

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARK ANTHONY THOMPSON,
Petitioner

v.

UNITED STATES,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE FIFTH CIRCUIT COURT OF APPEALS,
CASE NO. 15-31083 (consolidated with Case No. 16-31181),
STEWART, JONES, CLEMENT, CIRCUIT JUDGES.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner Mark Anthony Thompson, a first time offender and veteran of the United States Air Force, was convicted after a jury trial of attempting to produce a visual depiction of sexually explicit conduct and attempting to entice a minor to engage in criminal sexual activity. The government failed to disclose an exculpatory statement and relevant mental health diagnoses of its star witness, Rosalie Dornellas, which were not turned over to the defense until after Mark Thompson's conviction. Additionally, in a mid-trial ruling reversing a pre-trial ruling on the same issue, the District Court denied Mr. Thompson's legitimate and justified request to present expert testimony on sexual fantasy, addiction, and grooming. Following trial, the District Court denied Mr. Thompson's Motion for New Trial based on the newly discovered evidence contained in Rosalie Dornellas' mental health report.

In a brief, unpublished per curiam opinion, the Fifth Circuit Court of Appeals affirmed Mr. Thompson's conviction, justifying the violation of several of Mark Thompson's fundamental constitutional rights. The Fifth Circuit Court of Appeals held that, because the existence of the report itself was known to defense counsel, the substance of the statement and mental health diagnoses were not "newly discovered." The Court of Appeals likewise found that the favorable statement and information did not constitute *Brady* information based on the government's presentation of other evidence, all of which depended on the credibility of the witness, and found that the District Court did not abuse its discretion when it denied Mr. Thompson's request to present expert testimony in support of his defense.

The questions presented for review are:

1. Did the Fifth Circuit Court of Appeals err in holding in an unpublished, per curiam opinion that an exculpatory statement contained within a written report whose substance was not disclosed until after trial was not “newly discovered” because defense counsel knew of the existence of the report itself prior to trial?
2. Did the Fifth Circuit Court of Appeals err in holding in an unpublished, per curiam opinion that an exculpatory statement and mental health diagnoses related to its star witness were not material for *Brady* purposes where the conviction was based on other evidence, namely, text messages about which the witness was called to testify extensively?
3. Did the Fifth Circuit Court of Appeals err by entirely denying petitioner the right to call an expert because “sexual addiction” as a diagnoses is not contained in the DSM V?

LIST OF PARTIES

- [] All parties appear in the caption of the case on the cover page.
- [X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:
1. Mark Anthony Thompson
 2. United States Attorney's Office for the Western District of Louisiana
Lafayette, LA
 3. U.S. Department of Justice, Criminal Division, Washington, DC, for
Plaintiff–Appellee.

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**IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI**

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported _____ at _____; or,

☐ has been designated for publication but is not yet reported; or

☒ is unpublished and can be found at *United States v. Thompson*, 2017 WL 4082748 (5th Cir. 2017)

The opinion of the United States district court appears at Appendix to the petition and is

☐ reported _____ at _____; or,

☐ has been designated for publication but is not yet reported; or

☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix to the petition and is

☐ reported _____ at _____; or,

☐ has been designated for publication but is not yet reported; or

☐ is unpublished.

The opinion of the court appears at Appendix to the petition and is

☐ reported _____ at _____; or,

☐ has been designated for publication but is not yet reported; or

☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was September 14, 2017 .

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date:
_____, and a copy of the order denying rehearing appears at Appendix _____ .

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).
The United States Fifth Circuit Court of Appeals decided this case on.
Rehearing was not sought. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____ . A copy of that decision appears at Appendix _____ .

☐ A timely petition for rehearing was thereafter denied on the following date: _____ , and a copy of the order denying rehearing appears at Appendix _____ .

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the U.S. Constitution provides in pertinent part, “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.” U.S. Const. amend. VI.

The Fourteenth Amendment of the U.S. Constitution provides: “No State shall .. deprive deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection fo he laws.” U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

In February 2013, Mark Thompson and Rosalie Dornellas met at a casino near Kinder, Louisiana and began an extramarital affair. At the time, Mark Thompson, a veteran of the United States Air Force, was working at a company which provided offshore contract drilling services and his job involved frequent overseas travel. He had returned to his home in Houston, Texas and was driving to New Orleans to attend his mother's funeral when he stopped at the Coushatta Casino to gamble. Mark met Rosalie at the slot machines. Their conversation quickly turned sexual and they exchanged phone numbers. Mark called Rosalie the next day on his way to the funeral and she texted him a sexually suggestive picture of herself.

Over the next ten months of their affair, Mark and Rosalie saw each other in person on only five occasions. The vast majority of their interactions were conducted through electronic communication, either on the phone, sending text messages and photos or having video conversations via software applications such as Skype and Vyber. Their communications included extremely graphic discussions of a wide variety of non-mainstream and pornographic sexual practices, including sexual discussions about Rosalie Dornellas' 10 year old daughter, R.D.

On the morning of December 10, 2013, Rosalie Dornellas took a 5-minute video on her cell phone of her minor daughter partially awake, nude, but mostly covered by a blanket. The evidence established that Rosalie attempted to email a 90 second excerpt of the video to Mark Thompson, but did not establish whether or not Mark actually received it.

The following day, R.D. unlocked Rosalie's cell phone and discovered videos of Thompson and Dornellas engaged in sexual relations as well as hundreds of explicit sexual texts and Skype chats between them. The girl gave the cell phone to her father, Lloyd Dornellas.

The following day, after looking at the phone's contents, Lloyd Dornellas filed a criminal complaint with the local police. On December 13, 2013, Det. Stanford of the DeRidder Police Department contacted Rosalie Dornellas and asked her to come to the station to be interviewed. Det. Stanford confronted Rosalie Dornellas with the numerous text messages between herself and Mark Thompson and told her that Mark was trying to "groom" her in order to have sex with her daughter R.D.

According to Det. Stanford's police report, Rosalie Dornellas "denied having the intention of letting Thompson have sex with R.D. She advised that it was just his 'fantasy.'"

Following the interview, Rosalie was released without being charged or arrested. In February 2014, Det. Stanford contacted Special Agent Eric Link with Homeland Securities Investigation ("HSI") and turned the investigation over to him.

Three months after Rosalie Dornellas' interview with Det. Stanford, on March 18, 2014, arrest warrants were filed charging Mark Thompson and Rosalie Dornellas, with violations of 18 U.S.C. §2251. Rosalie Dornellas was arrested on March 19, 2014. Mark Thompson was arrested two days later on March 21, 2014 at the Houston International Airport as he was returning from overseas.

On April 9, 2014, a grand jury issued an indictment charging Mark Thompson and Rosalie Dornellas with one count of Attempting to Use a Child to Produce a Visual Depiction in violation of 18 U.S.C. § 2251(a) and an additional count of Attempting to Entice a Minor to Engage in Criminal Sexual Activity in violation of 18 U.S.C. § 2422(b) beginning on or about October 10, 2013 and continuing until on or about December 11, 2013.

Mark Thompson appeared for arraignment on April 11, 2014 and entered a plea of not guilty to the indictment.

