IN THE SUPREME COURT OF THE UNITED STATES

CASE NO._____

CHRISTOPHER WILLIAM KUEHNER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

THE LAW OFFICE OF LANA MANITTA, PLLC

By:_____/s/_____.
Lana Manitta, VSB #42994/DC Bar #989100
600 Diagonal Rd., Suite 600
PMB #1152
Alexandria, VA 22314
(703) 705-4428
FAX (703) 705-4429
Lmanitta@ManittaLaw.com
Counsel for Petitioner

QUESTIONS PRESENTED

I. Is The Failure to Disclose Subpoena Returns that are Exculpatory and Directly Related to a Defense Theory Until Post-Trial and Only Upon Request a Violation of *Brady*, And Should the Remedy for the Violation be to Vacate the Conviction?

II. Should the "In Concert" Element of 21 U.S.C. 2252A(g) be Met by the Aggregate of Predicate Offenses or Does the Statute Require that Each Predicate Offense be Committed in Concert with At Least Three Others?

III. Where There is Evidence of Outside Access to a Defendant's User Profile on an Exploitative Site, Is Evidence Sufficient to Convict, Especially Where the Offense Requires a Specific Number of Predicate Offenses Committed in Concert with Others

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

There are no related cases.

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The published opinion of the United States court of appeals appears at Appendix A.

JURISDICTION

The date on which the United States Court of Appeals for the Fourth Circuit issued its ruling in Petitioner's case was January 16, 2025, and no petition for rehearing was filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of law involved in this Petition are 18 U.S.C. § 2252A, the Fifth Amendment to the United States Constitution, and Federal Rule of Criminal Procedure ("FRCP") 5f.

STATEMENT OF THE CASE

I. Legislative History

In 2006, Congress enacted the Children's Safety and Violent Crime Reduction Act, or the Adam Walsh Act ("Walsh Act"). PL 109–248, July 27,

2006, 120 Stat. 587. Title VII of the Walsh Act included the Internet Safety Act and added subsection (g) to 18 U.S.C. § 2252A. *Id.* The objective of "tough new penalties for child exploitation enterprises" was aimed at "dramatically increas[ing] internet safety." 152 Cong. Rec. S8012-02, 152 Cong. Rec. S8012-02, S8018, 2006 WL 2034118.

Subsection (g) was not simply an increased penalty for existing offenses, but rather it "created a new crime outlawing child exploitation enterprises, [which] would imprison for a mandatory minimum sentence of 20 years those who act in concert to commit at least three separate violations of Federal child pornography, sex trafficking, or sexual abuse laws against multiple child victims." *Id.* The "new crime" was created "to prosecute the "molestation on demand" child pornographic industry." *Id.* Not surprisingly, the Act enjoyed bipartisan support.

But the early versions of the legislation that evolved into the Adam Walsh Act did not include the "new crime" created by 2252A(g) and were more broadly aimed at "protecting children, to secure the safety of judges, prosecutors, law enforcement officers, and their family members, to reduce and prevent gang violence, and for other purposes." HR 4472, 109th CONGRESS, 1st and 2d Sessions. Therein, the word "enterprise" was used only in relation to criminal street gangs and racketeering

enterprises. *Id.* Yet, the statute creates not only a "new crime," but a new criminal "enterprise" defined by the very specific elements. 18 U.S.C. § 2252A(g).

2252A is now being used to merely punish crimes that already exist more harshly rather than target the specified "new crime," and this misapplication is a direct result of the misinterpretation of the "in concert" element. In addition to the Fourth Circuit, other circuits that have taken up the question as to whether each predicate offense must be performed in concert with three or more other persons have decided—with little support from the legislative history or the language of the Act, and in contravention of tenets of statutory interpretation—that for purposes of two of the elements of the offense ("in concert with" and number of victims) the predicate offenses may be tallied together. *See United States v. Daniels,* 653 F.3d 399 (6th Cir. 2011); *United States v. DeFoggi,* 839 F.3d 701 (8th Cir. 2016); *United States v. Grovo,* 826 F.3d 1207 (9th Cir. 2016); *United States v. El-Battouty*, 38 F.4th 327 (3rd Cir. 2022); *see also* Model Crim. Jury Instr. 8th Cir. 6.18.2252A(g) (2021).

II. Mr. Kuehner's Case

On July 14, 2022, Mr. Kuehner was charged in a one-count Indictment with engaging in a child exploitation enterprise in violation of 2252A. The case arose out of activities on the "rapey.su" website, which was designed, operated, administered, and controlled by co-defendant Nathan Larson, who died in prison

awaiting trial on this and a case out of California. Mr. Kuehner registered with the site on September 27, 2020, with username "Nechris." Over the course of the next few weeks, Nechris posted comments in rapey.su's Siropu "chat" (a constant, continuously scrolling message board), participated in private, sexually explicit chats with minor (i.e., underage) users of the site, and through such communications solicited material of an explicit nature from minor users of the site.

Although a forensic examination of ten of Mr. Kuehner's devices found references in forensic data to a few filenames matching explicit files from the site, or including usernames from the site, no sexually explicit images let alone images of child pornography were found on *any* of Mr. Kuehner's devices seized by law enforcement, and it therefore could not be proved that Mr. Kuehner downloaded or even viewed the files in question, let alone that they were sexually explicit.

a. Impersonation

Mr. Kuehner's primary theory of defense was that since administrators of the rapey.su website—the most likely culprit being the founder, designer, and operator of the site Nathan Larson—could access user accounts, there was insufficient proof that Mr. Kuehner himself had performed all the acts comprising the alleged predicate acts, and therefore insufficient proof of his guilt to the offense charged. In support of his argument, Mr. Kuehner highlighted the fact that on

October 6, 2020, the profile for username Nechris was changed in various ways, most notably changing his email address from necryz@gmail.com to mc3996520@gmail.com.

When Mr. Kuehner was interviewed by law enforcement in December, 2021, he admitted registering for the rapey.su website and provided the email address he used, necryz@gmail.com. He never mentioned—and was notably *never asked* about the mc3996520@gmail.com address. By that time, however, Google subpoena returns for both email addresses had already been received, and agents therefore knew that the mc2996520@gmail.com address came back to a "John McJanal." The only evidence of that email address showing up on any of Mr. Kuehner's devices is evidence of emails *sent to the* necryz@gmail.com address on June 6, 2021—months after the relevant time period in this case—attempting to verify a Discord account for user Nekryz#9079. Despite the mc3996520@gmail.com being added to the Nechris rapey.su profile in October 2020, these June, 2021 *incoming* emails to Mr. Kuehner's actual email address are the first and only mentions of this second email address existing anywhere on Mr. Kuehner's devices. And again, they do not arise from him *using* that email address.

