

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN MILLETTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX

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United States District Court
District of Maine

U.S. DISTRICT COURT
PORTLAND, MAINE
RECEIVED AND FILED

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE P 12: 13

V.

Kevin Millette

Case Number: 2:16CR00004-001

DEPUTY CLERK

USM Number: 11500-036

David R. Beneman, Esq.

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) One of the Information
 pleaded nolo contendere to count(s) _____ which was accepted by the court.
 was found guilty on count(s) _____ 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. § Possession of Child	Possession of Child	November 18, 2015	One
2252A(a)(5)(B) and 18 U.S.C. § 2252A(b)(2)	Pornography		

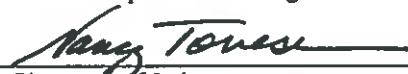
The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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 shall notify the court and United States attorney of material changes in economic circumstances.

June 6, 2016

Date of Imposition of Judgment



Signature of Judge

Nancy Torresen, U.S. Chief District Judge

Name and Title of Judge

6/6/2016

Date Signed

DEFENDANT: Kevin Millette
CASE NUMBER: 2:16CR00004-001**IMPRISONMENT**

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of 120 months.

The court makes the following recommendations to the Bureau of Prisons:
The defendant be designated to FMC Devens for purposes of his medical and mental health issues as well as sex offender treatment, and family visitations.

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 MARSHALBy _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Kevin Millette
CASE NUMBER: 2:16CR00004-001**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of 7 years.

The Defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two additional drug tests during the term of supervision, but not more than 120 drug tests per year thereafter, as directed by the probation officer.

- The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. (Check, if applicable.)
- The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments of this judgment.

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

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician. This provision does not permit the use of marijuana even with a prescription, without further permission of the Court or probation officer.
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Kevin Millette
CASE NUMBER: 2:16CR00004-001**SPECIAL CONDITIONS OF SUPERVISION**

- 1) Defendant shall submit to periodic random polygraph examinations as directed by the probation officer to assist in treatment and/or case planning related to behaviors potentially associated with sex offense conduct. No violation proceedings will arise solely on the defendant failure to pass a polygraph examination, or on the defendant refusal to answer polygraph questions based on 5th amendment grounds. Such an event could, however, generate a separate investigation. Defendant shall pay/co-pay for such services to the supervising officer satisfaction;
- 2) Defendant shall fully participate in sex offender treatment as directed by the supervising officer. Defendant shall pay/copay for services during such treatment to the supervising officer's satisfaction. He/she shall abide by all policies and procedures of that program;
- 3) Defendant shall participate and comply with the requirements of the Computer and Internet Monitoring Program (which may include partial or full restriction of computer(s), internet/intranet, and/or internet-capable devices), and shall pay for services, directly to the monitoring company. The defendant shall submit to periodic or random unannounced searches of his/her computer(s), storage media, and/or other electronic or internet-capable device(s) performed by the probation officer. This may include the retrieval and copying of any prohibited data. Or, if warranted, the removal of such system(s) for the purpose of conducting a more comprehensive search;
- 4) A United States probation officer may conduct a search of the defendant and of anything the defendant owns, uses, or possesses if the officer reasonably suspects that the defendant has violated a condition of supervised release and reasonably suspects that evidence of the violation will be found in the areas to be searched. Searches must be conducted at a reasonable time and in a reasonable manner. Failure to submit to a search may be grounds for revocation of release;
- 5) Defendant shall provide the supervising officer any requested financial information;
- 6) Defendant shall report to the supervising officer any financial gains, including income tax refunds, lottery winnings, inheritance, and judgments, whether expected or unexpected. Defendant shall apply them to any outstanding court ordered financial obligations;
- 7) Defendant shall not incur new credit charges or open additional lines of credit without the supervising officer's advanced approval; and
- 8) The defendant shall participate in workforce development programs and services as directed by the supervising officer, and, if not employed, shall perform up to 20 hours of community service per week. Workforce development programming may include assessment and testing; educational instructions; training classes; career guidance; and job search and retention services.

DEFENDANT: Kevin Millette
CASE NUMBER: 2:16CR00004-001

CRIMINAL MONETARY PENALTIES

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

<u>Count</u>	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
1	\$ 100	\$	\$39,000
Totals:	\$100		\$39,000

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 (including community restitution) to the following payees in the amount listed below.

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>
8 Kids (John Does II, III, IV, V) The Law Office of Erik Bauer in Trust for the 8 Kids Series 215 Tacoma Avenue South Tacoma, WA 98402		\$12,000	1
Angela Lenahan Law, P.L.L.C., F/B/O Angela 2655 Villa Creek, Suite 222 Dallas, TX 75234		\$3,000	1
At School Carol L. Hepburn, P.S., in trust for "Violet" 200 First Avenue West Suite 550 Seattle, WA 98119		\$3,000	1
TOTALS			

- 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:

DEFENDANT: Kevin Millette
CASE NUMBER: 2:16CR00004-001ADDITIONAL RESTITUTION PAYEES

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Cinderblock Blue The Marsh Law Firm PLLC Attn: Jane P.O. Box 4668 #65135 New York, NY 10163-4668	\$	\$3,000	1
Cindy Cusack, Gilfillan & O'Day, LLC for "Cindy" 415 Hamilton Boulevard Peoria, IL 61602		\$3,000	1
J_Blonde Carol L, Hepburn, P.S., in trust for Solomon 200 First Avenue West Suite 550 Seattle, WA 98119-4203		\$3,000	1
Jan_Socks (Sierra, Skylar, Sally) Carol L, Hepburn, P.S., in trust for Sierra, Skylar, Sally 200 First Avenue West Suite 550 Seattle, WA 98119-4203		\$9,000	1
Marineland Carol L, Hepburn, P.S., in trust for Sarah 200 First Avenue West Suite 550 Seattle, WA 98119-4203		\$3,000	
TOTALS	<u>\$</u> _____	<u>\$</u> _____	
		\$39,000	

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

DEFENDANT: Kevin Millette
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SCHEDULE OF PAYMENTS

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

- A Lump sum payment of \$39,100 due immediately, balance due
 - Any amount that the defendant is unable to pay now is due and payable during the term of incarceration. Upon release from incarceration, any remaining balance shall be paid in monthly installments, to be initially determined in amount by the supervising officer. Said payments are to be made during the period of supervised release, subject always to review by the sentencing judge on request, by either the defendant or the government.
 - not later than _____, or
 - in accordance with C, D, or 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

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and 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:

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

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,)
)
)
v.) Docket No. 2:16-cr-00004-NT
)
KEVIN MILLETTE,)
)
)
Defendant.)

ORDER ON MOTION FOR COMPASSIONATE RELEASE

The Defendant Kevin Millette filed a *pro se* motion for compassionate release on May 19, 2020 (ECF No. 68). After reviewing the motion, I appointed counsel to represent the Defendant (ECF No. 71). Appointed counsel filed the pending amended motion for compassionate release (“**Def.’s Am. Mot.**”) (ECF No. 74), which the Government opposes (ECF No. 75). I have also considered the Government’s supplemental memoranda (ECF Nos. 76, 85), the Defendant’s supplemental memorandum (ECF No. 84), and the Defendant’s reply briefs (ECF Nos. 77, 86). For the reasons that follow, the Defendant’s amended motion for compassionate release (ECF No. 74) is **GRANTED**.

PROCEDURAL BACKGROUND

On January 28, 2016, the Defendant pleaded guilty to one count of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B). Presentence Investigation Report (“**PSR**”) ¶ 4 (ECF No. 70-1). On June 6, 2016, I sentenced Mr. Millette to the mandatory minimum term of 120 months imprisonment, followed by

84 months of supervised release, and I ordered him to pay \$39,000 in restitution. Judgment (ECF No. 37).

Mr. Millette is incarcerated at the Federal Correctional Institution, Danbury, (“FCI Danbury”). Mr. Millette first requested compassionate release from the Warden, but this request was denied. Def.’s Am. Mot. Ex. 3, at 1 (ECF No. 74-3). Mr. Millette’s request for reconsideration of the Warden’s decision was also denied. Def.’s Am. Mot. Ex. 3, at 2–5. The Government acknowledges that Mr. Millette has exhausted his administrative remedies. Gov’t’s Resp. to Def.’s Mot. for Compassionate Release (“Gov’t Opp’n”) 7 (ECF No. 75).

ANALYSIS

Congress enacted the compassionate release statute¹ to allow district courts to modify sentences of imprisonment, as relevant here, upon finding that:

¹ Title 18, United States Code, Section 3582(c)(1)(A) governs “[m]odification of an imposed term of imprisonment.” Prior to the passage of the First Step Act of 2018, only the Director of the Bureau of Prisons (“BOP”) could move for modification of a sentence. *See United States v. Brooker*, 976 F.3d 228, 231 (2d Cir. 2020). In December of 2018, Congress amended § 3582(c) to allow inmates to seek a modification of an imposed term of imprisonment from the courts directly. *See First Step Act of 2018*, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239 (codified at 18 U.S.C. § 3582(c)(1)(A)). Section 3582 now provides that:

The court may not modify a term of imprisonment once it has been imposed except that—(1) in any case—(A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—(i) extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission

18 U.S.C. § 3582(c).

(1) extraordinary and compelling reasons warrant modification, (2) the modification accords with the § 3553(a) sentencing factors, and (3) the modification is consistent with “applicable policy statements” of the Sentencing Guidelines. In addition, Mr. Millette must provide an adequate plan for release. I address each part of the analysis in turn.

I. Extraordinary and Compelling Circumstances

Mr. Millette is a 48-year-old man with several chronic health conditions, including heart disease. Def.’s Am. Mot. 1–2. Mr. Millette suffered three heart attacks before his 39th birthday and has a stent implanted in an artery. Def.’s Am. Mot. 1–2; PSR ¶ 46. Additionally, Mr. Millette is obese and suffers from hypertension, high cholesterol, and various mental health conditions. Def.’s Supp. Mem. Supporting Mot. for Compassionate Release (“**Def.’s Supp. Mem.**”) 2 (ECF No. 84); PSR ¶¶ 46, 51; Def.’s Medical Chronology (ECF No. 74-1).

Mr. Millette’s medical conditions increase his risk of severe illness from COVID-19. The Centers for Disease Control and Prevention caution that individuals with certain underlying medical conditions, including “heart conditions” are at “increased risk of severe illness from the virus that causes COVID-19.” *See* Centers for Disease Control and Prevention, “COVID-19 (Coronavirus Disease), People with Certain Medical Conditions,” <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last visited Dec. 21, 2020) (emphasis deleted). Individuals with hypertension also “might be at an increased risk.” *Id.* (emphasis deleted). In addition, the Government now concedes that Mr. Millette’s obesity, at the very least, “presents an extraordinary and compelling reason

that may warrant compassionate release.” Resp. to Def.’s Supp. Mem. Supporting Mot. for Compassionate Release (“**Gov’t Supp. Opp’n**”) 1 (ECF No. 85). I find that Mr. Millette’s medical conditions likely make him more susceptible to complications from COVID-19.

FCI Danbury is reporting as of December 21, 2020, that there are ninety-five inmates and zero staff testing positive for COVID-19. Bureau of Prisons, COVID-19 Inmate Test Information, <https://www.bop.gov/coronavirus/> (last visited Dec. 21, 2020). FCI Danbury was the site of an early, severe COVID-19 outbreak last spring. Def.’s Am. Mot. 7. And the rapidly increasing numbers indicate that FCI Danbury may be on the verge of a second outbreak. The prison’s ninety-five current inmate infections are up from twenty-three inmate infections as recently as December 8, and five inmate infections one week prior. Status Report ¶ 2 (ECF No. 81). FCI Danbury also reports that eighty-two inmates and sixty-nine staff have recovered from COVID-19 and that one inmate died from the virus.

The Government describes all that the Bureau of Prisons (“**BOP**”) has done to try to prevent and contain the spread of COVID-19 within the walls of the federal prison system. Gov’t Opp’n 2–6. I do not opine on the adequacy or effectiveness of these efforts. However, it speaks for itself that inmate infections at FCI Danbury have more than quadrupled since last week, this being after last week’s numbers more than quadrupled from the week before. This is paradigmatic exponential growth. While the BOP may well be doing everything within its power to combat the spread of COVID-19 at FCI Danbury, it is apparent that these efforts are insufficient under

the circumstances. Rather than serve as evidence in support of the Government, this is evidence in support of the Defendant, because it shows that even despite BOP's best efforts, the virus is spreading rapidly at FCI Danbury. Mr. Millette's medical conditions, coupled with the increasing number of infections at FCI Danbury, constitute an extraordinary and compelling reason for release.

Because I find that Mr. Millette has established extraordinary and compelling reasons for a modification of his sentence, I go on to consider the § 3553(a) factors. *See* 18 U.S.C. § 3582(c)(1)(A).

II. Applicable 3553(a) Factors²

When I originally sentenced Mr. Millette for violating 18 U.S.C. § 2252A(a)(5)(B), his prior state conviction for Possession of Sexually Explicit Materials of Minor Under 12 triggered a ten-year mandatory minimum, pursuant to 18 U.S.C. § 2252A(b)(2). While I considered the § 3553(a) factors as I am always required to do, because of my obligation to impose the ten-year mandatory minimum, the § 3553(a) factors were somewhat beside the point. *See* PSR ¶ 33; 18 U.S.C. § 2252A(b)(2). I now review what I consider to be the applicable § 3553(a) factors in the context of the Defendant's motion.

² The parties do not address the 3553(a) factors in their briefing other than whether Mr. Millette poses a danger to the community if released. Gov't's Resp. to Def.'s Mot. for Compassionate Release 15–16 (ECF No. 75); Resp. to Def.'s Supp. Mem. Supporting Mot. for Compassionate Release 2–3 (ECF No. 85); Am. Mot. & Mem. in Support of Mot. for Compassionate Release 8–9 (ECF No. 74); Def.'s Supp. Mem. Supporting Mot. for Compassionate Release 5–7 (ECF No. 84).

A. Need for the Sentence to Reflect the Seriousness of the Offense & Provide Adequate Deterrence

I begin with the seriousness of the offense. There is no question that the possession of child pornography, particularly after a previous conviction for the same type of crime, is serious. The circulation of child pornography “is intrinsically related to the sexual abuse of children” and is itself harmful, separate and apart from the hands-on sexual abuse of a child. *New York v. Ferber*, 458 U.S. 747, 759–60 (1982). Mr. Millette’s crime involved downloading images and videos of minors engaged in sexual conduct, and he possessed a significant number of images and videos. PSR ¶¶ 5–11. While extremely serious, there was no evidence that Mr. Millette ever committed a contact offense or groomed a child with the intent to commit one. In addition, Mr. Millette fully accepted responsibility for his crime even before he was charged in this case. PSR ¶ 10.

Mr. Millette has already served over five years in prison. The BOP, having considered deductions for good conduct, lists a projected release date of May 25, 2024. Sentence Monitoring Computation Data (ECF No. 74-1). Accordingly, Mr. Millette has served almost fifty-one percent of the sentence I imposed and almost sixty percent of his sentence if good-time deductions are factored in. At the time that I sentenced Mr. Millette to a term of imprisonment, prison posed no greater risk to his well-being than to the average criminal defendant. Now, prison has become a more dangerous place for Mr. Millette given his health conditions and given that prisons, by their nature, put those who are incarcerated at a heightened risk of infection. *See United States v. Telson*, Case No. 16-80178-CR, 2020 WL 5742624, at *3 (S.D. Fla. Sept. 21,

2020) (“Due to the conditions under which inmates live, they are at extreme risk of infection once COVID-19 breaches prison walls.”). When I originally sentenced Mr. Millette, I “did not intend for his sentence to ‘include incurring a great and unforeseen risk of severe illness or death brought on by a global pandemic.’” *United States v. Carter*, No. 16-cr-156 (TSC), 2020 U.S. Dist. LEXIS 208639, at *3 (D.D.C. June 10, 2020) (quoting *United States v. Zukerman*, 451 F. Supp. 3d 329, 336 (S.D.N.Y. 2020)); *United States v. Weikel*, Criminal Case No. 16-20659, 2020 WL 6701914, at *5 (E.D. Mich. Nov. 13, 2020) (“While the nature of Weikel’s offense was undeniably serious, it did not merit a death sentence . . .”).

I find that under these circumstances, a sentence of sixty-one months is a significant sentence that adequately reflects the seriousness of the crime and affords adequate deterrence.

B. History and Characteristics of the Defendant

The § 3553(a) factors also require an examination of the history and characteristics of the Defendant. Mr. Millette was born out of wedlock, and he never met his biological father. PSR ¶ 39. His mother’s first husband physically abused him. PSR ¶ 40. He was sexually molested at the age of two by a family member and again between the ages of six and nine by a neighbor. PSR ¶ 41. Mr. Millette has a history of medical and mental health problems, including the heart conditions discussed above, but he also suffers from depression and suicidality. PSR ¶¶ 45–51.

Besides his prior state child pornography conviction, for which he received a ninety-day term of incarceration and two years of probation (resulting in two criminal history points), Mr. Millette’s only prior criminal history involved minor traffic-type

offenses from his teenage years (resulting in no criminal history points). PSR ¶¶ 30–33. Further, Mr. Millette has had no disciplinary infractions while at BOP, and he has continued to rehabilitate himself, completing BOP’s year-long Celebrate Recovery program and forty-week Resolve Program. Def.’s Am. Mot. 8; Def.’s Reply to Gov’t Resp. 1 (ECF No. 86).

C. Protection of the Public

Section 3553(a)(2)(B) requires me to consider the need to protect the public from further crimes of the defendant. As discussed above, Mr. Millette’s offense is serious, but he does not pose as significant a danger to the community as someone with a history of grooming children or touching them.

It is also significant that Mr. Millette has acknowledged that his proclivity for child pornography is problematic. And he did so at the time of his first contact with law enforcement in this case. This distinguishes Mr. Millette from many other child pornography offenders who refuse to recognize the harm caused by their conduct and who minimize their illicit and unacceptable behavior.

Robust supervised release conditions can be deployed to alleviate concerns as to the safety of the community. There are numerous conditions of supervised release that will help protect the community, including an internet monitoring program, participation in a sex offender treatment program, and regular polygraph examinations. Judgment 4. Further, Mr. Millette’s probation officer has the authority to conduct searches based on reasonable suspicion, and failure to submit to such a search constitutes grounds for a revocation of supervised release. These conditions of supervised release, as well as the supervision by Mr. Millette’s mother, with whom

he intends to live, will minimize the risks associated with the possibility that he will again seek out child pornography. In addition, I am imposing an additional condition of supervised release that will strictly limit his contact with minors.

Congress did not write child pornography offenders out of the compassionate release statute.³ Nor did Congress exempt prisoners serving a mandatory minimum sentence of imprisonment from the ability to seek compassionate release.⁴ With adequate conditions of supervised release, I can effectively mitigate the risk that Mr. Millette will reoffend. In the event that he does return to his past conduct, I, of course, retain the power to revoke his supervised release and return him to prison.

³ It is worth noting that multiple courts across the country have granted compassionate release to defendants who committed child pornography or other sexual offenses after determining that the defendants were at great risk for serious complications if they were infected with COVID-19. *See, e.g.*, *United States v. Hosek*, CR. 16-50111-JLV, 2020 WL 7318107, at *5–7 (D.S.D. Dec. 11, 2020) (sixty-five-year-old child pornography offender with family history of disease who had served approximately fifty-five percent of his sixty-month sentence); *United States v. Weikel*, Criminal Case No. 16-20659, 2020 WL 6701914, at *5–6 (E.D. Mich. Nov. 13, 2020) (sixty-eight-year-old child pornography offender with cardiovascular issues who had served slightly more than half of his ninety-six-month sentence); *United States v. Telson*, Case No. 16-80178-CR, 2020 WL 5742624, at *5–6 (S.D. Fla. Sept. 21, 2020) (child pornography offender with hypertension who had served approximately fifty-seven percent of his eighty-four-month sentence); *United States v. Lockhart*, No. 11 CR 231 (SJ), 2020 WL 4333010, at *3–4 (E.D.N.Y. July 29, 2020) (child pornography offender who had prior conviction for attempted rape where defendant had multiple health issues and had served approximately seventy-five percent of his 120-month sentence); *United States v. Watson*, Case No. 3:18-cr-00025-MMD-CLB-1, 2020 WL 4251802, at *3–4 (D. Nev. July 22, 2020) (child pornography offender with various health conditions who had served less than thirty percent of his forty-eight-month sentence); *United States v. Moit*, No. 2:17-CR-83-PPS, 2020 WL 4558953, at *3 (N.D. Ind. June 29, 2020) (child pornography offender with various health conditions who had served less than forty percent of his 108-month sentence); *United States v. Curtis*, Criminal Action No. 03-533 (BAH), 2020 WL 1935543, at *5–6 (D.D.C. Apr. 22, 2020) (member of sex trafficking ring with various health conditions who had served seventeen years of his life sentence).

⁴ *See United States v. Bess*, 455 F. Supp. 3d 53, 67 (W.D.N.Y. 2020) (“[T]his Court finds no indication in the text of section 3582(c)(1)(A) that courts are limited to offering compassionate release only to those inmates who have satisfied their statutory-minimum terms of incarceration.”). The Government has not argued that Mr. Millette is ineligible for compassionate release because he has not completed his mandatory minimum sentence, and I consider any argument to that effect to be waived.

D. The Sentencing Guidelines

Section 3553(a)(4) directs me to consider the sentencing guidelines. Mr. Millette, who had a total offense level of 28 and fell in a criminal history category II, PSR ¶¶ 28, 34, would have faced a sentencing guidelines range between 87 and 108 months,⁵ *see* U.S. Sentencing Guidelines Manual ch. 5, pt. A (U.S. Sentencing Comm'n 2014). Because of his prior state conviction, Mr. Millette's guideline range became the statutory minimum of 120 months. In addition, the United States Probation Office identified Mr. Millette's own history of sexual abuse as a child, history of depression and suicide attempts, his substance abuse history, and his medical conditions to be factors supporting a variance below the guideline range. PSR ¶ 79.

E. Unwarranted Sentencing Disparities

Section 3553(a) also requires consideration of the need to avoid unwarranted sentencing disparities. There is significant variation in the charging of individuals who possess child pornography within the District. Just last month, the Government chose not to charge a person who had previously been convicted of possession of child pornography after he had been caught possessing a flash drive containing child pornography while on supervised release. *See* Stipulation & Agreement, *United*

⁵ Even at the time of his original sentence, the guidelines for child pornography possession cases had come under criticism as being unduly harsh and not focused on particularly relevant factors, such as whether the defendant had ever had sexual contact with a minor. The United States Sentencing Commission has recognized that the sentencing guidelines are not working as intended in the context of offenders who commit non-production child pornography offenses and that § 2G2.2 of the Guidelines warrants revision. Presentence Investigation Report (“PSR”) ¶ 80 (ECF No. 70-1). This is because there are certain specific offense characteristics enhancements, such as use of a computer, that apply in virtually every case, with the end result that the guideline range for most offenders approaches or exceeds the statutory maximum. PSR ¶ 80.

States v. Whittenburg, No. 2:14-CR-82-NT, ECF No. 71 (D. Me. Nov. 4, 2020). In that case, the Government opted to treat the matter as a violation of the defendant's conditions of supervised release for which the Government recommended a sentence of twenty-four months. *See id.* Had the Government instead pursued that case as a second child pornography offense, it could have triggered the ten-year mandatory minimum. *See 18 U.S.C. § 2252A(b)(2).* I understand that the Government often possesses more information than the Court, and I am not criticizing the Government's charging decisions. But there exists a wide range of sentences being imposed on individuals convicted of possessing child pornography.

In light of the above, I conclude that a sixty-one-month term of imprisonment accords with the § 3553(a) factors.

IV. Consistency with Applicable Policy Statements by the Sentencing Commission

The United States Sentencing Commission's policy statement on compassionate release is found at § 1B1.13 of the sentencing guidelines. The Sentencing Commission, which has not had a quorum since the second quarter of fiscal year 2019, U.S. Sentencing Comm'n, *Annual Report 2–3, 2018, available at* <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018-Annual-Report.pdf>, has not revised § 1B1.13 in light of the passage of the First Step Act of 2018 (the “**First Step Act**”), *see United States v. Brooker*, 976 F.3d 228, 234 (2d Cir. 2020). Because the compassionate release statute only directs courts to consider “*applicable* policy statements issued by the Sentencing Commission,” 18 U.S.C. § 3582(c)(1)(A)(ii) (emphasis added), I need only

consider § 1B1.13 if it is in fact “applicable” to a compassionate release motion filed by a prisoner rather than by the BOP, *see United States v. Jones*, 980 F.3d 1098, 1107–08 (6th Cir. 2020).⁶

There is a “growing consensus in the district courts” that § 1B1.13 does not control where a compassionate release motion is filed by a prisoner. *United States v. McCoy*, No. 20-6821, --- F.3d ---, 2020 WL 7050097, at *7 (4th Cir. Dec. 2, 2020). *But see United States v. Hudec*, Criminal No. 4:91-1-1, 2020 WL 4925675, at *4 (S.D. Tex. Aug. 19, 2020); *United States v. Baye*, 464 F. Supp. 3d 1178, 1189–90 (D. Nev. 2020) (“While the First Step Act expanded the scope of who could bring [§ 3582(c)(1)(A)] motions, it did not affect the rest of [§ 1B1.13], including how the [Sentencing] Commission defined ‘extraordinary and compelling reasons,’ nor its partial delegation of this authority to the [BOP] Director.”). This Court and three others in the First Circuit are a part of that “growing consensus.” *See United States v. Calhoun*, No. 2:15-cr-00056-JDL-1, 2020 U.S. Dist. LEXIS 117527, at *3 (D. Me. July 1, 2020) (“[T]he Court’s authority to grant compassionate release is not limited by the policy statement’s definition of ‘extraordinary and compelling reasons’ warranting a reduction in sentence under 18 U.S.C.A. § 3582(c)(1)(A)(i) after the First Step Act.”); *United States v. Nelson*, Case No. 12-cr-111-PB-1, 2020 WL 6275232, at *1 (D.N.H. Oct. 26, 2020) (concluding the same); *United States v. Vigneau*, C.R. No. 97-cr-33-JJM-LDA, 2020 WL 4345105, at *3 (D.R.I. July 21, 2020) (“Because the Sentencing

⁶ Section 1B1.13 is “[t]he only policy statement that possibly could be ‘applicable’ ” to Mr. Millette’s compassionate release motion. *See United States v. McCoy*, No. 20-6821, --- F.3d ---, 2020 WL 7050097, at *7 (4th Cir. Dec. 2, 2020).

Commission's policy statement section 1B1.13 and Application Notes are now incompatible with the statute itself, the Court need not follow the outdated portion of this commentary that is contradictory to federal law."); *United States v. Pena*, 463 F. Supp. 3d 118, 127 (D. Mass. 2020) (describing the requirement of subdivision D that the BOP determine that an extraordinary and compelling reason exists as "vestigial and inoperative" after the First Step Act). The circuit courts to have addressed the issue agree that § 1B1.13 does not apply to motions filed by a prisoner. *See McCoy*, 2020 WL 7050097, at *7 ("By its plain terms . . . § 1B1.13 does not apply to defendant-filed motions under § 3582(c)(1)(A)."); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020) ("Section 1B1.13 addresses motions and determinations of the [BOP] Director, not motions by prisoners."); *Jones*, 980 F.3d at 1109 ("We now join the majority of district courts and the Second Circuit in holding that the passage of the First Step Act rendered § 1B1.13 'inapplicable' to cases where an imprisoned person files a motion for compassionate release."); *Brooker*, 976 F.3d at 235–37 ("Turning to the text of Guideline § 1B1.13, it is manifest that its language is clearly outdated and cannot be fully applicable.").

I agree with this "growing consensus" that § 1B1.13 is not an "applicable" policy statement, particularly since it does not reflect the Sentencing Commission's views in light of the passage of the First Step Act. Regardless of whether § 1B1.13 is "applicable," it still provides helpful guidance on how to analyze compassionate release requests. But the guidance that it offers in the prisoner-initiated motion context is almost entirely encompassed by the statutory mandate of § 3582(c). For

prisoners under seventy years old, § 1B1.13 requires a court to consider whether extraordinary and compelling reasons warrant a reduction, but § 3582(c) already mandates the same inquiry. *Compare* U.S. Sentencing Guidelines Manual § 1B1.13, *with* 18 U.S.C. § 3582(c)(1)(A)(i). Section 1B1.13 next requires consideration of whether a defendant is “a danger to the safety of any other person or to the community,” but this is already a factor in the § 3553(a) analysis required by § 3582(c)(1)(A). *Compare* U.S. Sentencing Guidelines Manual § 1B1.13, *with* 18 U.S.C. § 3582(c)(1)(A), *and* 18 U.S.C. § 3553(a)(2)(C). Finally, § 1B1.13 requires that any reduction be “consistent with this policy statement,” but this requirement is a nullity, because it is tautologically defined as being any motion filed by the BOP Director that is otherwise “consistent with this policy statement.” *See* U.S. Sentencing Guidelines Manual § 1B1.13 cmt. n.5.

An advisory note to § 1B1.13 contains helpful guidance as to what constitutes an “extraordinary and compelling reason” warranting release. *See* U.S. Sentencing Guidelines Manual § 1B1.13 cmt. n. 1 (U.S. Sentencing Comm'n 2018). But because the Government concedes that there exist extraordinary and compelling reasons in this case, whatever guidance Application Note 1(D) provides is beside the point.

V. Plan for Release

Finally, I must consider the acceptability of Mr. Millette’s release plan. I conclude that Mr. Millette has established an acceptable release plan. He intends to live with his parents in Alfred, Maine, on a three-acre property solely occupied by his parents. Def.’s Supp. Mem. 5. Mr. Millette’s parents are aware of his criminal history and can provide some level of supervision. There is no working computer in the home,

nor are there any current subscriptions to a video streaming service.⁷ Def.'s Supp. Mem. 5. Mr. Millette's brother has also offered him employment, which will allow Mr. Millette to begin to pay the \$39,000 in restitution that he owes. Def.'s Supp. Mem. 6. Mr. Millette's mother is also retired, so she can drive him to any counseling, treatment, or medical appointments. Def.'s Supp. Mem. 6. This is a release plan that will allow for adequate supervision of Mr. Millette and that will allow him to fulfill all conditions of his supervised release.

CONCLUSION

For the foregoing reasons, the Defendant's Amended Motion for Compassionate Release (ECF No. 74) is **GRANTED**. The Defendant's sentence is reduced to time served, and the Defendant is **ORDERED** released within twenty-one days of the date of this order upon the completion of any quarantine and COVID-19 testing protocols required by the BOP. Upon release from custody, the Defendant will complete the remainder of his sentence, including his eighty-four-month term of supervised release, as outlined in the original Judgment of this Court on June 6, 2016 (ECF No. 37). In accordance with 18 U.S.C. § 3583(e), I am also modifying Mr. Millette's supervised release conditions to include the following additional term: The defendant shall not associate, or have verbal, written, telephonic or electronic communication, with persons under the age of eighteen, except in the presence of a

⁷ The Government correctly points out that “[a]n offender seeking child pornography needs only a . . . device that has . . . a cellular connection to the internet” and does not necessarily need access to a home computer. Resp. to Def.'s Supp. Mem. Supporting Mot. for Compassionate Release 2 (ECF No. 85). However, in my view, this potential harm will be mitigated through the strict conditions of supervised release that I have imposed.

responsible adult who is aware of the nature of the defendant's background and current offense, and who has been approved by the probation officer. This restriction does not extend to incidental contact during ordinary daily activities in public places.