Rosalie Dornellas' Cooperation and Plea Agreement

On July 17, 2014, Rosalie Dornellas, debriefed with attorneys for the government and Special Agent Eric Link. On August 21, 2014, in exchange for the government's agreement to dismiss Count 2 and for her cooperation in the prosecution of Mark Thompson, Rosalie Dornellas entered a plea of guilty to Count 1 of the indictment charging her with Attempting to Use a Child to Produce a Visual Depiction in violation of 18 U.S.C. § 2251(a), a charge carrying a mandatory minimum sentence of 15 years, a minimum period of five years supervised release, and mandatory deportation. A presentence report ("PSR") was prepared on Rosalie Dornellas' behalf and submitted to the Court on October 20, 2014. The PSR recommended a guidelines sentence of 210-262 months.

Mark Thompson proceeded to trial.

Defense Expert Testimony about Fantasy, Grooming, and Sexual Addiction

On February 6, 2015, Thompson's defense counsel gave notice of its intent to introduce expert testimony through Dr. Jennifer Weeks, a Ph.D. in psychology specializing in treating addiction, sexual addiction and compulsivity, trauma and general mental health concerns. On March 31, 2015, after reviewing numerous case-related documents, Dr. Weeks issued a 31-page report which explained general theories of sexual offending and addiction, including the concept of "grooming," a process whereby an offender seeks to draw a victim into a sexual relationship, in this case, allegedly through a third party.

Based on interviews with Mark Thompson's family members and investigator interviews with Mark Thompson, Dr. Weeks detailed Mark Thompson's psychosocial history and concluded that, based on his history, he fit a sexual compulsivity model of sexual addiction, whereby addicts use pornography and fantasy as a coping mechanism to deal with untreated trauma. Dr. Weeks opined that Mark Thompson's engagement in sexual fantasy was characterized by an escalation in content that is not automatically indicative of offending behavior.

On April 17, 2015, the government filed a motion in limine to preclude Dr. Weeks' testimony, arguing that any opinion by Dr. Weeks about the defendant's intent was inadmissible pursuant to Federal Rule of Evidence ("FRE") 704(b) and 18 U.S.C. § 17(a) and should further be excluded pursuant to FRE 403 as improper because it would mislead and confuse the jury.

The defense agreed that Dr. Weeks was prohibited by the Code of Evidence from opining on Mark Thompson's intent and the government agreed that Dr. Weeks' proposed testimony as to "general expert opinion on sexual addiction, grooming and other information may be helpful to the jury and argued by both sides using facts from the case." In addition, the government "agreed that the qualifications that Dr. Weeks possesses are qualifications to where she could testify. I think the difference is whether the psychological methods that she is trained on, whether they were employed in this case."

Pretrial Motions and Discovery

On April 20, 2015, in preparation for trial, among other discovery requests, defense counsel sent a letter to the government specifically requesting any "mental health records of co-defendant Rosalie Dornellas." The government responded generally that this item was not discoverable pursuant to Rule 16, as they did not intend to call a mental health expert in their case in chief regarding Rosalie Dornellas' mental health.

On May 18, 2015, the defendant filed a *Motion to Compel Discovery*. In its response, the government confirmed that it had been provided a report of a mental health evaluation of Rosalie Dornellas by her defense attorney, but maintained its objection to its disclosure.

On June 9, 2015, the district court ruled that Dr. Weeks would be permitted to testify generally at trial about grooming and fantasy. On July 16, 2015, the district court filed amended minutes stating its ruling regarding the admissibility of Dr.

Weeks' testimony as follows: "If an adequate foundation is laid, Dr. Weeks will be permitted to testify about grooming and fantasy. Testimony about sexual addiction will be limited. Dr. Weeks will not be permitted to testify about whether or not the defendant possessed intent." In response to the district court's ruling, on July 20, 2015, Dr. Weeks conducted a 2½ hour clinical interview with Mark Thompson confirming her earlier observations and conclusions.

With respect to Rosalie Dornellas' mental health evaluation, the district court stated: "My inclination is that the mental health records of Ms. Dornellas would not be admissible but – unless they contain exculpatory information." The Court agreed to review the report *in camera* for *Brady* information.

Trial

Mark Thompson proceeded to trial from August 24, 2015 through August 28, 2015.

On the first day of trial, defense counsel renewed its request for a ruling on the district court's *in camera* review of Rosalie Dornellas' mental health evaluation for *Brady* information. The district court denied trial counsel's request to compel the production Rosalie Dornellas' mental health reports.

During opening statement, relying on the district court's pre-trial ruling that Dr. Weeks would be permitted to testify about fantasy and grooming, and with a proper foundation, would be permitted to testify about sexual addiction, defense counsel told the jury:

"We're going to call a doctor by the name of Weeks. She's a clinical psychologist who specializes in the treatment of sex addiction. Now I

want to just tell you what an expert is not allowed to do. An expert is not allowed to say ‘in my opinion, the defendant is or is not guilty.’ They can’t call an expert to say there’s somebody that’s guilty. We can’t call an expert to say they’re not guilty. What our expert is called to do is to explain to you the complicated world of addiction, compulsivity and fantasy, and how those things are treated. In a very short nutshell, addiction, there’s many forms of it, gambling, which Mark suffers from, sexual, there’s drugs, alcohol, there’s danger junkies. It’s compulsive behavior in which the desire is to achieve another high and to push the envelope. It is the thrill of the fantasy or it is the thrill of what’s going to happen next that keep you going. She’ll explain that to you. She’ll explain one aspect of sex addiction, which is fantasy, and that people fantasize about things that they would not do.”

On August 27, 2015, during a break in the government’s case, the district court conducted a hearing on the admissibility of defense expert, Dr. Jennifer Weeks’ proposed testimony. Recognizing the central importance of the evidence to the defense, the district judge correctly observed: “this is basically the crux of the defense, and I am loathe to entirely delete this from the trial because it would be an appealable error. And I usually am not queasy about that, but in this case, I am.” However, the district court reversed course and proceeded to rule Dr. Weeks’ testimony entirely inadmissible as to *any* subject, including general discussion of fantasy and grooming. Following the court’s mid-trial ruling, the defense moved for a mistrial and to be withdrawn as counsel for providing ineffective assistance of counsel for having informed the jury that they would be hearing expert testimony related to grooming and fantasy. The district court denied both motions.

Rosalie Dornellas was the government’s star witness at trial. During her testimony, Rosalie Dornellas repeatedly expressed her firm opinion that Mark

Thompson had criminal intent and would have had sex with R.D. if given the opportunity.

When the defense attempted to cross-examine Rosalie Dornellas about the inconsistency between her first interview with Det. Stanford in December 2013 in which she said Mark Thompson's expressed sexual interest in her daughter was part of a "fantasy" that he would not have acted on, and her testimony at trial, Dornellas testified that she lied when she spoke to Det. Stanford in December 2013 because, *at that time*, she was trying to cover for Mark Thompson.

Defense: "...[D]id you tell Detective Stanford that that was not true, [Mark Thompson] did not want to have sex with your daughter and that you would never allow it to happen?"

Rosalie: Yes, I think I say that. I was trying to cover Mark at that time so I said that a lot. And I can't remember a lot of it, what I said to him; but all that time I try to cover Mark not to get in trouble."

When the defense attempted to clarify with Rosalie Dornellas precisely when she stopped "covering for Mark" and began telling the government that Mark Thompson in fact wanted to have sex with R.D., the line of questioning was abruptly cut off by the government and by the district court.

Defense: Are you telling me that you, by telling a different story than what you told Detective Stanford – you did tell a different story than what you told Detective Stanford, right?