There was no evidence adduced that Mr. Kuehner registered or used the mc3996520@gmail.com email address, or that he even responded to the authentication emails sent by Discord to the necryz@gmail.com address on June 6,

2021. The evidence from Google is only that "John McJanal" was the subscriber to the mc3996520@gmail.com address, and that the email address was last accessed at the end of June 2021 from IP addresses not associated with Mr. Kuehner. Adding to the suspicion surrounding this second email address is the Discord subpoena return. Discord was unable to locate a user by the name Nekryz#9079. *Id.* The most logical conclusion from the subpoena returns and history of mc3996520@gmail.com showing up within Mr. Kuehner's *actual* emails is this: as late as June 2021, an attempt was made by someone other than Mr. Kuehner to register a new Discord user account but was unsuccessful because no one authenticated the mc3996520@gmail.com address. It is unclear if the emails seeking authentication were even *opened*, but they certainly were not responded to, and the new Discord account was never set up.

Various witnesses described interacting with Mr. Kuehner through a separate platform called "Discord" in October and November 2020. The Discord group was a more "close-knit community" that did not require posting material, like the rapey.su site. The Discord interactions described were private interactions, and the witnesses did not offer exact types of content solicited by Mr. Kuehner on this platform except "nudes," or "undressed." In fact, the descriptions of these interactions, which were "mainly voice calls", that were often "odd, but not outright explicit," "sometimes sexually explicit" but other

times "just general conversation," stood in stark contrast to the exhibits produced from the rapey.su site of Nechris' activity, which often involved very specific requests for highly explicit material. Also notable was that one witness discussing her known interactions with the actual Mr. Kuehner was that, although *another* user was "constantly asking to see people pee," Mr. Kuehner hadn't ever showed no apparent interest in this type of material. The fact that in a more "close-knit" group, ostensibly run by Mr. Kuehner, he was less demanding, less explicit, less aggressive, and displayed different predilections than Nechris, is also indicative that others may have been behind that username at various times relevant to the predicate acts.

Notably, October 6, 2020, changes were made to Nechris' profile on the rapey.su site, including his height, his eye color, his race, his home state, and his email address. One site user testified at trial that she could not go in and change her own username without moderator or administrator permission. And on direct examination at trial Agent Fottrell unequivocally confirmed that site administrators has the following capability:

> So, for example, . . . when an administrator was logging – somebody was logging in as Leucosticte [one of Larson's many usernames] and then changing the password to Nechris so they could log in. We don't know what Nechris's password is. If we wanted to log into them, the administrator has the ability to change his password to something else. So now that we changed his password to something else, we could log in as the user. But we don't know what Nechris's original password was; the administrator just has the ability to change it to something else.

Nathan Larson was the "admin of all admins," as the individual who set up the site, served as administrator and moderator. He had access to an administrator portal behind the scenes of the site. He could and did edit user profiles. He could also change user passwords. And rapey.su did not require two-factor authentication for login, only the password.

Agent Fottrell insisted however, that impersonating a user would be "a difficult task," but his testimony only bears out that it might be difficult to *avoid detection*. Various logs, for example, would show changes made to profiles, etc. But not everyone even had access to those logs, only administrators

On redirect examination, Agent Cottrell was asked how he knew there was "no evidence" someone had impersonated Nechris. Agent Cottrell's response was not a response, but a deflection. He could only repeat what he had said earlier, that "in [his] mind, it's a very difficult problem to fake somebody logging in as Nechris." In fact, it's not difficult at all:

First, Agent Cottrell said, "I'd have to know his password." But this had already been confirmed on direct (see above), and during cross, through this exchange:

> Q . . . [Larson] could go into their profile and he could make changes? A Correct.
> Q And he could even change someone's password?
> A *He could change somebody's password, absolutely*.

> Q Now, you testified on direct that he doesn't know their password, but he can change it?
> A Right. Correct.

And we know that changes *were made* to Nechris' profile.

Second, Agent Cottrell said, "I'd have to geolocate and login from an IP address that looks like his." Well, no. *Only to cover one's tracks in the IP logs* would one need to do this, and it would only involve signing in to the site through IP address within the same geolocation as the user. Once again, therefore, logging in as someone else was not difficult at all, and in fact, evidence showed that some of Nechris' activities on the site came from IP addresses linked to a Comcast "home-based" IP address, but other activity came from IP addresses that *were* routed through third-party IP address providers. These IP addresses were basically "rented" through Leaseweb, and do not associate with a user's computer, but rather Leasweb's server. Some were in the Seattle, Washington area, but some were even in California (the very place Larson was ultimately arrested after kidnapping a 12-year-old he met on the site in Colorado). Larson could have easily done this by "spoofing" his location to another location, simply adding another layer to his connection (i.e., routing through the third-party provider IP address) allowing his activity from his home in Virginia, or anywhere else, to reflect an IP address elsewhere. Importantly, there was no evidence offered at trial that Mr. Kuehner ever contacted, let

alone contracted or subscribed to Leaseweb services—or any third party—for an offsite IP address. Ten of his devices were seized and analyzed, and there was no evidence of any such service being used, website being access, subscription being paid, etc.

b. Interpretation of the "In Concert" Element

A secondary but related theory involved the interpretation of 18 U.S.C. § 2252A(g)—specifically the "in concert" element. First, Mr. Kuehner submitted that the district court should interpret the statute to require that *each* predicate act be performed in concert with at least three others. *Id.* Second, he argued that the actions of user Nechris were performed alone, for his own purposes, from behind a computer keyboard, not in concert with others. *Id.*

The Siropu chat feature of the rapey.su site—often referred to at trial as a "group chat" which is a bit misleading—is a continuous streaming and scrolling message board; so, a user signing on can't see all of the discussions going on and isn't necessarily intending to engage with everyone looking at the scroll while posting. A small portion of the messages, covering only the very most recent activity, shows on the user's screen. What is visible may be anything at that point from one-off posts directed at no one in particular, or a discussion between two or more users. Even when one is aware that multiple people are viewing the scroll, users can direct their comments to specific users explicitly by "tagging" them or implicitly

by simply engaging *only* with that other user (e.g., by responding to their comments and questions to the exclusion of others).. As the posted messages scroll by on the screen, only if one actively scrolled backward could they see earlier posts.

The experience of the group chat is therefore akin to entering a large room which is sometimes empty and sometimes packed with people. If one chooses to "talk" to another person one has no idea who is actually "listening to" (i.e., reading) your conversation. But that doesn't mean one is intentionally talking to everyone in the room every time they walk in the room. Nechris' activity in the Siropu chat was sometimes a "private conversation" in the larger room, and sometimes a conversation that invited others to weigh in. But those forming the predicate acts were not of the latter sort.

The first predicate act involving the solicitation of sexually explicit material by Nechris arises from, as Agent Cottrell described it, a "chat between the user Bananacabana and Nechris," and later postings within the group chat directed specifically to Bananacabana by Nechris. The "pee video" request by Nechris to user Yoonji also arises in the group chat. A discussion about producing a video takes place within the group chat but is between Nechris and Lilith. The request for material from Skinny.freakkk occurs in a private chat, seeking a video "just for me." While Nechris discusses looking forward to the material video with other users, the solicitation of sexually explicit material was private. Nechris also

encouraged, in the public chat, engagement in private video messaging with Skinny.freakkk but did not thereby ask for specific material.

