

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JONATHAN HIGH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for Writ of Certiorari
to the Eleventh Circuit Court of Appeals**

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

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[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-10601

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JONATHAN HIGH,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 4:22-cr-00020-AW-MAF-1

Before LUCK, BRASHER, and ABUDU, Circuit Judges.

PER CURIAM:

Jonathan High secretly recorded two minor boys urinating in a church bathroom. He appeals his two convictions for production of child pornography, arguing that the recordings do not depict sexually explicit conduct. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Florida Department of Law Enforcement received a tip that an internet user with a certain telephone number and email address uploaded videos and images depicting sexual exploitation of minor boys to an online storage account. The department received records showing that the telephone number was associated with High's mother and High's Quality Services, the family business that employed High. A search of the online storage account uncovered numerous photos and videos of the sexual exploitation of minor boys.

Within this account, there were recordings uploaded from a cell phone rather than downloaded from the internet. Specifically, the account contained a video of a minor boy, approximately ten to eleven years old and wearing a grey polo shirt ("Minor Male 1"), standing and then urinating in a public bathroom stall. There was also a screenshot of the video at the exact instance Minor Male 1 is urinating. And there was another screenshot of another video of a different minor boy, approximately ten to eleven years old ("Minor Male 2"), urinating in the same public bathroom.

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The department obtained an arrest warrant for High and arrested him at his home. High was read his *Miranda* rights and confessed that the phone number and email address linked to the online storage account were his, the bathroom depicted in the recordings was located at his church, and Minor Male 1 attended his church.

A federal grand jury indicted High on three counts. Count one was the production of child pornography relating to Minor Male 1. Count two was the production of child pornography relating to Minor Male 2. Both counts were violations of 18 U.S.C. sections 2251(a) and (e). Count three was for the possession of child pornography in violation of sections 2252A(a)(5)(B) and (b)(2). High pleaded guilty to count three and opted for a bench trial on counts one and two.

Before trial, High stipulated that he owned the online storage account, he downloaded and stored the videos and photos of the sexual exploitation of minor boys from the internet, he owned the two cell phones, and he took the videos and screenshots of Minor Male 1 and Minor Male 2. However, High did not stipulate that the videos and screenshots of Minor Male 1 and Minor Male 2 depicted sexually explicit conduct, leaving this single issue for the bench trial.

At the bench trial, two investigators from the department testified. Special Agent Aida Limongi explained that High's online storage account contained numerous videos and images of the sexual exploitation of minor boys, including depictions of minor boys

performing sex acts in the bathroom. And Agent Limongi testified that High created the videos and screenshots of Minor Male 1 and Minor Male 2. Digital Forensic Consultant Lee Pierce explained that High created the screenshots of the videos of Minor Male 1 and Minor Male 2 using computer software and placed them in a separate folder with a collection of other child pornography of minor boys.

Following this testimony, the government rested, and High moved for a judgment of acquittal, arguing that he did not use Minor Male 1 and Minor Male 2 to engage in sexually explicit conduct as required by section 2251 because the boys were not exhibiting themselves in a lustful manner. The district court denied the motion, reasoning that High used the boys in sexually explicit conduct because the videos and screenshots contained a lascivious exhibition of the boys' genitals. In the district court's view, the exhibitions were lascivious because High had an interest in minor boys' genitals, he deliberately took videos of Minor Male 1 and Minor Male 2 at a time he knew their genitals would be exposed, he took screenshots of the videos at the exact time of urination, and he placed these screenshots with other images of similar child pornography.

As the factfinder, the district court found High guilty on counts one and two. High was sentenced to 264 months' imprisonment for counts one and two and 120 months for count three. High appeals the denial of his motion for judgment of acquittal.

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STANDARD OF REVIEW

We review de novo the denial of a motion for judgment of acquittal, viewing the evidence in the light most favorable to the government and drawing all reasonable inferences in favor of the factfinder's verdict. See *United States v. Martin*, 803 F.3d 581, 587 (11th Cir. 2015). If "any reasonable construction of the evidence" would permit the factfinder "to find the defendant guilty beyond a reasonable doubt," we must affirm. *United States v. Friske*, 640 F.3d 1288, 1291 (11th Cir. 2011) (citation omitted).

DISCUSSION

High argues that he did not use Minor Male 1 and Minor Male 2 for sexually explicit conduct as required by section 2251(a) because the recordings do not depict lascivious exhibitions of the genitals. In his view, because the recordings depict innocuous conduct, they cannot be lascivious. Thus, he contends the district court erred in denying his motion for judgment of acquittal. We disagree.

Section 2251(a) makes it unlawful to employ or use a child to engage in "sexually explicit conduct" for the purpose of producing any visual depiction of that conduct using materials that have traveled in interstate commerce. 18 U.S.C. § 2251(a). "[S]exually explicit conduct" includes the "lascivious exhibition of the genitals or pubic area of any person." *Id.* § 2256(2)(A).

A "lascivious exhibition," we have found, is one that "potentially excites sexual desires or is salacious." *United States v.*

Grzybowicz, 747 F.3d 1296, 1306 (11th Cir. 2014) (cleaned up). And, critically here, “a lascivious exhibition may be created by an individual who surreptitiously videos or photographs a minor and later captures or edits a depiction, even when the original depiction is one of an innocent child acting innocently.” *United States v. Holmes*, 814 F.3d 1246, 1248, 1252 (11th Cir. 2016).

In *Holmes*, for example, the defendant secretly recorded nude images of his teenage stepdaughter while she used the bathroom. *Id.* at 1248. On appeal, the defendant argued that he did not produce child pornography because the images were not “lascivious” in that they depicted “mere nudity” as his stepdaughter “perform[ed] normal everyday activities.” *Id.* at 1251. We rejected the defendant’s argument and concluded that the images depicted “lascivious exhibition[s] of the genitals.” *Id.* at 1252.

The courts, we explained, “look[] to the intent of the producer or editor of an image” to determine whether that image depicts a lascivious exhibition. *Id.* (citation omitted). The producer’s intent can be discerned by looking to his conduct in producing or editing the images. *Id.* Specifically, where the producer of an image uses “freeze-framing” or zooming in on the genitals, it conveys an “intent to elicit a sexual response in the viewer.” *Id.* (citing *United States v. Horn*, 187 F.3d 781, 790 (8th Cir. 1999)). Thus, we held that the defendant’s “placement of the cameras in the bathroom where his stepdaughter was most likely to be videoed while nude, his extensive focus on videoing and capturing images of her pubic area, the angle of the camera set up, and his editing of the

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videos at issue . . . was sufficient to create a lascivious exhibition of the genitals or pubic area.”¹ *Id.*

Applied here, High engaged in the “lascivious exhibition of the genitals” when he recorded, edited, and stored the images of Minor Male 1 and Minor Male 2. § 2256(2)(A). High secretly positioned a camera to record videos of the minor boys as they urinated in a bathroom. He then created screenshots of the boys when their genitals were exposed. And he stored these images and videos with other child pornography, which included other images and videos of minor boys performing sex acts in bathrooms. *See United States v. Smith*, 459 F.3d 1276, 1296 n.17 (11th Cir. 2006) (“That the

¹ Our court’s pattern jury instruction is consistent with *Holmes*. Specifically, it instructs a jury to consider the following factors to determine whether an exhibition is lascivious:

- (1) the overall content of the material; (2) whether the focal point of the visual depiction is on the minor’s genitalia or pubic area; (3) whether the setting of the visual depiction is sexually inviting or suggestive— for example, in a location or pose associated with sexual activity; (4) whether the minor appears to be displayed in an unnatural pose or in inappropriate attire; (5) whether the minor is partially clothed or nude; (6) whether the depiction appears to convey sexual coyness or an apparent willingness to engage in sexual activity; and (7) whether the depiction appears to have been designed to elicit a sexual response in the viewer.

See 11th Cir. Crim. Pattern Jury Instructions O83.4A (numerals added). As the district court found, these factors also support a finding that the videos and screenshots High took of Minor Male 1 and Minor Male 2 were lascivious exhibitions.

photographs of the victim were found with other sexually explicit photographs could make it more likely that their purpose was to elicit a sexual response.”). Thus, the evidence, when viewed in the light most favorable to the government, was sufficient to find that High recorded the videos, and specifically made the screenshots, in order to engage in sexually explicit conduct in violation of section 2251(a).

Pushing back, High responds that *Holmes* does not apply for two reasons. First, he argues that *Holmes* is factually distinguishable because, unlike the defendant’s editing in *Holmes*, he did not use “extensive focusing” on the minor boys’ genitals. But High secretly recorded minors in a bathroom when he knew their genitals would be exposed and then edited the recording by creating screenshots of the exact moments in which their genitals were exposed. This kind of “freeze-framing,” we said, “can create an image intended to elicit a sexual response in the viewer.” *See Holmes*, 814 F.3d at 1252.

Second, High argues that the Supreme Court’s decision in *United States v. Williams*, 553 U.S. 285 (2008) compels us to adopt the D.C. Circuit’s decision in *United States v. Hillie*, 39 F.4th 674 (D.C. Cir. 2022), which held that videos depicting a minor merely engaged in “ordinary grooming activities” cannot fall within the definition of “lascivious exhibition of the genitals” because the “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.” But *Holmes* instructed courts to look to

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the intent of the producer to determine if an exhibition was lascivious, and directly rejected a requirement that the child must be depicted in a lustful manner as “[s]uch an interpretation would pervert both the language and the logic of the legislation and the case law.” 814 F.3d at 1251–52 (quoting *United States v. Wolf*, 890 F.2d 241, 246 (10th Cir. 1989)). Applying *Holmes*, as we must, we conclude that the district court did not err in denying High’s motion for judgment of acquittal.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 4:22cr20/AW

JONATHAN HIGH
_____ /

TRIAL STIPULATIONS REGARDING COUNTS ONE AND TWO

The parties in the above-captioned matter hereby stipulate to a bench trial on Counts One and Two of the Indictment, and in such trial, stipulate to the following facts and elements:


I. FACTUAL STIPULATIONS

The Florida Department of Law Enforcement (FDLE) reviewed a Cybertip that was received from the National Center for Missing and Exploited Children (NCMEC) on or about August 11, 2021. The Cybertip information was provided by Synchronoss¹ and stated that a user with telephone number of (850) 843-0489 and email address of jonathanhigh1991@gmail.com had uploaded files depicting the sexual exploitation of children.² Synchronoss provided nine (9) files with the Cybertip; of the files reviewed, seven (7) contained images of child sexual abuse

¹ Synchronoss Technologies is the cloud-based storage provider for content stored on the Verizon Cloud.

² Synchronoss indicated in the Cybertip that it had viewed the files.

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CLERK, U.S. DISTRICT
COURT, NORTH. DIST. FLA.

material, some of which depicted minor boys participating in various sex acts.

Records from Verizon were received in response to a subpoena seeking production of subscriber information related to phone number (850) 843-0489. The records showed the phone number is associated with the Verizon mobile account of Esther High (Jonathan High's mother) and the business name of High's Quality Services (the Defendant's family business). Jonathan High is an employee of High's Quality Services, and its Registered Agent was Esther High. According to the Florida Bureau of Vital Statistics, Esther High died on November 7, 2021.

SEARCH OF HIGH'S SYNCHRONOSS ACCOUNT

A state search warrant for records associated with the above-mentioned Synchronoss account was served on October 7, 2021. The following is a sample of files which show the sexual exploitation of children that were received from Synchronoss for High's account in response to the search warrant:

FILENAME: 9e0b5512-d2b7-42fa-bfec-463ed7ee1004.mp4 A color video with watermark of Omegle.com showing a boy who appears to be under the age of 10 years old sitting and facing the camera. The child is seen tilting the camera down and showing his penis while he masturbates.

FILENAME 1-24314.jpg A color photo showing a male child standing nude with his legs spread open over another male child while the male child performs oral sex on the other child.

FILENAME: Screenshot_20190617-072038.png A color picture of an adult male lying nude on a bed while a male child performs oral sex on the adult male.

FILENAME: KIMG0509.jpg This photograph shows a male child approximately 4 years old sitting nude in a shower with an unknown adult male. The adult's penis is in view of the camera as well as the child's penis. The EXIF data associated with this image indicates that it was taken with a Kyocera cell phone.

FILENAME: VID-20161012-WA0000.mp4 This is a color video that appears to have been taken discretely of two boys engaging in various sex acts in a bathroom stall. The approximate age of the boys is 12-14.

FILENAME: 07fda74a-a5ef-421c-b3a0-adb9bb265074.mp4 This is a color video of an adult male engaged in anal sex with a juvenile male.

FILENAME: 92da5ff2-f0f4-46e6-adea-e0a6622b8ac0.mp4 This is a color video of a juvenile male showing his penis and anus. The approximate age of the child is 12-14.

FILENAME: 1616156378852.png This is a color photograph depicting a juvenile male standing naked in the shower with his penis in view of the camera. The approximate age of the child is 14.

FILENAME: 1616155596988.jpg This is a color photograph depicting a juvenile male performing oral sex on an adult male. The approximate age of the child is 8-10.

FILENAME: 1616155597033.jpg This is a photograph depicting two male children approximately 6-8 years old lying naked on a bed while one child performs oral sex on the other.

High knowingly possessed these images and videos depicting child pornography in his Synchronoss account, and knew them to be child pornography. High obtained these, and the other images and videos depicting child pornography, by downloading them from the Internet. High's



Synchronoss account was also found to contain the following images and videos:

FILENAME: KVID1359~3.mp4³ A color video showing a male child who appears to be approximately 10-11 years of age who is wearing a grey polo shirt (Minor Male Victim 1) and who is standing while urinating in a public restroom. The video appears to be taken from above the stall. EXIF data associated with this video shows that it was recorded using a Kyocera cell phone and was originally created on November 8, 2020; however, according to metadata, the video was created in Synchronoss (uploaded there) on October 8, 2021 at 17:29. This video (KVID1359~3.mp4) was recorded using High's Kyocera cell phone, which was manufactured in Japan. The investigation revealed several videos of this type which were recorded using the Kyocera phone (as described below).

