**PUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

**No. 22-4322**

---

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

MICHAEL SCOTT HOOVER,

Defendant – Appellant.

---

Appeal from the United States District Court for the Western District of North Carolina, at Statesville. Kenneth D. Bell, District Judge. (5:20-cr-00088-KDB-DSC-1)

---

Argued: January 24, 2024 Decided: March 12, 2024

---

Before WILKINSON, Circuit Judge, MOTZ, Senior Circuit Judge, and John A. GIBNEY, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

---

Affirmed by published opinion. Senior Judge Motz wrote the opinion, in which Judge Wilkinson and Senior Judge Gibney joined.

---

**ARGUED:** David Q. Burgess, DAVID BURGESS LAW, Charlotte, North Carolina, for Appellant. Anthony J. Enright, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee **ON BRIEF:** Dena J. King, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee.

---

Appendix A-1

DIANA GRIBBON MOTZ, Senior Circuit Judge:

Michael Scott Hoover challenges his conviction and sentence for crimes related to his production and possession of child pornography. He argues the trial court erred in several evidentiary rulings, in denying his Rule 29 motion for judgment of acquittal, and in instructing the jury on the elements of child pornography production. He also maintains that the district court procedurally erred in sentencing him to 840 months' imprisonment. We have carefully considered these arguments and concluded that none are meritorious. Accordingly, we affirm.

I.

In August 2019, law enforcement authorities arrested Hoover for multiple counts of indecent liberties with a minor in violation of North Carolina law. Following his arrest, his employer, Wells Fargo, searched his work-issued iPhone and discovered a video of a minor boy masturbating. A North Carolina forensic investigator then searched that phone pursuant to a search warrant and discovered three more videos and multiple pictures of another minor boy masturbating. The investigation also uncovered web searches on Hoover's phone for "selfies boy masterbating [sic]," "NAMBLA [North American Man/Boy Love Association]," and other web-search queries indicating sexual interest in minor boys.

Investigators identified the two minors depicted in the illicit content found on Hoover's phone as Victim One and Victim Two, both relatives of Hoover. In June and September 2018, when Hoover recorded the videos of Victim One, the boy was 17 years

old. In August 2019, when Hoover recorded the video of Victim Two, the boy was 12 years old. Victim Two caught Hoover recording him and asked him to delete the video, but Hoover did not do so. Victim One did not know he was being recorded on either occasion.

Both Victim One and Victim Two reported a long period of inappropriate comments and sexual abuse by Hoover in the time leading up to the creation of the videos. Each victim said that Hoover had isolated him at Hoover's home or while on trips, and then pressured the minor to masturbate in front of Hoover, despite the minor not wanting to do so. Six other victims also came forward, reporting to investigators that Hoover had sexually abused them as minor boys prior to or around the same time as Hoover's sexual abuse of Victim One and Victim Two.

In October 2020, the Government indicted Hoover in the Western District of North Carolina for two counts of production of child pornography, in violation of 18 U.S.C. § 2251(a) — one charge for his conduct involving Victim One, and another for his conduct involving Victim Two — and one count of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B), for the illicit content of Victim One and Victim Two found on the phone. In April 2021, the district court held a one-day jury trial. The Government presented testimony from several witnesses, including Victim One, Victim Two, and the North Carolina forensic examiner who searched Hoover's phone. The prosecution also offered evidence of the sexually explicit materials and web searches discovered on Hoover's phone. After the Government's presentation of its evidence, Hoover moved for judgment of acquittal pursuant to Rule 29, asserting a lack of sufficient evidence. The



Appendix A-3

district court denied the motion. Hoover did not present any evidence in his defense. The jury deliberated for less than 30 minutes and found Hoover guilty on all three counts.

The presentence report calculated Hoover's recommended sentence under the U.S. Sentencing Guidelines ("the Guidelines") to be 840 months, or 70 years. The district court adopted the report with minor modifications and sentenced Hoover to 70 years' imprisonment. Hoover then timely filed this appeal.

II.

We first consider Hoover's evidentiary challenges to the admission of (1) the web searches discovered on his phone and (2) the testimony of Victim One and Victim Two.

A.

Hoover maintains that Federal Rule of Evidence 404(b) bars admission of the web searches on his phone. He claims that the web searches are propensity evidence not "intrinsic" to the charged conduct involving Victim One and Victim Two. *See United States v. Bush*, 944 F.3d 189, 195–96 (4th Cir. 2019).

Hoover did not make this argument at trial. Instead, he merely objected to the admission of the web searches on the ground that they were irrelevant and unduly prejudicial under Federal Rule of Evidence 403. We therefore review his appellate challenge for plain error. *See United States v. Zayyad*, 741 F.3d 452, 458-59 (4th Cir. 2014). To obtain relief, Hoover must show (1) "an error" (2) that is "plain," (3) that "affect[ed] substantial rights," and (4) that "had a serious effect on the fairness, integrity,



Appendix A-4

or public reputation of judicial proceedings." *Greer v. United States*, 593 U.S. 503, 507–08 (2021) (cleaned up).

Rule 404(b) bars the admission of "[e]vidence of any other crime, wrong, or act . . . to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). The Rule bars *extrinsic* evidence, that is, evidence "separate from or unrelated to the charged offenses." *Bush*, 944 F.3d at 195 (cleaned up). But Rule 404(b)(1)'s limitation on propensity evidence does not apply to *intrinsic* evidence. Thus, it does not bar evidence that "is inextricably intertwined with the evidence regarding the charged offense [because] it forms an integral and natural part of the witness's accounts of the circumstances surrounding the offenses for which the defendant was indicted," or "serves to complete the story of the crime on trial." *Id.* at 196.

The district court did not err in holding the web searches were intrinsic to Hoover's production and possession offenses. The web-search queries found on Hoover's phone included "selfies boy oh boy," "selfies boy," "NAMBLA," and "selfies boy masterbating." The forensic examiner discovered these web searches on the same phone that Hoover used to make and store videos and pictures of the victims masturbating. These web searches reveal Hoover's interest in depictions of minor boys masturbating, "the same sort of conduct" underlying the charged offenses. *See United States v. Ebert*, 61 F.4th 394, 403 (4th Cir. 2023) (cleaned up).

Hoover also made the web searches around the same time as his criminal conduct. Although most of the web searches were undated, they could not have been made any



Appendix A-5

earlier than March 2017, when the iPhone was imported from China.[1] Hoover's abhorrent behavior toward Victim One and Victim Two had begun by or before 2017 — a pattern of abuse the trial court also properly found intrinsic to the charged offenses. *Infra* II.B.

