No. _____

IN THE SUPREME COURT OF THE UNITED STATES

TONY MCLEOD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VINCENT J. BRUNKOW
KRISTI A. HUGHES
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467
Counsel for Mr. McLeod

QUESTIONS PRESENTED

1. Whether using Cellebrite technology to download forensic digital evidence from a cell phone requires specialized or technical knowledge so that the evidence must be presented in a federal trial by a qualified expert, as the Fourth and Sixth Circuits have held, or whether it may be presented as lay testimony and not subject to strict reliability standards, as the Second and Ninth Circuits have held?

2. Whether 18 U.S.C. § 2251, which prohibits persuading a minor to engage in sexual conduct in order to produce a visual depiction of that conduct, requires the government to prove that the defendant was aware that he was dealing with a minor, in light of the fact that the Internet permits people to interact anonymously and without ever meeting face-to-face, so the risk of mistaken identity is high?

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Petitioner, Tony McLeod, respectfully prays for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

On August 28, 2018, the Ninth Circuit affirmed Petitioner's conviction, finding in part that the district court did not need to satisfy Federal Rule of Evidence 702 before it admitted testimony and evidence about forensic data obtained from a cell phone using Cellebrite technology. *See* App. A; *United States v. McLeod*, 747 F. App'x 486 (9th Cir. Aug. 28, 2018) (unpublished). The court also held that 18 U.S.C. § 2251 did not require the government to prove that Petitioner knew the individuals in the images were underage. *Id.* On February 6, 2019, the Ninth Circuit denied Petitioner's request for rehearing, and amended the original memorandum, without changing its

holdings. *See* App. B; *United States v. McLeod*, - - - F. App'x - - - - , 2019 WL 468798 (9th Cir. Feb. 6, 2019) (unpublished).

JURISDICTION

Petitioner was convicted of violating of 18 U.S.C. §§ 2251, 2423(b), and 2423(a), in the United States District Court for the Southern District of California. The United States Court of Appeals for the Ninth Circuit reviewed his convictions under 28 U.S.C. § 1291, and denied a petition for rehearing on February 6, 2019. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

18 U.S.C. § 2251 provides in relevant part:

> (a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in ... any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.
>
> ...
>
> (e) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years.

Federal Rule of Evidence 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

INTRODUCTION

This Petition presents the Court with an opportunity to ensure both that federal law keeps up with the advent of new technology and that defendants are not prejudiced because of outdated law. Petitioner was convicted of child pornography offenses under 18 U.S.C. § 2251 because of his interactions over the Internet with two minors. At trial, where Petitioner's defense was that he did not know that he was interacting with minors, the government's main evidence was text messages and images extracted from a mobile phone using a technology called Cellebrite.

Despite the fact that Cellebrite is a complex technology that requires specialized training, the lower courts do not uniformly require Cellebrite evidence and testimony to pass the rigorous evidentiary standards in Federal Rule of Evidence 702. The Fourth and Sixth Circuits believe Cellebrite implicates specialized and technical knowledge, and so can only be presented by an expert to ensure evidentiary reliability. But the Second and Ninth Circuits allow a lay witness to present

Cellebrite evidence under more lax evidentiary standards. The Court should grant the Writ to determine whether Cellebrite evidence is subject to Rule 702 and must be presented by a qualified expert.

Additionally, this Court should reexamine its previous reasoning in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), that in a § 2251 prosecution for production of child pornography the government does not need to prove that the defendant knew the person in the images was a minor. When decided, the *X-Citement Video* Court reasoned that a pornography producer would have to meet the individual face-to-face in order to produce the pornography, so there was no real chance that the producer would be mistaken about whether the individual was a minor.

But *X- Citement Video* was decided 25 years ago, and much has changed since then. It is now entirely possible for people to interact over the Internet without ever meeting in person. This means people can misrepresent their age or identity when interacting over the Internet, and, even without any misrepresentation, raises the possibility that one can mistake the identity of the person at the other end of the line. This Petition allows the Court to determine whether the *X-Citement Video* rationale still holds, or whether—because those accused of violating section 2251 no longer need to meet anyone face-to-face to create an image—there is now a risk that people can be convicted of § 2251 (and sentenced to its 15-year mandatory minimum term) without having the guilty mind that our criminal law generally requires.

STATEMENT OF THE CASE

I. At trial, the prosecution introduced forensic data downloaded from a cell phone using Cellebrite technology.

Petitioner was charged with several counts of producing child pornography based on sexually explicit images recovered from a minor's Blackberry cell phone device, and testimony from another minor about engaging in sexually explicit video chats over Skype on another device. Before trial, as part of the police investigation, a detective had used a Cellebrite device to download text messages and images from the Blackberry device. The government then relied heavily on the downloaded forensic data from the Blackberry to support all charges at trial.

A Cellebrite device connects to a mobile device or phone and extracts data, translating the data's code into a readable format and capturing the images on the mobile device. Every mobile device has different and proprietary technology, so Cellebrite must create different devices and software that are specific to each particular mobile device. Because of this, Cellebrite cannot necessarily be used on all types of mobile devices, either because Cellebrite does not have software that supports a specific device, or because certain devices have quirks that prevent Cellebrite from working properly. For instance, as a forensic data examiner testified at Petitioner's trial, Cellebrite is not generally used on Blackberry devices because they could automatically delete data when the device is turned on to run the Cellebrite data extraction.

Here, a police detective used a Cellebrite UFED device to perform a "logical extraction" of the Blackberry's forensic data. Petitioner objected that using a Cellebrite device, and testifying about the technology and the results, requires specialized and technical knowledge and therefore must satisfy Federal Rule of Evidence 702. He argued that the police detective was not an expert in forensic data extraction, had not satisfied the requirements of Rule 702, and so should not be allowed to testify as an expert. The detective did not hold any certifications in computer forensics when he examined the Blackberry, and he was not certified by Cellebrite to perform data extractions (even though Cellebrite recommended that data examiners be certified before performing data extractions).

The detective's lack of training meant that he lacked basic knowledge about the Cellebrite technology and how it worked. He was unaware of whether the Cellebrite device he used was updated before he used it so that known bugs and errors would be corrected. He was unfamiliar with the three types of Cellebrite extractions, and he had performed only a "logical extraction" on the Blackberry, which extracted the least amount of data possible and missed any deleted data. And the detective's lack of knowledge or training resulted in mishandling the Blackberry, since he never ensured that the Blackberry was handled according to evidence protocols that recommend keeping a mobile device turned off to preserve its data.

Despite all of this, and even though the court never made all of the threshold findings that Rule 702 requires, the district court allowed the detective to testify about using Cellebrite and introduced the data he extracted. The detective testified

about what he downloaded from the minor's Blackberry, including the phone contacts, email messages, text messages, images and a video. Based on information obtained from the download, the detective testified that the minor exchanged explicit text messages, images and a video with Petitioner.

In addition to his testimony, the detective introduced a report produced by the Cellebrite technology. The Cellebrite report concerned the text messages exchanged between Petitioner and the minor. The report, created by Cellebrite data extraction and not the detective, contained not just the words of the text messages, but also other information, such as the alleged the sender and recipient, and the supposed time and date the message was sent.

The dates and times in the Cellebrite report were central to Petitioner's charges because his theory of defense was that at the time he exchanged the sexually explicit images with the other individual he was unaware of the minor's age. He believed he was interacting with an adult, based on the individual's misrepresentations, until a specific date and time when the individual finally was truthful and informed Petitioner of his true age. In light of this, the accuracy of the data in the Cellebrite report—the date and time stamps, as well as the sender and recipient—was extremely important to Petitioner's defense and the entire case.

Additionally, a different Cellebrite examiner, Sarah Kranz, testified about using Cellebrite to download data from other devices involved in the case. Kranz, who had degrees in computer science and information technology and was qualified as an expert, explained that she did not use Cellebrite on the Blackberry device (like the

police detective did) because she knew from her training and experience that when Blackberries are turned on to run Cellebrite they can automatically start deleting data.

II. The jury was not required to find that Petitioner was aware that the individuals in the sexually explicit images were minors.

The jury was instructed that it had to find that the individuals in the sexually explicit images were "under the age of eighteen years," and that Petitioner "employed, used, persuaded, induced, enticed, or coerced [the minor] to take part in sexually explicit conduct for the purpose of producing a visual depiction of such conduct." Over Petitioner's objection, the district court did not instruct the jury that it had to find that Petitioner knew that the individuals in the images were underage. Additionally, because Petitioner asserted a reasonable-mistake-of-age affirmative defense, which is allowed in the Ninth Circuit, *see United States v. U.S. Dist. Ct. for Cent. Dist. of California, Los Angeles*, 858 F.2d 534, 539-44 (9th Cir. 1988), the district court instructed the jury that it must acquit Petitioner of the production charges if it found by clear and convincing evidence that Petitioner did not know and could not have reasonably learned that the individuals were under 18. The jury later returned guilty verdicts on all counts, and Petitioner then appealed.

III. The Ninth Circuit affirmed Petitioner's conviction, finding that the Cellebrite forensic data was not expert testimony subject to Rule 702, and that section 2251 does not require any knowledge of minority.

The Ninth Circuit affirmed Petitioner's conviction. A divided panel held that the district court did not err in admitting the Cellebrite testimony and report because

the Ninth Circuit had previously found, in an unpublished memorandum, that testimony about Cellebrite is not based on technical or specialized knowledge and so is not expert testimony under Rule 702. *See* App. A. The majority further stated that any error "was harmless because sufficient evidence in the record supports [Petitioner's] conviction." *Id.* The majority also held that, based on Ninth Circuit precedent, *see U.S. Dist. Court*, 858 F.2d at 538, section 2251 does not require the government to prove knowledge that the individuals were underage. *Id.*

In contrast, the dissent concluded that the police detective provided expert testimony under Rule 702 because he testified based on "technical knowledge about the use of the Cellebrite device." *Id.* at 12. The dissent pointed out that the detective was not certified to perform Cellebrite extractions and lacked basic knowledge about the Cellebrite technology generally as well as the specific Cellebrite device he used to forensically examine the Blackberry. *Id.* at 14. Further, the dissent believed that the error was not harmless, as the detective's testimony and the "Cellebrite report were critical to the government's case." *Id.* The government had relied on the report to establish which text messages were sent and received, and the time and date they were sent, which was necessary to rebut Petitioner's defense. *Id.* It also relied on the Cellebrite report in closing to show the jury how the text messages would have looked on the Blackberry. *Id.*

Regarding the mens rea required for a § 2251 conviction, the dissent agreed that the claim was foreclosed by circuit precedent but believed that the issue should be reexamined in light of changing technology. *Id.* at 20. It acknowledged that

Petitioner was not involved in face-to-face communication with the minor individuals, and he was therefore not the typical "producer" of pornography mentioned in prior caselaw, who must necessarily meet the individuals to produce the images. *Id.* at 22. Times, and technology, had changed since the precedents holding that a knowingly mens rea was not required. *Id.* at 22-23. The dissent recommended en banc consideration by the Ninth Circuit on this point. *Id.*

The Ninth Circuit denied a Petition for Rehearing, but the majority amended the original opinion. In the amended memorandum, the majority added that testimony from Sarah Kranz, who used Cellebrite to examine other devices but did not examine the Blackberry at issue in this case, "independently supported the reliability of the information in the Cellebrite report." *See* App. B. The majority also now claimed the "error was harmless because McLeod's conviction was not ultimately attributable to that error." *Id.* With these amendments, the Court of Appeals denied the Petition for Rehearing. *Id.*

REASONS FOR GRANTING THE PETITION

The Court should grant the Writ to ensure that federal law keeps up with modern technology, address which rules apply in prosecutions involving new technologies like Cellebrite, and make certain that the realities of the Internet do not mean that people can be convicted and serve harsh penalties without knowing the facts that make their conduct a crime.