FILENAME:KVID1359~4.mp4 This video depicts the same thing as KVID1359~3.mp4: a male child who appears to be approximately 10-11 years of age who is wearing a grey polo shirt (Minor Male Victim 1) and who is standing while urinating in a public restroom. EXIF data associated with this video shows that it was recorded using a Kyocera cell phone and was originally created on November 8, 2020; however, according to metadata, the video was created in Synchronoss (uploaded there) on October 8, 2021 at 17:30. This video (KVID1359~4.mp4) was recorded using High's Kyocera cell phone, which was manufactured in Japan. The investigation revealed several videos of this type which were recorded using the Kyocera phone (as described below).

FILENAME: 1616155454978.jpg This is a color photograph that appears to be a frame/screenshot of the video files KVID1359~3.mp4 and KVID1359~4.mp4 (showing Minor Male Victim 1: a boy wearing a grey polo who is urinating in a bathroom stall). According to metadata, this image was created in Synchronoss (uploaded there) on October 08, 2021 at 16:13.

³ Filenames noted in **bold** denote files which depict Minor Male Victim 1 or Minor Male Victim 2.



FILENAME:1616155596738.jpg This is a photograph of a different boy of an approximate age of 10 or 11 years (Minor Male Victim 2) who is urinating in what appears to be the same restroom as depicted in KVID1359~3.mp4, KVID1359~4.mp4, and 1616155454978.jpg. According to metadata, this image was created in Synchronoss (uploaded there) on October 08, 2021 at 16:11.

Data received from the Synchronoss search warrant revealed that two separate Kyocera cell phones were used to upload data into the account – the Kyocera model 6910, and another Kyocera cell phone (a model 6810). The hash values of files stored in High's Synchronoss account were submitted to NCMEC for hash value comparison to hash values of known child pornography. NCMEC confirmed that of the 48 hashes received in this case, 44 were recognized, and 2 hash values were of files depicting known children.

ARREST OF HIGH ON STATE CHARGES

On December 3, 2021, FDLE obtained a state arrest warrant for High for state charges of Use of a Child in a Sexual Performance in violation of Section 827.071(5), Florida Statutes. The same day, High was arrested at his home in Steinhatchee, Florida. High had a E6910 Kyocera phone in his pocket, which was seized by agents. High was Mirandized and interviewed; High confirmed that his phone number is (850) 843-0489 and that his email is jonathanhigh1991@gmail.com. High also confirmed that the Kyocera found in his pocket (model 6910) was his current cell phone. High also identified the Minor Male Victim 1 (depicted in KVID1359~3.mp4, KVI1359~4.mp4, and

1616155454978.jpg) as a boy who attended Antioch Revival Church where the bathroom depicted in KVID1359~3.mp4, KVID1359~4.mp4, and 1616155454978.jpg was located. High also stated that his Kyocera cell phone synched to his computer. High's wife later gave FDLE agents consent to seize an All-in-One computer which was the computer that High said that his phone was synched to, and later gave FDLE agents High's "old" cell phone (Kyocera model 6810).

SEARCH OF HIGH'S KYOCERA MODEL 6910 CELL PHONE

FDLE obtained a search warrant for the cell phone (model 6910) seized from High at the time of his arrest. It was searched, and was found to be one of the two phones that were uploading to High's Synchronoss account (as noted above). This cell phone contained a significant quantity of child pornography (images and videos) stored on the device, for example:

File Name: _1 RyanUK12-2014.mpg
Hash MD5: ec5d4c90e186702fe271d203c458360a
Description: Color video of a male juvenile exposing his anus to the camera and then masturbating. The child appears to be 12-14 years old.

File name: 1616288382139.mp4
Hash: 6b10c1e8092d3d68ac5bc81b42a59a25
Description: A video covertly taken by what appears to be a pin hole camera showing a juvenile boy using the restroom to urinate. The video then shown an unknown male masturbating in a bathroom stall. The age of the child appears to be 14-16
File name: 2018-05-05-11.07.42.mp4
Hash: fcb0aebc68650a54c2a49dd5e755a11d

Description: A color video of a male juvenile performing oral sex on another male juvenile. The ages of the boys appear to be 8 and 12 years old approximately.

File name: 2018-07-31-17.33.25 (2).mp4

Hash: 6837260eacb1a09775f450311b258092

Description: A video of a male juvenile standing in front of the camera while he takes off his clothes. The child then begins to touch his penis and show his anus to the camera in a lewd manner.

File name: 2018-10-20-23.15.07.mp4

Hash: 4df402e21dad9ff941ae07a979100d71

Description: A video of a juvenile male exposing his anus to the camera. The child appears to be 10-12 years old.

File name: 4_562485989579161647.mp4

Hash: cdb96dd941fc433bf68763879583db83

Description: A video that begins with the "boybending (noun) The art of remotely directing a boy on webcam, through typing text and displaying videos, to achieve a desired pose or behavior" "use of money, coercion or blackmail is strictly forbidden". The video then shows a series of different aged juvenile males in different poses and performing sexual acts on themselves and others.

File name: 5e3ab899b632d.mp4

Hash: b109f219f4d4fb4bd7c3dde40eef256a

Description: A video of a juvenile male standing in front of a camera while he takes off his clothes. The child is then seen masturbating. The approximate age of the child is 12-13 years old.

File name: 4f4a8a546bdaewebcam hottie.mp4

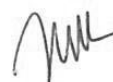
Hash: 84615d0ac36b26f1a22a96665fc0f723

Description: A video of a juvenile male masturbating in front of the camera. The child appears to be 14-16 years old.

File name: 5f20bba1073af.mp4

Hash: daa01817af8a03e27ab16263a01abb97

Description: A video of a juvenile male masturbating in front of the camera. The child appears to be 14-16 years old.



File name: 60dba7c75da56.mp4
Hash: f1c0e84f53c3ee761dc9f1b3b6051610
Description: A video of a juvenile male masturbating in front of the camera. The child appears to be 14-16 years old.

High knowingly possessed these images and videos depicting child pornography on his Kyocera model 6910 cell phone, and knew them to be child pornography. High obtained these, and the other images and videos depicting child pornography found on his Kyocera model 6910 cell phone, by downloading them from the Internet. Additionally, High's Kyocera model 6910 cell phone was also found to contain the following:

An artifact of FILENAME: KVID1359~3.mp4 This artifact indicates that this video was created on the Kyocera model 6910 cell phone on December 27, 2020, and was deleted from the phone on March 11, 2021. However, as noted above, this video was found stored in High's Synchronoss account.

FILENAME: KVID1359~3.mp4.jpg A screenshot of KVID1359~3.mp4, which depicts a male child who appears to be approximately 10-11 years of age who is wearing a grey polo shirt (**Minor Male Victim 1**) and who is standing while urinating in a public restroom. The video appears to be taken from above the stall. According to metadata, this screenshot was created on the Kyocera model 6910 cell phone on February 22, 2021.

An artifact of FILENAME:KVID1359~4.mp4 This artifact indicates that this video was created on the Kyocera model 6910 cell phone on December 27, 2020, and was deleted from the phone on March 11, 2021. However, as noted above, this video was found stored in High's Synchronoss account.

FILENAME: KVID1359~4.mp4.jpg A screenshot of KVID1359~4.mp4, which depicts a male child who appears to be approximately 10-11 years of age who is wearing a grey polo shirt (**Minor Male Victim 1**) and who is standing while urinating in a public restroom. According to metadata, this screenshot was created on the Kyocera model 6910 cell phone on February 22, 2021.

FILENAME: 1616155454978.jpg This is a color photograph that appears to be a frame/screenshot of the video files KVID1359~3.mp4 and KVID1359~4.mp4 (showing **Minor Male Victim 1**: a boy wearing a grey polo who is urinating in a bathroom stall). According to metadata, this image was created in Synchronoss (uploaded there) on October 08, 2021 at 16:13.

An artifact of FILENAME: KVID0064~3.mp4 This artifact indicates that this video was created on the Kyocera model 6910 cell phone on December 27, 2020, and was deleted from the phone on March 11, 2021.

FILENAME: KVID0064~3.mp4.jpg A screenshot of KVID0064~3.mp4, which depicts a different boy of an approximate age of 10 or 11 years (**Minor Male Victim 2**) who is urinating in what appears to be the same restroom as depicted in KVID1359~3.mp4, KVID1359~4.mp4, and 1616155454978.jpg. According to metadata, this screenshot was created on the Kyocera model 6910 cell phone on February 22, 2021.

FILENAME:1616155596738.jpg This is a photograph of a different boy of an approximate age of 10 or 11 years (**Minor Male Victim 2**) who is urinating in what appears to be the same restroom as depicted in KVID1359~3.mp4, KVID1359~4.mp4, and 1616155454978.jpg. According to metadata, this image was created in Synchronoss (uploaded there) on October 08, 2021 at 16:11.

SEARCHES OF HIGH'S KYOCERA MODEL 6810 CELL PHONE AND COMPUTER

A search of High's Kyocera model 6810 revealed the presence of child pornography (images) on the device. The Kyocera model 6810 was confirmed to



be the other device that was uploading child pornography to High's Synchronoss account. High's All-in-One computer was searched and found to contain images and videos of child pornography, including the following videos, which High knowingly possessed and knew them to be child pornography:

- !!!!![boy+man] [mb] our first time - boy brother in south america.avi
- [boy+man]jason4.mp4
- cp ultragay.mp4⁴
- 10Yo Boy Trying to Cum.mp4
- Phineas and Ferb little boycock.mp4⁵

High obtained these, and the other images and videos depicting child pornography found on his Kyocera model 6810 cell phone and computer, by downloading them from the Internet.

INTERVIEWS OF MINOR MALE VICTIM 1 AND MINOR MALE VICTIM 2

Minor Male Victim 1 and Minor Male Victim 2, the two boys depicted in the videos and photos (KVID1359~3.mp4, KVID1359~3.mp4.jpg, KVID1359~4.mp4, KVID1359~4.mp4.jpg, 1616155454978.jpg, KVID0064~3.mp4, KVID0064~3.mp4.jpg, and 1616155596738.jpg), were positively identified by the boys and their guardians as being members of High's church in Taylor County (Antioch Revival Church). The boys, and their guardians, were interviewed by FDLE, and identified the videos/photos as having been taken in the men's bathroom

⁴ "CP" is a known abbreviation for "child pornography" or "child porn."

⁵ *Phineas and Ferb* is a children's animated television series created for Disney Channel and Disney XD.

at the Antioch Revival Church in Perry, Taylor County, Florida. Minor Male Victim 1 stated that he remembered being in the church bathroom and seeing High stick a phone over the stall while Minor Male Victim 1 was urinating. Minor Male Victim 2 remembered being in the bathroom and hearing a camera going off (as though a photo was being taken).

All of the image and video files listed above (in **bold font**) were produced by the Defendant, Jonathan High, between on or about October 8, 2020, and on or about December 3, 2021, in the bathroom of the Antioch Revival Church in Perry, Taylor County, Florida (located in the Northern District of Florida), using his Kyocera cell phone which was manufactured in Japan (thus, a material that was mailed, shipped, or transported in foreign commerce).

II. STIPULATIONS TO ELEMENTS OF COUNTS ONE AND TWO

The parties further stipulate to the following elements of Counts One and Two as having been proven beyond a reasonable doubt and without the need for further testimony or evidence:

Count One:

- (1) An actual minor, that is, a real person who was less than 18 years old, namely, Minor Male Victim 1 (age 10-11), was depicted in KVID1359~3.mp4, KVID1359~3.mp4.jpg, KVID1359~4.mp4, KVID1359~4.mp4.jpg, and 1616155454978.jpg;
- (2) the Defendant, Jonathan High, employed, used Minor Male Victim 1 for the purpose of producing a visual depiction, that is, KVID1359~3.mp4, KVID1359~3.mp4.jpg, KVID1359~4.mp4,

KVID1359~4.mp4.jpg, and 1616155454978.jpg, and

- (3) the visual depiction, that is, KVID1359~3.mp4, KVID1359~3.mp4.jpg, KVID1359~4.mp4, KVID1359~4.mp4.jpg, and 1616155454978.jpg, was produced using materials that had been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer.

The Defendant does not stipulate that KVID1359~3.mp4, KVID1359~3.mp4.jpg, KVID1359~4.mp4, KVID1359~4.mp4.jpg, and 1616155454978.jpg depict “sexually explicit conduct,” including “actual or simulated lascivious exhibition of the genitals or pubic area of” Minor Male Victim 1, as those terms are defined in the Eleven Circuit Pattern Jury Instructions and in 18 U.S.C. § 2256.

Count Two:


- (1) An actual minor, that is, a real person who was less than 18 years old, namely, Minor Male Victim 2 (age 10-11), was depicted in KVID0064~3.mp4, KVID0064~3.mp4.jpg, and 1616155596738.jpg;
- (2) the Defendant, Jonathan High, employed, used Minor Male Victim 2 for the purpose of producing a visual depiction, that is, KVID0064~3.mp4, KVID0064~3.mp4.jpg, and 1616155596738.jpg, and
- (3) the visual depiction, that is KVID0064~3.mp4, KVID0064~3.mp4.jpg, and 1616155596738.jpg, was produced using materials that had been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer.

The Defendant does not stipulate that KVID0064~3.mp4, KVID0064~3.mp4.jpg, and 1616155596738.jpg depict “sexually explicit conduct,” including “actual or simulated lascivious exhibition of the genitals or pubic area of” Minor Male Victim 2, as those terms are defined in the Eleven Circuit Pattern Jury Instructions and in 18 U.S.C. § 2256.

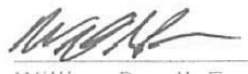
III. STIPULATIONS TO TRIAL EVIDENCE

The parties stipulate to the admission of the Government's trial exhibits, numbered 1-22, including all subexhibits thereof, listed in ECF No. 61 (or any revisions thereof) except for Exhibits 1A, 1B, 3, 5B,⁶ 7, and 14.


WHEREFORE, the parties submit the foregoing trial stipulation in this case.


