No. _____

IN THE

Supreme Court of the United States

JAKE DELAHNEY TAYLOR,
PETITIONER,

v.

UNITED STATES OF AMERICA
RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Chapter 110 of Title 18 of the U.S. Code criminalizes the production and distribution of "visual depictions" of minors engaged in "sexually explicit conduct."

One sort of "sexually explicit conduct" is "lascivious exhibition of the anus, genitals, or pubic area of any person."

The question presented, about which the courts of appeals are squarely in conflict, is:

Do the statutory terms "visual depiction" and "lascivious exhibition" refer to the same, or different things?

RELATED PROCEEDINGS

United States District Court (S.D. Tex.):

United States v. *Taylor*, No. 3:19-CR-23-1 (May 1, 2023)

United States Court of Appeals (5th Cir.):

United States v. *Taylor*, No. 23-40273 (March 15, 2024)

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Cases

OPINIONS BELOW

The Fifth Circuit Court of Appeals's unreported opinion (App., *infra*, 1a-4a) is found at 2024 WL 1134728.

The district court's *Memorandum Opinion and Order Entering Findings of Fact and Conclusions of Law* (App., *infra*, 5a–39a) is unreported.

JURISDICTION

The Fifth Circuit entered judgment on March 15, 2024. It denied en banc rehearing on April 16, 2024.

Mr. Taylor sought, and on July 15, 2024 received, an extension of time to file this petition to August 15, 2024.

Section 1254(1) of Title 28 of the United States Code confers upon this Court jurisdiction to review the judgment.

STATUTES INVOLVED

Pertinent statutory provisions—

- 18 U.S.C. § 2251(a) and (e);
- 18 U.S.C. § 2252(a)(4)(B);
- 18 U.S.C. § 2252A(a)(2)(B) and (b)(1); and
- 18 U.S.C. § 2256

—are reproduced in the appendix. App., *infra*, 49a–55a.

STATEMENT

A. Factual Background

Hiding his phone in the family bathroom, Jake Taylor recorded videos of his teenage stepdaughter "undressing, showering, toweling off, and using the toilet." App., *infra*, 19a, 31a.

The victim—identified as MV1 in the lower courts—never "exhibited" herself to the camera or anyone else. She simply went about normal bathroom activities, unaware that she was being recorded. App., *infra*, 20a.

Mr. Taylor edited the videos, extracting individual images that focused on her genitals, anus, and breasts. App., *infra*, 31a. He distributed those images to others in sexually charged social-media threads, sometimes in exchange for unquestionably pornographic images of other minors.

When Mr. Taylor's wife discovered the videos and conversations, she reported him to police. App., *infra*, 11a. Mr. Taylor met with detectives and confessed to making the surreptitious recordings, to distributing them, and to sending some of the images to other people. App., *infra*, 16a.

B. Procedural History

The grand jury indicted Mr. Taylor for two offenses.

Count 1 alleged that he "did employ, use, persuade, induce, entice and coerce and attempted to employ, use, persuade, induce, entice and coerce"

MV1 "to engage in any sexually explicit conduct for the purpose of producing a visual depiction of such conduct," in violation of 18 U.S.C. § 2251(a). App., *infra*, 44a.

Count 2 alleged that he knowingly distributed "material that contained child pornography," in violation of 18 U.S.C. § 2252A's subsection (a)(2)(B). App., *infra*, *45*a.

The indictment specified statutory definitions.

Count 2 relied on the definition of "child pornography" in 18 U.S.C. § 2256(8)(A)—that is, a "visual depiction … of sexually explicit conduct, where (A) the production of such visual depiction involves the use of a minor engag[ing] in sexually explicit conduct." App., *infra*, 42a–43a.

"Sexually explicit conduct"—a phrase that applies to both counts—was limited to the definition in 18 U.S.C. § 2256(2)(A):

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

App., *infra*, 43a.

Mr. Taylor waived his right to a jury trial, and the parties proceeded to a bench trial based on uncontested testimony and stipulated facts. The only disputed issue was:

> whether the images and videos made the basis of Counts One and Two depict "sexually explicit conduct," specifically, whether they depict "lascivious exhibition of the anus, genitals, or pubic area" of MV1.

App., *infra*, 28a.

Mr. Taylor urged the district court to acquit him under the logic of *United States* v. *Hillie*, 39 F.4th 674 (D.C. Cir. 2022).

Mr. Hillie had been charged with sexual exploitation of a minor and attempted sexual exploitation of a minor under § 2251(a), and with possession of images of a minor engaging in sexually explicit conduct under § 2252(a)(4)(B), for recordings he had made with a camera hidden in a bathroom. There, as here, the only form of sexually explicit conduct that arguably applied was "lascivious exhibition." *Hillie*, 39 F.4th at 681.

The Government argued that "'lascivious exhibition of the genitals' should be construed in accordance with the so-called *Dost* factors." *Id.* at 686.

In *United States* v. *Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub nom. United States* v. *Wiegand*, 812 F.2d 1239 (9th Cir. 1987), and *aff'd,* 813 F.2d

1231 (9th Cir. 1987), a California district court had created a non-exclusive list of factors that a trial court should look to "in determining whether a visual depiction of a minor constitutes a 'lascivious exhibition …'." *Dost*, 636 F.Supp. at 832.

Underlying *Dost*'s whole-cloth formulation was the unstated assumption that this petition expressly questions: that a visual *depiction* might be a lascivious *exhibition*.[1]

The D.C. Circuit explicitly rejected this premise: "The statutory term 'lascivious exhibition' … refers to the *minor's conduct* that the visual depiction depicts, and not the visual depiction itself." *Hillie*, 39 F.4th at 688 (emphasis added). Because the minor in *Hillie* had not engaged in "lascivious exhibition of the genitals," there was insufficient evidence to convict Mr. Hillie of sexual exploitation under § 2251(a), or of possession under § 2252A. And because there was no evidence that Mr. Hillie had intended to use the minor "to display her anus, genitalia, or pubic area in a lustful manner that connotes the commission of a sexual act," there was

1. In *Dost* the defendants had used minors by posing them sexually for photographs. Some of the *Dost* factors might help a jury to determine whether an *act* such as that is lascivious, without regard to the child's culpability, if modified to describe the exhibition rather than the depiction. The lasciviousness of an act of exhibition, for example, might depend in part on "whether the *exhibition* is intended or designed to elicit a sexual response in the viewer."

insufficient evidence of attempt under § 2251. *Hillie*, 39 F.4th at 692.

The district court here acknowledged that *Hillie* made "a persuasive case" about the meaning of § 2256(2)(A)'s "plain text." But, hemmed in by circuit precedent, it was not free to adopt that reasoning. App., *infra*, 32a. Applying that precedent "as it currently stands," the district court measured the lasciviousness of the *images*, rather than MV1's conduct, and found "that at least some of the images and videos at issue in this case depict the lascivious exhibition of MV1's genitals or pubic area." App., *infra*, 34a. Accordingly, it found Mr. Taylor guilty on counts 1 and 2 (*Id.* at 39a) and imposed an aggregate sentence of 27 years in prison, followed by ten years' supervised release. C.A. ROA 216.

C. The Appeal

Mr. Taylor appealed to the Fifth Circuit, where he conceded that circuit precedent foreclosed the panel answering the question presented here in his favor. The panel affirmed based on that precedent.

He petitioned for en banc rehearing, arguing that the issue was one of exceptional importance, meriting reconsideration under Fed. R. App. P. 35(a)(2), because the panel decision conflicted with *Hillie*.

The circuit court, declining to revisit its precedent in light of *Hillie*, denied en banc rehearing. App., *infra*, 40a.

REASONS FOR GRANTING THE PETITION

A. The circuits are intractably divided over the question presented.

The other regional circuits disagree with the D.C. Circuit over the meaning of §§ 2251(a), 2252A, and 2256. The split is acknowledged, and some jurists—including the one who convicted Mr. Taylor—have noted that the D.C. Circuit's interpretation may be more faithful to the plain text of § 2256(2)(A) than is circuit precedent foreclosing that position. Appx., *infra,* 37a; see also the discussion of dissents or concurrences in the Fifth, Seventh, and Eighth Circuits, *infra* at 8–11.

1. The Fifth Circuit treats a visual depiction as an exhibition.

In a case such as this, involving the alleged visual depiction of a lascivious exhibition, the Fifth Circuit treats the image—the *depiction*—as the conduct—the *exhibition*—making culpability turn on whether the depiction constitutes a lascivious exhibition even if the minor did not do anything sexual. See *United States* v. *McCall*, 833 F.3d 560, 563 (5th Cir. 2016) (noting, "we have defined 'lascivious exhibition' as 'a depiction …'"); 5th Cir. Pattern Jury Instr. (Criminal) § 2.84 (2019) (for 18 U.S.C. § 2251(a), instructing jury, "Whether a visual depiction

constitutes a lascivious exhibition requires a consideration" of various factors).[2]

Adoption of the *Dost* factors (see *supra* at 4) in the Fifth Circuit was not without controversy. The court first applied them in *United States* v. *Carroll*, 190 F.3d 290 (5th Cir. 1999), vacated by 227 F.3d 486, 488 (5th Cir. 2000). On initial submission, Judge Garwood dissented, 190 F.3d at 298–99, to a portion of the opinion holding that "cutting and pasting a photo of [a minor's] face onto an image of a nude boy constituted sexually explicit conduct," *id.* at 293. He wrote, "It seems to me that the language of section 2251(a) unambiguously requires that *the minor* in fact "engage in … sexually explicit conduct," *id.* at 298 (Garwood, J., dissenting).

