No. 24-

IN THE

Supreme Court of the United States

ZACKARY ELLIS SANDERS,

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

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QUESTIONS PRESENTED

18 U.S.C. § 2251(a) provides that "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 . . . shall be punished as provided under [this section]."

The questions presented are:

1. In accordance with the method of statutory interpretation set forth in *Dubin v. United States*, 599 U.S. 110 (2023), should the term "uses" be interpreted in the context of the statute and the other *actus reus* verbs listed in it.

2. Whether "for the purpose of" should be interpretated in accordance with the plain language of the statute to mean the purpose, rather than merely "a" purpose even if not the primary purpose.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Zackary Ellis Sanders was the defendant in the district court and the appellant in the court of appeals.

Respondent the United States was the prosecution in the district court and the appellee in the court of appeals.

There are no corporate parties involved in this case.

RULE 14.1(B)(III) STATEMENT

This case arises from the following proceedings in the United States District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit.

United States v. Sanders, No. 22-4242 (4th Cir. final judgment Sep. 25, 2024)

United States v. Sanders, No. 20-CR-00143 (E.D. Va. final judgment Apr. 1, 2022)

There is a forfeiture proceeding related to this case but not relevant to the issues raised in this Petition. The opinions in that proceeding are *United States v. Sanders*, No. 22-7054 (4th Cir. Jul. 9, 2024) and *United States v. Sanders*, No. 20-CR-143 (E.D. Va. Aug. 19, 2022).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

RULE 14.1(b)(iii) STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF APPENDICES vi

TABLE OF CITED AUTHORITIES viii

PETITION FOR A WRIT OF *CERTIORARI* 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTORY PROVISIONS 1

INTRODUCTION 2

STATEMENT OF THE CASE 4

A. Legal Background 4

B. Factual and Procedural Background 4

REASONS FOR GRANTING THE PETITION 8

Table of Contents

Page

I. The Fourth Circuit's process of statutory interpretation conflicts with this Court's precedent in *Dubin* governing how courts should interpret the word "uses" in criminal statutes and creates a circuit split regarding statutory interpretation. 8

A. The Fourth Circuit's method of statutory interpretation below was inconsistent with *Dubin* 8

B. The Fourth Circuit's decision creates a conflict among the courts of appeal 10

II. The Fourth Circuit allowed conviction based on conduct less than that required by the statute 11

III. The questions presented are important and frequently recurring, and this case is a good vehicle for resolving the issues. 14

CONCLUSION 16

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED JULY 9, 2024 . . . . . 1a

APPENDIX B — EXCERPTS OF TRANSCRIPT OF TRIAL PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, DATED NOVEMBER 27, 2021 . . . . . 58a

APPENDIX C — EXCERPTS OF TRANSCRIPT OF TRIAL PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, DATED NOVEMBER 26, 2021 . . . . . 64a

APPENDIX D — EXCERPTS OF TRANSCRIPT OF TRIAL PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, DATED NOVEMBER 25, 2021 . . . . . 71a

APPENDIX E — EXCERPTS OF TRANSCRIPT OF TRIAL PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, DATED NOVEMBER 22, 2021 . . . . . 77a

Table of Appendices

Page

APPENDIX F — EXCERPTS OF TRANSCRIPT OF TRIAL PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, DATED NOVEMBER 20, 2021 . . . . . 95a

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED SEPTEMBER 17, 2024 . . . . . 104a

APPENDIX H — RELEVANT STATUTORY PROVISIONS. 105a

TABLE OF CITED AUTHORITIES

Page

Cases

Bailey v. United States,
516 U.S. 137 (1995) 9

Dodd v. United States,
545 U.S. 353 (2005) 12

Dubin v. United States,
599 U.S. 110 (2023) 2, 3, 7-11

Henson v. Santander Consumer USA Inc.,
582 U.S. 79 (2017) 12

Liparota v. United States,
471 U.S. 419 (1985) 12

Oracle Int'l Corp. v. Rimini St., Inc.,
No. 23-16038, 2024 WL 5114449
(9th Cir. Dec. 16, 2024) 11

United States v. Frei,
995 F.3d 561 (6th Cir. 2021). 13

United States v. Gatlin,
90 F.4th 1050 (11th Cir. 2024) 12, 13

United States v. Hansen,
599 U.S. 762 (2023). 9

Page

United States v. Lanier,
520 U.S. 259 (1997). 3

United States v. Lemicy,
122 F.4th 298 (8th Cir. 2024). 3, 13

United States v. McShan,
No. 22-1275, 2023 WL 3035218
(6th Cir. 2023) (unreported) 13