The district court rejected defense arguments and found sufficient evidence that Mr. Kuehner committed five predicate acts— specifically five separate violations of 18 U.S.C. § 2251(a) and (e) (production or attempted production of child pornography). Each of the predicate acts found by the court involved Nechris interacting in a rapey.su message exchange with other site users, who were under the age of eighteen, asking them to produce video depictions of themselves engaging in sexually explicit activity. *Id.* In one such request, user Nechris asked for a "pee video," which Mr. Kuehner submits is not necessarily "sexually explicit material." No request was made to show genitalia, or in fact any body part, or even nudity, and in fact no such content was produced.

Further, the district court found the defense of impersonation "implausible," but in its oral ruling post-trial referred to the defense being that Larson "fully" impersonated Mr. Kuehner on the site, which was not the defense. The defense was that because Larson (or any other administrator but most likely Larson) could impersonate Mr. Kuehner, and because there were as the district court describes them "inexplicable changes" to Nechris' profile indicating as much, that the government could not prove commission of the predicate acts by Mr. Kuehner beyond a reasonable doubt.

III. The Brady Violation

Post-trial, Mr. Kuehner, by and through counsel, requested the government to produce the returns of administrative subpoenas, especially one sent to Google for subscriber information for the email mc3996520@gmail.com. In response, the government produced, for the first time *post-trial*, returns from Google *and* Discord which had been obtained in September, 2021 that showed that the mc3996520@gmail.com was not registered to Mr. Kuehner and a Discord account username linked to that email, believed to be associated with Mr. Kuehner, did not exist.

IV. Sentencing & Post Trial Motions

On April 25, 2023, Mr. Kuehner was sentenced to the statutory mandatory minimum of 240 months, with credit for time served. Based on the government's *Brady* violation, Mr. Kuehner sought to have his conviction and sentence vacated pursuant to Fed. R. Crim. P. 33 and the case dismissed on the grounds that the United States had violated its obligations pursuant to Fed. R. Crim, P. 5f and *Brady*. *See Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); FRCP 5f. Although the district court ruled a *Brady* violation had occurred, the court also held that even had the withheld evidence been introduced at trial, it would not have "made a material difference to the outcome."

On appeal, the Fourth Circuit affirmed the district court, but also found that no *Brady* violation had occurred.

REASONS FOR GRANTING THE PETITIOIN

I. The Government's Failure to Disclose Administrative Subpoena Returns from Google and Discord Violated *Brady*, and the Evidence Was Directly Supportive of the Defense Theory

"[F]avorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383 (1985); (White, J., concurring in part and concurring in judgment). Thus, the "showing of materiality" does not require a showing that the disclosure of the evidence in question *would have* resulted in acquittal. *Id.,* at 682, 105 S.Ct., at 3383–3384.

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles v. Whitley, 514 U.S. 419, 433–34, 115 S. Ct. 1555, 1565–66, 131 L. Ed. 2d 490 (1995) *citing Bagley,* 473 U.S. at 678, 105 S.C.t at 3381.

As in *Kyles*, the "disclosure of the suppressed evidence to competent counsel" in Mr. Kuehner's case would have made a different result reasonably probable." *Kyles*, 514 U.S. at 441, 115 S. Ct. at 1569, 131 L. Ed. 2d 490. The evidence at issue in Mr. Kuehner's Motion to Vacate was the results of Administrative Subpoenas sent to Google and Discord on September 27, 2021. This information was exculpatory evidence that the government did not disclose. In fact, it was direct evidence that was key to and supportive of the very theory of defense Mr. Kuehner developed at trial solely through his challenge via cross-examination to the government's case. Moreover, the district court's request that the government address availability of lesser included offenses, is indicative that indeed, the presentation of direct evidence supporting Mr. Kuehner's defense that not all of the incriminating chats and posts were in fact his own likely could have altered the ultimate determination of guilt, especially as to the narrow and specific offense charged in the Indictment.

The subpoena returns support the argument that since the original Nechris profile was changed, someone else was impersonating Mr. Kuehner on various platforms. Had defense counsel been able to utilize this evidence during cross examination of the agents tasked with forensic analysis of his devices, of Agent Cottrell's testimony regarding there being "no evidence" of impersonation, and of Agent Gallegly who interviewed Mr. Kuehner months after the subpoena return

yet failed to ask about this second email address, this would have significantly undermined the prosecution's case when it mattered—i.e., during the course of the trial. There is certainly at least a reasonable probability that the court's ruling, which was based on the implausibility of the impersonation defense—would have been different.

The availability of the Discord evidence as well—that *different* account was associated with the second email address not belonging to Mr. Kuehner was nearly created months after the relevant period—would have provided *even more* support to the impersonation defense and thereby a reasonable probability of a different result.

In light of the above, dismissal of the indictment was an available and appropriate remedy for violations of Fed. R. Crim. P. 5f and *Brady*. The district court's Rule 5f Order warned the government of this very potential consequence, but instead there was no consequence at all, except the grave prejudice to Mr. Kuehner, despite the finding that there was, indeed, a *Brady* violation.

II. The "In Concert" Element of 18 USC 2252A(g) Should Not be Met by Combining the Predicate Offenses

As noted above, 2252A(g) was passed to create a "new crime," not simply to punish already existing offenses more harshly. In addition, the rule of lenity should apply. The relevant language of the statute is as follows:

> A person engages in a child exploitation enterprise for the purposes of this section if the person violates section 1591, section 1201 if the victim is a minor, or chapter 109A (involving a minor victim), 110 (except for sections 2257 and 2257A), or 117 (involving a minor victim), as a part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and commits those offenses in concert with three or more other persons.

18 U.S.C. 2252A(g)(2).

Circuit courts tasked with interpreting this language have all at least implicitly acknowledged a lack of clarity with respect to the "in concert" element and some turned to precedent interpreting a different statue with "similar language"—18 U.S.C. § 848(c)—for guidance. *Daniels,* 653 F.3d at 412; *DeFoggi*, 839 F. 3d at 710; *Grovo*, 826 F. 3d at 1215. The Third Circuit, looking at the statute only last year, undertook to analyze the 2252A(g) itself, ultimately concluding that the absence of the word "each" in the phrase "commits those offenses" means that the phrase "in concert with three other persons" applies to the "series of offenses," not to each individual offense. *El-Battouty*, 38 F. 4th at 329.

Mr. Kuehner submits that the approach taken by the Third Circuit—considering the language of the statute independent of those with "similar language," is the better approach, given the fact that the *dissimilarities* between 2252A(g) and 848(c) renders the latter unfit for this purpose. However, the Third Circuit failed to

apply a tenet of statutory construction that ensures due process as guaranteed by the 5th Amendment. Where there is ambiguity, the rule of lenity should apply. "The rule that penal laws are to be construed strictly . . . . [] is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. 76, 95, 5 L.Ed. 37, ___ (1820). While strict construction should not subvert the clear intention of the legislature,

> The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases.

Id. at 96, 5 L.Ed. at ___.