In its brief on en banc rehearing the Government in *Carroll* confessed error, agreeing with Judge Garwood:

> After a thorough and searching review of the plain wording of 18 U.S.C. § 2251(a) and the legislative history addressing it at the time it was enacted, and other pertinent legislative history, the government concedes, that a violation of Section 2251(a) requires that the defendant employ, use, persuade, induce, entice or coerce the minor himself to engage in the actual or simulated

2. See also 5th Cir. Pattern Jury Instr. § 2.85C (for 18 U.S.C. § 2252A(a)(1), same language); *id.* §§ 2.85A, 2.85D, 2.85E, 2.85F (for other statutes, same).

> sexually explicit conduct for the purpose of producing a visual depiction of the *minor's* sexually explicit conduct.

United States v. *Carroll*, 227 F.3d 486, 488 fn.2 (5th Cir. 2000). Accordingly, the Fifth Circuit withdrew that part of its opinion to which Judge Garwood had dissented. A decade later in *United States* v. *Steen*, 634 F.3d 822 (5th Cir. 2011), Judge Higginbotham noted his "misgivings about excessive reliance on the judicially created *Dost* factors that continue to pull courts away from the statutory language of 18 U.S.C. § 2251." *Id.* at 828 (Higginbotham, J., concurring).

2. The D.C. Circuit distinguishes *visual depiction* from *lascivious exhibition*.

The D.C. Circuit, in a break with the other circuits, has held that "the statutory terms 'visual depiction' … and 'lascivious exhibition' … refer to different things." *Hillie*, *supra* at 4, 39 F.4th at 688.

3. Other circuits side with the Fifth Circuit.

A canvass of the other circuits shows this issue looming for decades before *Hillie*. Other circuits have, like the Fifth Circuit, long interpreted the statutes to mean that a visual depiction could *constitute* a lascivious exhibition, *United States* v. *Villard*, 885 F.2d 117, 125 (3d Cir. 1989);[3] or *contain*

3. See also *United States* v. *Price*, 775 F.3d 828, 837 (7th Cir. 2014) (discussing what makes a depiction a lascivious exhibition).

a lascivious exhibition, *United States* v. *Amirault*, 173 F.3d 28, 33 (1st Cir. 1999); or could *be* lascivious, *United States* v. *Brown*, 579 F.3d 672 (6th Cir. 2009).[4]

In addition to the Fifth Circuit, five circuits have equated the depiction with the exhibition in their pattern jury instructions, telling juries, "Whether an image of the genitals or pubic area constitutes a 'lascivious exhibition' requires a consideration of the overall content of the material." 1st Cir. Pattern Jury Instr. 4.18.2252 (2024); 6th Cir. Pattern Crim. Jury Instr. § 16.02 (2023); 8th Cir. Model Crim. Jury Instr. 6.18.2252A (2014); 9th Cir. Pattern Jury Instr., comment to § 20.18 (2024); 11th Cir. Pattern Jury Instr. (Crim.) O83.4A (2022).

As well as the pre-*Hillie* disagreement in the Fifth Circuit, discussed supra at 8, *Hillie* has found support from dissenters, see *United States* v. *McCoy*, 108 F.4th 639, 640 (8th Cir. 2024) (en banc) (Grasz, J., dissenting) ("The court's decision today ignores the plain language of 18 U.S.C. §§ 2251(a) and

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4. See *United States* v. *Rivera*, 546 F.3d 245, 250 (2d Cir. 2008) (asking whether the images are 'lascivious' material); *United States* v. *Wiegand*, 812 F.2d 1239,1244 (9th Cir. 1987) (asking "whether or not the pictures are lascivious"); see also *United States* v. *Horn*, 187 F.3d 781, 790 (8th Cir. 1999) ("The 'lascivious exhibition' is not the work of the child … but of the producer or editor of the video."). Perhaps the confusion arises from *exhibition* and *depiction* being roughly cosynonymous, in ordinary usage, with "display." That is, however, not Congress's usage.

2256(2)(A)(v) in order to keep an unsympathetic voyeur in prison."); *see United States* v. *Donoho*, 76 F.4th 588, 601–02 (7th Cir. 2023) (Easterbrook, J., concurring) (noting that the statutory definition "turns on whether the exhibition itself is lascivious").

The pattern is clear: in these circuits as in the Fifth, the *visual depiction* and the *lascivious exhibition* are the same thing.

4. Time will not mend the split.

Some circuit splits might, given time, resolve themselves; this is not one of those. *Hillie* is incontrovertibly incompatible with the position of all of the other circuits, *United States* v. *Boam*, 69 F.4th 601, 613 (9th Cir. 2023), cert. denied, 144 S.Ct. 1345 (2024), and those courts are bound by their own precedent.

As well as the Fifth Circuit in this case and the Ninth Circuit in *Boam*, three circuits have specifically rejected *Hillie*'s interpretation of the statutes. *United States* v. *Close*, No. 21-1962-CR, 2022 WL 17086495, at *2 fn.2 (2d Cir. Nov. 21, 2022), cert. denied, 143 S. Ct. 1043 (2023); *United States* v. *Sanders*, 107 F.4th 234 (4th Cir. 2024); *Donoho*, supra at 11, 76 F.4th 588; *United States* v. *Bracero-Navas*, No. 22-12887, 2024 WL 3385134,

at *2 (11th Cir. July 12, 2024) (noting that the court's "precedent forecloses" the argument).[5]

It would be surprising, in light of their unity in adopting *Dost* for decades, and of this Court's denial of review of related questions, to see one of the other circuits alter its position, but if some other circuit *were* to join the D.C. Circuit, it would only deepen the already-deep split.

The D.C. Circuit, having heard and reheard the case, and having denied rehearing en banc, is not likely, even if the issue is somehow raised again, to fold without correction from this Court.

B. The question is an important one.

There are circuit splits that are tolerable; this is not one of them.

> If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative, may be ranked among the number. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.

The Federalist No. 80 (Alexander Hamilton). A patchwork of contradictory precedent creates

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5. See also *Vallier* v. *United States*, No. 23-1214, 2023 WL 5676909, at *3 (6th Cir. Aug. 2, 2023) (counsel not ineffective for failing to advise petitioner of *Hillie*).

uncertainty everywhere. Thus this Court is vested with power over "all cases, in law and equity, arising under … the laws of the United States." U.S. CONST. art. III, § 2.

Similarly situated litigants will be treated differently under the same laws in different circuits. Conduct such as Mr. Taylor's and Mr. Hillie's, carrying a fifteen-year mandatory minimum sentence in Texas, is not a felony in federal court in the District of Columbia. This implicates the nation's strong interest in the uniform interpretation of federal penal statutes.

In D.C., in the Fifth Circuit, and elsewhere, people will go on surreptitiously recording, for sexual purposes, children engaged in nonsexual conduct,[6] and the Government will, outside of the District of Columbia,[7] continue charging those people with violating §§ 2251(a), 2252 and 2252A.

Some of those people will, if the D.C. Circuit is correct, be going to prison for something that is not a crime—an intolerable situation.

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6. Cases involving hidden cameras in bathrooms from this year alone include: *McCoy*, 108 F.4th 639; *United States* v. *Rider*, 94 F.4th 445 (5th Cir. 2024); *United States* v. *High*, No. 23-10601, 2024 WL 3338989 (11th Cir. July 9, 2024) (not reported); *Sanders*, 107 F.4th 234; *Donoho*, *supra* at 11, 76 F.4th 588; *United States* v. *Lewis*, No. 3:21-CR-00021-GFVT, 2024 WL 2980956, at *1 (E.D. Ky. June 13, 2024).

7. The Government elected not to seek this Court's review of the *Hillie* decision.

If other circuits are correct, the District of Columbia is currently a haven for lawbreakers—also an intolerable situation.

A grant of certiorari will either clear the way for the Government to resume prosecuting those people in the District of Columbia, or will stop the imprisonment of people in the rest of the country for conduct that does not violate the statute. "It is this Court's responsibility to say what a statute means …", *Rivers* v. *Roadway Exp., Inc.*, 511 U.S. 298, 312 (1994), and these statutes cry for this Court to say what they mean.

The outcome also matters to Mr. Taylor. The district court sentenced him to 27 years in prison as to count 1, 20 as to count 2, ten as to Count 3, and five as to Count 4, to run concurrently. C.A. ROA 216. Without the disputed counts, Mr. Taylor would have faced a maximum possible sentence of fifteen years in prison and five years of supervised release. Vacatur of counts 1 and 2 will cut Mr. Taylor's sentence by at least twelve years, and will reduce his sex-offender registration category from Tier II (25-year registration) to Tier I (15-year registration).

C. The court of appeals erred.

A visual depiction cannot be a lascivious exhibition, because the statutory terms *visual depiction* and *lascivious exhibition* refer to things in different categories: a visual depiction is a *work*, a thing "produc[ed]," 18 U.S.C. §§ 2251(a), 2256(8)(A);

lascivious exhibition is conduct, *id.* § 2256(2)(B), which is an *act*, a thing "engag[ed] in," *id.* §§ 2256(8)(A), 2251(a).

As a matter of statutory interpretation, this ought to be uncontroversial: § 2256(8)(A) requires that the work depict an act — including lascivious exhibition — *and* that its production involve the use of a minor engaging in that act; § 2251(a) "requires that the defendant employ, use, persuade, induce, entice or coerce the minor himself to engage" in sexually explicit conduct, *Carroll*, 227 F.3d at 488 fn.2 (reciting Government's confession of error), *and* that his purpose be to create a work depicting that act.