Lisabeth Fryer, Esq.
Florida Bar No. 089035
Attorneys for Defendant

9/30/22
Date


William Ponall, Esq.
Florida Bar No. 421634
Attorneys for Defendant


9/30/22
Date


Jonathan High
Defendant
9/29/22
Date

JASON R. COODY
United States Attorney

Justin M. Keen
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Assistant United States Attorney
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10/3/2022
Date


Kaitlin Weiss
Florida Bar No. 106130
Assistant United States Attorney
Kaitlin.Weiss@usdoj.gov

10/3/2022
Date

⁶ The Government reserves the right to introduce Exhibit 5B in any rebuttal case.

UNITED STATES DISTRICT COURT

Northern District of Florida

UNITED STATES OF AMERICA

v.

JONATHAN HIGH

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:22CR00020-001

USM Number: 00354-510

Nathan Robert Prince, Retained

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) three

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☒ was found guilty on count(s) one and two
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. §§ 2251(a) and (c)	Production of Child Pornography	12/03/2021	One
18 U.S.C. §§ 2251(a) and (c)	Production of Child Pornography	12/03/2021	Two
18 U.S.C. §§ 2252A(a)(5)(B) and (b)(2)	Possession of Child Pornography	12/03/2021	Three

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

2/13/2023

Date of Imposition of Judgment

s/ Allen Winsor

Signature of Judge

Allen Winsor, United States District Judge

Name and Title of Judge

2/14/2023

Date

DEFENDANT: JONATHAN HIGH
CASE NUMBER: 4:22CR00020-001

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
two hundred sixty-four (264) months on each of Counts One and Two and one hundred twenty (120) months on Count Three,
all terms to run concurrently for a total term of imprisonment of two hundred sixty-four (264) months.

☒ The court makes the following recommendations to the Bureau of Prisons:
that the defendant be designated to an institution near Tallahassee, Florida.

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

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JONATHAN HIGH
CASE NUMBER: 4:22CR00020-001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

LIFE as to each of Counts One through Three, all terms to run concurrently with each other.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☒ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☒ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

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

DEFENDANT: JONATHAN HIGH
CASE NUMBER: 4:22CR00020-001

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: JONATHAN HIGH
CASE NUMBER: 4:22CR00020-001

ADDITIONAL SUPERVISED RELEASE TERMS

1. The defendant must provide the probation officer all requested financial information, both business and personal.
2. The defendant must make monthly payments in the amount of not less than \$100 per month towards any unpaid restitution, fines, and/or assessments. Payments shall begin within 60 days of his release from imprisonment (or within 60 days of imposition of this sentence). The defendant must notify the United States Attorney's Office if there are any changes in his financial situation which significantly impact his ability to pay restitution.
3. The defendant must cooperate with the probation department and/or the appropriate state agency in the establishment and enforcement of child support payments and must make all required child support payments, if applicable.
4. The defendant must submit his person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. He must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that he has violated a condition of his supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.
5. The defendant must register with the state sex offender registration agency as required by state law. He must provide proof of registration to the Probation Officer within three days of release from imprisonment/placement on supervision. In any state that has adopted the requirements of the Sex Offender Registration and Notification Act (34 USC sec. 20911 et seq.), the defendant must also comply with all such requirements as directed by the Probation Officer, the Bureau of Prisons, or any state sex offender registration agency in which he resides, is a student, or was convicted of a qualifying offense.
6. The defendant must participate in sex offender-specific treatment, as directed by the probation officer. He must pay part or all of the cost of this treatment, at an amount not to exceed the cost of treatment, as deemed appropriate by the probation officer. The actual co-payment schedule must be determined by the probation officer. The probation officer must release the presentence report and all previous mental health evaluations to the treatment provider. As part of the treatment program, the defendant must submit to polygraph, or other psychological or physiological testing as recommended by the treatment provider.
7. The defendant must submit to periodic polygraph testing at the discretion of the probation office as a means to ensure that he is in compliance with the requirements of his supervision or treatment program.
8. The defendant's residence must be approved by the probation officer, and any change in residence must be pre-approved by the Probation Officer. He must submit the address of any proposed residence to the Probation Officer at least 10 days prior to any scheduled change.
9. The defendant's employment must be approved by the Probation Officer, and any change in employment must be pre-approved by the Probation Officer. The defendant must submit the name and address of the proposed employer to the Probation Officer at least 10 days prior to any scheduled change.
10. The defendant must not frequent or loiter within 100 feet of any location where children are likely to gather or have contact with any child under the age of 18 unless otherwise approved by the probation officer. Children are likely to gather in locations including, but not limited to, playgrounds, theme parks, public swimming pools, schools, arcades, museums or other specific locations as designated by the probation officer.
11. The defendant must not possess or use a computer without the prior approval of the probation officer. "Computer" includes any electronic device capable of processing or storing data as described at 18 U.S.C. § 1030, and all peripheral devices.

DEFENDANT: JONATHAN HIGH
CASE NUMBER: 4:22CR00020-001

ADDITIONAL STANDARD CONDITIONS OF SUPERVISION

12. As directed by the probation officer, the defendant must enroll in the probation office's Computer and Internet Monitoring Program (CIMP) and must abide by the requirements of the CIMP program and the Acceptable Use Contract.

13. The defendant must not access the Internet or any "on-line computer service" at any location (including employment) without the prior approval of the probation officer. "On-line services" include any Internet service provider, or any other public or private computer network. As directed by the probation officer, he must warn his employer of restrictions to his computer use.

14. The defendant must consent to the probation officer conducting periodic unannounced examinations of his computer equipment, which may include retrieval and copying of all data from his computer(s) and any peripheral device to ensure compliance with this condition, and/or removal of any such equipment for the purpose of conducting a more thorough inspection. The defendant must also consent to the installation of any hardware or software as directed by the probation officer to monitor his Internet use.

15. The defendant must not possess or use any data encryption technique or program.

16. The defendant must not possess, in any form, materials depicting child pornography, child erotica, or nude or sexual depictions of any child; or any materials described at 18 U.S.C. § 2256(8).

17. The defendant must refrain from accessing, via the Internet, any pornography or other materials depicting sexually explicit conduct as defined at 18 U.S.C. § 2256(2), without the prior approval of the probation officer.

DEFENDANT: JONATHAN HIGH
CASE NUMBER: 4:22CR00020-001

CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$ 300.00	\$ 15,000.00	\$	\$ 500.00	\$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☒ The defendant must make restitution to the following payees in the amount listed below. The payees are those identified in the Revised Final PSR, ECF No. 115 at paragraph 134. Restitution is payable through the USDC Clerk's Office.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Andy		\$3,000.00	
Donatello		\$3,000.00	
Jack		\$3,000.00	
Jessy		\$3,000.00	
Kauzie		\$3,000.00	

TOTALS	\$	<u>0.00</u>	\$	<u>15,000.00</u>
---------------	----	-------------	----	------------------

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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

☒ the interest requirement is waived for the ☐ fine ☒ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

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

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

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: JONATHAN HIGH
CASE NUMBER: 4:22CR00020-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A** ☒ Lump sum payment of \$ 15,800.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B** ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C** ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D** ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E** ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F** ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

- ☐ Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
---	--------------	-----------------------------	--

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
A. Kyocera 6810 cell phone (IMEI: 990006133537869); B. Kyocera 6910 cell phone (IMEI: 015100004355617);
and C. HP Pavilion All-in-One PC (s/n 5cm35009vx). See ECF No. 106.

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

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

UNITED STATES OF AMERICA,
Plaintiff,
v.
JONATHAN HIGH,
Defendant.

)
)
)
) Case No: 4:22cr20
)
) Tallahassee, Florida
) October 4, 2022
)
) 9:33 AM
)
)

**TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE ALLEN C. WINSOR
UNITED STATES DISTRICT JUDGE
(Pages 1 through 148)**

**LISA C. SNYDER, RPR, CRR
Official United States Court Reporter
111 North Adams Street, Tallahassee, FL 32301
(850) 567-1374 * lisasnydercr@gmail.com**

*Proceedings reported by stenotype reporter.
Transcript produced by Computer-Aided Transcription.*

1 APPEARANCES:

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10 Lisabeth J. Fryer, PA
11 By: LISABETH J. FRYER
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 247 San Marcos Avenue
13 Sanford, Florida 32771

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1 Mr. High present so we can discuss this issue over the break?

2 THE COURT: That will be fine.

3 Is it okay if he stays in here?

4 DEPUTY MARSHALL: If it's going to be brief, that's
5 fine. If they need more time we can take him down to the
6 attorney booth and they can have all the time.

7 THE COURT: Either way, you will be able to meet with
8 him.

9 MS. FRYER: Thank you, Your Honor.

10 THE COURT: Okay.

11 (Recess taken 11:38.)

12 (Resumed at 12:47.)

13 THE COURT: All right. Everyone can have a seat,
14 please.

15 We are back on the record. We have Mr. High here.
16 All the lawyers are here.

17 What I thought we would do is go ahead with the
18 Rule 29 motion and then we will see about whether there is going
19 to be a defense case and then go from there.

20 Is there anything else we need to address before we do
21 that?

22 MR. KEEN: Not from the government, Your Honor.

23 THE COURT: Okay. Who is going to be presenting?

24 MR. PONALL: Your Honor, it's our position that the
25 evidence presented by the government is legally insufficient to

1 support a verdict on Counts One and Two of the indictment;
2 either under completed offense theory or under an attempt
3 theory, because the videos and images in question do not
4 constitute sexually explicit conduct.

5 As the Court is aware, sexually explicit conduct is
6 defined in 18 USC 2256, and there are five different ways you
7 can prove that.

8 Everyone is in agreement that the only way that the
9 government can potentially prove that is to show lascivious
10 exhibition of the anus, genitals, or pubic area of any person.

11 It's our position that none of the photos or videos
12 related to the minors alleged in Counts One and Two of the
13 indictment constitute a lascivious exhibition as required by the
14 statute.

15 THE COURT: Is that just because of what's in the
16 photos? Or -- I mean, I guess I would like to know if your
17 position would be the same whether there was a finding that he
18 was doing it for sexual gratification purposes or not.

19 If I understand your view it's that you can look at
20 the photos themselves and tell that the child is not exhibiting
21 himself for a purpose of -- lustful purpose or something like
22 that. And then that would mandate an acquittal.

23 That's your position; right?

24 MR. PONALL: It is my position.

25 And I think the position is supported by the plain

1 language of the statute, and by the U.S. Supreme Court cases
2 discussed in the *Hillie* decision from the DC Circuit.

3 The government concedes this is not images that would
4 be traditionally considered child pornography.

5 It's our position they depict two minors -- certainly
6 not appropriate conduct -- but two minors engaged in a natural
7 bodily function of urinating in a bathroom stall.

8 They are not facing the camera. There is really no
9 focus on the genital area.

10 In one of the photos in question -- and I will go
11 through the photos individually -- in one of the photos there is
12 not even a genitalia area visible.

13 THE COURT: Well, all it takes is one for each child;
14 right?

15 MR. PONALL: Correct.

16 So -- but it's our position that the plain language of
17 the statute requires that there be some sexual connotation in
18 the images themselves.

19 THE COURT: And that's impossible to square with
20 *Holmes*; isn't it? I mean, *Hillie* is a very good case for you.
21 It's not binding here. *Holmes* is.

22 It seems like your ultimate position is that if you
23 can look at the pictures and conclude that the child is not
24 exhibiting himself, or herself, in a lustful manner. That's
25 game, set, match. That's your position. And that was squarely

1 rejected in *Holmes*, wasn't it?

2 MR. PONALL: I don't think so, Your Honor. I got to
3 look at the earlier Eleventh Circuit decision in *Williams* as
4 well. I think those are a little bit contradictory.

5 THE COURT: Well, *Williams* was about the possession
6 statute, which is different.

7 MR. PONALL: They were still interpreting the
8 definition of sexually explicit conduct.

9 THE COURT: Isn't it a different definition for the
10 possession in 2256?

11 MR. PONALL: I don't believe so. I think it's the
12 same definition.

13 THE COURT: I don't think that's right. Maybe it was
14 different at the time of *Williams*. But you are relying on the
15 definition in 2256(2)(A); right.

16 MR. PONALL: Correct.

17 THE COURT: It says: Except in subparagraph (B)
18 sexually explicit conduct means, and then it goes over the
19 definition we are talking about here.

20 And then in B...

21 MR. PONALL: So in *Williams* they are discussing the
22 definition of the term "lascivious." And if you look at page 9
23 of the opinion.

24 THE COURT: I am talking about the definition of
25 sexually explicit conduct. I see what you are saying.

1 Lascivious is not defined by the statute for either --

2 MR. PONALL: Right. So lascivious is the way the
3 government is seeking to establish sexually explicit conduct in
4 this particular case.

5 So when they define lascivious in the *Williams* case,
6 and they talk about innocuous photographs of a child, family
7 photographs of a child taking a bath, or an artistic masterpiece
8 portraying a naked child model -- similar to the peeing boy in
9 Brussels where the actual focus of that statue, which you can
10 get on Amazon or any Home Depot, is on the little boy peeing.

11 I would suggest that statue is way more explicit than
12 any of the photos or images that are present in this case.

13 What the *Williams* Court says is, generally, courts
14 must determine this with respect to the actual depictions
15 themselves. While the pictures needn't always be dirty or even
16 nude depictions to qualify, screening materials through the eyes
17 of a neutral fact finder limits the potential universe of
18 objectionable images.

19 Then there is a whole paragraph about how individuals
20 who may have a sexual interest in minors may find even
21 completely innocuous photos and videos to be sexually
22 stimulating but we cannot make those materials criminal because
23 they find those materials stimulating sexually individually.

24 So the fact that a person with a sexual interest in a
25 child might find, you know, any movie with children depicted at

1 a swimming pool, or children depicted on a beach -- we are
2 talking about movies like Jaws or episodes of Hannah Montana.
3 If you had those on your computer that would not make those
4 images child pornography just because an individual had
5 thousands of actual pictures of actual child pornography.
6 That's what the *Williams* case says.

7 And that was affirmed -- that part of the decision was
8 affirmed by the U.S. Supreme Court in the *Williams* decision.