Mr. Kuehner submits that the Third Circuit is incorrect in finding that the phrase "those offenses" means the collective "series of felony violations" instead of individual *offenses*. The words "series" and "violations" were clearly chosen to distinguish the "series" from the enumerated offenses mentioned immediately preceding that clause. In fact, there are "offenses" mentioned in the

statute. They are "violations of section 1591, section 1201 . . ., chapter 109A, 110, or 117." It is to *these* that "commits *those offenses*" refers.

While the Third Circuit makes much of the fact that the words "each of" are missing (and shouldn't be implied), they aren't in fact necessary so long as one carefully considers to what "those offenses" actually refers. To confirm that this reading is the more reasonable, especially in light of the rule of lenity, it is important to note some other things that the legislature did not say, but could have:

" . . . as part of a series of felony *offenses* constituting three or more separate incidents and involving more than one victim, and commits those *offenses* in concert with three or more other persons."

OR

" . . . as a part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and *commits that series of violations* in concert with three or more other persons."

OR

" . . . as a part of a series of felony *offenses* constituting three or more separate incidents involving *a total of two or more* victims, and commits those offenses in concert with a *total of three or more* other persons."

By returning the readers attention to "offenses," rather than the "series" or "the violations," it is actually fairly clear what the legislature meant, but to the

extent ambiguity exists, the statute should not be read to *expand* its reach—especially to cover conduct already criminalized, including as the object of conspiracy, elsewhere within the very titles mentioned in 2252A(g).

Finally, the reading that allows the "at least three other persons" to be tallied over the "series of violations," undermines the requirement for "three separate incidents," and further allows for the possibility that someone could perform two predicate acts *completely alone* and *only one* in concert with three people, and *still* be convicted of engaging in an enterprise based on those three predicate acts.

III. The Evidence Was Insufficient to Convict Mr. Kuehner of the Offense Charged

i. Use of the Nechris Username by an Administrator such as Larson Was Possible and Changes to the Nechris User Profile Indicate Use by Someone Other than Mr. Kuehner

Site administrators could have been behind the activities of Nechris by simply changing the password.

The "difficult task" would be *covering it up*. But "covering it up" was defined by Agent Fottrell as eradicating all trace of the impersonation, which would not be necessary if the user would not have access to the relevant logs Regardless there is no reason to assume that Larson would need to or try to "cover it up," even though he could. Larson set up this site and he set it up to allow himself to change user passwords and sign in as other users. Larson could have

chosen to require two-factor authentication, securing user profiles from impersonation (including by law enforcement). But he did not set it up that way, likely *because* it would have limited *his ability* to sign in as other users.

As Carl Sagan said, "absence of evidence is not evidence of absence," and so "no evidence" of impersonation would not mean it didn't happen. But we *do* have evidence that Nechris' profile was changed, including the crucial inclusion of a new email address. Knowing that Larson could do it easily, it *doesn't matter* whether it would have been difficult to cover his tracks, since that was the least of what Larson was trying to hide with the rapey.su site. Larson was hardly concerned about law enforcement let alone other users, but regardless, if someone tried to sign into their account and had trouble, *they would reach out to Larson for help*. If someone thought they were "hacked," *they would reach out to Larson for help*. And if someone thought *Larson* hacked them, to whom would they complain? More likely than not, the user (fearing perhaps law enforcement detection), would abandon the profile altogether, allowing Larson to continue to use their username indefinitely. It's a "no lose" situation for him, and the idea that it would be "difficult" to hide is of absolutely no consequence. It was possible, then there is no way to prove beyond a reasonable doubt that Mr. Kuehner committed each of the predicate acts associated with username "Nechris" (let alone "in concert with at least three others").

ii. Evidence is Insufficient to Prove Each—or Even the Collective "All" of the Predicate Acts was Performed "In Concert" With at least Three Other Persons

The activity of Nechris through the various channels of the rapey.su site is similar to that of the Defendant in the *DeFoggi* case, which the Eight Circuit found did not satisfy the "in concert" element of the statute. *United States v. DeFoggi*, 839 F.3d 701, 710 (8th Cir. 2016). DeFoggi was a member of the PedoBook site which was similar in purpose and design to rapey.su. *Id.* at 704. In the site's group chats, "DeFoggi wrote at length about his interest in child pornography and solicited child pornography from other members of PedoBook." *Id.* at 710. The predicate acts committed by DeFoggi were accessing child pornography, as opposed to "production or attempted production," but that does not alter the fact that Nechris' activities were like DeFoggi's, in that ultimately, they were done "alone from behind one computer's screen." *Id.*

The district court found that Mr. Kuehner had a "tacit agreement with at least three other users" to commit violations of 2251(a) and (e), but even if this is correct, that is a conspiracy to commit 2251(a) and (e), not necessarily a violation of 2252A(g). Although many of the adult users of rapey.su site may have intended to commit, committed, and applauded the commission of that offense by others, that does not mean they acted in concert with one another to produce or attempt

to produce child pornography.[1] To quote the Eight Circuit, "even assuming without deciding that the child exploitation enterprise offense requires a conspiracy and nothing more, the evidence was insufficient here." *Id.*

For purposes of finding action "in concert," the district court focused on the "group chat" on the site. Again, however, "group chat" is a bit misleading, since it is simply a continuous chat stream which could have anywhere from zero to any number of members "in the room," but only privy to what is scrolling by at the time they look at the screen. One-on-one conversations were held within that so- called "group chat." More importantly, the solicitation of sexually explicit material was done in either one-on-one or fully private discussions, while the "pee video" and encouragement to others to engage in a private video chat with Skinny.freakkk were posted on the Siropu chat. The government exhibits include various examples of Nechris seeking material for his sole use, most often within private chats. While the Siropu chats were inappropriate and often disgusting, they did not comprise

[1] Where the predicate act is a different child pornography offense, such as a violation of 2251(d) (advertising child pornography) participation in a message board and mutual encouragement has satisfied the "in concert" element, but the message board was in fact an instrumentality of the offense itself since that is where the material was advertised. *See United States v. Grovo,* 826 F.3d 1207 (9th Cir. 2016) (defendants being "active participants in the community" bulletin board, it was reasonable to infer "from their activities that they agreed with other members to further the board's common goal of sharing, accessing and viewing child pornography,")

at least three separate incidents of production or attempted production of child pornography in concert with others. Unless the *victims* of the solicitations can qualify both as "victims" and the "others" for 2252A(g), then the evidence is insufficient that Nechris acted in concert with at least three others in the commission of each separate *or* the series of incidents of violating 2251(a) and (e).

The statute under which Mr. Kuehner was charged was promulgated as creating a "new crime," targeting the organized sexual exploitation of children conducted by groups of individuals, usually facilitated by the internet. The sophisticated and organized nature of an "enterprise" as opposed to an individual, or even two or three individuals acting in concert (i.e., a conspiracy) would trigger a harsher penalty than those committing the predicate offenses outside of such an "enterprise." The specificity of the elements was not unintentional and the interpretation applied by the district court and sister circuits treats it as such, undermining the very purpose of the statute by enveloping far less serious offenses (to wit, those committed by individuals or by one or two people, acting solely for their own purposes) which are *already* crimes, punishable by in many cases different mandatory minimums and subject to significant sentencing guidelines offense levels and applicable enhancements.