In both statutes Congress has separated the work that depicts from the act that is depicted. A depiction

of the act does not satisfy the act element. If that is bad policy,[8] it is Congress's bad policy.

Figure 1: "This is not a pipe."
René Magritte, La Trahison des Images (1929)

As Magritte's painting is not the pipe it depicts, so is a depiction of conduct not the conduct depicted. Courts that ask when a visual depiction constitutes a lascivious exhibition might as well ask when a painting is a pipe. The answer is "Never!"

8. Cf. *McCoy*, 108 F.4th at 650 (Kelly, J., dissenting) ("The statute's description of a minor as 'engag[ing] in' 'sexually explicit conduct' through the 'lascivious exhibition of [their] anus, genitals, or pubic area' comes dangerously close to suggesting that the child's conduct and intent—and thus culpability—are relevant.") (quoting *Dost*, 636 F. Supp. at 831.

1. The Fifth Circuit excused the Government's failure to prove an element of count 1.

To convict Mr. Taylor of count 1, the Government should have been required to prove beyond a reasonable doubt that:

> (1) Taylor used a minor to engage in sexually explicit conduct; and
>
> (2) Taylor acted with the purpose of producing a visual depiction of such conduct.

App., *infra*, 44a.[9]

"Traditionally, 'the elements of a crime are its requisite (a) conduct (act or omission to act) and (b) mental fault (except for strict liability crimes)—plus, often, (c) specified attendant circumstances, and, sometimes, (d) a specified result of the conduct.'" *Erlinger* v. *United States*, 144 S. Ct. 1840, 1874–75 (2024) (Jackson, J., dissenting) (quoting 1 W. LaFave, Substantive Criminal Law § 1.8(b), p. 103, n. 14 (3d ed. 2018)).

The proscribed *act* in §2251(a) is using (or attempting to use) a minor to engage in sexually explicit conduct; the proscribed *will*, the specific intent to produce a visual depiction of sexually explicit conduct.[10]

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9. Also that interstate commerce was implicated; Mr. Taylor did not contest that.

10. See *United States v. Torres*, 894 F.3d 305, 319 (D.C. Cir. 2018) (Williams, J., dissenting) (The relevant statutes do not

Cont'd.

"[A]s a vicious will without a vicious act is no civil crime, so on the other hand, an unwarrantable act without a vicious will is no crime at all." 4 WILLIAM BLACKSTONE, COMMENTARIES *21. If *will* and *act* do not coincide, the crime has not been committed. For example, if a person uses a minor to engage in sexually explicit conduct, but has no intent to produce a visual depiction thereof, he has not violated *this* statute; if a person intends to produce a visual depiction of sexually explicit conduct, but does not use a minor, he has not violated this statute.

When the proscribed act and the proscribed will interweave, though, the crime is complete. Nothing that happens after that can undo it. If the actor uses a minor to engage in lascivious exhibition of her genitals, with the purpose of making a depiction thereof, the crime has been committed even if the actor's purpose is foiled (because, for example, the camera was, unbeknownst to the actor, not running).

Just as what happens after cannot *unmake* the crime,[11] what happens after an act that is not proscribed—for example, using a minor to purchase

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proscribe a defendant's photographing a minor with the purpose of creating child pornography, but instead proscribe a defendant's *engaging in sexual conduct for the purpose of creating the pornography*.").

11. See, *e.g.*, *United States* v. *Grimes*, 244 F.3d 375, 380 (5th Cir. 2001) (where pixel boxes covered children's genitalia in depictions, evidence was sufficient to support jury's child-pornography finding).

film on which sexually explicit conduct by others was to be depicted, see *Carroll,* 190 F.3d at 299 (Garwood, J., dissenting)—cannot turn *that act* into a crime.

Section 2251(a) as the Fifth Circuit interprets it, however, punishes any person who uses any minor *to do anything*, for the purpose of producing any visual depiction of sexually explicit conduct.

The circuit court has sheared "to engage in sexually explicit conduct" from the act element of Congress's statute.

2. The Fifth Circuit excused the Government's failure to prove an element of count 2.

To convict Mr. Taylor of count 2, the Government had to prove beyond a reasonable doubt, among other things, that he knowingly distributed material "that contained child pornography." App., *infra*, 27a.

For purposes of count 2, child pornography was:

> any visual depiction … where—
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct.

18 U.S.C. § 2256(8)(A). Unlike section 2251(a), section 2256(8)(A) requires that a depiction be created, but it too requires, as well, that there be sexually explicit conduct involving the minor.

The alleged child pornography in count 2 comprised the depictions produced in count 1, the production of which did not involve the minor

engaging in sexually explicit conduct. App., *infra*, 30a, 31a.

Where lascivious exhibitions are concerned,[12] the Fifth Circuit cuts the Government slack unwarranted by Congress's definition of child pornography. Instead of "any visual depiction … of sexually explicit conduct, where the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct," under the Fifth Circuit's rule child pornography is *any depiction of sexually explicit conduct, where the production of such visual depiction involves the use of a minor.*

The crime of distributing such depictions, of which Mr. Taylor was convicted, is not one that Congress created.

D. This case is an ideal vehicle.

This case was tailored in the district court to present the question here.

The parties agreed to the facts—facts typical of the class of cases in which this issue will arise—and the district court wrote a measured opinion, laying out the evidence and explaining its reasoning. Appx., infra, 5a–39a.

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12. Courts have not attempted, and surely would not attempt to apply the same reasoning to other sorts of sexually explicit conduct, because asking *whether a visual depiction constitutes sexual intercourse*, for example, would be so blatantly a category error.

The only dispute was the question of statutory interpretation presented here.

Mr. Taylor was convicted because, while MV1 engaged in no lascivious exhibitions, the district court found that the visual depictions Mr. Taylor made of her—"videos and pictures"—were themselves lascivious exhibitions. Appx., *infra*, 32a–33a.

The district court's answer to the question presented—*Do the statutory terms "visual depiction" and "lascivious exhibition" refer to the same, or different things*?—dictated the outcome, and increased Mr. Taylor's sentence by at least eight years in prison.

The Court will not find a more suitable vehicle than this one.

CONCLUSION

This Court should issue the writ of certiorari.

Respectfully submitted,

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August 2024

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-40273
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee

versus

JAKE DELAHNEY TAYLOR,

Defendant—Appellant

Filed: March 15, 2024

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 3:19-CR-23-1

Before BARKSDALE, GRAVES, AND OLDHAM, *Circuit Judges*.

PER CURIAM:[1]

Following a bench trial on stipulated facts, Jake Delahney Taylor was convicted of, *inter alia*: sexual exploitation of a child, in violation of 18 U.S.C. § 2251(a), (e); and distribution of child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(B), (b)(1).

1. This opinion is not designated for publication. See 5th Cir. R. 47.5.

(He pleaded guilty to two other related counts, but does not contest those convictions.)

First, Taylor renews his assertion made in district court that there was insufficient evidence to support the two convictions at issue because the surreptitiously recorded videos and images did not involve "lascivious exhibition" amounting to "sexually explicit conduct", as required by the statutes. *See* 18 U.S.C. § 2256(2)(A) (defining "sexually explicit conduct"). In that regard, he contends our court's test for "lascivious exhibition"—weighing the *Dost* factors—is overly expansive, and the D.C. Circuit's test is more in line with the statute. *See United States v. Hillie*, 39 F.4th 674, 684–90 (D.C. Cir. 2022). He correctly concedes his contention is foreclosed by our precedent but raises the issue to preserve it for possible further review. *See United States v. Steen*, 634 F.3d 822, 826–28 (5th Cir. 2011) (applying *Dost* factors); *United States v. McCall*, 833 F.3d 560, 563–64 (5th Cir. 2016) (concluding surreptitious recording of minor satisfied "lascivious exhibition" element).

Next, Taylor relatedly contends our court's *Dost* test for "lascivious exhibition" renders the statutes of conviction overbroad under the First Amendment because it allows for convictions based on images not depicting minors in a sex act. *See New York v. Ferber*, 458 U.S. 747, 764 (1982) (requiring visual depiction of sexual conduct); *United States v. Williams*, 553 U.S. 285, 297 (2008) (explaining "'[s]exually *explicit* conduct' connotes actual depiction of the sex

act rather than merely the suggestion that it is occurring" (emphasis in original)). Review of his preserved as-applied and facial constitutional challenges is *de novo*. *See, e.g., United States v. Arthur*, 51 F.4th 560, 568 (5th Cir. 2022). Our court, however, has previously rejected this contention. *E.g., United States v. Mecham*, 950 F.3d 257, 263–67 (5th Cir. 2020) (refusing to limit First Amendment's categorical exclusion of child pornography to images depicting minors' criminal abuse); *United States v. Traweek*, 707 F. App'x 213, 215 n.2 (5th Cir. 2017) (citing *Steen*, 634 F.3d at 826–28) (rejecting assertion that *Ferber* requires "minor affirmatively commit a sexual act or be sexually abused").

Last, Taylor challenges, for the first time on appeal, two special conditions of his 10-year supervised release. The special conditions require him to, inter alia: "not possess and/or use computers or other electronic communications or data storage devices or media, without the prior approval of the probation officer"; and "not … access any Internet service during the length of [his] supervision, unless approved in advance in writing by the United States Probation Officer". He contends: the conditions, read literally, require him to obtain permission before each computer or Internet use for the term of his supervised release; and, therefore, the conditions are unreasonably restrictive. *See* 18 U.S.C. § 3583(d)(2) (requiring "no greater deprivation of liberty than is reasonably necessary").

