuracy of the instructions de novo. *United States v. You*, 74 F.4th 378, 391 (6th Cir. 2023). And we review a challenge to the trial court's denial of a requested jury instruction for abuse of discretion and "reverse only if the denied instruction was: (1) a correct statement of the law, (2) not substantially covered by the charge actually delivered to the jury, and (3) concern[ed] a point so important in the trial that the failure to give it substantially impair[ed] the defendant's defense." *United States v. Anderson*, 67 F.4th 755, 764 (6th Cir. 2023) (internal quotation marks omitted) (alterations in original).

With respect to the meaning of "sexually explicit conduct" and "lascivious exhibition" under 18 U.S.C. § 2251(a), the district court utilized this court's pattern instruction for sexual exploitation of a minor, Sixth Circuit Pattern Instruction 16.01. These instructions include the *Dost* factors, and the district court modified one factor—in Jakits's favor—to stipulate that "nudity is not determinative." (Op. and Order Denying Mot. for Acquittal, R. 205, PageID 3981–82.) We have previously held that Sixth Circuit Pattern Instruction 16.01 is "soundly based on the law." *See United States v. Frei*, 995 F.3d 561, 565–66 (6th Cir. 2021); *see also Guy*, 708 F. App'x at 262 (holding that the district court did not err when following Sixth Circuit Pattern Instruction 16.01 and refusing to omit the *Dost* factors from the instructions because "[t]he inclusion of the *Dost* factors gave the jury information—in this case, the legal definition of 'lasciviousness'—necessary for it to determine whether [the defendant] attempted to use a minor to engage in sexually explicit conduct for the

purpose of producing a visual depiction of sexually explicit conduct."). The district court, therefore, did not abuse its discretion by adopting the instruction.

With respect to the meaning of "sexual activity" per 18 U.S.C. § 2422(b), the district court's instruction provided no specific definition of sexual activity and instead stated the elements of the offense. The district court also instructed that the government would need to prove that, had the video call occurred, Jakits could have been charged with a crime under Ohio Revised Code § 2907.323. As discussed above, activity that results in the creation of child pornography falls within the plain meaning of sexual activity. And the court instructed the jury on the definition of child pornography. A reasonable juror would not have needed further clarification to accurately review the evidence. *See Averett v. U.S. Dep't of Health & Hum. Servs.*, 943 F.3d 313, 315 (6th Cir. 2019) ("A statute's terms are not ambiguous simply because the statute itself does not define them.").

Finally, Jakits's proposed instructions rested on his arguments related to the meaning of "sexually explicit conduct" and "lascivious exhibition" per 18 U.S.C. § 2251(a) and the meaning of "sexual activity" per 18 U.S.C. § 2422(b) summarized above. For reasons previously discussed, we reject Jakits's constructions of these terms and conclude that they do not correctly represent the law. The district court, therefore, did not abuse its discretion in rejecting his proposed instructions.

IV.

Jakits further challenges his convictions by arguing that the district court violated his constitutional right to present a complete defense by excluding evidence that Ashley and Jae may have prompted a different minor to take sexually suggestive images to send to Jakits. He also challenges the exclusion of certain comments in the recorded jail call transcripts about Jae and Nik receiving money from other men. Again, we are unconvinced.

We review the district court's evidentiary rulings for abuse of discretion and will reverse only if "left with a definite and firm conviction that the [district] court committed a clear error of judgment." *United States v. Mack*, 808 F.3d 1074, 1084 (6th Cir. 2015) (internal citation and quotation marks omitted). Where a defendant claims an evidentiary ruling violates the Sixth Amendment, however, we review "the legal aspects of the constitutional violation" de novo. *United States v. Reichert*, 747 F.3d 445, 453 (6th Cir. 2014).

The Constitution secures the right of defendants to present a complete defense. *Id.* (citing *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)). The defendant, however, "does not have an unfettered right to offer evidence that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Id.* (internal citation and quotation marks omitted). "[T]he exclusion of defense evidence violates a defendant's constitutional right to present a defense only where it is 'arbitrary' or 'disproportionate.'"

Id. (citing *Holmes*, 547 U.S. at 324–26.) We also consider whether the evidence was central to the defendant's defense. *United States v. Ogden*, 685 F.3d 600, 605 (6th Cir. 2012) (citing *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)).

A.

The district court excluded evidence that a different minor may have taken sexually suggestive photos to send to Jakits at the behest of Ashley or Jae under Federal Rules of Evidence 403 and 404(b). Rule 403 permits a district court to "exclude relevant evidence if its probative value is substantially outweighed by" the risk of unfair prejudice or confusing the jury. We grant the district court "'very broad' discretion in making its determinations" on this front. *United States v. Libbey-Tipton*, 948 F.3d 694, 701 (6th Cir. 2020) (quoting *United States v. Newsom*, 452 F.3d 593, 603 (6th Cir. 2006)). Rule 404(b) prohibits the introduction of wrong acts to prove propensity.

The district court did not abuse its discretion in excluding this evidence. First, it was not relevant. The type of images that she took—photos of the minor wearing her underwear—are different from those that Jakits enticed Jae to take. And even if Ashley attempted to sexually exploit the minor, it is not probative of whether she planned to use her daughters to do the same. Instead, the record shows the opposite, as discussed further below. Lastly, it was likely to confuse the jury by prompting a "mini trial" about the photos of the minor, *see United*

States v. Hough, 385 F. App'x 535, 537–38 (6th Cir. 2010), the details of which had no bearing on whether Jakits solicited or received sexually explicit photographs from Jae or Nik. Exclusion was proper or, at least, was not arbitrary or disproportionate.

B.

The district court also determined that the evidence Jakits sought to admit of the minor victims obtaining money from other men constituted evidence of their sexual behavior and was excludable pursuant to Federal Rule of Evidence 412. In cases involving alleged sexual misconduct, Rule 412(a)(1) "forbids the introduction of evidence offered to prove that a victim engaged in other sexual behavior." *Ogden*, 685 F.3d at 605 (internal citations and quotation marks omitted). For example, in *Ogden* we considered the interplay of Rule 412 and the defendant's constitutional right to present a complete defense. *Id.* We determined that evidence showing that a minor victim had sent explicit pictures to men other than the defendant was inadmissible under Rule 412, and that its admission was not constitutionally required in that case. *Id.* at 605–06.

Jakits counters by arguing that evidence of a wider scheme to target men for money would not have constituted evidence of the minor victims' sexual behavior and instead was evidence only "of a general desire and plan to 'work' other men for money and Ashley[']s enlistment of her teenage daughters in doing so." (Appellant Br. 47.) But his argument is circular.

He asserts that he sought to offer evidence that "rather than him attempting to obtain or solicit images depicting 'sexually explicit conduct,' the teenage girls, their mother and grandmother *set the defendant up* by conspiring to obtain money from him in exchange for naked pictures," and that "[t]his was part of an ongoing family enterprise focused on the exploitation of multiple men for money." (Reply Br. 1.) The scheme in which he argues he was entrapped was one where he was set up to receive sexually explicit images of the minor victims as part of a broader family enterprise. For that broader enterprise to be relevant, it would have to involve similar conduct: principally, minor victims sending sexually explicit photos to men for money. Such conduct would have necessarily amounted to evidence of the minor victims' sexual behavior with others. The district court's decision to exclude it was not arbitrary.

Moreover, this evidence would not have been critical to Jakits's defense, as Jakits's arguments that he was set up are contradicted not only by substantial evidence that Jakits requested and downloaded sexually explicit images of the minor victims, but also by the very jail call transcripts he sought to introduce. In a recorded jail telephone call between Ashley and Nik on January 10, Nik told Ashley that Jakits called and sought pictures from Jae and Nik. When Nik joked about sending photos to Jakits, Ashley warned Nik about Jakits and explicitly instructed her to not send any photographs. If they needed money, Ashley said that she would reach out to a different man for help.

Jakits contends this exchange—where Nik notes that she, Jae, and her grandmother had joked about sending him pictures—is evidence of a scheme to send

Jakits photos. He also argues that the reference to the girls possibly obtaining money from another man offers evidence of a wider scheme to target men for money.

The exchange reveals the opposite. If a scheme to entrap Jakits existed, Ashley would have instructed Nik to send photos to Jakits, not cautioned her against doing so. Moreover, no evidence in the record suggests that the other man would provide the minors with money *in exchange* for sexually explicit content. The other places in the call transcripts that refer to the minors obtaining money from other men also do not show that they would obtain money *in payment for* sexually explicit images of the minors themselves.

Further undermining Jakits's argument that the excluded transcripts would reveal a scheme to entrap Jakits is a segment of a recorded call where Ashley expressly told Jakits to stay away from her daughters, reminding him that they were children. Ashley's distress at learning that her daughters sent photos to Jakits is also apparent in other parts of the available transcripts. Consequently, rather than featuring evidence that would cause a reasonable juror to acquit Jakits, the excluded transcripts only contain further evidence that Jakits knew Jae and Nik were children and that their mother told him that his communications with them were wrong. The district court's exclusion of the evidence was proper.

V.

For the foregoing reasons, we affirm Jakits's convictions on all eight counts.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION, FILED AUGUST 24, 2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 2:22-CR-194

UNITED STATES OF AMERICA,

Plaintiff,

v.

BERNHARD JAKITS,

Defendant.

August 24, 2023

OPINION AND ORDER

EDMUND A. SARGUS, JR., District Judge.

This matter is before the Court on Defendant Bernhard Jakits' Motion for Judgment of Acquittal (ECF Nos. 169, 183, 201[1]) the Government's Response

1. Defendant's first motion (ECF No. 169) was denied without prejudice from the bench during trial, as discussed herein. Defendant's second motion (ECF No. 201) is a verbatim reproduction of the original filing (ECF No. 183) with the exception

in Opposition to Defendant's Motion (ECF No. 189), and Defendant's Reply (ECF No. 202). For the reasons that follow, Defendant's Motions are **DENIED**.

I.

On October 11, 2022, the Grand Jury returned an eight-count indictment against Bernhard Jakits, (ECF No. 4), which was superseded January 17, 2023 (ECF No. 46). The superseding indictment included nine counts with regard to two minors who were the alleged victims and were referred to at trial as "Jae" and "Nik." In the indictment, Counts One (regarding Jae) and Two (regarding Nik) charge Defendant with using a minor to produce a visual depiction, in violation of Title 18, United States Code, § 2251(a) and (e). Count Two (regarding Nik) also charges the Defendant with the attempt to use a minor to produce a visual depiction, in violation of Title 18, United States Code, § 2251(a) and (e). Counts Three (regarding Jae) and Four (regarding Nik) allege attempted sexual exploitation of a minor in violation of 18 U.S.C. §§ 2251(a) and (e); Counts Five (regarding Jae) and Six (regarding Nik) allege attempted coercion or enticement of a minor in violation of 18 U.S.C. § 2422(b); Count Seven (regards both minors) alleges the making an interstate notice for child pornography in violation of 18 U.S.C. §§ 2251(d)(1)(B) and (e); Count Eight (regarding Jae) alleges the receipt of child pornography in violation of 18 U.S.C. §§ 2252(a)(2), and (b)(1); and Count Nine is transportation of obscene matters in violation of 18 U.S.C. §§ 1462(a).

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that all quotes and citations to the transcript of the trial are conformed to the final transcripts docketed by the Court Reporter.

Appendix B

Trial on the child pornography and child exploitation counts (Counts One through Eight) commenced on May 23, 2023. On May 30, 2023, the jury returned verdicts of guilty on all counts except part of Count 2, finding Defendant guilty only with regard to the attempt charge. (Jury Verdict, ECF No. 172.) At the close of all evidence, Defendant moved for judgment of acquittal as to Counts Five and Six, pursuant to Rule 29 of the Federal Rules of Criminal Procedure. The government responded orally to Defendant's motion on the last day of trial. The Court denied the motion without prejudice (ECF No. 169), inviting Defendant to file a renewed motion if the jury convicted him on Counts Five or Six.

After the jury returned guilty verdicts on Counts Five and Six, Defendant filed the instant motions (ECF Nos. 183, 201), in which he challenges his convictions on all counts, incorporating his argument related to Counts Five and Six made in the first motion (ECF No. 169.)

II.