CONCLUSION

For the reasons set for above, Mr. Kuehner respectfully prays that his petition for a writ of certiorari be granted.

Respectfully Submitted,

CHRISTOPHER WILLIAM KUEHNER
By Counsel

THE LAW OFFICE OF LANA MANITTA, PLLC

By: /s/
Lana Manitta, VSB #42994
1800 Diagonal Rd., Suite 600
PMB #1152
Alexandria, VA 20132
(703) 705-4428
FAX (703) 705-4429
LManitta@ManittaLaw.com
Counsel for Christopher Kuehner

APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4339

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

CHRISTOPHER WILLIAM KUEHNER, a/k/a nechris, a/k/a William Christopher Kuehner,

Defendant – Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge. (1:22-cr-00120-LMB-4)

Argued: September 27, 2024 Decided: January 16, 2025

Before GREGORY, QUATTLEBAUM, and BERNER, Circuit Judges.

Affirmed by published opinion. Judge Berner wrote the opinion in which Judge Gregory and Judge Quattlebaum joined.

ARGUED: Lana Manitta, LAW OFFICE OF LANA MANITTA, PLLC, Alexandria, Virginia, for Appellant. Seth Michael Schlessinger, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee. **ON BRIEF:** Jessica D. Aber, United States Attorney, Richmond, Virginia, Daniel Honold, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

BERNER, Circuit Judge:

More than forty years ago in *New York v. Ferber*, the United States Supreme Court expressed profound concern about the rise of child exploitation and abuse through the production and dissemination of photographs and films depicting minors engaging in sexual activity. 458 U.S. 747, 749 (1982). The Court emphasized that the "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id.* at 757. This is because such photographs and films become "a permanent record" of the abuse of a child "and the harm to the child is exacerbated by their circulation." *Id.* at 759. *Ferber* was decided long before the advent of the Internet and social media, digital cameras, video cameras, and cell phones at the ready, and relatively inexpensive computer equipment. Taken together, these technological advances have enabled an exponential increase in the instantaneous, often anonymous, and broad dissemination of such material.

Congress recognized this growing problem when, in 2006, it enacted the Adam Walsh Child Protection and Safety Act to protect children from sexual exploitation and abuse, by promoting Internet safety and preventing the production and dissemination of child pornography, which we will refer to as child sexual abuse material.[1] Adam Walsh

[1] "Child pornography" is defined as the "visual depiction" of a minor "engaging in sexually explicit conduct." 18 U.S.C. § 2256(8); *see United States v. Williams*, 553 U.S. 285, 288 (2008). We refer to such content as "child sexual abuse material" to reflect more accurately the abusive and exploitative nature of child pornography. *Child Sexual Abuse Material*, Nat'l Ctr. for Missing & Exploited Children (accessed Jan. 2, 2025), https://www.missingkids.org/theissues/csam [https://perma.cc/PV8D-GZEX]; *United States v. Larson*, No. 19-cr-50165, 2023 WL 196171, at *1 n.1 (D.S.D. Jan. 17, 2023) (Continued)

Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587, 587 (2006); *id.* § 501; *see id.* § 701. Among its many provisions, the Walsh Act amended Section 2252A of Title 18 of the United States Code, to add a criminal ban on "child exploitation enterprises." Adam Walsh Child Protection and Safety Act of 2006 § 701. This case concerns the proper interpretation of that provision.

Christopher William Kuehner actively used a website and a messaging server dedicated to sexual violence and the sexual exploitation of minors. Employing two different usernames, he produced and encouraged the production of child sexual abuse material on these platforms. After authorities revealed that Kuehner was behind the usernames, they charged him with one count of engaging in a child exploitation enterprise. Following a two-day bench trial, Kuehner was convicted and subsequently sentenced to serve twenty years in prison.

On appeal, Kuehner raises several challenges to his conviction. First, he maintains that the district court erroneously interpreted the requirement of the child exploitation enterprises statute that predicate felony offenses be performed "in concert with three or more other persons." The district court considered the number of people involved in the predicate offenses cumulatively. In other words, it was enough that *all* the predicate felonies were committed with a total of three or more other people when summed together.

(explaining that pornography "connotes a certain aspect of consent that is impossible when the images or videos depict children," and because of this lack of consent, child sexual abuse material is "evidence of a child being sexually abused."). Other courts have done the same. *See, e.g.*, *United States v. Johnson*, 93 F.4th 605, 608 (2d Cir. 2024); *Doe #1 v. Twitter, Inc.*, No. 22-15103, 2023 WL 3220912, at *1 (9th Cir. May 3, 2023); *United States v. Glowacki*, No. 22-3279, 2023 WL 179887, at *1 (6th Cir. Jan. 13, 2023).

Kuehner argues that *each* predicate offense must have been committed in concert with three or more other people. Second, Kuehner argues that there was insufficient evidence to support his conviction for engaging in a child exploitation enterprise. Third, he contends that the district court erred in denying his motion to vacate his conviction and dismiss the indictment because the Government failed to turn over certain information in its possession.

We reject each of these challenges and affirm the judgment of the district court.

I. Background

A.

Kuehner and four co-defendants were charged with one count of knowingly engaging in a child exploitation enterprise in violation of 18 U.S.C. § 2252A(g). One of the co-defendants, Nathan Larson, had created a website called "Rapey.su" (the Website) and served as its administrator.[2] The conduct at issue in Kuehner's criminal case arose from activities on the Website, which was dedicated to discussions of sexual exploitation and rape, and on "Discord," an online communications platform that allows users to message each other, share images and videos, and audio or video call.

[2] Larson died in federal pre-trial custody, and the Government subsequently dismissed the indictment as to Larson.

Kuehner waived his right to a jury trial and consented to a bench trial. Witnesses at the trial included three minor victims (MVs)[3]: MV1, MV2, and MV7, a co-defendant who pled guilty, Homeland Security Investigation special agents, and forensic analysts and experts, including James Fottrell, Director of the High Technology Investigative Unit of the Department of Justice's Child Exploitation and Obscenity Section.

The Website maintained a dedicated section for users interested in the sexual exploitation of children. This section had forums, galleries, and options that allowed users to message one another privately and in groups. Website users could also earn and display "badges" in their profiles to convey particular messages or the completion of a task, such as a badge for "confirmed rapist" or "confirmed child molester." *See, e.g.*, J.A. 147.[4] "Confirmed" users of the Website were provided greater access to chats with other users and access to non-public galleries and media.

The Government presented evidence that Kuehner joined the Website on September 27, 2020, under the username "nechris." "Nechris" earned the status of confirmed user on the Website by posting a picture of himself with the name of the Website written on his forearm. "Nechris" also earned "Confirmed rapist" and "Rapey" badges. *United States v. Kuehner*, Case No. 22-cr-120, 2023 WL 1422310, at *2 (E.D. Va. Jan. 31, 2023). The "nechris" profile described the user as a 36-year-old, 5'8", "Caucasian/Asian" man from Washington state, which Director Fottrell testified generally matched Kuehner's

[3] In an effort to protect their privacy and to avoid revictimization, we avoid using the names and Website usernames of the minor victims. As the egregious facts of this case make abundantly clear, content that is posted online becomes nearly impossible to remove.