United States v. Patterson,
119 F.4th 609 (9th Cir. 2024). 2, 11

United States v. Rosenow,
50 F.4th 715 (9th Cir. 2022). 12

United States v. Sanders,
107 F.4th 223 (4th Cir. 2024). 1

United States v. Santiago,
96 F.4th 834 (5th Cir. 2024). 2, 10

Statutes

Abolish Human Trafficking Act of 2017,
Pub. L. No. 115-392, § 14, 132 Stat. 5250
(2018) 12

18 U.S.C. § 231 14

18 U.S.C. § 1028 . . . . . .2, 8

Page

18 U.S.C. § 1586 15

18 U.S.C. ch. 110 4

18 U.S.C. § 2251 . . . . . 1-5, 11-13, 15

18 U.S.C. § 2252 . . . . . 5, 9

18 U.S.C. § 2423 12

21 U.S.C. § 856 14

21 U.S.C. § 856(a)(1) 2, 10

28 U.S.C. § 1254 1

Guidelines

U.S. Sentencing Guidelines Manual § 3A1.1(a) (U.S. Sentencing Comm'n 2023) 2, 11

PETITION FOR A WRIT OF *CERTIORARI*

Mr. Sanders respectfully petitions for a writ of *certiorari* to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at *United States v. Sanders*, 107 F.4th 234 (4th Cir. 2024), and is reproduced in the Appendix to this Petition ("Pet. App.") at 1a-57a. A petition for rehearing and rehearing *en banc* was denied by an order dated September 17, 2024, which is reproduced at Pet. App. 104a. The relevant proceedings in the district court are unpublished and are reproduced at Pet. App. 58a-103a.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its opinion on March 22, 2024. Pet. App. 1a-57a. A petition for rehearing and rehearing *en banc* was denied by the Fourth Circuit on September 17, 2024. *Id.* at 104a. On December 5, 2024, the Chief Justice of this Court granted an application to extend the time to file a petition for a writ of *certiorari* until January 15, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provision is 18 U.S.C. § 2251(a), which is reproduced at Pet. App. 105a.

INTRODUCTION

This Petition raises two issues of statutory construction. First, this Court has recently instructed on the process courts should follow to determine the meaning of common terms like "uses" in a statute. *See Dubin v. United States*, 599 U.S. 110 (2023). In *Dubin*, this Court, in interpreting the Aggravated Identity Theft Statute (18 U.S.C. § 1028A(a)(1)), held that, because "'use' takes on different meanings depending on context, and because it draws meaning from its context," courts should "look not only to the word itself, but also to the statute and [surrounding] scheme, to determine the meaning Congress intended." *See id.* at 118. This Court further instructed that where "uses" appears in a list of *actus reus* verbs, courts should "assume[] that Congress used [multiple] terms because it intended each term to have a particular, nonsuperfluous meaning." *See id.* at 126.

Appellate courts have followed the process set forth in *Dubin*. *See, e.g.*, *United States v. Santiago*, 96 F.4th 834, 847 (5th Cir. 2024) (under 21 U.S.C. § 856(a)(1) "'use" as akin to, but with a meaning different from, 'open, lease, rent,. . . . or maintain.'"); *United States v. Patterson*, 119 F.4th 609, 612 (9th Cir. 2024) (applying *Dubin* to the common phrase "because of" as used in U.S.S.G. § 3A1.1(a)). The Fourth Circuit below, however, diverged from those circuits and this Court's precedent by holding that "uses" in 18 U.S.C. § 2251(a) should be given its broadest ordinary meaning, thereby subsuming the other statutory *actus reus* terms surrounding it. Pet. App. 39a-41a. By employing a process of statutory construction contrary to *Dubin*, the Fourth Circuit erred by failing to interpret the statutory term "uses" in the context of the

statute at issue and rendered the other *actus reus* verbs listed in the statute superfluous. This Petition raises the issue of whether the process for statutory construction set forth by this Court in *Dubin* is applicable to statutes with similar construction.