"A defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict" and a court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a), (c). In assessing a defendant's challenge to the sufficiency of the evidence under Rule 29, the issue a court must determine "is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979) (emphasis in original). "Reversal of a conviction is warranted only if, viewing the record as a whole, the judgment is not supported by substantial and competent evidence." *United States v. Smith,* 749 F.3d 465, 477 (6th Cir. 2014).

In considering a Rule 29 motion, a court "must not 'weigh the evidence, consider the credibility of witnesses, or substitute its judgment for that of the jury.'" *United States v. Salgado,* 250 F.3d 438, 446 (6th Cir. 2001) (citation omitted). The defendant "bears a very heavy burden" of making his showing. *United States v. Ross,* 502 F.3d 521, 529 (6th Cir. 2007).

III.

Defendant argues "with respect to each of the eight counts presented to the jury in the trial that commenced on May 22, 2023, the government did not present sufficient evidence to permit a rational trier of fact to find all of the essential elements of the eight crimes charged beyond a reasonable doubt." (Def's Mot. at 2, ECF No. 201.) The Government disagrees, responding:

> The defendant's current motion largely mirrors the arguments he made to the jury. Essentially, the defendant contends that nude images of the genitalia of a minor female do not constitute the lascivious exhibition of the genitalia or pubic region.

> Thus, according to the defendant, evidence that he caused Jae to create such images, received such images, and attempted to cause and coerce Jae and Nik to create additional similar depictions was insufficient to sustain a conviction. The defendant's arguments mischaracterize the evidence and misconstrue the statutes at issue and the case law interpreting them.

(Govt's Resp. at 2-3, ECF No. 189.)

A. Counts One and Eight

The jury found Defendant guilty of Count One, which charged him with "using, employing, persuading, inducing, enticing, and coercing 'Jae' to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct from in or about December 2018 through on or about January 13, 2019," and Count Eight, which charged Defendant with "knowingly receiving digital image files of 'Jae' engaged in sexually explicit conduct on or about January 1, 2019 through on or about January 14, 2019." (Doc. #172, Jury Verdict). The jury's guilty verdicts on Counts One and Eight required a finding that the images Jae created and sent to Defendant at his behest depicted her engaged in sexually explicit conduct.

This Court instructed the jury as follows:

> The term "sexually explicit conduct" means actual or simulated:

(1) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; or

(2) masturbation; or

(3) lascivious exhibition of the genitals or pubic area of a person.

In deciding whether an exhibition is "lascivious," you may consider these six factors:

(a) whether the focal point of the visual depiction is on the child's genitalia or pubic area;

(b) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;

(c) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;

(d) whether the child is fully or partially clothed, or nude, though nudity is not determinative;

(e) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and

> (f) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.
>
> This list is not exhaustive, and an image need not satisfy any single factor to be deemed lascivious. Instead, you must determine whether the visual depiction is lascivious based on its overall content. It is for you to decide the weight or lack of weight to be given any of these factors.

(Jury Instructions, ECF No. 174.)

The factors set out in the jury instructions and copied above as (a) through (f) above are commonly referred to as the *Dost* factors. *See United States v. Brown,* 579 F.3d 672, 680 (6th Cir. 2009) (citing *United States v. Dost,* 636 F. Supp. 828, 832 (S.D. Cal. 1986)). Defendant points out that of the 23 images of Jae for which evidence was introduced, "none depicted sexual intercourse, bestiality, masturbation, or sadistic or masochistic abuse." (Def's Mot. at 4, ECF No. 201.) Defendant concludes:

> Thus, the issue is whether a reasonable jury could find that any of the 23 images about which "Jae" testified (Count 1) or any of the 16 images received by Defendant (Count 8) could be described as depicting a "lascivious exhibition of the anus, genitals, or pubic area." 18 U.S.C. § 2256(2)(A)(v).

Id.

Defendant is correct that the issue before the jury was whether Jae was lasciviously exhibiting her genitalia or pubic area. The question now before this Court is whether, after viewing the evidence in the light most favorable to the prosecution, there was substantial and competent evidence to support the jury's finding that Jae was lasciviously exhibiting her genitalia or pubic area. The Court answers that question in the affirmative.

Several of the images shown to the jury depicted nothing but Jae's nude genitalia and others depicted her fully nude while posed in a manner to focus on her genitalia and breasts. Defendant maintains that "[t]he mere display of the nude vagina or pubic area does not equate to 'sexually explicit conduct.'" (Def's Mot. at 5, ECF No. 201) (citing as an example, *United States v. Brown,* 579 F.3d 672, 681-82 (6th Cir. 2009) for the proposition that display of nude genitals and/or pubic area *is not alone* sufficient to satisfy "lascivious" requirement) (emphasis added). Here, however, the display of nude genitals was not the lone evidence presented.

Indeed, following the Sixth Circuit's guidance in considering the *Dost* factors set forth in the jury instructions, the record supports the jury's conclusion that Jae engaged in the lascivious exhibition of the genitalia or pubic area. Even if consideration is limited to the images that depicted only Jae's nude genitalia, government exhibits 2A7, 2A12, 2A15, and 2A20, a rational jury could find the first, third, and fourth factors satisfied, as the focus of those images was nothing except the genitalia, it is unnatural for a child of Jae's age to pose in such a way

that a camera is focused on nothing but her genitalia, and Jae's genitalia is depicted completely nude. Further, a reasonable jury could have considered in the sixth factor that the visual depictions were intended or designed to elicit a sexual response in the viewer based on the evidence presented.

That is, the Sixth Circuit analyzed this *Dost* factor and whether the visual depiction is intended or designed to elicit a sexual response in the viewer, weighing the pros and cons of whether a factfinder may properly consider evidence other than the photograph itself, or if it must discern the photographer's intent by examining only the content of the photograph and adopted a "limited context" approach. *Brown,* 579 F.3d. at 683. Under this limited context approach, it is improper to consider "past bad acts of the defendant, the defendant's possession of other pornography (pornography of another type or of other victims), and other generalized facts that would relate only to the general 'unseemliness' of the defendant." *Id.* However, under the limited context approach, "any statements the defendant made about the images" is an appropriate consideration. *Id.* at 684. That consideration is relevant here and supports the jury's guilty verdicts on Counts One and Eight.

There was evidence presented to the jury of Defendant's written statements to a friend about the pictures he asked Jae to send him. Defendant and his friend discussed at length their sexual interest and attraction to both Jae and her sister, describing sexual acts in which they would like to engage with the minor

girls. Defendant claimed to his friend that he paid $500 to spend all night with Jae and other sexually charged language, which a reasonable jury could attribute to an attempt to "elicit a sexual response in the viewer." *Brown,* 579 F.3d at 684.

Next, Defendant suggests that the government's closing arguments regarding the *Dost* factors were conclusory and did not explain why the images of just Jae's nude genitalia or her laying nude on a bed with her legs spread meet any of the factors. But, as the Government correctly notes, its arguments are not evidence, as the jury was properly instructed. (Final Jury Instructions at 5, ECF No. 174) ("The evidence in this case includes only what the witnesses said while they were testifying under oath, including the exhibits that I allowed into evidence, the stipulations that the lawyers agreed to, and any facts that I have judicially noticed. Nothing else is evidence. *The lawyers' statements, arguments, and objections are not evidence.* The indictment is not evidence. My legal rulings are not evidence. And my comments and questions are not evidence.") (emphasis added).

Finally, the Court is not persuaded by Defendant's argument that "[t]he Supreme Court has been consistent and clear for nearly 50 years that 'lascivious' means patently offensive representations or descriptions of specific 'hard core' sexual conduct." (Def's Mot. at 12, ECF No. 201). According to Defendant, the line of Supreme Court decisions that started with *Miller v. California,* 415 U.S. 15 (1973) and culminated in *United States v. Williams,* 553 U.S. 285 (2008), establishes the principle that for an

image to depict lascivious exhibition of the genitalia or pubic area and thus qualify as illegal child pornography, it must be a "hard core" exhibition "in a manner connoting an overt sexual act." (Def's Mot. at 16, ECF No. 201.) This interpretation—equating lasciviousness with "hard core" pornography—has not been utilized by the Sixth Circuit (nor any other federal circuit), and indeed is incongruent with the law set forth above.

To conclude, the jury observed all the photographs that Defendant paid Jae to take and send to him, heard his words about those photographs, was properly instructed as to the considerations to utilize in evaluating those photographs, and ultimately determined that the photographs met the standard of lasciviousness. Defendant's disagreement with Sixth Circuit law and the jury's assessment of the evidence is not sufficient to meet his burden of establishing that the jury's verdict should be set aside.

B. Counts 2, 3, and 4

Count 2 charges both production and attempted production of child pornography on January 15, 2019, with respect to Nik, the thirteen-year-old sister of Jae. Counts Three and Four charge Defendant with attempting to use a minor, both Jae and Nik, to produce a visual depiction or transmit a live visual depiction, in violation of Title 18, United States Code, § 2251(a) and (e).

As to Count 2, the jury acquitted Defendant on the completed crime charged and convicted him only of the

attempted crime against Nik. Thus, the jury needed only find that Defendant intended to use or persuade Nik to engage in sexually explicit conduct, specifically, the lascivious exhibition of Nik's genitals and pubic region, and took a substantial step towards doing so, even if the resulting image did not meet the legal definition of sexually explicit conduct. *See United States v. Hart,* 635 F.3d 850, 857 (6th Cir. 2011) ("A person violates 18 U.S.C. § 2251 if he or she attempts to persuade a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct.").

Defendant contends:

> In order to find Defendant guilty of attempt, however, the government had to prove beyond a reasonable doubt that the defendant intended to commit the crime of using a minor to engage in sexually explicit conduct to produce a visual depiction and that the defendant did some overt act that was a substantial step towards committing the crime. As the Court further instructed the jury, "[t]he defendant's conduct must go beyond mere preparation, and must *strongly confirm that he intended to use a minor to engage in sexually explicit conduct* for the purpose of producing a visual depiction of that conduct." (*See* Doc. 174 at 22 (emphasis added).)

(Def's Mot. at 18, ECF No. 201.)

Defendant concludes that the evidence does not support that he "intended to have Nik do anything other than what was requested and received," which was "one naked picture" or "a nude picture." *Id.* This Court disagrees.

The Government accurately assesses the evidence that supported the verdict as showing Defendant's efforts to persuade Nik to engage in sexually explicit conduct and his specific intent to do so.

> On January 14, 2019, the defendant sent a text to Jae which stated, "ask your sister if she wants to earn $500." (Government Exhibit 2B). He followed that text up less than twenty minutes later by reminding Jae to "remember to ask your sister." (*Id.*). Approximately an hour later, he sent another text message to Jae that stated, "Hi...did you ask your sister yet." (*Id.*)
>
> When Jae responded that she had not done so, the defendant wrote "please ask her when you can." (*Id.*) Approximately 24 hours later, the defendant again inquired as to whether Jae had spoken to Nik about involving herself with the defendant stating again "have you spoken to your sister, if so, $500 for her." (*Id.*)
>
> When Jae confirmed that she and Nik were "in," the defendant requested to see what Nik looked like. (*Id.*) After receiving three photographs of Nik wearing clothing, the defendant responded "cute Very very cute both of you Before we start

> We need to promise that its our secret. This is as far as it goes...i promise. Now one naked picture of your sister, after that we'll plan our party." (*Id.*)

(Govt's Response at 18, ECF No. 189.)

Based on this evidence, the jury could have reasonably concluded that the defendant wanted the same thing from Nik that he had received from Jae, that is, images that depicted certain body parts that the defendant specified, as described above. Again, the Government correctly assesses the evidence:

> The record [shows] that prior to sending nude, close-up images of her own vagina to the defendant, Jae only received $150 for the nonexplicit images she sent to him. However, when Jae sent the defendant close-up images of her nude vagina, the defendant paid her $500.
>
> The jury could . . . infer that when the defendant offered $500 to Nik for a nude image of herself, he was not seeking mere nudity. Because the amount he offered Nik was commensurate with what he paid Jae *only after* she sent him images of herself engaged in [what the jury determined as] lascivious exhibition of the genitalia, it stands to reason that his request for a nude image of Nik meant the same thing it meant when he paid Jae $500: images depicting the lascivious display of Nik's genitalia.
>
> The jury's inference in this regard is further supported by the additional computer forensic

> evidence presented by FBI Special Agent Josh Saltar that revealed how the images of Nik were stored in his devices via a hidden photo vault application that was titled with Nik's full name.

