

No. _____

In the
Supreme Court of the United States

Barry Ray Knight,

Petitioner,

v.

United States of America,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Appendix

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Appendix A

United States v. Knight, No. 23-962, 2024 WL 4972561 (9th Cir. Dec. 4, 2024)
Memorandum Disposition Affirming Conviction, Affirming Sentencing in Part,
Vacating Sentence in Part, and Remanding.....APP01

Appendix B

United States v. Knight, 122 F.4th 845 (9th Cir. 2024)
Published Opinion Affirming Conviction, Affirming Sentence in Part, Vacating
Sentence in Part, and Remanding.....APP05

Appendix C

United States v. Knight, No. 23-962, Dkt. 45 (9th Cir. Feb. 13, 2025)
Order Denying Petition for Rehearing

APP11

Appendix D

United States v. Knight, No. 2:21-CR-00127-CDS-BNW-1, 2022 WL 16636959
(D. Nev. Nov. 2, 2022)
District Court Order Denying Motion to Dismiss

APP13

Appendix E

United States v. Knight, 2:21-CR-00127-CDS-BNW-1, Dkt. 98 (D. Nev. May 17,
2023)
Judgment of Conviction

APP17

APPENDIX A

United States v. Knight

No. 23-962, 2024 WL 4972561 (9th Cir. Dec. 4, 2024)
Ninth Circuit Memorandum Disposition Affirming
Conviction, Affirming Sentencing in Part, Vacating
Sentence in Part, and Remanding

2024 WL 4972561

Only the Westlaw citation is currently available.
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.

Barry Ray KNIGHT, Defendant-Appellant.

No. 23-962

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Argued and Submitted June 6, 2024 Pasadena, California

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FILED DECEMBER 4, 2024

Appeal from the United States District Court for the District of Nevada, Cristina D. Silva, District Judge, Presiding, D.C. No. 2:21-cr-00127-CDS-BNW-1

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Lauren Torre, Ellesse Henderson, Assistant Federal Public Defenders, Federal Public Defender for the District of Nevada, Las Vegas, NV, for Defendant-Appellant.

Before: CLIFTON and COLLINS, Circuit Judges, and RODRIGUEZ,* District Judge.

MEMORANDUM **

***1** As explained in our concurrently filed opinion, we affirm Knight's conviction for receipt and possession of child pornography in violation of, respectively, 18 U.S.C. § 2252A(a)(2) and § 2252A(a)(5)(B), and we affirm his sentence except to the extent that the district court failed to orally pronounce the standard conditions of supervised release that were included in the written judgment. We address in this memorandum disposition the points raised by Knight on appeal that are not discussed in our published opinion.

1. Knight challenges the district court's denial of his motion to dismiss, for alleged vindictive prosecution, an additional charge (for receipt of child pornography) that was added in a superseding indictment. Reviewing the district court's legal conclusions *de novo* and its findings of fact for clear error, *United States v. Brown*, 875 F.3d 1235, 1240 (9th Cir. 2017), we affirm.

As the district court found, the prosecutor emailed Knight's counsel in May 2022, stating that, as the prosecutor had advised Knight's prior counsel, the Government was considering seeking a superseding indictment adding a charge for receipt or distribution of child pornography, which would carry a 15-year minimum sentence (as opposed to the 10-year minimum sentence applicable to the then-pending possession charge). Because the Government "wanted to provide [Knight] with an opportunity to negotiate the case before that decision was made," the prosecutor reiterated in the May 2022 email that, as the prosecutor had stated to Knight's prior counsel "at the outset of negotiations," "any pretrial motions (including discovery related) will be understood as a rejection of possible negotiation of the pending charges." Thereafter, in June 2022, the parties exchanged emails about defense proposals for resolving the case, but the Government rejected the proposals. In September 2022, the prosecutor sent a letter to Knight's counsel stating that, if Knight wished to plead guilty to the then-pending possession charge "without a plea agreement" but with the benefit of acceptance of responsibility under the Sentencing Guidelines, defense counsel should inform the prosecutor before the pretrial motion deadline of October 3, 2024. If Knight did not do so and instead filed a pretrial motion, the Government would proceed with obtaining a superseding indictment adding a receipt charge and the Government would begin preparing for trial. When Knight filed a pretrial motion to compel discovery, the Government obtained a superseding indictment adding a receipt charge.

The district court properly held that there was no vindictive prosecution here. A prosecutor does not engage in vindictive prosecution in violation of the Due Process Clause by "openly present[ing] the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution." *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978). The fact that the Government's presentation of the two choices in its September 2022 letter did not take the form of a formal written plea agreement does not distinguish this case from *Bordenkircher*. Likewise, the holding of *Bordenkircher* remains applicable here even

though the prosecutor's letter stated that the Government would consider the filing of a pretrial motion before the applicable deadline as an indication that Knight was not interested in pleading guilty to the then-current indictment and that he would instead prefer to proceed to trial. *See United States v. Kent*, 649 F.3d 906, 914 (9th Cir. 2011) (holding that prosecutors may “condition[] … plea agreements on acceptance of terms apart from pleading guilty” and “may make good on threats to enhance charges if these conditions are not accepted”).

***2** 2. Knight challenges the district court's denial of his motion to extend the pretrial motions deadline. Knight sought the continuance so that he could refile his motion to compel (after his first motion was denied without prejudice) and file a related motion to suppress. We review the denial of a continuance only for “a clear abuse of discretion.” *United States v. Mitchell*, 744 F.2d 701, 704 (9th Cir. 1984). We consider “(1) the extent of the defendant's diligence in readying the defense; (2) the likelihood that the continuance would have satisfied the defendant's need; (3) the inconvenience to the court, opposing party, and witnesses; and (4) the extent to which the defendant may have been harmed” by the denial of a continuance. *United States v. Tham*, 960 F.2d 1391, 1396 (9th Cir. 1991). The fourth factor is the most important, because “the defendant must show that the denial resulted in actual prejudice to his defense.” *Mitchell*, 744 F.2d at 704.