Second, this Petition raises whether the phrase "for the purpose of" in 18 U.S.C. § 2251(a) means the predominant or dominant purpose, or means any subsidiary purpose, specifically any "significant or motivating purpose." There is a split in the circuits on this issue. The Eighth Circuit has ruled that "[t]he intent requirement of § 2251(a) is satisfied if there is sufficient evidence that one of the defendant's 'dominant purposes' was to create a visual depiction. . . ." *See United States v. Lemicy*, 122 F.4th 298, 309-10 (8th Cir. 2024). While the Fourth Circuit in this case allowed for a lesser standard. It held that trial courts can properly choose among "motivating purpose," "significant purpose," "dominant purpose," or some "equivalent variation" and all that is required is that the purpose be more than "merely incidental." Pet. App. 48a.

Dominant, significant, and motivating are not equivalent to each other. By using motivating purpose, as the trial court did three times, which is arguably a redundant phrase as all purposes are motivating, and failing to instruct that the purpose must be the predominant or dominant purpose, the trial court allowed conviction for something less than *the* purpose. Pet. App. 62a, 78a, 84a. The statute, however, uses the phrase "**the** purpose of" not merely "**a** purpose of." The jury instructions and the Fourth Circuit's holding conflict with the plain language of the statute and disregard the canon that criminal statutes should be strictly construed. *See United States v. Lanier*, 520 U.S. 259, 266 (1997).

STATEMENT OF THE CASE

A. Legal Background

18 U.S.C. Chapter 110 criminalizes conduct relating to the sexual exploitation and abuse of children. The terms "uses" and "use" are not defined in the statute. Section 2251(a) of the statute prohibits the production of child pornography transmitted or transported in interstate or foreign commerce. It states: "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 . . . shall be punished as provided under [this section]." 18 U.S.C. § 2251(a).

B. Factual and Procedural Background

In August 2019, the FBI received notice from a foreign law enforcement agency identifying a U.S. Internet Protocol address (IP address) that allegedly had connected to a website that contained child exploitation material. Pet. App. 3a. Based on that information, in February 2020, the FBI obtained a warrant and conducted a search at Mr. Sanders' parents' home, where Mr. Sanders resided. *Id.* at 8a-9a. On electronic devices seized during that search, the FBI found conversations with six males ages 13 to 17, as well as child exploitation images. *Id.* at 10a. In some of the conversations, Mr. Sanders, then in his early 20's, asked teens who had expressed an interest in certain types of sexual activity to engage in the activity and to then send an image showing they had done so. *Id* at 7a, 10a*;* Indictment at 2.

Mr. Sanders was charged in a twelve-count indictment, including five counts of production of child pornography in violation of 18 U.S.C. § 2251(a) based on images sent by the teenagers with whom he was communicating. Pet. App. at 10a-11a. Section 2251(a) applies to 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. Mr. Sanders was also charged with six counts of the receipt of child pornography in violation of 18 U.S.C. § 2252(a)(2), and one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). *Id.*

At trial, Mr. Sanders denied that he employed, used, persuaded, induced, enticed, or coerced a minor to engage in sexually explicit conduct. To support his defense, he sought to introduce evidence of the initiation and voluntary participation by the teens in a BDSM role-playing relationship with him and the norms of the BDSM community, including the non-sexual nature of BDSM activity. *Id.* at 14a-16a. Mr. Sanders also requested that, as a part of the jury instruction that a minor's consent to creating images of the minor engaging in sexually explicit conduct is not a defense, the jury be instructed that it can, however, consider the minor's assent to engaging in sexually explicit conduct (conduct that would not be unlawful had no images of the conduct been created) in assessing the defendant's intent and purpose (*id.* at 65a-66a) and to determine whether the defendant employed, used, persuaded, induced, enticed, or coerced the minor. *Id.* at 67a-70a. The district court precluded the introduction of the evidence and rejected the requested charge. *Id.* at 14a-17a, 63a, 65a-70a.