Id. at 15-16 (emphasis in original).

Based on this evidence, the jury reasonably concluded beyond a reasonable doubt that Defendant attempted to produce child pornography featuring Nik on January 15, 2020. Reversal of Defendant's conviction for Count 2 is therefore not warranted because, viewing the record as a whole, the judgment is supported by substantial and competent evidence.

Counts Three and Four are related to Defendant's communications with Jae between January 15 and 21, 2019, during which he repeatedly attempted to convince the minor girls to engage in a Facetime video call with him. Defendant argues that there was no evidence of him putting in a text that he wanted the girls to engage in any sexually explicit conduct, stating:

> The text message exchange with "Jae" introduced by the government does not contain any request that either "Jae" or "Nik" engage in "sexually explicit conduct," or that they do anything at all other than be naked, send naked pictures, "do certain things Nothing nasty" and/or "a couple of pictures I want her to take of how I want it."

(Def's Mot. at 20, ECF No. 201.)

According to Defendant, asking for nude photographs of the minor girls and photos of Nik of how Defendant "wants it," is insufficient. However, the jury heard and was permitted to consider not only the evidence contained in the chats about the Facetime call that were recovered from Jae's phone, but also the evidence and testimony about everything that had come before that call. As discussed above, that evidence showed what kinds of activities for which Defendant was willing to pay: $150 for bra and underwear or nude images, $500 for images that show just genitalia or fully nude reclined on a bed and touching her breast. For the Facetime call, Defendant initially offered to pay $1000 to Jae and $500 to Nik, and after they declined his offer, offering $1000 to each girl, plus scholarships, a car, and a trip to Florida.

In the context of the entire interactions between Defendant and Jae there is competent and substantial evidence supporting the jury's decision to convict on these counts. As with Count 2, nothing that Defendant has put forth regarding Counts Three and Four show that the jury's inferences were unsupported by the evidence or meet his burden to have the Court overturn the jury's verdicts.

C. Counts 5 and 6

Counts 5 and 6 charge Defendant with knowingly attempting "to persuade, induce, entice, and coerce an individual who had not attained the age of 18 years" (*i.e.*, Jae in Count 5 and Nik in Count 6) to engage "in any sexual activity for which a person can be charged with a criminal offense, including Ohio Revised Code Section

2907.323 (Illegal use of minor in nudity-oriented material or performance)" in violation of 18 U.S.C. § 2422(b). *See, e.g., United States v. Wyatt,* 713 Fed. App'x 467, 469 (6th Cir. 2017). Defendant contends that the evidence presented at trial was insufficient to support a conviction on Counts Five and Six because the term "sexual activity" as used in 18 U.S.C. § 2422(b) requires interpersonal physical contact.

Specifically, Defendant asserts that the sexual activity required to support the § 2422(b) charges alleged in Counts Five and Six had to be defined pursuant to 18 U.S.C. § 2246(2). Because the definition in § 2246(2) requires physical contact and there was no evidence introduced that such contact was completed or attempted by Defendant, he argued he could not be convicted of the offenses charged in Counts Five and Six as a matter of law.

While the Sixth Circuit has not opined on this exact issue, three federal circuits have: the Fourth, Seventh and Eleventh Circuits. Defendant relies on the Seventh Circuit case, while the Government contends that the Fourth and Eleventh Circuit analysis is correct.

In *United States v. Dominguez,* the Eleventh Circuit recently framed the question as follows:

> [T]he relevant language in § 2422(b) is "sexual activity for which any person can be charged with a criminal offense," and the question we must decide is whether the term "sexual activity" requires interpersonal physical contact.

997 F.3d 1121, 1123 (11th Cir. 2021) The *Dominguez* court further stated:

> The two appellate courts that have addressed this question, the Fourth and the Seventh Circuits, have come to different conclusions. *Compare United States v. Fugit,* 703 F.3d 248, 255 (4th Cir. 2012) (no interpersonal contact required), with *United States v. Taylor,* 640 F.3d 255, 258-59 (7th Cir 2011) (interpersonal contact required). Exercising plenary review as to this statutory question, *see, e.g., United States v. Williams,* 790 F.3d 1240, 1244 (11th Cir. 2015), we side with the Fourth Circuit and hold that "sexual activity" under § 2422(b) does not require actual or attempted physical contact between two persons.

Id. This Court too agrees with the Fourth and Eleventh Circuits that § 2422(b) does not require actual or attempted physical contact between two persons.

As did all three appellate courts looking at this issue, this Court begins the analysis of this issue with statutory interpretation of the text and its ordinary public meaning at the time of enactment. *United States v. Fitzgerald,* 906 F.3d 437, 442 (6th Cir. 2013). Congress added the term "sexual activity" to § 2422(b) in 1998. *Dominguez,* 997 F.3d at 1124 (citing Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, § 102, 112 Stat. 2934). The Court finds no dictionary (or other) definitions of "sexual activity" in the late 1990s and early 2000s. *Id.*

Appendix B

Lacking a precise definition for "sexual activity" around the time of § 2422(b)'s amendment, both the Eleventh and Fourth circuits turned to the meanings of "sexual" and "activity" separately.

> When § 2422(b) was amended, the term "sexual" did not just refer to the act of physical intercourse with another. It also covered other types of behavior associated with sex. *See* Webster's Third New International Dictionary 2082 (2002) (defining "sexual" in part as "of or relating to the sphere of behavior associated with libidinal gratification"); Shorter Oxford English Dictionary 2780 (5th ed. 2002) (defining "sexual" as both "pertaining to or involving physical intercourse, as in reproduction," and "deriving from or relating to desire for sex or for carnal pleasure"); The American Heritage Steadman's Medical Dictionary 757 (1995) (defining "sexual" in part as "[i]mplying or symbolizing erotic desires or activity").
>
> For its part, "activity"—as relevant here—was not limited in the late 1990s or early 2000s to the interpersonal physical realm. It was instead defined as both "energetic action" and "any specific action or pursuit [recreational *activities*]." Webster's New World College Dictionary 14 (4th ed. 2004). *See also* 1 Shorter Oxford English Dictionary 23 (5th ed. 2002) (defining "activity" in part as a "[b]risk or vigorous action" or "a pursuit"); Black's Law

> Dictionary 33 (6th ed. 1990) (defining "activity" as "[a]n occupation or pursuit in which [a] person is active").

Dominguez, 997 F.3d at 1125; *see also Fugit,* 703 F.3d at 255.

As did the *Fugit* and *Dominguez* courts, this Court concludes that when combining these understandings of "sexual" and "activity," the ordinary public meaning of "sexual activity" around 1998 was an action or pursuit relating to intercourse *or* to the desire for sex or carnal pleasure. Because the latter formulation does not require physical touching between two persons, "sexual activity," within the meaning of § 2422(b), "need not involve interpersonal physical contact." *Fugit,* 703 F.3d at 255.

This Court finds that the meaning of the "sexual activity" element is not only plain; it also renders the statutory scheme coherent as a whole. The Sixth Circuit has stated that § 2422(b) "was designed to protect children from the act of solicitation itself." *United States v. Engle,* 676 F.3d 405, 419 (4th Cir.2012) (quoting *United States v. Hughes,* 632 F.3d 956, 961 (6th Cir. 2011)). "The primary evil that Congress meant to avert by enacting § 2422(b) was the psychological sexualization of children, and this evil can surely obtain in situations where the contemplated conduct does not involve interpersonal physical contact." *Fugit,* 703 F.3d at 255

This Court is unpersuaded by the Seventh Circuit's interpretation of "sexual activity" and "sexual act" as

synonymous as used in Title 18. As the *Fugit* court convincingly explained:

> Finally, we believe that the Seventh Circuit's decision in *United States v. Taylor*, 640 F.3d 255 (7th Cir. 2011), upon which Fugit places great weight, was mistaken. The *Taylor* court held that the phrase "sexual activity" in § 2422(b) is synonymous with the phrase "sexual act," as defined in 18 U.S.C. § 2246(2). *Id.* at 259-60. That complex provision defines "sexual act" to require not only interpersonal physical contact but interpersonal physical contact involving the genitalia or anus—and, for persons who are sixteen or older, requires either oral sex or actual penetration of the genital or anal opening.
>
> We decline *Taylor*'s invitation to cut and paste this restrictive definition into § 2422(b) because doing so would contravene express statutory text. Section 2246 explicitly limits the definitions provided therein to the chapter in which it resides. Specifically, the very first words of the section are "[a]s used in this chapter" (with the various definitions following), and the section's title is "[d]efinitions for chapter." Whereas § 2246 appears in Chapter 109A of Title 18, § 2422(b) is situated in an entirely different location, Chapter 117. Simply put, we find "no indication that Congress intended to import the definitions of chapter 109A to [another]

> chapter." *United States v. Sonnenberg,* 556 F.3d 667, 670 (8th Cir.2009).

Fugit, 703 F.3d at 256-57.

The Eleventh Circuit too persuasively rejected *Taylor*:

> The Seventh Circuit has come to a different conclusion. Applying the rule of lenity, it held in *Taylor,* 640 F.3d at 258-59, that "sexual activity" in § 2422(b) requires actual or attempted interpersonal physical contact. The *Taylor* opinion contains some pertinent observations, but like the Fourth Circuit, we choose not to follow it. *See Fugit,* 703 F.3d at 255-56.
>
> First, the Seventh Circuit acknowledged that, as a textual matter, the term "sexual activity" includes individual conduct such as masturbation. *See Taylor,* 640 F.3d at 259. Because, as discussed above, "sexual activity" encompasses activities beyond those involving interpersonal physical contact, we do not consider the term to be ambiguous. *See Fugit,* 703 F.3d at 255.
>
> Second, the Seventh Circuit looked to the meaning of "sexual act" in 18 U.S.C. § 2246(2)(D), a definitional provision which requires the intentional touching of a minor's genitals. *See Taylor,* 640 F.3d at 257. That provision,

however, applies to statutes in Chapter 109A of Title 18, and § 2422(b) is located in Chapter 117. Given that "sexual activity" and "sexual act" are not necessarily synonymous, *see Taylor,* 640 F.3d at 259-260, we do not think it is appropriate to borrow the definition of "sexual act" from § 2246(2)(D). *See Fugit,* 703 F.3d at 256. *See also* II Bouvier Law Dictionary at 2595 ("Sexual conduct is a broader category than sexual act.").

Third, the concern motivating the Seventh Circuit was that not reading "sexual activity" to require interpersonal physical contact could result in the criminalization of (and a mandatory minimum 10-year prison sentence for) flirting, flashing, or watching a pornographic movie, a pole dancer, a striptease artist, or an erotic painting. *See Taylor,* 640 F.3d at 257-58. But "sexual activity" in § 2422(b) is not a stand-alone term; the full phrase is "sexual activity for which any person can be charged with a criminal offense." And so it would seem, as "a general matter, [that] conduct that is innocuous, ambiguous, or merely flirtatious is not criminal and . . . not subject to prosecution under § 2422(b)." *Fugit,* 703 F.3d at 255. In other words, the term "sexual activity" is limited by the requirement that the conduct in question also be criminally proscribed.

Dominguez, 997 F.3d at 1126.

Last, Defendant asserts that this Court should limit sexual activity as used in § 2422(b), based on how the State of Ohio defines sexual activity in its criminal code. As the Government correctly notes, this position would have the effect of changing the scope of the term of a federal statute based on technical definitions and labels under the state law where the offense occurred. This is an untenable interpretation. While Ohio law is relevant to determining whether the defendant violated § 2422(b) in this specific case, it is relevant to the separate element that "any person can be charged with a criminal offense" and cannot limit the term "any sexual activity" as a matter of federal law. As to the relevant aspect of Ohio law, the evidence establishes (and Defendant does not dispute) that he took a substantial step toward the completion of the crime and that, had he been successful in his attempts, he could have been charged with violating Ohio Revised Code § 2907.323.

Based on the foregoing, the Court concludes that reversal of Defendant's convictions on Counts 5 and 6 is not warranted because the judgment is supported by substantial and competent evidence.