SO ORDERED.

/s/ Nancy Torresen
United States District Judge

Dated: December 21, 2020

United States District Court
District of Maine

UNITED STATES OF AMERICA

AMENDED JUDGMENT IN A CRIMINAL CASE

v.

KEVIN MILLETTE

Case Number: 2:16-cr-00004-NT-001

USM Number: 11500-036

Date of Original Judgment: 06/06/2016
 (Or Date of Last Amended Judgment)David R. Beneman, Esq.

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to Count One of the Information.
 pleaded nolo contendere to count(s) _____ which was accepted by the court.
 was found guilty on count(s) _____ 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. § 2252A(a)(5)(B) and 18 U.S.C. § 2252A(b)(2)	Possession of Child Pornography	November 18, 2015	One

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 shall notify the court and United States attorney of material changes in economic circumstances.

December 21, 2020
 Date of Imposition of Judgment

/s/ Nancy Torresen
 Signature of Judge

Nancy Torresen, U.S. District Judge
 Name and Title of Judge

December 22, 2020
 Date

DEFENDANT: KEVIN MILLETTE
CASE NUMBER: 2:16-cr-00004-NT-001

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IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of *Time Served**

**The defendant's sentence is reduced to time served, and the defendant is Ordered released within twenty-one days of December 21, 2020, upon the completion of any quarantine and COVID-19 testing protocols required by the BOP.

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

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 MARSHALBy _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: KEVIN MILLETTE
CASE NUMBER: 2:16-cr-00004-NT-001

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SUPERVISED RELEASE**SUPERVISED RELEASE**Upon release from imprisonment, you will be on supervised release for a term of 84 Months.**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 additional drug tests during the term of supervision, but not more than 120 drug tests per year thereafter, as directed by the probation officer.
 - 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 which 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)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments of this judgment.

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: KEVIN MILLETTE
CASE NUMBER: 2:16-cr-00004-NT-001

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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: KEVIN MILLETTE
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SPECIAL CONDITIONS OF SUPERVISION

1. Defendant shall submit to periodic random polygraph examinations as directed by the probation officer to assist in treatment and/or case planning related to behaviors potentially associated with sex offense conduct. No violation proceedings will arise solely on the defendant's failure to pass a polygraph examination, or on the defendant's refusal to answer polygraph questions based on 5th amendment grounds. Such an event could, however, generate a separate investigation. Defendant shall pay/co-pay for such services to the supervising officer's satisfaction.
2. Defendant shall fully participate in sex offender treatment as directed by the supervising officer. Defendant shall pay/co-pay for services during such treatment to the supervising officer's satisfaction. He shall abide by all policies and procedures of that program.
3. Defendant shall participate and comply with the requirements of the Computer and Internet Monitoring Program (which may include partial or full restriction of computer(s), internet/intranet, and/or internet-capable devices), and shall pay for services, directly to the monitoring company. The defendant shall submit to periodic or random unannounced searches of his computer(s), storage media, and/or other electronic or internet-capable device(s) performed by the probation officer. This may include the retrieval and copying of any prohibited data. Or, if warranted, the removal of such system(s) for the purpose of conducting a more comprehensive search.
4. A United States Probation Officer may conduct a search of the defendant and of anything the defendant owns, uses, or possesses if the officer reasonably suspects that the defendant has violated a condition of supervised release and reasonably suspects that evidence of the violation will be found in the areas to be searched. Searches must be conducted at a reasonable time and in a reasonable manner. Failure to submit to a search may be grounds for revocation of release.
5. Defendant shall provide the supervising officer with any requested financial information.
6. Defendant shall report to the supervising officer any financial gains, including income tax refunds, lottery winnings, inheritances, and judgments, whether expected or unexpected. Defendant shall apply them to any outstanding court ordered financial obligations.
7. Defendant shall not incur new credit charges or open additional lines of credit without the supervising officer's advance approval.
8. Defendant shall participate in workforce development programs and services as directed by the supervising officer, and, if not employed, shall perform up to 20 hours of community service per week. Workforce development programming may include assessment and testing; educational instructions; training classes; career guidance; and job search and retention services.
9. *Defendant shall not associate, or have verbal, written, telephonic or electronic communication, with persons under the age of eighteen, except in the presence of a responsible adult who is aware of the nature of the defendant's background and current offense, and who has been approved by the probation officer. This restriction does not extend to incidental contact during ordinary daily activities in public places.

DEFENDANT: KEVIN MILLETTE
CASE NUMBER: 2:16-cr-00004-NT-001

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CRIMINAL MONETARY PENALTIES

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

	<u>Count</u>	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment *</u>	<u>JVTA Assessment **</u>
	One	\$100.00	\$39,000.00	\$0		

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 (including community restitution) to the following payees in the amount listed below.

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>
8 Kids (John Does II, III, IV, V) The Law Office of Erik Bauer In Trust for the 8 Kids Series 215 Tacoma Avenue South Tacoma, WA 98402		\$12,000.00	1
TOTALS		See page 7 for totals	

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: KEVIN MILLETTE
CASE NUMBER: 2:16-cr-00004-NT-001

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ADDITIONAL RESTITUTION PAYEES

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Angela Lenahan Law, P.L.L.C. F/B/O Angela 2655 Villa Creek, Suite 222 Dallas, TX 75234		\$3,000.00	1
At School Carol L. Hepburn, P.S. In Trust for "Violet" 200 First Avenue West Suite 550 Seattle, WA 98119		\$3,000.00	1
Cinderblock Blue The Marsh Law Firm PLLC Attn: Jane PO Box 4668 #65135 New York, NY 10163-4668		\$3,000.00	1
Cindy Cusack, Gilfillan & O'Day LLC For "Cindy" 215 Hamilton Boulevard Peoria, IL 61602		\$3,000.00	1
J Blonde Carol L. Hepburn, P.S. In Trust for Solomon 200 First Avenue West Suite 550 Seattle, WA 98119-4203		\$3,000.00	1
Jan_Socks (Sierra, Skylar, Sally) Carol L. Hepburn, P.S. In Trust for Sierra, Skylar, Sally 200 First Avenue West Suite 550 Seattle, WA 98119-4203		\$3,000.00	1
Marineland Carol L. Hepburn, P.S. In Trust for Sarah 200 First Avenue West Suite 550 Seattle, WA 98119-4203		\$3,000.00	1
TOTALS		\$39,000.00	

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

DEFENDANT: KEVIN MILLETTE
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SCHEDULE OF PAYMENTS

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

A Lump sum payment of \$39,100.00 due immediately, balance due
 Any amount that the defendant is unable to pay now is due and payable during the term of incarceration. Upon release from incarceration, any remaining balance shall be paid in monthly installments, to be initially determined in amount by the supervising officer. Said payments are to be made during the period of supervised release, subject always to review by the sentencing judge on request, by either the defendant or the government.
 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
AmountCorresponding 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:

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 Court of Appeals For the First Circuit

No. 23-1819

UNITED STATES OF AMERICA,

Appellee,

v.

KEVIN MILLETTE,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[Hon. Nancy Torresen, U.S. District Judge]

Before

Gelpí, Thompson, and Kayatta,
Circuit Judges.

Edward S. MacColl, with whom Thompson, Bull, Bass & MacColl LLC, P.A. was on brief, for appellant.

Brian S. Kleinbord, Assistant United States Attorney, with whom Darcie N. McElwee, United States Attorney, was on brief, for appellee.

November 20, 2024

GELPÍ, Circuit Judge.

Defendant-Appellant Kevin

Millette ("Millette") was subject to several special conditions of supervised release. One special condition specifically prohibited Millette from unsupervised contact with minors. The district court found that Millette violated that condition. As a result, the court revoked his supervised release and sentenced him to two months' imprisonment followed by a five-year term of supervised release with the same special condition reimposed. Millette now appeals the revocation of his supervised release and the reimposition of the special condition prohibiting him from having unsupervised contact with minors. Upon review, we discern no error and affirm.

I. BACKGROUND

A. Millette's Criminal History and Supervised Release

We begin by recounting the facts. In 2016, a one-count information was filed against Millette, charging him with possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). According to the presentence report, Millette possessed 24,277 still images and 1,022 videos of child pornography. When law enforcement interviewed him, Millette admitted, among other things, that viewing child pornography was a "life-long" problem for him. Subsequently, Millette pleaded guilty to the possession of child pornography, and the district

court sentenced him to 120 months' imprisonment followed by a seven-year term of supervised release.¹

In December 2020, after Millette had served about sixty-one months of his sentence, the district court granted Millette's motion for compassionate release. To mitigate the risks associated with Millette's release, the district court imposed several special conditions. The special condition at issue, Special Condition 9, prohibits unsupervised contact with minors. It specifically states:

Defendant shall not associate, or have verbal, written, telephonic or electronic communication, with persons under the age of eighteen, except in the presence of a responsible adult who is aware of the nature of the defendant's background and current offense, and who has been approved by the probation officer. This restriction does not extend to incidental contact during ordinary daily activities in public places (emphasis added).

Millette's daughter was a minor at the time of his release.

In January 2021, a probation officer reviewed the conditions of Millette's supervised release with Millette over the phone. Millette confirmed to the officer that he understood those conditions. About two months later, however, Millette's internet activity revealed that he was searching for "tykable diapers" and

¹ This was Millette's second offense related to child pornography. In 2010, Millette was convicted in Maine state court for possession of sexually explicit materials depicting a minor under the age of twelve.

"ABDL," which stands for "Adult Baby Diaper Lovers." When a probation officer confronted Millette about his internet usage in April 2021, Millette admitted to the searches and was instructed not to do it again.

Millette continued to exhibit troublesome behavior over the following year. For example, in April 2021, his probation officer again reprimanded Millette for his internet activity. And, in May 2022, Millette disclosed to his supervising probation officer that he had magazines that depicted both adults and minors he found sexually attractive and that he had subscribed to the magazine "Parenting" for "arousal purposes."

On August 12, 2023, Probation Officer Kate Phillips ("PO Phillips") made an unannounced visit to Millette's residence. Millette lived with his mother, an adult whom the Probation Office approved to supervise Millette's contact with his then-fifteen-year-old daughter. When PO Phillips entered the house, she found Millette's teenage daughter on an inflatable mattress in Millette's bedroom. Millette's mother was found in the backyard near the pool -- about twenty to thirty feet from the house -- wearing a wet bathing suit.

PO Phillips asked Millette where he had slept the previous night, and he answered that he slept on the living room couch while his daughter slept on a "cot" in his bedroom. But when PO Phillips separately questioned Millette's mother, she

answered that Millette slept in his room with his daughter. Millette then admitted that his daughter and he slept in his bedroom the night before, and on previous occasions. PO Phillips subsequently moved the court to revoke Millette's supervised release for violating Special Condition 9.

B. Revocation Hearing

The district court held the final revocation hearing on September 25, 2023. At that hearing, PO Phillips testified that Millette's mother had stated that Millette slept in the same room as his daughter more than once. PO Phillips also stated that she had instructed Millette that it was his responsibility to leave a room whenever he was in it with a minor and no supervisor was present.

Millette, through counsel, admitted that he and his daughter slept on different beds in his bedroom without an approved supervisor in the room, but challenged that his conduct violated Special Condition 9. Millette's counsel argued that his conduct was consistent with Special Condition 9 because Millette was within his mother's presence. Arguing that the word "presence" made the condition "inherently ambiguous," Millette's counsel stated that the term is subject to different interpretations and that the interpretation of that term in the defendant's favor would be that an approved adult is present when within the same dwelling as Millette, even if in a different room. The government argued that

Special Condition 9 is clear enough to prohibit Millette from sleeping in the same room with a minor without supervision.

The district court ultimately found that Millette's conduct constituted a "clear violation" of Special Condition 9. The district court explained that "any reasonable person would see" that Millette's conduct constituted a violation in light of his criminal background and the purpose behind conditions that limit interactions with minors in this context -- namely, to protect them from a "serious epidemic" of adults who circulate images of sexually assaulted children. The district court noted that Millette has contributed to such epidemic "now twice." Indeed, the district court reasoned, Millette's initial response to lie to PO Phillips when she first questioned him about the sleeping arrangement with his daughter indicated that he "knew full well" that he violated Special Condition 9. While the district court acknowledged that Special Condition 9 may be "ambiguous in its outer recesses," it deemed Millette's conduct "so far beyond the line" not to be "really debatable," emphasizing that "no contact with minors means no minors sleeping in your room." Before sentencing, the district court noted that Millette was "in denial" about his conduct and urged him to "behave differently."

For said violation, the district court sentenced Millette to two months' imprisonment followed by five years of

supervised release. At the same time, it reimposed Special Condition 9 (now, Special Condition 8).

Millette timely appealed. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

II. DISCUSSION

Millette advances several related arguments on appeal. First, he asserts that "in the presence of" is ambiguous and, if the ambiguity is interpreted in his favor with the benefit of the rule of lenity, then the district court erred in finding that he violated Special Condition 9. Second, Millette argues that the district court erred by reimposing, without sufficient explanation, an ambiguous condition that restricts his ability to parent his child. We address each argument in turn, applying the appropriate standard of review.

A. Revocation of Supervised Release

Millette's challenge to Special Condition 9 centers on the phrase "in the presence of." He argues that the phrase is ambiguous. And so, he contends, the rule of lenity dictates that we construe the ambiguity in his favor, such that Special Condition 9 is satisfied when an approved adult is anywhere within the same house.

In a revocation proceeding, the government bears the burden of proving by a preponderance of the evidence that the defendant violated a condition of his release. United States v.

Teixeira, 62 F.4th 10, 17 (1st Cir. 2023); 18 U.S.C. § 3583(e) (3).

While the Federal Rules of Evidence do not apply in revocation proceedings, the government must present "reliable" evidence.

Teixeira, 62 F.4th at 17. If the court finds a violation, it must then decide whether to modify or revoke the defendant's supervised release. United States v. Colón-Maldonado, 953 F.3d 1, 3 (1st Cir. 2020).

"We review the district court's ultimate decision to revoke supervised release for abuse of discretion, and the underlying finding of a violation of supervised release for clear error." United States v. Dudley, 100 F.4th 74, 81 (1st Cir. 2024) (quoting United States v. Wright, 812 F.3d 27, 30 (1st Cir. 2016)).

Within the limits of the abuse of discretion standard, we review de novo "embedded questions of law" while "embedded findings of fact engender clear-error review." United States v. Del Valle-Cruz, 785 F.3d 48, 58 (1st Cir. 2015) (quoting United States v. Carrasco-De-Jesús, 589 F.3d 22, 27 (1st Cir. 2009)).

The clear error standard is "exceedingly deferential." United States v. Matos, 328 F.3d 34, 39-40 (1st Cir. 2003) (citation omitted). This court will find that a district court abused its discretion "only when [we are] left with a definite conviction that 'no reasonable person could agree with the judge's decision.'" United States v. McCullock, 991 F.3d 313, 317 (1st

Cir. 2021) (quoting United States v. Cruz-Ramos, 987 F.3d 27, 41 (1st Cir. 2021)).

A supervised release condition must be "sufficiently clear and specific to serve as a guide for the defendant's conduct." 18 U.S.C. § 3583(f). However, conditions of supervised release need not be "precise to the point of pedantry" and must be read "in a commonsense way." United States v. Gallo, 20 F.3d 7, 12 (1st Cir. 1994); see also United States v. Cruz, 49 F.4th 646, 653-54 (1st Cir. 2022) (holding that a condition of supervised release was not "unconstitutionally vague" based on a commonsense and contextual reading).

Millette did not and does not dispute his conduct. He admits to having slept in the same room as his minor daughter on multiple occasions without a supervisor in the room. His only contention is that he did not violate Special Condition 9 because his mother -- an approved "responsible adult" -- was at the home while he and his daughter slept in the same room. The district court disagreed with Millette, and in so doing, made clear its view that "in the presence of" requires more than the "responsible adult" be in a different room while Millette had prolonged contact with a minor in his bedroom.

We agree with the district court. A reasonable person would not conclude that A is in B's presence if A is in the bedroom and B is elsewhere in the house, out of sight and earshot, much

less out swimming in a pool. "Presence" suggests a person's "immediate vicinity." See Presence, Merriam-Webster (Nov. 18, 2024), <https://www.merriam-webster.com/dictionary/presence> (emphasis added). And even if a less immediate scope were suggested in some context, here the context -- an attempt to ensure that Millette was supervised when with a minor -- belies any notion that Millette could closet himself away with a minor overnight, free from observation by any adult.

Millette's own conduct supported the district court's interpretation of the condition as a sufficiently clear guide to his behavior. Millette initially lied to PO Phillips, telling her that he slept on a couch in the living room while his teenage daughter slept on a "cot" inside his bedroom. He later admitted that he slept in the same room with his daughter only after his mother had indicated as much. The district court reasoned that Millette's lie demonstrated that he "knew full well" that sleeping alone in a room with his underaged daughter constituted a violation of his supervised release. We agree that Millette's perceived need to cover up his sleeping arrangement provided support for the conclusion that he himself read the condition as likely barring such conduct.

Millette argues that the district court committed an error of law by refusing to apply the rule of lenity when interpreting Special Condition 9. But even if we were to assume

that lenity has a role to play that is not played by 18 U.S.C. § 3583(f) in construing conditions of supervised release, by its own terms lenity only applies where there is a "grievous ambiguity" that cannot otherwise be resolved. United States v. Dion, 37 F.4th 31, 39 (1st Cir. 2022). No such ambiguity exists here.

B. Reimposition of the Special Condition

Millette next argues that the district court erred by reimposing Special Condition 9 (now, Special Condition 8) without an adequate explanation. Millette insists that the reimposition of that condition is particularly inappropriate in this case because it restricts his constitutionally protected interest in parenting his minor daughter. We disagree.

We review "preserved objections to the imposition of a special condition of release for abuse of discretion and unpreserved objections for plain error." United States v. Windle, 35 F.4th 62, 67 (1st Cir. 2022) (citing McCullock, 991 F.3d at 317). Here, we assume that Millette properly preserved his challenge to the district court's decision to reimpose a condition that limits his unsupervised contact with minors. See United States v. Mulero-Algarín, 866 F.3d 8, 11 (1st Cir. 2017).

1. Abuse of Discretion Review

District courts have "significant flexibility" in imposing conditions of supervised release. McCullock, 991 F.3d at 319 (quoting United States v. Marino, 833 F.3d 1, 10 (1st Cir.

2016)). That flexibility, however, is not without limits. New (or reimposed) conditions of release must be "reasonably related" to, among other things, "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. §§ 3583(d)(1), 3553(a)(1). Of note, too, is that conditions must "involve[] no greater deprivation of liberty than is reasonably necessary" to deter and rehabilitate the defendant and "protect the public from [any] further crimes." See 18 U.S.C. §§ 3583(d)(2), 3553(a)(2)(B)-(D). For that reason, we require that the sentencing court "set forth a 'reasoned and case-specific explanation' for the conditions it imposes." United States v. DaSilva, 844 F.3d 8, 11 (1st Cir. 2016) (quoting United States v. Perazza-Mercado, 553 F.3d 65, 69 (1st Cir. 2009)).

A condition that limits Millette's unsupervised contact with minors is indeed "reasonably related" to his specific offense and his history and characteristics. Millette has admitted to law enforcement that viewing child pornography has been a "life-long" problem for him. And despite two convictions for child-pornography-related offenses, his subsequent conduct -- his internet activity in 2021, confessions to his supervising officer in 2022, and inability or unwillingness to understand that it was wrong to sleep in a bedroom with his 15-year-old daughter without a supervisor -- suggests that this continues to be a problem for him. In that way, Special Condition 9 (currently, Special

Condition 8) is related to Millette's specific offense and history and is also necessary to protect the public from further crimes.

In addition, the district court's explanation for reimposing the special condition was adequate. The requirement that the district court explain its reasoning for imposing (or reimposing) a condition is satisfied "without a written or oral explanation of the reasons supporting the condition if we can infer the court's reasoning" from examining the record. See United States v. Garrasteguy, 559 F.3d 34, 42 (1st Cir. 2009); see also United States v. Vega-Rivera, 866 F.3d 14, 21 (1st Cir. 2017). Before rendering its sentence, the district court expressed concerns that "there is serious epidemic" of people sexually assaulting children and circulating those images and noted that Millette has "fallen into it now twice." The court also concluded that Millette was in "denial" about the seriousness of his recent conduct. Against the backdrop of Millette's criminal history and more recent conduct, we can infer from the record that Millette poses an ongoing risk of danger to minors. Thus, we find that the explanation here was sufficient considering the extensive evidentiary record and Millette's criminal history and characteristics.

Moreover, the special condition does not overly restrict Millette's constitutional interest in parenting his daughter. Conditions that "would impair a defendant's relationship with his

child" require a "greater justification." United States v. Del Valle-Cruz, 785 F.3d 48, 62 (1st Cir. 2015). Conditions that limit a defendant's association with minors, including his children, are proper when, among other things, "the defendant's conduct otherwise indicates an enhanced risk to minors." United States v. Pabon, 819 F.3d 26, 31 (1st Cir. 2016). Such conditions "are sufficiently circumscribed when they do not place an outright ban on association with minors, but only curtail association, such as by requiring pre-approval by the probation officer." Id. at 31-32 (internal quotation marks and citations omitted). It is an added "safeguard" that "defendant can petition the district court to modify the condition in the event that approval has been unreasonably withheld." Id. at 32.

In Millette's case, the condition does not impose an "outright ban" on him from having any contact with his daughter. See id. at 31. It requires only that his interactions with her and other minors happen under the supervision of a responsible person approved by the probation officer. See, e.g., United States v. Tilley, 105 F.4th 482, 487 (1st Cir. 2024) (upholding a condition prohibiting unsupervised contact with minors). That is a proper limitation considering that Millette continues to pose an "enhanced risk to minors," as evidenced by his previous internet activity and more recent confessions to his supervising officer. Further, as the record reflects, Millette's probation officers did

not "unreasonably withhold permission" from Millette "to see his own children." United States v. Acevedo-Osorio, 118 F.4th 117, 138 (1st Cir. 2024) (quoting United States v. Mercado, 777 F.3d 532, 539 (1st Cir. 2015)). Rather, he had regular supervised visits with his daughter.

Since the record justifies limiting Millette's unsupervised contact with minors, we find that the district court did not abuse its discretion in reimposing such a condition.

III. CONCLUSION

For the foregoing reasons, we **affirm** the revocation of Millette's supervised release and reimposition of a condition that limits his contact with minors.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

**ORDER ON DEFENDANT'S EMERGENCY MOTION TO
APPROVE SUPERVISORS OR TO DELETE, AMEND, OR CLARIFY
SPECIAL CONDITION NO. 8 OF SUPERVISED RELEASE CONDITIONS**

Before me is Defendant Kevin Millette’s Emergency Motion to Approve Supervisors or to Delete, Amend, or Clarify Special Condition No. 8 of Supervised Release Conditions (“**Emergency Mot.**”) (ECF No. 149). The condition at issue prohibits the Defendant’s contact with minors except “in the presence of” a supervisor. The Defendant’s motion seeks to amend that condition so that it does not apply to his own child. In the alternative, the motion seeks to reinstate chaperones previously approved by the United States Probation Office to supervise the Defendant’s visits with his child. For the following reasons, the motion is **DENIED**.

PROCEDURAL BACKGROUND

I. Sentencing, Compassionate Release, and “Special Condition 8”

On June 6, 2016, I sentenced the Defendant to 120 months of imprisonment and seven years of supervised release after he pleaded guilty to possessing child

pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) (ECF No. 37).¹ On December 21, 2020, during the COVID-19 pandemic, I granted the Defendant's motion for compassionate release based on "extraordinary and compelling" circumstances. Order on Mot. for Compassionate Release ("Compassionate Release Order") at 3–5 (ECF No. 87). I noted that despite the "extremely serious" nature of the Defendant's offense, "there was no evidence that [the Defendant] ever committed a contact offense" or showed "the intent to commit one." Compassionate Release Order at 6 (citing Presentence Investigation Report ("PSR") ¶ 10 (ECF No. 70-1)). To "alleviate" public safety concerns, I imposed the following special condition of supervised release ("Special Condition 8")² to "strictly limit [the Defendant's] contact with minors," Compassionate Release Order at 8–9:

Defendant shall not associate, or have verbal, written, telephonic or electronic communication, with persons under the age of eighteen, except *in the presence* of a responsible adult who is aware of the nature of the defendant's background and current offense, and who has been approved by the probation officer. . . .

Am. J. in a Criminal Case at 5 (ECF No. 88) (emphasis added); *accord* Compassionate Release Order at 15–16. Special Condition 8 extends to the Defendant's contact with his minor daughter A.M.

¹ The Defendant was subject to a ten-year mandatory minimum sentence because of his prior state court conviction for possessing child pornography.

² This condition was originally numbered 9 in the "Special Conditions of Supervision" listed in the December of 2020 amended judgment. *See* Am. J. in a Criminal Case at 5 (ECF No. 88). When I reimposed the same condition in my October 12, 2023 revocation judgment, the identical condition was renumbered "Special Condition 8" for reasons not pertinent here. For consistency, I refer only to Special Condition 8 in this order.

The Defendant began federal supervision on January 7, 2021 after serving approximately five years in prison. Gov't's Mot. in Opp'n to Def.'s Mot. to Approve Supervisors or to Delete, Amend or Clarify Special Condition No. 8 of Supervised Release Conditions ("**Gov't's Opp'n**") at 2 (ECF No. 157); Revocation Report at 4 (ECF No. 122). The United States Probation Office ("**USPO**") approved three chaperones—including the Defendant's mother Melodie Millette ("**Ms. Millette**") and his friend Karen Stewart ("**Ms. Stewart**")—to supervise his visits with A.M. as required by Special Condition 8. Emergency Mot. ¶ 11; Revocation Report at 5.

II. Revocation

On August 15, 2023, when the Defendant was living with Ms. Millette, USPO filed a petition to revoke the Defendant's supervised release for allegedly violating Special Condition 8 by, among other things: (1) being unsupervised in the house with his then-fifteen-year-old daughter A.M. while Ms. Millette was in the family's outdoor swimming pool; and (2) sleeping unsupervised in the same bedroom as A.M. on multiple occasions. Pet. for Warrant or Summons for Offender Under Supervision at 2 (No. 106); Revocation Report at 9–10. After a final revocation hearing on September 25, 2023, I found the Defendant had violated Special Condition 8 and sentenced him to two months in prison and five years of supervision. See Oral Order Denying Mot. to Dismiss Revocation Pet. (ECF No. 133).³ As part of my revocation judgment, I

³ Neither my compassionate release order nor the amended judgment in 2020 defined Special Condition 8's use of the phrase "in the presence of." At the revocation hearing in 2023, I acknowledged "some ambiguity" in Special Condition 8, such as whether the phrase "in the presence of" required the chaperone to be "within earshot and eyeshot." Tr. of Proceedings ("**Final Revocation Tr.**") 15:24–16:8 (ECF No. 148). Nonetheless, I found that the Defendant had gone "beyond . . . that ambiguity" by sharing a bedroom with A.M., and I concluded that "any reasonable person" would know such behavior was prohibited. Final Revocation Tr. 16:9–16:12. During the hearing, I instructed the parties to

reimposed Special Condition 8 limiting the Defendant's contact with minors, including his child. J. in a Criminal Case at 5 (ECF No. 144). Before the Defendant's release, USPO revoked its approval of the Defendant's three chaperones pending their completion of additional training, Emergency Mot. ¶ 6, citing "concerns as to statements and conduct by each in relation to Defendant's violation of [Special Condition 8]." Gov't's Opp'n 5.

The Defendant completed his two-month sentence and resumed supervision on November 27, 2023. Gov't's Opp'n 4–5. USPO has since reinstated Ms. Millette as a chaperone but only for visits in public settings and not in the family home. Gov't's Opp'n 5–6. On January 25, 2024, the Defendant filed the present emergency motion asking me to either amend Special Condition 8 to not apply to his minor child A.M. or in the alternative, approve Ms. Millette or another former chaperone to supervise his visits with A.M. Emergency Mot. at 5. I held a hearing on the motion on October 9, 2024. Minute Entry (ECF No. 169).

FACTUAL FINDINGS

At the October 9, 2024 hearing, the defense offered four exhibits and testimony from Ms. Millette, Ms. Stewart, A.M., the Defendant's adult son Devin Millette

"clarif[y]" Special Condition 8's scope upon the Defendant's release from prison to ensure the Defendant would understand his obligations. Final Revocation Tr. 16:14–16:19. The Defendant appealed my revocation judgment on the grounds that Special Condition 8 and its predecessor are ambiguous. The First Circuit denied that appeal. *See United States v. Millette*, No. 23-1819, 2024 WL 4834633 (1st Cir. Nov. 20, 2024).

On November 27, 2023, when the Defendant resumed supervision, he and the probation officer signed an acknowledgment form that defines Special Condition 8's phrase "in the presence" of a responsible adult to mean "within close proximity that allows for continuous visual and audio observation." Gov't's Opp'n at 4–5; Gov't's Opp'n, Ex. 1 (ECF No. 157-1).

(“Devin”), and the Defendant.⁴ The Government offered twelve exhibits and testimony from U.S. Probation Officer Kate M. Phillips (“Officer Phillips”).⁵

I. Defense Testimony

A. Melodie Millette

The Defendant’s mother and A.M.’s grandmother Ms. Millette testified that she would “absolutely not” let the Defendant violate his supervision conditions. She said she now understands that Special Condition 8’s “presence” requirement means she must be “in the same room” as the Defendant during his visits with A.M. She said that during supervised visits (currently limited to public places), if she ever needs to leave the room, she takes A.M. with her so A.M. and the Defendant are not left alone. Ms. Millette said that because she is not permitted to supervise the Defendant’s visits with A.M. in the family home, A.M. did not attend the family’s Christmas gathering last year, which upset A.M. Ms. Millette said it never occurred to her to ask the Defendant not to attend Christmas so that A.M. could join instead.

Concerning the supervision violation in August of 2023 that led to the Defendant’s two-month prison sentence, Ms. Millette denied telling Officer Phillips

⁴ I admitted all four defense exhibits. *See* Def.’s Exs. 1–3, 5.