I. The Court should resolve the circuit split regarding whether the introduction of digital forensic data—which is used in prosecutions with increasing frequency given the ubiquity of cell phones—should be subject to the expert evidentiary standards of Federal Rule of Evidence 702.

As this Court well knows, cell phones and mobile devices are now so widely used that not having one is the exception. *See, e.g., Carpenter v. United States,* 138 S. Ct. 2206, 2211 (2018) (noting that there are more cell phone accounts than people in the United States); *Riley v. California*, 573 U.S. 373, 395 (2014) (noting that over 90% of American adults own a cell phone and that cell phones contain detailed records of every aspect of life). And with the proliferation of cell phone use has come the technology to access their information. Cellebrite technology is a relatively new technology that allows law enforcement to extract all of a phone's data, and then use it in a criminal prosecution. The question presented in this Petition is what rules apply when data obtained using Cellebrite is used at trial.

A. The use of digital forensic data in federal trials is a complex and important issue that the lower courts grapple with everyday.

Forensic data examination—like downloading data from a cellphone using hardware and software not used by the general public—requires technical and specialized knowledge that the average lay person does not possess. This fact is demonstrated by the large number of forensic tools available to examiners. For instance, the Department of Commerce maintains a forensic tool database that sorts forensic tools by capability; it contains over 35 different forensic capabilities, from "hash analysis," "file carving," "Steganalysis," "drone forensics," to "email parsing." National Institute of Standards and Technology, Department of Commerce,

Computer Forensics Tool Catalog, available at https://toolcatalog.nist.gov/populated_taxonomy/index.php (last accessed Feb. 17, 2019). Even looking just at Cellebrite, the company that manufactured the software and hardware used to obtain forensic data in Petitioner's case, Cellebrite makes at least six hardware devices to account for all of the different idiosyncrasies involved in forensic data examination—different types of data, different methods of extraction, and different types of devices, to name a few. *See, e.g.*, Cellebrite, *Sales Inquiry Form*, available at https://www.cellebrite.com/en/sales-inquiry (last accessed Feb. 17, 2019) (listing at least six types of mobile Cellebrite hardware devices).

Accurately and reliably extracting (or downloading) digital data from a device, analyzing the data, and verifying the results of the extraction requires technical knowledge based on training and experience. Those familiar with digital forensic data are well aware of the technical and specialized knowledge it requires. The Scientific Working Group on Digital Evidence (SWGDE), which is an industry group comprised of federal crime laboratory directors from, for example, the ATF, DEA, and FBI, recommends that examiners processing digital evidence be certified, and undergo a minimum of 40 hours of training each year. It also recommends that examiners' proficiency in the discipline be tested annually "to ensure consistency and quality." *See* Scientific Working Group on Digital Evidence, *Minimum Requirements for Quality Assurance in the Processing of Digital and Multimedia Evidence,* available at www.swgde.org/documents, at 5-7 (last accessed Feb. 17, 2019). Recognizing the need to continually provide forensic data examiners with the specialized knowledge

the discipline requires, SWGDE publishes a number of training documents and guidelines—aimed at the digital forensic community—to update examiners on guidelines and best practices for everything from collecting digital evidence to authenticating digital audio. *Id.*

Cellebrite itself recognizes that examiners using Cellebrite will need to testify as experts, and offers training to help lawyers "qualify [their] expert witnesses" to testify about digital forensics. Cellebrite, *Training, Legal Professional Track*, available at https://www.cellebrite.com/en/training-tracks/legal-professional-track (last accessed Feb. 17, 2019). To ensure that digital forensic examiners accurately use its technology, Cellebrite recommends that data examiners undergo a training and certification process that lasts at least six days. Cellebrite, *Training Tracks, Core Mobile Forensics Track*, available at https://www.cellebrite.com/en/training-tracks/core-mobile-forensic-track (last accessed Feb. 17, 2019).

And forensic data examination does not just require technical or specialized knowledge beyond what the average juror possesses. It also requires specialized hardware devices—devices that are so expensive that they are not accessible to the general public. Purchasing a device to download forensic data from a mobile device, for instance, can cost thousands of dollars. *See, e.g., Forensic Store*, available at https://forensicstore.com/product-category/cell-phone-analysis (last accessed Feb. 17, 2019) (listing various hardware devices available for purchase such as an Eclipse 3 Pro SLR Kit for $3,490, a Cellphone Investigation Bundle for $7,013, an MPE nFIELD for $1,995, and a Paraben E3: DS for $2,995). Simply put, to accurately

extract digital forensic data from devices requires a level of technical and specialized knowledge—as well as specialized technology—that is well beyond the average person's capabilities, and requires knowledge and expertise to understand and master.

Moreover, this extracted forensic data is relevant in virtually any type of criminal case, given the broad range of information we now keep on our phones—from everywhere we've traveled, to bank and health information, to text messages with our spouses. More and more criminal prosecutions hinge on forensic data evidence since mobile devices and computers are rich with detailed evidence of every move we make. Prosecutors themselves acknowledge that because most people possess data-rich smart phones, cell phone data is very "versatile" evidence for criminal prosecutions. *See* Kristin Hamann and Rebecca Rader Brown, *Secure in Our Convictions: Using New Evidence to Strengthen Prosecution*, 50-Feb. Prosecutor 15 (2018). This means that federal trial courts must confront the important question presented in this Petition: which rules govern the admission of digital forensic data at trial, and whether that data is subject to the heightened reliability standards of Federal Rule of Evidence 702, which ensures that evidence is reliable and that the expert presenting the evidence has a "reliable basis in the knowledge and expertise of his discipline." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591, 594-95 (1993).

B. The lower courts are deeply divided about whether testimony about digital forensic examinations is expert testimony that falls under Rule 702.

Rule 702 governs the admission of testimony that requires "technical, or other specialized knowledge [that] will help the trier of fact to understand the evidence or to determine a fact in issue," and requires a witness to testify based upon his or her "knowledge, skill, experience, training, or education." *See* Fed. R. Evid. 702. But the circuits are split on whether this Rule applies to Cellebrite testimony and evidence.

The Fourth and Sixth Circuits have held that testimony regarding digital forensic examinations, and specifically those using Cellebrite, implicate Rule 702 and must satisfy its strict evidentiary standards. These circuits reason that using and testifying about Cellebrite requires specialized and technical knowledge about computers and forensic software that the average layperson does not possess.

For instance, the Sixth Circuit has recognized that interpreting a Cellebrite report for the jury requires the witness "to apply knowledge and familiarity with computers and the particular forensic software well beyond that of the average layperson." *United States v. Ganier*, 468 F.3d 920, 926 (6th Cir. 2006). It held that the testimony fell under Rule 702 because it required "scientific, technical, or other specialized knowledge." *Id.* The court compared Cellebrite to specialized medical tests run by doctors, like paternity blood tests, and noted that the doctors testifying about the results would be subject to Rule 702's requirements for expert testimony. *Id.*

Similarly, the Fourth Circuit found that Rule 702 governed the admission of a forensic data examiner's testimony about her extraction and translation of the data

at issue, using software similar to Cellebrite. *United States v. Yu*, 411 F. App'x. 559, 566–67 (4th Cir. 2010) (unpublished). It noted that the examiner explained "the technique forensic examiners typically use to extract data," that they use forensic software to remove data, and that examiners "translate the raw information into a viewable format." *Id.* at 566. After reviewing this testimony, the Fourth Circuit concluded that "the process of forensic data extraction requires 'some specialized knowledge or skill or education that is not in possession of the jurors.'" *Id.* at 566-67 (quoting *Ganier*, 468 F.3d at 926).

It reached the same conclusion in a later case, where a computer forensic examiner from the police department used computer software to "make a 'mirror' image of [the defendant's] computer in order to examine its contents." *United States v. Stanley*, 533 F. App'x 325, 327 (4th Cir. 2013) (unpublished). The examination revealed that the defendant had installed a file-sharing program to download and share child pornography, and the examiner's testimony about this was held to constitute expert testimony under Rule 702. *Id.* In reaching this conclusion, the Fourth Circuit noted that "many courts have noted that the process of forensic data extraction requires specialized knowledge or skill conducive to expert testimony." *Id.*

But the Sixth and Fourth Circuits' holdings conflict with those of the Ninth and Second Circuits. In Petitioner's case, for instance, the Ninth Circuit concluded that the police detective's testimony about his forensic examination and extraction of the Blackberry's data, and about the report he produced using Cellebrite, was not expert testimony under Rule 702. *See* App. B. at 6. In its view, the detective testified

about "what Cellebrite does," "how he used it in the course of his investigation," how he "download[ed] information from one of the victim's cell phones," and how his "investigation and Cellebrite use yielded readable text of the downloaded data," which was not expert testimony. It pointed to a prior memorandum, *United States v. Seugasala*, 702 F. App'x 572, 575 (9th Cir. 2017) (unpublished), where it had "previously allowed testimony similar to Detective Jackson's testimony without requiring that the testimony meet Rule 702's expert testimony requirements." App. B. at 6.

This decision in line with the Second Circuit's view. In *United States v. Marsh*, the court concluded that a detective's use of Cellebrite to extract text messages and other data from a cellphone did not fall under Rule 702. 568 F. App'x 15, *17 (2d Cir. 2014) (unpublished). It reasoned that the detective testified only about his investigation and how he used Cellebrite to retrieve the phone's data, and did not "purport to render an opinion based on the application of specialized knowledge to a particular set of facts; nor did his testimony turn on or require a technical understanding of the programming or internal mechanics of the technology." *Id.*

Thus, the Ninth Circuit's conclusion in Petitioner's case deepens the existing circuit split over whether forensic data extraction requires specialized and technical knowledge, and whether this testimony is therefore expert testimony falling under Rule 702. This Court should grant the Petition to address whether this type of testimony and evidence implicates Rule 702, as the Fourth and Sixth Circuits have found, or whether it is not expert testimony, as held by the Second and Ninth Circuits.

Granting the petition will ensure uniformity across the federal courts, as well as ensure that only reliable evidence is introduced at trial.