D. Count 7

The jury found Defendant guilty of Count 7, which charged him with making a notice seeking or offering participation by a minor in an act of sexually explicit conduct, in violation of Title 18, United States Code, § 2251(d)(1)(B) and (e). Defendant contends that the guilty verdict on this Count should be overturned because the

jury should not have been able to consider any evidence other than the words that he put in the messages he exchanged with Jae and one-to-one messages cannot constitute a notice as a matter of law. Defendant's arguments are not well taken.

As to the latter argument, the Sixth Circuit has held that one-to-one communications can encompass a notice under § 2251(d)(1). *United States v. Sammons,* 55 4th 1062 (6th Cir. 2022). Defendant here, just like the defendant in *Sammons,* sent online one-to-one written communications in which he sought to have a child engage in sexually explicit conduct. He was charged with and convicted on the basis of the messages that he sent directly to one undercover agent. Further, the *Sammons* Court did not base its determination that one-to-one messages constitute notices on the specific facts of that case. Instead, the Court looked at the plain language of the statute and found that the words "any notice" unambiguously included private communications between just two parties. *Sammons,* 55 F.4th at 1067 ("'[A]ny notice' naturally covers private one-on-one messages." (alteration in original)).

As to Defendant's first position, and as this Court indicated above in its discussion of Counts 1 through 4, the entirety of the testimony and evidence that was introduced during trial in this case provides sufficient support for the jury's determination that the defendant sought depictions of Jae and Nik engaged in sexually explicit conduct. The jury had evidence that the defendant would pay $500 only for nude and sexually explicit images, that he offered $500 for a nude image of Nik, that he offered up to $2000

plus other gifts if the girls would engage in a Facetime video call with him, and that he wanted them to pose in certain ways in photos before the Facetime call but would not put in writing what those poses were. The jury was instructed that they were allowed to make "reasonable inferences" from the evidence that was introduced and it is a reasonable inference from all the evidence before the jury that the defendant's intent when he offered to pay Jae and Nik up to $2000 was that they would engage in sexually explicit conduct.

Thus, reversal of conviction on Count 7 is not warranted because, viewing the record as a whole, the judgment is supported by substantial and competent evidence.

IV.

For the reasons stated above, the Court **DENIES** Defendant Bernhard Jakits' Motions for Judgment of Acquittal. (ECF Nos. 169, 183, 201.)

IT IS SO ORDERED.

August 24, 2023
Date

/s/
Edmund A. Sargus, Jr.
United States District Judge

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION, FILED MAY 18, 2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 2:22-CR-194

UNITED STATES OF AMERICA,

Plaintiff,

v.

BERNHARD JAKITS,

Defendant.

Filed May 18, 2023

OPINION AND ORDER

EDMUND A. SARGUS, JR., District Judge.

This matter is before the Court on the Government's Motion in Limine to Preclude Evidence Pursuant to Federal Rule of Evidence 412 (ECF No. 104), Defendant's Response in Opposition (ECF No. 121), Defendant's Motion Regarding Potential Rule 412 Evidence and Offer of Proof (ECF No. 134), and the Government's Response

(ECF No. 139, sealed). For the reasons that follow, the Court **GRANTS** the Government's Motion (ECF No. 104) and **DENIES** Defendant's Motion (ECF No. 134).

I.

On October 11, 2022, the Grand Jury returned an eight-count indictment against Bernhard Jakits. (ECF No. 4). This indictment was superseded January 17, 2023. (ECF No. 46.) The superseding indictment included nine counts: Counts One and Two allege sexual exploitation of a minor in violation of 18 U.S.C. §§ 2251(a) and (e); Counts Three and Four allege attempted sexual exploitation of a minor in violation of the same, 18 U.S.C. §§ 2251(a) and (e); Counts Five and Six allege attempted coercion or enticement of a minor in violation of 18 U.S.C. § 2422(b); Counts Seven alleges the making an interstate notice for child pornography in violation of 18 U.S.C. §§ 2251(d)(1)(B) and (e); Count Eight alleges the receipt of child pornography in violation of 18 U.S.C. §§ 2252(a)(2), and (b)(1); and Count Nine alleges transportation of obscene matters in violation of 18 U.S.C. §§ 1462(a).

Defendant filed a motion requesting severance of Count Nine (ECF No. 58), which was opposed by the government (ECF No. 65). This Court granted Defendant's request (ECF No. 75), leaving Counts One through Eight.

II.

The government moves for exclusion under Federal Rule of Evidence "Rule 412. Sex-Offense Cases: The

Victim's Sexual Behavior or Predisposition," which provides:

> (a) Prohibited Uses. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct:
>
> > (1) Evidence offered to prove that any alleged victim engaged in other sexual Behavior, or
> >
> > (2) Evidence offered to prove any alleged victim's sexual predisposition.

Fed. R. Evid. 412(a).

Rule 412(b) provides three exceptions under which such evidence may be admissible: (1) where the evidence is offered to prove that someone other than defendant was the source of semen, injury, or other physical evidence; (2) where the evidence is offered to prove consent; and (3) where exclusion of the evidence would violate the defendant's constitutional rights. Fed. R. Evid. 412(b).

III.

The Court here reviews (A) the initial round of briefing on the potential Rule 412 evidence, (B) the Rule 412(c) hearing, (C) the combination of all evidence and argument before the Court on the potential Rule 412 evidence.

Appendix C

A. Government's Motion in Limine to Preclude Evidence Pursuant to Rule 412

The government moved in limine to exclude certain evidence under Federal Rule of Evidence Rule 412, indicating that it

> anticipates that the evidence adduced in its case-in-chief at trial will consist of testimony from the victims who communicated with the defendant and from law enforcement agents, who investigated the case and/or conducted forensic analysis of the various devices belonging to or used by the victims and the defendant. The forensic testimony will primarily consist of images of the minor victims and communications between the defendant and the victims or communications of the defendant about the victims. The images of the victims include pornographic and non-pornographic content.

(Gov't Mot. at 1-2, ECF No. 104.) With regard to potential 412 evidence:

> The government anticipates that one or both of the minor victims will testify at trial. Other than the fact that Jane Doe #1 had a boyfriend at the time she communicated with the defendant and had previously taken photos of herself wearing a bra and underwear, the government is unaware of any sexual history or predispositions of either Jane Doe.

> However, given that the defense previously suggested that Jane Doe #1 met the defendant on the website Skip the Games, which is largely used for advertising prostitution or escort services, and that the minor victims had developed a plot to send sexually explicit images to other individuals to obtain money, the government seeks a ruling that the defense be precluded from cross-examining Jane Doe #1 or Jane Doe #2 about their sexual interactions with individuals other than the defendant, or making any suggestion that either girl had any sort of sexual predisposition.

Id. at 2.

Defendant filed a response in opposition to the government's motion, contending that "'[t]he order sought by the government extends well beyond the scope of Rule 412[].'" (ECF No. 121 at 1.) Defendant argues that the evidence it seeks to present to support its position is as follows:

> The Defense would present evidence that other men also were contemplated as potential targets from whom Jane Doe #1 and/or Jane Doe #2 could get money by sending them pictures as part of the exact same scheme at the same time as Defendant was targeted not as evidence of "other sexual behavior" (it is actually the same behavior, at the same time, just viewed in full context) or "sexual predisposition," but

> as evidence of Jane Doe #1 and Jane Doe #2's actual motivation and purpose, the credibility of their versions of the communications with Defendant, and their motives in testifying and in deleting evidence.

Id. at 9.

On May 3, 2023, this Court issued a decision stating:

> Defendant gives examples of why certain alleged conduct of the minor victims should be considered res gestae because the acts, in his view, are inextricably intertwined with the charged offense and are necessary to complete the story of the charged offense. *Id*. at 8. Defendant's narrative of the conduct of the alleged minor victims and their mother is that he was targeted in a scheme to obtain money from him and that they engaged in the same conduct, *i.e.*, targeting other men for money in exchange for sexually explicit pictures. In other words, he intends to offer evidence of the minor victims' sexual behavior with others.

(Op. and Order at 2, ECF No. 126.)

The Court concluded:

> This conduct is uncharged sexual conduct of the alleged victims. It is exactly the type of evidence to which Rule 412 is directed.

> Consequently, much of the evidence Defendant seeks to introduce is limited under Rule 412.

Id.

The Court informed the parties that it would "strictly enforce the procedural requirements of Rule 412 regarding admissibility," which provides:

> (c) Procedure to Determine Admissibility.
>
> (1) Motion. If a party intends to offer evidence under Rule 412(b), the party must:
>
> > (A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;
> >
> > (B) do so at least 14 days before trial unless the court, for good cause, sets a different time;
> >
> > (C) serve the motion on all parties; and
> >
> > (D) notify the victim or, when appropriate, the victim's guardian or representative.
>
> (2) Hearing. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and

> the record of the hearing must be and remain sealed.
>
> Fed. R. Evid. 412(c).

Id. at 3.

The Court, therefore, held in abeyance the government's motion in limine, issued a briefing schedule so that Defendant could comply with Rule 412's requirement to specifically describe the evidence and state the purpose for which it is offered, and scheduled an in-Court hearing. *Id*. at 4.

B. Defendant's Motion Regarding Potential Rule 412 Material and Offer of Proof and Rule 412(c) Hearing

Pursuant to this Court's direction, Defendant filed its Motion Regarding Potential Rule 412 Material and Offer of Proof (ECF No. 134) and the government responded in opposition (ECF No. 139). The government's response included five audio recordings of jail telephone calls that make up the subject matter of the potential Rule 412 evidence. (ECF No. 134, Exs. 1-5.) The Court held a hearing on May 12, 2023, the day after the briefing was complete. (Transcript "Tr," ECF No. 148.)

1. Hearing

Pursuant to Rule 412(c)(2), this Court held a hearing on the Rule 412 issue on Friday, May 12, 2023. At the

hearing, defense counsel indicated that the evidence he seeks to introduce does not implicate Rule 412, but instead shows that the alleged victims engaged in the nonsexual exploitation of other men and that the mother and grandmother proliferated a culture of manipulation and exploitation of men for money. (Tr. at 43-49.)

The Court indicated that it was at a disadvantage, because although the jail calls had been submitted for in camera review by the government, Defendant did not specify the statements from the calls he intended to use and for what purpose. In other words, Defendant failed to meet the Rule 412 admissibility requirements. The Court, therefore, invited Defendant to file this information. In response to the invitation, Defendant submitted to the Court a 50-page transcript of jail calls, indicating that "[t]o follow up on our discussion with the Court on Friday, attached for the Court's benefit is a 'clip report' compiling excerpts of transcripts of the various jail calls which the Defense anticipates we might use in some form or fashion, depending upon how the trial goes and what the specific testimony in court is." This Court filed that transcript under seal. (Tr., ECF No. 152.)

2. Defendant's Motion and the Jail Calls

While Defendant largely failed to "specifically describe[] the evidence and state[] the purpose for which it is to be offered," Fed. R. Evid. 412, the Court has carefully reviewed the jail call transcript, the arguments made at oral argument, and all briefing by the parties in making its determination related to Rule 412.

Appendix C

In Defendant's Motion, he posits:

> [T]he Defense will offer evidence that the mother and the grandmother of the minor girls established a culture of exploitation of men whereby they sought to obtain money from men in a number of ways.
>
> As we describe in detail below, when the mother went to jail in December of 2018, her daughters and their grandmother were desperate for funds, in particular so that Jane Doe #1 could travel to Jacksonville, Florida with her boyfriend. During this period, the mother, at the time working as a prostitute, communicated with the girls and the grandmother by phone and essentially went through her customer list of men (including the Defendant) and urged the girls especially to contact them.
>
> Contrary to the government's narrative, far from telling her daughters not to contact Defendant, she actually encouraged their contact with him and other men. This evidence will support the Defense position that any photos Jane Doe #1 sent Defendant were offered by her, not requested by him. We describe below how this fits into the overall defense.

(Def's Mot. at 1-2, ECF No. 134.) Further, Defendant contends the evidence will show that "before the mother went to jail in December of 2018, the mother and both

of her daughters discussed a plan to send pictures to Defendant for money—before defendant had had any communication with Jane Doe #1." *Id.* at 4.