⁵ During the hearing, I conditionally admitted three Government exhibits over the Defendant’s objection: the Defendant’s April 30, 2021 sexual offense assessment and treatment evaluation (Gov’t’s Ex. 5); and two letters about the Defendant’s psychotherapy (Gov’t’s Exs. 8 & 9). The Defendant objected based on hearsay, citing the authors’ unavailability for cross-examination. But because “neither the Federal Rules of Evidence nor the . . . Sixth Amendment circumscribe the admissibility of hearsay in revocation proceedings,” *United States v. Navarro-Santisteban*, 83 F. 4th 44, 52 (1st Cir. 2023), I find these protections similarly do not apply to a hearing on a motion to modify supervision conditions. The Defendant cites no contrary authority. *See also* Fed. R. Evid. 1101(d)(3) (providing that the Federal Rules of Evidence do not apply to “miscellaneous proceedings such as . . . granting or revoking probation or supervised release”). Had the Defendant wished to inquire into the clinicians’ opinions, he could have subpoenaed them. Accordingly, the Government’s Exhibits 5, 8 and 9 are deemed admitted, along with those admitted during the hearing. *See* Gov’t’s Exs. 1–4, 6, 7, 10–12.

that A.M. had slept in the Defendant's bedroom more than once and said Ms. Millette would have known if that had happened.

B. Karen Stewart

Ms. Stewart is a long-time friend of the Millette family, the Defendant's current employer, and a previously approved USPO chaperone. She commented on the Defendant's close relationship with his children and said the current supervision conditions affect the Defendant's ability to spend time with A.M. Ms. Stewart agreed that Ms. Millette appears to be a loving grandparent and does not believe Ms. Millette would let the Defendant violate his supervision conditions. Ms. Stewart said that if she were reinstated as a chaperone, she would not allow the Defendant to violate his supervision conditions even if the prohibited conduct "didn't involve a risk."

C. A.M.

The Defendant's minor daughter A.M., who will turn seventeen in December of 2024, said she feels safe with her father and described him as understanding, supportive, and helpful. She said that if she ever felt concerned about his conduct, she could talk to "a lot of people," including her mother, her brothers, her grandmother Ms. Millette, Ms. Stewart, or her social worker.

Defense counsel asked A.M. about her father's supervision violation in August of 2023 when A.M. slept in her father's bedroom unsupervised. A.M. said that, although her brothers usually slept in their father's room while A.M. slept on the living room couch, on one or more occasions, A.M. slept on an air mattress or cot in her father's bedroom when her brothers were not present. When asked why, A.M. said because "it was just easy," because "there's no one to talk to" when she sleeps in

the living room, and because her father's room has a television. A.M. said that she now only sees her father at public restaurants during visits supervised by Ms. Millette and that she wants more contact with her father.

D. Devin Millette

The Defendant's twenty-two-year-old son (and A.M.'s brother) Devin said he has "never" observed his father make A.M. or his younger brother uncomfortable, nor did the Defendant ever do anything to make Devin uncomfortable. He called his family "close," referred to his siblings as his "best friends," and said A.M. could talk to Devin if their father made her uncomfortable. Devin testified that A.M. no longer joins him for weekly visits to Ms. Millette's house because of the Defendant's supervision conditions, and that it would be "helpful" if A.M. could attend family gatherings at Ms. Millette's house.

E. Defendant Kevin Millette

The Defendant testified that he loves his children and wants the best possible relationship with them. He said he has not violated Special Condition 8 since USPO clarified that "presence" means "in the same room." He said that ever since Ms. Millette was reinstated as a chaperone, he has seen A.M. only in public places and that A.M. has not visited Ms. Millette's house where the Defendant lives. The Defendant said he had not realized he was violating his supervision conditions when A.M. slept unsupervised on a cot in his bedroom in August of 2023. He said he thought Special Condition 8 required a chaperone to be "on the same property" and not necessarily in the same room. He said he had never been told that the chaperone

needed “to be in eye contact 24/7.” The Defendant said A.M. had slept in his bedroom more than once and that Ms. Millette never objected.

II. Government Testimony: Officer Kate Phillips

Officer Phillips testified about her decision to withdraw Ms. Millette’s chaperone authorization after the Defendant’s supervision violation in August of 2023.⁶ She also explained her decision to limit Ms. Millette’s reapproval as a chaperone to visits only in public spaces, citing: (1) the Defendant’s lack of progress in treatment; (2) his “lack of judgment with his use of marijuana” during supervision;⁷ and (3) his treatment provider’s determination that it was “not safe” for him “to have visits with any minor, specifically his daughter at this time, in the home, even with [Ms. Millette] as a chaperone.”⁸ On cross-examination, Officer Phillips agreed with

⁶ Officer Phillips cited Ms. Millette’s inconsistent statements about whether she had been outside in the pool while A.M. and the Defendant were inside, and about whether A.M. had slept in the Defendant’s bedroom more than once. Officer Phillips said she was concerned by Ms. Millette’s statement that A.M. should be permitted to sleep in the Defendant’s bedroom because she was almost sixteen years old at the time, which Ms. Millette called “the age of sexual consent.” The May 23, 2024 clinician letter submitted by the Government echoes these concerns about Ms. Millette’s “ability to be an effective chaperone” and questions her ability “to prioritize [A.M.’s] safety and needs over the wants/desires of [the Defendant].” Gov’t’s Ex. 8.

⁷ The Defendant testified that he has used marijuana almost daily since November of 2023 and that until several days before the present hearing, he did not know that such conduct was prohibited during his supervision period. He said that if he understood the rules to prohibit using marijuana, he would comply. Officer Phillips testified that she has instructed the Defendant repeatedly that he cannot use marijuana while under supervision, that she has discussed his positive drug tests with him, and that “he has always denied” using marijuana. At the hearing, I clearly advised the Defendant that his supervision conditions prohibit him from using marijuana.

⁸ The two mental health clinician letters submitted by the Government describe the Defendant as taking “minimal responsibility” for having shared a bedroom with A.M., Gov’t’s Ex. 8, and as “unwilling[] to recognize that conduct as “a significant risk factor,” Gov’t’s Ex. 9. The letters observe the Defendant to be “predominantly focused” on spending time with A.M. in his home “rather than exploring other/safer ways to engage with her.” Gov’t’s Ex. 9. They also state that the Defendant continues to struggle with “deviant sexual interest.” For these and other reasons, the October 8, 2024 letter recommends maintaining the condition of “supervised community contact,” which I interpret to mean limiting the Defendant’s supervised visits with A.M. to public places. Gov’t’s Ex. 9.

defense counsel that the Defendant's polygraph examinations do not indicate that the Defendant "has any sexual attraction to his own children" or has "ever touched his own children or any other minor."⁹

LEGAL STANDARD

I have "plenary jurisdiction" under 18 U.S.C. § 3583(e)(2) ("Section 3583(e)(2)") and Federal Rule of Criminal Procedure 32.1(c) "to supervise a convicted defendant's release," which includes "modify[ing] the conditions of supervised release." *United States v. El-Silimy*, 417 F. Supp. 2d 75, 79 (2006) (D. Me. 2006) (quoting *United States v. D'Amario*, 412 F.3d 253, 255 (1st Cir. 2005) (*per curiam*)). Section 3583(e)(2) permits me to "modify, reduce, or enlarge the conditions of supervised release" consistent with the applicable Federal Rules of Criminal Procedure. 18 U.S.C. § 3583(e)(2). "To modify a supervised release condition, § 3583(e) directs the court to consider the factors set forth in § 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)." *El-Silimy*, 417 F. Supp. 2d at 79.

"The showing required . . . to obtain a modification of a condition of supervised release pursuant to section 3583(e) is an open question in [the First Circuit]." *United States v. Garrasteguy*, 559 F.3d 34, 43 n.12 (1st Cir. 2009). "The unanswered question is whether . . . the trial court acts within its discretion or whether a defendant must demonstrate changed or extraordinary circumstances." *United States v. Bischoff*, No.

⁹ Years ago, A.M.'s mother became concerned the Defendant had inappropriately touched A.M. The state investigated and found no misconduct had occurred. A.M. has consistently maintained, and she testified as such on October 9, 2024, that her mother's concern arose solely from a misunderstanding. Officer Phillips testified that after a forensic psychologist interviewed A.M. about the incident, see Gov't's Ex. 7, "everyone was satisfied" that A.M. had not reported any abuse.

2:20-cr-00067-JAW-1, 2021 WL 1857406, at *5 (D. Me. May 10, 2021). Consistent with other courts in this District, I consider the Defendant's motion under both standards. *See, e.g., United States v. Stone*, No. 1:08-cr-00006-JAW, 2022 WL 834439, at *4 (D. Me. Mar. 21, 2022); *Bischoff*, 2021 WL 1857406, at *5.

DISCUSSION AND CONCLUSIONS OF LAW

I. Modifying Special Condition 8's Application to the Defendant's Minor Child

I begin with the Defendant's request to modify Special Condition 8 so as not to apply to contact with his minor daughter A.M. Emergency Mot. ¶ 12. Assuming the higher standard applies to his motion,¹⁰ I find the Defendant has not shown changed circumstances or an extraordinary justification for modifying Special Condition 8 for the following reasons: (1) the restriction is "reasonably related" to his underlying criminal offense, which specifically involved minors; (2) the restriction still affords him considerable opportunity to spend time with A.M.; and (3) the Defendant's mental health providers advise continuing to require supervised visits with A.M.

First, I find the limitation on his contact with A.M. is "reasonably related" to "the nature and circumstances of [his] offense." *United States v. Del Valle-Cruz*, 785 F.3d 48, 59 (1st Cir. 2015) (internal citation omitted). While I must provide a "greater justification" for special conditions "that would impair a defendant's relationship with his child[]," *United States v. Acevedo-Osorio*, 118 F.4th 117, 136 (1st Cir. 2024), I am

¹⁰ If the lower standard applied, which would give me discretion to modify the Defendant's supervision conditions under 18 U.S.C. § 3583(e), I would decline to do so based on factors enumerated under 18 U.S.C. § 3553(a), including the nature and circumstances of the underlying offense and the need to protect A.M.

“not foreclos[ed] . . . from restricting [the Defendant’s] interactions with his daughter” so long as any restrictions are “explained and supported by the record,” *United States v. Cabrera-Rivera*, 893 F.3d 14, 33–34 (1st Cir. 2018) (internal citation omitted).

Here, the record provides the necessary support. The Defendant’s original offense of conviction involved possessing thousands of images and videos of minors engaged in sexual conduct. PSR ¶¶ 5–11. Even though the Defendant “has never been charged or convicted of sexually or otherwise abusing any person,” Emergency Mot. ¶ 12, his specific sexual interest in minors makes it reasonable to require supervision during his contact with minors, including his daughter. The First Circuit has upheld similar restrictions on a defendant’s contact with his own child, even where the defendant had committed a “non-contact” child pornography offense and where there was “no evidence that he ha[d] physically harmed his [own child] or any child or that he [was] likely to” do so in the future. *United States v. Benoit*, 975 F.3d 20, 26–27 (1st Cir. 2020). Cf. *Cabrera-Rivera*, 893 F.3d at 28 (vacating a restriction on the defendant’s contact with his children where the underlying offense involved “a consensual exchange of sexually explicit images with a non-family member” who was of consenting age in Puerto Rico).

Second, I find modification is not justified because Special Condition 8 still affords the Defendant considerable opportunity to spend time with A.M., and I note that the Defendant appears not to take full advantage of these opportunities. See Gov’t’s Ex. 9 (letter from treatment provider describing the Defendant as “predominantly focused” on spending time with A.M. at home “rather than exploring

other/safer ways to engage with her"). As in cases where the First Circuit has upheld similar restrictions on a defendant's contact with his own children, Special Condition 8 "do[es] not comprise an outright ban on the [D]efendant's ability to associate" with A.M. *Acevedo-Osorio*, 118 F.4th at 137; *see id.* at 138 (upholding restriction on defendant's contact with his children because it could "be modified, including by removing it entirely if his . . . treatment provider . . . deem[ed] it appropriate").¹¹

On the contrary, the current conditions permit the Defendant to maintain a meaningful relationship with A.M. He can exchange monitored text messages with her, Gov't's Opp'n 6; he can seek "approved contact" with her by presenting a "specific plan" to USPO, Gov't's Opp'n, Ex. 1 (ECF No. 157-1); and any other "responsible adult" can seek USPO's chaperone approval by undergoing required training, Gov't's Opp'n, Ex. 1. Although Ms. Millette is currently approved to supervise visits only in public spaces, she and other chaperones could be approved to supervise visits within the home if they undergo further training. Gov't's Opp'n 5-6, 9.¹² The Defendant's close relationship and desire to spend time with his daughter are not extraordinary conditions, nor has he named any compelling reasons why Special Condition 8 is

¹¹ See also *United States v. Pabon*, 819 F.3d 26, 31-32 (1st Cir. 2016) (stating that restrictions on contact with minors are "sufficiently circumscribed" when they "do not place an outright ban . . . , but only curtail association, such as by requiring pre-approval by the probation officer . . . , or by operating in limited contexts") (internal citations omitted); *United States v. Mercado*, 777 F.3d 532, 539 (1st Cir. 2015) (upholding restriction that did not "outright ban" the defendant's contact with his children but rather required visits to be approved by the probation officer and supervised by an adult); *United States v. DaSilva*, 844 F.3d 8, 12-13 (1st Cir. 2016) (same).

¹² The record does not support the Defendant's assertions in his emergency motion that he is "currently prohibited from seeing [A.M.] because of decisions made by [USPO]," Emergency Mot. ¶ 1, and that "he might be permanently banned from any contact with his own daughter," Emergency Mot. ¶ 6. See also Emergency Mot. ¶ 8 (stating that Special Condition 8 "is now effectively a prohibition").

“overly broad” or “particularly onerous.” *See Stone*, 2022 WL 834439, at *5–6 (upholding limitation on defendant’s contact with minors in a child pornography possession case).

Finally, evidence of the Defendant’s lack of treatment progress also weighs against modifying Special Condition 8 and instead supports USPO’s decision to require supervision during visits with A.M. For example, at the hearing on the emergency motion, Officer Phillips testified that the Defendant “has not made a lot of progress in treatment” and cited his treatment providers’ determination that it was “not safe” for the Defendant to have home visits with his daughter, even if supervised by Ms. Millette. *See also* Gov’t’s Exs. 8 & 9.

In sum, I find the Defendant has not shown extraordinary or changed circumstances to justify modifying Special Condition 8’s application to his minor daughter.

II. Approval of Chaperones

The Defendant also asks me to override USPO’s (1) decision to authorize Ms. Millette to chaperone visits with A.M. only in public spaces, and (2) refusal to authorize other chaperones. Emergency Mot. ¶¶ 11, 14. Because I find the record supports USPO’s chaperone determinations, I deny the Defendant’s requests.¹³ Ms. Millette seems not to understand the risk articulated by Officer Phillips and the Defendant’s treatment providers. *See, e.g.*, Gov’t’s Opp’n 5 (“[Ms.] Millette made

¹³ As above, even if the lower standard applied to the Defendant’s requests to approve additional chaperones, I would exercise my discretion under 18 U.S.C. § 3583(e) by denying his requests given factors including the nature and circumstances of his underlying offense and the need to protect A.M.

comments to Officer Phillips which seemed to place the burden of preventing any inappropriate conduct on [A.M.]"); Gov't's Ex. 8 (expressing concerns about Ms. Millette's "ability to be an effective chaperone"); Gov't's Opp'n 5 (stating that the other former chaperones "gave testimony that raised questions as to whether they understood the risks of leaving [the] Defendant alone with [A.M.]").

Moreover, USPO has indicated it is withholding approval of the Defendant's other two former chaperones (apart from Ms. Millette) only because they have not yet completed their required training. Gov't's Opp'n 6 (noting the two former chaperones' ongoing "attendance issues"). USPO has even said that "it may consider approving the chaperones prior to completion [of] training, depending on their progress, and in consultation with Defendant's clinical provider and the provider of the chaperone course." Gov't's Opp'n 6. It appears that the Defendant has not proposed any alternative chaperones. The Defendant has tools available for achieving his goal of maintaining a close relationship with A.M., within the parameters of Special Condition 8 and without involving the Court.

CONCLUSION

For the reasons stated above, the Defendant's motion to modify Special Condition 8 or approve a chaperone is **DENIED**.

SO ORDERED.

/s/ Nancy Torresen
United States District Judge

Dated this 22nd day of November, 2024.

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MAINE

3

4 UNITED STATES OF AMERICA,

CRIMINAL ACTION

5 Plaintiff

Docket No: 2:16-00004-NT

6

7 -versus-

8

9 KEVIN MILLETTE,

10 Defendant

11 Transcript of Proceedings

12

13 Pursuant to notice, the above-entitled matter came on for
Final Revocation Hearing held before **THE HONORABLE NANCY**
TORRESEN, United States District Court Judge, in the United
States District Court, Edward T. Gignoux Courthouse, 156
Federal Street, Portland, Maine, on the 25th day of September
2023 at 10:02 a.m. as follows:

14

15 Appearances:

16

17 For the Government: Nicholas M. Scott, Esquire
Assistant United States Attorney

18

19 For the Defendant: Edward S. MacColl, Esquire

20

21 Also Present: Kate Phillips, U.S. Probation

22

Lori D. Dunbar, RMR, CRR
Official Court Reporter

23

(Prepared from manual stenography and
computer aided transcription)

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1 (Open court. Defendant present.)

2 THE COURT: All right. This is United States versus
3 Kevin Millette, Docket No. 2:16-CR-04-NT. We're here for a
4 final revocation hearing. Nick Scott is here representing the
5 Government. Good morning, Mr. Scott.

6 MR. SCOTT: Good morning, Your Honor.

7 THE COURT: Kate Phillips is here on behalf of
8 probation. Good morning, Ms. Phillips.

9 PROBATION OFFICER: Good morning, Your Honor.

10 THE COURT: Ed MacColl is here on behalf of
11 Mr. Millette, who is also here. Good morning, Mr. MacColl.

12 MR. MACCOLL: Good morning, Your Honor.

13 THE COURT: I think we may need to tidy up some
14 loose ends before we get started here. There's a motion
15 pending. Defendant's filed a motion to dismiss the revocation
16 petition or for a jury trial. There's also as part of that
17 request for the officers' -- any testifying officers'
18 statements. And I -- before I came in here I met with
19 Ms. Phillips, asked her what she had, and I asked her to
20 provide those statements. So that has been provided about a
21 half an hour ago. I don't know if that gives counsel enough
22 time. Mr. MacColl, have you got enough time on those
23 statements?

24 MR. MACCOLL: I would have guessed that what I got
25 wasn't all of her prior statements, all of her prior notes,

1 but I have had enough time to read them, yes, Your Honor.

2 THE COURT: I asked that question and she indicated
3 to me that that was all of her statements.

4 MR. MACCOLL: Okay. I've read them, thank you,
5 Judge.

6 THE COURT: I doubt she would have --

7 MR. MACCOLL: I'm not suggesting otherwise. I
8 thought there could have been a miscommunication, but if
9 they're complete then that's what they are.

10 THE COURT: You can cross-examine her about that.

11 MR. MACCOLL: Certainly.

12 THE COURT: All right. So with regard to the motion
13 to dismiss, I'm going to deny that motion and I am also going
14 to deny the motion for a jury trial. I don't think it's
15 supported on the record.

16 And I guess we're prepared, then, to go forward with the
17 Government's case.

18 MR. SCOTT: Thank you, Your Honor.

19 THE COURT: You're welcome.

20 MR. SCOTT: Your Honor, the Government is going to
21 move for admission Exhibits 1 through 5. Exhibit 1 is the
22 testimony of Officer Phillips at a prior hearing in this
23 revocation matter, at the preliminary hearing. Exhibit No. 2
24 is the testimony of Melodie Millette, which is the defendant's
25 mother. Exhibit 3 is a photograph which is relevant to the --

1 one of the violations -- alleged violations here where the
2 defendant is alleged to have attended a birthday party with a
3 minor. This is a photograph that was provided to probation by
4 a person who was present at that birthday party, showing where
5 the defendant was in relation to that minor.

6 I'm also submitting as Government's Exhibit 4 polygraphs
7 that the defendant underwent in this -- as part of his
8 supervision, as part of March -- his supervision, excuse me,
9 that occurred on March 29th of 2023 and again on September
10 12th of 2023, which also contain summaries of statements that
11 the defendant made to the examiner as part of those.

12 I'm also submitting -- let me back up. Exhibits 1
13 through 4 have been provided to the Court and counsel prior to
14 the hearing. I'm also submitting as Government's Exhibit 5
15 chronograph notes of Officer Hastings and Officer Phillips
16 that the Court released to the parties this morning. So I
17 believe the defendant has a copy of those. I'll hand these up
18 to the Court if I can approach.

19 THE COURT: I have copies of them.

20 MR. SCOTT: Thank you.

21 THE COURT: But you will need to give them to the
22 clerk of the court afterwards.

23 Any objections to Government's 1 through 5, Mr. MacColl?

24 MR. MACCOLL: Yes, Your Honor. So with respect to
25 Exhibit 5, which I just received a half an hour ago, there

1 are -- objection is based on hearsay, Crawford, confrontation
2 clause issues, including with respect to Mr. Hastings' note of
3 a purported meet -- of a meeting with Mr. Millette in
4 September of '21, where he characterizes, and we believe
5 mischaracterizes, what Mr. Millette said. And if the
6 Government's going to offer Mr. Hastings' interpretation of
7 what he said Mr. Hastings said in an uncounseled interview
8 with two probation officers, we think Mr. Hastings needs to
9 take the witness stand.

10 THE COURT: Mr. Hastings is in the courtroom, so you
11 can call him.

12 MR. MACCOLL: We object to the Government offering
13 his -- his statement, Your Honor.

14 THE COURT: All right. And specifically with regard
15 to your hearsay objection can you be -- is that the statement
16 you're referring to that you consider to be hearsay, or is
17 it -- how are you viewing this?

18 MR. MACCOLL: So obviously, Your Honor, the defense
19 has a different interpretation of the constitutional
20 requirements for this hearing. We contend we're entitled to a
21 jury trial and that in order for a proper proceeding to result
22 in what the Government's requesting is the incarceration of a
23 defendant that due process requires a higher level of
24 reliability than this method of proceeding, including with
25 respect to all of these exhibits but in particular

1 Mr. Hastings' notes.

2 Also, Your Honor, with respect to Exhibit 4, the
3 polygraph reports, I'm not an expert on polygraph examination,
4 never sat through one, don't think I've cross-examined or
5 presented a polygraph expert in court, usually not admissible
6 for lack of reliability. But to offer a polygraph report
7 without a polygraph examiner to testify to what the process
8 was, how reliable the process is, what the meaning is, I don't
9 know if the Government's offering these polygraph reports
10 to -- as evidence of what Mr. Millette said or as evidence
11 that Mr. Millette said something that wasn't true and that the
12 Court's going to argue that the Government should conclude
13 that Mr. Millette lied about some statement and therefore the
14 opposite of what he said is true based on a polygraph
15 examiner -- examination with the examiner not in the
16 courtroom. So I'd object to Exhibit 4 as hearsay, it's not
17 reliable, and on due process grounds to be offering that kind
18 of evidence.

19 With respect to the testimony of Ms. Phillips and
20 Ms. Millette, they're both in the courtroom. And an aspect of
21 the motion to dismiss, Your Honor, is that there aren't
22 factual disputes here. We think that what happened is
23 consistent with the conditions of supervision. The Millette
24 family -- everybody in the Millette family believes that what
25 happened was consistent with the conditions of supervision and

1 with what they were told was the meaning of the conditions of
2 supervision, and that what the Government is asking to do here
3 is counterproductive from a public policy, criminal justice,
4 sociological, and familial point of view. And we think it's
5 important for the Court to get an understanding that that
6 would be a mistake and to be proceeding with just read this
7 and you'll come to the right result we think is gravely
8 mistaken.

9 Judge Cohen heard the witnesses and came to the
10 conclusion that he interprets one rule as not having been
11 violated, the other rule as having been violated. I think
12 given the mistaken definition of the word presence, given an
13 ambiguity we contend has to be resolved in favor of the
14 defendant, but -- but ultimately came to the conclusion that
15 Mr. Millette should not be detained and that even no
16 additional conditions should be imposed.

17 And at this point the Government's asking on a pile of
18 paper to throw him in jail. And we think that that approach
19 violates due process and all of the other rules and principles
20 that I've outlined, Your Honor. Thank you.

21 THE COURT: All right. But -- so you said something
22 that's piqued my interest, which is you do not have a factual
23 dispute here. So this is really a legal question as to what
24 the term presence in the special condition No. 9 means?

25 MR. MACCOLL: There is -- there's -- Mr. Millette's

1 acknowledged, Ms. Millette's acknowledged, all of our
2 witnesses would acknowledge that on this occasion and on other
3 occasions when any of the approved supervisors -- and
4 everybody who's been an approved supervisor is in the room
5 today -- has been with Kevin and Lexie Millette, his daughter,
6 and the supervisor has needed to visit the toilet, either at
7 the house or at a restaurant, and all of those things have
8 happened at least scores of times, that it never occurred to
9 anybody there, Kevin, the supervisor, Lexie, who is not here
10 today but her brother is again, that Kevin should leave the
11 room while the supervisor is in the restroom or Lexie should
12 go to the restroom with the supervisor or Lexie should leave
13 the room. It just didn't occur to anybody.

14 But we don't dispute that, yes, on a regular basis, when
15 that kind of circumstance has occurred, the supervisor always
16 believed that she was present within the meaning of the rule,
17 whether she was in the kitchen stirring dinner, in the
18 restroom, whether it's going to the bathroom or taking a
19 shower, or on the back deck on the other side of a screen
20 door. They believed they were present. And if anybody -- as
21 I argued in my brief, and the Court's read it, if somebody had
22 come to the front door and said is your -- is Ms. Millette
23 present, the answer wouldn't be no because she was two rooms
24 down. The answer would be yes, she's two rooms down.

25 THE COURT: Yeah. Now, maybe we can shorten this

1 somewhat based on what I'm hearing from the defense counsel.
2 In my view, just looking this stuff over, the -- the troubling
3 spot is that the daughter was sleeping in the same room with
4 Mr. Millette and is -- apparently at the time was 15 -- I
5 don't know how old she is now -- with apparently the
6 grandmother present in the house. But, I mean, I haven't
7 heard the facts as to the arrangement, but, you know, my
8 question is if he was alone in a bedroom with a minor, then
9 that's a fairly clear violation of special condition No. 9,
10 presence with her in the house, I think -- to me, that's --
11 crosses the line. I'm not talking about the birthday party,
12 really; I'm talking about the bedroom situation, the bedroom
13 set-up.

14 And I'm only going by what I read in the papers, and I
15 want it to be proved if it's disputed, but if you're saying
16 it's not disputed then maybe we can just go forward and rule
17 today and move forward from there. And then you can take
18 whatever appeal you want to take and get the issue with regard
19 to the jury trial resolved as well.

20 MR. MACCOLL: While I -- I'd rather win today than
21 take an appeal, Your Honor, but -- but that Kevin and Lexie --
22 Lexie slept on a cot in Kevin's room or vice versa isn't
23 disputed. That's what happened. Kevin has said it happened.

24 THE COURT: Right.

25 MR. MACCOLL: And his mom has said it happened, and

1 the reason they said it happened is because it happened. I --
2 I don't want to be scolding of anybody but this condition is
3 not well written. What's prohibited is associating with a
4 minor. Kevin's associated with his children 365 days a year,
5 24 hours a day. He never disassociated from the children.

6 And so the Millettes have no objection to complying
7 with -- with the Court's understanding. And I get that from
8 an optics standpoint, from a concern standpoint, nobody wants
9 to be part of the bad story here that this happened -- what
10 we're afraid might happen happened and people didn't step up
11 and make sure it didn't happen. The Millette family all feels
12 like they know the circumstance, they know the situation,
13 they're complying at all times, and they would all testify
14 with the more strict of what's the best for the -- for the
15 kids and what's required by the order. And we err -- we err
16 on the side of caution on all of them.

17 The Government's interpretation is the bathroom
18 incident, Kevin's got to leave the house or Lexie's got to go
19 in the bathroom, and that's pretty I think preposterous, but
20 if that's the rule that's the rule. And the bedroom situation
21 is easy to fix. I mean, Lexie is 15, 16 in December, to
22 address the point raised. My -- my son was a freshman in
23 college and my daughter and I -- she must have been 16 -- went
24 on a cruise, and we didn't get two cabins. But, you know --

25 THE COURT: You haven't been convicted of possession

1 of child pornography, Mr. MacColl, to my knowledge.

2 MR. MACCOLL: No, I haven't been.

3 THE COURT: It's a different -- you're not on
4 supervised release.

5 MR. MACCOLL: No, no, I -- I'm not --

6 THE COURT: I have no concern about you and your
7 daughter. But that's irrelevant.

8 MR. MACCOLL: I'm just saying -- I'm just saying,
9 yes, that's a circumstance that it would make sense, to say,
10 hey, we're not accusing anybody of having done anything, but
11 we've got a controlled risk here and there is a different risk
12 in this circumstance than in the typical circumstance. And
13 it's a risk that a lot of us have a hard time evaluating.
14 Because I don't have any desire to look at child pornography.
15 Other people do. Thank God I don't. How exactly that risk
16 relates to other risks I don't know. It's very -- I don't
17 have enough empathy to get what it's like to have that desire,
18 I don't. It's just completely foreign to me.

19 But I -- so I -- I get -- and I look at the facts and I
20 go, ooh, that feels like that one, if I were sitting on the
21 bench I would be uncomfortable saying, yeah, that's okay,
22 don't worry about it, just go ahead and do it. Mom can be 50
23 feet away, you know, two doors, whether they're closed or open
24 away or not, we're not going to go that's okay. What are we
25 going to do about the fact that it happened?

1 And -- and to me we have to interpret the order, as we
2 briefed, in favor of the defendant if it's ambiguous. I think
3 if they didn't -- weren't told is it okay for a father with
4 this conviction to sleep in the same bedroom as his
5 15-year-old, soon to be 15-1/2-year-old daughter at the time,
6 is that okay. If they were just asked is the supervisor
7 present, if she's in the house, I think 90 people out of a
8 hundred would say yes. And so it's not a violation.

9 Now, it makes sense to clarify, okay, maybe we haven't
10 written this as clearly as we should have, but -- but more
11 clearly written might be the supervisor can be in a different
12 room briefly for functions like using the toilet and still be
13 considered present but not for periods longer than, if we were
14 trying to avoid ambiguity, a number of minutes, I'm within 10
15 minutes, I'm within 5 minutes, within 15, whatever it is. So
16 that's the solution that I'm hoping for.

17 This is a good, caring family. I have a lot of empathy
18 for Kevin and what he's gone through, how hard he's working on
19 his jobs, counseling, and to be a good, present parent, which
20 is the flip side of what's going on here. To some extent the
21 Court -- Congress has thrust the Court into sort of a family
22 court role here, which isn't traditionally what federal court
23 is all about. I handled a juvenile case 30 years ago; I think
24 it was the first one that had been brought in maybe the
25 history of the court. And so it's a difficult role, and I'm

1 not sure the Court's a great fit but you have that role.
2 Officer Phillips has that role. And we're trying to comply,
3 all of us, you know, we want to -- protecting Lexie is
4 paramount for all of us and paramount for all of the
5 Millettes.

6 So my hope is that we would just get -- and I don't
7 particularly care whether there's a finding of a violation or
8 not -- I don't want my client to go to jail; I think that
9 would be the worst thing could happen to Lexie today -- and
10 end up with a clearer set of conditions. All -- all of the --
11 the two currently approved supervisor in the room,
12 Ms. Millette who I think has sort of decided maybe -- maybe
13 Officer Phillips and I bang heads a little bit, maybe it's
14 better if I'm not an approved supervisor. That doesn't mean
15 she can't visit with her granddaughter on her own or with
16 Kevin as long as her daughter or Kevin -- Kevin's best friend
17 Karen is there. So everything can be accommodated if we take
18 a constructive approach. My goal here -- I don't -- I don't
19 want an appeal and --

20 THE COURT: I hear you.

21 MR. MACCOLL: -- want a jury trial. I just don't
22 want my client to go to jail.

23 THE COURT: Let me get the Government's position on
24 it.

25 MR. MACCOLL: Thank you.

1 THE COURT: Mr. MacColl is essentially seeking a
2 constructive approach, that is, a clarification of the special
3 condition No. 9. What's the Government's position on whether
4 that's a possibility? Or you might want to confer with
5 probation as well, I don't know.

6 MR. SCOTT: Yes, Your Honor. I would say, first of
7 all, I think the Government's position here, which I think
8 probation stands behind as well, is that condition No. 9 is
9 clear enough to prohibit the defendant from sleeping in the
10 same room with any minor, including his daughter, when there's
11 not a supervisor present in the room with them. You know, I
12 really question why that should even need to happen under the
13 circumstances that this defendant finds himself under in
14 supervision.

15 And with respect to finding a -- you know, doing a more
16 constructive approach here, am I to understand that the
17 Court's asking if -- if probation would be willing to withdraw
18 the petition and seek to clarify or -- I'm not -- I'm just
19 trying to make sure that I'm understanding what you're asking.

20 THE COURT: Well, I think what I hear Mr. MacColl
21 saying is that there could be an admission to the violation.

22 MR. SCOTT: Right.

23 THE COURT: His goal is to have at sentencing no
24 term of imprisonment. And I do agree that special condition 9
25 has some ambiguity to it, and he raises a point of what

1 happens if the approved chaperone has to use the restroom,
2 then is it required that the -- the minor and the -- and
3 Mr. Millette, you know, go to separate rooms, what happens in
4 situations where, you know, the chaperone has to be
5 momentarily out of the room. And really what is the
6 definition of presence? Is it within earshot and eyeshot? Is
7 it -- you know, what is it? And I do say that there is some
8 ambiguity there.

9 I agree with you that the situation that we're presented
10 with, which is sleeping in the same bedroom, is beyond really
11 that ambiguity. I think any reasonable person would know that
12 that is not permitted under these circumstances. But I do
13 hear Mr. MacColl's point of is there a way to sort of -- I
14 guess I would say this. Regardless of whether we go forward
15 with this proceeding today, I do think that the special
16 condition should be clarified going forward. If it is to
17 remain in place, then it needs to be given some contours so
18 that there cannot be -- so that there's bright lines and we
19 can know when a violation is or is not occurring.

20 And I feel like it depends really on the Government's
21 concern, essentially, here with regard to the violation that
22 has pretty much been admitted to as far as the conduct with
23 her sleeping in the room with him. If you want to pursue that
24 and pursue an incarcerative term, then I think you need to --
25 you should probably just prove it up if you can, and -- or if

1 it's admitted to, I don't know, but -- and then we can go
2 directly to sentencing.

3 You know, and from my perspective, I mean, I've read
4 some of this, but I did not finish the exhibits. I'm -- I'm
5 on Government No. 1, actually, so as far as the objections to
6 3 -- or to 3 and 4, I haven't read them yet. So, you know, I
7 mean -- I don't know how you want to proceed, really. But it
8 seems to me that you're in the best position, along with
9 consultation from probation, as to what needs to happen here,
10 what you want to see happen here and whether you want to push
11 forward or not. So why don't you just take a minute and, you
12 know, Mr. Hastings is back there too.

13 MR. SCOTT: Yes, Your Honor. I would say probation
14 is the party that's most directly responsible for carrying out
15 these -- the supervision of these conditions, so I'll consult
16 with them.

17 THE COURT: Why don't you just take a minute. I'll
18 take a five-minute recess and you can discuss it. Maybe you
19 can even talk to the other side. But I just want to get a
20 sense of what your position is as far as whether you want to
21 go forward or not. But I'll be in recess for five minutes.

22 (A recess was taken from 10:28 a.m. to 10:39 a.m.)

23 THE COURT: All right. I left off with you,
24 Mr. Scott.

25 MR. SCOTT: Yes, Your Honor. I've had an

1 opportunity now to discuss this with probation, and at this
2 point we'd be willing to proceed with an admission as to the
3 August 12th, 2023, violation. We do feel that an admission is
4 important here.

5 In addition, the Government and probation aren't -- not
6 going to change their recommendation as to the four-month jail
7 sentence here. However, you know, the Court at the conclusion
8 of this hearing would of course have the opportunity to and
9 the discretion to sentence the defendant to a time-served
10 sentence or anything between that and four months or
11 technically within the guideline range, I suppose.

12 The -- in addition, with respect to modifying the
13 condition, Your Honor, there's some concern that modifying the
14 condition, especially on the fly, would be kind of difficult
15 and it might have unintended consequences. It could introduce
16 further ambiguity. And I think that the problem here is that
17 we don't know exactly what circumstances are going to arise in
18 the future with respect to these conditions and how, you
19 know -- whether that condition could cover every single
20 possible, you know, circumstance that the defendant might find
21 himself in. I think it's difficult to craft a condition that
22 would cover every possible circumstance.

23 And I think that the -- at least probation has advised
24 me that the way that they would prefer to deal with it with
25 Mr. Millette is to sit down with him and go over this

1 condition again and to discuss and instruct him regarding what
2 his obligations are under these -- under this condition and
3 what he is expected to do in situations that arise in a manner
4 that would be documented so that it would be clear that he's
5 been advised as to what that condition requires. And that's
6 essentially what I have at this point.

7 THE COURT: All right. Let me -- Mr. MacColl, did
8 you want to say something?

9 MR. MACCOLL: I want to answer all the Court's
10 questions but --

11 THE COURT: Well, what's your position on this? Do
12 you want to go forward with a hearing; do you want to have --
13 do you want to admit to the August conduct? What do you want
14 to do on that?

15 MR. MACCOLL: So there isn't a dispute as to what
16 happened in August. The Court can hear it, not hear it.
17 We're not going to present any evidence that -- that
18 Mr. Millette and Lexie didn't end up sleeping in a cot and a
19 bed, two different bedding facilities, in the same room. That
20 happened. We don't agree it's a violation because we think
21 that the approved supervisor was present within the meaning of
22 the house.

23 We don't have any problem -- I get the Court's concern.
24 I didn't mean to be dismissive of it. Of course I'm not a
25 criminal defendant. I was just saying there are perspectives

1 from which -- and the Millettes all felt like this was not
2 risky behavior, but if -- if the Court says it's inconsistent
3 with the Court's understanding of the rule, they're the
4 Court's rules, that's that. That's what Judge Cohen said;
5 that has been that ever since then.

6 I -- I can't -- I can't recommend to my client that he
7 admit it's a violation because I do think he's entitled to the
8 resolution of the ambiguity. I do think that the ambiguity
9 should be resolved. And I -- and respectfully of the Court
10 and probation, I am a father. And if any judge were to say to
11 me, Mr. MacColl, if you need to discipline your daughter
12 because she didn't show up for school or she didn't do
13 something else, she didn't do her chores around the house
14 or -- or you needed to commend her and you can only do that in
15 the presence of somebody else, I'd resist that. I'd go find
16 some experts to explain you're doing more harm -- I know
17 you're trying to do good, Your Honor, but the system is doing
18 more harm than good driving that wedge between father and
19 daughter.

20 Mr. Millette doesn't need to be able to sleep in the
21 same room as his daughter with nobody else in the room. He
22 doesn't need that. There's no need of that. So agreeing to
23 that as a clarification is -- that's no harm to Lexie. Most
24 15-, 16-year-old girls do not want to spend the night with
25 their -- unless they're stuck on a cruise ship. But I don't

1 want to admit it's a violation because in our opinion it's
2 not.

3 THE COURT: I understand.

4 MR. MACCOLL: Thank you, Judge.

5 THE COURT: I guess the question would be, rather
6 than admitting to a violation, is it fair to go through a
7 colloquy where he admits to the factual conduct? Or do you
8 want the Government to prove it? Because it can happen either
9 way, but it has to happen one way or the other.

10 MR. MACCOLL: That's why I asked for a jury trial,
11 Your Honor, and I thought of doing it in this case because
12 this isn't a case with a factual dispute. Mr. Millette
13 doesn't dispute that they spent the night in the room. He --
14 ordinarily she would shift out to the living room after his
15 [sic] dad went away to sleep. But that's not really make a
16 difference, I don't -- and then they just fell asleep without
17 doing that, but that doesn't really matter because they were
18 on two different beds watching TV in a bedroom. And the Court
19 might be uncomfortable with that, might want to prohibit it,
20 whether it was clearly prohibited or not. So -- but they did
21 spend the entire night in that room in two -- in a cot and a
22 bed separately. That's not disputed. The Government doesn't
23 need to prove it. It needs to prove that it's a violation and
24 it needs to convince the Court what the sentence should be.

25 THE COURT: All right. Let me talk to --

1 MR. MACCOLL: I'm trying to save us some pain here;
2 that's part of my goal.

6 MR. MACCOLL: Yes, Your Honor, I understand.

7 THE COURT: And I can make a ruling as to what I
8 think -- whether or not it's a violation or not, but I need
9 the facts. So let me talk to Mr. Millette, and then you can
10 jump up at any point in time if you feel like I'm going into a
11 territory that you don't want me to cover, okay?

12 MR. MACCOLL: *Absolutely, Your Honor.*

13 THE COURT: All right. So, Mr. Millette, did you
14 receive the petition to revoke your supervised release and
15 have you had enough time to review that with Mr. MacColl?

16 THE DEFENDANT: Yes, I have.

17 THE COURT: All right. The petition is alleging one
18 violation, and it's a violation of special condition No. 9,
19 which says that you shall not associate or have verbal,
20 written, telephonic, or electronic communication with persons
21 under the age of 18 except in the presence of a responsible
22 adult who is aware of the nature of your background and
23 current offense and who has been approved by the probation
24 officer. This restriction does not extend to incidental
25 contact during ordinary daily activities in public places. So

1 you understand that --

2 THE DEFENDANT: Yes.

3 THE COURT: -- is the violation that's being
4 alleged. The Government is focused on one day, Saturday,
5 October [sic] 12th, of 2023, and it's alleged in the petition
6 that you were alone with your 15-year-old child in your room
7 at -- at the -- at your residence, that the probation officer
8 observed her, the daughter, to be on a blow-up air mattress,
9 and at the time your mother, who had been previously approved
10 as a chaperone, was outside of the house in the backyard pool
11 area, and she admitted she was swimming.

12 And it's alleged that during the contact -- during this
13 contact with Probation Officer Phillips and yourself you
14 disclosed that your daughter spent the previous night at the
15 residence, and when asked where you slept you stated that you
16 spent the night on the couch in the living room and the child
17 was on a cot in the bedroom. And when the probation officer
18 questioned your mother separately she informed the probation
19 officer that you slept in the bedroom with your minor child.
20 It's alleged that you then admitted you were dishonest and
21 that in fact you did sleep in the same bedroom as your minor
22 child. And it was conveyed during this conversation that this
23 had been the sleeping arrangement when the child spent the
24 night on previous occasions.

25 That's the allegation contained in the petition. Do you

1 understand it?

2 THE DEFENDANT: Yeah.

3 THE COURT: You have to say --

4 THE DEFENDANT: Yes.

5 THE COURT: Because this court reporter has to take
6 everything down.

7 All right. So have you had enough time to discuss that
8 factual basis that's alleged in the petition with your
9 counsel?

10 THE DEFENDANT: Yes.

11 THE COURT: Mr. MacColl.

12 THE DEFENDANT: Yeah.

13 THE COURT: You had enough time to review that with
14 him?

15 (Defendant conferred with counsel.)

16 MR. MACCOLL: So we have discussed it, Your Honor.
17 Mr. Millette doesn't -- doesn't agree with every factual
18 aspect of it.

19 THE COURT: All right. This is just the allegation.
20 I want to make sure he understands the allegation against him.

21 THE DEFENDANT: Yeah.

22 THE COURT: Do you understand it?

23 THE DEFENDANT: Yes.

24 THE COURT: Have you had enough time to talk with
25 Mr. MacColl about it?

1 THE DEFENDANT: Yes.

2 THE COURT: All right. Now, you understand you have
3 a right to have a hearing at which the Government would be
4 required to prove this allegation in an attempt to prove a
5 violation of this condition. Do you understand that?

6 THE DEFENDANT: Yes, I do.

7 THE COURT: All right. And at any such hearing your
8 counsel would be able to cross-examine the Government's
9 witnesses, object to evidence that the Government was
10 offering, call witnesses that would be able to testify in your
11 favor, as well as present evidence that he might want me to
12 consider. Do you understand that that would be your right at
13 any hearing?

14 THE DEFENDANT: Yes, I do.

15 THE COURT: All right. Now, I know there's some
16 dispute as to the actual factual allegations, and I have a
17 feeling I know where you're going with that, but I -- I guess
18 maybe the thing to do would be do you want to have a hearing
19 on this charge?

20 THE DEFENDANT: Yes, I do.

23 And, Mr. Scott, go forward. Well, let's -- now let's
24 back up on the exhibits, all right? I'm going to defer ruling
25 on the admission of the exhibits. I -- as I said before, I

1 have started reading the testimony of the -- Officer Phillips.
2 I have not read 4 and 5. I have looked at the picture, which
3 is I think Government 3. And I have not looked at Government
4 2, which I believe is the testimony of Mrs. Millette, the
5 grandmother or defendant's mother. So I'm going to just put a
6 pin in the ruling on whether or not I'm going to accept those
7 exhibits, and I'm going to let you go forward with whatever
8 you want to do. We'll get back to the exhibits later.

9 MR. SCOTT: Yes, Your Honor. All right. So I've
10 moved for admission of these exhibits. I just want to respond
11 a little bit to some of the defendant's objections about
12 these, though.

13 This -- despite counsel's argument and how he would like
14 to proceed, this is not a trial. The rules of evidence don't
15 apply in this proceeding as they do during a trial. The
16 defendant has certain due process rights to confront witnesses
17 against him, but it's not the same as the Fifth Amendment
18 due -- you know, Crawford right the defendant would have if he
19 was accused at a trial of criminal conduct.

20 THE COURT: Can we just -- before we go any further,
21 I just want to make sure you're right on that. And -- so
22 there is an evidentiary rule that discusses what rules apply?
23 And I just want to look at that. It's 1101. Okay. So it
24 does say that there is an exception for the rules of
25 evidence -- the rules except for those on privilege do not

1 apply to the following, and it says granting or revoking
2 probation or supervised release. So I think you're
3 technically correct.

4 Do you know of any other law than that, Mr. MacColl, on
5 the actual evidentiary objection?

6 MR. MACCOLL: I don't -- I don't know of a case that
7 is at odds with that. I would -- the Supreme Court case we
8 relied on with respect to a jury trial I think would undercut
9 the constitutionality of that, but that's what the rule says,
10 Your Honor.

11 THE COURT: All right. And I do -- I understand
12 what you're saying, but I do sort of -- can certainly evaluate
13 the -- sort of the reliability of evidence, so -- all right.
14 So that's your -- now go ahead. I know, I'm sorry, I kind of
15 got hung up on that because I wanted to check it.

16 MR. SCOTT: Certainly, Your Honor. And I would also
17 note that at least two of these exhibits were from a prior
18 proceeding where the defendant did have an opportunity to
19 cross-examine the witness.

20 In addition, Your Honor, with respect to Government's
21 Exhibit 5, which is chronographic notes, I would note that, as
22 Your Honor did previously, that both of those witnesses are
23 here and certainly are available to answer any further
24 questions that the Court has or if the defendant wants to call
25 them to the stand to examine them regarding those statements

1 in there.

2 And in addition to that, Your Honor, I'd just like to
3 respond, too, to the defendant's statements regarding the
4 polygraph examinations report there -- of which the Government
5 has sought admission of two as Exhibit 4. The Government
6 isn't seeking to admit these for really any value of the
7 polygraph results themselves. It's more as a statement of the
8 defendant's statements that he made in response to questions
9 by the polygraph examiner that we're seeking to admit these.
10 And in particular -- and also what was said to the defendant.

11 With respect to the first one, I would just note that on
12 page 3 of the first report here, this is the March 29th, 2023,
13 it just kind of goes over some information regarding contact
14 with minors -- excuse me. I think it's important to note that
15 Mr. Millette in this discussion when -- about the subject of
16 contact with minors indicated that he denied being all alone
17 with any minor, and I think that's kind of illustrative of his
18 understanding of what these conditions require, that he not be
19 all alone with any minor, which is relevant to the violation
20 here.

21 In addition, the second report, which refers to the
22 9/12, really I think the most important part here is that --

23 THE COURT: The second report, in Government 4?

24 MR. SCOTT: That's correct.

25 THE COURT: Okay.

1 MR. SCOTT: Yeah, so there's two reports here. I
2 put them together, so I apologize if that's confusing at all,
3 but the second report is -- refers to a September 12th, 2023,
4 interview and polygraph. But I think the important part here
5 is that the defendant admitted that he had had the sleeping
6 arrangement with his daughter who slept in his room on more
7 than one occasion. We're on page 3, where he stated he had
8 been alone with his daughter a few times. He said that
9 sometimes he watches television with his daughter in his room
10 when his parents are in another room. He said his daughter
11 had spent the night usually on Friday. He said also that he
12 had spent no more than three nights alone in his bedroom with
13 his daughter.

14 So I think that's important just because it shows that
15 this wasn't an isolated kind of incidence that happened. It
16 doesn't sound like the defendant is denying that he spent the
17 night alone with his daughter once, so I don't know how much
18 that's necessary.

19 With that being said, though, the probation officers are
20 here; I've offered these into evidence. I think this is a
21 pretty straightforward case, and if the Court has any
22 questions I'd be happy to answer them either myself or through
23 the probation officers that are present.

24 THE COURT: So I guess we're going to get down to
25 the issue of the -- the exhibits because that's what you're

1 going to rely on for your evidence.

2 MR. SCOTT: Yes, Your Honor.

3 THE COURT: All right. Do you want to be heard at
4 all in response, Mr. MacColl?

5 MR. MACCOLL: Can I have just a moment, Your Honor?

6 THE COURT: Um-hum.

7 MR. MACCOLL: I'm sorry to slow things down.

8 (Defendant conferred with counsel.)

9 MR. MACCOLL: So, yes, Your Honor, I object to
10 Exhibit 4. I appreciate the clarification. It is hearsay.
11 We contend that the rules of evidence need to apply. But in
12 any event under the due process clause to proceed by a
13 recently provided report of what somebody who's not in the
14 room says the defendant said on some other occasion, and I
15 don't have an opportunity to ask him or her, whichever, what
16 his or her process was for taking notes -- Michael,
17 apparently -- and how clearly he recalls exactly what the
18 defendant said. We believe it's an improper way of proceeding
19 consistent with the due process clause on a matter in which
20 the Government is asking for the incarceration of my client.
21 Thank you, Judge.

22 THE COURT: All right. I think I'd like to have
23 Kate Phillips sworn, please.

24 THE CLERK: Do you solemnly swear that the testimony
25 you shall give in the cause now in hearing shall be the truth,

1 the whole truth, and nothing but the truth, so help you God?

2 THE WITNESS: Yes.

3 THE CLERK: Please have a seat. Pull yourself up to
4 the microphone. Please state and spell your first and last
5 name.

6 THE WITNESS: Kate Phillips, P-H-I-L-L-I-P-S.

7 THE COURT: All right. I'm going to do some
8 questioning, and I know this is unusual but there are some
9 things I want to know and you may want to cross-examine on it.
10 KATE PHILLIPS, having been duly sworn, was examined and
11 testified as follows:

12 EXAMINATION

13 BY THE COURT:

14 Q. Ms. Phillips, I just reviewed your -- portions of your
15 testimony that you gave at the preliminary examination and
16 release hearing before Judge Cohen. One of the things that
17 you said was that when you spoke with the grandmother, I'll
18 refer to her, Mr. Millette's mother, she disclosed that he had
19 slept in the same room. That's what put you -- gave you the
20 information that she actually had slept there that night; is
21 that correct?

22 A. Yes.

23 Q. And one of the things you said was the essence of the
24 conversation was that this had occurred more than once.

25 A. Yes.

1 Q. That this wasn't the first time that there had been a
2 sleepover in his bedroom. Can you explain what you meant by
3 the essence of the conversation, if you can recall?

4 A. In speaking with both Mr. Millette and his mother, I
5 questioned them if this had happened before. And the answer I
6 received was along the lines of like, yes, but I always check
7 on them throughout the night. And I can't recall the exact
8 language that was used, but it was clear to me that had
9 happened before.

10 THE COURT: All right. Do you want to ask any
11 questions, Mr. Scott?

12 MR. SCOTT: Just briefly.

13 CROSS-EXAMINATION

14 BY MR. SCOTT:

15 Q. When you arrived at the residence on September 12th, I
16 think it was, you previously testified that Miss Millette was
17 not in the house; is that correct?

18 A. That is correct.

19 Q. And did you come to learn where she was exactly?

20 A. Yes.

21 Q. And where was that?

22 A. She was in the backyard pool area.

23 Q. And when you -- did there come a time that you saw her,
24 that she came into the house?

25 A. When I met with her it was -- all our meetings took

1 place outside that day.

2 Q. Thank you.

3 A. Yes.

4 Q. What was she wearing when you met with her?

5 A. A bathing suit, at least for the top because she showed
6 me how it was wet.

7 Q. Okay.

8 A. I can't remember on the bottom.

9 Q. All right. And did she say to you anything about what
10 she had been doing in the backyard?

11 A. She told me she was swimming.

12 Q. All right. Now, I'm going to show you what's been
13 marked as Government's Exhibit 3.

14 MR. SCOTT: If I can approach.

15 THE COURT: Yes, you may.

16 BY MR. SCOTT:

17 Q. Do you recognize Exhibit 3?

18 A. I do.

19 Q. Can you just tell us what that is?

20 A. It's a photo of Mr. Millette and a minor who is sitting
21 in front of a birthday cake.

22 Q. Okay. And just to be clear, is the minor's face
23 redacted --

24 A. Yes.

25 Q. -- in that? Okay. And do you understand that to be a

1 photo of the -- taken at the birthday party that occurred
2 sometime in July of 2021 at Mr. Millette's residence?

3 A. Yes.

4 Q. Did you receive that from a person who indicated to you
5 that they had been present at that birthday party?

6 A. I received it from the minor's mother. I don't believe
7 they were present at the party.

8 Q. Okay. Thank you.

9 MR. SCOTT: That's all I have.

10 THE COURT: Mr. MacColl, anything for
11 cross-examination?

12 MR. MACCOLL: Thank you, Your Honor.

13 CROSS-EXAMINATION

14 BY MR. MACCOLL:

15 Q. Good morning, Officer Phillips.

16 A. Good morning.

17 Q. How are you today?

18 A. I'm well, thanks.

19 Q. Terrific. Looking at Exhibit 3, the photograph from
20 the birthday party for the -- you understood it was the -- the
21 minor's birthday, correct?

22 A. Correct.

23 Q. And do you understand the minor was a relative of the
24 senior Mr. Millette?

25 A. It's my understanding.

1 Q. And you understood that the minor's father was present
2 at the party, correct?

3 A. That is my understanding.

4 Q. And your understanding was that the minor's father was
5 aware of Kevin's conviction, correct?

6 A. I have no way of -- I -- at the time of the birthday
7 party, that did not occur. There was no third-party risk
8 notification made from our office to the minor's father.

9 Q. But you -- have you investigated whether the father
10 knew that Kevin had been convicted?

11 A. I can't recall if I did.

12 Q. You were in court before Judge Cohen in this room a
13 month or two ago, right?

14 A. Correct.

15 Q. And you heard testimony that the minor's father was
16 aware of Kevin's conviction, correct?

17 A. Depends on when that testimony took place, because I
18 left after my testimony.

19 Q. You were actually present virtually now that I think
20 about it, correct?

21 A. Correct.

22 Q. You don't have any information -- any basis to dispute
23 that the minor's father, who was present, was aware of Kevin's
24 conviction, right?

25 A. Correct.

1 Q. And you agree that -- that Mr. Millette's mother was
2 present at this birthday party, correct?

3 A. Correct.

4 Q. And at the time she was an approved supervisor.

5 A. For his two minor children.

6 Q. Is there -- when you approved Ms. Millette as a
7 supervisor, did you provide any writing certifying that she
8 was approved?

9 A. That approval was made by Scott Hastings.

10 Q. Did Mr. Hastings provide a writing documenting that
11 Ms. Millette was an approved supervisor?

12 A. I am not aware but I cannot speak to what he did.

13 Q. Have you provided approval for any of the supervisors
14 approved for Mr. Millette's case?

15 A. Yes.

16 Q. That would be his friend Karen.

17 A. Scott Hastings approved his friend Karen and I approved
18 his sister.

19 Q. You approved Kim.

20 A. Yes.

21 Q. When you approved Kim, did you provide her with a
22 writing saying that she was approved?

23 A. No.

24 Q. Did you provide Mr. Millette with a writing saying that
25 Kim was approved?

1 A. I did not.

2 Q. Do you remember how -- how precisely do you remember
3 the question you asked that elicited a response as you recall
4 from Ms. Millette that she always checks on them -- and I took
5 that to mean Kevin and Lexie -- when they're in the bedroom
6 watching -- watching TV? Do you remember what your question
7 was?

8 A. My initial question was where did Kevin sleep, and the
9 answer was in his room. And I don't remember specifically
10 what my next question was, but it was a conversation about
11 concern over her being an approved supervisor and permitting
12 him to sleep in the same room as a minor child.

13 Q. So the way I understood your testimony, you had a
14 conversation about what happens when they're in the room
15 sleeping, and you understood the sen -- the elder
16 Mrs. Millette to say she goes in and checks regularly.

17 A. Yes.

18 Q. And I'm just going to suggest to you that it would make
19 more sense to me that she would go in and check regularly if
20 they were watching TV together, watching some show that
21 Mrs. Millette and maybe the senior Mr. Millette didn't want to
22 watch, as compared to going in regularly throughout the night
23 while people were asleep. But you understood her to mean I
24 get up while I'm sleeping in the middle of the night and I go
25 in and check on two people who are asleep in a different room.

1 That's what you thought she meant.

2 A. The context that the conversation was, she said she
3 would get up three to four times in the night because that was
4 how often the dog got her up. And during those times she
5 would check on Mr. Millette and his daughter.

6 Q. And did you have a sense for how many times she was
7 telling you that had happened?

8 A. She told me that she would check on them three to four
9 times in the night.

10 Q. And how many different nights was she talking about,
11 did you think?

12 A. I just gathered it was more than one. I don't have a
13 specific number.

14 Q. Did you measure the distance from the back door to the
15 pool?

16 A. No, I did not.

17 Q. Do you have a sense for how far it is?

18 A. I do have a sense of how far it is, yes.

19 Q. What's your sense of how far it is?

20 A. In my testimony I believe I said 30 to 40 feet. That's
21 the best I can give without having a measuring tape. It's in
22 the backyard of the home area.

23 Q. The -- the condition of release, special condition
24 No. 9, we talked about this at the prior hearing, prohibits
25 Mr. Millette from having communication with any minor except

1 in the presence of an approved supervisor, correct?

2 A. Correct.

3 Q. And you testified that in your mind that would mean
4 that an approved supervisor would have to be watching him sign
5 a birthday card to his daughter, for example, correct?

6 A. Well, signing a card wouldn't be contact with a minor.

7 Q. It would be communication in writing and that's
8 prohibited except in the presence of a supervisor, correct?

9 A. Yes.

10 Q. So -- so the supervisor needs to watch him sign a
11 birthday card.

12 A. Per the written communication, yes, and I think there
13 are levels of interpretation for that.

14 Q. And another form of written communication would be text
15 messaging, correct?

16 A. Correct.

17 Q. And Mr. Millette's allowed to have a phone capable of
18 text messaging, correct?

19 A. Correct.

20 Q. And you know that he text messages with his daughter,
21 correct?

22 A. Correct.

23 Q. And you know that because you have access to all of his
24 text messages in real time, correct?

25 A. Correct.

1 Q. And you know that when he text messages with his
2 daughter often there is no other third person who's a
3 recipient on those text messages, correct?

4 A. Correct.

5 Q. So you know that he's text messaging with Lexie without
6 having either Kim or Karen or Melodie Millette also on the
7 text communication.

8 A. Correct.

9 Q. Has it occurred to you that's a violation?

10 A. The conversation that I've had with Mr. Millette is
11 because the phone is monitored by our office then the level of
12 risk is reduced, and he can have that form of communication
13 with his daughter.

14 Q. Can he call his daughter on the phone?

15 A. That would not be -- we would not be able to monitor
16 the context of that so no, not without the presence of a
17 supervisor.

18 Q. Have you checked to see whether he -- whether he calls
19 his daughter on the phone?

20 A. I have not ran a specific report for that.

21 Q. That would be your interpretation if he -- if his
22 daughter calls him on the phone, he cannot answer the phone
23 call unless an approved supervisor is present. That's your
24 understanding of the rules.

25 A. Yes.

1 Q. Have you ever discussed that with him?

2 A. I don't think specifically. That was not a question
3 that was brought to us.

4 Q. Are you aware of any studies that address whether
5 it's -- it's healthy to prohibit a father and daughter from
6 communicating by phone without some third person present?

7 A. No.

8 MR. SCOTT: Your Honor, I'm going to object to this.
9 This isn't really the subject of this hearing. As to how this
10 condition applies to phone conversations isn't really relevant
11 to the Court determining whether the defendant's conduct in
12 this instant violated the condition. And if the defendant
13 wants to move to modify the conditions to clarify that, he's
14 welcome to do that. But I don't think that we need to address
15 this in this proceeding.

16 THE COURT: Do you want to respond, Mr. MacColl?

17 MR. MACCOLL: Yes, Your Honor. The principal
18 defense to the petition is that the condition is inherently
19 ambiguous and that the ambiguity needs to be resolved in favor
20 of the defendant and that in many circumstances the ambiguity
21 is resolved in favor of the defendant because probation and
22 everybody else involved goes, oh, that's not -- that's not
23 what we mean by the words that we used. We meant this thing
24 over here. But the words that we use cover a vast area more
25 than we mean, and that's not fair to criminal defendants on

1 supervised release.

2 THE COURT: The objection's overruled. You may
3 proceed.

4 MR. MACCOLL: Thank you, Your Honor.

5 A. Can you repeat the question, please?

6 BY MR. MACCOLL:

7 Q. Your understanding -- your understanding of special
8 condition No. 9 is that if Lexie Millette calls her dad on the
9 phone he cannot answer.

10 A. He can answer in the presence of a supervisor.

11 Q. And are you aware of conditions that relate to whether
12 that's a good thing or a bad thing or a helpful thing in the
13 circumstance of a father and a daughter where the father's
14 convicted of looking -- possessing child pornography?

15 A. No.

16 MR. MACCOLL: Thank you. I don't have any other
17 questions, Your Honor. Thank you.

18 THE COURT: Anything further, Mr. Scott?

19 MR. SCOTT: Yes, briefly.

20 REDIRECT EXAMINATION

21 BY MR. SCOTT:

22 Q. Just because this has been referenced several times I
23 think here, was there any point where you had a conversation
24 with Miss Millette in which she referenced what to do if she
25 had to go to the bathroom?

1 A. There was a conversation after the August 12th
2 incident, and it was mostly Miss Millette speaking and
3 expressing confusion, you know, what happens if I have to go
4 to the bathroom or I need to shower, do I need to bring her
5 into the shower with me or the bathroom with me and a teenager
6 probably wouldn't want to do that. It was a conversation that
7 I listened to, and I affirmed that she had confusion over
8 this. But at the end of the day the instruction was this is
9 Mr. Millette's burden, and he needs to be the responsible
10 person to leave the situation. There was no instruction that,
11 yes, a minor needs to go into the restroom with the
12 responsible party.

13 Q. Okay. And can we just expand on what you mean by
14 Mr. Millette needing to leave the situation?

15 A. Remove himself from the home if the responsible party
16 is going to be in a closed room so Mr. Millette wouldn't be
17 alone with a minor.

18 MR. SCOTT: Thank you.

19 THE COURT: Anything further, Mr. MacColl?

20 MR. MACCOLL: No, thank you, Your Honor.

21 THE COURT: You may step down, thank you.

22 Anything additional, Mr. Scott?

23 MR. SCOTT: No, Your Honor.

24 THE COURT: All right. With regard to the exhibits,
25 I am going to admit Exhibit No. 3. That is the Government's

1 photograph of the birthday party. As far as Exhibits 1 and 2,
2 do you have any objection to the admission of those exhibits?
3 That's just testimony from the earlier --

4 MR. MACCOLL: I'll withdraw my objection, Your
5 Honor.

6 THE COURT: Okay, 1 and 2 are admitted as well.

7 With regard to 4 and 5, I haven't read either of those,
8 and it appears to me that 4 is from the examination of the
9 Government, some kind of interview with the polygraph examiner
10 and then some answers to the polygraph.

11 As to the interview portion, are you objecting to that?
12 I understood your objection with regard to the polygraph to be
13 the expertise of the polygraph examiner. Do you have any
14 objection to the notes of the interview? Maybe you did object
15 to that, too.

16 MR. MACCOLL: I added that as well, Your Honor. I
17 don't care a lot. I'll withdraw the objection.

18 THE COURT: All right.

19 MR. MACCOLL: Understanding -- there is some
20 suggestion, as I read the scoring, that one of Mr. Millette's
21 answers was in the maybe untruthful range. And as long as
22 it's not being offered for that purpose then I'll withdraw the
23 objection.

24 THE COURT: All right. Well, I'm going to admit it
25 to the extent that it has some kind of chronological interview

1 notes that the polygraph examiner was taking on a theory that
2 those are probably accurate, reliable. I'm not going to
3 consider anything about the scoring of it because I have no
4 idea what that even means, and it's just not something I feel
5 comfortable with.

6 MR. SCOTT: Yes. And just to be clear, the
7 Government is not offering it for those -- for the purposes of
8 the scoring at all.

9 THE COURT: All right. And then -- so Exhibit 4 is
10 admitted under those circumstances.

11 Exhibit 5, which are the chronological notes, I mean, I
12 sort of thought of this as Jencks kind of stuff that you could
13 have used to cross-examine her with. Is there any need for me
14 to have these as substantive information for the Government?

15 MR. SCOTT: I guess I would say that I -- I don't
16 think they're Jencks because I think they're court records,
17 not --

18 THE COURT: Well, I get that. I know you want to be
19 careful on that for the next one. But I --

20 MR. SCOTT: Your Honor, I think it -- I think with
21 respect to the first violation in particular, it just offers
22 some context for instructions that the defendant was provided
23 with respect to the condition, specifically on Scott Hastings'
24 report, which would be the -- page 2 of this package. It says
25 access to minors. He has three biological children ages 18,

1 17, and 13. He's permitted contact in the presence of a
2 responsible adult. The parents are identified as such, and
3 requested his ex-wife and a platonic friend be considered for
4 the same. I told S that I would contact both of them and
5 assess suitability to serve as responsible adult to monitor
6 visits with his kids.

7 THE COURT: Is S supervisee?

8 MR. SCOTT: I believe that is the case. So I think
9 that there is another -- if you look at the second report of
10 Officer Hastings from September 14th of 2021, this is a
11 discussion regarding that -- the violation associated with the
12 birthday party in the summer of 2021 where Officer Hastings
13 says he started by inquiring with the defendant about
14 permissions he told PO Phillips he thought he had through me
15 about contact with minors. The defendant conceded that our
16 prior discussion when he was first released in which his
17 mother was approved to be a responsible person to supervise
18 visits with minors was specific to his two underage children
19 and was not blanket permission to have contact with all minors
20 in his mother's presence. And Officer Hastings then told the
21 defendant he was glad to hear him acknowledge that was a poor
22 assumption on his part and that otherwise it would be
23 reasonable for us to conclude he was intentionally trying to
24 dupe Officer Phillips.

25 Now, I realize that probably the most serious violation

1 we have here is the more recent one that happened in August,
2 but I do think that these are kind of relevant for the Court
3 to assess the defendant's kind of knowledge of the beginning
4 or the -- you know, what he was instructed to do with regard
5 to condition No. 9 with respect to whether he could see any
6 minor or just his own children under the supervision of the
7 approved supervisor. I would note again that Officer Hastings
8 is here if anybody has any questions for him regarding those
9 contacts.

10 THE COURT: All right. With regard to Government 5,
11 I'm not going to consider it. If the Government isn't going
12 to call them, I'm -- I'm not going to consider reports from
13 them that are, you know, provided 30 minutes before the
14 hearing. So the answer to that is -- and I know that's not
15 your fault. And I know that's not your Jencks so -- but I
16 don't think it's necessary for me to consider that.

17 There is one thing that is an elephant in the room, and
18 I want to give counsel an opportunity to address it. And that
19 is that in Government 4 there -- on the second report
20 there's -- it says that in 2014 Millette's daughter made an
21 accusation that he sexually touched her. DHHS investigated
22 but came to the conclusion that the allegation was unfounded.

23 I don't know if anybody wants to address it, but I just
24 wanted to say that I saw that and that is concerning to me.
25 Even though it's been investigated and found unfounded, there

1 has been an allegation made by the daughter at one point.

2 MR. MACCOLL: Yes, Your Honor. I'd move to exclude
3 that. I apologize for missing it. I -- I had seen that
4 somewhere and didn't realize it was in this. If we had known
5 that that would be in evidence we would have been prepared to
6 address it but we're not, that there's an allegation of
7 that -- of any improper contact. Mr. Millette has passed many
8 polygraphs that he's never done that with anybody.

9 THE COURT: Does the Government want to comment on
10 that at all?

11 MR. SCOTT: Your Honor, I don't have any further
12 information other than what's in the report on that subject.

13 THE COURT: That's a hard thing for me to exclude.

14 MR. MACCOLL: Pardon me?

15 THE COURT: I said that's a hard thing for me to
16 exclude.

17 MR. MACCOLL: I understand, Your Honor.

18 THE COURT: And did you want to speak, Mr. Scott?

19 MR. SCOTT: Just a moment, I think we're checking if
20 it's in the presentence report.

21 THE COURT: I looked in the presentence report. I
22 didn't see anything but --

23 MR. SCOTT: All right. I'll accept your
24 representation.

25 THE COURT: Well, I just was flipping through it, I

1 don't know, I could be wrong.

2 All right. Have you rested, then?

3 MR. SCOTT: Yes, Your Honor.

4 THE COURT: All right. Mr. MacColl, do you want to
5 offer any evidence or present any witnesses?

6 MR. MACCOLL: I do, Your Honor. I would call -- I'm
7 going to call Corbin Millette first because he needs to get to
8 an appointment.

9 THE CLERK: Please raise your right hand. Do you
10 solemnly swear that the testimony you shall give in the cause
11 now in hearing shall be the truth, the whole truth, and
12 nothing but the truth, so help you God?

13 THE WITNESS: Yes, ma'am.

14 THE CLERK: All right. Please have a seat. Pull
15 yourself right up to that microphone. Please state and spell
16 your first and last name for the record.

17 THE WITNESS: Corbin Millette, C-O-R-B-I-N,
18 M-I-L-L-E-T-T-E.

19 CORBIN MILLETTE, having been duly sworn, was examined and
20 testified as follows:

21 DIRECT EXAMINATION

22 BY MR. MACCOLL:

23 Q. Good morning, Corbin. Thanks for coming in this
24 morning.

25 A. You're welcome.

1 Q. I understand you need to get -- is it to work?

2 A. Yeah.

3 Q. And you work for the shipyard?

4 A. Correct.

5 Q. Down in Kittery?

6 A. Yeah.

7 Q. Thank you for that work. You're Kevin's son?

8 A. Yeah.

9 Q. And you're now 18 years old; is that right?

10 A. Nineteen.

11 Q. You're 19 years old. And you're the middle of three
12 children, correct?

13 A. Correct.

14 Q. How is your relationship with your dad?

15 A. It's a very good relationship. It's been great since
16 he got out of prison, and I enjoy every moment as much as I
17 can with work.

18 Q. And you understand that your father's twice been
19 convicted of possessing child pornography.

20 A. Yes, sir.

21 Q. And you understand what happened to him in his
22 childhood that -- that he associates in his mind with why he
23 has done that in the past.

24 A. Yes, sir.

25 Q. Has he been open in talking with you about that

1 background?

2 A. His past? No. I've heard it from my mother and it's
3 very -- very traumatic, I would say.

4 Q. Do you feel like -- like you've been able to talk to
5 your dad about his convictions?

6 A. Yes.

7 Q. And does he blame anybody else for his convictions, or
8 does he take responsibility for those?

9 A. He takes responsibility.

10 Q. And do you understand that your dad's involved in
11 counseling to address his background and the urges that inform
12 those convictions?

13 A. Yes.

14 Q. Is he attentive to trying to address those issues?

15 A. Yes.

16 Q. Does -- does your father have good relations with your
17 brother and your sister?

18 A. Yes.

19 Q. And do you have good relations with your brother and
20 your sister?

21 A. Yes.

22 Q. Is your brother comfortable around your dad?

23 A. I would say so.

24 Q. How about your sister?

25 A. Yes.

1 Q. If your sister were uncomfortable around your dad,
2 would she confide in you?

3 A. Yes.

4 Q. How much time are you able to spend with Lexie?

5 A. A lot.

6 Q. Okay.

7 A. She -- sorry.

8 Q. Go ahead, please explain.

9 A. She's with me almost every weekend, Friday, Saturday,
10 Sunday, when she's not working. So we have a very close bond.

11 Q. All right. And -- and is it your sense in the Millette
12 family that folks in the family are trying to get around the
13 conditions that are imposed on your dad or trying to comply
14 with the conditions imposed on your dad?

15 A. Comply with the conditions.

16 Q. When was the last time to your knowledge that Lexie was
17 with your dad?

18 A. Saturday, recently.

19 Q. And who -- who was there Saturday when Lexie was with
20 your dad?

21 A. It was dinner. It was my nana, my grandfather, Karen,
22 my dad, me, my brother, and my girlfriend, and Lexie.

23 Q. And Karen is the woman sitting in the second row
24 furthest to the -- your right, correct?

25 A. Correct.

1 Q. And you understood that she was there, one, because
2 she's a close family friend; is that right?
3 A. I understood that she's a supervisor.
4 Q. You understood -- do you know her to be a close family
5 friend as well?
6 A. That too.
7 Q. But you knew she needed to be there.
8 A. Um.
9 Q. And is that the set-up, that when your dad is with
10 Lexie an approved supervisor is always there?
11 A. Yeah.
12 Q. To your observations is your dad doing everything he
13 can to address his underlying issues and to comply with the
14 conditions of release?
15 A. Yeah.
16 Q. And you've spent the night at -- your dad lives with
17 your grandparents, correct?
18 A. Correct.
19 Q. You've spent the night there many times?
20 A. Yes.
21 Q. Do you think anything inappropriate happens?
22 A. No.
23 Q. What's usually the sleeping arrangement?
24 A. Usually sleeping arrangement would be my sister in the
25 living room and then me and my brother in the bedroom. I

1 would be on an air mattress, my brother to be on the other
2 side of the bed. But not until recently where I have a
3 full-time job, I've stopped sleeping over. So now Lexie's
4 sleeping on a cot in my father's room.

5 Q. Okay. And does that seem -- does she seem at all
6 uncomfortable with that?

7 A. No, sir.

8 Q. All right. Now, when you say that's what's happening
9 recently, has she been sleeping over since the probation
10 office raised an issue about the sleeping arrangements?

11 A. She hasn't slept over at all, sir.

12 Q. Okay. But she was there for dinner recently with Karen
13 present.

14 A. Yes.

15 Q. At this point in time do you understand that your
16 grandmother isn't an approved supervisor?

17 A. Yes.

18 Q. All right.

19 MR. MACCOLL: Appreciate your coming in, Corbin. I
20 don't have any other questions, Your Honor. Thank you very
21 much. The Government may have some questions for you and the
22 judge may ask you some questions, Corbin. Thank you.

23 THE COURT: Any questions, Mr. Scott?

24 MR. SCOTT: Yes, just briefly.

25 CROSS-EXAMINATION

1 BY MR. SCOTT:

2 Q. Good morning.

3 A. Good morning.

4 Q. All right. So you weren't present at your
5 grandmother's house on September 12th when Officer Phillips
6 visited; were you?

7 THE COURT: It was August 12th.

8 MR. SCOTT: Excuse me, August 12th. Thank you, Your
9 Honor, sorry about that.

10 A. I was not present.

11 BY MR. SCOTT:

12 Q. Okay. And you haven't been present at your
13 grandmother's house on any occasion which your father slept
14 alone in a bedroom with your sister; have you?

15 A. I have not.

16 Q. Okay. And when you are present she sleeps in the
17 living room?

18 A. Correct.

19 Q. Okay.

20 MR. SCOTT: Thanks. No further questions.

21 THE COURT: I have a question.

22 EXAMINATION

23 BY THE COURT:

24 Q. Did your sister ever talk to you about an allegation
25 that your father had sexually touched her?

1 A. She did, and it was false.

2 Q. How do you know that?

3 A. Well, I can't say for sure that I know it and I can't
4 deny it, but I know I did talk to her about it and she was,
5 what -- that was 2014, correct?

6 Q. Um-hum.

7 A. Four years old? No.

8 Q. Six?

9 A. Seven years old.

10 Q. What did she tell you?

11 A. She said that her father touched her inappropriately.
12 And my mother took legal action, it went to court, and it was
13 falsified. So I don't know much about it because I was young,
14 but I do know that my father would never touch --

15 Q. How old were you at the time? How much older are you
16 than --

17 A. I was -- I think I was 12. Yeah, so about 12.

18 Q. Did she come to you with that information at the time?

19 A. She came to me and said that he touched her
20 inappropriately when she was younger. And it wasn't until
21 recently that I -- I talked to her and I said, did he really
22 do that, and she said no.

23 THE COURT: Anyone want to follow up?

24 MR. MACCOLL: I don't have any questions, Your
25 Honor.

1 THE COURT: Mr. Scott, anything?

2 MR. SCOTT: No, Your Honor.

3 THE COURT: All right. You may step down, thank you
4 for coming.

5 MR. MACCOLL: May Corbin head off to work?

6 THE COURT: Yeah.

7 MR. MACCOLL: You're excused.

8 We call Kim Lapierre, please.

9 THE CLERK: Do you solemnly swear that the testimony
10 you shall give in the cause now in hearing shall be the truth,
11 the whole truth, and nothing but the truth, so help you God?

12 THE WITNESS: I do.

13 THE CLERK: All right. Please have a seat. Pull
14 yourself right up to that microphone. Please state and spell
15 your first and last name for the record.

16 THE WITNESS: Okay, it's Kim Lapierre, K-I-M, L-P --
17 L-A-P-I-E-R-R-E.

18 KIM LAPIERRE, having been duly sworn, was examined and
19 testified as follows:

20 DIRECT EXAMINATION

21 BY MR. MACCOLL:

22 Q. Good morning, Ms. Lapierre.

23 A. Good morning.

24 Q. You're Mr. Millette's sister; is that right?

25 A. Yes, I am.

1 Q. And you have the same parents?

2 A. Yes, we do.

3 Q. Okay. So Melodie Millette's your mom.

4 A. She is.

5 Q. And you're an approved supervisor under the conditions
6 of Mr. Millette's supervised release.

7 A. Yes, I am.

8 Q. Prior to the -- the birthday party incident two summers
9 ago, did you -- had anybody told you that -- that your
10 approval was limited to the Millette children, that there
11 couldn't be any other minors at a gathering where you were the
12 supervisor?

13 A. No, they never did.

14 Q. Did you -- had anybody prior to this summer's
15 allegation ever told you that the requirement that you be
16 present when you're the supervisor requires you to be in
17 direct physical contact at all times?

18 A. No.

19 Q. Have you sometimes gone to restaurants with Kevin and
20 his -- and his minor children?

21 A. Yes, I have.

22 Q. Did it ever occur to you when you excused yourself from
23 the table to use the facility or for any other purpose that --
24 that that -- that there was then a violation, that Kevin was
25 then violating the conditions of his release?

1 A. No, I had no idea that when you went to the restroom in
2 public areas that you -- somebody had to remove themselves
3 while they're -- the daughter or Kevin. There was never
4 really -- the rules are kind of very vague. They were not
5 really very descriptive and that was never described to me.

6 Q. Did it ever occur to you that anything was being done
7 wrong in that circumstance?

8 A. No.

9 Q. Are you close to your brother?

10 A. Very close.

11 Q. Do -- you've had a chance to observe him in the
12 presence of his children.

13 A. I have, and he's a great father.

14 Q. What do you mean by saying he's a great father?

15 A. He's always there for them. They have a very close
16 relationship. I know he really missed them a lot, and when he
17 got out he really, really wanted to make up for a lot of lost
18 time.

19 Q. Is there any aspect of their relationship that troubles
20 you?

21 A. Not at all. I've been around all of them many, many
22 nights, many, many days.

23 Q. As an approved supervisor, have you always tried to
24 comply with the conditions of Kevin's supervised release?

25 A. Absolutely.

1 Q. And have you also always tried to comply with, you
2 know, the best interests of the kids?

3 A. Always. I love the kids. They mean a lot to me.

4 MR. MACCOLL: Thank you, ma'am. No further
5 questions, Your Honor.

6 THE COURT: Mr. Scott, any cross-examination?

7 MR. SCOTT: Yes, Your Honor, thanks.

8 CROSS-EXAMINATION

9 BY MR. SCOTT:

10 Q. You were first approved as a chaperone or supervisor in
11 October of 2021; is that correct?

12 A. Yes.

13 Q. Okay. So that would have been well after this birthday
14 party incident in July of 2021.

15 A. Yes.

16 Q. So when Mr. MacColl asked you if you had been ever
17 instructed prior to that birthday party incident about whether
18 you were -- your chaperoning was limited to the children, you
19 weren't a chaperone at that time, correct?

20 A. I can't recall.

21 Q. Okay. So you don't recall if you were a chaperone at
22 the time of the July 2021 birthday party.

23 A. No, I can't recall --

24 Q. Okay.

25 A. -- when I was appointed.

1 Q. But at some point after you became a supervisor you
2 were instructed that your authority to supervise was limited
3 to Mr. Millette's minor children, correct?

4 A. I -- really it was kind of vague. It never really was
5 descriptive.

6 Q. So no one ever instructed you that you could only
7 supervise him with his minor children.

8 A. No.

9 Q. Now, Mr. Millette lived at your residence for a time.

10 A. Yes.

11 Q. Is that correct?

12 A. Yes, it is.

13 Q. Do you recall around when that was?

14 A. It was -- he lived with me for a year, and I know that
15 shortly after the incident that he was told that he needed to
16 be somewhere else.

17 Q. Okay. And that was when he came to live with you.

18 A. Correct.

19 Q. All right. And would it be fair to say that that's
20 around the time that you were approved to become a chaperone,
21 when he came to live with you?

22 A. Yeah, he had mentioned it before about me being
23 chaperone, so it was always in the works for me to be a
24 supervisor.

25 Q. It wasn't until that incident had occurred that you --

1 A. I believe so, if I recall the dates.

2 Q. So just to be clear, you didn't become a chaperone
3 until after that birthday party incident.

4 A. I believe it was after.

5 Q. Okay. Now, during the time that Mr. Millette lived at
6 your residence, did his minor children visit the residence?

7 A. Yes.

8 Q. And did they spend the night?

9 A. Sometimes they did spend the night, yes.

10 Q. Did you ever permit Mr. Millette to sleep alone in a
11 bedroom with his daughter?

12 A. No, I have two separate spare bedrooms, so I have lots
13 of room.

14 Q. Okay.

15 A. So --

16 Q. Would you have permitted him to sleep alone in a room
17 with her?

18 A. I really didn't know whether it was acceptable or not.
19 I just know that there was three of them so -- to split them
20 up because there's only so much room in each room and I have
21 several bedrooms.

22 Q. Do you think it's appropriate for Mr. Millette to sleep
23 alone in a bedroom with his daughter?

24 A. I think it's fine.

25 Q. Do you think that it was permitted by the condition

1 that you agreed to supervise him on?

2 A. If -- if I knew it was -- if I knew it was -- he should
3 not sleep in the room, I would stick to the rules.

4 Q. Okay. Don't you understand that condition to mean that
5 he can't be alone with the child, though?

6 A. I was told that he had to be supervised and that you
7 were supposed to be present. I had no idea it had anything to
8 do with going to the restrooms or bathrooms or -- it was very
9 vague. The rules were not --

10 Q. Okay. Well, I didn't ask about going to the bathroom.
11 I meant do you think that under that condition that you could
12 let him sleep alone in a room with a child?

13 A. I trust my brother. If the rules -- I had no idea
14 those were the rules, so I really can't -- but I trust my
15 brother.

16 Q. All right. So you think he would never do something
17 and that --

18 A. Correct.

19 Q. -- because of that it would be okay for him to sleep
20 alone with --

21 A. Not if -- not now that we're clear with rules. I would
22 stick to the rules. I believe in rules and I believe in the
23 goodness of everybody.

24 MR. SCOTT: All right. I don't have any further
25 questions.

1 THE COURT: Anything further, Mr. MacColl?

2 MR. MACCOLL: Not from me, Your Honor, thank you.

3 THE COURT: All right. You may step down, thank
4 you.

5 MR. MACCOLL: Karen Stewart, please.

6 THE CLERK: Do you solemnly swear that the testimony
7 you shall give in the cause now in hearing shall be the truth,
8 the whole truth, and nothing but the truth, so help you God?

9 THE WITNESS: Yes.

10 THE CLERK: All right. Please have a seat. Pull
11 yourself up to that microphone. Please state and spell your
12 first and last name for the record.

13 THE WITNESS: Karen Stewart, K-A-R-E-N,
14 S-T-E-W-A-R-T.

15 KAREN STEWART, having been duly sworn, was examined and
16 testified as follows:

17 DIRECT EXAMINATION

18 BY MR. MACCOLL:

19 Q. Good morning, Ms. Stewart.

20 A. Good morning.

21 Q. You are a close friend of Kevin Millette's?

22 A. Yes. I've known him for roughly 40 years.

23 Q. And are you also a family friend of the Millette family
24 generally?

25 A. I am like an adopted daughter.

1 Q. Do you -- so Kevin's parents are in the room?

2 A. Kevin's parents are in the room, and I call them Mom
3 and Dad.

4 Q. You call Kevin's mother Mom and you call Kevin's father
5 Dad.

6 A. I do.

7 Q. And you're an approved supervisor under Kevin's
8 conditions of release, correct?

9 A. Correct.

10 Q. Since it's been clarified in 2021 that supervisors are
11 only approved for identified children, have you been -- have
12 you ever been a supervisor of Kevin's when there were any kids
13 other than his kids in the room?

14 A. No, I haven't.

15 Q. Were you at the birthday party a couple summers ago
16 that's the object of the discussions here?

17 A. No, I wasn't.

18 Q. Had anybody told you -- when did you become an approved
19 supervisor?

20 A. Probably shortly after he was released from prison.

21 Q. Has anybody told you that he couldn't have contact in
22 your presence with anybody other than his -- his own kids?

23 A. Not that I recall.

24 Q. And has anybody before this summer told you that the
25 requirement for you to be present with Kevin when he's with

1 his kids means you have to be in the same room that they're in
2 at all times?

3 A. No, I wasn't aware of that.

4 Q. There's been some testimony earlier today about what
5 folks do when they need to go to the facilities or go to the
6 kitchen to stir the pot or anything. When you've had to go to
7 the restroom and Kevin was left in a room with his -- with his
8 kids, did you think anything improper was taking place?

9 A. No, I did not.

10 Q. Did you feel you were getting around the rules at all?

11 A. No, I did not.

12 Q. Did you believe you were complying with the rules?

13 A. I absolutely believed we were complying.

14 Q. Is Kevin a good parent?

15 A. Kevin is an excellent parent. He is actually the
16 better parent.

17 Q. He's the better parent of -- of what?

18 A. He is the better parent out of the mother and the
19 father. Even though he has done what he's done, I still
20 consider him the better parent.

21 Q. Okay. So you meant to suggest that you were comparing
22 Kevin with his ex-wife.

23 A. Correct.

24 Q. And does Kevin and do you encourage the kids to have
25 good relations with their mother?

1 A. Oh, yeah, absolutely. I like Ticia.

2 Q. You understand that there's -- the Government proposes
3 that Kevin should be sent back to prison.

4 A. Yes.

5 Q. From -- how close are you with his kids?

6 A. I'm very close.

7 Q. Would that be a good thing for his kids?

8 A. No, it wouldn't be a good thing for his kids. His kids
9 call him, depend on him, and ask him for advice and stuff all
10 the time. I'm there; Kevin and I are together a lot.

11 Q. Are you familiar with Kevin's work ethic?

12 A. Yes. I'm his supervisor actually, also.

13 Q. Where are you his supervisor?

14 A. We work at When Pigs Fly bakery in York, Maine.

15 Q. Okay. I think you said When Pigs?

16 A. When Pigs Fly.

17 Q. Bakery.

18 A. Bakery.

19 Q. What does Kevin do for the bakery?

20 A. He is a loader slash driver.

21 Q. And what is your position?

22 A. I am his supervisor.

23 Q. So you must do things other than supervise Kevin.

24 A. Well, I have to supervise other people and I also do
25 mail order, and I do deliveries and stuff as well.

1 Q. Okay. But you're in a supervisory role generally.

2 A. I am in charge of that department, correct.

3 Q. Okay. Is Kevin a good worker?

4 A. Kevin is an excellent worker.

5 Q. Is he a responsible worker?

6 A. He is very responsible, shows up on time, and a very
7 hard worker, which is very hard to find nowadays.

8 Q. Would it be a financial hardship for the family if
9 Kevin were sent off to prison?

10 A. Yeah, I totally believe it would be. I mean, he helps
11 his parents a lot, and his parents also helped him get the
12 vehicle that he currently has that he has to make payments on.

13 Q. You understand they're responsible for those payments
14 if Kevin were in prison?

15 A. Yes, they would be responsible.

16 Q. There are a good number of folks in the room today.
17 Can you just tell the Court who's here? Corbin has left but
18 who's still here?

19 A. Both of his parents, his sister, his sister's
20 boyfriend, and Bill is the other person that he paints for
21 sometimes in the afternoon.

22 Q. So he has a second part-time job and that's painting
23 for Bill, his supervisor in that -- in that work is here also.

24 A. Yes.

25 Q. It seems like Kevin and the Millette family have good

1 family support and support in the community?

2 A. Yes, they do.

3 Q. And generally speaking folks think highly of Kevin; is
4 that fair to say?

5 A. Yes, they think very highly of Kevin.

6 Q. To your observation does Kevin try hard to comply with
7 the rules?

8 A. Kevin tries very hard to comply with the rules.

9 Q. And how about -- how about attending the counseling and
10 those kinds of responsibilities, is --

11 A. He's on that all the time. He even sets alarms on his
12 phone to make sure that he shouldn't forget his counseling
13 appointments or anything, because sometimes we're working or
14 he's working and you can lose track of time. But he sets
15 alarms on his phone to make sure that he remembers he has to
16 go have a counseling appointment or whatever. We also camp
17 sometimes where there's no reception, but we make sure that
18 he's able to obtain reception.

19 MR. MACCOLL: Thank you, ma'am. I didn't have any
20 other questions for you. Thank you, Your Honor.

21 THE COURT: Mr. Scott, anything further?

22 MR. SCOTT: Briefly. Thank you, Your Honor.

23 CROSS-EXAMINATION

24 BY MR. SCOTT:

25 Q. Do you ever supervise visits with Mr. Millette's

1 children at overnight visits at your residence?

2 A. Not overnight at my residence, only camping.

3 Q. Okay. All right. When you go camping, do you let
4 Mr. Millette -- have you served as a chaperone for camping
5 trips with Mr. Millette and his minor children?

6 A. Many.

7 Q. Okay. And do you let Mr. Millette stay in a tent alone
8 with his daughter?

9 A. We actually all just sleep in the same tent because
10 there's a big tent.

11 Q. All right. If Mr. Millette wanted to stay in a tent
12 alone with his daughter, would you let him?

13 A. Yeah, I wouldn't have a problem with that.

14 Q. Okay. You're aware of Mr. Millette's conviction.

15 A. I am totally aware of his conviction.

16 Q. All right. And you're -- are you aware that some of
17 the facts of that condition suggest that he has attraction to
18 both male and female minors?

19 A. I am aware of that, yes.

20 Q. All right. And that still wouldn't give you concern
21 about him spending the night alone with his daughter?

22 A. No, because I know him and I see how he interacts with
23 his children.

24 Q. All right.

25 MR. SCOTT: No further questions.

1 MR. MACCOLL: If I might -- excuse me, Your Honor.

2 REDIRECT EXAMINATION

3 BY MR. MACCOLL:

4 Q. Just to be clear, Karen, if -- if your understanding
5 was that it's against the Court's rules, would you allow Kevin
6 to sleep alone in a tent with his daughter with you in a
7 separate tent?

8 A. No. Whatever the rules are, I have every intent of
9 following those, as long as they're clear.

10 MR. MACCOLL: Okay, thank you. Thank you, Your
11 Honor.

12 THE COURT: Anything further, Mr. Scott?

13 MR. SCOTT: No, Your Honor.

14 THE COURT: All right. You may step down, thank
15 you.

16 Anything more, Mr. MacColl?

17 MR. MACCOLL: I'm just going to briefly call Melodie
18 Millette. This will be quick.

19 THE CLERK: Do you solemnly swear that the testimony
20 you shall give in the cause now in hearing shall be the truth,
21 the whole truth, and nothing but the truth, so help you God?

22 THE WITNESS: I do.

23 THE CLERK: Please have a seat. Pull yourself right
24 up to that microphone. Please state and spell your first and
25 last name for the record.

1 THE WITNESS: It's Melodie Millette, M-E-L-O-D-I-E,
2 M-I-L-L-E-T-T-E.

3 MELODIE MILLETTE, having been duly sworn, was examined and
4 testified as follows:

DIRECT EXAMINATION

6 BY MR. MACCOLL:

7 Q. Good morning, Ms. Millette.

8 A. Good morning.

9 Q. The Court already has a transcript of your testimony
10 from last time, so I'm just going to hit a couple of high
11 points --

12 A. Okay.

13 Q. -- very quickly.

16 A. It was a niece, yes.

17 Q. Your husband's niece?

18 A. Um-hum.

19 Q. Okay. And am I correct in recalling that her father
20 was present?

21 A. Yes, he was.

22 Q. And the -- did her father know about Kevin's
23 convictions?

24 A. Absolutely.

25 Q. And did you think there was -- that you were doing

1 anything wrong with allowing the birthday party to be at your
2 house with Kevin there?

3 A. I never even thought twice about it, no.

4 Q. You were an approved supervisor.

5 A. Um-hum.

6 Q. Had you been told that you could only supervise Kevin
7 in the presence of his kids and not your other minor
8 relatives?

9 A. No.

10 Q. You've tried to comply with the rules; is that fair to
11 say?

12 A. Absolutely.

13 Q. At this point you understand you're not an approved
14 supervisor.

15 A. Absolutely.

16 Q. So you can spend time with your own grandchildren as
17 long as Kevin's not there.

18 A. Right.

19 Q. And if you want to spend time with Kevin and his
20 children, then you just have either Kim or Karen be present.

21 A. Yes.

22 Q. And is that how things have operated since this
23 proceeding started?

24 A. Yes.

25 Q. All right. And is Kevin trying to comply with the

1 rules?

2 A. Yes, he does, what we know of.

3 Q. Okay. And is your sense that everybody involved is
4 trying to comply with the rules, not get around the rules?

5 A. Absolutely.

6 Q. Okay.

7 MR. MACCOLL: Thank you, ma'am. No further
8 questions, Your Honor.

9 THE COURT: Mr. Scott?

10 MR. SCOTT: Thank you, Your Honor.

11 CROSS-EXAMINATION

12 BY MR. SCOTT:

13 Q. So I just want to direct your attention back to the
14 earlier hearing that we had in this matter where you testified
15 on August 17th. Do you remember testifying on that day?

16 A. Yes.

17 Q. And do you remember testifying about the July 2021
18 birthday party?

19 A. I'm not sure if that was brought up to me or not. I
20 would say yes but --

21 Q. All right. Do you remember Mr. MacColl asking you the
22 question: And when you had the birthday party did you think
23 that you or your son were doing anything wrong?

24 A. No.

25 Q. And -- you don't remember that?

1 A. Yeah, that's right. Yeah, I do.

2 Q. All right. Do you remember answering: No, he was
3 outside cooking the whole time. He wasn't even around her.

4 A. He wasn't, he was outside cooking.

5 Q. Okay. So is it your testimony here that Mr. Millette,
6 your son, was never close to the minor?

7 A. No, he was not close to her. She was sitting right
8 with her father and her grandmother.

9 Q. All right. And were you with him the entire time?

10 A. Yes, I was. I never left the premise whatsoever.

11 Q. Okay. So he was never sitting near her when she was at
12 her birthday cake?

13 A. No, he came in and he had something to eat at an
14 opposite table and that was it. And then he went right back
15 outside.

16 Q. All right. But your testimony was that he was outside
17 the entire time, correct?

18 A. He was outside cooking. He came in to have something
19 to eat, which -- and then he went right back outside. And he
20 wasn't -- he never even talked to her, spoke to her, gave her
21 a card or nothing.

22 Q. So he never sat right next to her?

23 A. No, he didn't. She was with her grandparents and her
24 father.

25 Q. I'm going to show you --

1 MR. SCOTT: If I can approach?

2 THE COURT: You may.

3 BY MR. SCOTT:

4 Q. -- what's been identified and admitted into evidence as
5 Government's Exhibit 3. I see you have a copy of it.

6 A. Yeah, that's at a table opposite of where she was.
7 There was two tables set up there.

8 Q. So you wouldn't describe your son as being close to the
9 minor?

10 A. No. She was way at the end of a 7-foot table over here
11 and he was over there. So he wasn't even next to her.

12 Q. So is -- is it your testimony that that's not her
13 sitting there where it has the black box that's marked --

14 A. Oh, no, she's at this table where the cake is.

15 Q. Correct.

16 A. He's at another table over here. Oh, and -- no, she
17 wasn't sitting here. She was sitting at the end. This
18 picture -- I don't know if somebody's done something to it,
19 but she was sitting at the end of a 7-foot table.

20 Q. All right. If I were to tell you that where there's a
21 black box that reads minor -- do you see that?

22 A. I see the minor.

23 Q. All right. So that's been covered up because in this
24 courtroom we don't put pictures of minors in evidence. But
25 are you saying that that's not where the minor was sitting?

1 A. I don't recall. I thought she was sitting at the end
2 over there. But I was sitting at the end of the opposite end.

3 Q. Okay. Where would you be in this picture?

4 A. At the opposite end of the 7-foot table.

5 Q. All right. And in this picture would you say that this
6 shows your son close to the minor or close to where the
7 birthday cake is?

8 A. No, there's a space probably -- I don't know how --
9 measurements, but there's one table here and one table on the
10 other side. So there was no way that he -- it may look like
11 he was, but he was not close to her.

12 Q. Okay. But he wasn't exactly outside cooking the whole
13 time. He was sitting at a table --

14 A. No, I just said he came in and he got something to eat,
15 and then he went back out. And he was cooking the whole time
16 prior to make the food for the party. And she normally was
17 sitting with her grandmother and her father.

18 Q. Now, I want to ask you about a different part of your
19 testimony at that same hearing on August 17th. Do you recall
20 testifying that the August 12th incident was the only time
21 that your granddaughter had slept in the same room with your
22 son?

23 A. She mostly slept in the living room because the boys
24 slept in that room and it's a small room. So there's not
25 enough space for three children in one room, so she normally

1 slept in the living room.

2 Q. But at that hearing you testified that she had only
3 slept in his room that one occasion.

4 A. Right, as far -- yes.

5 Q. All right. And is that the only time that you were
6 aware that that happened?

7 A. Well, yeah, she normally slept in the living room.

8 Q. Okay.

9 A. Because her brothers would sleep in the bedroom.

10 Q. So your son stated in a statement to a polygraph
11 examiner that it had happened up to three times.

12 MR. MACCOLL: Objection, that's not what it says.

13 A. I don't think so.

14 THE COURT: Hang on a minute, there's an objection.

15 MR. MACCOLL: The phrase in the report is not
16 more --

17 THE COURT: I'm sorry, Mr. MacColl, I couldn't
18 understand --

19 MR. MACCOLL: The exact words were, as I read them,
20 were not more than three.

21 THE COURT: Is that what it was; do you know?

22 MR. SCOTT: I think it says not more than three.

23 THE COURT: All right.

24 MR. SCOTT: Whatever you --

25 THE COURT: All right. Let's get the --

1 MR. SCOTT: I'm not sure that that's --

2 THE COURT: I'm going to sustain the objection, so
3 if you want to back it up you can.

4 MR. SCOTT: Yes, Your Honor.

5 BY MR. SCOTT:

6 Q. Could there have been other times that your son slept
7 in the same bedroom as your granddaughter?

8 A. I don't know.

9 Q. Okay.

10 A. I guess.

11 Q. Well, you were the supervisor, correct?

12 A. Um-hum.

13 Q. So you would know if she had; is that correct?

14 A. Um-hum. The night that she slept in there they were
15 watching a movie and they both fell asleep, and I got tired
16 and went to bed. But all the doors were open. The bedroom
17 doors were not shut. And I had gotten up three times with my
18 dog that night to take him out to go to the bathroom. And I
19 don't fall right back to sleep like that. So I -- the doors
20 were completely open.

21 Q. All right. Well, that's not what I asked. I asked you
22 would know if she had slept in the bedroom.

23 A. Well, probably the next morning.

24 Q. Okay. Well, I thought that you were waking up to go
25 walk the dog and check --

1 A. I got up in the middle of the night, not in the
2 morning. It was like 1:00 o'clock, I get up at 10:00 o'clock,
3 I get up at 2:00 o'clock to take him out. Whenever he's ready
4 to go to the bathroom is when I get up.

5 Q. And each of those times would you check on
6 Mr. Millette?

7 A. Absolutely. Well, I mean, yes. Our -- our house is
8 not big and there's no upstairs, so you can see, hear
9 everything that goes on. And I have a dog that's very
10 protective.

11 Q. All right.

12 A. And he barks.

13 Q. So basically you would know if he was sleeping in the
14 same room --

15 A. Um-hum, um-hum.

16 Q. -- as your granddaughter. And can you just clarify
17 this for us now. Did it happen on more than one occasion or
18 not?

19 A. Not that I'm aware of. I know it happened on that
20 occasion and I admitted it to Kate. And to clarify, too, I
21 was not swimming in the pool. I didn't say that. I -- I just
22 want to clarify that for the records. I was not -- I was
23 sitting on the deck.

24 Q. And are you saying that your swimsuit wasn't wet
25 either?

1 A. I was in the pool prior to her coming and I had cleaned
2 the green off the stairs. I went up back on the deck, I sat
3 there for a couple seconds to get myself dried off, and then I
4 was planning on going back into the house.

5 Q. Okay.

6 A. I was not -- I never said I was swimming.

7 Q. But you said you were -- you were in the pool, though.

8 A. No, I said I was prior in the pool. I was sitting on
9 the deck. I was not in the pool at the time that Kate came.
10 And I was -- it was prior to that, probably had been about 10,
11 15 minutes. And I went in and I cleaned off the algae, came
12 up, sat on the deck to get a little bit dried off and I was
13 going back into the house.

14 Q. All right. And that was all when Mr. Millette and your
15 granddaughter were in the house.

16 A. Yes.

17 Q. Okay. So they were in there alone for a period of at
18 least 15 minutes while you were out in the pool --

19 A. Yeah, yeah.

20 MR. MACCOLL: Objection. The senior Mr. Millette
21 was also at the house.

22 A. Yes, he was there, too, my husband.

23 BY MR. SCOTT:

24 Q. Okay.

25 A. Yeah, they weren't alone. He was there.

1 Q. All right. He's not an approved supervisor.

2 A. He's her grandfather. No, he's not an approved
3 supervisor but he is her grandfather.

4 Q. All right. And is it your testimony that you never
5 made any statement to Officer Phillips that this sleeping
6 arrangement with your granddaughter in Mr. Millette's room had
7 occurred on prior occasions?

8 A. No, I did not say that.

9 Q. All right. And if Mr. Millette stated that it had
10 happened on prior occasions, how would you explain that?

11 A. Probably I had gone to bed and fell asleep or I fell
12 asleep on the sofa.

13 Q. Okay. So you had fallen asleep --

14 A. I don't stay up all night. I try not to.

15 Q. Okay.

16 MR. SCOTT: I'm done, Your Honor, thank you.

17 MR. MACCOLL: Nothing further, thank you, Your
18 Honor.

19 THE COURT: All right. I do have a question or two
20 here so I'm going to ask it.

21 EXAMINATION

22 BY THE COURT:

23 Q. Were you aware that the daughter had previously made an
24 allegation that he had sexually contacted her?

25 A. Absolutely. We paid for a lawyer. The lawyer -- her

1 lawyer, his -- his ex-wife's lawyer found out that she was
2 lying to him.

3 Q. Who's she?

4 A. Leticia, his ex-wife, was lying about the whole thing
5 because she was sitting right there and he was -- had Lexie on
6 his lap. And she fabricated the whole thing. The lawyer
7 dropped her case. It went to court and the judge ruled that
8 she was lying, his ex-wife was lying.

9 Q. Was the -- was the daughter ever interviewed --

10 A. No, I don't think --

11 Q. -- by DHS?

12 A. Oh, DHS did interview her, yes, Your Honor. They did
13 interview her.

14 Q. Did you ever talk to the daughter about it?

15 A. I did, I asked her, and she said no, I never -- she
16 said he didn't do nothing to me. And when I -- his ex-wife,
17 she -- I went to pick up Alexis to visit with her a day. And
18 she came right down crying saying, I'm sorry but I lied about
19 the whole thing. But don't say anything to Alexis, please.
20 And it did go to court so it's court records that she lied.

21 | THE COURT: All right. Anything in follow-up?

22 MR. SCOTT: No, Your Honor, thank you.

23 MR. MACCOLL: If I could have just a moment.

24 (Defendant conferred with counsel.)

25 | REDIRECT EXAMINATION

1 BY MR. MACCOLL:

2 Q. You were aware that your former daughter-in-law took
3 Lexie to -- for a medical evaluation to see if there was any
4 evidence of any --

5 A. I wasn't aware of that, no.

6 MR. MACCOLL: Thank you. Thank you, Your Honor.

7 Nothing further.

8 THE COURT: All right. Anything further?

9 MR. SCOTT: No, Your Honor, thank you.

10 THE COURT: This witness may step down, thank you.

11 THE WITNESS: Thank you, Your Honor.

12 THE COURT: Anything further, Mr. MacColl?

13 MR. MACCOLL: Pardon me?

14 THE COURT: Anything further for evidence?

15 MR. MACCOLL: If I could have just a moment, but I
16 think not.

17 (Defendant conferred with counsel.)

18 MR. MACCOLL: Nothing further, Your Honor, thank
19 you.

20 THE COURT: All right. And I assume there's no
21 rebuttal case.

22 MR. SCOTT: No, Your Honor.

23 THE COURT: All right. So I think at this point I'm
24 prepared to rule as far as the violation, which I do find
25 there is one. There is evidence that he was -- Mr. Millette

1 was sleeping in the same room as his daughter and, although
2 his mother was in the premises or outside the house at some
3 points in time, to me that is a -- a clear violation of a rule
4 that may have some ambiguity to it, but any reasonable person
5 would see that sleeping with your daughter, given your
6 background and what these conditions are in place for, is a
7 violation. That seems to me to be so far beyond the line that
8 it's not -- it's not really debatable. The fact that when
9 first questioned about it you lied about it suggests to me you
10 knew full well it was a violation, and so I do find a
11 violation of special condition No. 9.

12 It seems to me that that takes us, then, to the question
13 of what is the appropriate punishment. And I can I think
14 maybe put the guideline records -- guideline calculations on
15 the record at this point, and then I'll hear your
16 recommendations.

17 So under the guidelines we have a Grade C violation.
18 This is Criminal History Category II involved, and the range
19 of imprisonment is four to ten months. Any objection to those
20 calculations from the Government?

21 MR. SCOTT: No, Your Honor.

22 THE COURT: From the defendant?

23 MR. MACCOLL: No, Your Honor.

24 THE COURT: All right. Then let's proceed to
25 recommendations. Mr. Scott.

1 MR. SCOTT: Yes, Your Honor. The Government is
2 recommending the same sentence that probation has recommended
3 as part of its revocation report, four months of incarceration
4 to be followed by a further period of supervised release as
5 indicated in the report.

6 Judge, I think just briefly, the sentence would be
7 appropriate here. This is extremely concerning conduct for
8 somebody who has a conviction involving child abuse imagery,
9 multiple convictions, in fact. There really isn't any reason
10 why the defendant should have been sleeping in a room alone
11 with his daughter here, and it's concerning to know that it
12 did happen and it's also concerning to, you know, this kind of
13 issue of, oh, like I didn't really realize that that was, you
14 know, prohibited by this condition of supervision that is
15 really, as Your Honor stated, intended to strictly limit his
16 contact with minors.

17 This is a side -- a kind of side point here, but just to
18 suggest that anybody could think that appropriate, even
19 somebody who knows the defendant well, I think is a little
20 maybe incredible for -- it maybe calls into doubt somebody's
21 judgment who is put in a position of chaperoning the defendant
22 and whether they are suitable chaperones for the future. But
23 I'll leave that to probation to decide.

24 But, you know, as far as we know nothing happened in the
25 bedroom with the defendant and his daughter aside from the

1 mere violation of the condition. But, you know, the problem
2 here is that we don't know what goes on in Mr. Millette's
3 head. We don't know what he's thinking about. We don't know
4 how he's reacting to these situations where he's with minors.
5 And as disturbing as it is to think about, and I think
6 Mr. MacColl kind of alluded to the fact that it's really
7 difficult to put yourself in that mindset, but we don't know
8 whether the defendant was thinking about inappropriate sexual
9 things when he was in that room, we don't know if that kind of
10 contact could be leading to some further contact with his
11 daughter or it could be kind of putting him down the road of
12 looking at images again. We don't know if it could be leading
13 him to a place where he might victimize another person besides
14 his daughter.

15 And I would just say that it really doesn't seem that
16 the defendant's fully bought into his conditions and how
17 they're meant to protect minors and the public from the kind
18 of difficulties that he faces, but also to protect himself
19 from getting into trouble. And it just seems like a person
20 who is truly invested in that would try to stay as far on the
21 line of if there was any perceived ambiguity of either seeking
22 clarification from his supervisors or just staying on that
23 side so he does not even come close to violating. And I think
24 he's just getting too close and over the mark here. Thank
25 you, Your Honor.

1 THE COURT: Mr. MacColl?

2 MR. MACCOLL: Your Honor, I have a -- I of course
3 respect the Court's conclusion that it's a violation. I
4 respect Judge Cohen. So I entertained the thought that, you
5 know, I'm -- I'm wrong, and it doesn't matter whether I'm
6 right or wrong from 40,000 feet. The Court interprets its
7 rules and you have interpreted the rules, and since they've
8 been interpreted they've been complied with.

9 I maybe have just come at life from a real different
10 point of view than Your Honor and Judge Cohen, although I
11 think Judge Cohen felt a lot this way, that -- that we could
12 be doing a lot more harm than good having the criminal justice
13 system regulate parent/child relationships. And I respect the
14 Government's argument that -- that a defendant with these
15 convictions should be extra, extra careful. I don't think
16 that, with due respect to Court's finding, that that should be
17 applied when the question is is this a violation. I think the
18 presumption is the other way, and the ambiguity has to be
19 resolved in favor of the defendant.

20 But I do have enough empathy to know that it must be
21 horribly difficult to feel branded and to have that brand
22 govern the -- my son's getting married a week -- the Court
23 knows my son is getting married a week from Saturday, and the
24 state would have a hard time if it were telling me how to
25 interact with my son. And I would have a hard time with the

1 state if the state were telling me how to interact with my
2 son.

3 And I -- my sense from my time talking with the Millette
4 family is that the Millette family has tried very hard to
5 comply, not to circumvent the rules, that they are helpful
6 with Kevin in getting to his counseling, that Kevin is
7 religious about his counseling, that Kevin gets benefit out of
8 his counseling, that Kevin is addressing in his counseling the
9 difficult issues of what happened to Kevin in his childhood so
10 that he would not be -- I don't know exactly how it works
11 because it didn't happen to me, but apparently it passes on
12 down through the generations. I assume it's not genetic, I
13 assume it's behavioral, that it passes on down and Kevin is
14 working hard to make sure that he's the break in the chain.
15 But I -- I suspect that Kevin relishes his time when Lexie's
16 on the couch and he's on the bed and they're watching TV in
17 the room like a regular father and daughter and not feeling
18 like he's branded.

19 I don't think he was trying to violate. I don't think
20 he was trying to circumvent. The Court made a comment about
21 Kevin initially telling Officer Phillips, which she does not
22 deny that he did, oh, no, no, I slept on the couch. He knew
23 he lied and we've discussed that. I'm authorized to explain
24 what he told me. He said, you know, when you have my
25 background you spent -- you spend a lot of your time in

1 denial. And in counseling you try to get over being in denial
2 and being honest among difficult circumstances but the impulse
3 at the moment of an authority figure saying did this happen is
4 to say no, even if he has -- I'm sorry, I shouldn't have said
5 no, it didn't happen. Yeah, it did. I didn't think it was
6 anything improper; we were in two different beds watching TV
7 and we fell asleep. We're not trying to get around the rules.
8 And this is my words, not Kevin's words, but I do think that
9 there's a sense there of wanting to be normal.

10 It's just a horrible, horrible burden, a difficult
11 crime. It's a difficult thing to understand but -- to feel
12 branded, to feel less than everybody else and in particular in
13 the most important relationship, in my opinion. The Court's
14 married, I used to be, but parent/child is the most important
15 relationship.

16 So I -- I think it's very hard. I think the notion that
17 he should go to prison here, that he should -- I don't think
18 he should be punished but the Court's found a violation. He
19 has served time. He -- I forget if it was a night or two when
20 he got arrested. I guess I would say the punishment should be
21 time served. I do think these rules should be clarified. I
22 don't think they should be clarified by the probation office.
23 I think they should be clarified by the Court. Judge Cohen
24 clarified and he said that this is what it means from now on
25 and now you know. But the Court needs to set those kind of

1 rules.

2 I don't think I've had a case where there were
3 conditions of supervision that were intended to govern
4 parent/child relations. I have a hard time thinking about
5 that for the federal criminal justice system. I get it; I
6 understand the Court's, you know -- Court doesn't want to feel
7 responsible if something bad happens, I understand that. But
8 I just think if we're going to wade into regulating that
9 relationship we should bear in mind that we should have a
10 responsibility to foster him.

11 And I don't want to scold anybody else, but my sense is
12 the Government's lost track of it, that this is an important
13 relationship that needs to be fostered and understood and
14 cherished. And that's my view, Your Honor. I think we're
15 heading in a real bad direction, sociologically speaking.
16 Thank you, Your Honor.

17 THE COURT: Mr. Millette, you have a constitutional
18 right to address the Court. Is there anything you'd like to
19 say at this time?

20 THE DEFENDANT: I'd just like to say that I do
21 apologize if I was in the wrong. I wasn't aware that I was in
22 the wrong at the time what I was doing. I'm just, you know,
23 trying to do what I can do since I've been released, working
24 and trying to be a good father and stuff. I try to give them
25 advice and spend time with them and do what I can to be there

1 for them. I haven't been there for five years. And I've been
2 feeling pretty guilty of that. And I've been trying to do
3 what I can to make up for that, things that's going to make up
4 for it. I've just got to go forward and be the best father I
5 can with them and try to abide by the rules as best I can by
6 my knowledge.

7 THE COURT: All right, thank you.

8 MR. MACCOLL: Thank you.

9 THE COURT: All right. Just to go back a bit, it
10 was in 2016, I believe, that I sentenced you to 10 years in
11 prison. That was a mandatory minimum, and the conduct at
12 issue involved a large number of images of child sexual abuse,
13 24,277 still images, 1,022 videos of child pornography. And
14 some of the images were quite disturbing. And that was a big
15 sentence.

16 And then during COVID you applied for compassionate
17 release and I granted that request. You were one of two
18 people, I think two, that I granted out of, I don't know, just
19 about everybody I sentenced has asked for compassionate
20 release. So I didn't give it very frequently.

21 On supervision I think you -- you have been trying. I
22 think you've been engaged in treatment, et cetera. But your
23 counsel mentioned the word denial, and I think that you are in
24 denial, I think your family's in denial and your friends are
25 in denial. Because someone with -- and your attorney's in

1 denial. Because someone with your background has to behave
2 differently. And Mr. MacColl doesn't like the state stepping
3 in. Well, wouldn't it have been nice if somebody had stepped
4 in and stopped your grandfather from doing something to you.
5 Wouldn't it have been nice if somebody had taken the -- your
6 best interests at heart, the child's best interests.

7 So it comes to me and we have the birthday party, we
8 have a rule that is ambiguous in its outer recesses, but this
9 is clear conduct that is over the line. And I'd ask you this,
10 having slept the night with your daughter in your room, would
11 you have, if you had counseling the next day, been free to
12 admit that or in a group setting, yeah, yeah, I -- did you
13 really think that it was all right? I don't think you did. I
14 think you knew in your heart that that was not the thing to
15 do. That's why you lied to Officer Phillips.

16 And I think that the whole family doesn't really
17 understand or doesn't want to understand what is at heart
18 here. And what is at heart here is that children all over the
19 world are being sexually assaulted by people, and those images
20 are being put around everywhere. And there is a serious
21 epidemic of this, and you have fallen into it now twice. And
22 so of course there are these rules to protect minors; of
23 course we need to be concerned about minors.

24 The fact that a seven-year-old leveled an accusation of
25 inappropriate sexual touching should have everybody's flags

1 flying. And maybe that was completely fabricated by ex-wife,
2 et cetera, I don't know. The only one that really knows is
3 you and your daughter. And your daughter, subject to
4 grooming, may not tell the truth. I'm not saying she -- it
5 happened. I'm not saying you did a thing. But I'm saying red
6 flags should be flying for anyone who cares about protecting a
7 child. And if they'd been flying when you were a little boy,
8 maybe we wouldn't be here.

9 And my job, whether I like it or not, as a federal judge
10 is to make sure that you follow the terms of your supervised
11 release, which is a portion of your sentence that you are
12 still under. And to me -- and, you know, in some ways it may
13 be that your family has not done you any favors here because
14 everybody is normalizing things. It's not normal for someone
15 who's in his position -- and they're still back there shaking
16 their heads like I'm crazy, and that shows the level of how
17 they have -- how their own thinking has become distorted.
18 This is a real problem, people. And, you know, those rules
19 are maybe ambiguous but clearly that is a violation of it. No
20 contact with minors means no minors sleeping in your room. If
21 I know anything, I know that.

22 Now, what to do about it is the next question. And the
23 Government is seeking four months; probation, that's their
24 recommendation. I am often in lockstep with probation. But I
25 do see some reason to deviate in this case. And I don't think

1 you need four months, but I do think you need to get the
2 message and I'm here to give it to you. And you're going to
3 have to get it the hard way as well. But I want you to hear
4 me.

5 We will work on those rules. We will maybe draw up a
6 contract in your case so that there is less wiggle room. But
7 this is something that you need to follow, all of these -- all
8 of these things. You need to be scrupulous about going to
9 your treatments, about -- you know, these are all problems.
10 You've had problems along the way that you've been good enough
11 to admit and address. And that's what has to keep going on.
12 But you can't stick your head in the sand on something like
13 this.

14 As far as doing more harm than good, we don't know who's
15 doing more harm than good. It could go either way,
16 Mr. MacColl. We could be doing more harm than good by
17 allowing it to continue, saying how it's just a
18 miscommunication. We could be doing a lot of harm that way
19 too. We don't know. I don't know and you don't know.

20 MR. MACCOLL: Precisely, Your Honor.

21 THE COURT: You know, I mean, that one of your
22 chaperones, the sister, thinks it would be okay for him to
23 sleep with his daughter is a problem that -- she shouldn't be
24 a chaperone. If she -- she's testified that she -- she thinks
25 it's okay for him, she trusts him. That's not the person we

1 need as a chaperone.

2 As far as the birthday thing, that's smoke and mirrors.

3 That's nothing compared to the underlying August 12th, 2023,

4 behavior. That crosses the line, clearly crosses the line.

5 Anyone can see it who's looking at it straight.

6 If you'll stand I'll impose the sentence. And to the
7 family, I just wish you would have to look at the images that
8 I have to look at. If you had to see what I had to see, you
9 wouldn't be back there shaking your heads.

10 All right. The defendant is hereby committed to the
11 custody of the United States Bureau of Prisons to be
12 imprisoned for two months. The cost of incarceration fee is
13 waived. Defendant's hereby remanded to the custody of the
14 United States Marshal.

15 Upon release from imprisonment the defendant shall be on
16 supervised release for a term of 60 months. The defendant
17 shall comply with the newly imposed standard conditions
18 effective November 1, 2016, and all previously imposed special
19 conditions except special condition 8. And I would just note
20 to the probation office that we need to regroup and talk about
21 special condition No. 9.

22 I must advise you that you have the right to appeal this
23 revocation of supervised release and sentence. If you wish to
24 do so, in order to effectively exercise that right you must
25 cause to be filed with the clerk of this court within 14 days

1 of today and not after that a written notice of appeal. Do
2 you understand, Mr. Millette?

3 THE DEFENDANT: Yes, I do.

4 THE COURT: And if you fail to file that written
5 notice of appeal in a timely fashion, you'll have given up
6 your right to appeal. Do you understand?

7 THE DEFENDANT: Yes.

8 THE COURT: If you can't afford to file the appeal,
9 you can appeal without cost to you. On your request the clerk
10 of this court will immediately prepare and file a notice of
11 appeal on your behalf. Do you understand?

12 THE DEFENDANT: Yes, I do.

13 THE COURT: All right. Anything more for the
14 Government?

15 MR. SCOTT: Your Honor, the Government would like to
16 make a motion at this time to redact those portions of the
17 transcript today that refer to the name of the minor child.

18 THE COURT: That motion is granted but you need to
19 coordinate it with the case manager on --

20 MR. SCOTT: Yes, Your Honor.

21 THE COURT: As far as anything in the exhibits, all
22 right? You're talking about just the transcript.

23 MR. SCOTT: Just the transcript. I don't think
24 there should be anything in the exhibits but I will
25 double-check.

1 THE COURT: All right. Anything more, Mr. MacColl?

2 MR. MACCOLL: The defendant respectfully asks he be
3 allowed to self-report.

4 THE COURT: I'm concerned about self-report. I
5 understand there have been suicide attempts. I'm very
6 concerned about that. Do you want to address that?

7 MR. MACCOLL: If I might, Your Honor.

8 (Defendant conferred with counsel.)

9 MR. MACCOLL: Of course I respect the Court's
10 decision today and concern. Mr. Millette feels like he's
11 doing quite a bit better in counseling. He would like to be
12 able to talk to his counselor again now that he knows the
13 sentence before going in, he thinks that it's the better thing
14 for his mental health and his well-being and feels that that's
15 healthier than going straight into custody. He doesn't feel
16 that he's going to harm himself either in custody or out. But
17 respectfully we submit that the -- that the better place from
18 a mental health standpoint is out until he's -- until he's
19 designated with an opportunity to see his counselor. Thank
20 you.

21 THE COURT: The Government's position?

22 MR. SCOTT: Your Honor, the Government opposes a
23 self-report. I'm understanding from probation, as Your Honor
24 alluded to, that there's some recent information that suggests
25 there's a pretty substantial risk of self-harm here. And I

1 think it's appropriate for the defendant to be remanded here.

2 THE COURT: Mr. MacColl, I'm going to remand him.

3 I'm concerned and I'm going to remand him.

4 Good luck, Mr. Millette. I'm not doing it because I'm
5 trying to punish you in that regard. Court's in recess.

6 (Time noted: 12:39 p.m.)

7 **C E R T I F I C A T I O N**

8 I, Lori D. Dunbar, Registered Merit Reporter, Certified
9 Realtime Reporter, and Official Court Reporter for the United
10 States District Court, District of Maine, certify that the
11 foregoing is a correct transcript from the record of
12 proceedings in the above-entitled matter.

13 Dated: December 13, 2023

14 /s/ Lori D. Dunbar

15 Official Court Reporter

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UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,

CRIMINAL ACTION

Plaintiff,

Case No: 2:16-cr-0004-NT

EXCERPT

-versus-

TESTIMONY OF KATE PHILLIPS

KEVIN MILLETTE,

Defendant.

Release Hearing Excerpt

Pursuant to notice, the above-entitled matter came on for **Preliminary and Release Hearing**, held before **THE HONORABLE DAVID M. COHEN**, United States Magistrate Judge, in the United States District Court, Edward T. Gignoux Courthouse, 156 Federal Street, Portland, Maine, on the 17th day of August, 2023, at 3:15 p.m. as follows:

Appearances:

For the Government: Nicholas M. Scott, Esquire
Assistant United States Attorney

For the Defendant: Edward S. MacColl, Esquire

Also Present: Kate Phillips, U.S. Probation Officer
(via videoconference)

Michelle R. Feliccitti, RPR
Official Court Reporter

(Prepared from manual stenography and
computer-aided transcription)

* * * * *

2 (Open court. Defendant Present.)

3 THE COURT: Good afternoon.

4 MR. SCOTT: Nicholas Scott for the United States, Your
5 Honor.

6 We're here today in the matter of the United States versus
7 Kevin Millette. The case number is 2:16-cr-4-NT. We are here
8 today for a preliminary hearing and detention hearing.

9 THE COURT: All right. Mr. MacColl.

10 MR. MACCOLL: Good afternoon, Your Honor. Pleasure to
11 see you again. Ed MacColl for Mr. Millette, who, of course, is
12 sitting with me. Thank you, sir.

13 THE COURT: Thank you.

14 Mr. Millette, I want to begin by clarifying what I was
15 explaining to you the other day because, as it happens, I
16 misspoke. And I appreciate counsel, Mr. Green -- Mr. Scott,
17 pointing that out.

18 So there are two parts to this. The first is a
19 preliminary hearing, the purpose of which is to determine
20 whether probable cause exists to believe that you have violated
21 one or more conditions of your supervised release. And as to
22 this part of today's proceeding, the Government has the burden
23 of proof. If the Government meets that burden of proof, then
24 we proceed to the second part, which is a release hearing. And
25 as to that, you are entitled to release if you establish, by

1 clear and convincing evidence, that you are not likely to flee
2 or pose a danger to the safety of other -- any other person or
3 the community, if released, before a final revocation hearing
4 takes place.

5 You understand what I've explained to you?

6 THE DEFENDANT: Yes, I do.

7 THE COURT: Any questions?

8 THE DEFENDANT: No.

9 THE COURT: All right. We're ready to proceed?

10 MR. MACCOLL: Yes, Your Honor.

11 MR. SCOTT: Yes, Your Honor.

12 THE COURT: Okay. Mr. Scott.

13 MR. SCOTT: Thank you, Your Honor.

14 Your Honor, I'd like to start out just by proffering
15 by reference the facts contained in the declaration of United
16 States Probation Officer Kate Phillips. In addition, I have
17 Kate Phillips here by video ready to testify, and I ask that I
18 be able to proceed with questioning her.

19 THE COURT: All right. Any objection?

20 MR. MACCOLL: No objection to that -- to that method
21 of proceeding, Your Honor. Thank you.

22 THE COURT: All right. So noted.

23 To the extent the record needs to be clear on this, the
24 petition is obviously a part of the record, which includes
25 Ms. Phillips' recitations.

Phillips - Scott/Direct Examination

1 All right. You may proceed with your examination of
2 Ms. Phillips.

3 THE CLERK: I just need to swear her in.

4 MR. SCOTT: Yes. Sorry.

5 THE CLERK: All right.

6 THE COURT: And let me -- let me -- I'm sorry.

7 Let me first say Ms. Phillips is appearing by video today.

8 And I assume that there's no objection to that, Mr.
9 MacColl?

10 MR. MACCOLL: That's with the consent of Mr. Millette
11 and his counsel, Your Honor. Thank you very much.

12 THE COURT: All right. Thank you.

13 THE CLERK: Please raise your right hand. Do you
14 solemnly swear that the testimony you shall give in the cause
15 now in hearing shall be the truth, the whole truth, and nothing
16 but the truth, so help you God?

17 THE WITNESS: Yes.

18 THE CLERK: All right. And if you could just state
19 your full name and spell your last name for the record.

20 THE WITNESS: Kate Phillips, P-H-I-L-L-I-P-S.

21 THE CLERK: Thank you.

22 THE COURT: All right. Thank you. Counsel.

23 MR. SCOTT: Thank you, Your Honor.

24 DIRECT EXAMINATION

25 BY MR. SCOTT:

Phillips - Scott/Direct Examination

1 Q. Good afternoon, Officer Phillips.

2 A. Good afternoon.

3 Q. I just want to ask you with respect to Mr. Kevin Millette,
4 have -- are you assigned as his supervising officer?

5 A. Yes.

6 Q. And have you been his supervising officer since his
7 initial release in this case?

8 A. Not continuously. When he was first released, he was
9 supervised by Scott Hastings, and then I supervised him
10 starting in May 2021. And when he moved from his mom's home --
11 I believe that was in September or October of 2021 -- he was
12 supervised by another officer until summer 2022. And I've been
13 supervising him since.

14 Q. Okay. Thank you. I'm going to draw your attention to
15 about September 10th of 2021. Were you supervising Mr.
16 Millette at that time, or was that a different officer?

17 A. I was supervising him.

18 Q. Okay. And on or about September 10th of 2021, did you
19 receive information regarding Mr. Millette?

20 A. Yes.

21 Q. What was the substance of that information?

22 A. It was that he was in the presence of a minor.
23 Specifically, a birthday party for a five year old had been
24 thrown at his residence where he lived with his parents, and
25 that the minor had been to the home on more than one occasion.

1 Q. And I'm not going to specifically ask you who the source
2 of that info -- information was; but was Mr. Millette the
3 source of the information?

4 A. No, he was not.

5 Q. And was Mr. Millette's mother the source of that
6 information?

7 A. No, she was not.

8 Q. Okay. Now are you familiar with Mr. Millette's mother?

9 A. Yes.

10 Q. Okay. And what is her relation to Mr. Millette's
11 supervision conditions?

12 A. After he had to move out in the fall of 2021, our office
13 required her to undergo a chaperone program if he -- if he
14 wanted to move back in. She did complete a chaperone program,
15 and he was able to move back in the residence. And I have had
16 many communications with her about that course and about
17 Mr. Millette.

18 Q. Okay. All right. Prior to September of 2021, was
19 Mr. Millette's mother aware that he had a condition that he not
20 be in the presence of any minors without supervision?

21 A. Yes.

22 Q. Okay. Now after this information was received on
23 September 10th of 2021, did probation take any action with
24 respect to Mr. Millette?

25 A. Yes.

1 Q. What was that?

2 A. We present -- we presented him with a waiver to modify his
3 conditions to live in the residential reentry center.

4 Q. Okay. Just to go back a little bit, on September 14th of
5 2021, was Mr. Millette questioned about unapproved contact with
6 a minor?

7 A. Yes.

8 Q. Okay. And did he acknowledge that an unapproved minor had
9 been at his residence?

10 A. Yes, he did.

11 Q. All right. And do you recall how many occasions he
12 reported that that occurred?

13 A. He reported that it occurred on at least two occasions.

14 Q. Okay. And do you know when those occasions were?

15 A. The 4th of July and the minor's birthday party.

16 Q. Was Mr. Millette's mother also questioned regarding
17 unapproved contacts with minors?

18 A. Yes.

19 Q. And what did she report to probation?

20 A. She reported that the minor had been at the residence
21 three times and that a birthday party for the minor was thrown
22 at the residence.

23 Q. Just to be clear, prior to this report on September 10th
24 of 2021, had Mr. Millette or his mother reported these contacts
25 to probation or requested permission for these contacts to

1 occur?

2 A. No.

3 Q. Did Mr. Millette indicate any reason why he had failed to
4 request permission or report these contacts to his probation
5 officer?

6 A. I believe he explained that his understanding of the
7 special condition was that as long as his mother, who had been
8 an approved person to be in the presence of his two minor
9 children, he thought that it was blanket permission for her to
10 supervise him in the presence of any minor.

11 Q. Okay. All right. Can I ask you about that condition,
12 Condition No. 9 on the special conditions of supervision?

13 A. Yes.

14 Q. Which would be the condition governing the defendant's
15 contact with minors.

16 Now, how does probation interpret that condition? If you
17 can just, kind of, lay that out. Maybe I can ask that question
18 a little bit differently.

19 With regards to Condition No. 9, how would you interpret
20 where it says that, the defendant shall not associate, et
21 cetera, except in the presence of a responsible adult, how --
22 how do you understand "presence" to -- what requirement do you
23 believe that imposes on the defendant?

24 A. So it would require the defendant to be in the presence of
25 an approved person who has the knowledge of his criminal

1 history and risks and knowledge of the special condition for
2 him to only be in the presence of a minor, and that minor would
3 also have to be approved. It's not any minor. And so,
4 essentially, there would be three people there at all times:
5 The approved chaperone; Mr. Millette; and the approved minor.

6 Q. And would you -- is your understanding of that provision --
7 would that prohibit the defendant from being alone in a room
8 with a minor?

9 A. Overall, yes. It's difficult when you start breaking down
10 rooms because open concept floor plans exist. Rooms with doors
11 open. For example, somebody could be in a kitchen and two
12 people could be in the living room, but they're still in eye
13 distance of each other. That -- it's -- that's generally a
14 good idea of how we would move forward. But every situation
15 is -- is different and needs to be reviewed.

16 Q. Okay. And how about would the defendant, under this
17 provision, based on your understanding, be permitted to be
18 alone in a house or a residence with a minor?

19 A. No, that would not be approved.

20 Q. Okay. During the course of your supervision of the
21 defendant, have you had conversations with the defendant
22 regarding what this condition requires, Condition No. 9?

23 A. We have had conversations about the necessity of a
24 chaperone to take place. In terms of breaking down specific
25 examples, I don't recall any conversations or questions that

Phillips - Scott/Direct Examination

1 have been brought to our office about that with him.

2 Q. Thank you. Now I just want to go a little bit more into
3 what happened after the September 10th of 2021 and
4 September 14th of 2021 incidents. Can you tell us what
5 probation did to, kind of, ameliorate what had happened?

6 A. We presented him with a waiver to live in the halfway
7 house for a period of 120 days. He was not receptive to that,
8 so we summonsed him to court. We were able to come up with a
9 resolution before we went to a hearing, and he moved in with
10 his sister in Farmingdale while his mother went through the
11 chaperone program.

12 Q. Okay. And is it your understanding his mother completed
13 the chaperone program?

14 A. Yes.

15 Q. All right. At some point after the mother completed the
16 chaperone program, did the defendant move back into the
17 residence with the mother?

18 A. Yes.

19 Q. And after that, did visitation with the defendant's minor
20 15-year-old child resume?

21 A. To my understanding, yes.

22 Q. Okay. Now, I want to direct your attention to this month,
23 August of 2023, particularly August 12th. On that day did you
24 conduct a home visit to Mr. Millette's residence?

25 A. Yes.

1 Q. And can you tell us what happened?

2 A. Yes. I arrived at the address. And it's a single-family
3 home with an attached garage. And I knocked on the door to the
4 garage, which is the primary entry point, and his father was in
5 that area. His father answered the door and told me that
6 Mr. Millette was inside. And so he went inside, which is
7 through a closed door, and got Mr. Millette, who came outside,
8 and we went into the main part of the home.

9 As I was in the main part of the home, it was -- he was
10 the only adult who was in the home. And we do a walk-through
11 every time. And when we got to his bedroom, his daughter was
12 in a twin bed, that I believe to be a blow-up mattress, still
13 in bed at that point, in his bedroom. His mother was outside
14 in the pool area. So Kevin was alone -- in the home alone with
15 his daughter. I questioned him about this situation, and he
16 did disclose that she spent the night at the home and that he
17 slept on the couch.

18 Q. Just to go back to the room where you saw the minor child.
19 How many beds are there in total in that room?

20 A. Every other time, except Saturday, I've only observed one
21 bed, and it's a full-sized bed that is Mr. Millette's.

22 Q. Okay. And when you went on August 12th, how many were
23 there?

24 A. There were two beds.

25 Q. Okay. And in Mr. Millette's statement to you that he

1 slept on the couch, did you understand what couch he was
2 referring to, or did he indicate it?

3 A. I made the assumption. It was the only couch I have
4 observed in the home, which was in the living room.

5 Q. Okay. Just to be clear, was there any couch in
6 Mr. Millette's room?

7 A. No.

8 Q. All right. Now, after you spoke to Mr. Millette, did you
9 have an opportunity to speak to his mother?

10 A. I did.

11 Q. And where -- where did you find her?

12 A. She was in the back yard in the pool area, specifically on
13 the pool deck.

14 Q. About how far is that from the house?

15 A. It's separated by a patio area. Perhaps 20 or 30 feet.

16 Q. Okay. Now, what -- can you tell us the substance of your
17 conversation with Mr. Millette's mother?

18 A. I spoke with her separate from Mr. Millette, and I asked
19 her about her granddaughter spending the night, which she
20 acknowledged occurred. And I asked her where Mr. Millette
21 slept, and she disclosed that he slept in his room. And the
22 conversation went in to my concerns about her being an approved
23 custodian if that is taking place at the home.

24 Q. Okay. And did she make any statements to you regarding
25 what was happening with Mr. Millette's minor child, the

1 sleeping arrangements, et cetera?

2 A. No. Only the confirmation that she -- that she slept in
3 the same room. And the essence of the conversation was that
4 this had occurred more than once, that this wasn't the first
5 time that there had been a sleepover in his bedroom.

6 Q. All right. Had Mr. Millette's mother ever reported this
7 sleeping arrangement on previous occasions to probation?

8 A. No.

9 Q. Had Mr. Millette or his mother ever asked probation
10 whether this kind of sleeping arrangement would be permitted
11 under Special Condition No. 9?

12 A. No.

13 Q. Had anybody -- or let me rephrase that.

14 Had you ever informed the defendant that he was permitted
15 to be in the presence of a minor as long as his mother was
16 present somewhere outside of his house?

17 A. No, that was not a specific conversation we had.

18 Q. Okay. Had he ever reported -- excuse me -- had the
19 defendant ever reported any kind of contact with his minor
20 child while his mother or chaperone was outside of the house
21 before?

22 A. No.

23 Q. Now is it -- what -- do you have any opinion on whether
24 that sleeping arrangement that the defendant had was in
25 compliance with Special Condition No. 9?

1 A. My professional belief is that it is not in compliance
2 with that special condition.

3 Q. Okay. And what is your belief as to whether the defendant
4 would be permitted to be alone with his daughter in his house
5 pursuant to Condition No. 9?

6 A. It is also my belief that is not conducive to Special
7 Condition No. 9.

8 Q. Okay. Now are you familiar with any proposals by the
9 defense for release in the wake of these occurrences?

10 A. Yes.

11 Q. Can you just, I guess, give us your understanding of what
12 that proposal is?

13 A. Yes. His attorney related earlier today that he proposes
14 release under the condition that he reside with his parents and
15 that he have no contact with any minors, other than his own
16 child, no contact with his daughter except in the immediate
17 presence of an approved chaperone other than -- other than his
18 mother, no contact with his daughter at his parents' house.

19 Q. Okay. And -- go ahead. Sorry. I didn't mean to --

20 A. Oh, that's okay. They also proposed that he submit to a
21 polygraph test as soon as a polygrapher is available.

22 Q. Okay. Do you have any opinion as to whether release under
23 those conditions is appropriate?

24 A. Yes. I -- I have significant concerns over his ability to
25 comply with those conditions and -- and for anybody who is a

1 vested person in his life to be a responsible reporter should
2 there be concerns that arise like the one that just did.

3 Q. All right. Specifically do you have any concerns about
4 Mr. Millette's mother continuing as the chaperone with respect
5 to Condition No. 9?

6 A. I do. I have very serious concerns about that, and our
7 office has taken the position that she was not approved after
8 that incident.

9 Q. Okay. And can you explain what your concerns are?

10 A. First, that she believed it was appropriate for him to be
11 in the same room overnight with a minor. She made several
12 comments during follow-up conversations that placed burden on a
13 child. Specifically stating that the minor knows right from
14 wrong and would be able to, essentially, yell for help. And it
15 made me believe that the dynamics of abuse, if anything like
16 that were taking place, were not fully understood by her.

17 Q. Okay.

18 A. I guess I can also add that she -- she was very clear with
19 me that she believes this is -- the action that we had taken
20 prior to him being arrested, which involved questioning and him
21 reporting into the office, was overboard and that we were
22 nitpicking his behavior.

23 Q. Okay. Thank you. Is there any other information that you
24 have that you think would be relevant to the Court's
25 determination as to the risk Mr. Millette would pose should he

Phillips - MacColl/Cross-Examination

1 be released?

2 A. Aside from the documents I provided to counsel, which
3 indicate treatment recommendations that he always be supervised
4 when in the presence of minors, I think that really just
5 highlights that he should -- he should not be alone with a
6 minor in any way, shape, or form. And given the incident that
7 occurred two years ago and that we're back here in the same
8 place, I have very strong concerns about his ability to
9 understand and comply with the -- with that condition.

10 MR. SCOTT: Thank you.

11 THE COURT: Cross.

12 MR. MACCOLL: Thank you, Your Honor.

13 CROSS-EXAMINATION

14 BY MR. MACCOLL:

15 Q. Good afternoon, Officer Phillips.

16 A. Good afternoon.

17 Q. Let me start by asking a few questions about the -- about
18 the July incident.

19 The second minor who was at the Millette family home was a
20 relative of Mr. Millette's father, correct?

21 A. That sounds right. I -- I understand that it was a
22 relative in some capacity.

23 Q. All right.

24 A. Or a friend's relative.

25 Q. You have no information that Mr. Millette, the

1 defendant -- the defendant, Mr. Millette, was ever alone with
2 that -- that child, correct?

3 A. Correct.

4 Q. At the time, it was only one approved chaperone; is that
5 correct?

6 A. I'd have to go back and check the timeline. Actually, I
7 I'm sorry, I can speak to that. No. His mother was an
8 approved chaperone, and his friend, Karen Stewart, was also an
9 approved chaperone.

10 Q. And every time that the relative of Mr. Millette's father
11 was visiting Mr. Millette -- senior Mr. Millette and
12 Mrs. Millette, one or both of those approved chaperones was
13 present, correct?

14 A. I -- if I remember correctly, the mother was present, but
15 I would have to go back and read everything. That sounds
16 accurate.

17 Q. And you take the position that Special Condition No. 1,
18 when it says, The defendant shall not associate with any minor
19 except in the presence of an approved chaperone, means that the
20 chaperone has to be separately approved with respect to each
21 minor who -- who attends an event, correct?

22 A. Correct.

23 Q. But that's not what the order says, correct? It's not
24 difficult to write the sentence, Is approved for that minor;
25 but it's not in the conditions of release, right?

1 A. If that's how you interpret it, correct.

2 Q. You agree with me that that would be clear if it said,
3 Shall not associate with a minor except in the presence -- the
4 presence of a chaperone approved for that minor, then we would
5 know that's what it meant, correct?

6 A. Correct.

7 Q. That's never been clarified or changed or required,
8 minor-specific approval, with respect to the chaperone,
9 correct?

10 A. That has been clarified with Mr. Millette.

11 Q. So was it -- is it probation's contention this was
12 clarified after -- after the July 21st event, correct?

13 A. Correct. Yes.

14 Q. And since then, as far as you know, Mr. Millette hasn't
15 been in the presence of any minor other than his own daughter?

16 A. That is the information we have, yes. Correct.

17 Q. Okay. So now there are three approved chaperones. I take
18 it you -- you testified that your office takes the position
19 that Mrs. Millette -- she's -- can you see she's in the room?
20 I don't know how good it --

21 A. I can see there are four people there, yes.

22 Q. All right. So Melodie Millette, is who we're talking
23 about, is the mother, correct?

24 A. Yes.

25 Q. And she has been an approved chaperone at all relevant

1 times, correct?

2 A. Yes.

3 Q. And your office takes the position that she's not -- not
4 an approved chaperone?

5 A. Correct.

6 Q. All right. And -- and I would read the order as
7 suggesting that the probation office can take away a
8 chaperone's approval. You get to decide who's approved. So
9 you can say, Mrs. Millette, you're no longer approved.

10 That would be your interpretation, correct?

11 A. Yes.

12 Q. And how did you communicate most recently to Melanie
13 Millette that she is no longer an approved supervisor?

14 A. I spoke with her on the phone earlier this week, and I
15 stated exactly that.

16 Q. Okay. And as far as you know, since you said that, she's
17 never been the chaperone for a visit between her son and her
18 granddaughter, correct?

19 A. Correct.

20 Q. And I asked you if you could send me the certificates for
21 Ms. Millette's approval, the chaperone courses, and I think you
22 sent me two certificates, correct?

23 A. Correct.

24 Q. Indicating that she took a Level 1 course and completed it
25 successfully, and Level 2 course and completed it successfully,

1 correct?

2 A. Correct.

3 Q. Looking at -- at violation one with respect to the Special
4 Condition No. 9, do you interpret that as -- as meaning that
5 any time Mr. Millette sends a birthday card to his daughter,
6 that needs to be supervised by a chaperone?

7 A. That would be the interpretation, yes, that there would
8 be -- needs to be some level of approval --

9 Q. Have you --

10 A. -- and supervision.

11 Q. Have you discussed that with any of the chaperones?

12 A. No, I have not.

13 Q. Birthday card review?

14 A. I have not.

15 Q. Since Mr. Millette's been on supervised release, there has
16 been no allegation that he has had any physical contact with
17 any minor, correct?

18 A. Correct.

19 Q. Since he's been on supervised release, there's been no
20 allegation that he engaged in any child pornography?

21 A. What do you mean "engaged in?"

22 Q. That he's looked at any child pornography while on
23 supervised release.

24 A. When he first was released, there were images found on his
25 internet history that he was looking at minor children, and

1 specifically a diaper fetish website. We have no information
2 that there was images for him to be referred for a new charge,
3 but there was a situation where there was material found on his
4 phone that was addressed.

5 Q. And he's -- and he's addressed that and, as far as you
6 know, completely complied thereafter with no visiting of any
7 suspicious sites, no images whatsoever, correct?

8 A. I think it's been since May 2021 there's been compliance
9 with the computer and internet monitoring program.

10 Q. Since the two or three visits of the Millette relative to
11 the Millette home in the presence of the approved chaperone,
12 there have been no known Kevin Millette contact with any minor,
13 correct?

14 A. Correct.

15 Q. And since then, no issue with the nature of his contact
16 with his own daughter, other than the recent event where
17 Mr. Millette was in the home, his daughter was in the home, and
18 his approved chaperone mother, it turns out, was sometimes in a
19 different room in the home or in the immediate back yard of the
20 home, correct?

21 A. Correct. And by immediate back yard, that's in the pool.

22 Q. Okay. And Mrs. Millette told you that that's where she
23 had been?

24 A. Correct.

25 Q. And after Mr. Millette told you that he had slept on the

1 couch, you confronted him with the fact that, Hey, your mom
2 says that you used the two beds in the bedroom, and he said,
3 Yes, I did. He apologized for fibbing to you, correct?

4 A. He acknowledged that he was dishonest about that, yes.

5 Q. So the issue for the Court in whether there's probable
6 cause that a violation occurred is in resolving the ambiguity
7 about what it means to have contact in the presence of an
8 approved chaperone, right?

9 A. Can you repeat that question, please?

10 Q. Sure. Sure. The issue in this case -- I mean, Mr.
11 Millette has told you -- the events that you just described,
12 Mr. Millette told you that it -- they happened, right?

13 A. Correct.

14 Q. Okay. And the issue is whether having one chaperone there
15 for two minors, back in July of '21, is a violation of --
16 technically a violation of this condition, which just -- which
17 says simply, no contact with minors except in the presence of
18 an approved chaperone, if that's the word that's used, right?

19 A. Are you asking me if the issue is the wording of the
20 language?

21 Q. Yes. You interpret it one way. And we agree that the
22 Judge gets the final say on what the word means, correct?

23 A. Yes, I -- I agree with that statement.

24 Q. And the question is whether the second child was in the
25 presence of a responsible adult who had been approved by

1 probation, whether that required -- and Mr. Millette was on
2 reasonable notice that it required that the chaperone be
3 approved for each minor at an event, correct? That's the legal
4 issue?

5 A. I -- I'm confused because you keep saying there are two
6 minors. Are you referring to the two incidents and the minor
7 being the five year old and his daughter?

8 Q. Yeah. The other relative who was present with
9 Mr. Millette and several adults, one of whom was the approved,
10 responsible adult to be with him, when -- I'm sorry, but I read
11 this, Officer Phillips, to say when one or more minors are
12 present, but you read it as saying when a specific minor, and
13 only a specific minor, is present. And that's a legal issue
14 for the Judge to decide, correct?

15 MR. SCOTT: I'm going to object to the question. I
16 think that was kind of a run-on, argumentative question, a
17 little bit hard to follow.

18 MR. MACCOLL: I'll break it down.

19 THE COURT: Rephrase, Counsel.

20 MR. MACCOLL: Okay.

21 BY MR. MACCOLL:

22 Q. The words of Special Condition No. 9 has never been
23 changed by the Court, correct?

24 A. Correct.

25 Q. The Court gets to decide what it means, correct?

Phillips - MacColl/Cross-Examination

1 A. Correct.

2 Q. Now since he's been released, Mr. Millette -- Mr. Millette
3 has taken a polygraph concerning whether he has ever sexually
4 touched any minor, correct?

5 A. Correct.

6 Q. And he passed that polygraph when saying he has never done
7 that?

8 A. Correct.

9 Q. And he regularly takes polygraph examinations, correct?

10 A. Yes.

11 Q. And he's asked in those polygraph examinations about
12 whether he's been in the presence of minors?

13 A. Correct.

14 Q. And best of your knowledge, he's always passed those
15 polygraph examinations?

16 A. There was a polygraph last year that was deemed to be
17 inconclusive.

18 Q. The most recent one was deemed to be -- all capital
19 letters -- truthful, correct?

20 A. Correct.

21 Q. And that's the only examination you provided to me,
22 correct?

23 A. Correct.

24 Q. The one that says, Truthful for all questions?

25 A. Yes. His latest one I provided to counsel.

Phillips - MacColl/Cross-Examination

1 Q. That's the only one provided, correct?

2 A. Correct.

3 Q. Now, with -- with respect to your visitation to the
4 Millette family home, that's about a 2,000-square-foot,
5 single-family ranch home, correct?

6 A. Correct.

7 Q. It has only two bedrooms, correct?

8 A. Correct.

9 Q. Have you had any communication with Mr. Millette's
10 15-year-old daughter, to be 16 in December?

11 A. No, I have not.

12 Q. Do you know if Child Protective Services is involved in
13 any way in assessing her circumstance?

14 A. I do not know that.

15 Q. In taking into account the Government's and your
16 recommendation that Mr. Millette go to prison, have you -- have
17 you evaluated the effect that could have on his 16 --
18 15-and-a-half-year-old daughter?

19 MR. SCOTT: I'm going to --

20 A. No, I have not.

21 MR. SCOTT: -- object.

22 Well, it's been answered, but I think that's kind of
23 irrelevant to --

24 THE COURT: Asked and answered.

25 MR. SCOTT: Yeah.

Phillips - MacColl/Cross-Examination

1 BY MR. MACCOLL:

2 Q. As far as you know, every time Mr. Millette has been with
3 his daughter at the family home, Ms. Millette was on the
4 property, correct, his mother?

5 A. I have no information to say otherwise, but I cannot say
6 affirmatively that I know that.

7 Q. And you don't know of an instance, for example, where she
8 even went to the store and left Mr. Millette and his daughter
9 and the senior Mr. Millette in the house? As far as -- as far
10 as you know, any time she's gone to the store, all three of
11 them went together, correct?

12 MR. SCOTT: I'm going to object. I think that
13 question has been answered by the witnesses.

14 MR. MACCOLL: That's fine, Your Honor. I agree with
15 that.

16 Q. Ms. Phillips, is it the office's practice, when it
17 approves a chaperone or terminates approval for a chaperone, to
18 put that in writing?

19 A. Not that I'm aware of.

20 Q. Okay. So -- so you're -- the approval has been oral, and
21 the termination has all been oral?

22 A. Yes.

23 MR. MACCOLL: If I could have just a moment, Your
24 Honor.

25 THE COURT: Certainly.

Phillips - MacColl/Cross-Examination and Examination by the Court

1 BY MR. MACCOLL:

2 Q. Just to clarify, as far as you know Mr. Millette has never
3 been charged with sexually abusing any minor or any person,
4 correct?

5 A. Correct.

6 Q. And, therefore, has never been convicted of any such
7 offense, correct?

8 A. Correct.

9 Q. Thank you.

10 MR. MACCOLL: Thank you, Your Honor. No more
11 questions.

12 THE COURT: Any redirect?

13 MR. SCOTT: No redirect, Your Honor. Thank you.

14 THE COURT: Ms. Phillips, I'm going to ask you a
15 couple questions to clarify something.

16 Your report and your testimony speaks about -- both
17 address a situation where your office received information that
18 the defendant was -- that a minor was present or two minors,
19 his daughter and then a five year old, at a birthday party at
20 his parents' and an indication that -- that the child had been
21 there on several occasions. Do I understand that correctly?

22 THE WITNESS: Yes.

23 THE COURT: At -- at that time, was the defendant's
24 mother an approved chaperone?

25 THE WITNESS: In 2021?

Phillips - Examination by the Court

1 THE COURT: Yes.

2 THE WITNESS: Yes. She was an approved chaperone for
3 him to have contact with his two minor children.

4 THE COURT: Okay. And was she present on the
5 occasion -- the birthday party occasion?

6 THE WITNESS: Yes.

7 THE COURT: So what is -- what is, so far as you're
8 concerned, the significance of and why have you told us about
9 this particular -- or made reference to this particular
10 birthday party at which, I understand from your testimony, the
11 defendant's two children were present, as was the defendant's
12 mother?

13 THE WITNESS: It was a minor that our office was not
14 aware of. And when a situation like this occurs, if there
15 would be someone -- a convicted sex offender to have contact
16 with a minor, we also want to make sure that that minor's
17 parents or their guardian are aware that their child is in the
18 presence of somebody who has sexual offenses on their record.
19 So that step wasn't taken. And it was concerning because it
20 was an unknown minor to us, and it created an environment of
21 risk for Mr. Millette.

22 THE COURT: But both of these minors on that occasion,
23 those are his two children; is that correct?

24 THE WITNESS: The minor referenced in the birthday
25 party is not his child.

Phillips - Examination by the Court

1 THE COURT: All right. Was his child -- was more than
2 one minor present at that birthday party?

3 THE WITNESS: I believe at least one of his children
4 were present at that birthday party. Our concern was the five
5 year old that was not his child.

6 THE COURT: But I understand your testimony to be that
7 the defendant's mother, who was then an approved chaperone, was
8 present on that occasion?

9 THE WITNESS: Correct.

10 THE COURT: Counsel, any other questions?

11 MR. MACCOLL: Appreciate the Court's clarification,
12 but no further follow-up. Thank you.

13 MR. SCOTT: Same. No questions.

14 THE COURT: Thank you, Ms. Phillips.

15 Any other witnesses for the Government?

16 MR. SCOTT: No further witnesses, Your Honor.

17 THE COURT: And for the defendant?

18 MR. MACCOLL: Yes, Your Honor. I would call Melodie
19 Millette.

20 MR. SCOTT: I'm sorry, before that, I did have one
21 exhibit I wanted to hand up to the Court, which would be a copy
22 of the polygraph examination report referenced by the
23 defendant. Since this has been brought up, I think it's just
24 important for the Court to just see what the actual questions
25 were. And in addition --

Phillips - Examination by the Court

1 MR. MACCOLL: No objection, Your Honor, to the
2 exhibit.

3 MR. SCOTT: -- I also wanted to draw the Court's
4 attention to one particular section on page three, which
5 references discussion regarding contact with minors,
6 specifically where the defendant denied being all alone with
7 any minor.

8 THE COURT: All right. You've marked that as what?
9 Government's Exhibit what?

10 MR. SCOTT: One, Your Honor.

11 THE COURT: One.

12 MR. MACCOLL: And just so I know, which polygraph is
13 that?

14 MR. SCOTT: That's the same one that probation
15 provided to both of us, which is dated March 29th of 2023.

16 MR. MACCOLL: I'm sorry?

17 THE COURT: Of what year? March 29th of...

18 MR. SCOTT: March 29th of 2023.

19 THE COURT: '23.

20 MR. MACCOLL: Can I ask one follow-up question about
21 that before, Your Honor?

22 THE COURT: Yes. Mr. MacColl, do you have a copy now
23 of that --

24 MR. MACCOLL: I -- I do.

25 THE COURT: -- exhibit?

Phillips - MacColl/Continued Cross-Examination

1 MR. MACCOLL: I marked it a different number.

2 THE COURT: All right. And you've indicated you have
3 no objection to its being admitted into the record. You may
4 wish to inquire.

5 MR. MACCOLL: I just -- I just have a clarification,
6 Your Honor.

7 THE COURT: All right. So let me -- let me, for the
8 record, indicate that Government's Exhibit 1 is admitted
9 without objection.

10 CONTINUED CROSS-EXAMINATION:

11 BY MR. MACCOLL:

12 Q. Ms. Phillips -- Officer Phillips, I noted what seemed like
13 an inconsistency to me in the report. On the first page it
14 says that the last polygraph exam was May 16 of '22, and on the
15 second page it says that the question -- the following
16 questions and responses from Millette will be specific to the
17 time period since October of 2022. And my understanding was
18 that he gets a polygraph every six months, and I thought maybe
19 on the first page the reporter didn't update when the last
20 polygraph exam was.

21 Do you know whether Mr. Millette had a polygraph in
22 the fall of last year?

23 A. One moment. I can check quickly. So I believe his last
24 polygraph before that was June 24th, 2022.

25 Q. I'm sorry, before the March of '23 exam, this said --

—Phillips - MacColl/Continued Cross-Examination and Examination by the Court-

1 | okay.

2 You think it was -- am I correct that he gets semiannual
3 polygraph examinations?

4 A. Yes.

5 Q. Okay. Okay. Thank you, Officer.

6 MR. MACCOLL: Nothing further, Your Honor.

9 MR. SCOTT: No, Your Honor.

10 THE COURT: Ms. Phillips, you indicated there was a
11 second approved chaperone. Did I understand you to so testify?

12 THE WITNESS: Yes.

13 THE COURT: And who is that person?

14 THE WITNESS: There has been three of them in the
15 past. Aside from his mother, it's been his sister, Kim
16 Lapierre, and his friend Karen Stewart.

17 THE COURT: Are both of those individuals currently
18 approved chaperones?

19 THE WITNESS: Yes. There will be reevaluation, based
20 on information that we have received in cellphone reports,
21 though, of Ms. Stewart.

22 THE COURT: All right. Counsel, again, based on that
23 last couple of questions, anything else for this witness?

24 MR. MACCOLL: No follow-up, Your Honor. Thank you.

25 | REDIRECT EXAMINATION:

Phillips - Scott/Continued Redirect Examination

1 BY MR. SCOTT:

2 Q. Can you -- can you just explain what you mean by
3 reevaluation with respect to cellphone reports by Ms. Stewart?
4 I wasn't clear on that.

5 A. Yes. Mr. Millette's cellphone is monitored, so I'm able
6 to see all communication activity. And prior to him reporting
7 in to the office on Wednesday, there was a conversation -- a
8 text message conversation between him and Karen where she says,
9 If they take you, they'll be taking me too 'cause if -- fight
10 them. And Mr. Millette responds, Me too. So that's a
11 communication that we need to look into and see if she would be
12 somebody that we can trust to report information.

13 Q. Thank you. And are there any concerns, other concerns,
14 with respect to either Kim Lapierre or Karen Stewart acting as
15 chaperones?

16 A. No specific.

17 MR. SCOTT: Thank you. Nothing further.

18 THE COURT: Mr. MacColl, any follow-up?

19 MR. MACCOLL: No.

20 Officer Phillips, thank you for participating remotely.
21 We appreciate getting this done today. Thank you.

22 THE COURT: All right. Thank you. Anything else?
23 Any other witnesses for the Government?

24 MR. SCOTT: No, further witnesses, Your Honor.

25 * * * * *

Phillips - Scott/Continued Redirect Examination and Examination by the Court-

1 THE COURT: Before -- before you proceed, I'm -- I'm
2 told that Ms. Phillips is unavailable after 5 o'clock, and it's
3 now 4:55.

4 Ms. Phillips, you've been listening to this testimony,
5 correct?

6 PROBATION OFFICER: Yes, Your Honor.

7 THE COURT: And you -- you see where I'm -- what's on
8 my mind, do you understand what's on my mind about this? I'm
9 concerned that in the -- in the picture that I currently have,
10 this -- Ms. Millette is not an approved supervisor or...

11 Having heard her testimony, are you still of -- are you still
12 of the mind that she is not an appropriate person to supervise
13 any visits with -- between the minor child and the defendant?

14 PROBATION OFFICER: Yes. I believe there needs to be
15 reeducation on the dynamics of victims and perpetrators.

16 | THE COURT: Counsel, do you wish to inquire?

17 MR. MACCOLL: Of Officer Phillips?

18 THE COURT: Yes.

19 MR. MACCOLL: I don't have any further questions for
20 her. Thank you.

21 | CONTINUED REDIRECT EXAMINATION

22 BY MR. SCOTT:

23 Q. I suppose could you just explain what you meant by
24 reeducation about the dynamics between victims and
25 perpetrators?

Phillips - Scott/Continued Redirect Examination and Examination by the Court

1 A. Yes. I was specifically concerned about the statement she
2 made in her testimony about being attacked and rape victims and
3 screaming. Well, there is so much more to sexual abuse than
4 rape. And, also, it seems like a -- it's a heavy burden placed
5 on a victim in that situation to identify a need for help. And
6 I'm not saying that she will never be an approved person again.
7 I believe she is very invested in her son's life, and she cares
8 very much for him to have a relationship with his children. I
9 just believe there needs to be some further education to help
10 her identify risky situations before it gets to this level.

11 MR. SCOTT: Thank you. I have no further questions.

12 MR. MACCOLL: Nor do I, Your Honor. Thank you.

13 THE COURT: All right. Thank you, Ms. Phillips.

14 And, Counsel, may this witness be -- Ms. Phillips be
15 excused, understanding that she will then not be available?

16 MR. MACCOLL: As far as the defense is concerned,
17 Officer Phillips can be excused. Thank you, Your Honor.

18 MR. SCOTT: Yes, Your Honor.

19 THE COURT: All right. Thank you, Ms. Phillips.

20 PROBATION OFFICER: Thank you.

21 (Time noted: 4:58)

22 * * * * *

23

24

25

C E R T I F I C A T I O N

2 I, Michelle R. Feliccitti, Registered Professional Reporter and
3 Official Court Reporter for the United States District Court,
4 District of Maine, certify that the foregoing is a correct
5 transcript from the record of proceedings in the above-entitled
6 matter.

7 | Dated: September 21, 2023

/s/ Michelle R. Feliccitti

Official Court Reporter

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,

CRIMINAL ACTION

Plaintiff,

Case No: 2:16-cr-0004-NT

EXCERPT

-versus-

TESTIMONY OF MELODIE MILLETTE

KEVIN MILLETTE,

Defendant.

Release Hearing Excerpt

Pursuant to notice, the above-entitled matter came on for **Preliminary and Release Hearing**, held before **THE HONORABLE DAVID M. COHEN**, United States Magistrate Judge, in the United States District Court, Edward T. Gignoux Courthouse, 156 Federal Street, Portland, Maine, on the 17th day of August, 2023, at 3:15 p.m. as follows:

Appearances:

For the Government: Nicholas M. Scott, Esquire
Assistant United States Attorney

For the Defendant: Edward S. MacColl, Esquire

Also Present: Kate Phillips, U.S. Probation Officer
(via videoconference)

Michelle R. Feliccitti, RPR
Official Court Reporter

(Prepared from manual stenography and
computer-aided transcription)

Millette - MacColl/Direct Examination

1

* * * * *

2

(Open court. Defendant Present.)

3

THE COURT: Mr. MacColl?

4

MR. MACCOLL: We would call Melodie Millette.

5

THE CLERK: Please step forward to the witness stand.

6

Step right up here.

7

Remain standing and raise your right hand. Do you solemnly swear that the testimony you give in the cause now in hearing be the truth, the whole truth, and nothing but the truth, so help you God?

11

THE WITNESS: I do.

12

THE CLERK: Thank you. Please be seated. Pull yourself right up to the microphone.

14

THE WITNESS: All right.

15

THE CLERK: If you'd state your name and then spell your name for the record.

17

THE WITNESS: The whole name?

18

THE CLERK: Yes, please.

19

THE WITNESS: Melodie Millette. It's M-E-L-O-D-I-E M-I-L-L-E-T-T-E.

21

DIRECT EXAMINATION

22

BY MR. MACCOLL:

23

Q. Good afternoon, Ms. Millette.

24

A. Afternoon.

25

Q. You're the defendant's mother, correct?

Millette - MacColl/Direct Examination

1 A. Yes.

2 Q. And you're, therefore, his daughter's grandmother?

3 A. Yes.

4 Q. And Mr. Millette has three children?

5 A. Yes.

6 Q. Currently only his daughter is a minor, correct?

7 A. Correct.

8 Q. She'll be 16 in December?

9 A. Yes.

10 Q. And his middle child is almost 19?

11 A. He'll be 19. He's right there. This week, I think.

12 Q. That is Corbin sitting in the front row?

13 A. Yes.

14 Q. You've been an approved chaperone for Mr. Millette to be

15 with minors, correct?

16 A. Yes.

17 Q. At any time did -- as a chaperone, did you approve or

18 allow any conduct by your son or contact with minors that you

19 thought was inappropriate or a violation of the conditions of

20 release?

21 A. Since the episode with that birthday party, we have had no

22 minors at our home except for my granddaughter.

23 Q. And when you had the birthday party, did you think that

24 you or your son were doing anything wrong?

25 A. No. He was outside cooking the whole time. He wasn't

Millette - MacColl/Direct Examination

1 even around her. And there was three grandparents, her father,
2 which was aware of what the situation was, and myself. So --
3 and there was probably, I would say, at least seven adults.
4 And she stayed strictly right there and never went anywhere.

5 Q. All right. And he was never alone with her, correct,
6 the --

7 A. No.

8 Q. -- five year old?

9 A. No.

10 Q. If I understood your testimony just now, the guests at the
11 birthday party included the five-year-old's dad?

12 A. Absolutely.

13 Q. And it was a five-year-old's birthday party?

14 A. Yes.

15 Q. And at the time you were an approved chaperone to be with
16 your son with minor children, correct?

17 A. Yes.

18 Q. And did you believe that included family relatives other
19 than his own kids?

20 A. I did. I did.

21 Q. So you thought what you were doing was consistent with
22 your responsibilities?

23 A. Absolutely.

24 Q. How about -- how about the last time around when -- when
25 it turned out you were out by the pool, or briefly in the pool,

Millette - MacColl/Direct Examination

1 or in a separate room in the house, did you think that was a
2 violation of the conditions of Mr. Millette's supervision?

3 A. No. Had I known, I would have been right with her.
4 Because I don't leave the house without her anyhow. I have her
5 come with me if I had to go to the store or anything. But had
6 I known, no, I would have been right there with her.

7 Q. After you found out that Officer Phillips interprets the
8 order differently than you do, did you ask her, Well, what
9 happens if I have to go to the bathroom?

10 A. I did.

11 Q. And what did Officer Phillips tell you --

12 A. She told me --

13 Q. -- should happen?

14 A. She told me either Kevin had to leave the house, or I had
15 to take her in the room with me. Which I spoke to her and
16 said, That's not appropriate. And that's the truth.

17 Q. Now can you -- can you see what I'm holding up, these two
18 certificates?

19 A. Yes.

20 MR. MACCOLL: I'd offer defendant's Exhibits 1 and 2,
21 Your Honor.

22 THE COURT: And for identification purposes, these
23 are?

24 MR. MACCOLL: These are the certificates that she
25 completed the two chaperone courses, Your Honor, at probation's

Millette - MacColl/Direct Examination

1 request.

2 THE COURT: Any objection?

3 MR. SCOTT: No, Your Honor. I have copies of them as
4 well.

5 THE COURT: Both defendant's Exhibits 1 and 2 are
6 admitted without objection.

7 BY MR. MACCOLL:

8 Q. In -- in those courses or in your conversations with
9 probation before the most recent event --

10 A. Mm-hmm.

11 Q. -- when Officer Phillips came to the home, had you been
12 told that presence means in the same room?

13 A. No.

14 Q. Had you had the conversation you've now had with Officer
15 Phillips about what do I do when I need to go to the restroom
16 or to the kitchen to check on the boiling water, now you've had
17 that conversation, but before the recent conversation, had you
18 ever had that conversation with Officer Phillips?

19 A. No.

20 Q. In your chaperone courses, did anybody tell you if -- if
21 the water is -- boiling in the kitchen is overboiling, you need
22 to take either the minor or the -- or your son, or both of
23 them, into the kitchen with you or into bathroom with you?

24 A. No.

25 Q. While you've been the approved chaperone, did you ever go

Millette - MacColl/Direct Examination

1 to the store and leave your granddaughter and your son in the
2 house alone?

3 A. No. No. I would take her with me, and he would stay at
4 home. I always took her with me. She liked to go shopping,
5 so...

6 Q. All right.

7 A. I took her with me.

8 Q. And you've had an opportunity in the home to observe
9 Mr. Millette's -- your son's relationship with your
10 granddaughter, correct?

11 A. Mm-hmm. Mm-hmm.

12 Q. They have a good relationship?

13 A. They do. Very good. All three children do.

14 Q. Would you have any sense that your granddaughter was in
15 any way uncomfortable around her dad?

16 A. Absolutely not.

17 Q. Have you ever had any sense from your other grandchildren
18 that they were either uncomfortable around -- around their dad
19 or that they thought their sister was uncomfortable around --

20 A. No.

21 Q. -- their dad?

22 A. No. Absolutely not.

23 Q. All right. It -- is it -- it's a good family dynamic?

24 A. It is.

25 Q. Is it an improving family dynamic?

Millette - MacColl/Direct Examination

1 A. Yes.

2 Q. You know your son had some difficulties in his childhood?

3 A. Right.

4 Q. And he's working -- to your observation, is he working
5 diligently to overcome the effects of those difficulties?

6 A. Absolutely. He doesn't miss any of his counseling. He
7 has counseling on Tuesday. He has counseling -- group
8 counseling on Thursday, and he's always doing his counseling.

9 Q. All right. It's important to you to protect your
10 granddaughter?

11 A. Absolutely.

12 Q. And you believe you've done it correctly and
13 appropriately?

14 A. Yes. The situation was that they both were watching a
15 movie, and they fell asleep. And of course, I'm older and I
16 was tired. I went to bed and thinking, you know -- it wasn't
17 done intentionally. We've always complied with all the rules,
18 as far as I know, and we still will, but...

19 Q. When you say, complied with the rules, you're complying
20 with your understanding of the rules?

21 A. Exactly.

22 Q. Officer Phillips might have a different understanding.
23 And if she hasn't shared it with you, you can't read her mind;
24 is that fair to say?

25 A. Right. Exactly.

Millette - Scott/Cross-Examination

1 Q. All right. Thank you, ma'am.

2 MR. MACCOLL: No further questions, Your Honor.

3 THE COURT: Cross.

4 MR. SCOTT: Thank you, Your Honor.

5 CROSS-EXAMINATION

6 BY MR. SCOTT:

7 Q. Good afternoon.

8 A. Good afternoon.

9 Q. So, Ms. Millette, I'm assuming that you're familiar with
10 the nature of your son's prior convictions in state and federal
11 court?

12 A. Absolutely.

13 Q. That you're familiar that he was -- both of these crimes
14 involved the possession of child pornography?

15 A. Absolutely.

16 Q. And your granddaughter, Mr. -- your son's daughter,
17 Mr. Millette's daughter, is currently 15 years old?

18 A. Mm-hmm. She'll be 16 in December.

19 Q. Okay. When did she -- how long has she been doing these
20 overnight visits since Mr. Millette was permitted to reside in
21 your house?

22 A. Well, all three of the children have been doing overnight
23 with us. So I would say probably a year at least.

24 Q. Okay. And how often are we talking about?

25 A. Once a week.

Millette - Scott/Cross-Examination

1 Q. Okay. And this wasn't the first time that Mr. Millette's
2 15-year-old daughter spent the night in his room, was it?

3 A. Basically, yes. Because normally she would sleep on the
4 couch because his other children were there, and they would
5 sleep in that room. So it wasn't -- I mean, the room is small.
6 And there's no other bed in there. What it was was a cot.

7 Q. Okay.

8 A. That's what it was, was a cot.

9 Q. Just -- just to be clear, is it your testimony that the
10 15-year-old daughter never slept in the bedroom prior to this
11 last --

12 A. No. The other children did.

13 Q. But I'm asking about the 15 year old.

14 A. Yeah. No. No, she didn't. No, because there wasn't
15 enough room for her to sleep in there.

16 Q. So this was the only time, that you're aware of, that she
17 slept in that room?

18 A. Right.

19 Q. You never made any comments to Ms. -- Officer Phillips
20 suggesting that this had happened on other occasions, that she
21 slept in that room?

22 A. No, I didn't tell her that.

23 Q. Were -- were the other children, the children who are not
24 minors, present in your house on this last occasion in August?

25 A. Yes. They were there for supper.

Millette - Scott/Cross-Examination

1 Q. Okay.

2 A. Corbin and his brother Devin and their girlfriends.

3 Q. But they didn't sleep overnight --

4 A. No.

5 Q. -- did they?

6 A. No.

7 Q. Do you think it's appropriate for the 15-year-old child to
8 sleep in the same bedroom as Mr. Millette, as your son?

9 A. I can't answer that question, to be honest with you. I
10 mean, it was -- it wasn't intentional. So because it wasn't
11 intentional, I guess I have to accept it. But if it was
12 intentional, it probably would be different.

13 Q. Okay. You mentioned that they were watching -- I think in
14 your direct testimony you mentioned that they were watching
15 movies?

16 A. Yes.

17 Q. And were they watching movies in the bedroom alone?

18 A. With the door open.

19 Q. Okay. Okay. So at some point, you went to bed while they
20 were watching movies --

21 A. Yes.

22 Q. -- in that bedroom?

23 A. Yes. No, not in that bedroom. In my bedroom.

24 Q. Correct. You went to your bedroom?

25 A. Yes.

Millette - Scott/Cross-Examination

1 Q. All right. And when you went to bed, you left them alone,
2 essentially, in that bedroom watching movies?

3 A. Well, no. My husband was awake. He was in the living
4 room.

5 Q. Okay. Your husband is not an approved chaperone; is that
6 correct?

7 A. Well, no, but he's her grandfather. So I -- I don't know.

8 Q. Okay.

9 A. He's not, no.

10 Q. But you understand that he's not permitted to be the
11 chaperone, that it's you that's the authorized chaperone?

12 A. Okay.

13 Q. Is that correct? Do you understand that?

14 A. Yep.

15 Q. Now, on other occasions -- not talking about spending the
16 night, but was Mr. Millette's daughter permitted to be alone
17 with him in his bedroom?

18 A. No.

19 Q. So it's your testimony that this is the only time that
20 anything like it ever occurred?

21 A. Yes, yes.

22 Q. But you would leave the house to go out to the swimming
23 pool and leave them in the house?

24 A. The swimming pool is 10 feet away from the house. There's
25 a window right up near the swimming pool. I wasn't in the

1 swimming pool. I was sitting on the deck. I had been in prior
2 just to clean the pool with a brush. I was on the deck just
3 trying to get the water off of me so I could return into the
4 house.

5 Q. All right.

6 A. But it's, like, 10 feet away, and there is a window. His
7 window is right there where the pool is.

8 Q. Okay.

9 A. It's not 20 or 30, it's 10 feet.

10 Q. All right. Now when you go outside to the pool, at all
11 times are you able to see your son and -- and --

12 A. Yes.

13 Q. So no matter what you're doing, you're able to see inside
14 the house --

15 A. Exactly.

16 Q. -- what's going on?

17 A. Exactly. It's a ranch, so it's down low. It's not up
18 high. So you can see through the windows.

19 Q. And how would you prevent anything inappropriate from
20 occurring if you were not in the same room with Mr. Millette
21 and his 15-year-old daughter?

22 A. I don't understand how -- if I -- I would see him through
23 the window. And if anything occurred, I would go in and call
24 the police.

25 Q. Okay. And what about when they are sleeping in the same

Millette - Scott/Cross-Examination

1 bedroom together, how would you --

2 A. Well, I think she could say -- she would -- could yell,
3 and I would -- my room is not that far away from there. It's a
4 small ranch, so... You got one room here, and you got one room
5 here. So it's very close in between. I would be able to hear
6 anything that occurred. I'm a light sleeper.

7 Q. Do you recall saying anything -- saying anything to
8 Officer Phillips regarding your 15-year-old granddaughter
9 knowing right from wrong?

10 A. Yes, I did say that. She does know right from wrong.
11 Most kids do.

12 Q. Can you explain what you meant by that?

13 A. I meant that if she was ever attacked by anyone, including
14 her father, she knows what's right and wrong, and she can
15 refuse, and she can yell out, like anybody else would. If
16 somebody was going to rape me, I'd be screaming. So that's
17 what I meant, that she has the ability at her age. If she was
18 younger, I could -- you know, I would think different. But at
19 her age, she has the ability to scream, as anybody would do if
20 somebody was attacking them.

21 Q. Okay. And because of that, do you believe that it's okay
22 to leave her alone with your son?

23 A. No. And I never have. And Kate knows I've been honest
24 with her through this whole thing.

25 MR. SCOTT: I have no further questions.

-Millette - -Examination by the Court-

1 THE COURT: Anything else?

2 MR. MACCOLL: No further questions for Ms. Millette.

3 I'm going to briefly call Corbin Millette to the stand, please.

4 THE COURT: Just a moment, counsel. For the record, I
5 want to inquire whether the testimony of these witnesses --
6 it's understood that the testimony will be relevant for both
7 prongs of today's --

8 MR. MACCOLL: That's how I've been operating, Your
9 Honor.

10 MR. SCOTT: I think for efficiency sake, I think
11 that's fine with the Government as well.

12 THE COURT: All right. Then I have a couple questions
13 for you --

14 THE WITNESS: Okay, Your Honor.

15 THE COURT: -- Ms. Millette.

16 THE WITNESS: Okay. Sure.

17 MR. MACCOLL: I apologize for not clarifying that --

18 THE COURT: That's all right.

19 MR. MACCOLL: -- but it's late in the day.

20 THE COURT: From all it appears from the charging
21 document here and the recitation of the probation officer's
22 conversation with you, you have been honest.

23 THE WITNESS: Yes, I have.

24 THE COURT: Your son, himself, has not been entirely
25 honest, but you have been honest in acknowledging that -- that

Millette - -Examination by the Court-

1 you were not present in the same room when your son and his
2 minor daughter were sleeping or were in that -- in his
3 bedroom --

4 THE WITNESS: Right.

5 THE COURT: -- alone.

6 THE WITNESS: Mm-hmm.

7 THE COURT: On the other hand, it is -- it's also
8 apparent -- it seems apparent to me that from the testimony of
9 the probation officer that -- you heard her testify that you
10 had indicated that you thought that the probation office was
11 overreaching or was being too technical in -- in taking the
12 position that it was not appropriate for you or it was not --
13 it was not the kind of supervision that the order -- that the
14 release condition contemplates for you to be outside in the
15 pool area, whether in the pool or in the area of the pool,
16 while your son and his daughter, minor daughter, were alone in
17 the house.

18 THE WITNESS: Had I known, I would have never done
19 that. I was never told that she had to be specifically right
20 with me at all times.

21 THE COURT: If I -- if I were to say to you that it
22 seems to me the only reasonable interpretation of this
23 provision is that the approved chaperone must be present and
24 able to visually observe the minor child any time that she is
25 in the same place where the defendant is --

Millette - -Examination by the Court-

1 THE WITNESS: Mm-hmm.

2 THE COURT: -- do you understand --

3 THE WITNESS: Oh, I understand; but we were never told
4 that. If I had been told that, I definitely would have
5 complied. But I was never told that, even through my courses
6 and stuff. It didn't say specifically that I had to be right
7 in the same room with her.

8 THE COURT: All right.

9 THE WITNESS: So...

10 THE COURT: But hearing what I just said, do you have
11 any problem with abiding by --

12 THE WITNESS: Oh, no. I'm not going to have her up to
13 the house anymore. No. I strictly am not -- if I want to go
14 visit, I'll go visit her myself and take her for lunch or
15 something, but I will not have her up to the house.

16 THE COURT: Well, how, then, does she have any contact
17 with her father?

18 THE WITNESS: That's up to you guys to decide how she
19 can. I just don't want to put myself or anyone else in this
20 position again. So if -- if you say that he can have contact
21 with her, but I won't have her overnight. I won't.

22 THE COURT: Well, here -- here's -- here's a
23 complication. The probation office has withdrawn its approval
24 of you as an approved --

25 THE WITNESS: That's okay.

Millette - -Examination by the Court-

1 THE COURT: -- chaperone.

2 THE WITNESS: Oh, then I can't have her up there.

3 THE COURT: Well, we can talk about that. But -- but
4 as a factual matter, that's where things now --

5 THE WITNESS: Okay. Okay.

6 THE COURT: -- stand.

7 THE WITNESS: I'll abide by that.

8 THE COURT: Should the probation office accede to the
9 appropriateness of reinstating you as --

10 THE WITNESS: Mm-hmm.

11 THE COURT: -- an approved chaperone --

12 THE WITNESS: Mm-hmm.

13 THE COURT: -- is there any question, in your mind,
14 about the absolute importance of your having your minor
15 granddaughter in your sight at all times that she is in the
16 presence of --

17 THE WITNESS: I can do that.

18 THE COURT: -- your son, the defendant?

19 THE WITNESS: I fully understand that, and I would
20 abide by it.

21 THE COURT: Thank you.

22 Counsel, anything else? Any follow-up here on this
23 witness?

24 MR. MACCOLL: Not for me, Your Honor. Thank you.

25 MR. SCOTT: No, Your Honor.

Millette - -Examination by the Court-

1 THE COURT: All right. Next witness.

2 MR. MACCOLL: Yes, Your Honor.

3 THE COURT: Thank you, Ms. Millette.

4 THE WITNESS: You're welcome.

5 * * * * *

6 (Time noted: 4:54)

7 * * * * *

8 **C E R T I F I C A T I O N**

9 I, Michelle R. Feliccitti, Registered Professional
10 Reporter and Official Court Reporter for the United States
11 District Court, District of Maine, certify that the foregoing
12 is a correct transcript from the record of proceedings in the
13 above-entitled matter.

14 Dated: September 21, 2023

15 /s/ Michelle R. Feliccitti

16 Official Court Reporter

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18 U.S. Code § 3553 - Imposition of a sentence

U.S. Code Notes

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.^[1]

(6) the need to avoid unwarranted sentence disparities among defendants

with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—

(1) IN GENERAL.—

Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) CHILD CRIMES AND SEXUAL OFFENSES.—

(A) ^[2] Sentencing.—In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking

account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal

Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,^[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE.—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

- (1)** permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;
- (2)** afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and
- (3)** include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) LIMITED AUTHORITY TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM.—

Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) LIMITATION ON APPLICABILITY OF STATUTORY MINIMUMS IN CERTAIN CASES.—

Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846), section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), or section 70503 or 70506 of title 46, the court shall impose a

sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have—

- (A)** more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
- (B)** a prior 3-point offense, as determined under the sentencing guidelines; and
- (C)** a prior 2-point violent offense, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.

(g) DEFINITION OF VIOLENT OFFENSE.—

As used in this section, the term “violent offense” means a crime of violence, as defined in section 16, that is punishable by imprisonment.

(Added Pub. L. 98-473, title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1989; amended Pub. L. 99-570, title I, § 1007(a), Oct. 27, 1986, 100 Stat. 3207-7; Pub. L. 99-646, §§ 8(a), 9(a), 80(a), 81(a), Nov. 10, 1986, 100 Stat. 3593, 3619; Pub. L. 100-182, §§ 3, 16(a), 17, Dec. 7, 1987, 101 Stat. 1266, 1269, 1270; Pub. L. 100-690, title VII, § 7102, Nov. 18, 1988, 102 Stat. 4416; Pub. L. 103-322, title VIII, § 80001(a), title XXVIII, § 280001, Sept. 13, 1994, 108 Stat. 1985, 2095; Pub. L. 104-294, title VI, §§ 601(b)(5), (6), (h), Oct. 11, 1996, 110 Stat. 3499, 3500; Pub. L. 107-273, div. B, title IV, § 4002(a)(8), Nov. 2, 2002, 116 Stat. 1807; Pub. L. 108-21, title IV, § 401(a), (c), (j)(5), Apr. 30, 2003, 117 Stat. 667, 669, 673; Pub. L. 111-174, § 4, May 27, 2010, 124 Stat. 1216; Pub. L. 115-391, title IV, § 402(a), Dec. 21, 2018, 132 Stat. 5221.)

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18 U.S. Code § 3558 - Implementation of a sentence

[U.S. Code](#) [Notes](#)

The implementation of a sentence imposed pursuant to section 3551 is governed by the provisions of chapter 229.

(Added Pub. L. 98-473, title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1991.)