C. This case presents an ideal vehicle to resolve the issue since the issue is preserved and would affect the outcome in Petitioner's case.

Petitioner's case presents an ideal vehicle to address whether evidence obtained using Cellebrite and other similar technologies that can extract forensic data is subject to the rigorous evidentiary standards in Rule 702.

The issue was fully litigated below and is outcome determinative. If Rule 702 applies to the police detective's testimony and Cellebrite report, Petitioner deserves a new trial. Though the panel majority found the admission of the evidence harmless by concluding Petitioner's conviction "was not ultimately attributable to [the] error," it did not engage in a proper harmless error analysis. In contrast to the majority's approach, the Court has explained that the harmless error inquiry "cannot be merely whether there was enough to support the result, apart from the phase affected by the error." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946). Instead, the "verdict and judgment should stand," only if "the error did not influence the jury, or had but very slight effect." *Id.* Thus, if the Court holds that the forensic data from the Cellebrite extraction falls within Rule 702, the Court should remand to the Ninth Circuit to apply the proper harmless error analysis.

Under a correct analysis, the detective's testimony and Cellebrite report certainly influenced the jury and cannot be deemed harmless. As the dissent noted, the detective's "testimony and the Cellebrite report were critical to the government's

case." App. B. at 15 (emphasis added). The government relied on the report to rebut Petitioner's defense that he did not know he was interacting with minors, used the report to make an easy-to-understand exhibit for the jury, and relied on the report at closing. *Id.* The majority's statement that other evidence "independently supported the reliability of the information in the Cellebrite report," ignores Kranz's testimony that Cellebrite should never be used on a Blackberry device, and does not speak to whether the Cellebrite report and testimony influenced the jury. Because the Cellebrite evidence likely influenced the jury, the application of the proper harmless error inquiry should result in a new trial upon remand to the Ninth Circuit.

Finally, though the memorandum is unpublished, the Court should nevertheless grant the petition since—as Petitioner's own case demonstrates, where the Ninth Circuit relied on an unpublished memorandum for its decision, *see* App. B—the lower courts continue to rely on unpublished memoranda every day for important issues like these.

II. The Court should determine whether section 2251 requires the defendant to know he is interacting with a minor, given that the Internet has eliminated the face-to-face interaction that justified not requiring knowledge of minority in *X-Citement Video*.

Petitioner was convicted of 18 U.S.C. § 2251, which punishes anyone who "employs, uses, persuades, induces, entices, or coerces any minor to engage in ... any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct." Relying on decades-old reasoning that pre-dates smart phones, tablets, and the

everyday use of the Internet, *see United States v. U.S. Dist. Ct. for Cent. Dist. of California, Los Angeles*, 858 F.2d 534 (9th Cir. 1988), the district court did not require the government to prove that Petitioner knew he was interacting with minors. As such, even though he had never met the individuals before exchanging the images, the government did not have to prove that Petitioner undertook his conduct knowing they were underage in order to convict him and subject him to over 25 years in prison.

A. The lack of a mens rea in section 2251 is based on outdated legal reasoning and this Court should reexamine it.

The failure to require proof of knowledge of minority is based on an outdated legal precedent that does not make sense anymore, given that the Internet allows people all over the world to interact and communicate with each other without ever meeting each other face-to-face. The district court and the Ninth Circuit relied on *U.S. Dist. Ct.,* 858 F.2d at 538-39, to hold that knowledge of minority is not an element of § 2251.[1] *See* App. B. In *U.S. District Court*, the Ninth Circuit had concluded that Congress deliberately omitted "knowingly" from section 2251 to relieve the prosecution of proving that a defendant knew the minor was underage. *Id.* at 538-39.

This Court concluded the same about Congress's intent in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), where it analyzed a related pornography

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[1] However, consistent with Ninth Circuit precedent, *see U.S. Dist. Ct.*, 858 F.2d at 539-44, the district court allowed Petitioner to present an affirmative defense that he reasonably mistook the minor for an adult.

distribution statute, 18 U.S.C. § 2252. There, the Court addressed whether § 2252—which contained the word "knowingly"—required the defendant to know that the person in the distributed image was a minor. The Court concluded the "knowingly" mens rea in the statute extended to the minor's age, noting that some form of scienter is to be implied in a criminal statute. *Id.* at 78.

Relevant to this Petition, the Court examined the different legislative history of the production (§ 2251) and distribution (§ 2252) statutes, and noted that Congress intentionally omitted "knowingly" from the production statute but not from the distribution statute. It reasoned that this difference in the two statutes made sense because a pornography producer, in contrast to a distributor, "confronts the underage victim personally" and would be more "able to ascertain the age of performers." *Id.* at 76 n.5. But the "opportunity for reasonable mistake as to age increases significantly" in the case of a distributor, because the performer is "unavailable for questioning by the distributor." *Id.* at 72 n.2. In other words, because a pornography producer met the minor face-to-face, the Court suggested in dictum that it was permissible to allow a conviction under § 2251 even if the defendant was unaware he was dealing with a minor.

But this reasoning that § 2251 does not require proof of knowledge of minority cuts against the general rule that this Court has repeatedly emphasized: "wrongdoing must be conscious to be criminal," *Morissette v. United States*, 342 U.S. 246, 250 (1952), and a "guilty mind is a 'necessary element in the indictment and proof of every crime.'" *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (quoting *United States*

v. Balint, 258 U.S. 250, 251 (1922)). In other words, a defendant generally must "know the facts that make his conduct fit the definition of the offense." *Staples v. United States*, 511 U.S. 600, 608 n.3 (1994). This is especially true when the statute carries a "harsh" potential penalty, like the 15-year mandatory minimum sentence here. *See id.* at 616 (noting that the "potentially harsh penalty" of "up to 10 years' imprisonment" confirmed the Court's view that a defendant should act knowing the facts that made his conduct a crime); *X-Citement Video*, 513 U.S. at 69 (reasoning that sentence of up to 10 years in prison was a "harsh" penalty and warranted imposing a scienter requirement).

Requiring a defendant to have a guilty mind and know the facts that make his conduct illegal ensures that innocent conduct is not punished by our criminal laws. For instance, in *Morissette*, where the statute prohibited knowingly converting property of the United States, the Court required the government to prove not just that the defendant had knowingly taken property, but that the defendant had taken government property that he knew still belonged to the government and had not been abandoned. 342 U.S. at 271. Similarly, in *Liparota v. United States*, where the statute prohibited knowingly possessing or using food stamps in an unauthorized manner, the Court rejected the government's argument that knowingly possessing or using food stamps was enough, if in fact the possession was unauthorized. 471 U.S. 419, 420-23 (1985). That interpretation would have criminalized "a broad range of apparently innocent conduct" and punished people who had no knowledge of the facts that made their conduct illegal. *Id.* at 426. Instead, the government had to prove the

defendant knew of the facts that made the use of the food stamps unauthorized. *Id.* at 425.

Keeping this principle in mind, this Court reasoned in *X-Citement Video* that it would not criminalize a broad range of innocent conduct if § 2251 did not require knowledge of minority. 513 U.S. at 72 n.2. It believed that producers of pornography involving minors would always know their conduct was illegal because producing the pornography required meeting the individual face-to-face, where the producer would be able to determine that the individual was a minor. But that necessity no longer exists—the Internet makes it possible to produce sexually explicit images without ever meeting the people in those images. People who have never met can communicate over the Internet and send images back and forth, and there is no way for them to know with whom they are interacting, or even if they are interacting with a real person at all. The producer rationale from *X-Citement Video* simply does not hold any longer.

And because of the realities of the Internet, the "crucial element separating legal innocence from wrongful conduct," *id.* at 73—the knowledge that one is dealing with a minor and not an adult—is no longer necessarily included in a section 2251 conviction. This means that section 2251 prosecutions now could sweep up innocent conduct along with wrongful conduct, which is just what this Court has consistently said must be avoided. *See, e.g.,* E*lonis,* 135 S. Ct. at 2009; *X-Citement Video*, 513 U.S. at 72 n.2., *Staples,* 511 U.S. at 608; *Liparota*, 471 U.S. at 420-23; *Morissette*, 342 U.S. at 250.

That is what happened in Petitioner's case, where Petitioner and the individuals in the sexually explicit images never met face-to-face before the images were created, and the individuals misrepresented their ages to Petitioner. When the Court decided *X-Citement Video*, it could not have anticipated the type of situation Petitioner found himself in: charged with "producing" visual depictions not after meeting minors face-to-face but instead "meeting" them from thousands of miles away. Unlike the producers the Court imagined, who would "confront the underage victim personally," *id.* at 76 n.5, Petitioner never had this opportunity. The dissent in Petitioner's case recognized this significant change:

> [Petitioner] is correct that Congress could not have envisioned the circumstances of his case when it enacted § 2251, and also correctly notes that the "producer" rationale underlying [*U.S. Dist. Ct.*] and *X-Citement Video* seems to contemplate face-to-face meeting between the defendant and the minor. The technology innovation since [*U.S. Dist. Ct.*] was decided raises a serious question as to the factual predicate to its reasoning. That technology did not exist when Congress enacted § 2251, nor was it available when [*U.S. Dist. Ct.*] was decided. When the law was enacted, and when [*U.S. Dist. Ct.*] was decided, a producer, almost of necessity, had to encounter the minor to produce the illicit film or image. That is no longer the case, which gives rise to the need to revisit the question of whether the government should be put to the task of proving the defendant knew the victim was underage.

See App. B. at 24.

Because the producer rationale no longer separates innocent and wrongful conduct in section 2251 the way it is presently construed—without requiring the defendant to know he is dealing with a minor—this Court should reexamine the statute and determine whether reading a "knowingly" mens rea into the statute is required to keep in line with its precedents.

B. The Court should grant the Petition, as it presents the important issue of whether someone can be convicted of a crime with a 15-year mandatory minimum sentence without possessing the knowledge of the facts that make his conduct criminal.

This Petition presents the Court with the opportunity to address whether and to what extent federal law keeps up with modern technology. Mobile and Internet technology is only becoming more widely used every day, and almost everyone has a smart phone that is capable of taking pictures. Accordingly, the mens rea required for § 2251 presents an issue that will arise more and more often, since the Internet provides boundless opportunities for connecting with others while cloaked in anonymity. The Petition presents the Court with an opportunity to reexamine the statute in the light of modern realities and ensure that only wrongful conduct is criminalized, and that individuals who mistakenly interact with minors do not face decades-long sentences.

Additionally, whether § 2251 includes a "knowingly" mens rea is an important issue. The "debate over mens rea is not some philosophical or academic exercise. It has major real-world consequences for criminal defendants." *United States v. Burwell*, 690 F.3d 500, 553 (D.C. Cir. 2012) (Kavanaugh, J., dissenting). Here, the real-world consequence of adhering to outdated precedent is that individuals can be convicted of § 2251 and face at least a 15-year mandatory sentence, *see* 18 U.S.C. § 2251(e), without the government following the usual rule that it must prove a mens rea for a criminal conviction.