Court: When?

Government: That has been established.

Court: Okay.

Rosalie: Yes, I did have lie to the DeRidder Police a lot of question.

Defense: Told them a different story than the first time, right?

Rosalie: The first time yes, I lied to the police.

Court: I think this is abundantly clear.

The government repeatedly bolstered the credibility of Rosalie Dornellas by telling the story of a woman who lied, *the first time*, when she was questioned by the police in December 2013 to protect Mark Thompson, but then immediately told the “truth” that Mark Thompson in fact wanted to have sex with R.D. when she began cooperating with the government.

In closing argument, the government repeated this story, that Rosalie lied when she spoke with the police in December 2013 and said it was fantasy to protect Mark Thompson, but had since started telling the “truth”:

“And when she got to the point about the police officer and DeRidder, Louisiana and she’s listening and she’s listening to what [defense counsel’s] saying and she said over and over again, “I lied because I was protecting him. She said it about five times... over and over when he would ask those questions she would say, “Yes, I was lying to protect him,’ because that’s the best she could do.”

Emphasizing Rosalie Dornellas’ central importance to its case, the government stated emphatically in its closing argument: “Let’s be absolutely clear about this. If Rosalie Dornellas is telling the truth, the defendant’s guilty, period. End of story.” And again: “So if [Rosalie Dornellas] is telling the truth, [Mark Thompson] is guilty, period.”

On August 28, 2015, Mark Thompson was found guilty on Counts 1 and 2.

Rosalie Dornellas' Sentencing Hearing

In support of the government's recommendation that Rosalie Dornellas be granted a 5K1.1 departure, it stated that Rosalie Dornellas "cooperated and was debriefed and interviewed several times by the Department of Homeland Security Investigations and the United States Attorney's Office regarding the offenses within the Indictment and provided *truthful* information corroborated by computer forensics." The government attorneys went on to specifically commend Ms. Dornellas for being "completely truthful *from the very beginning*, which in the experience of undersigned counsel, is rare."

The district court granted the government's motion for a downward departure pursuant to 5K1.1. and sentenced Rosalie Dornellas to 60 months in prison with credit for time served. The sentence meted out by the district court departed significantly far below the 210-262 month guidelines range calculated by Federal Probation and well below the 15 year mandatory minimum set by statute.

Mark Thompson's Sentencing Hearing

On December 2, 2015, the district court overruled each of Mr. Thompson's objections to his Presentence Report and sentenced him as a first offender to serve 360 months on each count to be served concurrently.

Appeal

On July 26, 2016, while the briefing schedule in the Fifth Circuit Court of Appeals was pending, Mark Thompson filed an *Unopposed Motion to Supplement the*

Appellate Record with Rosalie Dornellas' PSR, the transcript of her October 2, 2015 sentencing and the Government's 5K1.1 motion.

Post-Trial Disclosure of the Report

Counsel received a copy of Rosalie Dornellas' PSR via the clerk's office on August 18, 2016, with the July 23, 2014 mental health evaluation conducted by Dr. Margot Hasha, PhD, LCSW attached as an exhibit ("The Report").

The July 23, 2014 report, which had never been disclosed to Mark Thompson's defense counsel prior to trial, contained the memorialization of an unquestionably exculpatory statement by Rosalie Dornellas. The Report reflected that Rosalie Dornellas told Dr. Margot Hasha on June 2, 2014 that "she feared [Mark Thompson] would leave her if she didn't provide the [nude photo of R.D.] but also stated, "*I think it was a fantasy he had. I don't think he would do it,*" here referring to his having sex with [R.D.]" (Emphasis supplied).

Rosalie Dornellas' statement to her psychologist that her discussions with Mark Thompson about having sex with R.D. were fantasy that he would not have acted on was made months after the December 2013 statement to Det. Stanford, months after both she and Mark Thompson had been charged and arrested, without any representative of law enforcement present. Rosalie Dornellas' statement, corroborated the essence of the statement she made to Det. Stanford in December 2013 and Mark Thompson's defense at trial, that the discussions between the two were all fantasy that Mark Thompson would not have acted on. However, the statement was not disclosed to the defense until after undersigned counsel moved for

its inclusion in the appellate record, nearly a year after Mark Thompson had been convicted.

In addition to the exculpatory statement by Rosalie Dornellas, the Report contained Dr. Hasha's observations and diagnoses about Rosalie Dornellas' mental health. Dr. Hasha observed that Rosalie Dornellas:

“exhibited symptoms of major depression, including low self-esteem, self-loathing and shame. At times she appeared to be detached from her experiences and unable to comprehend the severity of the reality of her circumstances, consistent with PTSD. She had difficulty understanding concepts and exhibited a level consistent with the cognitive development of a 6 or 7 year old, meaning that she could only comprehend and explain things in a very concrete way. She is incapable of abstract thinking or of conceptualizing about the future or long-term consequences. She has no real job skills other than as a sex worker, and it is highly likely that without some training she will revert to this type of work upon release from incarceration. Additionally, she requires therapy and a psychiatric evaluation for possible pharmaceutical intervention for depression. Any therapy should take into account her educational level.”

Dr. Hasha concluded that Rosalie Dornellas suffers from major mental illnesses, including Major Depression and PTSD, with symptoms of avoidance, behavioral repetition of abuse through prostitution and other high risk activities, negative trauma-related emotions of shame and fear, detachment and estrangement from others, constricted affect. History of irritable and aggressive behavior, recklessness related to lack of occupational skills, functional impairment at social and occupational levels. Symptoms of depersonalization and possible derealization.”

To be clear, Petitioner submits that the Report contained two distinct categories of favorable *Brady* information which should have been disclosed pretrial:

- (1) Rosalie Dornellas' exculpatory statement to Dr. Hasha that she believed her discussions with Mark Thompson about having sex with her minor

daughter were “a fantasy he had. I don’t think he would do it,” here referring to his having sex with [R.D.]”, and;

- (2) the mental health symptoms and diagnoses observed by Dr. Hasha indicating that Rosalie Dornellas could not comprehend, know and correctly relate the truth.

Motion for New Trial

Following the disclosure of the report, undersigned counsel moved for leave in the Fifth Circuit Court of Appeals to file a *Motion for New Trial* in the district court pursuant to Rule 33 of the Federal Rules of Criminal Procedure, arguing that Thompson was entitled to a new trial based on newly discovered *Brady* evidence. The Fifth Circuit granted Mr. Thompson’s motion and remanded to the district court for the Motion for New Trial.

On November 17, 2016, the district court denied the *Motion for New Trial*.

On December 9, 2016, the Fifth Circuit Court of Appeals consolidated the appeals from Mark Thompson’s original appeal docketed under 15-31083 with his appeal from the Motion for New Trial docketed under 16-31181.

On September 14, 2017, following oral argument, the Fifth Circuit Court of Appeals issued an unpublished, per curiam opinion affirming Mark Thompson’s conviction and sentence.

This Petition follows.

REASONS FOR GRANTING THE PETITION

Petitioner seeks the Court’s intervention because the Fifth Circuit Court of Appeals’ affirmance of Mark Thompson’s conviction and sentence in a brief, unpublished per curiam opinion unreasonably denies fundamental constitutional

rights due to all criminal defendants, but specifically justified in this case wherein a first-time offender was sentenced to 360 months in prison primarily on the testimony of one witness. The Court of Appeals' opinion incorrectly applies the standard for "newly discovered evidence," misconstrues the materiality standard for *Brady* violations, and, by being couched in an unpublished, per curiam opinion, departs from the accepted and usual course of judicial proceedings such as to require this Court's supervisory power.