This might be a closer question had law enforcement authorities discovered the web searches on a different device than the phone Hoover used to record and store child pornography. But here the web searches "complete the story of the crime" by helping explain to the jury how Hoover used his phone: as a tool to discover, view, create, and store depictions of minor boys masturbating. *See Bush*, 944 F.3d at 196 (cleaned up). Omitting evidence of the web searches would have risked providing the jury "an incomplete or inaccurate view of other evidence" discovered on Hoover's phone, and of his intent to produce illicit content. *See United States v. Brizeula*, 962 F.3d 784, 795 (4th Cir. 2020).

Hoover argues in the alternative that the trial court erred in failing to instruct the jury that it could not consider the web searches as evidence of the possession charge. He did not ask for such an instruction at trial, and the district court did not plainly err in failing to give such an instruction *sua sponte*. *See United States v. Johnson*, 945 F.3d 174, 177–78 (4th Cir. 2019). The possession charge involved the same sexually explicit depictions

[1] Hoover attempts to bolster his contrary argument with speculation that the web searches could have been made as long ago as 2013 (when Hoover may have first received a smartphone from Wells Fargo), and later retrieved through the cloud. But he presented no evidence in support of this theory, and, in any event, forfeited it by failing to raise it in his opening brief. *United States v. Fernandez Sanchez*, 46 F.4th 211, 219 (4th Cir. 2022).

of Victim One and Victim Two that underlay the production charges, making the web searches intrinsic to all three offenses.

B.

Hoover next maintains that the district court violated the Federal Rules of Evidence in admitting, pursuant to Rule 414, Victim One's testimony regarding Hoover's long-running sexual abuse of Victim One. That is so, he claims, because Rule 414 governs the admission of evidence of "other child molestation" against defendants accused of "child molestation" offenses, and Victim One was not a "child" for purposes of the Rule. *See* Fed. R. Evid. 414(a), (d)(1).

But the court did not admit Victim One's testimony as evidence of "other child molestation" under Rule 414, but instead on the basis that Victim One's testimony was "intrinsic" to the charges involving Victim One. And Victim One's testimony clearly was intrinsic to those charges: Victim One detailed a long period in which Hoover isolated Victim One, gave him alcohol, showed him pornography, and pressured him to masturbate in front of Hoover. Hoover's predatory behavior toward Victim One thus formed an "integral and natural part of the witness's account[] of the circumstances surrounding the [charged] offenses." *See Bush*, 944 F.3d at 196 (cleaned up).

Hoover also contends that the trial court erred in failing to instruct the jury that it could not consider Victim Two's testimony when reaching a verdict on the production charge involving Victim One. Because Hoover did not request this instruction at trial, we again review for plain error. *See Johnson*, 945 F.3d at 178.



Appendix A-7

We see no error here. The trial court admitted Victim Two's testimony as "intrinsic" evidence with respect to the charges involving Victim Two, and as Rule 414 evidence with respect to the production charge involving Victim One. Rule 414 permits courts to "admit evidence that the defendant committed any other child molestation" when the "defendant is accused of child molestation," so long as such evidence is relevant. Fed. R. Evid. 414(a). The Rule further defines "child molestation" to include "a crime under federal law . . . involving any conduct prohibited by 18 U.S.C. chapter 110." Fed. R. Evid. 414(d)(2)(B). All three counts — the production offense involving Victim One, the production offense involving Victim Two, and the possession offense involving both Victim One and Victim Two — "involv[e] . . . conduct prohibited by 18 U.S.C. chapter 110." *Id.* All three offenses thus are "child molestation" for purposes of Rule 414. *See United States v. Arce*, 49 F.4th 382, 394 (4th Cir. 2022). Accordingly, the district court did not err in admitting Victim Two's testimony regarding Hoover's "child molestation" conduct involving Victim Two as Rule 414 evidence of the "child molestation" charge involving Victim One. *See* Fed. R. Evid. 414(d)(2)(B).[2]

Hoover resists this conclusion, arguing that Rule 414 covers only child molestation offenses involving victims younger than 14, and that Victim One was 17 at the time Hoover made the videos. Rule 414 does separately define "child" as "a person below the age of 14." Fed. R. Evid. 414(d)(1). But Hoover errs in maintaining that this restriction applies

[2] Hoover does not seem to dispute that his offense conduct involving Victim Two was "relevant" to the offense involving Victim One. *See* Fed. R. Evid. 414(a). Nor could he. "The similarity between the two offenses was striking," and they occurred during the same timeframe. *See United States v. Kelly*, 510 F.3d 433, 437 (4th Cir. 2007).



Appendix A-8

to the definition of "child molestation" in Rule 414(d)(2)(B), which defines "child molestation" simply to include "*any* conduct prohibited by 18 U.S.C. chapter 110." *Arce*, 49 F.4th at 394 (quoting Fed. R. Evid. 414(d)(2)(B) (emphasis added)). As our sister circuits have recognized, the definition of "child" in Rule 414(d)(1) does not limit the definition of "child molestation" in Rule 414(d)(2)(B). *United States v. Foley*, 740 F.3d 1079, 1087 n.3 (7th Cir. 2014); *United States v. Sturm*, 673 F.3d 1274, 1284 (10th Cir. 2012). Moreover, because the jury could consider Victim Two's testimony when reaching a verdict on the production charge involving Victim One, the district court need not have severed the counts — as Hoover argues in passing for the first time on appeal.

III.

Hoover next challenges the sufficiency of the evidence supporting his child pornography production convictions. He argues that the Government failed to prove the specific-intent and interstate-nexus elements of those offenses. He faces a "heavy burden" on appeal because "reversal for insufficient evidence is reserved for the rare case where the prosecution's failure is clear." *United States v. Davis*, 75 F.4th 428, 437 (4th Cir. 2023) (cleaned up). We will "sustain a guilty verdict if — viewing the evidence in the light most favorable to the prosecution — the verdict is supported by substantial evidence." *Id.* (cleaned up). Substantial evidence is "evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *Id.* (cleaned up). "We consider circumstantial as well as direct



Appendix A-9

evidence" in this review. *United States v. Hicks*, 64 F.4th 546, 550 (4th Cir. 2023) (cleaned up).

A.

We start with the Government's evidence of specific intent. Child pornography production under 18 U.S.C. § 2251(a) requires proof that "the defendant used, employed, persuaded, induced, enticed, or coerced the minor to take part in sexually explicit conduct *for the purpose* of providing a visual depiction of that conduct." *United States v. McCauley*, 983 F.3d 690, 695 n.3 (4th Cir. 2020) (cleaned up). "[A] defendant must engage in the sexual activity with the specific intent to produce a visual depiction; it is not sufficient simply to prove that the defendant purposefully took a picture." *United States v. Palomino-Coronado*, 805 F.3d 127, 131 (4th Cir. 2015).