C. This case provides the Court with an ideal vehicle for addressing the mens rea element.

This case provides an ideal vehicle for reaching the issue. In the district court, Petitioner litigated the issue, despite the Ninth Circuit precedent holding that the prosecution did not have to prove knowledge. Petitioner presented evidence about his lack of knowledge, and the issue was contested at trial. This makes the Petition ideally suited for certiorari, as most other § 2251 convictions will likely not have the issues preserved, in light of precedent like *X-Citement Video*. Additionally, the issue was squarely presented and briefed to the Ninth Circuit and ruled upon in a divided memorandum.

And holding that § 2251 requires the government to prove that a defendant knew he was producing an image containing a minor would affect the outcome in Petitioner's case. His entire defense at trial was that he did not know the individuals were minors. He presented evidence that the individuals frequently misrepresented their identities and lied about their ages. And while he was allowed to present an affirmative mistake-of-age defense, it required him to prove by clear and convincing evidence that he did not know the individuals were minors. *See U.S. Dist. Ct.*, 858 F.2d at 539-44. This is a much different burden than requiring the government to prove beyond a reasonable doubt that Petitioner *knew* he was dealing with minors. The difference and shifting burdens more than likely had an outcome on the jury's determination, so remanding for a trial with the burden correctly allocated would result in a different outcome. *See Lavine v. Milne*, 424 U.S. 577, 585 (1976) ("[w]here

the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application").

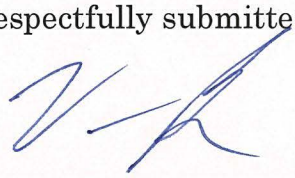
CONCLUSION

The Ninth Circuit further entrenched a circuit split in holding that the police detective did not offer expert testimony and did not need to meet the requirements in Rule 702. Additionally, section 2251, which does not require proof that a defendant knew he was dealing with a minor, implicates innocent conduct, which conflicts with this Court's precedents.

This Court should grant the writ to address these important questions of federal law and ensure that the Federal Rules of Evidence are uniformly applied.

Date: March 22, 2019

Respectfully submitted,



VINCENT J. BRUNKOW
KRISTI A. HUGHES
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101-5008
Telephone: (619) 234-8467
Attorneys for Mr. McLeod

APPENDIX A

NOT FOR PUBLICATION

FILED

AUG 28 2018

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TONY LEE MCLEOD, AKA Tony, Defendant-Appellant.	No. 16-50013 D.C. No. 3:13-cr-02297-JLS-1 MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Janis L. Sammartino, District Judge, Presiding

Argued and Submitted April 11, 2018
Pasadena, California

Before: BEA and MURGUIA, Circuit Judges, and MOLLOY,** District Judge.

Tony Lee McLeod was convicted by a jury of nine counts of persuading or attempting to persuade a minor to engage in sexually explicit conduct for the purpose of producing an image of that conduct, 18 U.S.C. § 2251(a), (e), one count of traveling with the intent to engage in illicit sexual conduct, 18 U.S.C. §2423(b),

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

and one count of transportation of a minor with the purpose of engaging in illicit sexual conduct, 18 U.S.C. § 2423(a). McLeod appeals his conviction, alleging the district court abused its discretion by: (1) failing to make a reliability finding on purported expert testimony concerning information obtained from a cell phone through a Cellebrite device, which he claims is required by Federal Rule of Evidence 702; (2) admitting testimony from one of the victims about physical contact between McLeod and the victim, over McLeod's objection based on Rule 403; and (3) failing to sever the § 2251 production counts from the § 2423 travel and transport counts. McLeod also asserts that § 2251 is unconstitutional as applied to him.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review the district court's evidentiary rulings and denial of McLeod's motion to sever for abuse of discretion. *See Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 460 (9th Cir. 2014) (en banc); *United States v. Beck*, 418 F.3d 1008, 1013 n.3 (9th Cir. 2005); *United States v. Leon-Reyes*, 177 F.3d 816, 821 (9th Cir. 1999); *United States v. Mayfield*, 189 F.3d 895, 899 (9th Cir. 1999). We review de novo his constitutional challenge to § 2251. *See United States v. Purdy*, 264 F.3d 809, 811 (9th Cir. 2001). We affirm.

1. McLeod argues the district court abused its discretion when it admitted Detective Damian Jackson's testimony at trial without making a

reliability finding under Rule 702. Rule 702 governs the admission of expert testimony and requires that proposed expert testimony be reliable. Further, under Rule 702, where the testimony's "factual basis, data, principles, methods, or [its] application" is called into question, a trial judge must make a reliability determination. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)).

It appears that the district court overruled McLeod's objections to Detective Jackson's testimony because the district court found that Detective Jackson had the experience and knowledge to present the contested documents, and nothing in his testimony required the district court to make additional findings about the testimony's reliability. *See id.* At trial, Detective Jackson testified about how he used a Cellebrite device during the course of his investigation to download information from one of the victim's cell phones onto a thumb drive and then testified about the contents of that information. He testified about what Cellebrite does and how he used it in the course of his investigation to extract information from the victim's cell phone. His investigation and Cellebrite use yielded readable text of the downloaded data, a link to images downloaded from the victim's cell phone, and "extraction reports." Detective Jackson also testified that he could select what data to extract from the phone through Cellebrite. In short, Detective Jackson testified about his use and interaction with Cellebrite—and how he

extracted data from one of the victim's phones in this case. We have previously allowed testimony similar to Detective Jackson's testimony without requiring that the testimony meet Rule 702's expert testimony requirements. *See United States v. Seugasala*, 702 F. App'x 572, 575 (9th Cir. 2017) ("The officers who followed the software prompts from Cellebrite and XRY to obtain data from electronic devices did not present testimony that was based on technical or specialized knowledge that would require expert testimony.").[1]

Nevertheless, the dissent asserts that Detective Jackson provided expert testimony subject to Rule 702. The dissent believes the district court erred by not making a reliability finding regarding Detective Jackson's testimony and accepting the information obtained through Cellebrite. However, even assuming that the district court erred in admitting Detective Jackson's testimony, the error was harmless. *See United States v. Spangler*, 810 F.3d 702, 708 (9th Cir. 2016) (holding that even assuming that the district court's decision to bar expert testimony was error, such error was harmless); *Estate of Barabin*, 740 F.3d at 464 (citing *United States v. Rahm*, 993 F.2d 1405, 1415 (9th Cir. 1993) (explaining that this court reviews improperly admitted expert testimony for harmless error). The record reflects that testimony from one of the victims and from one of the victim's

[1] That the *Seugasala* court reviewed for plain error is a distinction that does not change the fact that our court has previously allowed testimony similar to Detective Jackson's testimony.

aunts independently supports McLeod's conviction without Detective Jackson's testimony. Therefore, assuming Detective Jackson's testimony was admitted in error, any error was harmless because sufficient evidence in the record supports McLeod's conviction.

In sum, the district court did not abuse its discretion in admitting Detective Jackson's testimony. *See Harper v. City of Los Angeles*, 533 F.3d 1010, 1030 (9th Cir. 2008) ("We afford broad discretion to a district court's evidentiary rulings."); *see also Kumho Tire*, 526 U.S. at 149. And even if the district court erred, such error was harmless. *See Estate of Barabin*, 740 F.3d at 464.

2. The district court also did not abuse its discretion in admitting testimony from one of the victims concerning touching between the victim and McLeod in the car on the way to the Los Angeles International Airport and on the flight to Florida. The parties agree that the disputed testimony was probative of the transport and travel counts, but the testimony had low probative value as to the production counts. *See United States v. Gonzalez-Flores*, 418 F.3d 1093, 1098 (9th Cir. 2005) (explaining that the trial court should weigh the prejudicial effect of certain evidence against its probative value). McLeod points to no authority holding that evidence must be probative as to all charges against a defendant to be admissible under Rule 403, which permits a district court to "exclude relevant evidence if its probative value is substantially outweighed by," among other things,

unfair prejudice. *See United States v. Jayavarman*, 871 F.3d 1050, 1063 (9th Cir. 2017) (quoting Fed. R. Evid. 403).

McLeod argues that the district court erred by admitting the victim's testimony regarding the touching because it was not probative of the production counts, irrelevant to the production count related to the other victim, and its graphic nature was highly prejudicial. However, McLeod points to no authority holding that testimony must be probative of all charges.[2]

Moreover, the contested testimony was not unduly prejudicial. Given all the charges against McLeod, and the sexually explicit and graphic nature of the other evidence presented at trial that was probative of the production charges, the district court permissibly concluded that in this context, admitting the victim's testimony was not extraordinarily inflammatory. *Jayavarman*, 871 F.3d at 1063–64 (holding that the district court did not err under Rule 403 where it admitted audio recordings of the defendant's statements that he had sex with the victim when she was thirteen or fourteen years old because the probative value of the evidence was very high and that "value was not substantially outweighed by any risk of unfair prejudice that might have arisen from the evidence, especially in the context of other evidence adduced at trial"); *United States v. Higuera-Llamos*, 574 F.3d 1206, 1209 (9th Cir. 2009) ("The district court is to be given 'wide latitude' when it balances

[2] The dissent makes similar arguments as McLeod on this issue.

the prejudicial effect of proffered evidence against its probative value.") (citation omitted). Although courts must take care to prevent emotionally charged evidence that may lead to a decision on an improper basis, *see Gonzalez-Flores*, 418 F.3d at 1098, we review a district court's decision to admit or exclude evidence with great deference, *see United States v. Hinkson*, 585 F.3d 1247, 1267 (9th Cir. 2009). The dissent reweighs the testimony's prejudicial value without considering the deference we afford district courts. On this record, it was not an abuse of discretion for the district court to admit the contested testimony.

3. Assuming McLeod did not waive his motion to sever the transport and travel counts from the production counts by failing to renew the motion at the close of evidence, McLeod bears the burden of proving the undue prejudice he suffered from the joint trial. *See United States v. Vasquez-Velasco*, 15 F.3d 833, 845 (9th Cir. 1994). Federal Rule of Criminal Procedure 14 "sets a high standard for a showing of prejudice." *Id.* McLeod argues that because the contested victim testimony had no bearing on the production charges, only on the travel and transportation count, its admission prevented him from receiving a fair trial. The dissent argues substantially the same thing as McLeod. However, as discussed above, the district court did not err in admitting the victim's testimony regarding touching between the victim and McLeod.