[4] Citations to "J.A." refer to the Joint Appendix filed by the parties in this appeal.

description. *Id.* Kuehner admitted to federal agents that he had used his personal email, necryz@gmail.com, to register on the Website as "nechris." On October 6, 2020, some of the information in "nechris's" profile on the Website, including the birth year, location, identifying information, and age, were modified, and the email address associated with the username was changed from necryz@gmail.com to mc3996250@gmail.com.

At trial, the Government produced evidence that Kuehner, under the username "nechris," repeatedly interacted with, encouraged, and pressured minor victims to post child sexual abuse material. Director Fottrell testified about the conduct involving the minor victims. Unless otherwise noted, the events described below took place before the "nechris" profile information was changed on October 6, 2020.

"Nechris" messaged MV1 describing his desire to sexually abuse her and directing her to send him sexually explicit material of herself. Following these instructions, MV1 posted five videos of herself, including videos showing her masturbating. MV1 tagged "nechris" in this post. He acknowledged the videos by thanking her in the gallery where MV1 posted the media. The Website had a public chat that was a "running commentary" between Website users. J.A. 144. In the public chat, "nechris" discussed the child sexual abuse material depicting MV1 with another confirmed adult user and bragged about his role in convincing MV1 to post the material.

MV2 testified at trial about her interactions with "nechris" on Discord. "Nechris" also requested child sexual abuse material from MV2, as well as other minor victims. "Nechris" also sent nude images of himself to MV2. Kuehner's face was visible in some of these images.

Director Fottrell testified that "nechris" asked MV3 to produce and post child sexual abuse material. In the public chat, in response to Larson's commentary, "nechris" posted that he was looking forward to MV3's next video. "Nechris" gave a "thumbs up" reaction to a comment by Larson that MV3 was an "ephebophile's delight,"[5] and commented that he "love[d]" the child sexual abuse material depicting MV3. J.A. 123–24. "Nechris" gave a "thumbs up" reaction to a crude comment by Larson about MV3's body. "Nechris" and other users of the Website commented on the child sexual abuse material posted by MV3, expressing their gratification.

In the public chat on the Website with several other confirmed adult users, "nechris" commented "[l]et's see this now" in response to another user who wanted MV4 to produce a child sexual abuse material video. J.A. 112. Another confirmed adult user indicated his agreement and approval by reacting with a "smiley face" to "nechris's" comment. J.A. 112.

"Nechris" also publicly commented on child sexual abuse material posted by MV5, referring to some of this material as "the gold standard." J.A. 111. He encouraged MV5 to make another video, saying "we all look forward to it . . . ." J.A. 111. Another confirmed adult user "liked" a comment by "nechris" about MV5 having engaged in sexually explicit conduct before going to school in the morning.

"Nechris" advised yet another minor, MV6, on the optimal placement of the camera to make child sexual abuse material. MV6 proposed an idea for a child sexual abuse

[5] Director Fottrell testified that an "ephebophile" is someone "who is sexually interested [in] post pubescent minors." J.A. 124.

material video and "nechris" encouraged her to record herself engaging in lewd acts because he wanted to watch her. MV6 complied with these requests.

After the "nechris" profile was changed, in the Website's public chat, "nechris" urged MV7 to make a lewd video and pressured her to do so several times, despite MV7 repeatedly declining. Another confirmed adult user joined "nechris" to urge MV7 to produce an exploitative video. MV7 finally acceded to the pressure from "nechris" and other Website members and posted child sexual abuse material.

Kuehner's exploitation of minor victims was not limited to the Website. "Nechris" was one of the individuals who ran a private "server" on Discord, akin to a chat room, to share and distribute child sexual abuse material. "Nechris" and other adult users of the Website invited minor victims, including MV1 and MV2, to join Discord to communicate with one another. All three minor victims who testified at trial, MV1, MV2, and MV7, described their interactions with "nechris" on Discord. "Nechris" had asked each of them to provide sexually explicit content on the Discord server.

Kuehner's principal defense at trial was that someone had impersonated him as "nechris" on the Website and Discord, such that he himself had not engaged in the charged activities. The evidence indicated otherwise, however. Kuehner's own statements implicated him. In addition to Kuehner's confessions about his email address and Website account, Kuehner admitted that he took a confirmation photo for the "nechris" account and posted it to the Website. Even then, Kuehner argued that there was no evidence that he was always behind the "nechris" account.

The Government also presented significant forensic evidence connecting Kuehner to the Website. Federal agents had executed a search warrant of Kuehner's home and recovered a desktop computer, a laptop, and a cell phone. Law enforcement successfully conducted a forensic analysis of the desktop computer and cell phone, but forensic experts could only access the deleted files on the laptop. The evidence presented at trial established that Kuehner had accessed child sexual abuse material, including videos and images of minors, on these devices. Analyses of Kuehner's web browser history and his laptop confirmed that he had used the necryz@gmail.com email address and variations of the alias "nechris."

To support his defense that someone had impersonated him, Kuehner elicited testimony from Director Fottrell that as the Website's creator and administrator, Larson had access to statistics and data pertaining to the Website, including records of users' activity and associated IP addresses. Director Fottrell testified that Larson could edit profiles, change passwords, and modify or delete the administrative logs that track his own actions taken as an administrator. Director Fottrell further testified that there were "three fundamental problems" with the theory that Larson, or perhaps another administrator, impersonated Kuehner. J.A. 152. To impersonate Kuehner as "nechris," Director Fottrell testified that the impersonator would need to know: (1) "nechris's" password; (2) Kuehner's IP address; and (3) how to fake the administrative logs to cover the impersonator's actions.

Director Fottrell specifically testified that without access to "nechris's" password, neither Larson nor any other administrator could login as "nechris" to impersonate

Kuehner. Larson could have changed "nechris's" password and then logged in, but he would have been unable to change it back to "nechris's" original password—because Larson never knew the original password. After an extensive review, Director Fottrell identified no evidence suggesting that Larson knew "nechris's" password or that someone else logged in as "nechris." There was no evidence that the password to the "nechris" account had ever been changed. Although it is possible that someone could have altered the IP address to make it appear as if that person was using the Website from "nechris's" location, according to Director Fottrell, it was highly improbable that someone could do so without leaving a record. Director Fottrell further testified that most of the IP addresses connected to "nechris" were from the Seattle area, where Kuehner resided, and that, taken together, it was "very unlikely" that Larson, or another individual, impersonated Kuehner.

B.

The district court found Kuehner guilty of engaging in a child exploitation enterprise. That statute provides that a:

> person engages in a child exploitation enterprise for the purposes of this section if the person violates section 1591, section 1201 if the victim is a minor, or chapter 109A (involving a minor victim), 110 (except for sections 2257 and 2257A), or 117 (involving a minor victim), as a part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and commits those offenses in concert with three or more other persons.