Defendant additionally asserts that "[t]o the extent any of the evidence the government seeks to exclude falls under Rule 412, the evidence should still not be excluded. Rule 412 has three enumerated exceptions in criminal cases." (Def's Mem. in Opp. at 10, ECF No. 121) (citing Fed. R. Evid. 412(b)(1)). Defendant relies on the third exception, which "states that a court may admit any evidence whose exclusion would violate the defendant's constitutional rights." *Id.* (citing Fed. R. Evid. 412(b)(1)(C)). Defendant contends that "[e]xcluding the broad categories of evidence the government seeks to exclude runs the risk of violating defendant's Constitutional rights." *Id.*

Defendant continues:

> In summary, the mother and grandmother modeled behavior which influenced Jane Doe #1 and Jane Doe #2 to exploit men and seek money from them in exchange for nude photos. Jane Doe #1 had pre-existing nude photos to send. As a consequence, in need of money, she offered and sent unsolicited photos to the Defendant in exchange for money. Importantly, the handful of photos that the government contends depict "the lascivious exhibition of the genitalia and pubic area" were never requested by the Defendant, and there was not even any payment

> associated with some of them. Based on forensic evidence, it appears they were volunteered.

(Def's Mot. at 6, ECF No. 134.))

The government agrees with Defendant, as does the Court, that:

> To be sure, whether the minor victims took the sexually explicit photos for the defendant or whether they sent him pre-existing photos is relevant to Counts One and Two (though not to any of the other counts). As such, the defendant should be permitted to cross-examine the minor victims about the timing and origin of the sexually explicit images. If they respond, as the government anticipates, that they took the images for defendant in exchange for the offered money, any further inquiry would run afoul of Rule 412.

(Gov't Mem. in Opp. at 6, ECF No. 139.)

The government otherwise disagrees, arguing that the calls do not support what Defendant suggests, and even if they did it is exactly the type of evidence Rule 412 is meant to cover. Specifically,

> Defendant's filing sets forth the general theory of his defense, which is premised on his claim that the minor victims' mother created "a culture of exploitation and manipulation of

> men" that allegedly involved the minor victims sexually targeting the defendant, other men, and possibly one of the minor victim's boyfriends. Defendant's motion references various pieces of evidence, including recorded jail calls and one image of male genitalia, that he asserts supports his belief that the victims were part of this culture and that they acted consistent with this culture in their interactions with him. As this Court previously found, however, any evidence that the minor victims had targeted other men (or involved their friend) in similar schemes falls directly within the scope of Rule 412.
>
> Defendant's theory of the case is a classic sexual propensity argument: he alleges that because the victims were part of a culture that targeted and exploited men and/or because they exchanged sexually explicit photos with a boyfriend, they were more likely to have engaged in similar conduct with the defendant—*i.e.*, targeting him for money in exchange for sexually explicit photographs. This is not permissible under Rule 412(a), and the defendant should be precluded from making this argument or introducing any evidence, including the male genitalia image or recorded calls, in support of this theory.

Id. at 4. The government's arguments are well taken.

First, if the evidence were as Defendant presents it, it is the exact type of evidence precluded under Rule 412. Rule 412 applies "in all cases involving sexual misconduct[.]" Fed. R. Evid. 412, Advisory Committee Notes, 1994 Amendments. It is therefore applicable in cases involving charges such as child sexual exploitation or child pornography. "Sexual behavior" includes "all activities that involve actual physical conduct, *i.e.*, sexual intercourse or sexual contact," or that imply sexual intercourse or sexual contact, such as use of contraceptives, birth of an illegitimate child, or diagnosis of venereal disease. Fed. R. Evid. 412, Advisory Committee Notes, 1994 Amendments. The reference to "sexual predisposition" is "designed to exclude evidence that . . . the proponent believes may have a sexual connotation for the fact finder," such as "the alleged victim's mode of dress, speech or lifestyle." *Id.* Rule 412 is interpreted broadly and applies to all sexual behavior of the victim "whether offered as substantive evidence or for impeachment." Fed. R. Evid. 412, Advisory Committee Notes, 1994 Amendments. Because this case involves alleged sexual misconduct, Rule 412 applies and prohibits the introduction of any evidence related to the sexual histories or predispositions of Jane Doe #1 or Jane Doe #2.

Second, the evidence Defendant presents does not fall within any of Rule 412(b)'s exceptions. Defendant asserts that the evidence is required to give him a meaningful opportunity to present a complete defense and prohibiting this opportunity violates his constitutional rights. (Def's Mem. in Opp. at 10, ECF No. 121 at 10-12.) This Court disagrees. The circuit courts have consistently concluded

that such evidence is not constitutionally required and thus not admissible.

The Sixth Circuit has addressed the constitutional violation exception to Rule 412(b)(1)(C) in the context of sex trafficking cases, in which defendants have argued that evidence of past prostitution activities by a victim were relevant cross-examination material necessary to protect their constitutional right to present a defense. *United States v. Bixler*, No. 21-5194, 2022 WL 247740, at * 4 (6th Cir. Jan. 27, 2022). The court explained: "Prior acts of prostitution lead only to improper character inferences and are not relevant to proving sex trafficking charges," as such evidence has no bearing on whether defendant "forced or coerced [victims] into prostitution on the *particular occasions* alleged in the indictment." *See also United States v. Palms*, 21 F.4th 689, 703-704 (10th Cir. 2021) (excluding victim's prior knowledge and experience in how prostitution worked because it did not counter allegation that Defendant enticed or recruited her or impeach her credibility because under Rule 412(b)(1)(c) the "sexual behavior evidence is not probative of a central issue in this case," and "general impeachment evidence [] is not required by the Constitution"); *United States v. Carson*, 870 F.3d 584, 593-594 (7th Cir. 2017) (defendant's proposed evidence of victims' prior prostitution activities was not relevant to *his* state of mind, *i.e.* whether the defendant subjectively believed the victims voluntarily engaged in prostitution for him, and thus was not constitutionally required under Rule 412); *United States v. Lockhart*, 844 F.3d 501, 510 (5th Cir. 2016) (excluding evidence of prostitution before and after

defendants allegedly trafficked victims for irrelevance to any element necessary to convict defendants and exclusion of evidence therefore did not violate their rights under the Due Process Clause, nor did exclusion violate defendants' rights under confrontation clause where they had opportunity to cross-examine victims based on drug use, bias, and potential consent to engage in prostitution for defendants).

Defendant contends that these trafficking cases are not comparable because "[e]vidence of past prostitution activities are particularly irrelevant and extremely prejudicial in sex trafficking cases. (Def's Mem. in Opp. at 12, ECF No. 121) (citing, *inter alia, United States v. Gardner*, No. 16-CR-20135, 2016 WL 5404207, at *3 (E.D. Mich. Sept. 28, 2016) ("Introducing evidence of [witness]'s prior prostitution would solely go to reinforce a narrative that she acted consistent with past sexual behavior, a line of reasoning 'deemed so extremely prejudicial as to warrant special treatment under the Federal Rules of Evidence.")). Further, Defendant maintains that these cases are not helpful because, unlike this case, the evidence showed that the charges themselves and the facts underlying them had no bearing on whether the defendant was guilty of the charged offenses. That, however, is the same situation as here: Whether the minor alleged victims targeted men to give them money for nude pictures has nothing to do with the elements the government must prove in the charges alleged against Defendant. The state of mind of the minors is not an element of any of the offenses nor is it a defense. Therefore, the proposed evidence, even if it was as Defendant purports it to be, is

particularly irrelevant and certainly unfairly prejudicial in this child exploitation case.

Any evidence that the minor alleged victims in this case sent, either voluntarily or as a result of coercion, sexually suggestive or sexually explicit images of themselves to persons other than the defendant at times other than those alleged in the superseding indictment, is subject to the same analysis employed by the courts in the sex trafficking cases. Whether or not the minor victims engaged in sexual activity, be it online or in person, with individuals other than the defendant, provides little insight into whether Defendant caused or attempted to cause them to engage in the sexually explicit conduct at issue in this case. Because analysis of a defendant's constitutional right to present such evidence requires consideration of "the extent to which the evidence 'was central to the defendant's claim of innocence,'" and the degree to which exclusion of the evidence "was supported by a 'valid state justification,'" the marginal relevance of the evidence here cannot outweigh the strong interest in excluding the evidence. *Ogden*, 685 F.3d at 605 (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

Third, the Court disagrees with Defendant as to what the evidence shows. The Court finds no evidence before the Court that shows or supports in any way Defendant's contention that Ashley M. "and both of her daughters (the two minor alleged victims) discussed a plan to send pictures to Defendant for money before A[shley] M. went to jail." Nor does Defendant point the Court to any evidence, leaving the sentence un-cited. (Def's Mot. at 4, ECF No. 134.)

Further, there is no evidence in the jail calls or otherwise that Ashley M. "encouraged the minor alleged victim to contact Defendant and other men for money." The jail calls are clear that Ashley M. directs her minor daughters *not* to contact Defendant and, as for the other men, Ashley M. asks for phone numbers that are on her own phone that she does not have in jail. Ashley M. does not "urge the girls especially to contact them" or "encouraged their contact with him and other men." (ECF No. 134 at 1.)

Defendant does specifically describe one of the statements from the jail calls and suggests what it will show:

> On January 9, 2019, the family discussed obtaining money from "Dale." They discussed having him drive Jane Doe #1 and Jane Doe #2 to the jail to visit the mother, and the mother urged the grandmother and her daughters to get money from him, remarking: "Trust me. That ride up here to the jail, [Jane Doe #1] and [Jane Doe #2] know how to work a mother fucker. It is not that hard, especially him. Especially, I promise you, him. He's cake."
>
> In summary, the mother and grandmother modeled behavior which influenced Jane Doe #1 and Jane Doe #2 to exploit men and seek money from them in exchange for nude photos.

(Def's Mot. at 6, ECF No. 134.)

This statement provides no indication that either of the minor victims ever engaged in any sexual behavior to target the person in question, a male friend of Ashley M. Ashley M.'s statement that the minor victims may be able to obtain money from this person to help support themselves while she was incarcerated has no relevance to whether defendant used the minors to engage in sexually explicit conduct with the intent to create a visual depiction of that conduct.

Additionally, the statement is hearsay and Defendant has pointed to no exception that would apply to allow admission nor can the Court find one. The only exception remotely relevant is "Then-Existing Mental, Emotional, or Physical Condition." Fed. R. Evid. 803(3) ("A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will."). The declarant, Ashley M., is not stating her then existing mental or emotional condition. She is, at best, stating her daughters' mental state. However, even as to that exception, it is unlikely that a declarant's statements regarding third parties qualifies for the exception, with most circuits finding that it does not, at least without "independent evidence that connected the declarant's statement with the non-declarant's activities." *U.S. v. Best*, 219 F.3d 192, 198 (2d Cir. 2000) (looking to "ample circumstantial evidence to corroborate" and/or "ample independent proof" that the conduct in the statement had occurred).

Finally, the Court finds unpersuasive Defendant's position taken at the hearing that the evidence reflects extortion disconnected from sex. The position is in complete opposition with what Defendant indicates is relevant and necessary about the evidence. That is, Defendant is clear throughout his briefing that the evidence shows that the minor alleged victims "exploit men and seek money from them in exchange for nude photos." (Def's Mot. at 6, ECF No. 134.) He specifies that "other men also were contemplated as potential targets from whom Jane Doe #1 and/or Jane Doe #2 could get money by sending them pictures as part of the exact same scheme at the same time as Defendant was targeted" or "sexual predisposition," but as evidence of Jane Doe #1 and Jane Doe #2's actual motivation and purpose, the credibility of their versions of the communications with Defendant, and their motives in testifying and in deleting evidence." (Def's Opp. at 9, ECF No. 121.) The minor alleged victims' motivation is not relevant as they are not on trial. And even if the evidence did show what Defendant posits, which it does not, it is unequivocally connected sex/pornography and is offered to show that the minor alleged victims targeted other men to get money for nude photos, which makes it more likely they did the same thing with Defendant. This evidence is precluded by Rule 412.

IV.

Based on the foregoing, the Court **GRANTS** the Government's Motion (ECF No. 104) and **DENIES** Defendant's Motion (ECF No. 134).

IT IS SO ORDERED.

May 18, 2023
Date

/s/
Edmund A. Sargus, Jr.
United States District Judge

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION, FILED MAY 2, 2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 2:22-CR-194

UNITED STATES OF AMERICA,

Plaintiff,

v.

BERNHARD JAKITS,

Defendant.

Filed May 2, 2023

OPINION AND ORDER

EDMUND A. SARGUS, JR., District Judge.