Because Taylor did not raise this issue in district court, review is only for plain error. *E.g., United States v. Broussard*, 669 F.3d 537, 546 (5th Cir. 2012). Under that standard, Taylor must show a forfeited plain error (clear-or-obvious error, rather than one subject to reasonable dispute) that affected his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). If he makes that showing, we have the discretion to correct the reversible plain error, but generally should do so only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings". *Id.* (citation omitted).

Our court has held special conditions requiring a defendant to obtain prior approval for each use of an electronic device to access the internet are "unreasonably restrictive". *United States v. Naidoo*, 995 F.3d 367, 384 (5th Cir. 2021); *see also United States v. Sealed Juv.*, 781 F.3d 747, 756–57 (5th Cir. 2015). Pursuant to our precedent, and in the light of other unchallenged, imposed special conditions relating to the two at issue, we affirm Taylor's two special conditions, but subject to the interpretation that individual approval is not required for each instance of usage under the two conditions. *See Naidoo*, 995 F.3d at 384 (affirming condition subject to similar construction); *Sealed Juv.*, 781 F.3d at 756–57 (same).

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

No. 3:19-cr-23-1

UNITED STATES OF AMERICA
v.
JAKE DELAHNEY TAYLOR

Filed: December 14, 2022

Memorandum Opinion and Order
Entering Findings of Fact and
Conclusions of Law

JEFFREY VINCENT BROWN, *UNITED STATES DISTRICT JUDGE*:

Jake Delahney Taylor was indicted on four counts: Count One charges him with sexual exploitation of a child in violation of 18 U.S.C. § 2251(a) & (e); Count Two charges him with distribution of child pornography in violation of 18 U.S.C. §§ 2252A(a)(2)(B), 2252A(b)(1); Count Three charges him with possession of child pornography in violation of 18 U.S.C. §§ 2252A(a)(5)(B), 2252A(b)(2); and Count Four charges him with destruction of property in violation of 18 U.S.C. § 2232(a). Dkt. 16. Taylor

pleaded guilty to Counts Three and Four. As to Counts One and Two, Taylor waived his right to a jury trial under Federal Rule of Criminal Procedure 23(c), with the Government's consent and the court's approval. On January 20, 2022, the court held a one-day bench trial to determine Taylor's culpability as to Counts One and Two.

After careful consideration of the record, including exhibits and testimony, the parties' arguments, and the applicable law, the court submits the following findings of fact and conclusions of law under Rule 23(c) of the Federal Rules of Criminal Procedure.[1] Based on these findings and conclusions, the court finds the defendant, Jake Delahney Taylor, guilty of Counts One and Two.

I. FINDINGS OF FACT

A. The Bench Trial

At the outset of the bench trial the parties filed a list of stipulated facts. Dkt. 43. Before proceeding with the bench trial as to Counts One and Two, the court accepted Taylor's guilty plea as to Counts Three and Four based partially on those stipulated facts. Dkt. 47 (Trial Tr.) at 8:16–17:16.

During its case in chief, the Government introduced nineteen exhibits, which were admitted without objection. *Id.* at 17:17–18:19; Dkt. 44

1. Any findings of fact that are also, or only, conclusions of law are so deemed. Any conclusions of law that are also, or only, findings of fact are so deemed.

(Government's Ex. List). After reading the stipulated facts into evidence, the Government called its only witness, Detective James Staton.

Detective Staton, an officer with the Pearland Police Department, is an experienced peace officer. He is currently assigned to the department's crime-scene unit. As part of his responsibilities, Staton gathers items such as computers, cell phones, video records, and other electronics and then forensically examines the evidence found on those devices.

Detective Staton, who was present at the scene when the search warrant was executed at Taylor's residence, performed the digital forensics for the evidence obtained at the scene. He testified that he extracted evidence from several mobile devices found at the scene, including a Samsung Note 8 marked as Government's Exhibit 7. His investigation revealed that Taylor owned and was the main user of the device. Detective Staton testified that he found 48 images of Minor Victim 1 ("MV1") on the Samsung Note 8. Staton testified that the images appeared to be MV1 getting undressed and toweling off in the shower. He testified that the images appeared to be cropped so that the focal point of the pictures were MV1's vaginal and pubic areas, and sometimes her breasts.

Detective Staton's investigation also revealed that Taylor had uninstalled an app called "Calculator+." The app, while at first glance appearing to be a calculator, actually facilitates the hiding of images, videos, and other content for the user. Though the

app had been uninstalled, Detective Staton was able to locate its file system because it was still present on the device.

Detective Staton next testified as to a second device found at the scene, a Galaxy S5 marked as Government's Exhibit 5. His investigation revealed that the device contained eight videos of child pornography that depicted a minor other than MV1. *See* Government's Ex. 8.

Detective Staton then testified as to a third cell phone found at the scene, a Galaxy S5 without a case marked as Government's Exhibit 6. His investigation revealed that this cell phone also belonged to Taylor and contained 70 images and approximate 134 videos of MV1. Staton also found approximately 24 images and 78 videos of child pornography depicting subjects other than MV1. Of the images depicting MV1, Detective Staton testified that they showed her in the shower, getting out of the shower, and toweling off. *See* Government's Ex. 9B1–9B5. Of the videos of MV1, Staton testified that some of the videos appeared to be slow-motion or cropped versions of a handful of longer videos. For example, in an approximately seven-minute video, Taylor is seen adjusting some type of recording device while sitting on the toilet. He then leaves the room and, about six minutes into the video, MV1 appears and takes a shower. *See* Government's Ex. 9B6. In another video about 11 minutes long, after MV1 takes a shower, Taylor is seen retrieving the recording device from

the bathroom after MV1 leaves. *See* Government's Ex. 9B7.

Detective Staton further testified as to four other videos of MV1 in the bathroom, either using the toilet, getting in and out of the shower, or toweling off. *See* Government's Ex. 9B8–9B11. One of the videos, nearly ten minutes long, was in slow motion. *See* Government's Ex. 9B8. In that video, MV1 is seen undressing, her pubic area visible and her buttocks showing as she gets into the shower. Another video was a slow-motion version of another video depicting MV1's pubic region and vagina. *Compare* Government's Ex. 9B6, *with* Government's Ex. 9B9.

Detective Staton further testified that both photo- and video-editing apps were found on Government Exhibit 6, as well as still images that had been extracted from longer videos. *See* Government's Ex. 19A–19G (comparing still images to video clips).

At the conclusion of Detective Staton's testimony, the Government rested.

The defendant did not call any witnesses nor offer any evidence. Instead, he moved for a judgment of acquittal as to Counts One and Two arguing that none of the videos nor photographs depicted a child engaged in sexual conduct as required by the statute. The court denied the defendant's motion. Thereafter, the defense rested. The court then heard argument from both the Government and the defendant. The court took the case under advisement.

B. Stipulated Facts

The parties stipulated to the following:[2]

1. The Defendant is charged by Superseding Indictment in Count One with Sexual Exploitation of a Child, in Violation of 18 U.S.C. § 2251(a) & (e). The Defendant is charged by Superseding Indictment in Count Two with Distribution of Child Pornography, in violation of 18 U.S.C. §§ 2252A(a)(2)(B) and 2252A(b)(1). The Defendant is charged by Superseding Indictment in Count Three with Possession of Child Pornography, in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2252A(b)(2). The Defendant is charged by Superseding Indictment in Count Four with Destruction of Property, in violation of 18 U.S.C. § 2232(a).
2. For purposes of this stipulation, the terms "minors," "child pornography," "sexually explicit conduct," "computer," "producing," and "visual depiction" have the statutory definitions as referenced in the introduction to the indictment.
3. On or about August 14, 2018, Courtnie Taylor went to the Brazoria County District Attorney's Office to report that she found pictures and videos of her 14-year-old daughter MV1 taking showers hidden on a "calculator app" on her

2. The stipulated findings are taken verbatim from the parties' joint filing. *See* Dkt. 43.

husband Jake Delahney Taylor's phone. Mrs. Taylor also saw other images and videos of naked juvenile females approximately the same age. Mrs. Taylor stated that she was able to take pictures of the images in the calculator App., *infra*, Mrs. Taylor also discovered that Jake Taylor had been chatting on KIK messenger and trading the pictures of MV1 with others on KIK. Mrs. Taylor provided Jake Taylor's KIK usernames as jim_parker22 and jimmyt8484. The KIK chats included Jake Taylor talking about having a "peep hole" in the bathroom of their residence and installing hidden cameras. Mrs. Taylor stated she was able to locate what she believed to be a peephole in the bathroom at their residence but did not see any cameras. Mrs. Taylor was further able to verify that the naked pictures on Jake Taylor's cell phone were of MV1.

4. The Brazoria County District Attorney's Office Investigator relayed this information to Detective Cecil Arnold with Pearland Police Department and brought Mrs. Taylor's cell phone to Pearland PD to be processed. *See* Government's Exhibits 1, 1A, 1B. Detective Staton was able to perform a forensic analysis of the Mrs. Taylor's cell phone. *See* Government's Exhibit 1C. After looking at the forensic analysis, Detective Arnold found the images and KIK chats described by Mrs. Taylor on her cell phone. *See* Government's Exhibit 1D.