Here, Knight failed to show prejudice. Knight sought a continuance so that he could obtain discovery in support of a motion to suppress on the ground that the investigators' use of Torrential Downpour violated the Fourth Amendment. But Knight failed to provide any plausible factual or legal basis to support the view that the files that he made available to members of the public for sharing on a peer-to-peer network were protected by a reasonable expectation of privacy. *United States v. Borowy*, 595 F.3d 1045, 1047–48 (9th Cir. 2010); *United States v. Ganoe*, 538 F.3d 1117, 1127 (9th Cir. 2008). Moreover, the district court did not abuse its discretion in concluding that Knight had not been diligent in pursuing discovery about Torrential Downpour. Knight knew about that program from the beginning of his case and yet did not file his motion to compel until over a year after the initial indictment. There was no prejudicial abuse of discretion in denying the requested continuance of the pretrial motions deadline.

3. Knight argues that the district court erred in enhancing his sentence for having engaged in the knowing distribution of child pornography. U.S.S.G. § 2G2.2(b)(3)(F). But the district court did not abuse its discretion in determining that the Government had proved, by a preponderance of the evidence, that Knight had knowingly “post[ed] material involving the sexual exploitation of a minor on a website for public viewing.” *Id.* § 2G2.2, app. note 1; *United States v. Vallejos*, 742 F.3d 902, 909 (9th Cir. 2014). The evidence amply supported a conclusion that Knight was aware that his use of peer-to-peer file-sharing would result in others obtaining child pornography from him. The programs that he used informed users that files users downloaded would be publicly shared with other users automatically. The district court also heard evidence that Knight had used file-sharing programs for a “decade,” which supported a strong inference that he understood their basic operations.

4. We review for abuse of discretion the district court's imposition of two additional special conditions of supervised release. *United States v. Napulou*, 593 F.3d 1041, 1044 (9th Cir. 2010).

Knight contends that the condition requiring him to “submit to periodic polygraph testing” violates his Fifth Amendment right against self-incrimination. But Knight “will retain” his Fifth Amendment rights “during his polygraph exams,” and “the condition does not require [him] to answer incriminating questions.” *United States v. Stoterau*, 524 F.3d 988, 1003–04 (9th Cir. 2008) (citation omitted). Knight also argues more generally that polygraph testing is unreliable, but he has not established that the district court abused its discretion in concluding that it would be helpful in supervising Knight.

Knight also challenges two special conditions that permit the government to monitor activities on his computers and to conduct “periodic, unannounced searches” of those computers. Knight argues that these conditions are overbroad because they fail to specify precisely how intrusive the monitoring and searches will be. *See United States v. Sales*, 476 F.3d 732, 737–38 (9th Cir. 2007). But Knight did not object to these conditions below, and they survive plain-error review. Construing these conditions in the context of the full package of supervised release conditions, we think it is sufficiently clear that the monitoring and search authority authorized by the challenged conditions is limited to ensuring that Knight's devices do not contain “prohibited data” (such as the pornographic depictions referenced in another supervised release condition). We affirmed a similar monitoring and

search condition in *United States v. Goddard*, 537 F.3d 1087, 1090 & n.3 (9th Cir. 2008), and we cannot say that the district court committed plain error here.

***3** For these reasons, and those stated in our concurrently filed opinion, we affirm Knight's conviction and sentence, but we vacate the standard conditions of supervised release in his written sentence and remand for the limited purposes set forth in our opinion.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

All Citations

Not Reported in Fed. Rptr., 2024 WL 4972561

Footnotes

- * The Honorable Xavier Rodriguez, United States District Judge for the Western District of Texas, sitting by designation.
- ** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

APPENDIX B

United States v. Knight

122 F.4th 845, 847 (9th Cir. 2024)

Ninth Circuit Opinion Affirming Conviction,
Affirming Sentence in Part, Vacating
Sentence in Part, and Remanding

122 F.4th 845

United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.

Barry Ray KNIGHT, Defendant-Appellant.

No. 23-962

|

Argued and Submitted June 6, 2024 Pasadena, California

|

Filed December 4, 2024

Synopsis

Background: Defendant was convicted after bench trial in the United States District Court for the District of Nevada, Cristina D. Silva, J., of receipt and possession of child pornography, and sentenced to 192 months imprisonment, to be followed by lifetime of supervised release. Defendant appealed.

Holdings: The Court of Appeals, Collins, Circuit Judge, held that:

[1] special condition of supervised release limiting defendant's viewing of child pornography as well as certain adult pornography was not overbroad, and

[2] district court's error in failing to orally recite conditions of supervised release that were referred to as "standard conditions" in written sentence warranted vacating such conditions and remand.

Affirmed in part, vacated in part, and remanded.

Procedural Posture(s): Appellate Review.

West Headnotes (6)

[1] **Criminal Law** Probation and related dispositions

Plain error standard of review applied to defendant's challenge on appeal of special condition of supervised release, where defendant

did not object to the special condition in trial court.

[2] **Criminal Law** Necessity of Objections in General

Plain error is (1) error, (2) that is plain, (3) that affects substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings.

[3] **Sentencing and Punishment** Discretion of court

A district court has broad discretion to impose special conditions on supervised release.

[4] **Sentencing and Punishment** Validity or reasonableness of conditions in general

After considering the pertinent statutory sentencing factors, including the nature of the offense and the defendant's background, a district court may impose any special condition on supervised release that (1) is reasonably related to the goals of deterrence, protection of the public, and/or defendant rehabilitation; (2) involves no greater deprivation of liberty than is reasonably necessary to achieve those goals; and (3) is consistent with any pertinent policy statements issued by the Sentencing Commission. 18 U.S.C.A. §§ 3553(a) 3583(c).