This matter is before the Court on:

(A) the Government's Motion in Limine Regarding Victim Identification (ECF No. 83) and Defendant's Memorandum in Opposition (ECF No. 95);

(B) the Government's Motion in Limine to Exclude Certain Evidence and Argument (ECF No. 84) and Defendant's Memorandum in Opposition (ECF No. 96); and,

(C) the Government's Motion in Limine to Exclude Evidence Pursuant to Rules 403 and 404(b) Regarding S.P. (ECF No. 86) and Defendant's Memorandum in Opposition (ECF No. 97).

I.

On October 11, 2022, the Grand Jury returned an eight-count indictment against Bernhard Jakits. (ECF No. 4). This indictment was superseded January 17, 2023. (ECF No. 46.) The superseding indictment included nine counts: Counts One and Two allege sexual exploitation of a minor in violation of 18 U.S.C. §§ 2251(a) and (e); Counts Three and Four allege attempted sexual exploitation of a minor in violation of the same, 18 U.S.C. §§ 2251(a) and (e); Counts Five and Six allege attempted coercion or enticement of a minor in violation of 18 U.S.C. § 2422(b); Counts Seven alleges the making an interstate notice for child pornography in violation of 18 U.S.C. §§ 2251(d)(1)(B) and (e); Count Eight alleges the receipt of child pornography in violation of 18 U.S.C. §§ 2252(a)(2), and (b)(1); and Count Nine is transportation of obscene matters in violation of 18 U.S.C. §§ 1462(a).

Defendant filed a motion requesting severance of Count Nine (ECF No. 58), which was opposed by the government (ECF No. 65). This Court granted Defendant's request

(ECF No. 75), leaving Counts One through Eight as part of the first trial scheduled against Mr. Jakits.

II.

Preliminary questions relating to the admissibility of evidence may be raised pretrial with the Court via a motion in limine. *See* Fed. R. Evid. 104(a); *Compton v. Kolvoord,* No. 92-3214, 1993 WL 141063, at *2 (6th Cir. Apr. 30, 1993). Although neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure explicitly authorize a court to rule on an evidentiary motion in limine, the United States Supreme Court has noted that the practice of such motions "has developed pursuant to the district court's inherent authority to manage the course of trials." *Luce v. U.S.,* 469 U.S. 38, 41 n.4 (1984); *In re. E.I. Du Pont De Nemours & Co. C-8 Personal Injury Litigation,* No. 2:13-CV-1103, 2016 WL 3064124, at *2 (S.D. Ohio May 30, 2016)).). The purpose of a motion in limine is to allow a court to rule on issues pertaining to evidence in advance of trial, to avoid delay and ensure an evenhanded and expeditious trial. *See Ind. Ins. Co. v. Gen. Elec. Co.,* 326 F.Supp.2d 844, 846 (N.D. Ohio 2004).

To obtain the exclusion of evidence, a party must prove that the evidence is clearly inadmissible on all potential grounds. *Id.* "Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context." *Ind. Ins. Co.* at 846; *In re. E.I. Du Pont,* 2016 WL 3064124, at *2.

Evidence is not admissible if it is irrelevant. *See* Fed. R. Evid. 401, 402. To establish the relevance of a particular matter, the evidence must affect the "probability of the existence of any fact that is of consequence to the determination of the action." Fed. R. Evid. 401. Further, even potentially relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. Fed. R. Evid. 403.

District courts also frequently grant motions in limine to prevent the introduction of improper character evidence at trial. *See* Fed. R. Evid. 402, 403, 404, 608, and 609; *U.S. v. Stout,* 509 F.3d 796, 797 (6th Cir. 2007) (affirming grant of motion in limine suppressing prior bad acts evidence); *Allstate Ins. Co. v. Shuler,* No. 94-5329, 1995 WL 258139, *4 (6th Cir. May 2, 1995) (affirming decision of district court granting motion in limine excluding character evidence until character attacked); *Randolph v. Ohio, Dept. of Youth Servs.,* No. C2-01-1253, 2007 WL 2852356, *2 (S.D. Ohio Oct. 2, 2007) (granting motion in limine excluding improper character evidence); *Ross v. American Red Cross,* No. 2:09-cv-00905-GLF-MRA, 2012 WL 2004810, at *4 (S.D. Ohio June 5, 2012) (granting motion in limine excluding improper character evidence).

III.

The Court will consider the government's three motions in limine motions seriatim.

Appendix D

A. Motion in Limine Regarding Victim Identification

The United States seeks direction on the manner in which victims are identified at trial. The government proposes "the adult victim" who is identified by her initials in the Superseding Indictment, be identified "only by her first name and the first initial of her last name, specifically Ashley M." (ECF No. 83, at 1). And that "[t]he minor victims referred to in the Superseding Indictment as Jane Doe #1 (J.A.) and Jane Doe #2 (N.A.), be identified by their initials" (*Id.*). "To the extent that the Court has concerns regarding the use of initials, the government alternatively asks that the victims be referred to by their nicknames." (*Id.*).

Defendant "does not oppose referring to the individuals identified in the superseding indictment as Jane Doe #1, Jane Doe #2, and A.M. by something other than their full legal names." (ECF No. 95, at 1). Further, "[t]he Defense agrees with the government's proposal to use Ashley M. for A.M." (*Id.*). However, "the Defense has practical concerns about using first and last initials for Jane Doe #1 and Jane Doe #2." (*Id.*). Instead, Defendant prefers to refer to Jane Doe #1 and Jane Doe #2 by their nicknames. Because both sides agree to the use of nicknames, and the Court finds this choice acceptable as well.

Accordingly, reference at trial to Jane Doe #1 and Jane Doe #2 will be by nicknames and the adult victim will be referred to as Ashley M. The government's Motion in Limine Regarding Victim Identification is therefore **GRANTED**. (ECF No. 83).

Appendix D

B. Motion in Limine to Exclude Certain Evidence and Argument

The United States moves to prevent Defendant from offering any evidence or argument related to:

> (1) discovery disputes between the parties; (2) bases for prosecution determinations and/or comparisons of the facts underlying this case to those of other child exploitation or child pornography cases; (3) the defendant's knowledge of or beliefs about the ages of Jane Doe #1 and Jane Doe #2 for purposes of Counts One through Four; (4) any evidence of the defendant's "good acts" or character, other than that which is permitted pursuant to Federal Rules of Evidence 404 and 405; and (5) whether Jane Doe #1 and Jane Doe #2 consented to engage in the sexually explicit conduct at issue. . . . [(6)] any argument, evidence, or lines of inquiry designed to elicit or which has the effect of supporting jury nullification, including potential penalties the defendant will face if convicted.

(ECF No, 84, at 1). Defendant also makes an argument in his response memorandum related to the admissibility of the potential criminal sanctions against the alleged victims in this case. Thus, the Court will address that issue below as well.

Appendix D

1. References to and Comments Regarding Discovery

The government "moves to preclude counsel from referencing discovery in any way or otherwise commenting on discovery matters in the presence of the jury." (ECF No. 84, at 3). It argues that "[c]omments on discovery issues in front of the jury are irrelevant under Rule 401 and may create the misimpression that one side has suppressed information as a means of seeking an unfair advantage." (*Id.*).

Defendant responds that he "does not intend to detail the full extent of its discovery requests to the jury or the government's responses to those requests." (ECF No. 96, at 2). Rather, he asserts that "there are a number of matters that fall within or otherwise relate to the broad category of 'discovery' which would be entirely appropriate subjects of evidence or argument." (*Id.*). Defendant indicates that he intends to "point out evidence that is absent, evidence that was not sought by the government, evidence that was not provided and/or deleted by witnesses, and evidence that was available to the government but not examined and/or not made available to the Defense." (*Id.*). "In particular," Defendant focuses on "forensic evidence from the three phones Janet S. produced to the government which has been available to the government's expert, SA Saltar, but which the government has not made available to the Defense or its experts." (*Id.* at 3.) Defendant contends that this type of evidence "is entirely fair game" and that "[i]t is completely appropriate for the Defense to point out where the government has been able to examine and analyze

something while the Defense has not. It is analogous to spoliation evidence, and the jury is entitled to hear it." (*Id.*) This Court disagrees.

The presentation of argument before a jury is not the remedy for failure to provide appropriate responses or disclosures to discovery requests. Instead, a motion to compel is the solution. Juries do not decide discovery disputes. *See Rheinfrank v. Abbott Labs., Inc.,* Case No. 1:13-cv-144, 2015 U.S. Dist. LEXIS 120581, *21-22 (S.D. Ohio 2015) (stating "the Court finds that evidence or argument about discovery disputes would be irrelevant and unfairly prejudicial"); *Hinkle v. Ford Motor Co.,* No. 3:11-24-DCR, 2012 U.S. Dist. LEXIS 130585, 2012 WL 4049477, at *6 (W.D. Ky. Sept. 13, 2012) (granting motion *in limine* to exclude evidence of discovery disputes as irrelevant, and noting that such "matters are properly presented to the Court for resolution").

Further, the evidence at issue here is not comparable to spoliation evidence. There is no suggestion that the government destroyed or altered evidence. The argument is strictly related to whether the government sufficiently responded to discovery. In other words, the discovery was available, just allegedly not provided to discovery requests for it.

Based on the foregoing, the Court concludes that the evidence related to discovery is not relevant and is excludable pursuant to Rule 401 of the Federal Rules of Evidence.

2. Arguments or Comments Before the Jury Regarding the Bases for Prosecution in this Case or Comparison of this Case to Other Child Exploitation Cases

The government requests that the Court "preclude the defendant from making arguments or eliciting testimony that challenge the institution of prosecution, such as selective prosecution or the motivations behind the investigation." (ECF No. 84, at 3). Defendant does not oppose this request, stating "Defendant does not intend to present a comparison between the facts of this case versus those in any specific other case the government has prosecuted." (ECF No. 96, at 5).

3. Knowledge of Age

The government asks for certain evidence and argument related to the age of the alleged victims to be excluded. Defendant agrees with regard to Counts One through Four but raises issues as to how the government seeks to limit age evidence. Thus, the Court will review the admissibility of age evidence on all counts.

a. Exploitation of a Minor, Attempted Exploitation of a Minor, 18 U.S.C. § 2251(a) and (e) (Counts One through Four)

The government seeks to exclude "any evidence of the defendant's knowledge or belief regarding the ages of Jane Doe #1 or Jane Doe #2," in regard to Counts One through Four (sexual exploitation of a minor or the attempt

of such) of the Superseding Indictment. (ECF No. 84, at 5). Defendant does not disagree with this legal proposition.

The government asks that

> neither in opening statements, closing arguments, nor any questioning of witnesses should the defense be allowed to suggest that the defendant's knowledge of the victims' ages, or lack thereof, has any bearing on Counts One through Four.

(ECF No. 84 at 6, n.4.)

The parties are correct that the sexual exploitation of minor statute, 18 U.S.C. § 2251, does not contain any knowledge of age requirement on its face, and the precedent of this Circuit and others have established that no such requirement exists. *United States v. Humphrey,* 608 F.3d 955, 962 (6th Cir. 2010) ("We find the reasoning of the majority of our sister circuits to be persuasive and adopt it as our own. Simply stated, 'the statutory text, legislative history, and judicial interpretation compel the conclusion that knowledge of the victim's age is neither an element of the offense nor textually available as an affirmative defense'" under a § 2251(a) offense). Thus, the ages of the alleged victims are not relevant these charges.

b. Attempted Coercion or Enticement of a Minor, 18 U.S.C. § 2422(b) (Counts Five and Six)

To convict Mr. Jakits under 18 U.S.C. § 2422(b), the jury has

> to unanimously agree (1) that [Jakits] used interstate commerce in an attempt to knowingly persuade an individual under the age of 18 to engage in sexual activity; (2) that [Jakits] believed that such an individual was less than 18; and (3) that if sexual activity had occurred, [Jakits] could have been charged with a criminal offense under the laws of [Ohio].

U.S. v. Hart, 635 F.3d 850, 855 (6th Cir. 2011).