18 U.S.C. § 2252A(g)(2).

The district court held that the evidence at trial "established that Kuehner committed a series of predicate felony violations constituting over three or more separate incidents." *Kuehner*, 2023 WL 1422310, at *6. Section 2251(a) and (e) of Title 18 of the United States

Code "criminalize production and attempted production of child [sexual abuse material], which are predicate offenses of engaging in a child exploitation enterprise under § 2252A(g)." *Kuehner*, 2023 WL 1422310, at *6. Kuehner "violated or attempted to violate 18 U.S.C. § 2251(a)," and his conduct "also constituted enticement or attempted enticement of a minor to engage in unlawful sexual conduct in violation of 18 U.S.C. § 2422(b)." *Kuehner*, 2023 WL 1422310, at *7–8. The district court sentenced Kuehner to the mandatory minimum sentence of twenty years' incarceration, as well as twenty years' supervised release.

After sentencing, Kuehner filed a motion to vacate the district court's judgment, commitment order, and memorandum opinion, and to dismiss the indictment, or, in the alternative, to grant him a new trial. Kuehner argued that the Government's failure to disclose material it received in response to subpoenas sent to Google and Discord was a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Following an evidentiary hearing, the district court denied Kuehner's motion. Kuehner filed a timely appeal.

II. Analysis

Kuehner contends that the district court erred in three ways. First, he challenges the district court's interpretation of the "in concert with" requirement of the child exploitation enterprises statute. Second, he maintains that there was insufficient evidence to support his guilty verdict. Third, he contends that the district court erred in denying his *Brady* motion

because the Government failed to turn over material and exculpatory information received from various Google and Discord accounts. We address each in turn.

A. Statutory Interpretation of the Child Exploitation Enterprises Statute

Kuehner maintains that the district court's interpretation of the child exploitation enterprises statute was erroneous because the statute requires a defendant to act "in concert with" three or more individuals when committing *each* of the predicate felony offenses. He also maintains that the rule of lenity requires us to interpret the child exploitation enterprises statute in his favor. We disagree with both arguments.

We review issues of statutory interpretation *de novo* and begin our interpretation with the plain text of the statute. *United States v. Muhammed*, 16 F.4th 126, 127–28 (4th Cir. 2021). A person violates the child exploitation enterprises statute if that person "as a part of a series of felony violations constituting three or more separate incidents and involving more than one victim, . . . commits *those offenses* in concert with three or more other persons." 18 U.S.C. § 2252A(g)(2) (emphasis added). The most natural reading of this text is that the phrase "those offenses" refers to the collective "series of felony violations." The phrase "with three or more other persons" modifies "those offenses," thereby indicating that the series of felony offenses must have been committed with "three or more other persons." A person will therefore have been found to have engaged in a child exploitation enterprise if the predicate felony offenses, as a series: (1) constituted three or more separate incidents; (2) involved more than one victim; and (3) were committed in concert with three or more people. If Congress wanted to require that *each* predicate

offense be committed in concert with three or more people, the statute would have included this requirement.

We decline to adopt Kuehner's strained construction of the statute to require that "each" predicate offense be committed in concert with three or more other people and find ourselves in good company. All our sister circuits that have addressed this interpretive question have held that the number of people for the "in concert with" requirement may be considered cumulatively. *See, e.g.*, *United States v. El-Battouty*, 38 F.4th 327, 329 (3d Cir. 2022); *United States v. DeFoggi*, 839 F.3d 701, 710 n.4 (8th Cir. 2016); *United States v. Grovo*, 826 F.3d 1207, 1215 (9th Cir. 2016); *see also United States v. Daniels*, 653 F.3d 399, 412 (6th Cir. 2011). Not a single circuit has interpreted the child exploitation enterprises statute in the manner urged by Kuehner.

The continuing criminal enterprise statute, 21 U.S.C. § 848, informs our reading of the child exploitation enterprises statute as well. The child exploitation enterprises statute and the continuing criminal enterprise statute are structured similarly: a person is found to have engaged in either enterprise if that person committed certain predicate felonies, and such violations are part of a series committed in concert with several people. *See Grovo*, 826 F.3d at 1214; *compare* 18 U.S.C. § 2252A(g)(2) *with* 21 U.S.C. § 848(c). In relevant part, the continuing criminal enterprise statute requires that the requisite predicate felony violations be "undertaken by such person in concert with five or more other persons . . . ." 21 U.S.C. § 848(c)(2)(A). In defining "in concert with" under the continuing criminal enterprise statute, this court has not required that each predicate felony have been committed by five individuals at the same time or even that five people collectively

engaged in a single specific offense. *See United States v. Johnson*, 54 F.3d 1150, 1155 (4th Cir. 1995) (quoting *United States v. Ricks*, 882 F.2d 885, 891 (4th Cir. 1989)). We decline to construct the child exploitation enterprises statute in a contradictory manner.

Kuehner also contends that the rule of lenity requires us to find in his favor due to the ambiguity present in the interpretation of the child exploitation enterprises statute. The rule of lenity guides courts to "strictly construe[ ]" criminal statutes and avoid interpreting them to "extend criminal liability beyond that which Congress has 'plainly and unmistakably' proscribed." *United States v. Hilton*, 701 F.3d 959, 966 (4th Cir. 2012) (citation omitted). "Under [this] well-established principle of statutory construction, ambiguities in criminal statutes must be resolved in favor of lenity for the accused." *United States v. Headspeth*, 852 F.2d 753, 759 (4th Cir. 1988). This rule, however, is employed only if, after "considering text, structure, history, and purpose, there remains a 'grievous ambiguity or uncertainty in the statute,' . . . such that the Court must simply 'guess as to what Congress intended.'" *Barber v. Thomas*, 560 U.S. 474, 488 (2010) (citations and quotations omitted). No such uncertainty or ambiguity exists here. Upon review of the text of the child exploitation enterprises statute, we find that the meaning is clear and does not call for application of the rule of lenity.

We hold that the child exploitation enterprises statute does not require that *each* predicate felony be committed "in concert with" three or more people. The required total of three or more people can be summed across the relevant predicate offenses.

B. Sufficiency of the Evidence

We next address Kuehner's contentions regarding the sufficiency of the evidence. Kuehner maintains that there was insufficient evidence to convict him because (1) someone else could have used the "nechris" account and (2) the predicate felonies were not performed in concert with at least three other people.

We review "judgments resulting from a bench trial under a mixed standard of review: factual findings may be reversed only if clearly erroneous," and legal findings are reviewed *de novo*. *United States v. Landersman*, 886 F.3d 393, 406 (4th Cir. 2018) (quoting *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333, 340 (4th Cir. 2016)). The court should "uphold a guilty verdict if, taking the view most favorable to the Government, there is substantial evidence to support the verdict. 'Substantial evidence' means evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *Id.* at 406 (quoting *United States v. Armel*, 585 F.3d 182, 184 (4th Cir. 2009)).

1.

The district court did not clearly err in finding that no one else accessed the "nechris" account and impersonated Kuehner. Indeed, the Government presented substantial evidence showing that, at the time of the conduct in question, Kuehner controlled the "nechris" account.