On appeal, the Fourth Circuit held that because "uses" is not defined in the statute, it must be interpreted to have its plain ordinary meaning. *See id.* at 39a. The Fourth Circuit referred to Merriam-Webster Online and Black's Law Dictionary and found the ordinary meaning of "uses" includes, but is not limited to, "put into action or service," "avail oneself of," "employ," or "[t]o employ for the accomplishment of a purpose." *See id.* The Fourth Circuit then noted that its interpretation of "uses" makes the term synonymous with "employs," another term on the list of *actus reus* verbs in the statute. *Id.* at 40a. It found that Congress must have intended "uses" in its broad ordinary sense and the remaining terms in the statute "employ, persuade, induce, entice, and coerce" are specifics that would, in effect, be encompassed by the broader term. *Id.* at 41a. The Fourth Circuit held that when Congress includes a list of similar verbs it intends to criminalize "as broad a range of conduct as possible." *Id.* "Congress's use of 'broad terms without limiting them or defining them' reflects its decision to utilize sweeping ordinary meaning." *Id.*

Mr. Sanders also requested a jury instruction that "for the purpose of producing any visual depiction" means that the production of the visual depiction of sexually explicit conduct is the defendant's predominant purpose of the minor's engaging in sexually explicit conduct. *Id.* at 47a. The trial court rejected that instruction. *Id.* at 48a. During trial, over defendant's objection, the court instructed the jury that "the purpose" means "**a** motivating factor" but does not require it to be **the** primary or dominant purpose. Pet. App. 78a-79a (emphasis added). At a second point during the trial, the court told the jury that only **a** motivating or significant purpose is required. *Id.* at 84a

(emphasis added). During its final charge, the trial court instructed the jury that: "The production of a visual depiction of sexually explicit conduct must have been **a** significant or motivating purpose of the defendant, and not merely incidental to engaging in the sexually explicit conduct." *Id.* at 62a (emphasis added). Based on the trial court's understanding that even a subsidiary purpose of visually depicting sexual conduct is sufficient for conviction, it excluded evidence that the defendant had a dominant purpose other than the visual depiction of sexually explicit conduct. *Id.* at 16a. On appeal, the Fourth Circuit held that trial courts can properly choose among motivating purpose, significant purpose, dominant purpose or some equivalent variation when instructing a jury. *Id.* at 47a-48a. The Fourth Circuit—apparently believing a motivating purpose, a significant purpose, and dominant purpose are all equivalents of each other—held that a jury instruction is proper as long as it notes that the visual depiction of sexual conduct is **a** purpose that is more than "merely incidental." *Id.*

Mr. Sanders sought rehearing or rehearing *en banc* on the meaning of "uses" consistent with *Dubin*. Rehearing was denied without opinion on September 17, 2024. *Id.* at 104a.

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit's process of statutory interpretation conflicts with this Court's precedent in *Dubin* governing how courts should interpret the word "uses" in criminal statutes and creates a circuit split regarding statutory interpretation.

A. The Fourth Circuit's method of statutory interpretation below was inconsistent with *Dubin*.

The Fourth Circuit's approach conflicts with the method of statutory interpretation set forth in *Dubin* in three ways.

First, the court below did not consider the "interpretational difficulties" posed by the term "uses" because of the "different meanings attributable to it" and that the term "takes on different meanings depending on context, and because it draws meaning from its context. . . ." *See Dubin*, 599 U.S. at 117-118 (internal quotation marks omitted). Instead, the Fourth Circuit looked only to the broadest ordinary usage and found that the term could mean, but was not limited to, the following: "to put into action or service," "avail oneself of," "employ," "[t]o employ for the accomplishment of a purpose." Pet. App. at 39a. In *Dubin* this Court rejected such a sweeping interpretation under the Aggravated Identity Theft Statute (18 U.S.C. § 1028A(a)(1)), finding "uses" was more limited than "employs in any sense." *See Dubin*, 599 U.S. at 117-118. This Court held that the word "uses," specifically, and terms like it, require a consideration of the statutory context. *See id.* The Fourth

Circuit, however, rather than interpreting the word "uses" in the context of the statute, instead simply defined the word with its broadest dictionary definition. *See* Pet. App. at 39a-41a.[1]

Second, the Fourth Circuit, in interpreting "uses" in a statute where that term was one of several *actus reus* verbs, disregarded the canon of statutory construction that courts should "assume[] that Congress used [multiple] terms because it intended each term to have a particular, nonsuperfluous meaning." *See id.* at 126 citing *Bailey v. United States*, 516 U.S. 137, 146 (1995) ("used" and "carried" should not be interpreted to be redundant in the statute); *United States v. Hansen*, 599 U.S. 762, 776 (2023) (words which appeared alongside the term reinforce that Congress gave the word its narrower criminal law meaning). Instead, the Fourth Circuit held that when Congress includes a list of similar verbs it intends to criminalize "as broad a range of conduct as possible." Pet. App. at 41a ("Congress's use of 'broad terms without limiting them or defining them' reflects its decision to utilize sweeping ordinary meaning.") In *Dubin*, after analyzing the terms surrounding "uses," this Court determined that "'uses' supplies the deceitful use aspect." *See Dubin*, 599 U.S. at 127. In this case, the Fourth Circuit gave "uses" an overbroad meaning by improperly