9 And the relevant language in that case, which, of
10 course, the Court would be bound by, is -- they are reviewing
11 the Eleventh Circuit decision. And this is on page 301 of the
12 opinion, under this heading: The Eleventh Circuit also thought
13 that the statute could apply to someone who subjectively
14 believes that an innocuous picture of a child is lascivious,
15 quote, that is not so.

16 The defendant must believe that the picture contained
17 certain material, and that material, in fact, and not merely in
18 his estimation -- the defendant's estimation -- must meet the
19 statutory definition.

20 Where the material at issue was a harmless picture of
21 a child in a bath tub and the defendant knowing that material,
22 or erroneously believes that it constitutes a lascivious
23 exhibition of the genitals, the statute has no application.

24 That's our position, that the Court is bound by the
25 U.S. Supreme Court decision in *Williams*.

1 THE COURT: How would *Holmes* come out the way it did,
2 though, if you are right? Because the pictures there, like
3 here, were of someone who didn't realize at the time she was
4 being photographed. She was going about regular non-sexual
5 bathroom routines. And in the course of doing so made her
6 private areas visible to the photographer.

7 MR. PONALL: I think there is a couple of reasons.
8 First, I think *Holmes* is wrong.

9 THE COURT: Suppose I agreed with you on that. What
10 am I to do there?

11 MR. PONALL: I think if you find that the Supreme
12 Court got it right in *Williams*, and *Holmes* conflicts with
13 *Williams*, you are bound to follow *Williams*.

14 THE COURT: I think that is not correct at all.
15 *Holmes* came ten years after *Williams*. It acknowledged
16 *Williams*. It talked about *Williams*. And that represents the
17 Eleventh Circuit's -- we have to presume that the Eleventh
18 Circuit took into account the Supreme Court decisions that came
19 before it.

20 I don't think a district judge can tell the circuit
21 court they misinterpreted or overlooked some preceding Supreme
22 Court decision.

23 MR. PONALL: I, respectfully, disagree. I think if
24 you find they are irreconcilable, and they say two separate
25 things, then I think you are bound by the U.S. Supreme Court.

1 That's the best I can say on that.

2 I think, factually, the cases are different. And I
3 don't think the *Williams* case --

4 THE COURT: They are not different in this way,
5 though -- there may be some difference about what the person did
6 afterwards, or where he zoomed, or things like this. But the
7 bottom line position you are taking, which is the fact that the
8 child did not exhibit herself in a lustful way, means it's
9 not -- there is no violation of statute. That's not distinct
10 there, I don't think.

11 MR. PONALL: I don't think that's what *Holmes* says,
12 though. I think that *Holmes* says -- they do say that --

13 THE COURT: They say that a lascivious exhibition can
14 be created by someone who surreptitiously videos or photographs
15 a minor and later captures or edits the depiction even when the
16 original depiction is one of an innocent child acting
17 innocently. And I think that's inconsistent with your position
18 that if a child is acting innocently there cannot be a violation
19 of the statute.

20 MR. PONALL: So I think the language is important: An
21 individual who surreptitiously videos or photos a minor and,
22 quote, later captures or edits a depiction.

23 So I think there has to be some evidence that there is
24 a later edit or capture.

25 THE COURT: No. No. You have an argument there about

1 a distinction, factually, as to what happened. But I am saying
2 that your top-line position, which is that you do not have a
3 lascivious exhibition unless the child is acting lasciviously,
4 that's rejected here.

5 They wouldn't have even gotten to that second part.
6 If your position were correct *Holmes* would have said the only
7 pictures at issue here was a minor in the bathroom not acting in
8 any sexual manner. The end. Wouldn't it have?

9 MR. PONALL: I don't think so. I think that -- I
10 think what they are doing is they are analyzing the edited
11 picture to determine whether that is a lascivious exhibition.
12 And they are saying that an edited photo, that is focused in or
13 zoomed in, is a lascivious exhibition, even though the original
14 photo, which would have been zoomed out, and had a complete
15 photo of the entire person, the entire bathroom, may not have
16 been lascivious. So I think that's the distinction.

17 I think that --

18 THE COURT: Right. But at the end of the day what
19 you've got is a child displays herself in an ordinary way. And
20 they say, based on what the defendant did it becomes a
21 lascivious exhibition, not based on what the child did, which is
22 what I understood to be your position, and what *Hillie* says.

23 *Hillie* says, basically, exactly what you're saying;
24 that the child has to exhibit himself lasciviously.

25 MR. PONALL: So I will go back to this: I think that

1 *Holmes* says it is judge-made law, which is not tethered in any
2 way to the language of the statute.

3 I think the *Williams* case and the *Hillie* case have got
4 it right based on the language of the statute.

5 And I think if you extend it this way, now you are
6 wandering into unconstitutional territory which *Hillie* talked
7 about in all of those U.S. Supreme Court cases -- *X-Citement*
8 *Video, Miller* -- all of those case said that these child
9 pornography statutes have to be construed to only apply to
10 images or depictions that depicted some sexual conduct. And,
11 again, the Court is bound by those decisions.

12 So I understand if we are --

13 THE COURT: What would the constitutional violation
14 be? You're saying -- you're talking about some First Amendment
15 cases?

16 MR. PONALL: Yes.

17 THE COURT: So, in your view, they couldn't even
18 criminalize like a voyeur statute or something?

19 MR. PONALL: No. They say you can criminalize
20 voyeurism, but when --

21 THE COURT: Why couldn't you do that if it's a
22 First Amendment violation?

23 MR. PONALL: They -- they made a very good argument on
24 that in *Hillie*. But they said that the U.S. Supreme Court has
25 repeatedly held that the pornography statutes are only

1 constitutional if they are limited to images, or depictions,
2 that depict any type of sexual conduct, or coyness, or imagery,
3 or connotation.

4 And if you expand it past that then it's a
5 First Amendment violation because now you are going into the
6 thought process of the viewer or the person who captured the
7 image. So that's how --

8 THE COURT: You are not -- just to be clear, you are
9 not making a First Amendment argument? You are just saying --

10 MR. PONALL: What I'm saying is that the U.S. Supreme
11 Court has said these statutes have to be construed in a manner
12 that only apply to images and depictions, including
13 lascivious -- the lascivious language that's addressed in these
14 Supreme Court cases only addresses images and videos that
15 actually depict either sexual conduct, or some sexual coyness,
16 or sexual expression on the part of someone in the image.

17 And that's why those statutes have been found to be
18 constitutional under the First Amendment. Otherwise, the Court
19 said they would have to invalidate them. And those are
20 U.S. Supreme Court cases.

21 I agree with the Court if it's *Hillie* versus *Holmes* we
22 lose. What I am saying is I think the *Hillie* rationale is
23 compelling and it is dictated by the U.S. Supreme Court.

24 Back to the *Holmes* decision.

25 THE COURT: Yeah.

1 MR. PONALL: I think by focusing on the fact that
2 there is an edit -- a later edit, or a later capture, they are
3 saying that you have to consider the initial photo and then the
4 later photo.

5 And the actions of the defendant isn't to the
6 intent -- isn't that the defendant is sexually excited by the
7 video. It's what did the defendant do with the video? Did he
8 zoom in? Did he focus? Did he crop it so it only portrayed the
9 genital area of the victim? Did he -- is the genital area the
10 centerpiece of the video? We don't have any of those things
11 here.

12 THE COURT: Let me ask this, because this wasn't clear
13 to me from the arguments: I understand what you are saying
14 about *Holmes*. They looked at -- he had what you would take --
15 if you imagine somebody who just captures a nude teen in a
16 bathroom and then crops it, to zoom in on the genitals. And has
17 a bunch of screenshots on his computer.

18 MR. PONALL: Sure.

19 THE COURT: Is that what constitutes the offense, or
20 is that evidence of what his intention was when he first took
21 them?

22 In other words, if you have two people who both take
23 the same snapshot through the locker room, like a pinhole --
24 like in some of these cases, two people take the same picture of
25 a bunch of nude minors in the gym, or the shower, and then one

1 of them doesn't do anything with it. And the other one goes
2 home and edits it and zooms in on all the private areas and
3 makes a bunch of screenshots. Is that second person's actions
4 just evidence of what he was intending when he took it, or is
5 that to complete the offense?

6 In other words, if they both had the same plan and the
7 second guy -- the first guy just never did anything with it, or
8 maybe had some regret and deleted the videos and said, I
9 shouldn't have done that, has one committed an offense and not
10 the other or --

11 MR. PONALL: Yes.

12 THE COURT: Okay.

13 MR. PONALL: So the --

14 THE COURT: So they have -- I guess what I would want
15 you to do is square that to the text of the language that talks
16 about how it's using a child. So they are using a child after
17 the picture is taken. Would that be the argument?

18 MR. PONALL: Yes. And *Williams* says, or the
19 U.S. Supreme Court says, that the actual image has to depict a
20 lascivious depiction. Not just the intent of the viewer.

21 So, I think that the first person would not have been
22 guilty of the production of child pornography. He certainly
23 would have been subject to being charged with voyeurism in state
24 court, as I think Mr. High would be.

25 But without the cropping, or the zooming, or the

1 making the genital area a centerpiece, I don't think a crime
2 would have been committed and the person would be guilty.

3 THE COURT: Okay.

4 MR. PONALL: I think what we are -- I think it doesn't
5 make logical sense to say that because an individual has
6 admitted child pornography on his computer that that transforms
7 non-pornographic images into pornographic images. I don't think
8 that makes logical sense.

9 THE COURT: No. But you would agree if the question
10 is: What was his intent? The fact that he has -- there is
11 evidence from these other pictures that he has a sexual interest
12 in children would be relevant to his intent. You don't disagree
13 with that?

14 MR. PONALL: I think it's relevant to his intent, but
15 the case law says that there is still -- the pictures themselves
16 still have to have a lascivious display. And I don't think we
17 have that here.

18 THE COURT: Okay.

19 So your view, then, is if you are talking about there
20 is no photo that could constitute a production offense without
21 also that photo itself being child pornography?

22 MR. PONALL: Correct.

23 THE COURT: Okay.

24 MR. PONALL: And I think that's what *Hillie* says. I
25 think that's what *Hillie* lays out that the U.S. Supreme Court is

1 saying. I think that's what the U.S. Supreme Court said in
2 *Williams*. And I don't think that *Holmes* is saying that's not
3 the case. I don't think they made a finding that the original
4 photos in that case were pornography. They found that the
5 edited photos were pornography. So I think that's the main
6 distinction with *Holmes*.

7 The courts, including *Hillie* and the Eleventh Circuit
8 have said that they don't strictly apply the *Dost* factors. The
9 Eleventh Circuit has considered them, but said it's not
10 necessarily the law of the Eleventh Circuit.

11 THE COURT: That's an independent argument. In other
12 words, that would be an argument that if there can be...

13 MR. PONALL: The U.S. Supreme Court in *Miller*, *Super*
14 *8MM Film*, *X-Citement Video*, and *Williams* all talked about
15 pornography statutes applying to hardcore sexual conduct, or
16 conduct that exhibits some sexual desire to engage in, quote,
17 any type of sexual activity.

18 We have none of that in the videos or photos in
19 question.

20 The government certainly, at the bench trial today,
21 certainly proved Count Three. We have no argument that there
22 was possession of child pornography. Many of the images and
23 videos that were displayed to the Court and introduced into
24 evidence meet the definition with no problem.

25 The exhibits containing the photos and videos the

1 government us using to support Count One and Two do not meet
2 that.

3 And based on that rationale, and the same rationale
4 used by *Hillie*, which I don't think is inconsistent with *Holmes*,
5 they reversed convictions for attempt and the completed offense
6 of production, suggesting that JOA would be appropriate in this
7 case as well.

8 So we don't think -- specifically, we don't think the
9 sixth factor, whether the viewer is excited by the photos, is
10 appropriate. The Eleventh Circuit has never said that's
11 necessarily appropriate.

12 Courts around the country, including *Hillie* and the
13 Second DCA in *Spore*, whether a video is objectively a lascivious
14 exhibition depends on the content of the video itself and not on
15 the sexual predilections of its creator.

16 Fifth Circuit 2011, the concurrence: Congress did not
17 make production of child pornography turn on whether the maker
18 or viewer of the image is sexually aroused.

19 Again, we don't believe that *Holmes* says that that's a
20 factor. It's the actions of the defendant in altering the
21 videos.

22 So, it's our position whether you consider the *Dost*
23 factors, or not, that none of the images relied upon by the
24 government meet the requirement of establishing a lewd
25 exhibition of the genital area of the minors depicted.

1 For comparison purposes, if you look at 10B35.

2 THE COURT: Just a minute.

3 10B35?

4 MR. PONALL: Yes. I am going to give the Court two
5 examples of photographs in bathrooms, that I think easily meet
6 the definition of child pornography, for the purpose of
7 contrasting them with the images in our case.

8 10B35, certainly the child's genitals area is the
9 center piece. He looks like he is posed in a way to indicate
10 some sexuality. I don't think there would be any question that
11 that would meet the requirements.

12 10B41; same situation. He is staring at the camera.
13 He is holding his genital area and it's certainly a focus of the
14 photo. It looks like he was posed by the person taking the
15 picture.

16 THE COURT: It looks like he is taking the picture.

17 MR. PONALL: Right. That's distinct and different
18 than what we have here.

19 The images the government relies on to support its
20 argument in this case start at 2C12.

21 THE COURT: This is maybe a question for Mr. Keen, but
22 they are relying on video and stills; correct?

23 MR. PONALL: Correct. I have two videos, which are
24 10C8 KVID 1359/3 and 4, which I don't think are any more graphic
25 than the photos. I think they are exactly the same as the

1 photos. They are videos.

2 But the first photo that we can look at together in
3 the notebook is 2C12. I don't see a depiction of a genital area
4 in that photo, so I would argue that that does not qualify under
5 the plain language of the statute.