Therefore, in these attempt charges, the government need not prove that the individual the Defendant attempted to entice was actually under the age of 18, but that Defendant believed she was under 18. *See id.*

c. Child Pornography (Counts Seven and Eight)

(i) Making an Interstate Notice for Child Pornography, 18 U.S.C. §§ 2251(d)(1)(B) and (e) (Count Seven)

Count Seven of the Superseding Indictment charges violation of Making an Interstate Notice for Child Pornography, 18 U.S.C. § 2251(d), which is the sexual exploitation of minor statute, 18 U.S.C. § 2251 discussed *supra.* Specifically with regard to Count Seven, the Sixth Circuit has held "as an issue of first impression, knowledge of the victim's age is neither an element of the offense nor an affirmative defense to charge of producing child pornography[.]" *U.S. v. Humphrey,* 608 F.3d 955 (6th Cir.

2010). Thus, as is the case in Counts One through Four, the minor's age is irrelevant to Count Seven.

(ii) Receipt of Child Pornography, 18 U.S.C. §§ 2252(a)(2) and (b)(1) (Count Eight)

Count Eight charges a violation of 18 U.S.C. §§ 2252(a)(2) and (b)(1), which requires that Defendant "knowingly received . . . any child pornography" or "any material that contains child pornography." *See U.S. v. Ogden,* 685 F.3d 600, 603-04 (6th Cir. 2012). "[T]hat the defendant knew the visual depiction involved a minor engaging in sexually explicit conduct, is based on *United States v. X-Citement Video,* 513 U.S. 64, 78 (1994), in which the Court held that the scienter requirement of knowingly 'extends both to the sexually explicit nature of the material and to the age of the performers.'" Pattern Crim. Jury Instr. 6th Cir. 16.05 (2023), Pattern Crim. Jury Instr. 6th Cir. 16.05 (2023). "Proof of knowledge . . . is rarely established by direct evidence." *U.S. v. Hentzen,* 638 Fed. Appx. 427, 431 (6th Cir. 2015) (citing *United States v. Scruggs,* 549 F.2d 1097, 1104 (6th Cir. 1977)). "Instead, knowledge of the contents of material 'may be proven by circumstantial evidence.'" *Id.* (citing *United States v. Kussmaul,* 987 F.2d 345, 350 n. 4 (6th Cir. 1993)). Accordingly, as is the case in Counts Five and Six, in Count Eight the government must prove that Defendant believed the alleged victims were minors.

4. "Good Acts" Evidence

The government moves to preclude evidence and argument regarding Defendant's prior good acts, including

his "strong relationship with his daughter, his relationship with his life partner, his role as an engaged and involved grandfather, his close relationship with his brothers, and his role as a supportive and engaged member of the professional sailing community and businessman." (ECF No. 84, at 7). The United States argues that highlighting these personal and community relationships in the context of Defendant's jury trial would be improper because they "do not go to his law-abidingness" and "any attempt by the defendant to demonstrate that he interacts with others (be it adults or minors) without an intent to exploit them does not go to any pertinent character trait." (*Id.* at 9).

In response, Defendant states that he "has no intention of introducing evidence of specific instances in which he helped people, did something worthy of commendation, or accomplished something impressive." (ECF No. 96, at 6). Defendant asserts, however, that he "certainly will discuss his family, personal and professional background as part of his testimony to give the jury a sense of who he is generally and where he comes from." (*Id.*) He argues "for Defendant to testify that he has a life partner, a daughter, two granddaughters, and was a successful businessman does not venture into the realm of 'specific good acts.'" (*Id.*). This Court agrees.

"[T]he defendant's family relationships, engagement in particular communities, ect." are not specific acts. (ECF No. 84, at 9). They are merely facts of his life. Within reason, Defendant may "discuss these facts as relevant foundation for his testimony. Thus, the government's request is granted in part and denied in part.

5. Consent of Alleged Victims to Engage in Sexually Explicit Conduct

The government requests that the Court "limit argument suggesting that the victims 'consented' to any of the charged conduct" because it not relevant. (ECF No. 84, at 10). Defendant responds that "while *consent* of the minor to the conduct is not by itself an absolute defense, it is incorrect to suggest that the minor's intent—more accurately his or her state of mind—is irrelevant." (ECF No. 96, at 8) (emphasis in original). This Court disagrees.

a. Counts One through Four

Consent is not a defense to Counts One to Four, two counts of sexual exploitation of a minor in violation under 18 U.S.C. §§ 2251(a) and (e) and two counts of attempted sexual exploitation of a minor in violation of 18 U.S.C. §§ 2251(a) and (e). A minor simply cannot give valid consent to being sexually exploited. *See United States v. Sibley,* 681 F. App'x 457 (6th Cir. 2017) ("[Victim]'s consent is irrelevant to the question whether [Defendant] used her for the purposes of 18 U.S.C. § 2251(a)."). Therefore, the minor's state of mind is irrelevant.

b. Counts Seven and Eight

Like the first four counts, consent is not a defense to Counts Seven and Eight, which regard making a notice for child pornography and receipt of child pornography, under18 U.S.C. § 2251(d)(1)(B) and § 2252(a)(2). The state of mind of the recipient of a notice under § 2251(d) or the

sender of depictions under § 2252(a) is not an element of the offenses. 18 U.S.C. § 2251 ("Sexual exploitation of children"); 18 U.S.C. § 2252 ("Certain activities relating to material involving the sexual exploitation of minors," such as transporting visual depictions of minors engaging in sexually explicit conduct.) Here too, the minor's state of mind is irrelevant.

c. Counts Five and Six

As to Counts Five and Six, attempted coercion or enticement of a minor under 18 U.S.C. § 2422(b), the Sixth Circuit sets out the elements of the crime:

> The statute provides:
>
> > Whoever, using . . . any facility or means of interstate . . . commerce, . . . knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in . . . any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.
>
> 18 U.S.C. § 2422(b).
>
> The elements of this crime are that (1) the defendant used a means or sexual activity or to attempt to do so; (2) that the defendant believed

> the person was under the age of 18; and (3) that if sexual activity had occurred, the defendant could have been charged with a criminal offense under state law. *United States v. Hart,* 635 F.3d 850, 855 (6th Cir.2011).

U.S. v. Roman, 795 F.3d 511, 515-16 (6th Cir. 2015) (alterations in original) (holding that "a defendant's communications with an adult intermediary . . . may be punished as an attempt under § 2422 where the defendant sought to obtain the minor's assent to the unlawful sexual activity").

Defendant points out that he and the government agree "with respect to Counts 5 and 6, 'it is a requirement of the offense that the victims *not initially be in a state of assent or consent to sexual activity,* and that the defendant's actions be directed at achieving that mental state." (ECF No. 96 at 7) (emphasis in the original). Defendant maintains:

> While it may be true that an attempt charge does not require proof that the required mental state of the alleged victim be achieved . . . it ignores the issue as presented on the facts in this case. Where, as here, the proof of Defendant's alleged coercion, enticement, persuasion and/or inducement will depend so heavily on testimony from Jane Doe #1 and Jane Doe #2, evidence that they not only assented to the exchange *from the outset,* but that it was their and/or their mother's idea from

> the beginning, calls into doubt the very notion that Defendant coerced, enticed, persuaded, or induced anything."

(*Id.,* at 7) (emphasis in original).

Regardless of what the government and Defendant agree, it is simply not "a requirement of [§ 2422(b)] that the victims *not initially be in a state of assent or consent to sexual activity.*" *See United States v. Peterson,* 977 F.3d 381, 389-90 (5th Cir. 2020) (rejecting argument that the government must show that the minor was "unwilling" until the defendant's actions persuaded the minor to engage in sexual activity). Instead, it is the government's burden to show that Defendant intended to persuade, induce, entice or coerce the minor with the purpose of causing or with the belief that it would cause such result (*i.e.,* assent of the minor) without further conduct on his part. The mental state of the minor at the outset of the crime is irrelevant to this inquiry. As the Seventh Circuit recently explained on this issue:

> Under § 2422(b), a minor's willingness or unwillingness to engage in sexual activity is irrelevant. *See United States v. Dhingra,* 371 F.3d 557 (9th Cir. 2004) ("The victim's willingness to engage in sexual activity is irrelevant, in much the same way that a minor's consent to sexual activity does not mitigate the offense of statutory rape or child molestation."). As we've noted before, the "essence of [§ 2422(b)] is attempting to obtain the minor's assent" to

> sexual activity. *See United States v. Hosler,* 966 F.3d 690, 692 (7th Cir. 2020) (citation omitted).
>
> The focus is therefore on the defendant, not the victim. As long as [Defendant] York's actions constitute an attempt to entice "Brionica" to engage in sexual activity, the government satisfies § 2422(b). *Berg,* 640 F.3d at 246; *see also Zupnik,* 989 F.3d at 654 (8th Cir. 2021) (noting that a defendant can be found to "persuade" or "entice" even a seemingly "willing" minor"); *United States v. Peterson,* 977 F.3d 381, 389-90 (5th Cir. 2020) (rejecting argument that the government must show that the minor was "unwilling" until the defendant's actions persuaded the minor to engage in sexual activity).

United States v. York, 48 F.4th 494, 500 (7th Cir. 2022).

In his opposition memorandum, Defendant continues, offering additional support for his position:

> Indeed, the verbs persuade, induce, entice and coerce denote "acts that seek to transform or overcome the will of a minor." *United States v. Hite,* 769 F.3d 1154, 1161 (D.C. Cir. 2014).
>
> Accordingly, the Sixth Circuit has held that 18 U.S.C. § 2422(b) requires proof the alleged minor victim was not initially in a state of assent, even in the context of an alleged attempt

> because the statute "criminalizes an intentional attempt to achieve a *mental* state—a minor's assent[.]" *United States v. Roman,* 795 F.3d 511, 517 (6th Cir. 2015) (quoting *United States v. Dwinells,* 508 F.3d 63, 71 (1st Cir. 2007)) (emphasis in original).

(ECF No. 96 at 7.)

Defendant misapprehends the quote upon which he relies from the Sixth Circuit case. The *Roman* court's explanation that § 2422(b) criminalizes an intentional attempt to achieve the assent (a *mental* state) of the minor *does not* put at issue or make relevant the mental state of the minor. Whether the minor was in or achieved the mental state of assent is irrelevant. The relevant conduct here is that of Defendant—whether he attempted to persuade, induce, entice, or coerce.

Indeed, the *Roman* court reiterated that the Sixth Circuit had previously "held that the statute is violated even if the targeted minor is not a real person as long as the defendant demonstrates that he is, or is attempting to, persuade, induce, entice, or coerce the minor to engage in sexual activity." *Roman,* 795 F.3d at 516 (citation omitted). In other words, the *focus* is on the defendant, not the victim, as the *Roman* court highlighted when discussing § 2422(b):

> "Congress has made a clear choice to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves."

> [*United States v. Bailey,* 228 F.3d 637, 639 (6th Cir. 2000)] As a result, the *focus* always remains on the defendant's subjective intent because the statute is "designed to protect children from the act of solicitation itself." *United States v. Hughes,* 632 F.3d 956, 961 (6th Cir.2011); *Hackworth,* 483 Fed. Appx. at 977

Roman, 795 F.3d at 516 (emphasis added).

Similarly, Defendant misunderstands *Hite's* statement relating to the verbs persuade, induce, entice and coerce. Defendant is correct that those verbs "denote acts that seek to transform or overcome the will of a minor." (ECF No. 96 at 7) (citing *Hite,* 769 F.3d at 1161). A defendant can seek to transform or overcome the will of a minor regardless of the state of mind of the minor. *See id.* ("Whether the defendant aims to achieve a minor's assent by contacting the minor directly, by sending the minor enticing messages through an adult intermediary, or by enlisting an adult intermediary to persuade the minor, *the defendant has the same intent to gain the minor's assent. And that intent is criminalized under § 2422(b).*") (emphasis added). The will of the minor matters not at all—whether it is the minor's state of mind at the outset, middle, or completion of the enticement or attempted enticement.

Accordingly, the mental state of the minors in this action is irrelevant and, therefore, excluded.

6. Punishment or Collateral Consequences and Jury Nullification

The government seeks to preclude "[i]nformation relating to punishment or collateral consequences following conviction." (ECF No. 84, at 13). This includes "the term of incarceration applicable to the offenses charged, or any collateral consequences of conviction, such as having to register as a sex offender." (*Id.*). The government also asks for exclusion of evidence or arguments intended or likely to invite jury nullification, asserting that "[a]ny suggestion by the defendant, by way of argument, questioning, or presentation of evidence, that the jury engage in such nullification would be improper and should be prevented by the Court. (*Id.* at 13, 14.)