[5] **Constitutional Law** Sentencing and punishment in general

Sentencing and Punishment Validity

Special condition of supervised release for defendant's offenses of receipt and possession of child pornography limiting defendant's viewing of child pornography as well as certain adult pornography was not unduly restrictive and, thus, was not overbroad; condition only applied to visual depictions of actual or simulated child pornography or actual adult pornography, including any photograph, film, video, or image of such conduct, and did not apply to materials

that merely described child pornography, such as defendant's own presentence report, copies of statutes or cases defendant might need to bring a collateral challenge, or any journal or autobiography he wrote as part of sex offender treatment. 18 U.S.C.A. §§ 2252A(a)(2), 2252A(a)(5)(B).

[6] **Criminal Law**  Sentence

Sentencing and Punishment  Announcement of and advice as to conditions

District court's error in failing to orally recite the conditions of supervised release that were referred to as "standard conditions" in written sentence, at sentencing for receipt and possession of child pornography, warranted vacating such conditions on appeal, and remanding to district court for limited purpose of reconsidering the vacated supervised release conditions. 18 U.S.C.A. §§ 2252A(a)(2), 2252A(a)(5)(B).

***846** Appeal from the United States District Court for the District of Nevada, Cristina D. Silva, District Judge, Presiding, D.C. No. 2:21-cr-00127-CDS-BNW-1

Attorneys and Law Firms

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Before: Richard R. Clifton and Daniel P. Collins, Circuit Judges, and Xavier Rodriguez, * District Judge.

OPINION

COLLINS, Circuit Judge:

***847** Defendant-Appellant Barry Ray Knight appeals from his conviction and sentence for receipt and possession of child pornography. We resolve most of Knight's contentions in a concurrently filed memorandum disposition, and for the reasons stated there we affirm Knight's conviction and several of his challenges to his sentence. In this published opinion, we address only two of Knight's challenges to his conditions of supervised release. Although we conclude that Knight's substantive challenges to his special conditions of supervised release lack merit, we nonetheless remand to the district court to "orally pronounc[e] any of the standard conditions of supervised release that it chooses to impose" after "giving [Knight] a chance to object to them." *United States v. Montoya*, 82 F.4th 640, 656 (9th Cir. 2023) (en banc).

I

Knight frequently downloaded child pornography from other computers using "BitTorrent," a "peer-to-peer" file-sharing network that allows users to download files directly from each other's computers. In January 2021, undercover officers used a peer-to-peer downloading program called "Torrential Downpour" to connect with Knight's computer and to download files that were available for sharing and download from that computer. The downloaded files contained multiple videos that constituted child pornography, including files depicting sexual abuse of an infant and of a pre-pubescent girl. Based on this information, officers obtained and executed a search warrant for Knight's home. Examination of the electronic devices seized from Knight's home revealed a substantial child pornography collection containing more than 3,100 videos and 115,000 still images. After a bench trial, the district court convicted Knight on one count of receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(2) and one count of possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B).

Because Knight had a prior 2003 conviction in the Eastern District of Missouri for possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B), Knight was subject to a 15-year minimum sentence on the receipt charge and a 10-year minimum sentence on the possession charge. See

18 U.S.C. § 2252A(b)(1), (2). The district court sentenced Knight to 192 months (16 years) imprisonment, to be followed by a lifetime of supervised release.

As to the conditions of supervised release, the Probation Office's Presentence Report ("PSR") recommended imposition of the "standard conditions of supervision recommended by the Sentencing Commission," *see U.S.S.G. § 5D1.3(c)* (listing those conditions), the applicable mandatory conditions of supervised release, *see id. § 5D1.3(a)*, and 12 special conditions. The district court asked whether Knight had "any objections to any of the conditions set forth in the PSR," and Knight objected to only one condition, namely, the special condition requiring that he submit to periodic polygraph tests. The district court overruled *848 that objection. In pronouncing sentence, the court recited orally all of the mandatory and special conditions, but not the standard conditions.

Knight timely appealed his conviction and sentence. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

II

On appeal, Knight challenges, *inter alia*, the following special condition of supervised release:

No Pornography — You must not view or possess any "visual depiction" (as defined in 18 U.S.C. § 2256(5)), or any photograph, film, video, picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, of "sexually explicit conduct" (as defined by 18 U.S.C. § 2256(2)) involving children, or "actual sexually explicit conduct" (as defined by 18 U.S.C. § 2257(h)(1)) involving adults. These restrictions do not apply to materials necessary to, and used for, any future appeals, or materials prepared or used for the purposes of sex-offender treatment.

[1] [2] Specifically, Knight contends that, under our decision in *United States v. Cope*, 527 F.3d 944 (9th Cir. 2008), this condition is impermissibly overbroad to the extent that it does not exempt use of such materials for purposes of asserting a future "collateral challenge" to his conviction and sentence. Because Knight did not object to this special condition below, our review is only for plain error. *United States v. Daniels*, 541 F.3d 915, 927 (9th Cir. 2008). "Plain error is (1) error, (2) that is plain, (3) that affects substantial rights, and (4) [that] ... seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Gadson*, 763 F.3d 1189, 1203 (9th Cir. 2014) (simplified). Here, Knight fails at the first step, because there is no error.

[3] [4] [5] "A district court has broad discretion to impose special conditions on supervised release." *United States v. Bell*, 770 F.3d 1253, 1259 (9th Cir. 2014). After considering the pertinent statutory sentencing factors, including the nature of the offense and the defendant's background, *see* 18 U.S.C. § 3583(c) (referencing these and other factors in § 3553(a)), a district court may impose any special condition that "(1) [is] reasonably related to the goals of deterrence, protection of the public, and/or defendant rehabilitation; (2) involve[s] no greater deprivation of liberty than is reasonably necessary to achieve those goals; and (3) [is] consistent with any pertinent policy statements issued by the Sentencing Commission." *United States v. Napulou*, 593 F.3d 1041, 1044 (9th Cir. 2010). Here, the district court applied these factors and concluded that a special condition was warranted limiting Knight's viewing of child pornography as well as certain adult pornography. Knight has not challenged that underlying determination and argues only that the particular condition fashioned by the district court is overbroad under *Cope*. We reject this contention.