Kuehner's own admissions to federal law enforcement agents established that his username on the Website was "nechris." The three minor victims identified Kuehner in open court and testified that "nechris" told them his name and, in some instances, shared

other specific details about his life that pertained to his family, location, and age. He even shared photos of himself. All of these details described Kuehner accurately.

The forensic evidence presented at trial also overwhelmingly supported a conclusion that Kuehner was "nechris": The IP addresses, computer files, browser history, and shortcut files all indicate that Kuehner accessed child sexual abuse material on the Website and used the username "nechris." Further strengthening this conclusion is Director Fottrell's testimony on how unlikely it was for anyone else to have accessed the "nechris" account and Kuehner's failure to identify any forensic evidence of anyone else logging in under this username. The most reasonable inference, based on the evidence in the light most favorable to the Government, is that Kuehner operated the "nechris" account.

2.

Kuehner's final argument is that, even if there is sufficient evidence that there had been a "tacit agreement" among Kuehner and others to produce or attempt to produce child sexual abuse material, that is only evidence of a conspiracy to commit those offenses, and not evidence of a violation of the child exploitation enterprises statute. The Supreme Court has recognized, however, that "the plain meaning of the phrase 'in concert' signifies mutual agreement in a common plan or enterprise" and requires proof of a conspiracy. *Rutledge v. United States*, 517 U.S. 292, 300 (1996). There is no reason why this meaning does not apply equally to the child exploitation enterprises statute. *See DeFoggi*, 839 F.3d at 710;

Grovo, 826 F.3d at 1214; *Daniels*, 653 F.3d at 413; *United States v. Wayerski*, 624 F.3d 1342, 1351 (11th Cir. 2010).

The Government need only produce evidence showing that Kuehner entered into "an agreement with three or more other persons to commit the series of predicate felonies." *Grovo*, 826 F.3d at 1214. An agreement need not be explicit. This court has established that an "agreement may be inferred from the facts and circumstances of the case," and "a tacit or mutual understanding among or between the parties will suffice." *United States v. Baker*, 985 F.2d 1248, 1255 (4th Cir. 1993) (first quote); *United States v. Depew*, 932 F.2d 324, 326 (4th Cir. 1991) (second quote). There was sufficient evidence to conclude that Kuehner had tacitly agreed with other Website users to produce or attempt to produce child sexual abuse material and entice or attempt to entice minor victims to engage in unlawful sexual conduct. *See Grovo*, 826 F.3d at 1216.

The Government also produced evidence sufficient to show that Kuehner acted "in concert" with at least three other people, and the district court did not err in relying on evidence from the Website's public chat, including Kuehner's comments and likes in the public chat. Taking the view most favorable to the Government, a reasonable factfinder could conclude beyond a reasonable doubt that Kuehner produced and attempted to produce child sexual abuse material and enticed or attempted to entice minor victims to engage in unlawful sexual conduct with the approval and support of other confirmed Website users. *See id.* at 1216. Kuehner repeatedly encouraged minor victims to post and share child sexual abuse material because users on the Website wanted to see that material.

Taken together, the Government presented substantial evidence that Kuehner committed the predicate felonies in concert with three or more people.

C. *Brady* Violation

Finally, Kuehner maintains that the Government violated *Brady v. Maryland* by failing to disclose information it received from Google and Discord about various accounts. Kuehner also contends that the district court erred in denying his motion to vacate his conviction or, in the alternative, to order a new trial. In *Brady*, the Supreme Court held that the prosecution's withholding of evidence that was favorable to a defendant and material to guilt or punishment violated the defendant's due process rights. 373 U.S. at 87.

The court reviews a district court's denial of a motion for a new trial under the abuse of discretion standard. *See United States v. Stokes*, 261 F.3d 496, 502 (4th Cir. 2001). We review the district court's legal conclusions in a *Brady* ruling *de novo* and its factual findings under the clear error standard. *United States v. King*, 628 F.3d 693, 702 (4th Cir. 2011).

To establish a *Brady* violation, Kuehner must show: "(1) that the undisclosed information was favorable, either because it was exculpatory or because it was impeaching; (2) that the information was material; and (3) that the prosecution knew about the evidence and failed to disclose it." *United States v. Parker*, 790 F.3d 550, 558 (4th Cir. 2015). "Evidence is 'exculpatory' and 'favorable' if it 'may make the difference between conviction and acquittal' had it been 'disclosed and used effectively.'" *United States v. Wilson*, 624 F.3d 640, 661 (4th Cir. 2010) (quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985)). Evidence is material if "there is a reasonable probability that, had the evidence

been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. A "'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* It is undisputed that the Government had in its possession information from Google and Discord and failed to disclose it. Kuehner does not argue that this information was impeaching. He contends that the information was both exculpatory and material. Even assuming the information was exculpatory, the information from neither Google nor Discord is material.

Relevant here, the Government issued subpoenas to Google to produce information about the mc3996250@gmail.com email account and Discord to produce information about the "Nekryz#9079" account. The information received from Google showed that mc3996250@gmail.com had been created on October 6, 2020, and was registered to a "John McJanal."

According to Kuehner, the information received by the Government from Google showed that someone other than him created and used mc3996250@gmail.com and posted as "nechris" on the Website after October 6, 2020. Yet Kuehner fails to explain how that is material when most of the offending conduct took place prior to October 6, 2020. Kuehner also offers no convincing response to the forensic evidence connecting him to mc3996250@gmail.com, including evidence that this email was accessed from a tablet recovered from Kuehner's home and created at the request of a user with an IP address from the area in which Kuehner lived.

Kuehner's contentions regarding the information received from Discord are equally unavailing. Discord was "unable to locate a user" by the username of "Nekryz#9079" and

had "no information" on this account. J.A. 488. The Government posits that this was due to Discord's retention policy. At that time, Discord deleted a user's information from its back-up systems after 45 days. Even if the information from Discord had been disclosed, it was not material to Kuehner's claim that he had been impersonated. The evidence in the record still tied Kuehner to this Discord account. Director Fottrell testified that "nechris" invited a minor Website user to join him on Discord under the name "Nekyrz#9079." There was an overwhelming amount of evidence against Kuehner notwithstanding the information from Discord about the "Nekryz#9079" account. Kuehner has not demonstrated a reasonable probability that the information produced by Discord would have made the difference between conviction and acquittal. *See Bagley*, 473 U.S. at 682; J.A. 514–15.

We find no *Brady* violation. The district court did not abuse its discretion in denying Kuehner's motion to vacate his conviction, or, in the alternative, for a new trial.

III. Conclusion

We hold that the total number of people required for the "in concert with" element may be summed across the series of predicate offenses under the child exploitation enterprises statute. We also hold that there was sufficient evidence to convict Kuehner of engaging in a child exploitation enterprise, and that the Government did not commit a *Brady* violation.

The district court's judgment is therefore

AFFIRMED.

FILED: January 16, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4339
(1:22-cr-00120-LMB-4)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

CHRISTOPHER WILLIAM KUEHNER, a/k/a nechris, a/k/a William Christopher Kuehner

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK