

No. _____

**In The
Supreme Court of the United States**

————— ♦ —————

KYLE STEPHEN THOMPSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

————— ♦ —————

**ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

————— ♦ —————

PETITION FOR WRIT OF CERTIORARI

————— ♦ —————

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QUESTION PRESENTED

18 U.S.C. § 2251(a) is one part of the federal scheme to combat sexual exploitation of minors. Section 2251(a) singles out for severe penalties those defendants who, not only induce or coerce a minor to engage in “sexually explicit conduct,” but do so “*for the purpose of*” producing a visual depiction of such conduct. *Id.* (emphasis supplied). There is a split in the circuits concerning an important and recurring question about the “purpose” element of § 2251(a), in those cases where the defendant has multiple purposes for inducing or coercing a minor to engage in sexually explicit conduct:

Whether the “for the purpose of” element of § 2251(a) means the defendant’s prevailing or most influential purpose for the sexually explicit conduct was to produce a visual depiction of it?

**PARTIES TO PROCEEDING AND
RELATED CASES**

The parties to the proceeding in this Court appear on the cover of the petition. There is a proceeding in Maryland state court directly related to the case in this Court:

- *Maryland v. Kyle Thompson*, Circuit Court for Montgomery County, Case No. 131547 (Criminal). Judgment entered on March 8, 2019.
- *Kyle Thompson v. Maryland*, 226 A.3d 871 (Md. App. 2020). Judgment entered on April 7, 2020. Reconsideration denied on June 24, 2020. Petition in the Maryland Court of Appeals for a writ of certiorari to the Maryland Court of Special Appeals denied on September 25, 2020. 2020 WL 6036447 (2020).

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**IN THE
SUPREME COURT OF THE UNITED STATES**

KYLE STEPHEN THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

PETITION FOR WRIT OF CERTIORARI

Kyle Stephen Thompson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The *per curiam* opinion of the United States Court of Appeals for the Fourth Circuit is unpublished and reproduced in its entirety in the appendix. Pet. App. 1a. The order on rehearing or rehearing *en banc* is included. Pet. App. 7a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fourth Circuit entered its judgment denying the petition for

rehearing or rehearing *en banc* on May 27, 2020. Pet. App. 7a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 2251(a) provides, in pertinent part:

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) [].

18 U.S.C.A. § 2251(a) (Pet. App. 25a)

STATEMENT OF THE CASE

This case concerns an important question of statutory interpretation that has deeply divided the circuits. The issue of the “purpose” element of § 2251(a) is important and likely to recur in future cases where the evidence demonstrates multiple purposes for a defendant to engage in sexually explicit conduct with a minor. Here, the district court defined the “purpose” element of § 2251(a) to be “one of the defendant’s purposes” that was a “significant or motivating purpose and was not merely incidental to the sexually-explicit conduct.” Pet. App. 3a. Under this definition, the district court instructed the jury

that a “purpose” that is “not merely incidental” would satisfy the level of proof Congress intended when it used the words “for the purpose of” in the statute. That instruction is contrary to the plain language of the statute and deepens a conflict with other circuits. The panel affirmed the decision of the district court in a *per curiam* opinion and denied a petition for rehearing or rehearing *en banc*. Pet. App. 1a, 7a.

1. On April 5, 2017, a federal grand jury for the District of Maryland returned an indictment charging Mr. Thompson with 18 counts of Production of Child Pornography, in violation of 18 U.S.C. § 2251(a). The 18 counts were based on videos recorded between May 9, 2015, and January 28, 2017, of Mr. Thompson engaging in sexually explicit conduct with three young girls. Law enforcement seized the videos during the execution of a state court search warrant on March 17, 2017, at Mr. Thompson’s residence in Montgomery County, Maryland.

2. Mr. Thompson was tried before a jury in the U.S. District Court for the District of Maryland (Southern Division). At the close of the government’s case in chief, Mr. Thompson moved for judgment of acquittal on the grounds that the evidence of “purpose” necessary to sustain a conviction under 18 U.S.C. § 2251(a) was insufficient. The court below denied Mr. Thompson’s motion for judgment, and his subsequent request for a jury instruction on his theory of defense. The jury convicted Mr. Thompson on each count of production of child pornography. On January 30, 2019, the district court sentenced Mr. Thompson to a total of 5,040 months of

imprisonment.¹ Mr. Thompson timely filed a notice of appeal on February 4, 2019.