Moreover, we have previously held that district courts do not abuse their

discretion by denying motions to sever in cases that involve potentially inflammatory evidence. *See Vasquez-Velasco*, 15 F.3d at 846–47 (holding that the district court did not abuse its discretion in denying defendant's motion to sever where the defendant did not "present[] any reasons, other than the emotionally-charged nature of [one of the] murder[s], as to why the jury would be unable to consider separately the evidence that applies to the two pairs of murders."); *United States v. Smith*, 795 F.2d 841, 850–51 (9th Cir. 1986) (holding that the district court did not abuse its discretion in refusing to sever a felon in possession of a firearm charge from child pornography counts under Federal Rule of Criminal Procedure 14 where defendant argued evidence of the gun would "inflame[] an already emotionally charged trial and invited the jury to infer that Smith would have used the gun to threaten or kill the children if they had refused to allow him to take their pictures").

Here, McLeod's charges all arose from related conduct concerning his communication with the victims and the subsequent enticement of one of the victims to leave with McLeod for Florida with the intention of engaging in illicit sexual conduct. Indeed, McLeod's underlying conduct as to all charges was sufficiently related such that the nature of the evidence, within the context of this case, was not unduly inflammatory. *See Jayavarman*, 871 F.3d at 1063–64.

Further, for the reasons discussed above, trying all counts in the same trial

"was not so manifestly prejudicial that it outweigh[ed] the dominant concern with judicial economy and compel[led] the exercise of the court's discretion to sever." *United States v. Lopez*, 477 F.3d 1110, 1116 (9th Cir. 2007) (internal quotation marks and citation omitted) (alterations in original). Accordingly, McLeod has not met his burden of proving that he was prejudiced from the joint trial. *See Vasquez-Velasco*, 15 F.3d at 845.

4. Finally, McLeod argues that his due process rights were violated when he was convicted under 18 U.S.C. § 2251(a) without requiring proof that he knew the victims were underage. McLeod's constitutional challenge is precluded by *United States v. U.S. Dist. Court for Cent. Dist. of Cal., L.A.*, 858 F.2d 534, 538 (9th Cir. 1988) (holding that "knowledge of the minor's age is not necessary for conviction under section 2251(a).").

Accordingly, the district court did not commit any reversible error on any issue on appeal, and we affirm.

AFFIRMED.

United States v. Tony Lee McLeod, AKA Tony, No. 16-50013

MOLLOY, District Judge for the District of Montana, dissenting in part and concurring in part:

I respectfully disagree with the majority reasoning and rulings in this case.

1. The district court abused its discretion when it admitted Detective Jackson's expert testimony without making a reliability finding, and the error prejudiced McLeod.

First, Jackson provided expert testimony. *See* Fed. R. Evid. 702(a). Jackson testified based on technical knowledge—specifically, technical knowledge about the use of the Cellebrite device. Jackson testified as to what the Cellebrite device is, what it does, how it works, and what it produces. Jackson also testified he performed a "logical extraction" on the Blackberry, and explained the resulting report to the jurors at length.

The majority cites to *United States v. Seugasala* for the proposition that testimony by an officer who uses Cellebrite to extract the contents of a cellular device is not expert testimony. 702 F. App'x 572, 575 (9th Cir. 2017). But *Seugasala*, a non-binding memorandum opinion, involved plain error review, not abuse of discretion. Moreover, simply because the user can follow prompts from the program does not mean that expert testimony is not required or that the underlying technology is reliable. In the context of this case, McLeod presented

evidence that the Cellebrite device Jackson used can produce significant errors, including not acquiring files and misreporting data.

Even if Jackson only provided lay testimony, as the majority found, he nevertheless received the court's expert imprimatur in front of the jury. *See Barefoot v. Estelle*, 463 U.S. 880, 926–27 (1983), *superseded by statute on other grounds*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214 (1996), *as recognized in Slack v. McDaniel*, 529 U.S. 473 (2000) ("Where the public holds an exaggerated opinion of the accuracy of scientific testimony, the prejudice is likely to be indelible."). The district court stated that, based on Jackson's experience, he was "more than qualified" to testify about the Cellebrite report. When McLeod objected to further introduction of the Cellebrite report into evidence, the district court stated Jackson "[had] . . . the experience and the knowledge to present the[] documents." Later, the district court overruled McLeod's relevance objection as the government questioned Jackson about his continued use of Cellebrite in the years *following* the extraction at issue in this case. In other words, the district court first endorsed Jackson as an expert, and then permitted the government to bolster Jackson's credentials in front of the jury.

Second, the district court made no reliability finding before admitting Jackson's testimony and the Cellebrite report. "[T]he failure to make an explicit

reliability finding [i]s error," even where "the district court's ruling suggests an implicit finding of reliability." *United States v. Jawara*, 474 F.3d 565, 583 (9th Cir. 2007) (citation omitted).

While erroneous admission of expert testimony is harmless where the record shows the witness was reliable and qualified, *see United States v. Figueroa-Lopez*, 125 F.3d 1241, 1247 (9th Cir. 1997), the record here casts doubt on Jackson's qualifications. Although Jackson testified he holds multiple computer forensic certifications, none of them pertained to Cellebrite, and they all post-dated his work with the victim's Blackberry. He was not certified by Cellebrite to perform extractions, seemed unsure about the types of Cellebrite extractions that could be performed, and did not know when the device he used was last updated. Jackson's lack of certification is particularly troubling given that, as McLeod notes, Cellebrite itself "strongly encourages all users to attend certification training in order to best understand—and explain—how to extract, decode, analyze and document mobile device evidence using these advanced methodologies." In short, Jackson's testimony did not demonstrate reliable scientific or technical principles reliably applied. *See* Fed. R. Evid. 702.

Third, Jackson's report and testimony prejudiced McLeod. Where evidence has been improperly admitted, this Court must "consider whether the error was harmless." *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 464 (9th Cir.

2014) (quotation and citation omitted). Prejudice is presumed, and the burden is on the benefitting party to show "that it is more probable than not that the jury would have reached the same verdict even if the evidence had not been admitted." *Id.* at 464–65 (quotation and citation omitted). "Prejudice is at its apex when the district court erroneously admits evidence that is critical to the proponent's case." *Id.* at 465.

Jackson's testimony and the Cellebrite report were critical to the government's case. The government relied on the report to establish which messages were sent and received, as well as the time of each message. The timing of the messages rebutted McLeod's claim that he did not know the victim was a teenager when the images were produced. The government also used the Cellebrite report to create demonstrative exhibits showing a "more readable" format that was "closer to the way [the messages] would have looked on the [Blackberry] device when the individual was holding it." The government relied on that report in closing.

In sum, the district court erred when it allowed Detective Jackson to provide expert testimony without making a reliability finding and accepted the Cellebrite report he prepared. That error was not harmless because it involved evidence critical to the government's case, prejudicing McLeod. Reversal and a new trial is appropriate for this reason and for the additional reasons set forth below.

2. The district court abused its discretion when it admitted the victim's testimony that McLeod molested him. While that testimony is relevant to McLeod's intent regarding the travel and transportation counts, *United States v. Dhingra*, 371 F.3d 557, 565 (9th Cir. 2004), it had limited, if any, relevance to the production counts, and its probative value was substantially outweighed by its prejudicial effect, Fed. R. Evid. 403.

Relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice." *Id.* "The probative value of evidence against a defendant is low where the evidence does not go to an element of the charge." *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1098 (9th Cir. 2005). In this case the proper balance of fairness and "judicial economy" should tip to the defendant's right to a fair trial.

McLeod faced nine counts of persuading, or attempting to persuade, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of the conduct, in violation of 18 U.S.C. § 2251; one count of traveling for the purpose of engaging in illicit sexual conduct with a minor, in violation of 18 U.S.C. § 2423(b); and one count of transporting a minor with the intent of engaging in criminal sexual activity, in violation of 18 U.S.C. § 2423(a). Of these eleven charges, the touching testimony was probative of only two—the travel and transportation counts—because those required the government to prove McLeod

had the intent to engage in illicit sexual conduct. *See Dhingra*, 371 F.3d at 565 (where intent was a "key element" of the charge—coercion of a minor in violation of 18 U.S.C. § 2422—testimony that defendant fondled victim was not unduly prejudicial, even though sexual contact was not an element of the offense). Morever, "what counts as the Rule 403 'probative value' of an item of evidence, as distinct from its Rule 401 'relevance,' may be calculated by comparing evidentiary alternatives." *Old Chief v. United States*, 519 U.S. 172, 184 (1997). In this case, the text messages provided alternative evidence of McLeod's intent, further diminishing the probative value of the touching testimony even as to those two counts. *See id.*

On the other hand, the testimony was not probative of any of the elements the government had to prove for the production counts, which were that (1) the victims were minors, (2) McLeod persuaded (or attempted to persuade) them to take part in sexually explicit conduct for the purpose of producing a visual depiction, and (3) the visual depictions were transported in or affecting interstate or foreign commerce by any means, including by computer. 18 U.S.C. § 2251(a). Sexual contact between the defendant and the victim is not an element, as the government conceded in its pretrial brief opposing severance. The district court reasoned that the testimony "would be relevant to rebut a defense that the defendant did not know that the victim was a minor" because "the subsequent acts

tend[ed] to rebut the inference raised by such a defense that the defendant would not have committed the acts had he known the minor's age." But the victim testified before McLeod presented his case, which forced McLeod into rebuttal regardless. The same forced hand ruling took place in a pretrial exchange between the court and defense counsel. Further, one of the production counts involved a different victim than the one who testified about the physical contact, meaning not only that the touching testimony was not probative of that count, but was not even relevant.

McLeod suffered unfair prejudice because of the touching testimony. "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief*, 519 U.S. at 180. "In other words, unfairly prejudicial evidence is that having 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" *Gonzalez-Flores*, 418 F.3d at 1098 (quoting *Old Chief*, 519 U.S. at 180). "Where the evidence is of very slight (if any) probative value, it's an abuse of discretion to admit it if there's even a modest likelihood of unfair prejudice or a small risk of misleading the jury." *Id.* (quotation and citation omitted). A fair trial cannot be dependent on a "guilty anyway" assessment of the evidence or the joinder of charges.

The graphic testimony about uncharged conduct was highly prejudicial. Because it described sexual physical contact between the victim and McLeod, it differed in kind from the texting, photo, and video evidence otherwise presented. As to the production charges, then, the testimony was evidence "lur[ing] the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief*, 519 U.S. at 180. Finally, while the testimony itself occupied little trial time, it required significant rebuttal—seven witnesses, including three flight attendants, two passengers, an FBI agent, and a forensic biologist. Had the counts been tried separately, the defendant may have prevailed in his defense. Tried together, the defense to the touching was rendered meaningless by virtue of the nature of the crimes and the reality of propensity proof.

The district court erred by admitting the touching testimony because it was not probative of the production counts and presented an unacceptably high risk of prejudice. Reversal for a new trial on this ground is appropriate.

3. The district court's failure to sever the travel and transportation counts from the production counts after it decided to admit the touching testimony abridged McLeod's right to a fair trial. *United States v. Lewis*, 787 F.2d 1318, 1321 (9th Cir. 1986), *amended on denial of reh'g*, 798 F.2d 1250 (9th Cir. 1986).

First, while McLeod failed to renew his motion to sever, he briefed and

argued it pretrial and also argued the touching testimony warranted severance in his motion for a new trial. Further, severance was inextricably bound up in the admission of the touching testimony, so much so that the district court's decision not to sever was premised on its conclusion that the touching testimony was relevant to the production counts. Because severance had been thoroughly litigated, renewal would have been an "unnecessary formality," *United States v. Vasques-Velasco*, 15 F.3d 833, 845 (9th Cir. 1994), and McLeod did not waive the issue.

The question here "is whether joinder was so prejudicial that the trial judge was compelled to exercise his discretion to sever." *Lewis*, 787 F.2d at 1321. "There is a high risk of undue prejudice whenever . . . joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible." *Id.* (citation omitted) (alteration in original). McLeod "has the burden of proving that the joint trial was manifestly prejudicial," meaning that his "right to a fair trial was abridged." *Id.* (citations omitted). In my view he has satisfied that burden.

The district court concluded the touching testimony was relevant to the production counts because it rebutted what the court presumed was McLeod's affirmative defense—that he did not know the victims were underage. But the testimony does not go to any element of the production charges, and allowing the

government to introduce that evidence in its case in chief put the cart before the horse. Whether McLeod touched the victim after the two exchanged photos and video does not make it more likely that he knew how old the victim was *during* those exchanges. The problem here was that the testimony was not probative of the production counts but in the jury's mind was more than likely evidence of bad character. *See id.* at 1322. Such prejudice would have been at its peak regarding the production count concerning the other victim.

Nor were the district court's instructions to the jury that it could consider evidence of other uncharged acts "only for its bearing, if any, on the question of the defendant's intent and for no other purpose," and that it could not "consider [such] evidence as evidence of guilt of the crimes for which the defendant is now on trial" sufficient to cure the prejudice. This Court has expressed skepticism that "general instructions" can "ameliorat[e] the prejudice arising from joinder." *Bean v. Calderon*, 163 F.3d 1073, 1084 (9th Cir. 1998); *see also Lewis*, 787 F.2d at 1323 ("To tell a jury to ignore the defendant's prior convictions in determining whether he or she committed the offense being tried is to ask human beings to act with a measure of dispassion and exactitude well beyond mortal capacities." (quoting *United States v. Daniels*, 770 F.2d 1111, 1118 (D.C. Cir. 1985)).

In my opinion, the district court abused its discretion by refusing to sever the production counts from the travel and transport counts once it decided to admit the

touching evidence. Reversal and a new trial with the counts severed is appropriate here.

4. McLeod argues that because he did not meet the victims face-to-face before they sent him the pictures and videos—and so could not ascertain that they were minors—his due process rights were violated when he was convicted under 18 U.S.C. § 2251(a) without requiring proof that he knew the victims were underage. I agree with the majority that McLeod's challenge to the constitutionality of 18 U.S.C. § 2251 is foreclosed by *United States v. U.S. Dist. Court for Cent. Dists. of Cal., L.A. ("Kantor")*, 858 F.2d 534 (9th Cir. 1988). However, McLeod's argument that *Kantor*'s rationale is inapplicable to the facts of his case is not without some merit.

The defendants in *Kantor* were charged under § 2251 after they produced a sexually explicit film with a sixteen-year-old performer. *Id.* at 536. They sought to present as a defense evidence that the performer misled them by "pass[ing] herself off as an adult," and argued their First Amendment and due process rights required the government to prove they knew she was a minor. *Id.* A panel of this Court considered the legislative history of § 2251(a), noting that the omission of a *mens rea* requirement "was quite clearly deliberate." *Id.* at 538. Nevertheless, *Kantor* concluded that because § 2251 regulates speech, and "the first amendment [sic] does not permit the imposition of criminal sanctions on the basis of strict

liability where doing so would seriously chill protected speech . . . . imposition of major criminal sanctions on the[] defendants without allowing them to interpose a reasonable mistake of age defense would choke off protected speech." *Id.* at 540–41. Accordingly, *Kantor* held that, as to *mens rea*, "[a] defendant may avoid conviction only by showing, by clear and convincing evidence, that he did not know, and could not reasonably have learned, that the actor or actress was under 18 years of age." *Id.* at 543 (footnotes omitted). *Kantor* did not reach the defendants' due process claim. *Id.* at 538.

The Supreme Court, considering 18 U.S.C. § 2252, a related statute which prohibits distributions of child pornography, addressed whether the statute required that a defendant know that the person in the images distributed was a minor. *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994). In its analysis, the Supreme Court contrasted the legislative history of § 2252 with that of § 2251, noting that Congress intentionally omitted "knowingly" from § 2251 but not from § 2252. *Id.* at 76. And in a footnote, it noted that "[t]he difference in congressional intent with respect to § 2251 versus § 2252 reflects the reality that producers are more conveniently able to ascertain the age of performers," and cited to *Kantor* for the proposition that "[i]t thus makes sense to impose the risk of error on producers." *Id.* at 76 n.5.

McLeod argues *Kantor*'s "rationale is inapplicable to [his] case, which involves indirect communications over the internet—a forum known to be rife with inaccurate information." In other words, McLeod argues the facts of his case make him more akin to a distributor than to a producer. McLeod is correct that Congress could not have envisioned the circumstances of his case when it enacted § 2251, and also correctly notes that the "producer" rationale underlying *Kantor* and *X-Citement Video* seems to contemplate face-to-face meeting between the defendant and the minor. The technology innovation since *Kantor* was decided raises a serious question as to the factual predicate to its reasoning. That technology did not exist when Congress enacted § 2251, nor was it available when *Kantor* was decided. When the law was enacted, and when *Kantor* was decided, a producer, almost of necessity, had to encounter the minor to produce the illicit film or image. That is no longer the case, which gives rise to the need to revisit the question of whether the government should be put to the task of proving the defendant knew the victim was underage. *Kantor*'s precedent is binding here, as the majority found, but the issue is worth reconsideration by an *en banc* panel of this Court.

Because the district court erred by admitting Jackson's expert testimony and the Cellebrite report without making a reliability finding, by admitting the touching testimony, and by failing to sever the production counts from the travel and transport counts, I respectfully dissent in part, and I would send this case back for

new trials on the severed counts with instructions to the district court to reconsider its evidentiary rulings.

APPENDIX B

FILED

FEB 6 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TONY LEE MCLEOD, AKA Tony, Defendant-Appellant.	No. 16-50013 D.C. No. 3:13-cr-02297-JLS-1 Southern District of California, San Diego ORDER*

Before: BEA and MURGUIA, Circuit Judges, and MOLLOY,** District Judge.

The memorandum disposition filed on August 28, 2018, is amended as set out in the attached Amended Memorandum Disposition.

With that amendment, the majority of the panel has voted to deny the petition for panel rehearing. Judge Murguia and Judge Bea voted to deny the petition for rehearing en banc, and Judge Molloy has recommended denial. The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

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* This order is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

The petition for rehearing and rehearing en banc is therefore **DENIED** (Doc. 59).

No further petitions for rehearing will be accepted in this case.

NOT FOR PUBLICATION

FILED

FEB 6 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TONY LEE MCLEOD, AKA Tony, Defendant-Appellant.	No. 16-50013 D.C. No. 3:13-cr-02297-JLS-1 AMENDED MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Janis L. Sammartino, District Judge, Presiding

Argued and Submitted April 11, 2018
Pasadena, California

Before: BEA and MURGUIA, Circuit Judges, and MOLLOY,** District Judge.

Tony Lee McLeod was convicted by a jury of nine counts of persuading or attempting to persuade a minor to engage in sexually explicit conduct for the purpose of producing an image of that conduct, 18 U.S.C. § 2251(a), (e), one count of traveling with the intent to engage in illicit sexual conduct, 18 U.S.C. §2423(b),

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

and one count of transportation of a minor with the purpose of engaging in illicit sexual conduct, 18 U.S.C. § 2423(a). McLeod appeals his conviction, alleging the district court abused its discretion by: (1) failing to make a reliability finding on purported expert testimony concerning information obtained from a cell phone through a Cellebrite device, which he claims is required by Federal Rule of Evidence 702; (2) admitting testimony from one of the victims about physical contact between McLeod and the victim, over McLeod's objection based on Rule 403; and (3) failing to sever the § 2251 production counts from the § 2423 travel and transport counts. McLeod also asserts that § 2251 is unconstitutional as applied to him.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review the district court's evidentiary rulings and denial of McLeod's motion to sever for abuse of discretion. *See Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 460 (9th Cir. 2014) (en banc); *United States v. Beck*, 418 F.3d 1008, 1013 n.3 (9th Cir. 2005); *United States v. Leon-Reyes*, 177 F.3d 816, 821 (9th Cir. 1999); *United States v. Mayfield*, 189 F.3d 895, 899 (9th Cir. 1999). We review de novo his constitutional challenge to § 2251. *See United States v. Purdy*, 264 F.3d 809, 811 (9th Cir. 2001). We affirm.

1. McLeod argues the district court abused its discretion when it admitted Detective Damian Jackson's testimony at trial without making a

reliability finding under Rule 702. Rule 702 governs the admission of expert testimony and requires that proposed expert testimony be reliable. Further, under Rule 702, where the testimony's "factual basis, data, principles, methods, or [its] application" is called into question, a trial judge must make a reliability determination. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)).

It appears that the district court overruled McLeod's objections to Detective Jackson's testimony because the district court found that Detective Jackson had the experience and knowledge to present the contested documents, and nothing in his testimony required the district court to make additional findings about the testimony's reliability. *See id.* At trial, Detective Jackson testified about how he used a Cellebrite device during the course of his investigation to download information from one of the victim's cell phones onto a thumb drive and then testified about the contents of that information. He testified about what Cellebrite does and how he used it in the course of his investigation to extract information from the victim's cell phone. His investigation and Cellebrite use yielded readable text of the downloaded data, a link to images downloaded from the victim's cell phone, and "extraction reports." Detective Jackson also testified that he could select what data to extract from the phone through Cellebrite. In short, Detective Jackson testified about his use and interaction with Cellebrite—and how he

extracted data from one of the victim's phones in this case. We have previously allowed testimony similar to Detective Jackson's testimony without requiring that the testimony meet Rule 702's expert testimony requirements. *See United States v. Seugasala*, 702 F. App'x 572, 575 (9th Cir. 2017) ("The officers who followed the software prompts from Cellebrite and XRY to obtain data from electronic devices did not present testimony that was based on technical or specialized knowledge that would require expert testimony.").[1]

Nevertheless, the dissent asserts that Detective Jackson provided expert testimony subject to Rule 702. The dissent believes the district court erred by not making a reliability finding regarding Detective Jackson's testimony and accepting the information obtained through Cellebrite. However, even assuming that the district court erred in admitting Detective Jackson's testimony, the error was harmless. *See United States v. Spangler*, 810 F.3d 702, 708 (9th Cir. 2016) (holding that even assuming that the district court's decision to bar expert testimony was error, such error was harmless); *Estate of Barabin*, 740 F.3d at 464 (citing *United States v. Rahm*, 993 F.2d 1405, 1415 (9th Cir. 1993) (explaining that this court reviews improperly admitted expert testimony for harmless error). The record reflects that testimony from one of the victims and from one of the victim's

[1] That the *Seugasala* court reviewed for plain error is a distinction that does not change the fact that our court has previously allowed testimony similar to Detective Jackson's testimony.

aunts—in addition to testimony from Sarah Kranz, a computer forensics expert whose qualifications McLeod does not contest—independently supported the reliability of the information in the Cellebrite report. Therefore, assuming Detective Jackson's testimony about the Cellebrite report was admitted in error, the error was harmless because McLeod's conviction was not ultimately attributable to that error.