6 Certainly, the minor is not posing in any sexual way.
7 There is no sexual connotation. He is simply engaged in the
8 natural bodily function of urination. We see the entire
9 bathroom stall, or a large portion of it. We see a sink. We
10 see a soap dispenser. We see the child's head and body. We
11 don't even really see any nudity in that photo.

12 Next photo is 2C13. Again, nothing is zoomed in. We
13 have a full-body picture from head almost to toe of the minor.
14 He is not fully nude. We see the toilet and the sink. Again,
15 it's just a normal ordinary child who is engaging in ordinary
16 urination. There is no evidence that the photo was zoomed. No
17 cropping. No altering.

18 2C14; same situation. We have -- and in the previous
19 two pictures the individual is clothed appropriately, like they
20 would be to go to the bathroom.

21 I point out the location. I think case law is a
22 little bit all over the map on whether a bathroom is necessarily
23 a place there would be a sexual connotation. I would suggest,
24 and I think case law supports this, and common sense, that a
25 shower or a bathtub, with water in it, would be way more sexual

1 than the inside of a stall, or an individual standing at a
2 urinal.

3 Many men's bathrooms there is no dividers between
4 urinals. Intentionally, or unintentionally, sometimes genital
5 areas are shown in public bathrooms.

6 Now in a shower or a tub you would expect for privacy.

7 2C14 --

8 THE COURT: I mean, you may be approaching it from
9 more of a conventional standpoint. I mean, in this universe
10 there are bathrooms things. There is a lot in the notebook, and
11 on the videos, including I think there is a photo of a boy
12 sitting on a toilet, isn't there, in this sort of --

13 MR. PONALL: Sure. That's why I showed you the other
14 two photos. I thought those were examples of where they would
15 be pornography in a toilet setting. But in those situations the
16 minor victims are almost always looking at the camera, posed,
17 expressing some sort of sexual coyness. They are posed. They
18 are not engaging in actual -- a bodily function. They are
19 posing in a sexual manner.

20 We don't have that here. There is really no dispute
21 or no argument that these kids were anything other than
22 urinating.

23 2C14, again, we have a picture of the minor from head
24 almost to toe. A very, very small portion of the image is
25 depicted to the genital area. Certainly you could not say

1 that's the focus. Certainly could not say, like most of the
2 cases talk about that the genital area is at the center of the
3 photo. It is not.

4 10B15.

5 THE COURT: 10B15?

6 MR. PONALL: Yes. This is similar to 2C12, where I
7 don't see any display of the genital area. And I don't think
8 there is any legitimate argument that this is a lascivious
9 display.

10 10B16 --

11 THE COURT: These are the same photos just from the
12 different source; maybe one is from the cloud and maybe one is
13 from the photo itself.

14 MR. PONALL: Sure.

15 10B16, we have an almost entire view of the stall. We
16 have the sink, the soap dispenser, the handicapped railing, part
17 of the toilet. No focusing. No zooming. Just a boy peeing.

18 Again, certainly not appropriate conduct. Certainly
19 would qualify as voyeurism. I don't think it constitutes child
20 pornography. And I don't think the case law supports a finding
21 of child pornography.

22 Same argument for 10B17. I think that's like a
23 duplicate, like the Court said, as to the other photo.

24 The other two photos the government relied on were
25 10B42 and 10B43, which, again, look almost like duplicates. And

1 I think the same arguments apply to those photos.

2 What we don't have is full nudity. We don't have any
3 zooming or focusing. We have an entire bathroom stall almost
4 floor to ceiling. We have walls. We have sinks. We have soap
5 dispensers.

6 I think it would be different if it was a bed or a
7 shower -- a bed, shower, or bath tub. The genital area is
8 barely visible on all of these photos. There is just really no
9 sexual connotation from any of these photos or videos.

10 Again, if we make this -- if we determine that this is
11 pornographic then I think we are hard-pressed to find that
12 someone who has an image of the peeing boy from Brussels doesn't
13 possess pornography. And --

14 THE COURT: For this statute it has to involve a real
15 child. I mean, that's -- I think a lot of your argument is that
16 the same type of principles ought to apply in a child
17 pornography case in a possession case, like Count Three, versus
18 Count One. And I do think they are different. I think that may
19 explain why you have *Williams* and then you have *Holmes* coming
20 along.

21 And it does seem like -- getting back to the point I
22 made earlier that there is a different definition of sexually
23 explicit conduct for the definition of child pornography than in
24 other places in the statute.

25 Of course, it seems to me that 851(a) -- we call it

1 production of child pornography, but the term "child
2 pornography" is not part of the statute.

3 MR. PONALL: No. I know. And I have said this
4 previously, so I don't want to beat a dead horse, but *Williams*
5 specifically defined the term lascivious and that's the term we
6 are looking at in the statute.

7 So I hear the Court saying there is a different
8 definition, but lascivious means the same thing in both places.
9 I don't think there is any evidence to the contrary. So I think
10 the U.S. Supreme Court case in *Williams* was on point and
11 requires a finding that there be some sexual purpose, coyness,
12 display --

13 THE COURT: On the child's part.

14 MR. PONALL: I'm sorry?

15 THE COURT: On the child's part.

16 MR. PONALL: Yes. Or I think if you had a photo where
17 there was an adult in the picture and the adult was acting in a
18 sexual manner towards the kid.

19 THE COURT: Right.

20 MR. PONALL: So I don't think there has to be a -- I
21 think if you had a display of a genital area of an adult with a
22 kid in the photo it would still qualify.

23 THE COURT: Fair enough.

24 But in terms of either -- the government cited cases
25 like *Walker*, a very recent Eleventh Circuit unpublished decision

1 where a janitor put a camera under a sink. They upheld the
2 conviction there even though there was no indication that the
3 girls photographed were doing anything like what you are talking
4 about.

5 Those are obviously not binding, but you would say
6 those were wrongly decided?

7 MR. PONALL: I think they are wrongly decided and I
8 also think they are factually distinguishable. I do want to go
9 through those because I anticipate the government is relying on
10 those.

11 THE COURT: Okay.

12 For the record, I am talking about *Walker*, which is
13 2022 Westlaw 3221905.

14 MR. PONALL: In *Walker*, we don't really have a really
15 good description of the video. We know that the defendant
16 angled the phone so it could view under the stall door and into
17 the stall, quote, around the hip level -- which would suggest
18 that the focus was more on the genital area because it's at the
19 hip level -- and pressed the button to record.

20 From that vantage point he captured videos in which at
21 least 10 students exposed their genitals or buttocks while
22 undressing to use the bathroom.

23 We don't have any more detail of the photo. Certainly
24 the photos were not included in the opinion, so I think it's
25 hard to compare *Walker* to this case, other than that I think by

1 installing the camera at the hip level that suggests more focus
2 on the genital area than we have in this particular case.

3 The Court is correct. It's unpublished and it's not
4 binding authority. So I think -- I don't think it's
5 particularly relevant since we don't know exactly what the video
6 depicted.

7 The *Rodriguez-Fernandez* case; really that's about a
8 jury instruction question and they added jury instructions
9 consistent with *Holmes*.

10 Again, we don't have a description of the videos or
11 photos in that case so I don't think it's particularly helpful
12 to determine the sufficiency of the evidence.

13 Was there one more case, Your Honor, from the
14 Eleventh?

15 THE COURT: Those were the two relatively recent
16 unpublished ones.

17 For the record, *Rodriguez-Fernandez* is 833 Federal
18 Appendix 803, and certainly they are not binding.

19 MR. PONALL: Well, it's our position that the fact
20 that there is evidence that this particular defendant has an
21 interest in young boys, as evidenced by his possession of images
22 depicting young boys, does not transform form non-pornographic
23 images into pornographic images unless there is a lewd display,
24 which is required by the statute, required by the U.S. Supreme
25 Court, and I do not think a proper reading of *Holmes* eliminates

1 that.

2 I think *Holmes* is talking about the actions of the
3 defendant in editing or altering videos and photos.

4 We don't have any of that. We don't have any evidence
5 before this Court that Mr. High, or anybody else, did anything
6 other than that videotape these children and take screenshots of
7 the videos without altering. There is no evidence that the
8 screenshots are any different than the video other than it's one
9 small portion of a video. There is no lighting added. There is
10 no cropping. There is no zooming.

11 THE COURT: Isn't that relevant? In other words, if
12 you have say a two minute video of a child going to the
13 bathroom -- taking off his or her clothes, then going to the
14 bathroom, then putting the clothes back on, and the screenshot
15 that you have shown, which was a child holding his genitals,
16 wouldn't that be probative of what the intent was?

17 In other words, you could have taken a screenshot of
18 someone after they fully reclothed and were heading out of the
19 stall.

20 MR. PONALL: You could have. But, again, there is
21 nothing in the depiction that makes it lewd. There is
22 absolutely nothing in the depiction that makes it lewd.

23 THE COURT: That makes his actions lewd. Again, this
24 is -- like *Holmes*, you were saying what was different was he
25 zoomed in on the vaginal area of the child. Well, that doesn't

1 make what the child was doing lewd. It just makes what --

2 MR. PONALL: I hear what the Court saying but I don't
3 think there is any evidence before this Court that there is
4 parts of the video that -- where the individual was fully
5 clothed and then the other photos, the screenshots, were taken
6 of specific portions where the genitals were exposed. I
7 certainly haven't heard that evidence.

8 Again, the *Williams* case, from the Eleventh Circuit,
9 and the *Williams* case in the U.S. Supreme Court, says you gotta
10 look at the photos themselves and look at them objectively. And
11 whether you use the *Dost* factors or not, and I suggest the sixth
12 factor should not be used, based on all of the authority, the
13 government's evidence simply doesn't must meet the test here and
14 the Court should grant a judgment of acquittal.

15 At most, this is voyeurism. It's inappropriate. It's
16 creepy. It's not criminal under this statute.

17 THE COURT: Related to that last point, one other
18 question: One of the things some of these cases talk about is a
19 jury could have noted that there was no other explanation -- no
20 non-sexual purpose. There is no evidence of any other purpose
21 than to have pictures of boys with their penises exposed; is
22 there?

23 MR. PONALL: I don't think there is any evidence
24 either way. I think -- but I think the case law requires you to
25 look at the images. And I don't think the images meet the

1 standard. So I would ask the Court to grant a judgment of
2 acquittal.

3 THE COURT: Okay.

4 MR. PONALL: I don't know how you want us to handle --
5 this is the first time for me -- since the Court is both the
6 individual determining the judgment of acquittal and the actual
7 fact finder, is there going to be a separate closing argument?
8 How do you want to handle that?

9 THE COURT: Well, what I think we will do is we will
10 hear Mr. Keen's response. And then we will address this, which
11 is preserving it.

12 And then I want to have a colloquy with Mr. High
13 before -- if I do not grant your motion now, I will have a
14 colloquy with him about whether he wants to testify.

15 And then if you don't put on evidence, and either I
16 have denied the motion or reserved on it, then we will probably
17 take a break and come back and address everything outstanding.

18 MR. PONALL: Okay. Thank you.

19 THE COURT: Yes, sir.

20 Mr. Keen or Ms. Weiss?

21 MS. WEISS: Good afternoon, Your Honor.

22 THE COURT: Good afternoon.

23 MS. WEISS: Your Honor, it's the government's
24 position, as outlined in our trial brief document 68, that the
25 images and videos at issue in Counts One and Two constitute

1 sexually explicit conduct. And we believe we have presented
2 ample sufficient evidence to sustain the conviction.

3 We believe that the Court should be assessing whether
4 or not this standard has been met by looking to the standard
5 jury instructions from the Eleventh Circuit, which is noted by
6 the Eleventh Circuit, incorporate the *Dost* factors, and present
7 a complete outline for the way this question is to be answered.
8 And I will note that that is completely at odds with *Hillie*.

9 THE COURT: You would acknowledge -- *Hillie* is a very
10 good case for them and if that were binding here you couldn't
11 succeed; could you?

12 MS. WEISS: If *Hillie* was binding here, Judge, we
13 would be in a different posture. I agree.

14 But, *Hillie* --

15 THE COURT: To the point where you couldn't succeed.
16 I mean, it's a question, I guess, but maybe there is some
17 argument. But it would seem to me you are not arguing that
18 there is evidence that the child was doing anything?

19 MS. WEISS: No. I think the government has been very
20 clear from the beginning with this. We are not arguing that the
21 videos and images at issue here are conventionally pornographic.
22 We are not arguing that it's any of the other potential ways to
23 prove that the images are sexually explicit, aside from the
24 lascivious exhibition of the genitals.

25 THE COURT: So, *Hillie* is just incorrect in your view

1 then?

2 MS. WEISS: Yes. Completely.

3 I would say that with respect to the DC Circuit,
4 *Hillie* is incorrectly decided. It's non-binding. And what
5 Your Honor has before you is Eleventh Circuit case law with a
6 binding definition of lascivious that is, you know, not only
7 inconsistent with *Hillie* but completely consistent with the
8 pattern jury instructions and with other more recent cases since
9 *Hillie*, including *Walker*, that continue to interpret lascivious
10 in this specific way.

11 So from the government's perspective, *Hillie* is
12 incorrectly decided and is not the proper vehicle for analysis
13 in this case.

14 And, Your Honor, one point that I do want to make, and
15 this is something that's brought up in the trial brief, there
16 has been a lot of discussion of the plain language of the
17 statute -- the plain language of 2251(a) here. And what I just
18 want to point out to the Court is that the plain language of
19 2251(a) says that no person shall use a minor.

20 The onus in this statute is on the person who is
21 producing the image that the person should use a minor. The
22 onus is not on the minor to engage in the sexually explicit
23 conduct. In no way is that the purpose of 2251.

24 If we go to the true plain language of the statute
25 it's to the defendant, to the person creating the image, that we

1 look to determine whether or not they used the child to create
2 sexually explicit material.

3 So that, again, is very consistent with what *Holmes*
4 says, with what *Walker* says, with what the Eleventh Circuit
5 cases say.

6 I will point Your Honor specifically to *Walker*. The
7 facts were discussed, but there is -- there is a lot of
8 conversation in *Walker* about the viewpoint from which
9 lasciviousness should be assessed. And, actually, in that case
10 there was a jury question explicitly saying whose viewpoint do
11 we look to to determine whether it's lascivious.

12 The District Court said, the viewpoint of the
13 defendant or any intended viewer, and that was affirmed by the
14 Eleventh as a correct statement of the law of this circuit just
15 in August.

16 So I think that it is very clear that the intent of
17 the producer is something that we have to assess. It's
18 consistent in the case law. It's consistent in the statute.
19 And it's consistent in the jury instructions.

20 THE COURT: How does that affect your attempt
21 argument, or do you have one now? I mean, is one possible view
22 of the evidence that there was not a completed offense but there
23 was an attempt? I guess, when you talk about the use being the
24 key, and you cited a case where someone didn't have the camera
25 activated, you're still using the child whether you take the

1 picture or not. So I was struggling to understand how there
2 would be an attempt without a substantive offense on the facts
3 of this case.

4 MS. WEISS: Judge, I think that in this case the
5 government's position, and I think this is clear from the trial
6 brief, is that our position is that it was completed.

7 THE COURT: I understand that. I am not asking you to
8 abandon that at all. I mean, walk me through -- would it be
9 that someone put a camera in the bathroom and then no one ever
10 came in there? Would that be the attempt?

11 MS. WEISS: Sure. Judge, I think in this situation it
12 appears from the videos we have that they are being taken over
13 the stall. Maybe the camera is in the wrong spot. Maybe you
14 don't quite get the full image. I don't think that's what
15 happened here. But I think they are -- maybe in this case the
16 defendant expected something else would happen, something that
17 that was maybe more conventionally sexual. Maybe that didn't
18 occur.

19 THE COURT: Okay. There is no evidence of that; is
20 there?

21 MS. WEISS: No.

22 THE COURT: You're not arguing -- I wondered if --
23 some of the other pictures are about people -- non-Count One and
24 Count Two -- pictures from the statement of facts and things
25 have people masturbating in the bathroom stalls. There is no

1 evidence that that was his hope here; is there?

2 MS. WEISS: No, Judge. And I think that while there
3 are other pictures that show that kind of conduct in bathroom
4 stalls there are also images of people just using the bathroom
5 and engaging in those functions. So I think that the
6 government -- I would agree that there is not any of that in
7 this case.

8 We are not arguing that there would have been. And I
9 don't think there needs to be because I think that from the
10 content of the devices, which we presented to you, the conduct
11 which the defendant captured was sexually explicit from his
12 subjective perspective.

13 THE COURT: Okay.

14 There is not an alternative attempt argument?

15 MS. WEISS: Judge, I think that the -- I think that
16 the way you could view attempt in this case is -- again, I
17 don't -- I think from our perspective we don't see anything else
18 happening that would have been expected. I think that we can't
19 know the exact circumstance of the videos. I think you could
20 argue that there is, you know, an attempt if the defendant
21 thought something else was happening. I don't want to abandon
22 the possibility of attempt, but I do think that the government's
23 position here is that the act was completed, the images were
24 created, and they are sexually explicit.

25 THE COURT: Okay.

1 But the images don't have to be -- again -- I guess
2 this is on the attempt thing, and maybe it's much ado about
3 nothing, but if it's the use of the child, and you are doing it
4 with a purpose to create the image, and I think this is
5 consistent with that case you cited, then it wouldn't matter
6 whether you actually created the image or not. In other words,
7 if you put the camera over the stall and -- assuming everything
8 was otherwise sufficient evidence -- and pushed button, but your
9 battery was low or something like that, have you completed the
10 offense or is that just an attempt?

11 MS. WEISS: Judge, I think that -- I think that you --
12 are you saying that there is no image captured whatsoever?

13 THE COURT: Right.

14 MS. WEISS: I think that in that case you have
15 attempted production. And I think that does speak to the Fourth
16 Circuit case in the brief that if, for some reason, in some
17 situation, like the case cited in the trial brief, where the
18 tape isn't rewound but you tried to create it, I think that
19 that's where you get into attempt.

20 THE COURT: Okay.

21 MS. WEISS: Judge, I think that if you look at the
22 factors in this case, under the structure proposed by the
23 Eleventh Circuit -- and I won't belabor the point, Your Honor.
24 They are laid out explicitly in the government's trial brief --
25 I think looking at the evidence presented by the government

1 here, under this standard in the Eleventh Circuit, there is more
2 than sufficient evidence to show that the content was sexually
3 explicit.

4 The focal point of the videos is genitalia. What
5 other reason are you videotaping in a bathroom but-for to
6 capture somebody in a state of undress. The fact that the
7 videos are being created there speak to that.

8 The fact that the screen grabs, or screen captures
9 were captured of that specific image goes to the fact that the
10 focal point was that act and was the fact that the children were
11 nude.

12 THE COURT: With the screen grabs, were these all the
13 screen grabs?

14 MS. WEISS: Judge, if you look at --

15 THE COURT: I mean, in evidence. I'm not asking about
16 beyond the evidence. I am saying in terms of the -- what's in
17 this notebook, is that all of the -- or is there evidence that
18 there were other screen grabs?

19 MS. WEISS: Judge, I think that Exhibit 13, the
20 summary, summarizes all the images that are relevant to the
21 minor male victims in this case, including artifacts, videos,
22 screen grabs. And I can confirm that.

23 THE COURT: So there are -- I am looking at
24 Exhibit 13. Give me a minute here. There are how many videos
25 of the two children? Two or three?

1 MS. WEISS: Judge, there are two videos of -- I will
2 ask my agents to correct me if I mistake this -- there are two
3 videos of one of the children. There is a video artifact of the
4 second child indicating that a video existed at one point but
5 was deleted.

6 THE COURT: That's the 64~3.

7 MS. WEISS: Yes, Judge.

8 THE COURT: All right.

9 So, there are two videos in evidence?

10 MS. WEISS: Yes, Judge.

11 THE COURT: 1359~3 and 59~4?

12 MS. WEISS: KVID 1359~3 and KVID 1359~4 are the two
13 videos.

14 And so that is on the top row of the chart, the third
15 exhibit. And the second row, I believe, is the first exhibit.
16 Those are the videos.

17 THE COURT: Okay. And each of the screen grabs that's
18 in evidence, some of which I went through with Mr. Ponall, are
19 from one of those two videos?

20 MS. WEISS: No, Judge. Because there is -- those two
21 videos are of the same child. So the videos that exists are of
22 one child.

23 The first box on the chart, KVID 6604~3.mp4, that is
24 an artifact of the second child. And if you look at the
25 description, Judge, it says which children are involved. That

1 is artifact. So there was a video at one point but it was not
2 found. So what we have is a --

3 THE COURT: A screenshot?

4 MS. WEISS: -- screenshot of a video that no longer
5 exists.

6 THE COURT: Okay.

7 Give me one second.

8 (Pause in proceedings.)

9 THE COURT: So, the two images of "L" are -- the two
10 screen grabs are the same picture, just in different locations?

11 MS. WEISS: Yes, Your Honor. All exhibits starting
12 with 2 are the Synchronoss photos.

13 THE COURT: So we have 2C14 and 10B17 that are in
14 evidence. They appear to be the same. I am not sure it
15 matters. But anyway. Go ahead.

16 MS. WEISS: Judge, I think to briefly re-address your
17 question about attempt, I just want to make clear, while the
18 government's position here as to attempt is that this was
19 completed and sexually explicit images were made, I think that
20 attempt comes into play in this case not only if there was some
21 mistaken belief, you know, that maybe something else would
22 happen. Maybe it would be different. But also if for some
23 reason this Court finds that the conduct of the children is not
24 sexually explicit. I think that one of the questions you asked
25 Mr. Ponall goes to this.

1 The defendant was attempting to create something
2 sexually explicit. I think that the evidence that the
3 government has presented supports that contention. And so I
4 think that you can find, in this case, that the defendant
5 committed the crime of attempt based on his conduct, based on
6 putting the camera over the stall, children were nude, based on
7 the contents of his other devices, even if there is a finding
8 that he somehow didn't manage to capture sexually explicit
9 conduct.

10 So just to be clear on the government's position
11 there, I will, again, say that we believe that this was a
12 completed act. And I think that looking to -- again, I won't
13 belabor the point, but looking to the factors laid out in the
14 jury instructions in the *Dost* factors, the focal point, the
15 setting of the depiction is suggestive.

16 I cited several cases in the trial brief that
17 bathrooms can be considered a sexually explicit setting. I
18 think that's particularly true in this case where the government
19 has introduced significant evidence of other pornography
20 involving children and involving bathrooms, whether the minor is
21 partially clothed or nude. And, again, in this case conduct in
22 a bathroom is done, the government's puts forward, because you
23 expect a child to be, or a person to be, nude or undressed in a
24 bathroom.

25 And then whether the depiction appears to be designed

1 to elicit a sexual response. And that is the question that we
2 have all been discussing. And the Eleventh Circuit makes clear
3 that that's a subjective question.

4 And, again, the government's evidence in this case is
5 not only that the defendant is sexually attracted to male
6 children but he is sexually attracted to male children in
7 situations involving a restroom.

8 And the videos, and some of the specific images that
9 the government has put forward, strongly suggest that the
10 conduct in this case in videotaping the two minor victims was,
11 you know, an attempt to duplicate or replicate some of the
12 pornography that was found elsewhere on the devices.

13 Judge, I would also point out -- and I'm happy to show
14 Your Honor on the computer -- these images were stored -- I'm
15 happy to show Your Honor the Cellebrite -- these images were
16 stored with other images of pornography.

17 They were screenshotted after the fact. They weren't
18 accidentally taken and then forgotten about in somebody's camera
19 roll. They were revisited.

20 And it's the government's position, that looking at it
21 from the standard required by the Eleventh Circuit, the
22 government has set forth sufficient evidence for Your Honor to
23 find that these are lascivious exhibition of the genitals and
24 they are sexual conduct.

25 THE COURT: Thank you, Ms. Weiss.

1 I will give you any rebuttal if you like, Mr. Ponall.

2 MR. PONALL: Judge, I think that part of the
3 government's argument is that because the person capturing the
4 videos would know the children would display some nudity that it
5 makes it child pornography. I think the case law is clear that
6 nudity alone is not child pornography.

7 As far as the government's reliance on the pattern
8 jury instructions; if you go to the Eleventh Circuit's website
9 itself it specifically says, the Eleventh Circuit authorizes the
10 committee to publish them but makes no adjudicatory
11 determination that they are accurate, or that on a case-by-case
12 basis they should not be altered. So I don't think they have
13 any binding authority as legal authority.

14 The Court has indicated that it believes there may be
15 a different definition of sexually explicit conduct for
16 production and possession. And I'm looking at the *Williams*
17 case, and I could be wrong, but the *Williams* case from the
18 U.S. Supreme Court cites 2256(2) (A).

19 When I look at 2256(2) (A), we are talking about
20 sexually explicit conduct and lascivious exhibition. And I
21 think the government agrees that's the same statute. I don't
22 think there is any argument among the parties that that's not
23 the same statute.

24 *Williams* talks about that on --

25 THE COURT: Which -- there is no disagreement about

1 what?

2 MR. PONALL: About whether 2256(2) (A) is the relevant
3 definition.

4 THE COURT: Oh, I agree. I was just saying it's got a
5 different definition for sexually explicit conduct as it is
6 within the separate definition for child pornography, which is
7 not at issue in this case. That's what I was saying.

8 I agree with you that 2256, I think it's (A) (2), is
9 the right definition for this case.

10 MR. PONALL: Okay. So I guess what we were --

11 THE COURT: Excuse me. I said (A) (2). It's (2) (A).

12 MR. PONALL: Correct.

13 What I thought we had a disagreement on, earlier, is
14 on page 301 of the *Williams* case, from the Supreme Court.
15 Again, I don't want to repeat myself but I think it's important;
16 under this heading the Eleventh Circuit also thought that the
17 statute could apply to someone who subjectively believed that an
18 innocuous picture of a child is lascivious.

19 And then they cite to Clause (v) of subsection
20 2256(2) (A) which is the clause we are talking about, and they
21 say, That is not so. The defendant must believe that the
22 picture contained certain material and that material, in fact,
23 and not merely in his estimation, must meet the statutory
24 definition.

25 Where the material at issue was a harmless picture of

1 a child in a bathtub and the defendant knowing that material
2 erroneously believes it constitutes a lascivious exhibition of
3 the genitals, the statute has no application.

4 I am having a very difficult time seeing how that
5 doesn't apply to the facts of our case and doesn't require a
6 judgment of acquittal.

7 When I look at the plain language of the statute the
8 defendant also has to have an intent to produce -- use a minor
9 for production of sexually explicit conduct.

10 We have no evidence, other than that the person who
11 took this video planned to take a video of a child urinating.
12 We have no evidence that he expected there to be sexual conduct
13 inside the stall.

14 I think we would have a different scenario if, for
15 some reason, in a hypothetical, the defendant knew that a
16 teenager masturbated at a certain time of night and they videoed
17 it at that time of night because they expected to see
18 masturbation.

19 Here, the only reasonable expectation could have been
20 a child urinating. There is nothing sexual about that. So
21 under the plain language of the statute there is no intent to
22 produce sexually explicit conduct.

23 And the government is speculating because he has
24 images that do depict sexual conduct that that was his intent in
25 this particular case. And I don't think that's appropriate.

1 And I think they are speculating. And that doesn't support a
2 conviction.

3 So for those reasons and the reasons previously stated
4 I think the government has failed to meet its burden.

5 THE COURT: Okay. Thank you.

6 I understand both sides' arguments, I think. I am
7 going to take the Rule 29 motion under advisement for the moment
8 and we will continue on. I will defer on it, I guess.

9 I will revisit what you and I talked about before the
10 lunch break, Mr. High, and that is that you do have the right to
11 testify. Again, there is no burden on the defense at all. The
12 government has the burden in the case. But you have an
13 opportunity -- your side will have an opportunity to put on a
14 case if you would like and you have the right to testify if you
15 would like.

16 Do you understand that?

17 THE DEFENDANT: Yes, sir. I understand.

18 THE COURT: Have you talked to your lawyers about
19 that?

20 THE DEFENDANT: Yes, sir, I have.

21 THE COURT: Have you reached a decision about whether
22 you would like to testify or not?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: And your decision is what?

25 THE DEFENDANT: No, I will not.

1 THE COURT: Okay.

2 Then is there going to be any presentation at all from
3 the defense?

4 MS. FRYER: No, Your Honor.

5 THE COURT: You rest on your whole case? And I assume
6 you will renew your motion and then we can -- we will take a
7 brief break. Is there anything else we ought to address?

8 MR. PONALL: No. We would renew our motion for the
9 reasons previously stated.

10 THE COURT: We will take a recess.

11 It will probably be in the neighborhood of 25 to 30
12 minutes, perhaps a little more. Perhaps a little less. We will
13 be back after that.

14 Actually, you know what -- I apologize -- I would like
15 to, before we break, I would like to see the one video in the
16 bathroom in its entirety from start to finish in evidence.

17 It's exhibit -- tell me what exhibit number that is,
18 Mr. Keen.

19 MR. KEEN: If it's the one of the gray shirt it should
20 be in 2D, on the Synchronoss.

21 THE COURT: Okay.

22 MR. KEEN: And there are -- I believe there is two;
23 ~3 and ~4.

24 THE COURT: That's consistent with what Ms. Weiss was
25 just saying. I apologize. Both end in 59~3 and 4. So

1 logistically maybe you could just -- we could all go over here
2 by the sidebar area with the computer and a lawyer from each
3 side.

4 MR. KEEN: I have them cued up here, Judge.

5 THE COURT: Okay. These are both within 2 --

6 MR. KEEN: 2, Delta.

7 THE COURT: 2D.

8 (Video viewed by counsel and the Court at sidebar.)

9 THE COURT: All right. We will be in recess.

10 (Recess taken 1:54.)

11 (Resumed at 2:36.)

12 THE COURT: Everyone can have seat.

13 We have all the lawyers back. Mr. High is back.

14 Here is the situation: We had a long argument on the
15 Rule 29 motion. I took the Rule 29 motion under advisement and
16 deferred on that.

17 But I did want to give both sides a chance to make a
18 closing argument. I don't know if you have anything different
19 to say, but I wanted to make sure you have an opportunity to do
20 that.

21 Obviously, Rule 29 standard is different than the
22 ultimate question about whether he is or is not guilty. So if
23 either side wants to make any closing argument they are welcome
24 to do so.

25 Mr. Keen?

1 MR. KEEN: Yes, Your Honor. Briefly.

2 Your Honor, what I hope to do for my closing, so I am
3 not belaboring the point, is I wanted to talk just about a
4 couple of the factors in the jury instructions and then also
5 just link it into some of the evidence that we have already
6 presented.

7 THE COURT: Okay.

8 MR. KEEN: I am going to be reading from pattern
9 instruction 082, in particular. The factors that are listed in
10 there, which, as the Court knows, is similar to the *Dost*
11 factors.

12 When we are looking at the first factor that's to be
13 considered about whether a visual depiction is a lascivious
14 exhibition we can look at the overall content.

15 In this case, as we talked about, Exhibit 13, the
16 summary chart, there are a number of videos and a number of
17 screenshots of those videos of the two boys that are alleged to
18 be victims in Counts One and Two.

19 The overall content of those videos is the boys go
20 into the bathroom, unzip their pants, urinate, put their pants
21 back on, and then the video stops.

22 That's important to note because then when we talk
23 about the screenshots --

24 THE COURT: You are talking about videos plural. Just
25 one child is on the video, correct?

1 MR. KEEN: Well, there is the two -- okay. There is
2 the video --

3 THE COURT: The two videos are probably identical,
4 aren't they? The two videos we just watched at the end?

5 MR. KEEN: They appear to be identical but they are
6 different file sizes and then the hash values are different, so,
7 technically they are different videos.

8 THE COURT: But they are -- it was one incident --

9 MR. KEEN: It's the same --

10 THE COURT: -- represented on two different digital
11 files?

12 MR. KEEN: Correct. It's the same --

13 THE COURT: It certainly looked identical.

14 MR. KEEN: They look identical. We are not saying he
15 recorded the child more than once -- that child.

16 The other video we don't have, and that's
17 KVID 0064~3.mp4, but we do have a screenshot created using the
18 VLC player from that video. And we also have the other file
19 that starts with the 1616.

20 The Court can deduce from the screenshot that there
21 was another video created of the child in a black jacket
22 urinating in the church bathroom just as much. We just don't
23 have the video anymore because it was deleted from the device
24 and it wasn't backed up, according to the chart on Exhibit 13.

25 What I am pointing out is, Mr. High recorded two boys

1 in a bathroom at different times urinating. And that's the
2 overall content.

3 But then when you look at the screenshots created of
4 the videos that either existed, or currently exist, what he
5 created were still shots of what I would suggest is the moment
6 in the video where the boys have their penis into their hand.
7 He didn't create a screenshot of the first half of the video
8 where their pants were zipped up, or the second half after the
9 urination where the pants are zipped up.

10 The screenshot that Mr. High created:
11 KVID 0064~3.mp4.jpg, or the KVID 1359~3.mp4.jpeg, or KVID
12 1359~4.mp4.jpeg, or the two files that start with 1616. If you
13 look at those in the red binder -- which I am not going to hold
14 up for you, Your Honor, but --

15 THE COURT: No. Just a minute. Let me see where my
16 red binder is.

17 Which one, Mr. Keen.

18 MR. KEEN: 10B16, which is KVID 1359~4.mp4.jpeg. And
19 then 10B17, those screenshots are the moments in time on the
20 video where the boys' penises are visible and in hand.

21 And the reason why that's important is if the Court
22 were to -- going back to the -- just a moment, Your Honor. I am
23 trying to do it without necessarily displaying this everywhere.

24 Looking at 2C, which is the Synchronoss production.
25 It's 2C15. And I will note 2C13 and 2C14 are the --

1 THE COURT: 2C15 you are saying?

2 MR. KEEN: One-five. Yes, sir. That's a different --
3 that's not these boys. That's a different boy. But if you
4 notice that picture, that Mr. High possessed, which the file
5 name is a 1616 file. Similar to the two of the boys, which are
6 the preceding two, 2C13 and 2C14; what it appears is that
7 Mr. High created a still shot that mimics 2C15, which is another
8 image of child pornography of a boy in a bathroom.

9 The point I am trying to make is this is consistent
10 with his collection of child pornography, which was in
11 Count Three.

12 Then if you look at the other factor that can be
13 considered in the jury instructions, whether the child is
14 partially clothed or nude, the videos overall include both the
15 children are clothed and then nude at a particular point in the
16 video. The particular screenshots Mr. High created are at the
17 moment where the child's penis is fully visible and the child is
18 semi-nude.

19 So I am pointing that out because the screenshots were
20 created one using VLC and one using another program, according
21 to Mr. Pierce, and they were found on multiple devices or in the
22 cloud server. So that's a factor.

23 Also the defendant captured these boys on video and
24 then made the screenshots from them in a place where the
25 children would be unclothed. They were in a bathroom, which is

1 a private setting. He didn't choose to photograph them on the
2 church playground or in the church -- in the common areas, or
3 any other part of the church. What he chose to videotape was
4 the children in a bathroom, which is a private setting, which
5 is, as Ms. Weiss indicated earlier, and as the Court can use
6 common sense, it can be a location that's the subject of sexual
7 activity or a sexually explicit setting.

8 The other thing I wanted to point out to the Court is
9 this last factor that I want to talk about which is whether the
10 depictions appear to have been designed to elicit a sexual
11 response in the viewer, and can that viewer, we would submit, be
12 Mr. High himself.

13 If you look at those videos and compare them to the
14 other videos that are in evidence you can see a striking
15 similarity that it appears that Mr. High was recreating his
16 child pornography collection with the boys that are alleged to
17 be victims in Counts One and Two.

18 I don't want to -- I know the Court doesn't want me to
19 plug in the laptop but there is an addition to the video that
20 Your Honor -- the videos Your Honor has seen --

21 THE COURT: You may do that. I didn't -- we didn't do
22 it before because it wasn't coming up for some reason. But if
23 you have it now and can do it just on my screen and the counsel
24 screens that would be fine.

25 MR. KEEN: Oh, okay. I believe what I have on here is

1 innocuous at the moment. I want to confirm everybody can see
2 what I have on my screen before I change it.

3 If you could do the Court and the counsel table
4 screens, please.

5 THE COURTROOM DEPUTY: You want counsel table? You
6 got it hooked up there?

7 MR. KEEN: I have it hooked up here but if you can
8 display it for defense counsel and the Court.

9 THE COURTROOM DEPUTY: This is probably -- we are
10 getting a white screen right now. It's not coming through.

11 (Pause in proceedings.)

12 MR. KEEN: Okay. There you go.

13 THE COURT: Will someone confirm it's not --

14 MR. KEEN: It's not there.

15 THE COURT: Okay.

16 MR. KEEN: What I wanted to show the Court from
17 Exhibit 2D --

18 THE COURTROOM DEPUTY: That one is turned off. That's
19 why they are sitting on this side of the table.

20 THE COURT: Oh, okay. Thank you.

21 MR. KEEN: So I am showing the Court what was on
22 Exhibit 10D, which are the videos that came from the 6910.

23 One of the files that I didn't play ends in 82139.
24 Hopefully, if I play this one...

25 (Video played.)

1 MR. KEEN: I am going to stop it there. I am at the
2 one minute mark.

3 As the Court can see, that's a video that appears to
4 have been taken secretly of a boy peeing in a bathroom. That
5 was one I didn't necessarily play earlier. But all of these
6 videos all are consistent with what Mr. High had produced, which
7 is boys peeing in a bathroom. And that appears to be his
8 intent, which is one of the things the Court can consider.

9 If we look at the -- look back into the red binder,
10 the Court can thumb through the pictures. As you probably noted
11 already, there is a number of still shots of boys in the
12 bathroom doing various sex acts, or just standing nude, lewd
13 exhibition. So our evidence that Mr. High was intending to
14 produce the child pornography material, or looking at that one
15 factor is that whether the depiction appears to be designed to
16 elicit a sexual response from the viewer can be found in what
17 his child pornography collection was primarily consisting of.

18 The other thing I wanted to point out with respect to
19 these images of the boys that are summarized in Exhibit 13 is
20 Mr. Pierce had discussed file paths for the Court.

21 Exhibit, I believe it's, 10A, which was the full
22 Cellebrite report for the Kycoera 6910 in evidence. I have it
23 loaded up -- it takes a little bit of time to load, Your Honor,
24 so we loaded it separately during the break.

25 I believe you can see that, Your Honor. Is that

1 right?

2 THE COURT: I can see -- I guess this is the
3 Cellebrite analyzer.

4 MR. KEEN: Yes.

5 If you go to the file system on the left hand side,
6 and you click on it, and you go down to, as Mr. Pierce had
7 discussed earlier, there is the file structure under media. And
8 then you go down to pictures. These are all those user-created
9 subfolders that Mr. Pierce testified about earlier, including
10 BB as in boy-boy. BB-8. There is one that says "Bible." There
11 is one entitled "RB," as in real boy screenshots. And then
12 there is a subfolder titled "XXX."

13 The reason I am pointing this out to the Court, you
14 can see that under the subfolder RB, as in real boy, the file
15 name KVID 1359~3.mp4 and KVID 1359~4.mp4 was stored there.

16 Now there is a little X in there and it shows zero
17 flight. So it's deleted. This is the artifact of those videos.

18 But those videos are stored within a folder, along
19 with the 0064~3.mp4 video, which is the other boy -- the boy in
20 the black jacket.

21 As well as if we look under the subfolder titled
22 "XXX," KVID 1359~4.mp4 is stored there. And if you look at the
23 other files within that XXX folder, for instance, the one right
24 underneath it, the folder that Mr. High chose to store that
25 video, 1359~4, was stored along with other videos, including

1 V Camp Skype 14-year-old and 10-year-old brothersjerksuck.mp4.

2 So, again, the evidence of Mr. High's state of mind,
3 and whether these images that he captured of these boys convey
4 sexual -- I'm sorry -- have been designed to elicit a sexual
5 response, evidence of that can be found specifically in the way
6 that Mr. High chose to not only screenshot them but also how he
7 chose to store them with the other, quote, traditional child
8 pornography material.

9 It wasn't as though -- again, if you go back to what
10 other reason would there be for Mr. High to have videotaped boys
11 in a bathroom stall? There is no common sense explanation other
12 than, in his mind, he wanted to recreate what he had already
13 obtained off the internet, which was found in this other
14 material. And that shows why he is obviously guilty of the use
15 of a child counts.

16 The other thing I wanted to also note for the Court is
17 that, as was briefly talked about during the JOA argument, you
18 know, we also have this attempt crime that's in the statute and
19 it's also been alleged in the indictment. And if for some
20 reason Your Honor finds that the defendant did not use the
21 children to produce the sexually explicit content, because you
22 don't believe that it meets that standard, or those factors, we
23 would still argue that he attempted to use the children to
24 produce those images which still makes him guilty of
25 Counts One and Two.

1 Thank you.

2 THE COURT: Thank you, Mr. Keen.

3 MR. PONALL: Judge, it's our position that the
4 state -- or the government has failed to meet its heavy burden
5 of establishing beyond a reasonable doubt all of the elements in
6 this case.

7 Specifically they failed to show that Mr. High
8 intended to create a depiction of sexually explicit conduct, or
9 that there actually is a depiction of sexually explicit conduct
10 in this case with regard to the images and videos relied on for
11 Counts One and Two.

12 I think it's important to note, and it reflects the
13 deficient nature of the government's evidence, that you are
14 hearing a lot more argument about other images than you are
15 about the images that actually depict the two minors described
16 in Counts One and Two.

17 It's impossible to conclude, I think, under these
18 facts that Mr. High had some sort of expectation that sexually
19 explicit conduct was going to occur in that stall. The only
20 reasonable thing he could expect to occur in that stall was a
21 child urinating. A child urinating by itself is not sexually
22 explicit conduct.

23 The government is asking you to use evidence of other
24 crimes, possession of child pornography, to bolster its case and
25 cure deficient nature of the evidence its submitting to you to

1 support the verdict.

2 I am asking the Court not to do so.

3 The mere fact that the video included the minors
4 holding their penis while they urinating -- it's part of the
5 natural act of urinating. There is nothing sexual about that.

6 The government wants you to compare it to 2C15, which
7 appears to depict a child with an erect penis and is certainly
8 more graphic and distinct in many ways from the photos they rely
9 on to support Counts One and Two.

10 Again, the government is asking, repeatedly, relying
11 on other evidence of crimes to support its verdict. They cannot
12 use that to support the verdict. It does not rise to the level
13 of beyond a reasonable doubt.

14 The Court should find Mr. High not guilty on these two
15 counts.

16 Thank you.

17 THE COURT: Thank you, Mr. Ponall.

18 You are entitled to rebuttal if you'd like, Mr. Keen.

19 MR. KEEN: No, Your Honor. I don't believe that's
20 necessary.

21 THE COURT: Well, I am going to go ahead and announce
22 the verdict right now.

23 I will start off by saying that I may have introduced
24 some confusion during the Rule 29 argument when I was talking
25 about this alternative definition that applies to certain

1 categories of child pornography offenses for sexually explicit
2 conduct. It's not a helpful point to make. It doesn't have
3 anything to do with this case.

4 All sides agree that the definition of sexually
5 explicit conduct here is what's found in 18 USC 2256(2)(A).

6 So to the extent I added any confusion by -- the point
7 I was making was that some of these cases are different, maybe
8 if they are talking about child pornography possession, but at
9 any rate, that's the definition.

10 So the defense requested before I ruled that I provide
11 specific findings so I am going to do that.

12 I do find the government has met its burden as to both
13 Counts One and Two, and so I do find Mr. High is guilty of both
14 of those counts.

15 Many of the facts here are stipulated to. And I do
16 find that the government has proven beyond a reasonable doubt
17 each element of the crimes as to each of the two counts.

18 First, we do have an actual minor as to two of the two
19 counts. That person is under 18. That's stipulated to. But
20 it's also clear in the photo that the person is under 18 -- both
21 of the people were under 18. We also have testimony that I find
22 credible to that end. But that's stipulated at any rate.

23 Second, it's also stipulated that the two minor
24 victims were used for purposes of creating visual depictions.
25 There is no dispute about that. At any rate, it is stipulated.

1 And, third, the materials used to produced the images,
2 namely the camera, did move in interstate commerce. That's been
3 stipulated to also.

4 So really what's in dispute, and what's been in
5 dispute throughout the day is whether the defendant used the
6 children to engage in sexually explicit conduct for the purpose
7 of producing a visual depiction.

8 No question that he used them for a purpose of
9 producing a visual depiction. The question is was he using them
10 to engage in sexually explicit conduct.

11 I find that he did as to each of the two.

12 Some of the facts, even as to this, really aren't in
13 dispute in terms of what happened. Neither side is contending
14 that the children were intentionally displaying themselves in a
15 sexual manner, or that the children were behaving in any lustful
16 way or in any way that would connote sexual activity. They were
17 simply using the bathroom in an ordinary way. That's my
18 finding.

19 I think it's clear in the photos and videos.

20 But -- and, again, the statute talks about other
21 things that have no application here: Intercourse,
22 masturbation, bestiality. So really it is just whether there
23 was a lascivious exhibition of the anus, genitals or pubic area
24 of any person. That's what the statute says is one way of
25 meeting the sexually explicit conduct.

1 Much of the argument on the defense side has been
2 that, as a matter of law -- we discussed this at length in the
3 Rule 29 discussion -- that minors who are engaging in sort of
4 otherwise innocuous conduct, like going to the bathroom, cannot,
5 as a matter of law, constitute lascivious exhibition of the
6 genitals.

7 There are cases that support that view. We talked at
8 length about the *Hillie* case -- the recent Court of Appeals
9 decision from the DC Circuit.

10 There, the Court construed the term "lascivious
11 exhibition" to mean -- and I am quoting from the case here --
12 that the minor displayed his or her anus, genitalia, or pubic
13 area in a manner connoting that the minor, or any person, or
14 thing appearing with the minor in the image exhibits sexual
15 desire or an inclination to engage in any type of sexual
16 activity.

17 That's how the DC Circuit interpreted that statute.

18 I, of course, am bound by the Eleventh Circuit's
19 interpretations of that statute and the Eleventh Circuit law,
20 generally, and in *Holmes* they explicitly rejected the view that
21 is set out in the *Hillie* decision.

22 There the Court said that depictions of otherwise
23 innocent conduct by a minor can constitute the lascivious
24 exhibition of the genitals or pubic area based on the actions of
25 the individual who is creating the depiction.

1 That's where the factual issue here is.

2 And I do find that the defendant, looking at his
3 actions and what he did in creating this depiction, I do find
4 that it was a lascivious exhibition of the genitals.

5 First, I do find that the defendant has a sexual
6 interest in children. That's clear from the photos that he
7 collected and the videos that he collected. They are all here
8 in the notebook. There are a lot of them in evidence. I won't
9 describe them in detail, but it's clear that he has a sexual
10 interest in young boys, particularly, in young boys touching
11 their own penises. There are many, many examples of this in the
12 photos.

13 So this does support my conclusion that his purpose in
14 obtaining the photos was to add to this collection. It is clear
15 that boys are expected, in a bathroom, to touch their penises
16 while urinating. And that's what this defendant, I find, would
17 have reasonably expected to capture in these photos that he
18 took.

19 We talked about this some in the Rule 29 discussion,
20 but if he wanted children without exposing their penises,
21 pictures of them, there were plenty of other opportunities to
22 take them. So he took them over the bathroom stall at a time
23 where children would be exposing themselves that way. And I do
24 find that that was his purpose.

25 I also find there is no other logical purpose for

1 taking the photos other than to capture the boys' private areas.

2 The manner in which the photos were taken supports
3 this, too.

4 It is true that there is not evidence that he zeroed
5 in, precisely, on the private areas but he did position the
6 camera over where the toilet area would have been, which is
7 exactly where the boys would have been, and, in fact, were
8 exposing their penises. So he was pointing the camera in the
9 right direction and I do find that's the area that he was after.

10 Again, there is nothing he could do really other than
11 to aim to the middle of the stall, which is exactly where these
12 boys would be exposing their private areas, or their private
13 areas would be visible to someone taking the picture.

14 I have considered all the context surrounding this and
15 I do find that the defendant, as the producer of these images
16 here, did intend the picture to elicit a sexual response.

17 I have taken into consideration the fact that the
18 photos were on the same devices and in the same cloud storage
19 area with his regular child pornography collection.

20 I do find that he had these organized in user-created
21 folders as the child pornography that he had from the Internet,
22 or downloaded from the Internet, or otherwise collected along
23 with these pictures.

24 Again, the child pornography collection that exists
25 does include a lot of photos of boys holding their penises. A

1 lot of photos are of boys in bathrooms, including, at least that
2 we have mentioned, the nude boy on the toilet.

3 There was another one of a boy above the toilet, 2C15,
4 that both sides referenced.

5 I say "nude." I should be more precise. It was a boy
6 by the toilet with an exposed penis -- holding his penis.

7 Again, there is no plausible non-sexual purpose for
8 taking these pictures.

9 You look at the *Holmes* decision, and the other
10 Eleventh Circuit cases, and there was some discussion about this
11 too about what does he do after he takes them. I find that that
12 supports this conclusion, too.

13 I do find that after taking initial the videos
14 Mr. High did later use a software device to capture screenshots
15 of the photos -- or of the videos. These are the still photos
16 that are in evidence.

17 So, again, this is not something that he just took the
18 videos. After doing that he grabbed screenshots.

19 Obviously, the evidence only has the video of one of
20 the two boys. It's in there twice. I think it's the same
21 video. Maybe a different video file but the same conduct. But
22 I watched that video all the way through and the boy does what
23 children do when urinating in the bathroom. He goes in. Pulls
24 down his pants. At that point his penis is exposed and in his
25 hand. He urinates. Pulls up his pants and leaves, in a very

1 ordinary way.

2 The screenshots that Mr. High collected captured him
3 at the very moment when the penis was the most exposed. In
4 other words, if someone were trying to create an image of a boy
5 holding his penis out of this video the screenshot that he
6 captured, at least one of them, is the screenshot that would
7 highlight that best.

8 So I do find that the post-video actions support the
9 conclusion that his purpose in gathering this was to create a
10 lascivious exhibition.

11 I would -- even if he had not done the screen clips,
12 based on everything else I have said, I would still find him
13 guilty as to both counts. But I do find that what he did after
14 capturing the videos further supports this conclusion.

15 I have already talked about this but I do think the
16 manner in which they were created with the user-created folders
17 on the devices and keeping these nude photos in the same
18 collection of other items -- boys in similar circumstances.

19 I will note, again, you know, this is -- I think the
20 government acknowledges that under the DC Circuit case we have
21 discussed, *Hillie*, which looks just from the perspective of the
22 child in the pictures and not from the perspective of the person
23 taking the pictures, that would be a different outcome. But,
24 again, I am bound by *Holmes*. And I do note that there are some
25 unpublished decisions -- some of these we have talked about

1 already -- that are consistent with the legal rule that *Holmes*
2 announced.

3 *Walker* we talked about where a janitor put a phone up
4 to a sink. Again, the question was, what's the focus of the
5 janitor's intent as the producer.

6 *Rodriguez-Fernandez* we talked about also.

7 These are unpublished and those do not bind the Court
8 here. But they are consistent *Holmes*, which does bind the
9 Court.

10 I am not suggesting that *Holmes* requires this outcome
11 on the facts. I am saying that *Holmes* sets up the law that
12 leads to this.

13 But it is the fact finding based on the evidence in
14 this case that Mr. High's purpose was to create this lascivious
15 exhibition.

16 There has been some discussion, too, on the Rule 29
17 about you can't impute someone's motives on to a picture. And
18 there was some discussion in some of the cases about you could
19 have a pedophile who is sexually interested in children in
20 swimsuits -- ordinary swimsuits. And that doesn't mean that an
21 ordinary catalog filled with such swimsuits becomes child
22 pornography.

23 But, here it's a little bit different because the
24 offense is not the possession of the images. The offense is the
25 use of the children. And when we are talking about use of the

1 children the intent very much makes a significant difference.

2 You could imagine a physician, a pediatrician, who has
3 a need -- a legitimate medical need -- to manipulate a child's
4 genitals in a certain way. And you could have a pedophile that
5 does the exact same handling of the genitals but for a very
6 different purpose and be very much focused on the intent of the
7 person touching the child's genitals. And I don't think anyone
8 suggests that the motives don't matter when you just look at the
9 manner the touching occurs.

10 Again, we do have a display of the private area. And
11 we have a person who was setting that up, using the children in
12 that way, to create these images, this display of the private
13 area of the children holding their penises.

14 So, again, even if I did agree with you that the
15 producer's intent doesn't matter, I am bound by the Eleventh
16 Circuit which holds otherwise. And I do find that this
17 producer's intent, Mr. High's intent, was to create lascivious
18 images -- images of lascivious conduct.

19 His intention, I do find, was to create lascivious
20 exhibition of the genitals or pubic area. That's for all of
21 those reasons I have talked about.

22 I will also note that I did consider the factors laid
23 out in the Eleventh Circuit jury instructions. Those are
24 factors that the defense correctly points out it's not clearly
25 established that those so-called *Dost* factors -- and they are a

1 little bit different here -- are dispositive. But I considered
2 obviously the content of the material. I discussed that at
3 length.

4 The focal point is on the pubic area in the
5 screenshots. Again, they were captured at a time to do where
6 they were best displayed.

7 And, again, I do find that the defendant designed
8 these photos to elicit a sexual response in himself as the
9 viewer based on his sexual interest in these types of photos,
10 which I find the government has proven.

11 Obviously, the children were partially clothed but had
12 exposed penises. That's another factor here.

13 So, again, Eleventh Circuit says lasciviousness is not
14 a characteristic of the child photographed, but of the
15 exhibition which the photographer sets up for an audience that
16 consists of himself or like-minded pedophiles. That's from the
17 *Walker* decision which is quoting *Holmes*, which itself is
18 favorably quoting a Ninth Circuit case.

19 Here I do find that what the defendant set out was to
20 elicit the exhibition of these two boys' private areas and so I
21 find that the government has proven its case as to each of those
22 two counts beyond a reasonable doubt.

23 And I do find the defendant guilty as to both counts.

24 Those are the findings.

25 Are there any requests for additional findings from

1 either side? Mr. Ponall?

2 MR. PONALL: Just for the record, it's inherent in the
3 Court's ruling but I would like the Court to make it implicit on
4 the Rule 29 motion.

5 THE COURT: Yes, sir. The Rule 29 motion is denied
6 for the same reasons I just set out.

7 MR. PONALL: No other findings are necessary.
8 We object based on our previous filing.

9 THE COURT: Sure.

10 Mr. Keen?

11 MR. KEEN: Nothing further requested by the
12 government, Your Honor.

13 THE COURT: Here is what happens from here, Mr. High,
14 based on the verdict that I just announced.

15 I do adjudicate you guilty of the other two counts.
16 You were adjudicated guilty of Count Three this morning. So you
17 now stand adjudicated guilty of all three counts.

18 There will be a sentencing. That will be the next
19 step. I had mentioned this morning it will be in December. I
20 understand from our courtroom deputy that there were schedule
21 conflicts and that all sides would rather it be in January.

22 Is that correct?

23 MR. PONALL: Yes, Your Honor.

24 MR. KEEN: Yes, Your Honor.

25 THE COURT: January 9th. Does that work for both

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Any redaction of personal data identifiers pursuant to the Judicial Conference Policy on Privacy are noted within the transcript.

/s/ Lisa C. Snyder 2/13/2023

Lisa C. Snyder, RPR, CRR Date
Official U.S Court Reporter

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