3. The record clearly reflects Mr. Thompson's challenge to the sufficiency of the evidence and the instruction to the jury. Mr. Thompson's sole contention at trial was that he did not, in violation of § 2251(a), coerce the child victims to engage in sexually explicit conduct "for the purpose of" producing a visual depiction of that conduct. There is no question that Mr. Thompson voluntarily created video depictions of his sexual abuse. The video depictions were certainly the result of Mr. Thompson's sexual abuse of the children, but not the purpose for such conduct. Based on the evidence at trial, the jury could have rationally concluded that Mr. Thompson sexually abused the child victims *and* created video depictions of the abuse, but that he did not sexually abuse the children *to* create the videos. For precisely this reason, it was crucial for the district court to adequately instruct the jury on the meaning of "*for the purpose of*" to ensure that Mr. Thompson, who disputed no other element, had a fair opportunity to present his defense.

¹ On April 13, 2017, a state grand jury for the circuit court of Montgomery County returned an indictment charging Mr. Thompson with 78 counts of sex abuse of a minor and related sex offenses depicted in the videos. *State v. Kyle Stephen Thompson*, case no. 131547C (circuit court for Montgomery County, Maryland). Following his federal trial in the case at hand, Mr. Thompson entered a conditional guilty plea in state court to ten counts of the indictment, preserving his right to appeal the denial of his motions to suppress a search warrant of his residence. On March 8, 2019, the state court sentenced Mr. Thompson to three consecutive life terms plus 145 years, consecutive to his federal sentence.

4. The Fourth Circuit affirmed, holding that the district court’s instruction adequately informed the jury of the controlling legal principles. Pet. App. 3a. The panel alternatively held that even if it assumed error, “such error would have been harmless given the overwhelming evidence that producing videos was one of Thompson’s purposes – and not merely an incidental one – when he engaged in the sexually explicit conduct.” Pet. App. 4a. However, the question is not about sufficiency of evidence but about what Congress intended when it used the language “for the purpose of” to link a defendant’s “purpose” to his “sexually explicit conduct.” On Mr. Thompson’s petition for rehearing and rehearing *en banc*, the lower court denied relief.

This petition follows.

REASONS FOR GRANTING THE WRIT

*The Lower Court’s Decision is in Conflict
with the Plain Language of the Statute
and Decisions of Other Federal Courts of
Appeals*

The divided decisions in the lower courts has spawned enormous confusion, and persistent conflict, in the district courts. The issue has percolated in the lower courts long enough to show that a consensus view is unlikely to emerge. This case provides a proper vehicle for the Court to provide authoritative guidance to the district courts that must instruct juries about the level of proof Congress intended when it used the words “for the purpose of” in the statute. The decision of the court below is in conflict with the plain language of the statute and decisions of at least

three federal courts of appeals. The petition should be granted to review this important question that is likely to recur in future cases.

Section 2251(a) covers a broad category of sexually explicit conduct with minors that is motivated by the purpose of creating a visual depiction of such conduct. It is not, however, a child sexual abuse statute. State law targets the sexual abuse itself—see, *e.g.*, MD. CODE ANN., CRIM. LAW ART., § 3-602 (sex abuse of a minor)—crimes for which Kyle Thompson received three consecutive life terms plus 145 years in Maryland state court. Ordinarily, Congress is seen by the courts as “traditionally [] reluctant to define as a federal crime conduct readily denounced as criminal by the States.” *United States v. Bass*, 404 U.S. 336, 349 (1971). The “purpose” element of § 2251(a) services the important function to limit the reach of the federal statute whenever there is a visual depiction of child sexual abuse. However, the circuits are sharply divided over the meaning of the “purpose” element of § 2251(a).

In *United States v. Torres*, 894 F.3d 305 (D.C. Cir. 2018), the D.C. Circuit assumed “that the government must show that the purpose of producing a visual image was a defendant’s dominant motive for using, inducing, or coercing a minor’s sexual conduct.” *Id.* at 312. At the other end of the divide, are the First, Seventh, and Eleventh Circuits. The First Circuit holds that “a” purpose of “the defendant must be to foster sexually explicit conduct by a minor in order to make a visual depiction of it.” *United States v. Ortiz-Graulau*, 526 F.3d 16, 19 (1st Cir. 2008). The Seventh Circuit holds that “the ‘purpose’ element of § 2251 is

proven by the mere fact that the Defendant personally took a photo of ... a minor engaging [in] sexually explicit conduct.” *United States v. Fifer*, 188 F. Supp. 3d 810, 820 (C.D. Ill. 2016); *aff’d*, 863 F.3d 759, 768 (7th Cir. 2017) (the government need only prove the defendant “intentionally induced” a minor to engage in sexually explicit conduct with a purpose to produce illegal visual depictions). Similarly, the Eleventh Circuit rejects a “dominant motive” requirement, holding that “one” purpose is enough. *United States v. Lebowitz*, 676 F.3d 1000, 1013 (11th Cir. 2012) (“The Government did not have to prove that Lebowitz was single-minded in his purpose.”).