In sum, the district court did not abuse its discretion in admitting Detective Jackson's testimony. *See Harper v. City of Los Angeles*, 533 F.3d 1010, 1030 (9th Cir. 2008) ("We afford broad discretion to a district court's evidentiary rulings."); *see also Kumho Tire*, 526 U.S. at 149. And even if the district court erred, such error was harmless. *See Estate of Barabin*, 740 F.3d at 464.

2. The district court also did not abuse its discretion in admitting testimony from one of the victims concerning touching between the victim and McLeod in the car on the way to the Los Angeles International Airport and on the flight to Florida. The parties agree that the disputed testimony was probative of the transport and travel counts, but the testimony had low probative value as to the production counts. *See United States v. Gonzalez-Flores*, 418 F.3d 1093, 1098 (9th Cir. 2005) (explaining that the trial court should weigh the prejudicial effect of certain evidence against its probative value). McLeod points to no authority holding that evidence must be probative as to all charges against a defendant to be

admissible under Rule 403, which permits a district court to "exclude relevant evidence if its probative value is substantially outweighed by," among other things, unfair prejudice. *See United States v. Jayavarman*, 871 F.3d 1050, 1063 (9th Cir. 2017) (quoting Fed. R. Evid. 403).

McLeod argues that the district court erred by admitting the victim's testimony regarding the touching because it was not probative of the production counts, irrelevant to the production count related to the other victim, and its graphic nature was highly prejudicial. However, McLeod points to no authority holding that testimony must be probative of all charges.[2]

Moreover, the contested testimony was not unduly prejudicial. Given all the charges against McLeod, and the sexually explicit and graphic nature of the other evidence presented at trial that was probative of the production charges, the district court permissibly concluded that in this context, admitting the victim's testimony was not extraordinarily inflammatory. *Jayavarman*, 871 F.3d at 1063–64 (holding that the district court did not err under Rule 403 where it admitted audio recordings of the defendant's statements that he had sex with the victim when she was thirteen or fourteen years old because the probative value of the evidence was very high and that "value was not substantially outweighed by any risk of unfair prejudice that might have arisen from the evidence, especially in the context of other

[2] The dissent makes similar arguments as McLeod on this issue.

evidence adduced at trial"); *United States v. Higuera-Llamos*, 574 F.3d 1206, 1209 (9th Cir. 2009) ("The district court is to be given 'wide latitude' when it balances the prejudicial effect of proffered evidence against its probative value.") (citation omitted). Although courts must take care to prevent emotionally charged evidence that may lead to a decision on an improper basis, *see Gonzalez-Flores*, 418 F.3d at 1098, we review a district court's decision to admit or exclude evidence with great deference, *see United States v. Hinkson*, 585 F.3d 1247, 1267 (9th Cir. 2009). The dissent reweighs the testimony's prejudicial value without considering the deference we afford district courts. On this record, it was not an abuse of discretion for the district court to admit the contested testimony.

3. Assuming McLeod did not waive his motion to sever the transport and travel counts from the production counts by failing to renew the motion at the close of evidence, McLeod bears the burden of proving the undue prejudice he suffered from the joint trial. *See United States v. Vasquez-Velasco*, 15 F.3d 833, 845 (9th Cir. 1994). Federal Rule of Criminal Procedure 14 "sets a high standard for a showing of prejudice." *Id.* McLeod argues that because the contested victim testimony had no bearing on the production charges, only on the travel and transportation count, its admission prevented him from receiving a fair trial. The dissent argues substantially the same thing as McLeod. However, as discussed above, the district court did not err in admitting the victim's testimony regarding

touching between the victim and McLeod.

Moreover, we have previously held that district courts do not abuse their discretion by denying motions to sever in cases that involve potentially inflammatory evidence. *See Vasquez-Velasco*, 15 F.3d at 846–47 (holding that the district court did not abuse its discretion in denying defendant's motion to sever where the defendant did not "present[] any reasons, other than the emotionally-charged nature of [one of the] murder[s], as to why the jury would be unable to consider separately the evidence that applies to the two pairs of murders."); *United States v. Smith*, 795 F.2d 841, 850–51 (9th Cir. 1986) (holding that the district court did not abuse its discretion in refusing to sever a felon in possession of a firearm charge from child pornography counts under Federal Rule of Criminal Procedure 14 where defendant argued evidence of the gun would "inflame[] an already emotionally charged trial and invited the jury to infer that Smith would have used the gun to threaten or kill the children if they had refused to allow him to take their pictures").

Here, McLeod's charges all arose from related conduct concerning his communication with the victims and the subsequent enticement of one of the victims to leave with McLeod for Florida with the intention of engaging in illicit sexual conduct. Indeed, McLeod's underlying conduct as to all charges was sufficiently related such that the nature of the evidence, within the context of this

case, was not unduly inflammatory. *See Jayavarman*, 871 F.3d at 1063–64.

Further, for the reasons discussed above, trying all counts in the same trial "was not so manifestly prejudicial that it outweigh[ed] the dominant concern with judicial economy and compel[led] the exercise of the court's discretion to sever." *United States v. Lopez*, 477 F.3d 1110, 1116 (9th Cir. 2007) (internal quotation marks and citation omitted) (alterations in original). Accordingly, McLeod has not met his burden of proving that he was prejudiced from the joint trial. *See Vasquez-Velasco*, 15 F.3d at 845.

4. Finally, McLeod argues that his due process rights were violated when he was convicted under 18 U.S.C. § 2251(a) without requiring proof that he knew the victims were underage. McLeod's constitutional challenge is precluded by *United States v. U.S. Dist. Court for Cent. Dist. of Cal., L.A.*, 858 F.2d 534, 538 (9th Cir. 1988) (holding that "knowledge of the minor's age is not necessary for conviction under section 2251(a).").

Accordingly, the district court did not commit any reversible error on any issue on appeal, and we affirm.

AFFIRMED.

United States v. Tony Lee McLeod, AKA Tony, No. 16-50013

MOLLOY, District Judge for the District of Montana, dissenting in part and concurring in part:

I respectfully disagree with the majority reasoning and rulings in this case.

1. The district court abused its discretion when it admitted Detective Jackson's expert testimony without making a reliability finding, and the error prejudiced McLeod.

First, Jackson provided expert testimony. *See* Fed. R. Evid. 702(a). Jackson testified based on technical knowledge—specifically, technical knowledge about the use of the Cellebrite device. Jackson testified as to what the Cellebrite device is, what it does, how it works, and what it produces. Jackson also testified he performed a "logical extraction" on the Blackberry, and explained the resulting report to the jurors at length.

The majority cites to *United States v. Seugasala* for the proposition that testimony by an officer who uses Cellebrite to extract the contents of a cellular device is not expert testimony. 702 F. App'x 572, 575 (9th Cir. 2017). But *Seugasala*, a non-binding memorandum opinion, involved plain error review, not abuse of discretion. Moreover, simply because the user can follow prompts from the program does not mean that expert testimony is not required or that the underlying technology is reliable. In the context of this case, McLeod presented

evidence that the Cellebrite device Jackson used can produce significant errors, including not acquiring files and misreporting data.

Even if Jackson only provided lay testimony, as the majority found, he nevertheless received the court's expert imprimatur in front of the jury. *See Barefoot v. Estelle*, 463 U.S. 880, 926–27 (1983), *superseded by statute on other grounds*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214 (1996), *as recognized in Slack v. McDaniel*, 529 U.S. 473 (2000) ("Where the public holds an exaggerated opinion of the accuracy of scientific testimony, the prejudice is likely to be indelible."). The district court stated that, based on Jackson's experience, he was "more than qualified" to testify about the Cellebrite report. When McLeod objected to further introduction of the Cellebrite report into evidence, the district court stated Jackson "[had] . . . the experience and the knowledge to present the[] documents." Later, the district court overruled McLeod's relevance objection as the government questioned Jackson about his continued use of Cellebrite in the years *following* the extraction at issue in this case. In other words, the district court first endorsed Jackson as an expert, and then permitted the government to bolster Jackson's credentials in front of the jury.

Second, the district court made no reliability finding before admitting Jackson's testimony and the Cellebrite report. "[T]he failure to make an explicit

reliability finding [i]s error," even where "the district court's ruling suggests an implicit finding of reliability." *United States v. Jawara*, 474 F.3d 565, 583 (9th Cir. 2007) (citation omitted).

While erroneous admission of expert testimony is harmless where the record shows the witness was reliable and qualified, *see United States v. Figueroa-Lopez*, 125 F.3d 1241, 1247 (9th Cir. 1997), the record here casts doubt on Jackson's qualifications. Although Jackson testified he holds multiple computer forensic certifications, none of them pertained to Cellebrite, and they all post-dated his work with the victim's Blackberry. He was not certified by Cellebrite to perform extractions, seemed unsure about the types of Cellebrite extractions that could be performed, and did not know when the device he used was last updated. Jackson's lack of certification is particularly troubling given that, as McLeod notes, Cellebrite itself "strongly encourages all users to attend certification training in order to best understand—and explain—how to extract, decode, analyze and document mobile device evidence using these advanced methodologies." In short, Jackson's testimony did not demonstrate reliable scientific or technical principles reliably applied. *See* Fed. R. Evid. 702.

Third, Jackson's report and testimony prejudiced McLeod. Where evidence has been improperly admitted, this Court must "consider whether the error was harmless." *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 464 (9th Cir.

2014) (quotation and citation omitted). Prejudice is presumed, and the burden is on the benefitting party to show "that it is more probable than not that the jury would have reached the same verdict even if the evidence had not been admitted." *Id.* at 464–65 (quotation and citation omitted). "Prejudice is at its apex when the district court erroneously admits evidence that is critical to the proponent's case." *Id.* at 465.

Jackson's testimony and the Cellebrite report were critical to the government's case. The government relied on the report to establish which messages were sent and received, as well as the time of each message. The timing of the messages rebutted McLeod's claim that he did not know the victim was a teenager when the images were produced. The government also used the Cellebrite report to create demonstrative exhibits showing a "more readable" format that was "closer to the way [the messages] would have looked on the [Blackberry] device when the individual was holding it." The government relied on that report in closing.