In *Cope*, the district court imposed a special condition of supervised release that prohibited the defendant from possessing "any materials ... depicting and/or describing child pornography." 527 F.3d at 957. We held that this condition was overbroad in two respects. *Id.* at 957–58.

First, the prohibition on possessing material "describing" child pornography "straightforwardly applies to Cope's own presentence report, as well as copies of statutes and cases that Cope might need were he to bring a collateral challenge to an aspect of his sentence once he is released from prison."

*849 *Cope*, 527 F.3d at 957 (emphasis added). We rejected the Government's suggestion that it would be sufficient to amend this condition "to make it clear that [Cope] can

review legal materials in the possession of his lawyer or probation officer.” *Id.* As we explained, because “Cope is indigent and has no statutory or constitutional right to counsel on collateral attack[,] … requiring him to obtain counsel, or even the assistance of his probation officer, in order to formulate a collateral attack is unduly restrictive.” *Id.* at 957–58. Accordingly, we “direct[ed] the district court on remand to amend this condition to clarify that Cope may possess materials necessary to a collateral attack for the purposes of preparing a collateral attack.” *Id.* at 958.

Second, we held that the prohibition on possessing descriptions of child pornography was also overbroad to the extent that it would “apply to journal-writing or the writing of a ‘sexual autobiography’ that may be required elements of Cope’s sex offender treatment.” *Cope*, 527 F.3d at 958 (citation omitted). We therefore “direct[ed] the district court on remand to amend the condition to clarify that Cope may keep journals or participate in the writing of a ‘sexual autobiography,’ if required by his sex offender treatment.” *Id.*

The predicate for both of these overbreadth holdings in *Cope*—namely, that the special condition prohibited possession of materials “describing” child pornography—is absent in this case. Here, the special condition crafted by the district court narrowly applies only to possession of a “‘visual depiction’ (as defined in 18 U.S.C. § 2256(5)), or any photograph, film, video, picture, or computer or computer generated image or picture … of ‘sexually explicit conduct’ (as defined by 18 U.S.C. § 2256(2)) involving children, or ‘actual sexually explicit conduct’ (as defined by 18 U.S.C. § 2257(h)(1)) involving adults.” By its terms, this condition applies only to “visual depiction[s] … of” actual or simulated child pornography or actual adult pornography, including any photograph, film, video, or image “of” such conduct. Because, unlike in *Cope*, this condition only applies to visual depictions of such conduct and not to materials that merely describe child pornography, this condition would not prohibit Knight from possessing his “own presentence report, as well as copies of *statutes* and *cases* that [Knight] might need were he to bring a collateral challenge,” nor would it prohibit Knight from writing a “journal” or an autobiography as part of his sex offender treatment. *Cope*, 527 F.3d at 957–58 (emphasis added). Because the predicate for *Cope*’s finding of overbreadth is absent here, *Cope* is distinguishable and does not apply.

Apart from his reliance on *Cope*, Knight has provided no basis for concluding that the challenged condition is impermissibly overbroad. He has presented no conceivable factual predicate for supposing that, when he completes his lengthy sentence and is released on supervision, he will then need personal access to child pornography or actual adult pornography for purposes of preparing a collateral challenge to his conviction or sentence. The only pornographic materials that could even theoretically be relevant to a collateral challenge would be the materials that formed the basis for his conviction and sentence —*viz.*, the more than 115,000 still images and 3,100 videos that were found during the search of his devices. We are aware of no support for the proposition that criminal defendants convicted of possession of contraband—whether it be drugs, illegal firearms, or child pornography—must generally be allowed, while on supervised release, to have access to the contraband that underlay their convictions. *850 ¹ Indeed, as reflected in the mandatory conditions of supervised release, the defendant remains subject to the requirement that he not commit another state or federal crime, *see* 18 U.S.C. § 3583(d), including a violation of criminal laws prohibiting the possession of contraband. Accordingly, the supervised release condition imposed by the district court here was not unduly restrictive, and we therefore reject Knight’s challenge to it.

III

[6] As both sides correctly note, the district court’s failure to orally recite the standard conditions of supervised release was erroneous under our decision in *Montoya*, 82 F.4th at 655–56. In accordance with *Montoya*, we therefore “vacate only the conditions of supervised release that were referred to as the ‘standard conditions’ in the written sentence but were not orally pronounced,” and we “‘remand to the district court for the limited purpose of’ reconsidering the supervised release conditions we have vacated herein.” *Id.* at 656 (citation omitted). We otherwise affirm Knight’s conviction and sentence.

AFFIRMED IN PART, VACATED IN PART, and REMANDED.

All Citations

122 F.4th 845

Footnotes

- * The Honorable Xavier Rodriguez, United States District Judge for the Western District of Texas, sitting by designation.
- 1 Even assuming *arguendo* that there might be some extraordinary case in which examination of the contraband underlying the conviction (if still in existence) might theoretically be warranted as part of a constitutionally-based legal challenge, any such exceptional situation could be addressed by a motion for modification of the conditions of supervised release that would attempt to make, if possible, a case-specific showing for such an extraordinary request. See 18 U.S.C. § 3583(e)(2); FED. R. CRIM. P. 32.1(c). Such a theoretical possibility would not suffice to make the condition imposed here impermissibly overbroad.

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APPENDIX C

United States v. Knight

No. 23-962, Dkt. 45 (9th Cir. Feb. 13, 2025)

Ninth Circuit Order Denying Petition for
Rehearing

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FEB 13 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BARRY RAY KNIGHT,

Defendant - Appellant.