At trial, in addition to the testimony of Rosalie Dornellas, the government produced numerous text messages between Thompson and the minor's mother, Rosalie Dornellas. Mark Thompson argued that the incriminating-appearing text messages could not be taken literally because the statements were part of sexual fantasies engaged in by Mark Thompson and Rosalie Dornellas. At trial, the Government's star witness, Rosalie Dornellas, who had entered into a plea bargain, testified unequivocally that Mark Thompson's intent, as expressed in those text messages as well as in unrecorded phone conversations, was for her to take a pornographic image of her minor daughter and to facilitate his sexual relations with the girl.

However, unbeknownst to defense counsel, and corroborative of Mark Thompson's defense at trial, Rosalie Dornellas stated for months to the attorneys for the government and to her psychologist following her arrest that the discussions she had with Mark Thompson were "fantasy" that he did not intend to act out on. Following Mark Thompson's conviction, defense counsel was provided for the first

time with a statement Dornellas made to her psychologist in the presence of her attorney, months after she was initially interviewed by local police, reaffirming that her conversations and text messages with Mark Thompson were part of a fantasy that she believed he would not have acted upon.

The Fifth Circuit Court of Appeals affirmed Mark Thompson's conviction finding that the substance of Rosalie Dornellas' statement was not "newly discovered" for purposes of a motion for new trial because the existence of the report in which the statement was contained was known to defense counsel prior to trial and finding that the statement was not "material" for *Brady* purposes. The Court found that the mental health diagnoses were not sufficiently "serious" as to be considered favorable. And, further, the Court sanctioned the denial of justified and legitimate expert testimony in violation of Mr. Thompson's right to present a defense.

I. THE COURT SHOULD GRANT THE WRIT BECAUSE THE FIFTH CIRCUIT COURT OF APPEALS' INTERPRETATION OF WHAT CONTITUTES "NEWLY DISCOVERED EVIDENCE" IN A RULE 33 MOTION FLOUTS THE MEANING OF THE TERM "NEWLY DISCOVERED" TO UNJUSTIFIABLY DENY MR. THOMPSON RELIEF.

Mark Thompson's defense at trial was that his conversations with Rosalie Dornellas about her minor daughter, like many other topics they discussed but did not act out, were part of elaborate sexual fantasies the two engaged in over the course of their 10 month affair. At trial, the defense argued that the child's mother, Rosalie Dornellas, also believed these discussions to be fantasy, but changed her story at trial in exchange for a favorable sentencing recommendation from the government. In response to defense cross-examination about her initial statement to Det. Stanford, corroborating Mark Thompson's defense that it was all fantasy, the government was

able to successfully argue that Rosalie Dornellas told Det. Stanford that it was all fantasy when she was first interviewed because, at that time, she was trying to cover for Mark Thompson.

The discovery by the defense of the June 2, 2014 statement Dornellas made to her psychologist, which was in the government's possession during trial, was a game-changer. The July 23, 2014, Preliminary Report by Dr. Hasha makes clear that months after Rosalie Dornellas and Mark Thompson had both been arrested and charged, in a statement to her psychologist, in the presence of her lawyer, and without law enforcement present, Rosalie Dornellas continued to maintain that her conversations with Mark Thompson about him having sex with her ten year old daughter was fantasy.

The prosecution had an independent obligation, notwithstanding its submission of the report to the district court for an *in camera* inspection, to disclose this favorable information to the defense. The suppression of Rosalie Dornellas' statement to Dr. Hasha was undeniably favorable, exculpatory and material to the question of Mark Thompson's guilt or innocence and its suppression by the district court and by the government violated Mark Thompson's due process rights and entitled him to a new trial.

In response to the the claim that the statement contained in the Report was favorable and should have been disclosed to the defendant, the Fifth Circuit Court of Appeals ruled: "Dr. Hasha's medical report was not newly discovered evidence because Thompson was aware of the report at the time of trial. Indeed, Thompson

filed a motion to compel production of Dornellas's mental health records before trial, and during trial the district court denied the motion."

The Fifth Circuit Court of Appeals reasoning, that because the existence of the Report itself was known to counsel, that the information contained within the Report, of which defense counsel was completely unaware, is not "newly discovered," cannot withstand muster.

Mr. Thompson has always conceded that he was aware of a mental health evaluation of Rosalie Dornellas prior to Mark Thompson's trial. That fact is confirmed by defense counsel's specific pre-trial request for access to any and all mental health records related to Rosalie Dornellas. Mark Thompson was not, however, aware until nearly a year after his trial and conviction, that Rosalie Dornellas told a psychologist in June 2014, in the presence of her lawyer, without law enforcement present, that her conversations with Mark Thompson were fantasy and that she did not believe he wanted to have sex with her daughter. Mr. Thompson was not aware that in June 2014 the psychologist who evaluated Rosalie Dornellas concluded that she suffered from Major Depression and PTSD marked by depersonalization and derealization, possessed the cognitive development of a 6 to 7-year old, and had been recommended for additional psychiatric evaluation and possible pharmaceutical intervention.

The primary purpose of the newly discovered evidence rule is to afford relief when, "despite the fair conduct of the trial, ... facts unknown at the trial" make clear that "substantial justice was not done." *United States v. Jones*, 597 F.2d 485 (5th

Cir.1979). As a general rule, to obtain a new trial based on newly-discovered evidence, a defendant must demonstrate that: (1) the evidence was discovered after trial; (2) the failure to discover the evidence was not due to the defendant's lack of diligence; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) a new trial would probably produce a new result. *United States v. Williams*, 985 F.2d 749, 757 (5th Cir.1993).

When a motion for new trial based on newly-discovered evidence raises a *Brady* claim, the court instead applies a three-prong *Brady* test to determine whether a new trial is appropriate. *See, e.g., Gonzales*, 121 F.3d at 946 (applying the three-prong *Brady* test in assessing a motion for new trial based on an alleged *Brady* violation); *accord United States v. Conley*, 249 F.3d 38, 45 (1st Cir.2001) (noting that the three-part *Brady* test—rather than the five-part test governing motions for new trial—is applicable “where a defendant claims that the newly-discovered evidence should have been produced under *Brady* ”); *United States v. Quintanilla*, 193 F.3d 1139, 1149 n. 10 (10th Cir.1999) (“Evaluation of a *Brady* claim asserted in a motion for a new trial involves an application of the three [*Brady*] elements identified above, and not the five-prong ... test utilized in typical newly discovered evidence claims.”).

It is axiomatic that the term “newly discovered evidence” refers to the content, and not the form, of the newly discovered evidence. It is further axiomatic that newly discovered is viewed from the defendant’s perspective. The Fifth Circuit has frequently defined the phrase “newly discovered” in the context of Rule 33 motions with the phrase “unknown to the defendant at the time of trial.” *United States v.*

Lowder, 148 F.3d 548, 551 (5th Cir.1998) (Defining newly discovered evidence as “*newly discovered and [] unknown to the defendant at the time of trial*”). The salient information contained within the Report was not disclosed, was unknown to Mark Thompson, and was clearly “newly discovered” within the meaning of the law.