In sum, the district court erred when it allowed Detective Jackson to provide expert testimony without making a reliability finding and accepted the Cellebrite report he prepared. That error was not harmless because it involved evidence critical to the government's case, prejudicing McLeod. Reversal and a new trial is appropriate for this reason and for the additional reasons set forth below.

2. The district court abused its discretion when it admitted the victim's testimony that McLeod molested him. While that testimony is relevant to McLeod's intent regarding the travel and transportation counts, *United States v. Dhingra*, 371 F.3d 557, 565 (9th Cir. 2004), it had limited, if any, relevance to the production counts, and its probative value was substantially outweighed by its prejudicial effect, Fed. R. Evid. 403.

Relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice." *Id.* "The probative value of evidence against a defendant is low where the evidence does not go to an element of the charge." *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1098 (9th Cir. 2005). In this case the proper balance of fairness and "judicial economy" should tip to the defendant's right to a fair trial.

McLeod faced nine counts of persuading, or attempting to persuade, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of the conduct, in violation of 18 U.S.C. § 2251; one count of traveling for the purpose of engaging in illicit sexual conduct with a minor, in violation of 18 U.S.C. § 2423(b); and one count of transporting a minor with the intent of engaging in criminal sexual activity, in violation of 18 U.S.C. § 2423(a). Of these eleven charges, the touching testimony was probative of only two—the travel and transportation counts—because those required the government to prove McLeod

had the intent to engage in illicit sexual conduct. *See Dhingra*, 371 F.3d at 565 (where intent was a "key element" of the charge—coercion of a minor in violation of 18 U.S.C. § 2422—testimony that defendant fondled victim was not unduly prejudicial, even though sexual contact was not an element of the offense). Morever, "what counts as the Rule 403 'probative value' of an item of evidence, as distinct from its Rule 401 'relevance,' may be calculated by comparing evidentiary alternatives." *Old Chief v. United States*, 519 U.S. 172, 184 (1997). In this case, the text messages provided alternative evidence of McLeod's intent, further diminishing the probative value of the touching testimony even as to those two counts. *See id.*

On the other hand, the testimony was not probative of any of the elements the government had to prove for the production counts, which were that (1) the victims were minors, (2) McLeod persuaded (or attempted to persuade) them to take part in sexually explicit conduct for the purpose of producing a visual depiction, and (3) the visual depictions were transported in or affecting interstate or foreign commerce by any means, including by computer. 18 U.S.C. § 2251(a). Sexual contact between the defendant and the victim is not an element, as the government conceded in its pretrial brief opposing severance. The district court reasoned that the testimony "would be relevant to rebut a defense that the defendant did not know that the victim was a minor" because "the subsequent acts

tend[ed] to rebut the inference raised by such a defense that the defendant would not have committed the acts had he known the minor's age." But the victim testified before McLeod presented his case, which forced McLeod into rebuttal regardless. The same forced hand ruling took place in a pretrial exchange between the court and defense counsel. Further, one of the production counts involved a different victim than the one who testified about the physical contact, meaning not only that the touching testimony was not probative of that count, but was not even relevant.

McLeod suffered unfair prejudice because of the touching testimony. "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief*, 519 U.S. at 180. "In other words, unfairly prejudicial evidence is that having 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" *Gonzalez-Flores*, 418 F.3d at 1098 (quoting *Old Chief*, 519 U.S. at 180). "Where the evidence is of very slight (if any) probative value, it's an abuse of discretion to admit it if there's even a modest likelihood of unfair prejudice or a small risk of misleading the jury." *Id.* (quotation and citation omitted). A fair trial cannot be dependent on a "guilty anyway" assessment of the evidence or the joinder of charges.

The graphic testimony about uncharged conduct was highly prejudicial. Because it described sexual physical contact between the victim and McLeod, it differed in kind from the texting, photo, and video evidence otherwise presented. As to the production charges, then, the testimony was evidence "lur[ing] the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief*, 519 U.S. at 180. Finally, while the testimony itself occupied little trial time, it required significant rebuttal—seven witnesses, including three flight attendants, two passengers, an FBI agent, and a forensic biologist. Had the counts been tried separately, the defendant may have prevailed in his defense. Tried together, the defense to the touching was rendered meaningless by virtue of the nature of the crimes and the reality of propensity proof.

The district court erred by admitting the touching testimony because it was not probative of the production counts and presented an unacceptably high risk of prejudice. Reversal for a new trial on this ground is appropriate.

3. The district court's failure to sever the travel and transportation counts from the production counts after it decided to admit the touching testimony abridged McLeod's right to a fair trial. *United States v. Lewis*, 787 F.2d 1318, 1321 (9th Cir. 1986), *amended on denial of reh'g*, 798 F.2d 1250 (9th Cir. 1986).

First, while McLeod failed to renew his motion to sever, he briefed and

argued it pretrial and also argued the touching testimony warranted severance in his motion for a new trial. Further, severance was inextricably bound up in the admission of the touching testimony, so much so that the district court's decision not to sever was premised on its conclusion that the touching testimony was relevant to the production counts. Because severance had been thoroughly litigated, renewal would have been an "unnecessary formality," *United States v. Vasques-Velasco*, 15 F.3d 833, 845 (9th Cir. 1994), and McLeod did not waive the issue.

The question here "is whether joinder was so prejudicial that the trial judge was compelled to exercise his discretion to sever." *Lewis*, 787 F.2d at 1321. "There is a high risk of undue prejudice whenever . . . joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible." *Id.* (citation omitted) (alteration in original). McLeod "has the burden of proving that the joint trial was manifestly prejudicial," meaning that his "right to a fair trial was abridged." *Id.* (citations omitted). In my view he has satisfied that burden.

The district court concluded the touching testimony was relevant to the production counts because it rebutted what the court presumed was McLeod's affirmative defense—that he did not know the victims were underage. But the testimony does not go to any element of the production charges, and allowing the

government to introduce that evidence in its case in chief put the cart before the horse. Whether McLeod touched the victim after the two exchanged photos and video does not make it more likely that he knew how old the victim was *during* those exchanges. The problem here was that the testimony was not probative of the production counts but in the jury's mind was more than likely evidence of bad character. *See id.* at 1322. Such prejudice would have been at its peak regarding the production count concerning the other victim.

Nor were the district court's instructions to the jury that it could consider evidence of other uncharged acts "only for its bearing, if any, on the question of the defendant's intent and for no other purpose," and that it could not "consider [such] evidence as evidence of guilt of the crimes for which the defendant is now on trial" sufficient to cure the prejudice. This Court has expressed skepticism that "general instructions" can "ameliorat[e] the prejudice arising from joinder." *Bean v. Calderon*, 163 F.3d 1073, 1084 (9th Cir. 1998); *see also Lewis*, 787 F.2d at 1323 ("To tell a jury to ignore the defendant's prior convictions in determining whether he or she committed the offense being tried is to ask human beings to act with a measure of dispassion and exactitude well beyond mortal capacities." (quoting *United States v. Daniels*, 770 F.2d 1111, 1118 (D.C. Cir. 1985)).

In my opinion, the district court abused its discretion by refusing to sever the production counts from the travel and transport counts once it decided to admit the

touching evidence. Reversal and a new trial with the counts severed is appropriate here.

4. McLeod argues that because he did not meet the victims face-to-face before they sent him the pictures and videos—and so could not ascertain that they were minors—his due process rights were violated when he was convicted under 18 U.S.C. § 2251(a) without requiring proof that he knew the victims were underage. I agree with the majority that McLeod's challenge to the constitutionality of 18 U.S.C. § 2251 is foreclosed by *United States v. U.S. Dist. Court for Cent. Dists. of Cal., L.A. ("Kantor")*, 858 F.2d 534 (9th Cir. 1988). However, McLeod's argument that *Kantor*'s rationale is inapplicable to the facts of his case is not without some merit.

The defendants in *Kantor* were charged under § 2251 after they produced a sexually explicit film with a sixteen-year-old performer. *Id.* at 536. They sought to present as a defense evidence that the performer misled them by "pass[ing] herself off as an adult," and argued their First Amendment and due process rights required the government to prove they knew she was a minor. *Id.* A panel of this Court considered the legislative history of § 2251(a), noting that the omission of a *mens rea* requirement "was quite clearly deliberate." *Id.* at 538. Nevertheless, *Kantor* concluded that because § 2251 regulates speech, and "the first amendment [sic] does not permit the imposition of criminal sanctions on the basis of strict

liability where doing so would seriously chill protected speech . . . . imposition of major criminal sanctions on the[] defendants without allowing them to interpose a reasonable mistake of age defense would choke off protected speech." *Id.* at 540–41. Accordingly, *Kantor* held that, as to *mens rea*, "[a] defendant may avoid conviction only by showing, by clear and convincing evidence, that he did not know, and could not reasonably have learned, that the actor or actress was under 18 years of age." *Id.* at 543 (footnotes omitted). *Kantor* did not reach the defendants' due process claim. *Id.* at 538.

The Supreme Court, considering 18 U.S.C. § 2252, a related statute which prohibits distributions of child pornography, addressed whether the statute required that a defendant know that the person in the images distributed was a minor. *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994). In its analysis, the Supreme Court contrasted the legislative history of § 2252 with that of § 2251, noting that Congress intentionally omitted "knowingly" from § 2251 but not from § 2252. *Id.* at 76. And in a footnote, it noted that "[t]he difference in congressional intent with respect to § 2251 versus § 2252 reflects the reality that producers are more conveniently able to ascertain the age of performers," and cited to *Kantor* for the proposition that "[i]t thus makes sense to impose the risk of error on producers." *Id.* at 76 n.5.

McLeod argues *Kantor*'s "rationale is inapplicable to [his] case, which involves indirect communications over the internet—a forum known to be rife with inaccurate information." In other words, McLeod argues the facts of his case make him more akin to a distributor than to a producer. McLeod is correct that Congress could not have envisioned the circumstances of his case when it enacted § 2251, and also correctly notes that the "producer" rationale underlying *Kantor* and *X-Citement Video* seems to contemplate face-to-face meeting between the defendant and the minor. The technology innovation since *Kantor* was decided raises a serious question as to the factual predicate to its reasoning. That technology did not exist when Congress enacted § 2251, nor was it available when *Kantor* was decided. When the law was enacted, and when *Kantor* was decided, a producer, almost of necessity, had to encounter the minor to produce the illicit film or image. That is no longer the case, which gives rise to the need to revisit the question of whether the government should be put to the task of proving the defendant knew the victim was underage. *Kantor*'s precedent is binding here, as the majority found, but the issue is worth reconsideration by an *en banc* panel of this Court.

Because the district court erred by admitting Jackson's expert testimony and the Cellebrite report without making a reliability finding, by admitting the touching testimony, and by failing to sever the production counts from the travel and transport counts, I respectfully dissent in part, and I would send this case back for

new trials on the severed counts with instructions to the district court to reconsider its evidentiary rulings.