5. One of the KIK chats was with a username "Burning Gundam" which took place between June 13, 2018 and June 14, 2018. In this chat, "Burning Gundam" asks if the Defendant's stepdaughter plays any sports to which the Defendant responded that she plays all sports. "Burning Gundam" then asks what the name of that calculator app was and the Defendant responds, "Calculator+". "Burning Gundam" asks, "Do you sniff her panties?" to which the Defendant responds, "Yes, wonderful". "Burning Gundam" states that he hopes that his stepdaughter has a sleepover and that they stay in an apartment "so there are so many girls to choose from" to which the Defendant responded, "lol awesome." *See* Government's Exhibit 1D, pages 2–5.
6. There is another chat between the Defendant and "Chuck Richards" in which "Chuck Richards" sends an image of a girl and under that image states, "My step, 16." The Defendant then sends an image of MV1 wearing a red t-shirt and a visor. "Chuck Richards" sends an image of a female, wearing some sort of top and underwear, laying on her stomach on a bed. The Defendant then sends an image of MV1 naked with her buttock and anus as the focal point. *See* Government's Exhibit 1D at 6–7.
7. There is a chat between the Defendant and "Crave Man". "Crave Man" asks if he has ever "played with her?" The Defendant responds,

"Not yet. Working on it." The Defendant then sends an image of MV1 in which she is naked with her buttock and anus as the focal point. "Crave Man" responds, "Wow" and "How'd you get that?" The Defendant replies, "Camera in clothes hamper." "Crave Man" asks if the Defendant has "any of the front?" to which the Defendant sends an image of MV1's vagina. The Defendant asks "Crave Man" if he has any pictures and "Crave Man" sends an image of a minor female. "Crave Man" tells the Defendant that was the only image he had on his phone because he had to move them because the minor female was using his phone the other day and that "freaked" him out. "Crave Man" also told the Defendant that the minor female was 16 years old. The Defendant responded that he had gotten a "calculator app that hides them. It's a real calculator tell you hit passcode. I started mine with a 0 cause no one ever hits 0 first on a calculator." The Defendant also sends "Crave Man" two more images of MV1; one in which she is wearing a red shirt and visor and another that is just of her face. *See* Government's Exhibit 1D at 8–11.

8. There is a KIK chat between the Defendant and "Miss My Texas PYT" on June 14, 2018. During that chat, the Defendant sends an image of MV1 wearing a red shirt and visor. "Miss My Texas PYT" asks if the Defendant is active with her. The Defendant responds, "[w]orking on it".

"Miss My Texas PTY" asks if he has any sexy pics of hers and that he has a few for trade. The Defendant then sends an image of MV1 naked with her buttock and anus as the focal point. "Miss My Texas PYT" states that he spies on his too from under the bathroom door. The Defendant responds, "camera in clothes hamper." *See* Government's Exhibit 1D at 12–16.

9. There is a KIK chat between the Defendant and "play time." The Defendant sends an image of MV1 in which she is naked and it depicts her torso which includes her breasts as well as her vagina. "Play time" sends an image of what appears to be a minor female's face, neck and decolletage. The Defendant sends an image of MV1 which depicts MV1 naked with her leg up. From the image, one can see her breasts and what appears to be a towel over her lap. "Play time" sends an image which is blurry but seems to depict a naked female. The Defendant sends an image of MV1 which is a picture of her naked torso which includes her breasts and vagina and states "… just my spy cam" and then sends another image of MV1 which is a closeup image of MV1's vagina. *See* Government's Exhibit 1D at 17–19.
10. There is a KIK chat between the Defendant and "Sand Storm" between June 13, 2018 and June 14, 2018. "Sand Storm" asks if he wants to share and the Defendant responds back "sure."

"Sand Storm" states, "Go for it, ill match." The Defendant sends an image of MV1 naked with her buttock and anus as the focal point. "Sand Storm" asks how the Defendant got that image and then sends an image of a naked buttocks. The Defendant responds, "spy cam." "Sand Storm" asks if he wants to share more and the Defendant then sends another image of MV1's naked torso in which her breasts and vagina are visible. *See* Government's Exhibit 1D at 20–22.

11. There is a KIK chat between the Defendant and "Tit Lover" in which the Defendant tells "Tit Lover" that he is going to Colorado for work and the family is also going. The Defendant states that he should be able to get some good pictures. The Defendant tells "Tit Lover" that he wishes that he wasn't working so much because the summer is the "best pic time and I been missing it." The Defendant further states that he is redoing his spare bathroom and it's backed up to his master so he put in a peephole so when he gets back, he should get great pictures. *See* Government's Exhibit 1D at 23–24.
12. Based on this information, Detective Arnold drafted a search warrant and executed at 605 Ave. A, Sweeny, Texas on August 17, 2018. *See* Government's Exhibit 2. Detective Arnold made contact with the Defendant, Jake Taylor. The Defendant was read his Miranda warnings and stated he understood those rights. The Defendant stated that he knew what KIK

messenger was, but that he hadn't used it in several years. The Defendant denied knowledge of the usernames jim_parker22 and jimmyt8484. The Defendant initially denied taking any naked pictures of MV1 and said that there would be none on his phone. As the interview continued, the Defendant stated that he did see naked pictures of MV1 on his phone, but that she probably took these herself to send to other people. When confronted with the fact that MV1 was not facing the camera or have a cell phone in her hand in the image, the Defendant stated that MV1 may have set up a camera with a timer. When Detective Arnold stated that he would need to speak with MV1 about this, the Defendant stated that he did not want the detective to speak with MV1. The Defendant then stated that he was the one who took the naked pictures of MV1. During the interview, Detective Staton brought the Defendant his cell phone so that he could unlock it with his fingerprint pattern that was stored. *See* Government's Exhibit 18.

13. The Defendant went on to admit that he made the videos and took pictures of MV1 by using the camera on his cell phone. The Defendant stated that MV1 had no idea that he was doing this. The Defendant stated that he would put his cell phone on the vanity before MV1 would go into the bathroom and hit record. When MV1 finished showering, he would go in and get his

cell phone. The Defendant went on to admit that he got involved in a KIK chat group about dads and daughters. He stated that he received images of child pornography from other KIK users and that he sent out some of the naked images of MV1. The Defendant then confirmed the usernames jim_parker22 and jimmyt8484, were his KIK messenger usernames. *See* Government's Exhibit 18.

14. Detective Arnold was able to confirm with the on-scene forensic analyst, Detective Jonathan Cox that there was, what he believed to be, child pornography (of MV1 and other children) located in the Defendant's "calculator app" on the Defendant's cell phone. Detective Cox relayed to Detective Arnold that the cell phone had a swipe pattern to unlock the phone in order to download from the phone. The Defendant agreed to enter the swipe pattern. When Detective Staton handed the Defendant the phone, the Defendant immediately deleted the "calculator app." The phone was retrieved from the Defendant, who stated that he thought the detective wanted him to delete the pictures for him. At the time that the Defendant deleted the child pornography, the Defendant was well aware of the criminal investigation concerning child pornography and where it was located on his phone.
15. Multiple cell phones, to include a Samsung Note 8, ESN 352078091092999 (*See* Government's

Exhibit 4); a Samsung Galaxy S5, IMEI 353502068684974 (*See* Government's Exhibit 6); and a Samsung Galaxy S5, IMEI 353502064604661 (*See* Government's Exhibit 5) as well as a shower curtain (*See* Government's Exhibit 13), backpack (*See* Government's Exhibit 14), t-shirt (*See* Government's Exhibit 15) and visor (*See* Government's Exhibit 16) that all matched items in the images were collected as evidence.

16. Detective Staton performed a forensic analysis on the three cell phones. *See* Government's Exhibit 4D (phone extraction of Samsung Note 8); Government's Exhibit 5D (phone extraction of the Galaxy S5 in a case); and Government's Exhibit 6D (phone extraction of the Galaxy S5 not in case).
17. On the Samsung Note 8, Detective Staton found 48 images of MV1. *See* Government's Exhibit 7. The images appear to be still shots or cropped images from videos. 19 images depict MV1's naked vagina, buttocks and anus. 5 of the images show MV1 in the bathroom.
18. On the Samsung Galaxy S5 which was in a case, IMEI 353502064604661, Detective Staton found 8 videos of child pornography. The child pornography was of a prepubescent female who was displaying her genitals in a lewd and lascivious manner and who was masturbating with a plastic object. *See* Government's Exhibit 8.

19. On the Samsung Galaxy S5 which was not in a case, IMEI 353502068684974, Detective Staton found images and videos of minors engaged in sexually explicit conduct as well as images and videos of MV1. Detective Staton found 24 images and 78 videos that meet the federal definition of child pornography not involving MV1. *See* Government's Exhibit 9A. These images and videos depicted a minor female child being orally penetrated by the erect penis of an adult male, a prepubescent minor female being vaginally penetrated by the erect penis of an adult male, a prepubescent minor female masturbating with an object, and a prepubescent minor female displaying her genitals in a lewd and lascivious manner. *See* Government's Exhibit 9A.

20. Also on the Samsung Galaxy S5 which was not in a case, Detective Staton found 70 images and 134 videos of MV1. *See* Government's Exhibit 9B. The images and videos appear to be taken in the bathroom. The images appear to be still shots or cropped images from the videos. The images depict MV1's naked vagina, buttocks and anus. Some of the videos appear to be edited and to have been in a slower motion. There is one video, approximately 7 minutes in length, in which the Defendant's face is seen in the beginning of the video setting up the recording device in the bathroom. The Defendant leaves and MV1 comes into the bathroom wearing a

white top and a pink and purple striped pajama bottoms. The video captures MV1 taking off her clothing before showering. There is a second video, which is approximately 11 minutes in length. MV1 is seen going into the bathroom wearing a black shirt and white and black shorts. MV1 undresses, utilizes the toilet, gets into the shower, gets out of the shower, towels off and then gets dressed. At the end of the video, the Defendant is seen going into the bathroom and taking down the recording device. There is a third video, which is approximately 17 minutes in length, in which MV1 is seen in the bathroom wearing a pink sweatshirt and black pants. MV1 gets undressed, showers, towels off, and gets out of the shower. The Defendant is then seen at the end of the video going into the bathroom. There is a fourth video, which is approximately 9 minutes in length, in which MV1 is wearing a blue sports uniform. MV1 undresses, utilizes the toilet, and showers. This video appears to be in slow motion. In all of the videos, the recording device was positioned to capture MV1 when she is undressing, utilizing the toilet, utilizing the shower, toweling off or getting dressed; no other activity by her was recorded. MV1 was unaware that her actions were being observed or recorded. *See* Government's Exhibit 9B.