Rosalie Dornellas’ testimony at trial was that she lied to the DeRidder Police when she said it was a fantasy, but, in fact, Mark Thompson would have had sex with her ten-year-old. Rosalie Dornellas testified *repeatedly* at trial that Mark Thompson would have had sex with R.D. if given the opportunity.

Rosalie Dornellas’ statement to her psychologist, months after the DeRidder Police Department interview, months after both she and Mark Thompson had been charged and arrested, in the presence of her attorney who presumably told her to tell the psychologist “the truth” and while she and her attorney were attempting to plead guilty in exchange for cooperation at trial, that her discussions with Mark Thompson about having sex with the minor were fantasy is directly exculpatory to Count 2 of the Indictment and significantly undermines Rosalie Dornellas’ credibility, which was of central importance to the prosecution.

Mark Thompson submits that the information contained in Dr. Hasha’s July 23, 2014 Report constitutes newly discovered information and meets both the 3-prong standard for relief governing motions for new trial alleging Brady violations, as well as the more stringent 5-prong standard for relief governing motions for new trial based on newly discovered evidence, generally. The information was discovered after trial, after diligent specific requests were made. The information is favorable. It is

not merely cumulative of other statements that were in the defense's possession. And it is material to guilt, in that it undermines confidence in the result and but for its suppression, there probably would have been a different result.

The Fifth Circuit Court of Appeals' characterization of "newly discovered evidence" as denying relief to a defendant who may be aware that a witness statement exists, but not of the substance of the statement itself, denies the meaning of "newly discovered" in order to deny Mark Thompson relief, in the insulated mechanism of an unpublished, per curiam opinion. This error requires the intervention of this Court.

II. THE COURT SHOULD GRANT THE WRIT BECAUSE THE FIFTH CIRCUIT COURT OF APPEALS MISAPPLIED THE MATERIALITY STANDARD AND UNREASONABLY DENIED *BRADY* RELIEF.

In an unpublished, per curiam opinion, the Fifth Circuit Court of Appeals applied the wrong standard of review, misapplied the materiality standard, and unreasonably denied *Brady* relief to Mark Thompson. The information suppressed by the government and only discovered by the defense after trial, that Rosalie Dornellas told her psychologist and attorney in June 2014 that Mark Thompson's expressed sexual interest in her daughter was not real, but fantasy, cannot be characterized as anything less than casting Rosalie Dornellas' trial testimony in a wholly different light. There can be no doubt that, in light of this new information, there exists a reasonable probability, defined as less than a preponderance of the evidence, that one juror would have shifted their verdict. *Trottie v. Stephens*, 720 F.3d 231, 251 (5th Cir.2013); *Cone v. Bell*, 556 U.S. 449, 452, 470, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009); see *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); *Turner v. United States*, 137 S.Ct. 1885 (2017).

The Fifth Circuit Court of Appeals held that “Thompson has not shown that the district court clearly erred in excluding Dornellas’s mental health report, nor do we have a firm conviction that Dornellas’s statement to Dr. Hasha would have changed the outcome of the trial. In arriving at its guilty verdict, the jury relied on voluminous additional evidence including texts from Thompson, not solely the testimony of Dornellas. *See United States v. Sipe*, 388 F.3d at 478 (“When the testimony of the witness who might have been impeached by the undisclosed evidence is strongly corroborated by additional evidence supporting a guilty verdict, the undisclosed evidence generally is not found to be material.”). Further, for witnesses like Dornellas, “whose mental history is less severe, district courts are permitted greater latitude in excluding records.” *United States v. Jimenez*, 256 F.3d 330, 344 (5th Cir. 2001).

The text messages standing alone, without Rosalie’s testimony to interpret them and fill in the gaps with her characterizations of unrecorded telephone conversations, were insufficient to establish Mark Thompson’s intent. Rosalie Dornellas’ testimony was critical for the government’s case. Rosalie Dornellas’ testimony “interpreting” the intent behind the text messages, filling in the unrecorded conversations between herself and Mark Thompson, and repeating unequivocally that Mark Thompson would have had sex with her daughter was of central, critical, and devastating importance to the government’s case against Mark Thompson.

When assessing materiality, courts look to whether the suppressed evidence impeaches a witness at the “heart of the government's case,” whether the case is close on any element of the crime, and whether the testimony that could be attacked with the suppressed evidence is strongly corroborated. *United States v. Sipe*, 388 F.3d at 490, 492. Where the withheld evidence would seriously undermine the testimony of a key witness on an essential issue or there is no strong corroboration, the withheld evidence has been found to be material. *See McDowell v. Dixon*, 858 F.2d 945 (4th Cir.1988), *cert. denied*, 489 U.S. 1033, 109 S.Ct. 1172, 103 L.Ed.2d 230 (1989) (Victim gave only direct evidence identifying the defendant, a black man, as her assailant, and the prosecution withheld the fact that she had originally stated that the culprit was white); *Lindsey v. King*, 769 F.2d at 1042 (Prosecution withheld original statement by an eyewitness that he did not see an assailant's face and thus could not identify the culprit. At trial, the same eyewitness positively identified the defendant). *United States v. Weintraub*, 871 F.2d 1257, 1262 (5th Cir.1989).

The suppression of the favorable statement contained in Dr. Hasha’s July 23, 2014 report by the government’s star witness was clear error. Mark Thompson raised the issue in a Motion for New Trial and raises the issue again on appeal. “While the standard of review for a motion for a new trial is typically abuse of discretion, if the reason for the motion is an alleged *Brady* violation then [the Court of Appeals] review[s] the district court's determination *de novo*.” *United States v. Miller*, 520 F.3d 504, 514 (5th Cir.2008). Mark Thompson was entitled to this favorable mental health

information relevant the star witness' ability to accurately perceive reality and its suppression was a violation of his rights to due process and a fair trial.

III. THE COURT SHOULD GRANT THE WRIT TO CLARIFY THE DEEFENDANT'S RIGHT TO PRESENT EXPERT EVIDENCE IN HIS SUPPORT OF HIS DEFENSE.

The district court abused its discretion when it entirely excluded Mark Thompson's expert testimony on grooming, fantasy and sexual addiction in violation of his right to present a defense. The Fifth Circuit Court of Appeals unreasonably departed from its precedent in *United States v. Miliet*, which held that a complete defense challenge is meritorious when two factors are present: the excluded evidence is indispensable to the theory of defense; and the district court fails to provide a rational justification for its exclusion. *United States v. Miliet*, 804 F.2d 853, 859 (5th Cir.1986); *United States v. McGinnis*, 201 Fed.Appx. 246, 252 (5th Cir.2006). Both the government and the district court acknowledged that Thompson's "principal theory" was that he fantasized about sex with R.D. but that he did not intend to consummate that fantasy. The district court's wholesale exclusion of Dr. Weeks' testimony because "sexual addiction" as a specific diagnosis is not included in the DSM V and because it had doubts about the validity of one of the instruments she used, was not a rational justification for excluding all testimony related to sexual addiction, fantasy and grooming.