No. 23-962

D.C. No. 2:21-cr-00127-CDS-BNW-1

District of Nevada, Las Vegas

ORDER

Before: CLIFTON and COLLINS, Circuit Judges, and RODRIGUEZ, ** District Judge.

The panel has voted unanimously to deny the petition for panel rehearing.

Judge Collins has voted to deny the petition for rehearing en banc, and Judge Clifton and Judge Rodriguez so recommend. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. *See* FED. R. APP. P. 40. Accordingly, Appellant's petition for panel rehearing and rehearing en banc (Dkt. No. 44) is **DENIED**.

** The Honorable Xavier Rodriguez, United States District Judge for the Western District of Texas, sitting by designation.

APPENDIX D

United States v. Knight

No. 2:21-CR-00127-CDS-BNW-1, 2022 WL 16636959
(D. Nev. Nov. 2, 2022)
District Court Order Denying Motion
to Dismiss

2022 WL 16636959

Only the Westlaw citation is currently available.
United States District Court, D. Nevada.

UNITED STATES of America, Plaintiff
v.
Barry Ray KNIGHT, Defendant
Case No. 2:21-cr-00127-CDS-BNW-1
|
Signed November 2, 2022

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Benjamin F. Nemec, Andrew Wong, Federal Public Defender, Las Vegas, NV, for Defendant.

Order Denying Defendant's Motion to Dismiss

[ECF No. 56]

Cristina D. Silva, United States District Judge

*1 Defendant Barry Ray Knight moves to dismiss count one of the superseding indictment against him, arguing that the government engaged in vindictive prosecution by “threaten[ing] to file enhanced charges if ... Knight filed a motion to compel, and then executed that threat.” Mot. to Dismiss, ECF No. 56 at 2. The government opposes Knight’s motion and asserts that it “only made good on a[n] expressly noticed repercussion of Knight’s decision to refuse any potential for plea bargaining” and that “there is no punitive motivation” in the government’s decision to seek a superseding indictment. Opp. to Mot., ECF No. 59 at 1–2. I find that Knight has established a presumption of vindictiveness. I also find that the government has rebutted that presumption by demonstrating that it repeatedly warned Knight that it would seek a superseding indictment if the case did not resolve via negotiations and that the filing of any pre-trial motion would be interpreted as a rejection of negotiations. I therefore deny Knight’s motion to dismiss, and this case will now proceed to trial on both counts.

I. Legal standard

“A prosecutor violates due process when he seeks additional charges solely to punish a defendant for exercising a constitutional or statutory right.” *United States v. Gamez-Orduno*, 235 F.3d 453, 462 (9th Cir. 2000) (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)). “To establish a presumption of vindictiveness, [Knight] need not show ‘that the prosecutor acted in bad faith’ or that he ‘maliciously sought’ ” the indictment. *United States v. Jenkins*, 504 F.3d 694, 699 (9th Cir. 2007) (quoting *United States v. Groves*, 571 F.2d 450, 453 (9th Cir. 1978); citing *United States v. Ruesga-Martinez*, 534 F.2d 1367, 1369 (9th Cir. 1976)). Knight must show, rather, that there is a reasonable likelihood of vindictiveness or must produce direct evidence of the prosecutor’s punitive motivation. *Id.* (citing *United States v. Gallegos-Curiel*, 681 F.2d 1164, 1169 (9th Cir. 1982) (“[T]he appearance of vindictiveness results only where, as a practical matter, there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or a punitive animus towards the defendant because he has exercised his specific legal rights.”)). If the defendant establishes a presumption of vindictiveness, then the burden shifts to the government to rebut that presumption with “objective evidence justifying the prosecutor’s action.” *United States v. Brown*, 875 F.3d 1235, 1240 (9th Cir. 2017) (quoting *United States v. Goodwin*, 457 U.S. 368, 376 n.8 (1982)). “The presumption may be found more readily when the same conduct forms the basis for both indictments, but this is not essential to a showing of vindictiveness.” *United States v. Garza-Juarez*, 992 F.2d 896, 907 (9th Cir. 1993) (citing *United States v. Robison*, 644 F.2d 1270, 1272–73 (9th Cir. 1981)).

“Vindictiveness claims are, however, evaluated differently when the additional charges are added during pretrial proceedings, particularly when plea negotiations are ongoing, than when they are added during or after trial.” *Gamez-Orduno*, 235 F.3d at 462 (citations omitted). “Particularly when a vindictiveness claim pertains to pretrial charging decisions, the Supreme Court urges deference to the prosecutor.” *United States v. Brown*, 875 F.3d 1235, 1240 (9th Cir. 2017) (citing *Kent*, 649 F.3d at 913; *Goodwin*, 457 U.S. at 381).

II. Background

*2 On April 9, 2021, the government brought a complaint against Knight, charging him with one count of possession of child pornography under 18 U.S.C. §§ 2252A(a)(5)(B)

and (b)(2). ECF No. 1; ECF No. 56 at 3. Then on May 5, 2021, Knight was indicted by a grand jury under that same charge, and because Knight has a prior qualifying offense, the charge carries with it a ten-year mandatory minimum sentence. ECF No. 15; ECF No. 56 at 3. After the indictment was returned, Knight's prior counsel and current counsel "sought information from the government related to Torrential Downpour," which is a "law enforcement software which scours peer-to-peer information sharing software and flags potentially illegal files." ECF No. 56 at 3–4. Knight and the government also engaged in plea bargaining, and the government made a written plea offer on September 20, 2021, which Knight rejected. *Id.* at 4; ECF No. 56-1 at 2.

In May 2022, the government emailed Knight's counsel and reminded him that it had "advised [Knight's prior counsel] that, although Mr. Knight was initially indicted on possession of child pornography, that [it was] considering returning to the grand jury and presenting charges of distribution or receipt of child pornography." ECF No. 56 at 4; ECF No. 59-1 at 4. This correspondence also indicated that the government had informed Knight's prior counsel, and told Knight's counsel now, "that any pretrial motions (including discovery related) will be understood as a rejection of possible negotiation of the pending charges." ECF No. 59-1 at 4. And the government noted that the potential distribution charge would be based on the same evidence as the initial charge: "the forensic examination of the devices seized during the search warrant" execution. *Id.*

The parties stipulated to continue pretrial motion deadlines so they could attempt to resolve the ongoing discovery requests related to Torrential Downpour. ECF Nos. 41, 44. The government then sent a letter to Knight on September 19, 2022, again informing Knight that it "intend[ed] to re-present the matter to the grand jury for a superseding indictment charging [r]eceipt of [c]hild [p]ornography" if Knight filed a motion to compel. ECF No. 56 at 5. About a week later, Knight filed such a motion, which the government responded to on October 4, 2022. ECF No. 45; ECF No. 49. In its response, the government again "reiterated its plan" to seek a superseding indictment, and the next day, the government did so. ECF No. 49 at 6; ECF No. 50. The additional charge carries a fifteen-year mandatory minimum sentence, thus potentially adding five years to Knight's sentence. ECF No. 56 at 5.

III. Discussion

Knight asserts that he "brings this current motion as a result of the government's impermissible motivation in increasing his sentencing exposure." *Id.* And he takes particular issue with the timing of the government's superseding indictment: "[T]he fact that the government *only* superseded once Mr. Knight filed the [m]otion to [c]ompel indicates that the true motivation was to file a superseding indictment in response to" the motion. Knight's Reply, ECF No. 63 at 6. Knight further contends that "[t]he government cannot [] avoid the consequences of a vindictive prosecution by simply mentioning plea negotiations in the same breath as it discusses pretrial motions." *Id.* at 10. And Knight urges me to rely on two Ninth Circuit cases: *United States v. Hollywood Motor Car Co., Inc.*, 646 F.2d 384 (9th Cir. 1981), and *United States v. De Marco*, 550 F.2d 1224 (9th Cir. 1977). *Id.* at 3–5; ECF No. 63. Knight argues that the government does not address either case in its response, which is true, despite Knight's discussion of both in his motion. See ECF Nos. 56, 59. Instead, the government relies on *United States v. Gamez-Orduno*, 235 F.3d 453, 462 (9th Cir. 2000), and argues that "no presumption of vindictiveness should apply, because the new charges were sought after the breakdown of plea negotiations," which terminated in September 2022—shortly before the government sought a superseding indictment—not October 2021, as Knight argues. ECF No. 59 at 7.

*3 The United States Supreme Court ultimately vacated the Ninth Circuit's decision in *Hollywood Motor Car* on jurisdictional grounds and did not reach the merits of the court's vindictive prosecution analysis. *United States v. Hollywood Motor Car Co., Inc.*, 458 U.S. 263 (1982); see *United States v. Love*, 2011 WL 1326013, at *3 n.1 (S.D. Cal. 2011) (relying on *Hollywood Motor Car* because its "holding rested directly on *United States v. DeMarco*, ... which has never been expressly overruled."). Like the Southern District of California in *Love*, I look to both *Hollywood Motor Car* and *DeMarco* here. *Love*, 2011 WL 1326013, at *3. In *DeMarco*, the Ninth Circuit affirmed the district court's decision to dismiss a superseding indictment that the government sought after the defendant moved to change venue. *DeMarco*, 550 F.2d at 1227–28. The *DeMarco* court relied on *North Carolina v. Pearce*, 395 U.S. 711 (1969), and *Blackledge v. Perry*, 417 U.S. 21 (1974), concluding that the right that Love tried to exercise had "due process overtones" and that the government's decision to seek a superseding indictment after he exercised that right created the "appearance of vindictiveness" that could "chill[] the exercise of such rights by other defendants who must make their choices under similar circumstances in the future." *Id.*

And in *Hollywood Motor Car*, the Ninth Circuit found that the case “f[e]ll[] under this court’s ruling in [DeMarco]” and the prosecutors’ threats to file additional charges—and their follow through on those threats—“establish[ed] a case of vindictive prosecution.” *Hollywood Motor Car*, 646 F.2d at 388. Neither case came down to the timing of the government’s superseding indictments, and both involved a different right than is involved here: venue.

In *Garza-Juarez*, the prosecutor threatened to withdraw a plea offer if the defendant proceeded with filing a motion to dismiss for outrageous government conduct. *Garza-Juarez*, 992 F.2d at 907). Once that motion was filed, the government “followed through on this threat” and sought a superseding indictment. *Id.* The Ninth Circuit found that the defendant “made ‘an initial showing that charges of increased severity were filed because the accused exercised a statutory, procedural, or constitutional right in circumstances that give rise to an appearance of vindictiveness.’ ” *Id.* at 907 (citing *Gallegos-Curiel*, 681 F.2d at 1168). I reach the same conclusion here and find that Knight has established a presumption of vindictiveness because the prosecution did not seek additional charges until after Knight exercised a right and because the additional charge was not based on an intervening circumstance or new information. The government itself admitted repeatedly in its communications to Knight that the threatened charge would be based on the same information as the initial charge was. *See ECF No. 59-1* at 4. The burden thus shifts to the government to rebut the vindictiveness presumption.