21. MV1's date of birth is [redacted] 2004. MV1 would have been 13 years old at the time that the images and videos were produced of her.

22. The Samsung Note 8 and both Samsung Galaxy S5 cell phones were manufactured outside of the state of Texas. *See* Government's Exhibits 4C; 5C; 6C. Consequently, the cell phone media and the materials used in this offense traveled in foreign or interstate commerce. Further, the Defendant utilized the Internet when he was utilizing his KIK account which is a means and facility of interstate and foreign commerce.

C. Admitted Exhibits

The following are descriptions of the exhibits admitted at trial:

1. Exhibit 7 contains the 48 images of MV1 that were found in the defendant's Samsung Note 8. The images appear to be still shots or cropped images from videos. Nineteen images depict MV1's naked vagina, buttocks, and anus. Five of the images show MV1 in the bathroom.
2. Exhibit 7A is an image of MV1 from the neck down in which MV1 is naked with her right knee bent. MV1's breasts are visible and there appears to be a towel over her lap. This image appears to be cropped from the video offered as Exhibit 9B11.
3. Exhibit 7B is an image of MV1 in which the shower, drying herself with a towel. The image appears to be taken at an upward angle with something covering the recording device

because the view is partially obstructed. This image appears to be cropped from the video offered as Exhibit 9B10.

4. Exhibit 7C is an image of MV1 in which MV1 is naked with her right knee bent. MV1's breasts are visible and there appears to be a towel over her lap. This image appears to be cropped from the video offered as Exhibit 9B11.
5. Exhibit 7D is an image of MV1's naked torso which shows her breasts and genitals. The image is from an upward angle and MV1 is standing in front of the shower curtain. This image appears to be cropped from the video offered as Exhibit 9B8.
6. Exhibit 7E is an image of MV1's nude vagina. The focal point of the image is MV1's genitals. It appears that MV1's hips are angled towards the camera. The image appears to be cropped from the video offered as Exhibit 9B11.
7. Exhibit 9B contains the 70 images and 134 videos of MV1 found on the defendant's Galaxy S5, which was not in a case. The images and videos appear to be taken in a bathroom. The images appear to be still shots or screenshots cropped from the videos. The images depict MV1's naked vagina, buttocks, and anus. Some of the videos are edited to play in slow motion.
8. Exhibit 9B1 is an image of MV1's naked buttocks and genitals. The image appears to be taken at an upward angle from a recording device which was covered because the view is

partially obstructed. MV1 is in front of the shower curtain. This image appears to have been cropped from the video offered as Exhibit 9B11.

9. Exhibit 9B2 is an image of MV1's nude vagina. The focal point of this image is MV1's genitals. It appears that MV1's hips are angled towards the camera. This image appears to have been cropped from the video offered as Exhibit 9B11. This image appears to be similar to Exhibit 7E.
10. Exhibit 9B3 is an image of MV1 naked in the shower. MV's body is arched backward, and she is holding a towel behind her back. MV1's breasts and genitals are clearly visible. This image appears to be cropped from the video offered as Exhibit 9B11.
11. Exhibit 9B4 is an image of MV1 naked. MV1's leg is lifted and her genitals are visible and is the focal point of the image. The image appears to be taken at an upward angle. This image appears to be cropped from the video offered as Exhibit 9B6.
12. Exhibit 9B5 is an image of MV1 naked from her chin down to right below her pubic area. MV1's breasts and genitals are clearly visible. MV1 appears to be standing in front of the shower curtain. The image appears to be taken at an upward angle. This image appears to be cropped from the video offered as Exhibit 9B8.
13. Exhibit 9B6 is a video that is 6 minutes and 52 seconds in length in which the defendant's face is seen at the beginning of the video setting up

the recording device in the bathroom. The defendant leaves after setting up the hidden camera. MV1 enters the bathroom after some time wearing a white top and pink and purple striped pajama bottoms. The video captures MV1 taking off her clothes. MV1's genitals are visible on the video for approximately 15 seconds throughout the video. This video was recorded from an upward angle, and the camera appears to have been hidden because part of the view is obstructed.

14. Exhibit 9B7 is a video that is 11 minutes and 18 seconds in length in which MV1 is seen going into the bathroom wearing a black shirt and white and black shorts. MV1 undresses, uses the toilet, gets into the shower, gets out of the shower, towels off and then gets dressed. During this video, MV1's genitals are visible for approximately 13 seconds and buttocks are visible for approximately 6 seconds. At the end of the video, the defendant is seen going into the bathroom and taking down the recording device. This video was recorded from an upward angle, and the camera appears to have been hidden because part of the view is obstructed.

15. Exhibit 9B8 is a video which is approximately 9 minutes and 55 seconds in length, in which MV1 is wearing a blue sports uniform. MV1 undresses, uses the toilet, and showers. This video appears to be in slow motion. MV1's genitals are visible for approximately 15 seconds

and her buttocks is visible for approximately 23 seconds throughout the recording. This video was recorded from an upward angle, and the camera appears to have been hidden because the view is partially obstructed.

16. Exhibit 9B9 is a video which is approximately 1 minute and 21 seconds in length, in which MV1 is nude from the waist down and wearing a white tank top. MV1 takes both her white tank top and bra off. This video appears to be in slow motion and appears to be edited from the video offered as Exhibit 9B6. During this clip, MV1's genitals are visible for approximately 1 minute and 7 seconds. This video was recorded from an upward angle and the camera appears to have been hidden because the view is partially obstructed.
17. Exhibit 9B10 is a video which is approximately 17 minutes and 8 seconds in length, in which MV1 is seen in the bathroom wearing a pink sweatshirt and black pants. MV1 gets undressed, showers, towels off, and gets out of the shower. The defendant is seen at the end of the video going into the bathroom. MV1's genitals are visible for approximately 8 seconds during the video and her buttocks is visible for approximately 4 seconds. This video was recorded from an upward angle, and the camera appears to have been hidden because the view is partially obstructed.

18. Exhibit 9B11 is a video which is approximately 9 minutes and 20 seconds in length, in which MV1 is seen in the bathroom wearing a black top and black and white shorts. MV1 pulls the shower curtain over, turns on the water, uses the toilet, undresses, showers, towels off, and puts on underwear. MV1's genitals are visible for approximately 38 seconds throughout the video. This video was recorded from an upward angle, and the camera appears to have been hidden because the view is partially obstructed.

II. CONCLUSIONS OF LAW & ADDITIONAL FINDINGS

Count One charges Taylor with the sexual exploitation of a child in violation of 18 U.S.C. § 2251(a) & (e). Section 2251(a) prohibits "[a]ny person who employs, uses, persuades, induces, entices, or coerces any minor to 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." 18 U.S.C. 2251(a).

To find Taylor guilty of Count One, the Government had to prove beyond a reasonable doubt that:

(1) Taylor used a minor to engage in sexually explicit conduct;
(2) Taylor acted with the purpose of producing a visual depiction of such conduct; and

(3) the visual depiction was produced using material that have been transported in interstate commerce by any means, including by computer.

United States v. Traweek, No. 4:13–CR–712, 2015 U.S. 5972461, at*8 (S.D. Tex. Oct. 14, 2015) (citing 18 U.S.C. § 2251(a), *aff'd*, 707 F. App'x 213 (5th Cir. 2017) (per curiam); Fifth Circuit Pattern Jury Instructions (Criminal Cases) 2.84 (2015)).

Count Two charges Taylor with distribution of child pornography in violation of 18 U.S.C. §§ 2252A(a)(2)(B) & 2252A(b)(1). Section 2252A(a)(2)(B) makes it a crime for any person to "knowingly distribute[] any material that contains child pornography using any means or facility of interstate or foreign commerce … including by computer." 18 U.S.C. § 2252A(a)(2)(B).

To find Taylor guilty of Count Two, the Government had to prove beyond a reasonable doubt that:

(1) Taylor knowingly distributed material that contained child pornography;
(2) That the material containing child pornography was transported in or affecting interstate or foreign commerce by any means, including by computer; and
(3) That when Taylor distributed the material, he knew it contained child pornography.

18 U.S.C. § 2252A(a)(2)(B); Fifth Circuit Pattern Jury Instructions (Criminal Cases) 2.85E (2019).

"Child pornography" as charged in Count Two is defined as:

> 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 engaged in sexually explicit conduct.

18 U.S.C. § 2256(8)(A).

"Sexually explicit conduct," as applied to both Counts One and Two, is defined as "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). The parties agree that only subsection (v) is at issue in this case.

A. Stipulated Elements

The parties' stipulations establish certain elements of the Government's case.

1. Count One

For Count One, it is undisputed that MV1 was a minor when the images and videos of her were made. It is also undisputed that Taylor, using materials transported in interstate commerce, knowingly produced 19 images of MV1 on his Samsung Note 8, each of which appears to be a still shot or cropped image from a video and depicts MV1's naked vagina, buttocks, or anus.