In *United States v. Hite*, the DC Circuit Court of Appeals found that was error for the trial court to exclude a defense expert to testify in support of his "fantasy-only" defense. *United States v. Hite*, 769 F.3d 1154, 1168–70 (D.C. Cir.2014). The defense expert would have testified on (1) on "the difference between a desire actually to

engage in sexual activity with a minor and mere fantasy and role playing,” (2) on his diagnosis that Hite does not suffer from any of the psychiatric conditions that are “associated with a desire to have sexual contact with children or that may predispose an individual to want to engage in sexual activity with a child,” and (3) on the relationship between viewing child pornography and sexual interest in children. The Court found that the district court erred when it excluded the expert’s testimony in its entirety:

The central focus of Hite's defense was that he was a fantasist with no real sexual interest in children. Because the District Court determined that Hite's sexual interest in children was relevant to the question of whether he had the requisite intent with respect to 18 U.S.C. § 2422(b), Hite should have been permitted to introduce the Diagnostic Testimony and the Child Pornography Testimony so that he could seek to demonstrate to the jury that he did not possess such an interest.

The Court found that while Dr. Berlin may not testify that Hite lacked the requisite intent, *see* Fed.R.Evid. 704(b), expert testimony that generally explains the world of sexual fantasy on the Internet is permissible.

Likewise, we find that the General Clinical Testimony should have been admitted, because it can shed light on what may be an unfamiliar topic to most jurors: sexual fantasy involving children, particularly the kind that unfolds in the virtual realm of the Internet. The District Court acknowledged that the concept of Internet-based sexual fantasy may be new to many jurors. *United States v. Hite*, 769 F.3d 1154, 1168–70 (D.C. Cir.2014).

See also United States v. Joseph, 542 F.3d 13, 21 (2d Cir.2008) (urging the district court to “give a more thorough consideration” to the defendant's request to present expert testimony regarding “a distinct culture of the Internet in which one can become a ‘fantasy character’ ”), *abrogated on other grounds by United States v.*

Ferguson, 676 F.3d 260 (2d Cir.2011); *United States v. Curtin*, 588 F.3d 993, 997–98 (9th Cir.2009) (the district court permitted the expert testimony concerning “the role of fantasies in sexual behavior and ... that many people fantasize about things they would never do in actuality”); *United States v. Gladish*, 536 F.3d 646, 650–51 (noting that the district court should have permitted the defendant's expert to testify “that it was unlikely, given the defendant's psychology, that he would act on his intent”); *See United States v. Cohen*, 510 F.3d 1114, 1127 (9th Cir.2007) (improper exclusion of expert testimony not harmless where central to the defense).

In *United States v. Simmons*, the Fifth Circuit Court of Appeals rejected a *Daubert* challenge to the trial court’s admission of a licensed psychologist who specialized in sexual violence and sexual victimization. *United States v. Simmons*, 470 F.3d 1115, 1122–23 (5th Cir.2006). The district court instructed the jury it could credit or discredit expert testimony as it could any other testimony. Dr. Fitzgerald, the psychologist, testified that the “[victim's] behavior following the incident, as well as her in court testimony, were ‘quite consistent’” with that of sexual assault victims. *Id.* at 1123; *See also Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1297 (8th Cir.1997) (recognizing inherent methodological limitations in all social-science research, particularly sexual-harassment research; nevertheless, holding such expert testimony admissible), *cert. denied*, 524 U.S. 953, 118 S.Ct. 2370, 141 L.Ed.2d 738 (1998). The Fifth Circuit There can be no doubt that Dr. Weeks’ testimony was central and relevant to Mark Thompson’s defense. The government acceded that “the expert could come here and testify about grooming. Grooming is something that is relevant

to this case and is certainly part and parcel to Count 2 as we are alleging that the defendant enticed and persuaded the mother ... Also, I think the expert could discuss fantasy. You know I think there are some questions that the Government could ask the expert with respect to fantasy and how it relates.”¹ During the hearing mid-trial, Dr. Weeks testified as to her qualifications. The government had previously agreed that Dr. Weeks possessed the requisite qualifications to testify as an expert. general matter, “[t]o show that expert testimony is reliable ... the government need not satisfy each *Daubert* factor.” *United State v. Hicks*, 389 F.3d at 525 (5th Cir.2004). In fact, the Fifth Circuit has held expert testimony admissible even though multiple *Daubert* factors were *not* satisfied. *See, e.g., United States v. Norris*, 217 F.3d 262, 269–71 (5th Cir.2000) (testimony admissible under *Daubert* even though “no error rate was known” and “no independent validation” of the expert's testing had occurred).

There can be no doubt that Dr. Weeks’ testimony was central and relevant to Mark Thompson’s defense. The district court’s mid-trial ruling, entirely excluding all of Dr. Weeks’ proposed testimony violated Mark Thompson’s constitutional rights to due process, a fair trial and to present a defense and constituted an abuse of discretion under the circumstances.

CONCLUSION

Under the circumstances of this case, where Mr. Thompson has shown that his fundamental constitutional rights were violated at trial and the Fifth Circuit unreasonably affirmed his conviction and sentence in an unpublished, per curiam

¹ ROA.507-508.

opinion, justify this Court's intervention under the circumstances. Mr. Thompson respectfully submits that this Court should grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 13th day of December, 2017.

Respectfully Submitted,



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APPENDIX A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 15-31083

United States Court of Appeals
Fifth Circuit

FILED

September 14, 2017

Lyle W. Cayce
Clerk

consolidated with 16-31181

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

MARK ANTHONY THOMPSON,

Defendant - Appellant

Appeals from the United States District Court
for the Western District of Louisiana
USDC No. 2:14-CR-74-1

Before STEWART, Chief Judge, and JONES and CLEMENT, Circuit Judges.
PER CURIAM:*

INTRODUCTION

The defendant appeals his conviction for attempting to use a child to produce a visual depiction of sexually explicit conduct and attempting to entice a minor to engage in criminal sexual activity. He raises a host of issues on

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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appeal. For the reasons articulated below, we AFFIRM the judgment of the district court.

BACKGROUND

In February 2013, Defendant-Appellant Mark Thompson and Rosalie Dornellas met at a casino in New Orleans and began an extramarital affair. Because Thompson's job involved frequent travel, the majority of Thompson and Dornellas's time was spent communicating through different platforms like text message, telephone, instant message, Skype, Viber, and video-chat.

Thompson frequently discussed with Dornellas his interest in sex with minor children. He repeatedly asked Dornellas for a naked picture of her nine-year-old daughter, *see, e.g.*, and on multiple occasions expressed his desire to have sex with her daughter. Dornellas sent Thompson pictures of her daughter wearing underwear. In response, Thompson stated that her daughter was "a beautiful little whore. When I [have sex with] her it will be like [having sex with] you when you were her age because she looks so much like you." Thompson asked Dornellas if she could let him come to the house, introduce him to her daughter, and let him have sex with Dornellas and then "go and talk to [her daughter] in her room knowing I would talk to her about [having sex] because you want her to learn about sex so she can become a whore like us." After Thompson had expressed sexual interest in her daughter, on one occasion, Dornellas allowed Thompson to speak to her daughter on the phone, though the content of their conversation was not sexual.

Thompson continued to ask Dornellas for more graphic pictures of her daughter, including pictures of her genitals. Dornellas sent him a photo of Dornellas's underwear and he praised the clarity of the photo and stated "it's how I would like for the pic of [your daughter's vagina] to look." In December 2013, Dornellas sent him a cell phone video of her daughter sleeping naked,

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but covered by a blanket. But he became upset because the blanket covered her genitals.

The next day, upon discovering the videos and text messages between Dornellas and Thompson, Dornellas's daughter gave her mother's cell phone to her father, who notified the authorities. Within a few days, Detective Joshua Stanford from the police department interviewed Dornellas regarding the pictures. Dornellas communicated to Detective Stanford that her conversations with Thompson were mere "fantasy."