The government contends that it did not vindictively prosecute Knight because it warned him repeatedly for months leading up to the superseding indictment that the filing of a pretrial discovery motion would “be understood as a rejection of possible negotiation of the pending charges.” *ECF No. 59-1* at 4. Indeed, it is the government’s communication with Knight’s counsel from May 31, 2022, rebuts the presumption of vindictiveness. As summarized in that email, the government was contemplating adding an additional charge at the time that it initially sought an indictment against Knight, but it wanted to give the defendant an opportunity to resolve the case before doing so. *Id.*

The government’s communication from September 15, 2022, also rebuts the presumption of vindictiveness. *See ECF No.*

59-3 at 2. In this email, the government asked Knight’s counsel one final time “if [his] client was interested in a plea agreement or if he wanted to file a motion to compel/go to trial.” *Id.* This email was sent twelve days before Knight filed his motion to compel on September 27, 2022, and twenty days before the government sought the superseding indictment from the grand jury. ECF Nos. 45, 50, 52. As the *Garza-Juarez* court found, “the timing gives some support to the government’s position” because “the government waited until [the defendant] rejected the plea bargain and then sought the superseding indictment.” *Garza-Juarez*, 992 F.2d at 907–08.

*4 Although Knight had rejected the government’s written plea offer in September 2021, the communications between counsel indicate that the plea-bargaining process continued throughout the year that followed. It was not until September 2022, when the government again offered to negotiate and Knight declined, that plea negotiations concluded. And within twenty days of the end of negotiations, the government followed through on its threat to seek an additional charge.

The Ninth Circuit has recognized that during plea negotiations, “prosecutors may threaten additional charges and carry through on this threat.” *United States v. Noushfar*, 78 F.3d 1442, 1446 (9th Cir. 1996) (citing *United States v. North*, 746 F.2d 627, 632 (9th Cir. 1984), cert. denied, 470 U.S. 1058 (1985)). Although it cuts against the government that it sought the heightened sentence after Knight filed his motion to compel, I heed the Supreme Court’s urging and allow deference to the prosecution, especially in light of the repeated warnings that it would add a charge—should the case not resolve via negotiations—for almost a year before the additional charge was sought before the grand jury. *See Brown*, 875 F.3d at 1240 (citations omitted) (“Particularly when a vindictiveness claim pertains to pretrial charging decisions, the Supreme Court urges deference to the prosecutor.”).

IV. Conclusion

IT IS THEREFORE ORDERED that the defendant’s motion to dismiss [ECF No. 56] is DENIED.

All Citations

Not Reported in Fed. Supp., 2022 WL 16636959

APPENDIX E

United States v. Knight

No. 2:21-CR-00127-CDS-BNW-1, Dkt. 98

(D. Nev. May 17, 2023)

Judgment of Conviction

UNITED STATES DISTRICT COURT

District of Nevada

UNITED STATES OF AMERICA

v.

BARRY RAY KNIGHT

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:21-cr-00127-CDS-BNW-1

USM Number: 29713-044

Benjamin F. Nemec, AFPD

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) _____

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

was found guilty on count(s) 1 and 2 of the Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 2252A(a)(2) and 2252A(b)(1)	Receipt of Child Pornography	4/8/2021	<u>1s</u>
18 U.S.C. § 2252A(a)(5)(B) and 2252A(a)(5)(B) and 2252A(b)(2)	Possession of Child Pornography	4/8/2021	<u>2s</u>

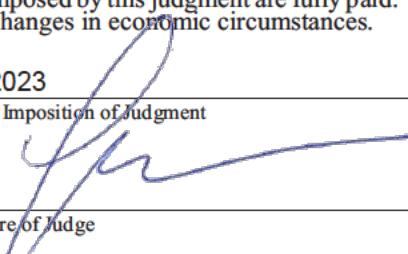
The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

Count(s) all remaining is are dismissed on the motion of the United States.

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

5/8/2023
Date of Imposition of Judgment


Signature of Judge

CRISTINA D. SILVA, UNITED STATES DISTRICT JUDGE
Name and Title of Judge

5/17/2023
Date

DEFENDANT: BARRY RAY KNIGHT
CASE NUMBER: 2:21-cr-00127-CDS-BNW-1

IMPRISONMENT

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

192 months, per count, to run concurrent.

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

The Court recommends the defendant be permitted to serve his term of incarceration at FCI Terminal Island, CA or alternative placed in medical facility that can address the defendant's medical conditions.

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 _____

a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: BARRY RAY KNIGHT

CASE NUMBER: 2:21-cr-00127-CDS-BNW-1

SUPERVISED RELEASEUpon release from imprisonment, you will be on supervised release for a term of: Life**MANDATORY CONDITIONS**

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court not to exceed 104 tests annually.
 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 cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. You must 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 the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. You must participate in an approved program for domestic violence. *(check if applicable)*
7. You must make restitution in accordance with 18 U.S.C. §§ 3663, 3663A, or any other statute authorizing restitution. *(check if applicable)*

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

DEFENDANT: BARRY RAY KNIGHT
CASE NUMBER: 2:21-cr-00127-CDS-BNW-1

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: BARRY RAY KNIGHT
CASE NUMBER: 2:21-cr-00127-CDS-BNW-1