It is likewise undisputed that Taylor, using materials transported in interstate commerce, knowingly produced 70 images and 134 videos of MV1 on his "Samsung Galaxy S5 which was not in a case," each of which depicted her naked vagina, buttocks, or anus. "The images appear to be still shots or cropped images from the videos." Stipulation No. 20, *supra*. Some of the videos appear to have been edited and set in slow-motion. "In all of the videos, the recording device was positioned to capture MV1 when she is undressing, utilizing the toilet, utilizing the shower, toweling off or getting dressed; no other activity by her was recorded." *Id.*

Through the stipulations, the defendant has conceded—and the court accordingly finds—that the Government has proven all the elements of Count

One save one fundamental piece—the parties have not stipulated to "sexually explicit conduct."

2. Count Two

For Count Two, it is again undisputed that MV1 was a minor when the images and videos of her were made. It is also undisputed that Taylor, using his KIK messenger accounts, distributed images and videos of MV1 that included:

(1) "an image of MV1 naked with her buttock and anus as the focal point" sent to a KIK chatter identified as "Chuck Richards," Stipulation No. 6, *supra*;

(2) "an image of MV1 naked with her buttock and anus as the focal point" sent to a KIK chatter identified as "Miss My Texas PYT," Stipulation No. 8, *supra*;

(3) "an image of MV1 in which she is naked and it depicts her torso which includes her breasts as well as her vagina," "an image of MV1 which depicts MV1 naked with her leg up," and "an image of MV1 which is a picture of her naked torso which includes her breasts and vagina" sent to a KIK chatter identified as "play time," Stipulation No. 9, *supra*; and

(4) "an image of MV1 naked with her buttock and anus as the focal point" and "an image of MV1's naked torso in which her breasts and vagina are visible" sent to a KIK chatter identified as "Sand Storm," Stipulation No. 10, *supra*.

It is also undisputed that Taylor "utilized the Internet when he was utilizing his KIK account which is a means and facility of interstate and foreign commerce." Stipulation No. 22, *supra*. As with Count One, through the stipulations the defendant has conceded, and the court finds, that the Government has proven all the elements of Count Two except the presence of "sexually explicit conduct."

B. Sexually Explicit Conduct

The one outstanding issue not covered by the parties' stipulations is whether the images and videos made the basis of Counts One and Two depict "sexually explicit conduct," specifically, whether they depict "lascivious exhibition of the anus, genitals, or pubic area" of MV1.

It is undisputed that Taylor created and shared images and videos of MV1 he derived from hidden cameras in their family's bathroom. The videos feature MV1 undressing, showering, toweling off, and using the toilet. Taylor used various video-editing techniques to make MV1's genitals, anus, and breasts the focal point of his videos and excerpted images. Nevertheless, Taylor argues that the material depicts no "sexually explicit conduct" because MV1 is not engaging in overt sexual conduct in the videos and images. Instead, he argues that they show her engaging in "mundane, non-sexual activities." Dkt. 45 at 4. Taylor argues that engaging in mundane private conduct such as undressing and

bathing do not meet the definition of sexually explicit conduct regardless of whether the videos were later edited to focus on the minor's genitals.

The Fifth Circuit defines "lascivious exhibition" as "a depiction which displays or brings forth to view in order to attract notice to the genitals or pubic area of children, in order to excite lustfulness or sexual stimulation in the viewer." *United States v. Steen*, 634 F.3d 822, 828 (5th Cir. 2011) (quoting *United States v. Grimes*, 244 F.3d 375, 381 (5th Cir. 2001)). The Fifth Circuit has also employed the six factors from *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), to aid in determining whether a particular depiction is lascivious:

1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
4) whether the child is full or partially clothed, or nude;
5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; [and]
6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Steen, 634 F.3d at 826 (quoting *Dost*, 636 F. Supp. at 832). These so-called *Dost* factors are not exhaustive and no one factor is dispositive in determining whether a certain display is "lascivious." *Id.*

The images and videos at issue here trigger at least four of the *Dost* factors:

(1) the focal point of many of the images and edited videos is MV1's genitalia or pubic area (the first *Dost* factor);
(2) some images have been cropped to depict MV1 in an unnatural pose, considering her age, such as moments when MV1's hips are angled toward the camera (Exhibits 7E and 9B2) and her naked body is arched backward (Exhibit 9B3) (the third *Dost* factor).
(3) MV1 is nude in many of the images and videos (the fourth *Dost* factor); and
(4) the communications on KIK messenger, to which Taylor has stipulated, demonstrate that he intended the visual depictions to elicit a sexual response from those who viewed them (the sixth *Dost* factor).[3]

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3. The stipulated evidence supporting the sixth Dost factor includes: (1) Taylor's conversation with KIK chatter "Burning Gundam" about sniffing MV1's panties, Stipulation No. 5, supra: (2) Taylor's conversation with KIK chatter "Crave Man" about whether Taylor had ever "played with" MV1 as Taylor sends "Crave Man" nude photos of her, Stipulation No. 7, supra; (3) Taylor's conversation with KIK chatter "Miss My Texas PYT" about whether Taylor was "active with" MV1,

Cont'd.

Moreover, the Fifth Circuit has held that just because a minor victim does not know she was being recorded, did not intend to display herself, and did not engage in any affirmative sexual act does not mean that a surreptitiously recorded video does not depict "lascivious exhibition." *United States v. McCall*, 833 F.3d 560, 564 (5th Cir. 2016). Under Fifth Circuit precedent as it currently stands, the court finds that at least some of the images and videos at issue in this case depict the lascivious exhibition of MV1's genitals or pubic area.

Indeed, the defendant concedes as much. Dkt. 45 at 6–7 ("Taylor concedes that this motion is foreclosed by current Fifth Circuit law.") But he has urged the court to depart from Fifth Circuit precedent and instead adopt the reasoning from a recent case in the D.C. Circuit: *United States v. Hillie*, 39 F.4th 674 (D.C. Cir. 2022) (on reh'g). *See* Dkt. 45 at 7.[4] In *Hillie*, the defendant was convicted of various child-

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Stipulation No. 8, supra; (4) Taylor sending an image of MV1 naked focusing on her buttocks and anus to "Miss My Texas PYT" after "Miss My Texas PYT" requested "sexy pics" of her, Stipulation No. 8, supra; and (5) the fact that one of the KIK chatters Taylor communicates with goes by the name "Tit Lover," Stipulation No. 11, supra.

4. Since the bench trial in this case, the D.C. Circuit has granted rehearing and issued an amended opinion. *United States v. Hillie*, 37 F.4th 680 (D.C. Cir. 2022) (per curiam). The original opinion can be found at 14 F.4th 677. The holding and analysis did not change from the original to the amended opinion.

pornography offenses, including two counts of sexual exploitation of a minor under § 2251(a), and one count of possession of images of a minor engaging in sexually explicit conduct under § 2252(a)(4)(B). 39 F.4th at 677. The evidence supporting Hillie's convictions were hidden-camera videos he obtained of his then-girlfriend's two daughters. *Id.* at 677-78. Two videos were relevant to the *Hillie* court's analysis. *Id.* In the first, a minor, identified as "JAA," is walking around her bedroom, clothed, dancing and singing to herself. *Id.* at 678.

> She proceeds to undress, standing almost directly in front of the camera. While undressing, she bends over in front of the camera, exposing her genitals to the camera for approximately nine seconds. After she has undressed, she sits slightly to the left of the camera and appears to clean her genitals and legs with a towel. While she does this, her breasts and pubic hair are visible but her genitals are not. She proceeds to apply lotion to her body for approximately 11 minutes. While she does this, her breasts are visible and her pubic hair is occasionally visible but her genitals are not. She proceeds to stand up and walk naked around the room. While she walks, her pubic area is intermittently visible for periods of approximately one or two seconds. She then dresses and exits the room.

Id.

The second video is seen from a bathroom ceiling. *Id.* In it, JAA and a second minor, "KA," enter a bathroom. Id.

> JAA proceeds to sit on the toilet. The upper part of JAA's buttocks is visible for approximately 20 seconds while she sits on the toilet. Because the camera is directly above the toilet, JAA's genitals are not visible. JAA stands up and KA proceeds to sit on the toilet. The upper part of KA's buttocks is visible for approximately 20 seconds, but her genitals are not visible. JAA proceeds to wipe KA's pubic area with a washcloth. KA's pubic area is not visible while she does this, although occasionally the upper part of KA's buttocks is visible. KA proceeds to leave the bathroom. After she has left, JAA removes her pants and underwear and proceeds to wipe her pubic area with a washcloth. JAA's pubic area is visible for approximately 16 seconds while she does this. JAA proceeds to dress and exit the bathroom.

Id.

Addressing the same statutory language at issue here, the *Hillie* court construed "lascivious exhibition" of the genitals as used in § 2256(2)(A)(v) "to mean that the minor displayed his or her anus, genitalia, or pubic area in a manner connoting that the minor, or any person or thing appearing with the minor in the image, exhibits sexual desire or an inclination to engage in any type of sexual activity." *Id.* at 685.

"Applying this construction to the evidence introduced at trial," the *Hillie* court "conclude[d] that no rational trier of fact could find JAA's conduct depicted in the videos … to be a 'lascivious exhibition of the anus, genitals, or pubic area of any person,' as defined by § 2256(2)(A)." *Id.* at 686. The court continued: "To fall within the definition of 'lascivious exhibition of the … genitals,' JAA's conduct depicted in the videos must consist of her displaying her anus, genitalia or pubic area in a lustful manner that connotes the commission of a sexual act." *Id.* As "none of the conduct in which JAA engages in the two videos at issue comes close" to such behavior, but instead consisted of just "ordinary grooming activities, some dancing, and nothing more," the court that vacated the defendant's convictions on the counts associated with the two videos and directed the trial court "to enter a judgment of acquittal on those counts." *Id.* Moreover, the *Hillie* court expressly declined to adopt or apply the *Dost* factors. *Id.* at 686–90.