In April 2014, a grand jury charged Thompson and Dornellas with one count of attempting to use a child to produce a visual depiction of sexually explicit conduct in violation of 18 U.S.C. § 2251(a), and additionally charged Thompson with one count of attempting to entice a minor to engage in criminal sexual activity, in violation of 18 U.S.C. § 2242(b). On June 2, 2014, Dornellas met with a psychologist, Dr. Margot Hasha, and reiterated that she believed Thompson only fantasized about having sex with her daughter, but would not actually act upon it. Dr. Hasha created a medical report based on their discussion and noted this statement. Dr. Hasha found that Dornellas exhibited symptoms of major depression and PTSD, and she had "difficulty understanding concepts and exhibited a level consistent with the cognitive development of a 6 or 7 year old, meaning that she could only comprehend and explain things in a very concrete way." In August, Dornellas pled guilty to the § 2251(a) count and agreed to assist the government in its case against Thompson.

At his trial, Thompson claimed that he fantasized about having sex with Dornellas's daughter, but would not have acted on that fantasy. Dornellas testified against Thompson and opined that Thompson would have had sex with her daughter if she had permitted it. She testified that she had previously attempted to "cover" for Thompson with Detective Stanford because she loved

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him. Thompson extensively cross-examined Dornellas on this statement and her former statement to Detective Stanford. Nevertheless, Thompson was ultimately convicted on both counts. He was sentenced to concurrent 360 month terms of imprisonment on both counts, followed by 10 years of supervised release. The district court denied Thompson's motion for a new trial.

DISCUSSION

Thompson raises several issues on appeal. He challenges the district court's denial of his motion for a new trial, asserts *Brady*, *Napue*, and *Giglio* claims, challenges the district court's exclusion of expert testimony and the sufficiency of the evidence to support his convictions, and claims that the district court exhibited impermissible bias against him.

A. Motion for New Trial

Thompson contends that his constitutional rights were violated when the district court did not admit into evidence Dr. Hasha's medical report and when the government allowed Dornellas to testify contrary to her previous statements made to Detective Stanford and Dr. Hasha. Thompson asserts that Dr. Hasha's medical report should have been admitted because it includes information on Dornellas's mental health that would have undermined her credibility. He also asserts that because her statements to Dr. Hasha and Detective Stanford, that she thought Thompson was only fantasizing about having sex with her daughter, were exculpatory, her contrary testimony at trial violated the government's duties under *Napue* and *Brady*. Thompson argues that he is entitled to a new trial.

We review the district court's denial of a motion for a new trial for abuse of discretion. *United States v. Bowler*, 252 F.3d 741, 747 (5th Cir. 2001). "Motions for new trial based on newly discovered evidence are disfavored and reviewed with great caution." *United States v. Wall*, 389 F.3d 457, 467 (5th

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Cir. 2004) (internal quotations omitted). To obtain a new trial based on newly discovered evidence, a defendant must prove: “(1) the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) the failure to detect the evidence was not due to a lack of diligence by the defendant; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence if introduced at a new trial would probably produce an acquittal.” *Id.* Dr. Hasha’s medical report was not newly discovered evidence because Thompson was aware of the report at the time of trial. Indeed, Thompson filed a motion to compel production of Dornellas’s mental health records before trial, and during trial the district court denied the motion.

Thompson is also not entitled to a new trial under *Napue* or *Brady*. A new trial based on *Napue* is proper only if the defendant demonstrates that (1) the testimony was actually false; (2) the testimony was material; and (3) the prosecution knew that the testimony was false. *United States v. Stanford*, 823 F.3d 814, 838–39 (5th Cir. 2016); *United States v. Webster*, 392 F.3d 787, 801 (5th Cir. 2004). Thompson has not demonstrated that Dornellas’s testimony at trial was false. Dornellas’s communications with Detective Stanford and Dr. Hasha do not make her later incriminating testimony false, since she had a motivation to cover for Thompson before she pled guilty. Thompson’s explicit text messages to Dornellas also corroborate her trial testimony that this was not merely his fantasy. Thompson therefore has failed to establish that Dornellas’s testimony was actually false in violation of *Napue*.

A *Brady* violation occurs when the government suppresses evidence “favorable to an accused upon request . . . where the evidence is material either to guilt or to punishment.” *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1197 (1963). Evidence is material only when there is a “reasonable probability”

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that the outcome of the trial would have been different if the evidence had been disclosed to the defense. *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985). Whether evidence is material “depends almost entirely on the value of the evidence relative to the other evidence mustered by the state.” *United States v. Sipe*, 388 F.3d 471, 478 (5th Cir. 2004). Because the district court reviewed Dr. Hasha’s report *in camera*, we review the potential *Brady* material only for clear error. *United States v. Brown*, 650 F.3d 581, 589 (5th Cir. 2011). A district court’s finding is clearly erroneous when, viewing all of the evidence, we are left with a “definite and firm conviction that a mistake has been committed.” *Id.* (internal quotations omitted).

Thompson has not shown that the district court clearly erred in excluding Dornellas’s mental health report, nor do we have a firm conviction that Dornellas’s statement to Dr. Hasha would have changed the outcome of the trial. In arriving at its guilty verdict, the jury relied on voluminous additional evidence including texts from Thompson, not solely the testimony of Dornellas. *See Sipe*, 388 F.3d at 478 (“When the testimony of the witness who might have been impeached by the undisclosed evidence is strongly corroborated by additional evidence supporting a guilty verdict, the undisclosed evidence generally is not found to be material.”). Further, for witnesses like Dornellas, “whose mental history is less severe, district courts are permitted greater latitude in excluding records.” *United States v. Jimenez*, 256 F.3d 330, 344 (5th Cir. 2001). Accordingly, the new trial motion was properly denied.

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B. Plea Agreement

Thompson contends that the government misled the jury in allowing Dornellas to testify, without clarification, that she was facing at least 15 years in prison, despite a potential lesser sentence in her plea agreement. Thompson asserts that the government's failure to clarify her plea deal constitutes a violation of *Napue*, *Brady*, and *Giglio*. *Id.* Because Thompson did not raise this argument in the district court, we review it for plain error. *See United States v. Williams*, 821 F.3d 656, 657 (5th Cir. 2016); *United States v. Scroggins*, 379 F.3d 233, 258 (5th Cir. 2004), *cert. granted, judgment vacated on other grounds*, 543 U.S. 1112, 125 S. Ct. 1062, 160 L. Ed. 2d 1049 (2005). To demonstrate plain error, (1) there must be an error, (2) that is plain, and (3) that affects substantial rights. *United States v. Serna-Villarreal*, 352 F.3d 225, 231 (5th Cir. 2003). The error must also seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Id.*

The government cannot knowingly present or fail to correct false testimony. *Giglio v. United States*, 405 U.S. 150, 153, 92 S. Ct. 763 (1972); *Napue v. Illinois*, 360 U.S. 264, 271, 79 S. Ct. 1173 (1959). To prove a due process violation, the appellant must demonstrate (1) false testimony from the witness (2) that the government knew was false and (3) that is material. *United States v. Mason*, 293 F.3d 826, 828 (5th Cir. 2002). The government also cannot suppress material impeachment evidence. *Brady*, 373 U.S. at 87, 83 S. Ct. at 1197.