Defendant responds that he has "no intention of presenting evidence or argument identifying the mandatory minimum or maximum sentences, or applicable Guideline ranges, if he is convicted, or the fact that he would be required to register as a sex offender." (ECF No. 96, at 8).

The parties are correct. "When a jury has no sentencing role, providing sentencing information "invites [jurors] to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion." *U.S. v. Johnson,* 62 F.3d 849, 850 (6th Cir. 1995) (quoting *Shannon v. U.S.,* 512 U.S. at 579 (1994). The Sixth Circuit explained further:

> Indeed, the only possible purpose that would be served by informing jurors of the mandatory sentence would be to invite jury nullification of the law. In *United States v. Calhoun,* 49 F.3d 231, 236 n. 6 (6th Cir.1995), this Circuit held that a defendant did not have the right to inform the jury of possible punishment or that the jury had the power to nullify the law.

Id. at 850-51

Accordingly, Defendant's punishment or collateral consequences is excluded as irrelevant.

Defendant addresses the issue of jury nullification, arguing that he "will not make arguments or comments to the jury telling them that they have the power to nullify or specifically arguing that they should do so in this case." (ECF No. 96, at 9). However, he contends that "the government's request that Defendant be prohibited from making 'any suggestion' the jury engage in nullification ([ECF No. 84] at 13) or 'presenting evidence or arguments intended or likely to invite jury nullification' (*Id.* at 15) are much broader and would preclude Defendant from presenting valid and admissible arguments, evidence, and impeachment material." (*Id.*).

Both parties agree, and it is well settled, that jurors may not be instructed that they "have the power to ignore the law." *United States v. Avery,* 717 F.2d 1020, 1027 (6th Cir. 1983) (citing *Sparf & Hansen v. United States,* 156 U.S. 51, 102 (1895). Further, the Court finds that it would

be improper for Defendant to suggest that the jury should acquit him even if it finds that the United States has met its burden of proof. As to any remaining concern, the Court is currently without sufficient information as to how the evidence may be presented at trial and will, therefore, rule on any objections at trial. The Court cautions either side that, if it has a concern about the admissibility of the evidence, a request to take argument at side bar is the appropriate procedure.

7. Criminal Exposure of Alleged Victims

In his response memorandum, Defendant also makes an argument related to the admissibility of the potential criminal liability of the alleged victims in this case. Defendant raises this argument in the context of collateral consequences and punishment, suggesting that the government may have been referring not only to Defendant but also to witnesses. Defendant states that

> the government's request to broadly preclude introduction of any "information relating to punishment or collateral consequences" would keep out more than just that which may be problematic. Further, when Ashley M., Jane Doe #1, and/or Jane Doe #2 testify, in examining them regarding their own conduct vis-à-vis S.P., Defendant will ask questions pointing out that their conduct creates not just criminal exposure for them, but significant criminal exposure, and asking whether they have received any promises or assurances from the government with respect thereto.

> Defense counsel can conduct such examinations without identifying the specific mandatory minimum sentences applicable to those offenses, but the point will be made that they face criminal consequences and they are substantial. This would be fair and appropriate cross-examination for any witness facing his or her own criminal exposure; that should not change simply because Defendant is charged with the same thing. If anything, the instant situation heightens the significance of the point.

(ECF No. 96 at 8-9.) Defendant's arguments are not well taken.

In theory, the potential criminal liability of these witnesses/alleged victims would be relevant if they were cooperating co-defendants and the government made any promises to them for their testimony—but Defendant would already know about this through discovery and the Jencks Act, 18 U.S.C. § 3500. The evidence before the Court at this time, however, does not show that these witnesses are facing criminal charges that will be lessened for their testimony or that the government made any promises to them for their testimony. Defendant's belief that these individuals engaged in criminal behavior is not relevant.

Based on the foregoing, the government's Motion in Limine is **GRANTED** in part and **DENIED** in part.

C. Motion in Limine to Exclude Evidence Regarding S.P.

The evidence at issue here concerns S.P., a minor, who is a friend of Jane Doe #1 and knew A.M. and other members of Jane Doe #1's family. There is evidence of photographs of S.P., a minor, in her underwear and brazier. The government moves to exclude "any evidence or argument pertaining to the creation of sexually suggestive images of S.P." (Doc. 86 at 12.) In support, the government claims that "evidence of these events is tenuous and largely irrelevant to the defendant's [alleged] exploitation and attempted exploitation of" Jane Doe #1 and Jane Doe #2. (Doc. 86 at 1.)

The government explains its position as follows:

> Jane Doe #1 and Jane Doe #2 can generally be questioned about whether they initially or voluntarily reported their interactions with the defendant to law enforcement, whether they immediately and voluntarily revealed everything they knew to law enforcement, whether they have or had an interest in protecting A.M. from legal problems, and whether they feared that they may face legal repercussions for taking and sending nude photographs. Given the numerous opportunities that the defense has to attack the credibility of the witnesses without confusing the jury with the side story of S.P., it is well within this Court's discretion to limit cross-examination

> "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *United States v. Love,* 553 F. App'x 548, 552 (6th Cir. 2014) (quoting *Delaware v. Van Arsdall,* 475 U.S. 673, 679 (1986)) (internal quotations omitted). The ambiguous story surrounding S.P. is unnecessary to attack the minor victims' credibility, will serve only to harass the witnesses and confuse the jury, and should be excluded.

(ECF No. 86 at 10-11) (also arguing that S.P. evidence would create a mini-trial to determine whether and how it occurred).

Defendant responds that A.M. and her two daughters attempted to exploit S.P. to provide pictures to attempt to blackmail Defendant. He concludes that the evidence is relevant to the charges against him and that it is also important for impeachment purposes, stating:

> Ashley M., Jane Doe #1 and Jane Doe #2, as well as others, engaged in a joint enterprise to send pictures to Defendant for money, to blackmail him, and to attempt to receive leniency for Ashley M.s extensive criminal record and pending charges. This information is relevant to multiple elements of the offenses with which Defendant is charged.

> This includes both teenage girl's own states of mind, and that Defendant overcame or attempted to overcome their will. It includes whether either girl even engaged in any "sexually explicit conduct" or "unlawful sexual activity," much less whether they did so for the purpose of producing any visual depiction thereof. Additionally, this evidence further bears on the credibility of at least five (and perhaps more) witnesses and contradicts the government's underlying narrative of the case.

Id.

This Court disagrees.[1] First, the state of mind of the alleged minor victims is not relevant for reasons set forth above. Second, the alleged victims are not cooperating co-defendants and are not charged with any crime as discussed above.

Third, Defendant's argument that the S.P. evidence is relevant to prove "whether either girl even engaged in any 'sexually explicit conduct' [§ 2251(a)] or 'unlawful sexual activity,' [§ 2422(b)] much less whether they did so for the purpose of producing any visual depiction thereof," misses the mark. As to the "sexually explicit conduct," under § 2251(a) the question is not whether *either girl* engaged in the sexually explicit conduct and that *they did so* for the purpose of producing a visual depiction. Instead,

1. The intersection of this evidence with Rule 412 of the Federal Rules of Evidence is the subject of a forthcoming decision.

the relevant inquiry is whether "defendant 'acted with the *intent* to create visual depictions of sexually explicit conduct, and that the defendant *knew* the character and content of the visual depictions." *U.S. v. Frei,* 995 F.3d 561, 566 (6th Cir. 2021), *cert. denied,* 211 L. Ed. 2d 380 (Dec. 6, 2021) (emphasis within quotation in the original). Section "2251 is a specific-intent crime, which requires that the defendant must purposefully or intentionally commit the act that violates the law and do so intending to violate the law. S.P.'s conduct does not make this conduct of Defendant more or less probable.

Similarly, § 2422(b) "criminalizes both the enticement and the attempted enticement, but not the actual performance of the sexual activity." *U.S. v. Fuller,* 77 Fed. Appx. 371, 378 (6th Cir. 2003) (citing *United States v. Bailey,* 228 F.3d 637, 639 (6th Cir. 2000) for the proposition that "intent to commit the sexual act is not required to prove attempt to persuade a minor to engage in sexual activity," *cert. denied,* 532 U.S. 1009 (2001). Indeed, the *Fuller* court indicated that the assertion that "a sexual act [is an] element[] of the charged offense [§ 2422(b)] . . . . is meritless." *Id.* Thus, evidence seeking to prove that no sexually explicit conduct is irrelevant.

IV.

Based on the foregoing, the Court **GRANTS** the Government's Motion in Limine Regarding Victim Identification (ECF No. 83), **GRANTS in part and DENIES in part** the Government's Motion in Limine to Exclude Certain Evidence and Argument (ECF No.

84), and **GRANTS** the Government's Motion in Limine to Exclude Evidence Pursuant to Rules 403 and 404(b) Regarding S.P. (ECF No. 86).

As to impeachment evidence, the Court will be better suited to make these determinations as the evidence is presented in trial. Further, as with all in limine decisions, this ruling is subject to modification should the facts or circumstances at trial differ from those which have been presented in the pre-trial motions and memoranda.

IT IS SO ORDERED.

May 2, 2023
Date

/s/
Edmund A. Sargus, Jr.
United States District Judge

APPENDIX E — CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS AND FEDERAL RULES INVOLVED

CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS AND FEDERAL RULES INVOLVED

Pursuant to Supreme Court Rules 14(f) and 14(i)(v), set forth below is the pertinent text of the constitutional provisions, statutes, and rules involved in this petition:

U.S. Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment VI

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;

Appendix E

18 U.S.C. § 2251. Sexual exploitation of children

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

….

(d)(1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering--

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the

production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct;

shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that--

(A) such person knows or has reason to know that such notice or advertisement will be transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed; or

(B) such notice or advertisement is transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed.

(e) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under the Uniform Code of Military Justice

or the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years, but if such person has 2 or more prior convictions under this chapter, chapter 71, chapter 109A, or chapter 117, or under the Uniform Code of Military Justice or the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 35 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for not less than 30 years or for life.

18 U.S.C. § 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who--

….

(2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any

means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails, if--

> **(A)** the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> **(B)** such visual depiction is of such conduct;
>
> ….

shall be punished as provided in subsection (b) of this section.

(b)(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but if such person has a prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under the Uniform Code of Military Justice or the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under

this title or imprisoned not more than 10 years, or both, but if any visual depiction involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under the Uniform Code of Military Justice or the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

….

18 U.S.C. § 2256. Definitions for chapter

For the purposes of this chapter, the term--

…

(2)(A) Except as provided in subparagraph (B), "sexually explicit conduct" means actual or simulated--

(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) bestiality;

(iii) masturbation;

(iv) sadistic or masochistic abuse; or

(v) lascivious exhibition of the anus, genitals, or pubic area of any person;

(B) For purposes of subsection 8(B) of this section, "sexually explicit conduct" means--

(i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;

(ii) graphic or lascivious simulated;

(I) bestiality;

(II) masturbation; or

(III) sadistic or masochistic abuse; or

(iii) graphic or simulated lascivious exhibition of the anus, genitals, or pubic area of any person;

…

(8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer

or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where--

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

….

18 U.S.C. § 2422. Coercion and enticement

(a) Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

(b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any

individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

18 U.S.C. § 2427. Inclusion of offenses relating to child pornography in definition of sexual activity for which any person can be charged with a criminal offense[1]

In this chapter, the term "sexual activity for which any person can be charged with a criminal offense" includes the production of child pornography, as defined in section 2256(8).

18 U.S.C. § 2246. Definitions for chapter

As used in this chapter--

…

(2) the term "sexual act" means--

> **(A)** contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
>
> **(B)** contact between the mouth and the penis,

1. Version effective through Dec. 22, 2023, Pub. L. 105-314, Title I, § 105(a), Oct. 30, 1998, 112 Stat. 2977.

the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(3) the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

….

Federal Rule of Evidence 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition

(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions.

(1) Criminal Cases. The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

(C) evidence whose exclusion would violate the defendant's constitutional rights.

(2) Civil Cases. In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(c) Procedure to Determine Admissibility.

(1) Motion. If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;

(C) serve the motion on all parties; and

(D) notify the victim or, when appropriate, the victim's guardian or representative.

(2) Hearing. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

(d) Definition of "Victim." In this rule, "victim" includes an alleged victim.