In *Hillie*, the D.C. Circuit makes a persuasive case that it is more faithful to § 2256(2)(A)'s plain text than courts applying the *Dost* factors.[5] But even if

5. *See Hillie*, 39 F.4th at 688 (noting, in response to the dissent's contention that the majority's construction of § 2256(2)(A) is contrary to the statute's purpose, that "a broadly stated legislative purpose cannot trump more narrowly worded statutory text") (citing *Nichols v. United States*, 578 U.S. 104, 112 (2016) ("Yet 'even the most formidable

Cont'd.

this court were inclined to adopt *Hillie*'s construction of the statute, it is not free to do so. "It is well established that a federal district court must generally apply an interpretation of law articulated by its circuit court of appeals." *Hulsey v. Am. Brands, Inc.*, No. C-97-003, 1997 WL 271755, at *3 (S.D. Tex. Apr. 7, 1997) (citing *Gacy v. Welborn*, 994 F.2d 305, 309 (7th Cir. 1993) (noting that "[o]urs is a hierarchical judiciary")); *see also* Bryan A. Garner et al., *The Law of Judicial Precedent* 27 (2016) ("Federal … courts are absolutely bound by vertical precedents—those delivered by higher courts within the same jurisdiction.").

As set forth above, this court has determined that under current Fifth Circuit precedent, the images and videos made the basis of Counts One and Two depict "sexually explicit conduct" as defined in 18 U.S.C. § 2256(2)(A) because they portray "lascivious exhibition" of MV1's "anus, genitals, or pubic area." The defendant does not dispute this. Dkt. 45 at 6–7. Accordingly, the Government has proven beyond a reasonable doubt all the elements necessary to find

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argument concerning the statute's purposes could not overcome the clarity we find in the statute's text.'") (quoting *Kloeckner v. Solis*, 568 U.S. 41, 55 n.4 (2012)); *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 98 (1991) ("best evidence of . . [legislative purpose] is the statutory text")); *see also Hillie*, 39 F.4th at 692 (holding "the Government produced no evidence that JAA engaged in 'sexually explicit conduct[]' as defined by the plain text of the statute").

the defendant guilty of both 18 U.S.C. § 2251(a) and 18 U.S.C. § 2252A(a)(2)(B).

* * *

The court finds the defendant, Jake Delahney Taylor, GUILTY of Counts One and Two.

SIGNED on Galveston Island this 14th day of December, 2022.

/s/

JEFFREY VINCENT BROWN
UNITED STATES DISTRICT JUDGE

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-40273
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff—Appellee

versus

JAKE DELAHNEY TAYLOR,
Defendant—Appellant

Filed: April 16, 2024

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 3:19-CR-23-1

ON PETITION FOR REHEARING EN BANC

Before BARKSDALE, GRAVES, AND OLDHAM, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5th Cir. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (Fed. R. App., *infra*, P. 35 and 5th

Cir. R. 35), the petition for rehearing en banc is DENIED.

Appendix D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

UNITED STATES OF AMERICA	*CRIMINAL NO. 3:19-CR-23*
vs.	
JAKE DELAHNEY TAYLOR	

Filed: November 17, 2020

SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES THAT:

INTRODUCTION

At all times material to this Indictment:

1. The term "minor" is defined, pursuant to Title 18, United States Code, Section 2256(1), as "any person under the age of eighteen years."

2. The term "child pornography," for purposes of this Indictment, is defined, pursuant to Title 18, United States Code, Section 2256(8)(A), as:

> "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 engaged in sexually explicit conduct."

3. The term "sexually explicit conduct" is defined, pursuant to Title 18, United States Code, Section 2256(2)(A), as any:

"actual or simulated

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

(ii) bestiality; [or]

(iii) masturbation; [or]

(iv) sadistic or masochistic abuse; or

(v) [the] lascivious exhibition of the genitals or pubic area of any person."

4. The term "computer" is defined, pursuant to Title 18, United States Code, Sections 2256(6) and 1030(e)(1), as any:

"electronic, magnetic, optical, electrochemical, or other high-speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but

> such term does not include an automated typewriter or typesetter, a portable handheld calculator or other similar device."

5. The term "producing", for purposes of this Indictment, is defined, pursuant to Title 18, United States Code, Section 2256(3) and case law, as:

> "producing, directing, manufacturing, issuing, publishing or advertising" and includes downloading or copying visual depictions from another source.

6. The term "visual depiction" is defined, pursuant to Title 18, United States Code, Section 2256(5), as including, but is not limited to, any:

> "undeveloped film and videotape, [and] data stored on computer disk or by electronic means which is capable of conversion into a visual image."

COUNT ONE

(Sexual Exploitation of a Child)

On or about January 1, 2018 through on or about June 1, 2018, within the Southern District of Texas,

JAKE DELAHNEY TAYLOR,

defendant herein, did employ, use, persuade, induce, entice and coerce and attempted to employ, use, persuade, induce, entice and coerce a minor child, to wit: Minor Victim #1, to engage in any sexually

explicit conduct for the purpose of producing a visual depiction of such conduct, and such visual depiction was transmitted using any means and facility of interstate or foreign commerce, and the visual depiction was produced using materials that had been mailed, shipped and transported in and affecting interstate and foreign commerce by any means, including by computer.

In violation of Title 18, United States Code, Section 2251(a) & (e).

COUNT TWO

(Distribution of Child Pornography)

From on or about June 13, 2018, through on or about June 14, 2018, within the Southern District of Texas and elsewhere,

JAKE DELAHNEY TAYLOR,

defendant herein, did knowingly distribute material that contained child pornography using any means and facility of interstate and foreign commerce, including by computer.

In violation of Title 18, United States Code, Section 2252A(a)(2)(B) and Section 2252A(b)(1).

COUNT THREE

(Possession of Child Pornography)

On or about August 17, 2018, within the Southern District of Texas,

JAKE DELAHNEY TAYLOR,

defendant herein, did knowingly possess material that contained an image of child pornography, which had been shipped and transported using any means and facility of interstate and foreign commerce, and which were produced using materials which have been mailed, shipped, and transported in and affecting interstate and foreign commerce, by any means, including by computer, more specifically: the defendant possessed a Samsung Galaxy S5, IMEI 353502068684974, a Samsung Galaxy S5 IMEI 353502064604661, and a Samsung Note 8, ESN 352078091092999; which contained still images and videos of child pornography.

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

COUNT FOUR

(Destruction of Property)

On or about August 17, 2018, within the Southern District of Texas,

JAKE DELAHNEY TAYLOR,

defendant herein, before the search for and seizure of property by Homeland Security Investigations Special Agent DeWayne Lewis, a person authorized to make such search and seizure, did knowingly destroy, damage, waste, dispose of, transfer and otherwise take any action and attempted to destroy,

damage, waste, dispose of, transfer and otherwise taken any action, for the purpose of preventing and impairing the Government's lawful authority to take said property into its custody and control.

In violation of Title 18, United States Code, Section 2232(a).

NOTICE OF FORFEITURE

18 U.S.C. § 2253(a)

Pursuant to Title 18, United States Code, Section 2253(a)(2) and (a)(3), the United States gives the defendant notice that in the event of conviction for the offenses charged in Count One and Count Two of the Indictment, the United States will seek to forfeit all property, real and personal, constituting or traceable to gross profits or other proceeds obtained from the offenses charged in Count One through Count Three; and all property, real and personal, used or intended to be used to commit or to promote the commission of the offenses charged in Count One through Count Three, or any property traceable to such property, including, but not limited to, the following:

A Samsung Note 8, ESN 352078091092999;

A Samsung Galaxy S5, IMEI 353502068684974; and

A Samsung Galaxy S5 IMEI 353502064604661.

A True Bill:

ORIGINAL SIGNATURE ON FILE
GRAND JURY FOREPERSON

RYAN K. PATRICK
UNITED STATES ATTORNEY

BY: /s/
ZAHRA JIVANI FENELON
ASSISTANT UNITED STATES ATTORNEY
713-567-9309

Appendix E

STATUTORY PROVISIONS

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.

* * *

(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 ….

18 U.S.C. § 2252—
CERTAIN ACTIVITIES RELATING TO MATERIAL INVOLVING THE SEXUAL EXPLOITATION OF MINORS

(a) Any person who—

(4)…

* * *

(B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or 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 that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

shall be punished as provided in subsection (b).

18 U.S.C. § 2252A—
CERTAIN ACTIVITIES RELATING TO

MATERIAL CONSTITUTING OR CONTAINING CHILD PORNOGRAPHY

(a) Any person who—

* * *

(2)knowingly receives or distributes—

* * *

(B) any material that contains child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer …

* * *

shall be punished as provided in subsection (b).

(b)(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years ….

18 U.S.C. § 2256—
DEFINITIONS FOR CHAPTER

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of eighteen years;

(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;

bestiality;

masturbation; or

sadistic or masochistic abuse; or

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

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "organization" means a person other than an individual;

(5) "visual depiction" includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format;

(6) "computer" has the meaning given that term in section 1030 of this title;

(7) "custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained;

(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.

(9) "identifiable minor"—

(A) means a person—

(i) (I) who was a minor at the time the visual depiction was created, adapted, or modified; or

(II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

(ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and

(B) shall not be construed to require proof of the actual identity of the identifiable minor.

(10) "graphic", when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted; and

(11) the term "indistinguishable" used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.