In the middle of the divide, the Second and Eighth Circuits require proof that the purpose of producing a visual image was one of the defendant’s dominant motives. See, *United States v. Sirois*, 87 F.3d 34, 39 (2d Cir. 1996) (§ 2251(a) requires proof that illegal sexual activity for the production of visual depictions of that activity was one of the defendant’s dominant motives); *United States v. Raplinger*, 555 F.3d 687, 693 (8th Cir. 2009) (government must prove only that “one” of the defendant’s “dominant purposes” was to produce sexually explicit images).

The Third and Fourth Circuits hold that § 2251(a) contains a specific intent requirement and that the government must prove that production of a visual depiction was “a” purpose of engaging in the sexually explicit act that is not merely incidental to the sexually explicit conduct. *United States v. Crandon*, 173 F.3d 122, 129 (3d Cir. 1999) (interpreting analogous cross-reference under U.S.S.G. § 2G2.1(c)(1) to require proof of specific

intent); *United States v. Palomino-Coronado*, 805 F.3d 127, 131-32 (4th Cir. 2015) (“a defendant must engage in the sexual activity with the specific intent to produce a visual depiction”).

To be sure, the dividing line is not that § 2251 requires that a defendant be single-minded in his purpose. See, e.g., *United States v. Morales-de Jesus*, 372 F.3d 6, 21-22 (1st Cir. 2004); *United States v. Cox*, 744 F.3d 305, 309 (4th Cir. 2014) (“purpose” in context of sentencing guidelines governing production of some child pornography offenses). Rather, the conflict in the lower courts arises in the frequently encountered context where there are multiple purposes for the defendant to induce, entice, or coerce “any minor to engage in, ... any sexually explicit conduct[.]” § 2251(a). In this analytical gap, clarity is required.

The confusion is evident in the case at hand. Here, the lower court defined “for the purpose of” in both positive and negative ways that effectively cancelled each other out and reduced the government’s burden of proof. The elements of the lower court’s definition of engaging in sexually explicit conduct “for the purpose of” producing a visual depiction told the jury that (1) the “purpose” can be one of many purposes; (2) the “purpose” does not have to be the primary purpose; (3) the “purpose” must be “significant” or “motivating” and, (4) the “purpose” cannot be merely “incidental.” Linking “motivating” purpose to “significant” purpose in the alternative lowers the bar. In any case, the “not incidental” element lowers the bar of a “significant or motivating” purpose below the level of proof Congress intended when it used the

words “for the purpose of” in the statute. As long as the defendant’s purpose is not “incidental” it qualifies.

Thompson proposed the following instruction be given:

“For the purpose of” means that producing a visual depiction was Defendant’s motivating purpose for using, employing, persuading, inducing, enticing, or coercing the victim to engage in sexually explicit conduct. The Government does not have to prove that Defendant’s sole purpose for engaging in such conduct was to produce a visual depiction. But where there are two or more purposes to engage in such conduct, the Government must prove that Defendant’s prevailing or most influential purpose was to produce a visual depiction of the sexually explicit conduct.

(CA4 Appeal: 19-4085; JA 113). Thompson’s proposed instruction is aligned with the statutory text, its history, and the views expressed by the D.C. Circuit in *Torres*, 894 F.3d at 312.

The § 2251(a) requirement that conduct is undertaken “for the purpose of” has a history in the Mann Act with a similar purpose. Pub. L. No. 61-277, 36 Stat. 825 (1910), *codified as amended at* 18 U.S.C. §§ 2421-2424. Because the language of the Mann Act is similar to the language of the statute at issue, its jurisprudential history is instructive. *See generally United States v. Vang*, 128 F.3d 1069 (7th Cir. 1997). In an early case involving that provision,

Mortenson v. United States, 322 U.S. 369 (1944), the Court stated that an intention to transport women across state lines for the purpose engaging in the conduct outlawed by the Act “... must be the *dominant* motive of such interstate movement.” *Id.* (emphasis added). In other words, intent to bring about illegal sexual conduct through transportation was required before the Mann Act could have been violated. Notably, *Mortenson* considered the petitioner’s intent to transport two woman for a vacation trip as a whole and did not disaggregate the interstate travel to find the requisite purpose had been satisfied by some part of the whole, *i.e.*, the return portion of the trip to the petitioner’s “house of ill fame.” *Id.* at 372.