Hoover argues that the Government failed to present "direct evidence or statements indicating" that Hoover specifically intended to produce sexually explicit videos of Victim One and Victim Two when he pressured the victims to masturbate. *See* Def. Br. 34. But the Government did not need to present *direct* evidence when proving Hoover's intent as to the § 2251(a) production charges. "More often . . . courts are presented only with circumstantial evidence to show that a defendant acted with purpose." *Palomino-Coronado*, 805 F.3d at 131. And we have expressly "recognize[d] that the jury may infer intent from circumstantial evidence" when deliberating on § 2251(a) offenses. *See United States v. Engle*, 676 F.3d 405, 418 & n.9 (4th Cir. 2012). The Government presented abundant evidence that Hoover's decisions to record both victims were not "spontaneous,"



Appendix A-10

but rather "a motivating purpose" when he pressured them to engage in sexual activity. *See McCauley*, 983 F.3d at 696–97 (cleaned up).

As to the § 2251(a) production offense involving Victim Two, the jury could consider Hoover's web searches indicating his interest in depictions of minor males masturbating, as well as Victim Two's testimony regarding Hoover's severe sexual abuse of Victim Two in the time leading up to Hoover making the video. Victim Two also testified that, during the offense itself, Hoover secretly followed Victim Two into the woods and repeatedly pressured Victim Two to masturbate, despite the minor telling Hoover that he did not want to. Hoover "actively concealed from the minor the fact that he was videotaping" him. *See Palomino-Coronado*, 805 F.3d at 131 (cleaned up). He also manipulated the video by recording Victim Two in slow motion. *See id.* ("zoom[ing] the camera in and out" can indicate specific intent (quoting *United States v. Morales de Jesus*, 372 F.3d 6, 21–22 (1st Cir. 2004)). And instead of deleting the video as Victim Two asked, Hoover saved it to a secret app on his phone where he hid what he called his "bad pictures."

And as to Hoover's intent with respect to § 2251(a) offense involving Victim One, the jury could consider the web searches, Victim Two's testimony, and Victim One's own testimony regarding Hoover's pattern of predatory behavior toward Victim One. The jury could also consider the fact that Hoover secretly recorded Victim One masturbating twice, and that the June 2018 video zoomed in on Victim One's genitals. *See id.* ("The number of sexually explicit recordings or depictions [can be] indicative of purpose.")

The jury thus could reasonably find that Hoover had the specific intent necessary to convict him of both § 2251(a) production offenses.



Appendix A-11

B.

Conviction of child pornography production under § 2251(a) also requires proof of an interstate-nexus element: that the "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." 18 U.S.C. § 2251(a); *McCauley*, 983 F.3d at 695 n.3. Hoover asserts that his iPhone cannot be a "material" under § 2251(a), arguing that "material" refers only to the actual substance or data that the illicit images are made of. Hoover did not move for acquittal on this basis at trial, and so we review this claim only for plain error. *See United States v. Duroseau*, 26 F.4th 674, 678 & n.2 (4th Cir. 2022); *Zayyad*, 741 F.3d at 458-59.

There was no error here, let alone plain error. In *United States v. Malloy*, we held that § 2251(a) prohibits the entirely intrastate "production of child pornography with a video camera and videotape that had traveled in foreign commerce" — there, from Japan and Mexico. 568 F.3d 166, 170, 180 (4th Cir. 2009). It follows that § 2251(a) also prohibits Hoover's production of child pornography in North Carolina using an iPhone imported from China.

This conclusion accords with the interstate-nexus analysis of other child pornography offenses prohibited under 18 U.S.C. chapter 110. The Government can prove the interstate-nexus element for receipt of child pornography and possession of child pornography by showing that the defendant had downloaded or stored the images using a computer that had previously moved "through interstate or foreign commerce." *United States v. Miltier*, 882 F.3d 81, 92 (4th Cir. 2018). And both the receipt and possession



Appendix A-12

offenses use the same term of art to describe their interstate-nexus requirement — "affecting interstate or foreign commerce by any means." 18 U.S.C. §§ 2252A(a)(2)(A), (a)(5)(B). That language "expresses an intent by Congress to exercise its full power under the Commerce Clause." *Miltier*, 882 F.3d at 91 (quoting *Russell v. United States*, 471 U.S. 858, 859 (1985)).

The crime of child pornography production, 18 U.S.C. § 2251(a), also uses this term to define its interstate-nexus requirement. *Id.* (covering materials "affecting interstate or foreign commerce by any means"). We therefore must conclude that § 2251(a) also "unambiguously allows the interstate nexus to be satisfied based on the movement of a computer" used in the crime. *See Miltier*, 882 F.3d at 91. That includes smartphones, which, after all, are "minicomputers that also happen to have the capacity to be used as a telephone." *See Riley v. California*, 573 U.S. 373, 393 (2014). The Government thus provided sufficient evidence of the interstate-nexus element of § 2251(a) by presenting testimony showing that Hoover's iPhone was imported from China.

## IV.

Hoover additionally contends that the district court erred in instructing the jury on the specific-intent requirement of the child pornography production charges, maintaining that the court wrongly departed from our "approved language in *Palomino-Coronado*." Def. Br. 36. We review this issue de novo. *McCauley*, 983 F.3d at 694.

Hoover does not explain what he means by *Palomino-Coronado*'s "approved language." But we understand him to be referring to that case's *explanation* that production

of child pornography under § 2251(a) requires proof of specific intent: "a defendant must engage in the sexual activity with the specific intent to produce a visual depiction; it is not sufficient simply to prove that the defendant purposefully took a picture." *Palomino-Coronado*, 805 F.3d at 131. *Palomino-Coronado* thus explains the meaning of the specific-intent requirement in § 2251(a), but it does not dictate use of particular language when explaining that element to the jury.

In the case at hand, the district court satisfactorily explained this specific-intent requirement to the jury, instructing that to convict Hoover under § 2251(a):

> [T]he government must prove that the minor engaged in the sexual activity and that the defendant had the specific intent to produce a visual depiction. It is not sufficient simply to prove that the defendant purposefully took the picture. The government must prove that producing a visual depiction of the sexually explicit conduct was one of the defendant's purposes for using, employing, persuading, enticing, or coercing the victim to engage in sexually explicit conduct and that it was a significant or motivating purpose and was not merely incidental to the sexually explicit conduct.

The court thus "adequately informed the jury of the controlling legal principles" governing the § 2251(a) offenses. *See McCauley*, 983 F.3d at 694 (cleaned up). "Whether an instruction reads 'the purpose,' 'the dominant purpose,' 'a motivating purpose' — or some other equivalent variation — may not be crucial, but [§ 2251(a)] plainly requires something more than 'a purpose.'" *Id.* at 697. The trial court made that fact clear.

## V.

Finally, Hoover challenges the procedural reasonableness of his 840-month sentence on several grounds: six challenges to the district court's calculation of his

recommended sentence under the Guidelines, and an additional challenge to how the court weighed the § 3553(a) factors before imposing sentence. We review these claims for abuse of discretion. *See United States v. Morehouse*, 34 F.4th 381, 387 (4th Cir. 2022). We first summarize the disputed aspects of the calculation of Hoover's recommended sentence under the Guidelines, and then explain why Hoover's sentencing challenges fail.

A.

The district court adopted the Guidelines calculations in the presentence report. In doing so, it followed the grouping rules to put Count 2 and Count 3 (the production offense involving Victim Two and the possession offense) into one group, and Count 1 (the production offense involving Victim One) into a second group. *See* U.S.S.G. §§ 3D1.2(b), 2G2.1 cmt. n.7. The court then applied several offense-level adjustments to the production offenses, including a two-level increase under § 2G2.1(b)(2)(A) because the crimes involved sexual contact, and a two-level increase under § 2G2.1(b)(5) because Hoover was a relative and caregiver of both victims.

The court also applied several adjustments to the *initial* offense level for Hoover's possession offense, including a five-level increase under § 2G2.2(b)(5) because Hoover had engaged in a pattern of sexual exploitation of minors. The district court, however, did not ultimately use the initial offense level calculated under § 2G2.2. Instead, the court applied the § 2G2.1 guidelines because Hoover's possession offense "involved causing . . . a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction," and applying the § 2G2.1 guidelines would result in a greater offense level. *See* U.S.S.G. § 2G2.2(c)(1).



Appendix A-15

The court concluded that Hoover's combined adjusted offense level was 40, after applying another two-level adjustment for multiple offenses under § 3D1.4. Finally, the district court added a five-level enhancement under § 4B1.5(b)(1) because Hoover had "engaged in a pattern of activity involving prohibited sexual conduct." Hoover's total offense level thus was 45, which the district court lowered to 43, the highest level the Guidelines recognize. U.S.S.G. ch. 5, pt. A cmt. n.2. The Guidelines generally recommend a life sentence when the total offense level is 43. U.S.S.G. ch.5, pt. A (table Zone D). The district court accordingly calculated Hoover's Guidelines-recommended sentence to be 840 months, or 70 years, the statutory maximum penalty for his child pornography production and possession offenses. *See* 18 U.S.C. §§ 2251(e), 2252A(b)(2).

B.

All of Hoover's challenges to the district court's Guidelines calculations fail.

1.

Hoover first challenges the two-level enhancement under § 2G2.1(b)(5), which applies when the defendant is a relative of the victim. Hoover's presentence report stated that Hoover was related to Victim One and Victim Two. Hoover objected to that finding, but only in passing and via a conclusory assertion that he had pled not guilty to the offenses. He did not elaborate on this objection at the sentencing hearing. Hoover thus failed "to make a showing that the information in the presentence report [was] unreliable, and articulate the reasons why the facts contained therein [were] untrue or inaccurate." *See United States v. Fowler*, 58 F.4th 142, 151 (4th Cir. 2023) (cleaned up). Accordingly, the district court could and did properly "adopt the findings of the presentence report without



Appendix A-16

more specific inquiry or explanation," including that Hoover was a relative of Victim One and Victim Two. *See id.* (cleaned up).

2.

Hoover next challenges the district court's application of the cross-reference instruction at § 2G2.2(c)(1) when calculating the offense level for the possession offense, arguing that this cross-reference provision applies only to advertising child pornography. But the purposeful *production* of child pornography can also trigger the cross-reference at § 2G2.2(c)(1). *See United States v. Cox*, 744 F.3d 305, 309–10 (4th Cir. 2014). The district court thus did not err in following the §2G2.2(c)(1) cross-reference to calculate the offense level for Hoover's possession offense under the guidelines at § 2G2.1.

3.

Hoover's third challenge is to the court's application of a five-level pattern-of-behavior adjustment under § 2G2.2(b)(5) when calculating the initial offense level for his possession offense. But, as explained above, the court ultimately did not use the guidelines at § 2G2.2 to calculate the offense level for the possession offense. Instead the district court followed the cross-reference provision at § 2G2.2(c)(1) and applied the guidelines at § 2G2.1. Any error in the court's initial application of § 2G2.2(b)(5) thus would be harmless. *See Morehouse*, 34 F.4th at 387. The court, however, did not err in any event. As stated in the presentence report, Hoover had sexually abused Victim One, Victim Two, and several other minors multiple times. *See* U.S.S.G. § 2G2.2 cmt. n.1.



Appendix A-17

4.

Hoover also challenges the district court's application of a two-level adjustment under § 3D1.4, which it applied because Hoover had committed multiple offenses against different minors under the grouping rules at § 3D1.2. The Guidelines instruct courts to group together "counts involving substantially the same harm," U.S.S.G. § 3D1.2(c), and to group separately "multiple counts involving the exploitation of different minors," *id.* § 2G2.1 cmt. n.7. Accordingly, the district court placed Count 1 (the production offense involving Victim One) into one group and Counts 2 and 3 (the production offense involving Victim Two and the possession offense) into another group.

Hoover maintains that the court nonetheless should have grouped all three counts together. He notes that § 3D1.2(c) instructs sentencing courts to group together counts where "one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guidelines applicable to another of the counts." Hoover next points to § 2G2.2(b)(5), which assigns a five-level adjustment to a possession count when "the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor." He concludes that, because his production offenses "embod[y]" the conduct resulting in the initial five-level adjustment under § 2G2.2(b)(5) to his possession offense, the district court should have grouped all three counts together. *See* U.S.S.G. § 3D1.2(c).

This argument fails because the district court did not find the pattern-of-behavior enhancement at § 2G2.2(b)(5) ultimately "applicable" to Hoover's possession offense. *See* U.S.S.G. § 3D1.2(c). Instead, following the cross-reference provision at § 2G2.2, the court

applied the § 2G2.1 guidelines to calculate the offense level of his possession count. Hoover's argument also conflicts with the purpose of the grouping rule at § 3D1.2(c): "prevent[ing] 'double counting' of offense behavior." *See* U.S.S.G. § 3D1.2 cmt. n.5. Grouping the production offenses separately did not result in double counting because those offenses concerned the separate harms Hoover inflicted on Victim One and Victim Two.

5.

Hoover further challenges the district court's application of a five-level pattern-of-behavior adjustment under § 4B1.5(b)(1) to his combined adjusted offense level. Specifically, he argues that applying this § 4B1.5(b)(1) pattern-of-behavior adjustment resulted in "impermissible double counting." Def. Br. 41. In doing so, Hoover is seemingly referring again to the court's provisional application of the § 2G2.2(b)(5) pattern-of-behavior adjustment to the possession offense. But, as we have explained, the court ultimately did not apply the § 2G2.2 guidelines when calculating the offense level of the possession conviction. And even if the court had done so, our precedent instructs that applying the adjustments established in § 2G2.2(b)(5) and § 4B1.5(b)(1) for the same conduct does not result in "impermissible double-counting" because those adjustments serve different penological goals. *United States v. Dowell*, 771 F.3d 162, 170–71 (4th Cir. 2014).

6.

Hoover's last Guidelines challenge also fails. Hoover maintains that the district court's erred in applying a two-level adjustment for "sexual contact" under



Appendix A-19

§ 2G2.1(b)(2)(A). But any such error would be harmless. *See Morehouse*, 34 F.4th at 387. The court calculated Hoover's offense level at 45, two levels higher than 43, the highest level recognized under the Guidelines. U.S.S.G. ch. 5 pt. A cmt. n.2. Even if the court had erred in applying the two-level sexual-contact adjustment to Hoover's offenses, his total offense level still would have been 43. Hoover conceded this point at oral argument before us. Oral Argument at 5:15–5:50.

C.

Hoover's final sentencing claim is that the district court procedurally erred in weighing the sentencing factors in 18 U.S.C. § 3553(a) when imposing the Guidelines-recommended sentence of 840 months. He argues that the court failed to consider his argument that the Guidelines recommendations were overly harsh to Hoover as a child pornography offender. We review for abuse of discretion. *Fowler*, 58 F.4th at 153.

After calculating the Guidelines range, a sentencing court must consider the § 3553(a) sentencing factors, "conduct an individualized assessment based on the facts before the court, and explain adequately the sentence imposed to allow for meaningful appellate review and to promote the perception of fair sentencing." *Id.* The § 3553(a) sentencing factors include the nature of the offense, the characteristics of the defendant, the Guidelines recommendation, and the need for deterrence, public safety, and rehabilitation. *See* 18 U.S.C. § 3553(a)(1)–(7). The court must also "consider all non-frivolous reasons" the defendant has given for "a different sentence and explain why it has rejected those arguments." *Fowler*, 58 F.4th at 153 (cleaned up). The court's explanation must "fully address[] the defendant's central thesis." *Id.* (cleaned up). But "where the



Appendix A-20

district court imposes a within-Guidelines sentence" — as it did here — "the explanation need not be elaborate or lengthy." *Id.* (cleaned up).

We see no procedural error here. The district court considered the presentence report and victim impact statements, and concluded that Hoover was a "child predator" with eight victims over many years. The court acknowledged several potential mitigating factors, including Hoover's good employment record, military service, and possible PTSD. But the district court also noted that a forensic psychologist had found that Hoover exhibited medium risk of recidivism, and concluded that medium risk was "significant." The court accordingly deemed it appropriate to "impose a sentence that [it] would be confident would be for the rest of [Hoover's] life," and thus imposed the Guidelines-recommended sentence of 840 months. Given the court's assessment of Hoover's characteristics, history, and crimes, the court adequately explained its conclusion that the Guidelines-recommended sentence of 840 months was not unfairly harsh for Hoover.[3]

VI.

For the foregoing reasons, the judgment of the district court is

*AFFIRMED.*

[3] Hoover asserts on appeal that the district court did not consider possible unwarranted sentencing disparities, but he did not make that argument at sentencing. "The district court is only required to address non-frivolous arguments a defendant actually presents." *United States v. Odum*, 65 F.4th 714, 725 n.5 (4th Cir. 2023) (cleaned up).



Appendix A-21

Rec'd 1/16/2024 - postmarked 1/11/2024 - opened in front of me by Elliot

FILED: January 10, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

No. 22-4322
(5:20-cr-00088-KDB-DSC-1)

---

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MICHAEL SCOTT HOOVER

Defendant - Appellant

---

ORDER

---

Upon consideration of appellant's pro se motion to file a pro se supplemental brief, the court denies the motion.

For the Court

/s/ Nwamaka Anowi, Clerk

Appendix B-1

FILED: March 12, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

No. 22-4322
(5:20-cr-00088-KDB-DSC-1)

---

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MICHAEL SCOTT HOOVER

Defendant - Appellant

---

JUDGMENT

---

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK

Appendix C-1

FILED: May 17, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

No. 22-4322
(5:20-cr-00088-KDB-DSC-1)

---

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MICHAEL SCOTT HOOVER

Defendant - Appellant

---

ORDER

---

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Senior Judge Motz, and Senior Judge Gibney.

For the Court

/s/ Nwamaka Anowi, Clerk

Appendix D-1

FILED: May 28, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

No. 22-4322
(5:20-cr-00088-KDB-DSC-1)

---

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MICHAEL SCOTT HOOVER

Defendant - Appellant

---

# MANDATE

---

The judgment of this court, entered March 12, 2024, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

*/s/Nwamaka Anowi, Clerk*

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
CASE NO.: 5:20-CR-88-KDB-DSC

UNITED STATES OF AMERICA

v.

MICHAEL SCOTT HOOVER

# SENTENCING MEMORANDUM AND MOTION FOR DOWNWARD VARIANCE

Michael Scott Hoover ("Scott") comes before the Court for sentencing having been convicted by a jury for production of child pornography and possession with intent to view child pornography, in violation of 18 U.S.C. § 2251 and 18 U.S.C. § 2252A. Through counsel, he submits this memorandum to assist the Court in fashioning an appropriate sentence pursuant to 18 U.S.C. § 3553 (a).

The Presentence Report ("PSR") has determined the advisory Guidelines call for a sentence of 840 months. By way of comparison, the median federal sentence for murder is 240 months.[1] As the Court is well aware, the advisory Guideline range is but one factor to be considered in determining a sentence that is "sufficient, but not greater than necessary" to achieve the purposes of sentencing. See *Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (quoting 18 U.S.C. § 3553 (a)). The defense submits that

[1] United States Sentencing Commission Quarterly Data Report September 30, 2019 at 17. Located at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_4th_FY19.pdf.

after all of the relevant statutory factors are taken into consideration, a sentence far below the advisory guideline range is appropriate.

## SCOTT HOOVER'S HISTORY AND CHARACTERISTICS

Scott Hoover grew up in a poor family in the North Carolina mountains. After graduating from high school, he chose to serve his country and enlisted in the Navy. He was deployed to the Middle East and served in Operations Desert Shield and Desert Storm. There, he flew numerous combat missions and performed as door gunner, in mine searches, and in surface surveillance. He participated in numerous search and rescue missions. For his service in he was awarded the Sea Service Deployment Ribbon, the National Defense Service Medal, and the Southwest Asia Service Medal. As a result of his combat experiences, Scott has been diagnosed with Post-Traumatic Stress Disorder.

After receiving an honorable discharge, Scott decided to continue his education. He enrolled in Wilkes County Community College and earned his Associate's Degree. He eventually received his Bachelor's Degree from Gardner-Webb University in 2006, graduating *cum laude*.

Since leaving the Navy, Scott has maintained gainful full-time employment, even during the years that he was attending college. He first worked as a service technician for two different companies before taking a job as a senior program analyst at Lowe's. After five years at Lowe's, he left for a

better job at Wells Fargo. From 2013 until his arrest in this case, Scott held the title of Vice-President/Team Lead at Wells Fargo.

## DISCUSSION

### I. The Overly Harsh Penalties for Certain Child Pornography Offenses Warrant a Downward Variance

Courts throughout the country have noted the severity of the United States Sentencing Guidelines as they are applied to offenses involving child pornography and have found them to be overly harsh. Courts have also observed that the guidelines are arbitrary due to a lack of empirical analysis in formulating the guidelines. As a consequence, courts have routinely applied downward variances to comply with the mandate of 18 U.S.C. 3553(a) to impose sentences that are "sufficient, but not greater than necessary."

While much of the criticism of the child pornography guidelines have focused on USSG §2G2.2 (discussed in more detail below), courts have recognized that the same criticism can be at aimed at USSG §2G2.1, the guideline that applies to production of child pornography. *See, e.g., United States v. Price*, 775 F.3d 828 (7th Cir. 2014). In *Price*, the Seventh Circuit upheld a downward variance from 40 years to 18 years where the defendant was convicted of producing and distributing child pornography. *Price*, 775 F.3d at 841. The 22-year sentence reduction was upheld even though the defendant molested children, appeared to pose future danger, and showed no remorse. *Id.* at 830, 834-35. The Seventh Circuit recognized that the district court properly concluded that USSG §2G2.1 "presents some of the same

pornography for pecuniary gain and who fall in higher criminal history categories." *Dorvey*, 616 F.3d at 187. The Court explained:

> This result is fundamentally incompatible with § 3553(a). By concentrating all offenders at or near the statutory maximum, § 2G2.2 eviscerates the fundamental statutory requirement in § 3553(a) that district courts consider "the nature and circumstances of the offense and the history and characteristics of the defendant" and violates the principle, reinforced in *Gall*, that courts must guard against unwarranted similarities among sentences for defendants who have been found guilty of dissimilar conduct.

*Id.* USSG § 2G2.1 is no different, as it concentrates all offenders at or near the statutory maximum regardless of their offense conduct, criminal history category, or background.

## II. Scott Hoover's History and Characteristics Warrant a Downward Variance, Especially In Light of the Overly Harsh Sentence He Faces.

Even though Scott has no criminal history points (his only prior convictions are for minor traffic violations), he is subject to a guideline sentence of life in prison. Due to the statutory maximums for the offenses of conviction, he is facing a sentence of 840 months in prison, a *de facto* life sentence. For the reasons previously discussed with regard to the overly harsh penalties for child pornography offenses, and based on his background, such a sentence is too severe and a downward variance is warranted.

Scott overcame growing up in poverty to accomplish a great deal in his life. He served the United States in the Navy in combat roles

Appendix F-6

during Operations Desert Shield and Desert Storm. His service was not without sacrifice, as it left him with Post-Traumatic Stress Disorder.

After serving his country, he worked toward a bachelor's degree while working full time and supporting his family. Until his arrest, he maintained gainful employment and worked his way up to the level of vice president at Wells Fargo.

Those are not the history and characteristics of one who deserves to spend the rest of his life in prison. His service, sacrifice, and accomplishments warrant a measure of leniency. Moreover, his lack of criminal history warrants a downward variance. *See, e.g., United States v. White*, 506 F.3d 635 (8th Cir. 2007) (in case of distribution of child pornography case where guidelines were 108-135 months, variance to 72 months proper in part because it was the defendant's first offense, rejecting government's argument that the court may not consider defendant's lack of prior record because it was already taken into account by guidelines; after *Booker*, the court can consider lack of a criminal record apart from the guidelines); *United States v. Paul*, 561 F.3d 970 (9th Cir. 2009) (where defendant convicted of embezzlement and guidelines were 10-16 months, court's within guideline sentence of 15 months unreasonably high in part because defendant was a first-time offender with no criminal record

Appendix F-7

whatsoever); *United States v. Autery*, 555 F.3d 864, 874 (9th Cir. 2009) (where guidelines were 41-51 months, court's *sua sponte* variance to probation not unreasonable in part because defendant's first conviction and Criminal History Category I "did not fully account or his complete lack of criminal history" because defendant with minor criminal history still falls into Category I); *United States v. Huckins* (10th Cir. 2008) 529 F.3d 1312 (where defendant convicted of possession of child pornography and guidelines were 78-97 months, court's variance to 24 months was proper in part because it was defendant's first conviction; the court rejected government's argument that guidelines already considered this by placing defendant in Category I).

## III. The Advisory Guideline Range Far Exceeds What Is Necessary To Afford Adequate Deterrence To Criminal Conduct And To Protect The Public.

At his own expense, Scott has submitted for evaluation by forensic psychologists George Demakis and Terri Watters Klosek, who have substantial experience in sex offense cases. A copy of a report summarizing their findings is attached. Those findings include the following:

> In terms of risk for future violence (including that of a sexual nature), Mr. Hoover is at **the lowest end of the medium-risk range**. Protective factors or factors that reduce risk include that he was married at the time of the offenses, lack of prior criminal history, lack of antisocial personality disorder, as well as relatively older age. Future risk is likely to decrease further as he ages. Specifically, research indicates that are **very few recidivists among sexual offenders released after age 60**. In contrast, areas of concern include that he has failed to take responsibility for his convictions and appears to minimize

Appendix F-8

aspects of the crimes (i.e., the relatively small number of pictures found on his phone).

Exhibit A attached hereto (emphasis in original).

## CONCLUSION

For the reasons stated herein, the defense respectfully requests that this Honorable Court impose a sentence that is far below the advisory guideline range.

This the 14th day of May, 2022.

Respectfully submitted,

/s/ Noell P. Tin
TIN FULTON WALKER & OWEN PLLC
301 East Park Avenue
Charlotte, N.C. 28203
T: (704) 338-1220
F: (704) 338-1312
ntin@tinfulton.com
*Counsel for Mr. Hoover*

Appendix F-9

this guideline applies, and the defendant engaged in a pattern of activity involving prohibited sexual conduct . . . [t]he offense level shall be 5 plus the offense level determined under Chapters Two and Three." "'[P]rohibited sexual conduct' means any of the following: (i) any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B); (ii) the production of child pornography; or (iii) trafficking in child pornography only if, prior to the commission of the instant offense of conviction, the defendant sustained a felony conviction for that trafficking in child pornography. It does not include receipt or possession of child pornography."

As the court noted in *United States v. Bruffy*, No. 6:11CR00006–I, 2012 WL 1003503 (W.D. Va. Mar. 26, 2012), although the § 4B1.5(b)(1) enhancement may apply, "there [may be] a valid question as to impermissible double counting under the facts and circumstances of [a particular defendant's] case." *Id.* (allowing downward variance). Here, the application of this enhancement was erred. *But see United States v. Schellenberger*, No. 06-4209, 246 Fed. App'x. 830, 832 (4th Cir. Sept. 4, 2007) (unpublished) (rejecting argument).

**2. The District Court Improperly Considered The 18 U.S.C. § 3553(a) Factors.**

First, as to the defense's argument that the sentencing guidelines are overly harsh in cases such as Mr. Hoover's, the district court responded by focusing on what the public think of the guidelines: "I'm telling you when I just talk to folks I know about child pornography, child abuse, they don't think any sentence is too



Appendix G-1

long. So I don't know what the sentencing commission might do in the future with respect to some of these things, but my guess is the public is unconcerned with the harshness of these guidelines, and the Court is unconcerned as well." JA314. *Lester*, 985 F.3d at 388 (4th Cir. 2021).

Second, the district court, in a case where a 49-year-old defendant was sentenced to three consecutive sentences totaling 70 years, erred by failing to consider and thus address the argument in the defense's Sentencing Memorandum as to "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6).

## CONCLUSION

The Court should vacate Mr. Hoover's conviction. Alternatively, the Court should vacate Mr. Hoover's procedurally unreasonable sentence and remand for resentencing.

This the 22nd day of August, 2023.

/ David Q. Burgess
David Q. Burgess
N.C. Bar No. 26239
P.O. Box 18125
Charlotte, NC 28218
(704) 377-9800 (voice)
(704) 565-4086 (fax)
david@davidburgesslaw.com

*Counsel for Appellant*



Appendix G-2

trying to do this favor for me and put his hands down my pants."

In the process, that other child was on the way to his house at that moment to mow his grass. And the more and more I found out, the more and more I found out. The whole time he had been acting like he was helping.

My wife died that eighth year knowing that we had let him into our lives and that affected our children.

My oldest son, he still has mental problems. I can't guarantee it's from this or it's from losing his mother. At times he has outbursts just like was stated by the other child. But this is something he'll have to live with.

One of the last things his mother said before she took her last breath, "I hope he gets everything that comes to him."

It's so hard to speak about this, but -- and I wasn't going to speak today, but hearing that young man speak, I want to make sure you get everything that's coming to you.

That's all I have to say, Your Honor.

THE COURT: Thank you.

Anything else?

MS. SPAUGH: No, Your Honor.

Just for the record, that was Chris Faw.

THE COURT: All right. Mr. Hoover, you were, and I'm confident are, a child predator. Over the course of many

Appendix H-1

years with at least eight victims you demonstrated that you were a child predator, victimizing them not only then but for the rest of their lives, as we've heard. And then even at trial watching those young men have to sit there and watch a jury watch them watch a video of them masturbating was painful to see.

The Court has considered your attorney's request for a variance and the Court has considered, as it must, your history and characteristics, some of which are good. Your navy service is much appreciated. The presentence report says that you may suffer from PTSD from Desert Storm, which it is a common thing, but it's not particularly well supported in the records and you seemed to function awfully well at work for an awfully long time, so that seems an insufficient reason to vary downward.

Your counsel has also argued that the sentencing guidelines for these kind of cases are overly harsh. And I understand the legal arguments there, but I'm telling you when I just talk to folks I know about child pornography, child abuse, they don't think any sentence is too long. So I don't know what the sentencing commission might do in the future with respect to some of these things, but my guess is the public is unconcerned with the harshness of these guidelines, and the Court is unconcerned as well. The Court is fully satisfied with the way the guidelines are right now.

Appendix A-2

The Court also notes that even your own forensic psychologist put you at, they call it the low end of medium risk. Medium risk is significant risk to this Court. I don't care which end of it you are. I have no reason to believe that you wouldn't be a recidivist if given the chance. And the psychologist also made note of your total lack of acceptance of responsibility for these offenses and that you even minimized them.

Now, the Court could vary downward for mere appearance sake so that the court of appeals would know that I knew that I could and maybe took some of these arguments into account. Even if I did, which I'm not going to, even if I did, I would impose a sentence that I was satisfied would make sure you never saw the light of day. Probably 50 years might do that. Forty might. But I'm not going to play a game of trying to appear that I didn't think a guideline sentence was appropriate and still impose a sentence that I would be confident would be the rest of your life, so I'm just going to stick with the guidelines. I think that's the appropriate sentence.

So pursuant to the Sentencing Reform Act of 1984 and *U.S. versus Booker*, it is the order of the Court, having considered all of the factors in 3553(a), that the defendant, Michael Scott Hoover, is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a

Appendix H-3

term of 360 months on each of counts one and two to be served consecutively, and a term of 120 months on count three to be served consecutive to the terms imposed on counts one and two to the extent necessary to produce a total term of 840 months, which is 70 years.

The Court calls to the attention of the custodial authorities that the defendant has a history of mental health issues and recommends he be allowed to participate in any available mental health treatment programs while incarcerated.

The Court recommends that the defendant participate in a sex offender treatment program while incarcerated, if eligible.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of life on each count to be served concurrently. The term of life is necessary in the Court's judgment, if there ever is a supervised release term, because of his -- the long history of this offense, the period over which it occurred, and his own forensic psychologist's estimation of a significant risk of recidivism.

Within 72 hours of release from the custody of the Bureau of Prisons, you are to report in person to the probation office in the district into which you are released.

While on supervised release, you shall abide by each of the discretionary conditions of supervised release that

Appendix H-4

DEFENDANT: Michael Scott Hoover
CASE NUMBER: DNCW5:20CR00088-001
DISTRICT: North Carolina – Western

# STATEMENT OF REASONS
**(Not for Public Disclosure)**

***Sections I, II, III, IV, and VIII of the Statement of Reasons form must be completed in all felony and Class A ses.***

## I COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

A ☐ **The Court adopts the presentence investigation report without change.**

B ☒ **The Court adopts the presentence investigation report with the following changes:** *(Use Section VIII if necessary)*
*(Check all that apply and specify court determination, findings, or comments, referencing paragraph numbers in the presentence report)*

1 ☒ **Chapter Two of the United States Sentencing Commission Guidelines Manual** determinations by court *(briefly summarize the changes including changes to base offense level, or specific offense characteristics):*

The Court grants the objection to the 2 level enhancement for use of a computer. Due to the original total offense level of 45 the resulting offense level remains 43.

2 ☐ **Chapter Three of the United States Sentencing Commission Guidelines Manual** determinations by court *(briefly summarize the changes, including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility):*

3 ☐ **Chapter Four of the United States Sentencing Commission Guidelines Manual** determinations by court *(briefly summarize the changes, including changes to criminal history category or scores, career offender status, or criminal livelihood determinations):*

4 ☐ **Additional Comments or Findings** *(include comments or factual findings concerning any information in the presentence report, including information that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions; any other rulings on disputed portions of the presentence investigation report; identification of those portions of the report in dispute but for which a court determination is unnecessary because the matter will not affect sentencing or the court will not consider it):*

The Court overruled the remaining objections.

C ☐ **The record establishes no need for a presentence investigation report pursuant to Fed.R.Crim.P. 32.**
Applicable Sentencing Guideline *(if more than one guideline applies, list the guideline producing the highest offense level):* _____

## II COURT FINDINGS ON MANDATORY MINIMUM SENTENCE *(Check all that apply.)*

A ☒ One or more counts of conviction carry a mandatory minimum term of imprisonment and the sentence imposed is at or above the applicable mandatory minimum term.

B ☐ One or more counts of conviction carry a mandatory term of imprisonment, but the sentence imposed is below the mandatory minimum term because the court has determined that the mandatory minimum term does not apply based on:
- ☐ findings of fact in this case *(Specify)*:
- ☐ substantial assistance (18 U.S.C. § 3553(e))
- ☐ the statutory safety valve (18 U.S.C. § 3553(f))

C ☐ No count of conviction carries a mandatory minimum sentence.

## III COURT DETERMINATION OF GUIDELINE RANGE *(BEFORE DEPARTURES OR VARIANCES)*:

Total Offense Level: 43
Criminal History Category: I
Guideline Range *(after application of §5G1.1 and §5G1.2)*: 840 months
Supervised Release Range: Ct. 1: 5 years-life Ct. 2: 5 years-life Ct. 3: 5 years-life
Fine Range: $50,000-$250,000

☒ Fine waived or below the guideline range because of inability to pay.

For you to find the defendant guilty of using a minor to produce a visual depiction of a minor engaging in sexually explicit conduct charged in these two counts, the government must prove the following elements beyond a reasonable doubt:

First, that the minor named in counts one and two of the superseding bill of indictment was under the age of 18;

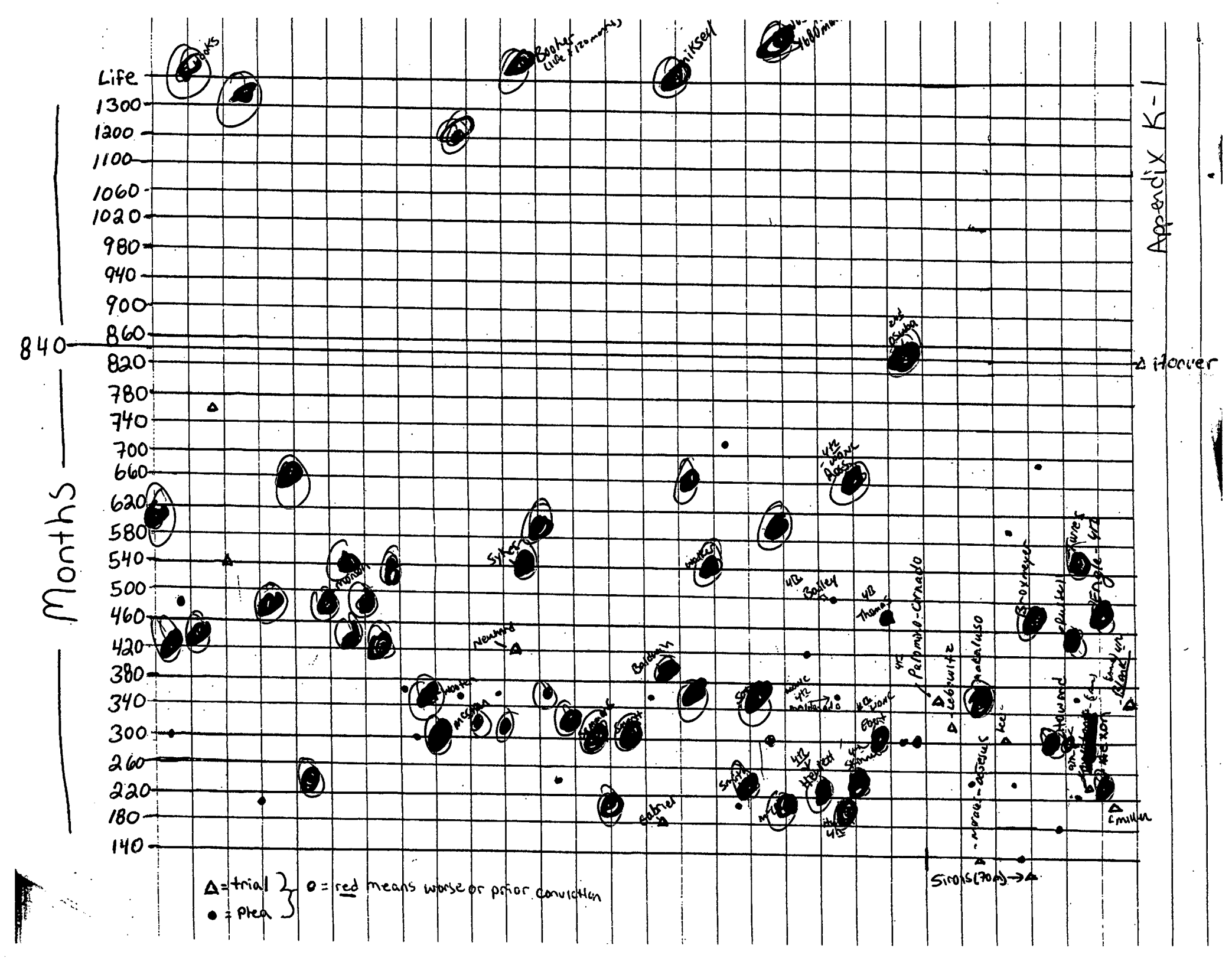
Two, that the defendant used or employed or persuaded or induced or enticed or coerced the minor named in counts one and two to engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct; and

Third, that the visual depiction was produced using materials that had been mailed, shipped, or transported in and affecting interstate or foreign commerce by any means, including by computer.

I will now define certain terms used in these essential elements. You are to apply these definitions as you consider the evidence. If I do not define certain concepts or words, you will assign to them their usual, ordinary, everyday meanings.

As used in these instructions, the term "minor" means any person under the age of 18 years. When you consider whether a person is under the age of 18, you may use your life experience in observing children. The government does not

Appendix J-1


Months
Life
1300
1200
1100
1060
1020
980
940
900
860
840
820
780
740
700
660
620
580
540
500
460
420
380
340
300
260
220
180
140
Appendix K-1
Hoover
Sirois (70s) →
Δ = trial
• = plea
o = red means worse or prior conviction