SPECIAL CONDITIONS OF SUPERVISION

1. Substance Abuse Treatment – You must participate in an outpatient substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).
2. Drug Testing – You must submit to substance abuse testing to determine if you have used a prohibited substance. Testing shall not exceed 104 tests per year. You must not attempt to obstruct or tamper with the testing methods.
3. No Alcohol – You must not use or possess alcohol.
4. Mental Health Treatment – You must participate in a mental health treatment program [Outpatient] and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).
5. Minor Prohibition – You must not have direct contact with any child you know or reasonably should know to be under the age of 18, not including your own children, without the permission of the probation officer. If you do have any direct contact with any child you know or reasonably should know to be under the age of 18, not including your own children, without the permission of the probation officer, you must report this contact to the probation officer within 24 hours. Direct contact includes written communication, in person communication, or physical contact. Direct contact does not include incidental contact during ordinary daily activities in public places.
6. Place Restriction – Children Under 18 – You must not go to, or remain at, any place primarily used by children under the age of 18, unless you have the express prior permission of your Probation Officer. Examples of such prohibited places include parks, schools, playgrounds, and childcare facilities.
7. Search and Seizure – You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.
8. No Pornography - You must not view or possess any "visual depiction" (as defined in 18 U.S.C. § 2256(5)), or any photograph, film, video, picture, or computer or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, of "sexually explicit conduct" (as defined by 18 U.S.C. § 2256(2)) involving children, or "actual sexually explicit conduct" (as defined by 18 U.S.C. § 2257(h)(1)) involving adults. These restrictions do not apply to materials necessary to, and used for, any future appeals, or materials prepared or used for the purposes of sex-offender treatment.
9. Sex Offender Treatment – You must participate in a sex offense-specific treatment program, and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).
10. Polygraph Testing – You must submit to periodic polygraph testing at the discretion of the probation officer as a means to ensure that you are in compliance with the requirements of your supervision or treatment program.
11. Computer Monitoring – To enable the Computer Search Condition, you must submit your computers (as defined in 18 U.S.C. § 1030(e)(1)) or other electronic communications or data storage devices or media, to the installation of computer monitoring software by the probation officer.

DEFENDANT: BARRY RAY KNIGHT
CASE NUMBER: 2:21-cr-00127-CDS-BNW-1

SPECIAL CONDITIONS OF SUPERVISION

12. Computer Search – Monitoring Software – To ensure compliance with the computer monitoring condition, you must allow the probation officer to conduct periodic, unannounced searches of any computers (as defined in 18 U.S.C. § 1030 (e)(1)) subject to computer monitoring. These searches shall be conducted for the purposes of determining whether the computer contains any prohibited data prior to installation of the monitoring software; to determine whether the monitoring software is functioning effectively after its installation; and to determine whether there have been attempts to circumvent the monitoring software after its installation. You must warn any other people who use these computers that the computers may be subject to searches pursuant to this condition.

DEFENDANT: BARRY RAY KNIGHT
CASE NUMBER: 2:21-cr-00127-CDS-BNW-1

CRIMINAL MONETARY PENALTIES

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

TOTALS	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
	\$ 200.00	\$ 0.00	\$ 0.00	\$ 62,000.00

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

The defendant must make restitution (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.

Name of Payee	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Sealed Restitution List	\$62,000.00	\$62,000.00	

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:

* 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: BARRY RAY KNIGHT
CASE NUMBER: 2:21-cr-00127-CDS-BNW-1

SCHEDULE OF PAYMENTS

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

A Lump sum payment of \$ 62,200.00 due immediately, balance due

not later than _____, or
 in accordance with C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after the date of this judgment; or

D Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (*e.g., 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

Any unpaid balance shall be paid at a monthly rate of not less than 10% of any income earned during incarceration and/or gross income while on supervision, subject to adjustment by the Court based upon ability to pay.

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:
Final Order of Forfeiture attached.

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) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

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5
6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8 UNITED STATES OF AMERICA,
9 Plaintiff

2:21-CR-00127-CDS-BNW

10 v.

Final Order of Forfeiture

11 BARRY RAY KNIGHT,
12 Defendant

13 The United States District Court for the District of Nevada entered a Preliminary
14 Order of Forfeiture under Fed. R. Crim. P. 32.2(b)(1) and (b)(2) and 18 U.S.C. § 2253(a)(1)
15 and 2253(a)(3), based upon the verdict finding Barry Ray Knight guilty of the criminal
16 offenses, forfeiting specific property set forth in the Forfeiture Allegation of the Superseding
17 Criminal Indictment and shown by the United States to have the requisite nexus to the
18 offenses to which Barry Ray Knight was found guilty. Superseding Criminal Indictment,
19 ECF No. 50; Minutes of Bench Trial, ECF No. 79; Preliminary Order of Forfeiture, ECF
20 No. 84.

21 This Court finds that on the government's motion, the Court may at any time enter
22 an order of forfeiture or amend an existing order of forfeiture to include subsequently
23 located property or substitute property under Fed. R. Crim. P. 32.2(e) and 32.2(b)(2)(C).

24 This Court finds the United States published the notice of forfeiture in accordance
25 with the law via the official government internet forfeiture site, www.forfeiture.gov,
26 consecutively from February 10, 2023, through March 11, 2023, notifying all potential third
27 parties of their right to petition the Court. Notice of Filing Proof of Publication Exhibits,
28 ECF No. 88-1, p. 5.

This Court finds no petition was filed herein by or on behalf of any person or entity and the time for filing such petitions and claims has expired.

This Court finds no petitions are pending regarding the property named herein and the time has expired for presenting such petitions.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that all possessory rights, ownership rights, and all rights, titles, and interests in the property hereinafter described are condemned, forfeited, and vested in the United States of America under Fed. R. Crim. P. 32.2(b)(4)(A) and (b)(4)(B); Fed. R. Crim. P. 32.2(c)(2); 18 U.S.C. § 2253(a)(1) and 2253(a)(3); and 21 U.S.C. § 853(n)(7) and shall be disposed of according to law:

1. one Samsung/Seagate 1 TB SATA hard drive, model number: ST1000LM024, serial number: S2V4J9DCA22532;
2. one SanDisk 64 GB thumb drive with unknown serial number;
3. one SanDisk 32 GB thumb drive, serial number BM1111WZ08;
4. one SanDisk 32 GB thumb drive, serial number BM11020GNB;
5. one Apple IMAC Computer, model number: A1224, serial number: QP83510X2PN; and
6. one Apple IMAC Computer, model number: A1418, serial number: D251T15SDNMI.

(all of which constitutes property).

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the forfeited property shall be disposed of according to law.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Clerk send copies of this Order to all counsel of record.

DATED: April 24, 2023

CRISTINA D. SILVA
UNITED STATES DISTRICT JUDGE