The D.C. Circuit’s assumption in *Torres*, 894 F.3d 305, that the government must prove the production of a visual depiction of child was a defendant’s dominant motive, is most closely aligned with the plain language of the statute and its historical use in the Mann Act. Those circuits that hold § 2251 does not require the government to prove a defendant engaged in the illegal sexual activity with the dominant purpose to produce child pornography, have diluted the “purpose” requirement of the statute. It is illogical to conclude that “the purpose” requires proof only of “one of the dominant motives and not a mere incident” to the activity. See *e.g.*, *Sirois*, 87 F.3d at 39; *Raplinger*, 555 F.3d at 693; *Palomino-Coronado*, 805 F.3d at 131.

Congress used language in the statute that plainly requires the government to prove a defendant’s prevailing or most influential purpose was to produce a visual depiction of the sexually explicit conduct. The

lengthy mandatory minimum penalty indicates that Congress likely meant that, to be guilty, a defendant must be found to have given the production of child pornography the highest priority of the sexual conduct. Indeed, as originally enacted, Congress used the phrase “for the purpose of” so that § 2251(a) *could* target producers of child pornography who employed, used, enticed, *etc.* any minor to engage in “sexually explicit” (but not necessarily obscene) conduct:

Section 2251(a) makes it a federal crime for any person knowingly to employ, use, persuade, induce, entice, or coerce any minor to engage in, or to have a minor assist any other person to engage in, any sexually explicit conduct, for the purpose of promoting any film, photograph, negative, slide, book, magazine, or other print or visual medium, if such person knows or has reason to know that such film, photograph, negative, slide, book, magazine, or other print or visual medium will be mailed or otherwise transported in interstate or foreign commerce.

S. Rep. 95-438, 20, 1978 U.S.C.C.A.N. 40, 57. Section 2251 was designed to target the crime of production of child pornography, as opposed to child sexual abuse, which is a matter ordinarily covered by state law:

The proponents of s.1585 insist that the best way to put a prompt and effective end to the mischief is to make the

production of child pornography a federal crime. Accordingly, the bill provides, under section 2251, that it shall be unlawful for anyone knowingly to persuade or force any minor to engage in “sexually explicit conduct” for the purpose of promoting any film, book, or magazine, if this person knows or has reason to know that such material will be mailed or otherwise transported in interstate or foreign commerce.

The term “sexually explicit conduct” is the key to an understanding and appreciation of this legislation, because it extends beyond more obscenity, as defined by the supreme court, and includes every form of sexual behavior, whether actual or simulated. This bill, in other words, does not forbid simply the production of obscene materials, but all materials which portray the kinds of “sexually explicit conduct” that are proscribed under section 2251.

With regard to the sale and distribution of these materials, however, s.1585 attacks the problem simply by increasing the penalties for the distribution of obscene materials where children are depicted. Thus the bill contains a double standard, one for the producers of child pornography (“sexually explicit conduct”) and another

for the distributors (obscenity as legally defined).

S. Rep. 95-438, 31, 1978 U.S.C.C.A.N. 40, 66.

Congress “very well could have criminalized the conscious production of child pornography, but it did not, at least not in § 2251(a).” *Torres*, 894 F.3d at 321 (concurring and dissenting). Rules of statutory construction call for the reading of the statute as a whole. “Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). “It is our duty ‘to give effect, if possible, to every clause and word of a statute.’” *United States v. Menasche*, 348 U.S. 528, 538-539 (1955). As the Court has repeatedly stated, “the meaning of statutory language, plain or not, depends on context.” *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Moreover, if the meaning of the standard “for the purpose of” is unclear, then the rule of lenity applies. *Reno v. Koray*, 515 U.S. 50, 65 (1995) (Rule of lenity applies when, “after seizing everything from which aid can be derived, ... we can make no more than a guess as to what Congress intended.”) (internal citations omitted).