At trial the government stipulated that under the plea agreement, it could file a motion under 18 U.S.C. § 3553(e) to request a sentence below the statutory minimum. The government also entered Dornellas's plea agreement into evidence. The government did not suppress or misrepresent the terms of the plea agreement. The district court therefore did not err, much less, plainly err.

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Thompson next asserts that the cumulative effect of the government's alleged misrepresentations of Dornellas's plea agreement, Dornellas's excluded statement regarding Thompson's fantasy, and the district court's failure to admit the medical report, constitutes a due process violation entitling Thompson to a new trial. Since none of these arguments establishes a due process violation, their net effect similarly does not create a reasonable probability that the outcome of the trial would have been different if the evidence had been disclosed. *See Kyles v. Whitley*, 514 U.S. 419, 438, 115 S. Ct. 1555, 1568 (1995).

C. Expert Testimony

Thompson contends that the district court abused its discretion when it excluded Dr. Jennifer Weeks's expert testimony and report on sexual addiction. The district court reasoned that Dr. Weeks's research had not been subject to sufficient peer review.

This court reviews the district court's exclusion of expert testimony for abuse of discretion. *In re Complaint of C.F. Bean L.L.C.*, 841 F.3d 365, 369 (5th Cir. 2016). A district court has "wide latitude in determining the admissibility of expert testimony," and its "decision will not be disturbed on appeal unless manifestly erroneous." *Id.* (internal quotations and citations omitted). Under *Daubert*, the "subject of the expert's testimony must be 'scientific [k]nowledge.'" *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589-90, 113 S. Ct. 2786, 2795 (1993). This implies a "grounding in the methods and procedures of science" and "more than subjective belief or unsupported speculation." *Id.* at 590. For an assertion to qualify as scientific knowledge, "an inference or assertion must be derived by the scientific method." *Id.* There must be a "standard for evidentiary reliability" or a "process for proposing and refining theoretical explanations." *Id.*

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Thompson has not convinced us that the district court improperly excluded Dr. Weeks's testimony. Dr. Weeks is a licensed counselor who specializes in sexual addiction. She assessed Thompson and created a report, which concluded that Thompson's behavior was more consistent with fantasy than grooming behavior. During the *Daubert* hearing, Dr. Weeks testified that she performed a sexual addiction screening test that revealed Thompson might be hypersexual. But Dr. Weeks acknowledged that the screening test is not well studied and does not have a validity scale. The self-reporting test enables subjects to over-report or under-report. The error rate of the test could place Thompson in a parameter in which there is no basis to conclude he is sexually addicted, or could place him within a parameter in which there is a high likelihood that he is a sexual addict. It is also revealing that sexual addiction was removed from The Diagnostic and Statistical Manual of Mental Disorders ("DSM")'s list of disorders.¹ Unlike other conditions, the updated DSM-5 has not even listed sexual addiction as a disorder warranting further study for potential inclusion in the DSM. Thompson has therefore not shown that Dr. Weeks's testimony establishes a standard of evidentiary reliability or is grounded in the methods and procedures of science. *Daubert*, 509 U.S. at 590, 113 S. Ct. at 2795. The district court did not abuse its discretion.

¹ The DSM is published by the American Psychiatric Association and is the "guiding force" used by clinicians and psychiatrists to diagnose psychiatric illnesses. The DSM-5 is the most updated version of the DSM.

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D. Sufficiency of the Evidence

Thompson argues that the evidence is insufficient to sustain both of his convictions. Thompson preserved his challenge to the sufficiency of the evidence by moving for acquittal under Fed. R. Crim. Proc. 29 at the conclusion of the government's case and again at the close of all evidence. Our review is therefore de novo. *United States v. Ongaga*, 820 F.3d 152, 157 (5th Cir. 2016). This court reviews the sufficiency of the evidence in the light most favorable to the government, with all reasonable inferences drawn in support of the verdict. *Id.* "We will affirm the jury's verdict if we conclude that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.*

Thompson was convicted of attempting to use a child to produce a visual depiction of sexually explicit conduct in violation of 18 U.S.C. § 2251(a) and attempting to entice a minor to engage in criminal sexual activity in violation of 18 U.S.C. § 2242(b). "To prove attempt, the government must demonstrate that the defendant (1) acted with the culpability required to commit the underlying substantive offense, and (2) took a substantial step toward its commission." *United States v. Barlow*, 568 F.3d 215, 219 (5th Cir. 2009). This court has defined a "substantial step" as "conduct which strongly corroborates the firmness of [the] defendant's criminal attempt." *Id.*

To prove a violation of § 2251(a), the government must show that Thompson employed, used, persuaded, induced, enticed, or coerced a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct. 18 U.S.C. § 2251(a); *United States v. Terrell*, 700 F.3d 755, 760 (5th Cir. 2012). The government correctly notes that Thompson fails to discuss or cite to any trial evidence in support of his contention that the evidence supporting this crime was insufficient. Consequently, there is no basis on which to question whether a reasonable trier

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of fact could find that the evidence established Thompson's guilt beyond a reasonable doubt. Moreover, viewing the evidence in the light most favorable to the government leaves little doubt of its sufficiency to support his conviction for attempted use of a child to produce a sexually explicit visual depiction.

To prove a violation of § 2242(b), the government must prove beyond a reasonable doubt that Thompson intended to "persuade[], induce[], entice[], or coerce[]" Dornellas's daughter to engage in any sexual activity. *Barlow*, 568 F.3d at 219. Thompson claims that he only engaged in obscene speech.

But Thompson described to Dornellas his desire to have sex with her daughter and repeatedly asked her to send him a naked picture of her daughter, which he ultimately received. He also discussed coming over to Dornellas's house and talking to her daughter about having sex, "so that she can become a whore like us." On one occasion, he even spoke with her daughter on the phone after he had told Dornellas he was interested in having sex with her daughter. This was all done in an attempt to entice Dornellas to allow him to have sex with her daughter. All of these actions support that Thompson not only intended to engage in sexual acts with a minor, but also took substantial steps toward committing this offense. *See United States v. Broussard*, 669 F.3d 537, at 547 (upholding a conviction under § 2242(b) where the defendant asserted he was engaging in "all fantasy" and "just talk").

E. Judicial Bias

Lastly Thompson contends that the district judge exhibited bias when she abruptly took recesses at various points throughout the trial and commented that certain lines of questioning were "uncomfortable." Thompson also complains of the judge's statements during Dornellas's sentencing hearing that this case was more disturbing than a case she had formerly prosecuted involving the killing of a child. The district court denied Thompson's motion for recusal.

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This court reviews denial of a motion for recusal for abuse of discretion. *Andrade v. Chojnacki*, 338 F.3d 448, 454 (5th Cir. 2003). Judicial opinions “on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.” *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 1157 (1994). Judicial remarks that are critical, disapproving of, or even hostile, normally do not support a bias or partiality charge. *Id.*

The judge’s conduct did not demonstrate bias or partiality. The district court’s remarks during trial that the subject matter is uncomfortable does not evince bias. Likewise, the judge’s expression of her opinion that this case is more disturbing than a former case was not stated in front of the jury, and therefore had no impact on the guilty verdict. Moreover, the district court is permitted to express critical or disapproving remarks. *See id.* Finally abruptly calling for a recess does not imply a deep-seated antagonism. *See id.*

CONCLUSION

Appellant’s conviction and sentence are **AFFIRMED**.