In a case such as the matter at hand, where the evidence shows multiple purposes for the defendant to induce or coerce a minor to engage in sexually explicit conduct, the defendant’s purpose to produce a visual depiction of such conduct must be “the purpose of” the conduct. In other words, if there are multiple

purposes, it must be the defendant's primary purpose. The jury should be so instructed. It is contrary to the plain language of the statute for courts to instruct the jury that the "purpose" element of § 2251(a) means "a" purpose that is "not merely incidental." In short, § 2251(a) requires the defendant's purpose of producing child pornography to be "*the* purpose" for inducing or coercing the child victim to engage in sexually explicit conduct.

CONCLUSION

This case presents the Court an opportunity to resolve the conflict among the lower courts and provide authoritative guidance to the district courts on an important and recurring question. In the public interest, the petition for issuance of a writ of certiorari should, respectfully, be granted.

Respectfully Submitted,

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APPENDIX

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[ENTERED: April 6, 2020]

UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

No. 19-4085

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

KYLE STEPHEN THOMPSON,
Defendant - Appellant.

Appeal from the United States District Court for the
District of Maryland, at Greenbelt. Theodore D.
Chuang, District Judge. (8:17-cr-00195-TDC-1)

Submitted: January 30, 2020 Decided: April 6, 2020

Before MOTZ, DIAZ, and HARRIS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Stephen B. Mercer, RAQUINMERCER LLC,
Rockville, Maryland, for Appellant. Robert K. Hur,
United States Attorney, Kelly O. Hayes, Assistant
United States Attorney, OFFICE OF THE UNITED
STATES ATTORNEY, Baltimore, Maryland, for
Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

A federal jury convicted Kyle Stephen Thompson of 18 counts of production of child pornography, in violation of 18 U.S.C. § 2251(a) (2018), and the district court sentenced him to 5040 months' imprisonment. On appeal, Thompson argues that the district court erred when it (1) provided an inadequate jury instruction and refused his proposed jury instruction, and (2) denied his motion to suppress. We affirm.

“We review a district court’s decision to give a particular jury instruction for abuse of discretion, and review whether a jury instruction incorrectly stated the law de novo.” *United States v. Miltier*, 882 F.3d 81, 89 (4th Cir.) (citations omitted), *cert. denied*, 139 S. Ct. 130 (2018). “In reviewing the adequacy of jury instructions, we determine whether the instructions construed as a whole, and in light of the whole record, adequately informed the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party.” *United States v. Kivanc*, 714 F.3d 782, 794 (4th Cir. 2013) (internal quotation marks omitted). “Even if a jury was erroneously instructed, however, we will not set aside a resulting verdict unless the erroneous instruction *seriously* prejudiced the challenging party’s case.” *Miltier*, 882 F.3d at 89 (internal quotation marks omitted).

As relevant here, the statute of conviction prohibits any person from employing, using,

persuading, inducing, enticing, or coercing any minor to engage in sexually-explicit conduct “for the purpose of producing any visual depiction of such conduct.” 18 U.S.C. § 2251(a). The phrase “for the purpose of” is not further defined in the statute. *See id.* The district court read the following instruction regarding this element:

The second element which the government must prove beyond a reasonable doubt is that the defendant knowingly used or employed or persuaded or induced or enticed or coerced the victim, Victim 1, 2 or 3 as charged to engage in sexually-explicit conduct for the purpose of producing a visual depiction of that conduct. . . . The government does not have to prove that the sole purpose or the primary purpose of engaging in such conduct was to produce a visual depiction. But the government must prove that producing a visual depiction of the sexually-explicit conduct was one of the defendant’s purposes for using, employing, persuading, using, enticing, coercing the victim to engage in sexually-explicit conduct. And that it was a significant or motivating purpose and was not merely incidental to the sexually-explicit conduct.

J.A. 646.

We conclude that, in light of the record as a whole, this instruction adequately informed the jury of the controlling legal principles. *See, e.g., United States v. Palomino-Coronado*, 805 F.3d 127, 130-31 (4th Cir.

2015); *United States v. Lebowitz*, 676 F.3d 1000, 1014-15 (11th Cir. 2012). Moreover, even if we were to assume error, such error would have been harmless given the overwhelming evidence that producing videos was one of Thompson’s purposes – and not merely an incidental one – when he engaged in the sexually explicit conduct.

Thompson also argues that the district court erred in refusing to give his “theory of defense” jury instruction, which would have informed the jury that, “where there are two or more purposes to engage in such conduct, the Government must prove that Defendant’s prevailing or most influential purpose was to produce a visual depiction of the sexually explicit conduct.” We review for abuse of discretion a trial court’s decision not to give a proposed instruction. *United States v. Raza*, 876 F.3d 604, 614 (4th Cir. 2017). Declining to give a proposed instruction “is reversible error only if [the instruction] (1) was correct, (2) was not substantially covered by the charge that the district court actually gave to the jury, and (3) involved some point so important that the failure to give the instruction seriously impaired the defendant’s defense.” *Id.* (internal quotation marks omitted). Here, Thompson’s proposed instruction did not correctly state the law, *see, e.g., Palomino-Coronado*, 805 F.3d at 130-31, and the district court thus did not abuse its discretion in rejecting it.

Turning to the denial of the motion to suppress, we review the district court’s legal conclusions de novo and factual findings for clear error. *United States v. Seerden*, 916 F.3d 360, 365 (4th Cir. 2019). “In doing so, we must construe the evidence in the light most

favorable to the prevailing party and give due weight to inferences drawn from those facts by resident judges and law enforcement officers.” *United States v. Lull*, 824 F.3d 109, 114-15 (4th Cir. 2016) (internal quotation marks omitted).

A search warrant may only be issued upon a showing of probable cause, *United States v. Lyles*, 910 F.3d 787, 791 (4th Cir. 2018), and evidence obtained from an invalid warrant typically cannot be used in a criminal proceeding against the victim of the illegal search, *United States v. Thomas*, 908 F.3d 68, 72 (4th Cir.), *cert. denied*, 140 S. Ct. 49 (2019). One exception to this general rule is that evidence obtained by an officer acting in objective good faith reliance on a search warrant will not be suppressed even if the warrant is later deemed invalid. *United States v. Leon*, 468 U.S. 897, 922 (1984). However, the good faith exception does not apply where the warrant was issued based on a deliberately or recklessly false affidavit. *Seerden*, 916 F.3d at 366.

In the instant case, the district court proceeded directly to the good faith analysis and found that the officers acted in good faith reliance on the signed warrant. *See Leon*, 468 U.S. at 925 (permitting courts to start with good faith analysis). The court subsequently held a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), and, after hearing testimony from the warrant’s affiant, concluded that no material information in the affidavit was deliberately or recklessly false. The court therefore refused to revisit its previous good faith determination. On appeal, Thompson argues that the district court should have found a *Franks* violation because the affiant displayed a reckless disregard for

the truth, and that the district court thus erred in finding that the officers executed the search warrant in good faith.

To establish a *Franks* violation, the defendant must prove by a preponderance of the evidence that (1) “a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit,” and (2) “with the affidavit’s false material set to one side, the affidavit’s remaining content is insufficient to establish probable cause.” *Lull*, 824 F.3d at 114 (internal quotation marks omitted). “[A]n allegedly false statement in a probable-cause affidavit amounts to reckless disregard if the drafter made the statement with a high degree of awareness of its probable falsity.” *Nero v. Mosby*, 890 F.3d 106, 128 (4th Cir.) (brackets and internal quotation marks omitted), *cert. denied*, 139 S. Ct. 490 (2018). Here, the district court did not err in finding that Thompson failed to meet this burden. To the extent that one statement in the affidavit misrepresented the source of the affiant’s information, as Thompson argues on appeal, there is no evidence that this was done intentionally or with a “high degree of awareness of its probable falsity.” *See id.* Accordingly, the district court did not err in failing to find a *Franks* violation or in concluding that the officers executed the search warrant in good faith.

We therefore affirm the criminal judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

7a

[ENTERED: May 27, 2020]

FILED: May 27, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4085
(8:17-cr-00195-TDC-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

KYLE STEPHEN THOMPSON

Defendant - Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Motz, Judge Diaz, and Judge Harris.

For the Court

/s/ Patricia S. Connor, Clerk

[ENTERED: February 4, 2019]

**United States District Court
District of Maryland**

UNITED STATES OF AMERICA

v.

KYLE STEPHEN THOMPSON

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed on or
After November 1, 1987)

Case Number: TDC-8-17-CR-00195-001

Defendant's Attorney: Stephen Mercer & Isabelle
Raquin

Assistant U.S. Attorney: Kristi O'Malley, Kelly
Hayes, Joseph Baldwin

THE DEFENDANT:

pleaded guilty to count(s) ____

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

**was found guilty on Counts 1, 2, 3, 4, 5, 6, 7, 8,
9, 10, 11, 12, 13, 14, 15, 16, 17, and 18 of the
Indictment after a plea of not guilty.**

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Numbers</u>
18 U.S.C. § 2251(a)	Production of Child Pornography	01/28/2017	1
18 U.S.C. § 2251(a)	Production of Child Pornography	01/28/2017	2

The defendant is adjudged guilty of the offenses listed above (and continued to page 2) and sentenced as provided in pages 3 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 as modified by United States v. Booker, 543 U.S. 220 (2005).

- The defendant has been found not guilty on count(s) _____
- Counts is/are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

January 30, 2019
Date of Imposition of Judgment

/s/ January 30, 2019
Theodore D. Chuang Date
United States District Judge

Name of Court Reporter: Lisa Bankins

DEFENDANT: KYLE STEPHEN THOMPSON

CASE NUMBER: TDC-8-17-CR-00 195-00 1

ADDITIONAL COUNTS OF CONVICTION

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Numbers</u>
18 U.S.C. § 2251(a)	Production of Child Pornography	01/28/2017	3
18 U.S.C. § 2251(a)	Production of Child Pornography	01/28/2017	4
18 U.S.C. § 2251(a)	Production of Child Pornography	01/28/2017	5
18 U.S.C. § 2251(a)	Production of Child Pornography	01/28/2017	6
18 U.S.C. § 2251(a)	Production of Child Pornography	01/28/2017	7
18 U.S.C. § 2251(a)	Production of Child Pornography	01/28/2017	8
18 U.S.C. § 2251(a)	Production of Child Pornography	01/28/2017	9

18 U.S.C. § 2251(a)	Production of Child Pornography	01/28/2017	10
18 U.S.C. § 2251(a)	Production of Child Pornography	01/28/2017	11
18 U.S.C. § 2251(a)	Production of Child Pornography	01/28/2017	12
18 U.S.C. § 2251(a)	Production of Child Pornography	01/28/2017	13
18 U.S.C. § 2251(a)	Production of Child Pornography	01/28/2017	14
18 U.S.C. § 2251(a)	Production of Child Pornography	01/28/2017	15
18 U.S.C. § 2251(a)	Production of Child Pornography	01/28/2017	16
18 U.S.C. § 2251(a)	Production of Child Pornography	01/28/2017	17
18 U.S.C. § 2251(a)	Production of Child Pornography	01/28/2017	18

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **360 months as to Count 1; 360 months as to Count 2; 360 months**

as to Count 3; 360 months as to Count 4; 360 months as to Count 5; 360 months as to Count 6; 360 months as to Count 7; 360 months as to Count 8; 360 months as to Count 9; 360 months as to Count 10; 360 months as to Count 11; 360 months as to Count 12; 360 months as to Count 13; 360 months as to Count 14; 360 months as to Count 15; 360 months as to Count 16; 360 months as to Count 17; 360 months as to Count 18; with all terms of imprisonment to run consecutively, except for the sentences on Counts 7, 8 and 9, which shall to run concurrently with each other; the sentences on Counts 11 and 12, which shall run concurrently with each other; and the sentences on Counts 16 and 17, which shall run concurrently with each other; for a total sentence of 5,040 months.

- The court makes the following recommendations to the Bureau of Prisons:
1. Under USSG § 5G1.3(c), the sentence imposed in this case shall run concurrently to the anticipated sentence to be imposed in Montgomery County Circuit Court case# 131547C, which is expected to be imposed on 2/19/2019.
 2. That the defendant be designated to FCI Butner in Butner, North Carolina for service of his sentence in order to participate in a sex offender management and treatment program, or if not, at a facility that provides a sex offender management and treatment program.
 3. That the defendant be enrolled, if eligible, in a sex offender management and treatment program.

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

A defendant who fails to report either to the designated institution or to the United States Marshal as directed shall be subject to the penalties of Title 18 U.S.C. §3146. If convicted of an offense while on release, the defendant shall be subject to the penalties set forth in 18 U.S.C. §3147. For violation of a condition of release, the defendant shall be subject to the sanctions set forth in Title 18 U.S.C. §3148. Any bond or property posted may be forfeited and judgment entered against the defendant and the surety in the full amount of the bond.

RETURN

I have executed this judgment as follows:

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

UNITED STATES MARSHAL

By: _____
DEPUTY U.S. MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **life as to each of Counts 1 through 18, with the terms to run concurrently.**

The defendant shall comply with all of the following conditions:

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

A. MANDATORY CONDITIONS

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

you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*

- 7) You must participate in an approved program for domestic violence. *(check if applicable)*

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

B. STANDARD CONDITIONS OF SUPERVISION

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

- 1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment. unless the probation officer instructs you to report to a different probation office or within a different time frame.
- 2) After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
- 3) You must not knowingly leave the federal judicial district where you are authorized to reside

without first getting permission from the court or the probation officer.

- 4) You must answer truthfully the questions asked by your probation officer.
- 5) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 6) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
- 7) You must work full time (at least 30 hours per week) at a lawful type of employment. unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

- 8) You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- 9) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
- 10) You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
- 11) You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
- 12) If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
- 13) You must follow the instructions of the probation officer related to the conditions of supervision.

**C. SUPERVISED RELEASE ADDITIONAL
CONDITIONS**

Substance Abuse Testing

The periodic drug testing mandated by the Violent Crime Control and Law Enforcement Act of 1994 is suspended as this defendant poses a low risk of substance abuse.

No Contact with Victim

You must not communicate, or otherwise interact, with the victims in this case, either directly or through someone else, without first obtaining the permission of the probation officer.

No Contact with Minors

You must not have direct contact with any child you know or reasonably should know to be under the age of 18, including your own children, without the permission of the probation officer. If you do have any direct contact with any child you know or reasonably should know to be under the age of 18, including your own children, without the permission of the probation officer, you must report this contact to the probation officer within 24 hours. Direct contact includes written communication, in-person communication, or physical contact. Direct contact does not include incidental contact during ordinary daily activities in public places.

No Post Office Box or Storage Facility

You must not rent or use a post office box or storage facility without prior approval from the U.S. Probation Officer. If approved, any changes must be reported 72 hours in advance. You shall permit the

probation officer to conduct random inspections of any approved storage facility.

Restriction on Places with Persons Under 18 Present

You must not go to, or remain at, any place where you know children under the age of 18 are likely to be, including parks, schools, playgrounds, and childcare facilities.

Sex Offender Treatment

You must participate in a sex offense-specific treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).

No Possession of Pornographic Materials

You must not view or possess any “visual depiction” (as defined in 18 U.S.C. §2256), including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of “sexually explicit conduct” (as defined in 18 U.S.C. § 2256), that would compromise your sex offense-specific treatment.

**SUPERVISED RELEASE
ADDITIONAL CONDITIONS CONTINUED**

Search/Seizure

You must submit *your* person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search

conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

Restitution: Money

You must pay any outstanding monetary restitution imposed by the court.

Special Assessment

You must pay the special assessment of \$1,800.

U.S. Probation Office Use Only

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

Defendant's Signature _____ Date _____

CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$1,800	Waived	N/A

- CVB Processing Fee \$30.00
- The determination of restitution is deferred until _____. *An Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

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

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Choose an item.		\$.00	
Choose an item.			
Choose an item.			
Choose an item.			
TOTALS	\$ _____	\$ _____	\$0.00 _____

- Restitution amount ordered pursuant to plea agreement _____
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the
 fine restitution
 - the interest requirement for the fine
 restitution is modified as follows:

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

SCHEDULE OF PAYMENTS

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

Payment of the total fine and other criminal monetary penalties shall be due as follows:

- A **A special assessment of \$1,800 is due in full immediately.**
- B \$_____ immediately, balance due (in accordance with C, D. or E); or
- C Not later than ____; or
- D Installments to commence ____ day(s) after the date of this judgment.
- E In _____ (*e.g. equal weekly, monthly, quarterly*) installments of \$_____ over a period of ____ year(s) to commence when the defendant is placed on supervised release.

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

Unless the court expressly orders otherwise, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Bureau of Prisons Inmate Financial Responsibility Program, are to be made to the Clerk of the Court.

NO RESTITUTION OR OTHER FINANCIAL PENALTY SHALL BE COLLECTED THROUGH THE INMATE FINANCIAL RESPONSIBILITY PROGRAM.

If the entire amount of criminal monetary penalties is not paid prior to the commencement of supervision, the balance shall be paid:

- in equal monthly installments during the term of supervision; or
- on a nominal payment schedule of \$___ per month during the term of supervision.

The U.S. probation officer may recommend a modification of the payment schedule depending on the defendant's financial circumstances.

Special instructions regarding the payment of criminal monetary penalties:

- Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:

18 U.S.C.A. § 2251

§ 2251. Sexual exploitation of children

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor 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.

18 U.S.C.A. § 2251 (West)