1. The Fourth Circuit also declined to conduct the requisite statutory analysis set forth in *Dubin* with respect to the word "use" in 18 U.S.C. § 2252(a)(2), which prohibits receiving or distributing a visual depiction involving "the use of " a minor engaging in sexual activity. Rather than interpreting the phrase "the use of " in the context of § 2252 and the statute as a whole, it simply interpreted the phrase by adopting the broadest ordinary meaning of "use." Pet. App. at 41a-42a.

construing congressional intent and rendering the remaining *actus reus* terms in the sentence superfluous.

Third, the Fourth Circuit, in applying the broadest possible construction to the statute, disregarded this Court's precedent to exercise "restraint in assessing the reach of a federal criminal statute." *See Dubin*, 599 U.S. at 129. "This restraint arises both out of deference to the prerogatives of Congress and out of concern that a fair warning should be given to the world in language that the common world will understand of what the law intends to do if a certain line is passed." *See id.* This Court should grant *certiorari* to correct the Fourth Circuit's failure to adhere to this Court's precedent.[2]

B. The Fourth Circuit's decision creates a conflict among the courts of appeal.

Since *Dubin* was decided, the Fifth and Ninth Circuits have followed the process it set forth for statutory interpretation. In *Santiago*, 96 F.4th at 847, the Fifth Circuit found that under 21 U.S.C. § 856(a)(1), "use" is akin to, but with a meaning different from, "open, lease,

2. In failing to follow the correct method of statutory interpretation for a criminal statute with an *actus reus* verb like "uses" that is susceptible to many meanings, not surprisingly, the lower court reached a problematic result. Under its expansive definition of "uses," if a 17-year old girl asks her 18 year-old boyfriend, with whom she is lawfully in a sexual relationship, if he would like her to text him a sexually explicit photo and he says he would, he has committed a federal felony with a 15-year mandatory minimum. *Dubin* again is instructive, admonishing courts that reading "incongruous breadth" into opaque language may result in far-reaching consequences. *See Dubin*, 599 U.S. at 130.

rent, . . . or maintain." In *Patterson*, 119 F.4th at 612, the Ninth Circuit applied *Dubin* to the common phrase "because of" as used in U.S.S.G. § 3A1.1(a). It likewise relied on *Dubin* to define "derivative work" in the context of copyright litigation. *See Oracle Int'l Corp. v. Rimini St., Inc.*, No. 23-16038, 2024 WL 5114449, at *4 (9th Cir. Dec. 16, 2024). The Fourth Circuit's disregard below of this Court's precedent in *Dubin* in interpreting "uses," a common phrase with multiple meanings, creates a split with these circuits.

II. The Fourth Circuit allowed conviction based on conduct less than that required by the statute.

18 U.S.C. § 2251(a)—which has a 15-year mandatory minimum sentence for first time offenders and a 25-year mandatory minimum for an offender with one prior conviction for any of several different offenses, including sexual abuse of an adult or the possession of child pornography (*see* 18 U.S.C. § 2251(e))—is directed at employing, using, persuading, inducing, enticing, or coercing a minor to engage in sexually explicit conduct only when it is "for the purpose of producing any visual depiction of such conduct. . . ." The statute uses the phrase "the purpose of" not "a purpose of." In common usage, "the" purpose does not mean any subsidiary nonincidental purpose, but rather, the dominant purpose. Yet based on the decision below, the Fourth Circuit employs the lesser standard by allowing trial courts to instruct the jury that it need only find **a** "motivating purpose," "significant purpose" *or* an "equivalent variation." Pet. App. 48a. The Fourth Circuit will allow conviction based on any purpose that is not incidental. *See id.*

"The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely the creatures of statute." *Liparota v. United States*, 471 U.S. 419, 424 (1985). Courts must apply the law as Congress has written it. *See Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 89 (2017) ("our job [is] to apply faithfully the law Congress has written, it is never our job to rewrite a constitutionally valid statutory text . . . "). Courts should not replace the text of a statute based on its belief that "further[ing] the statute's primary objective must be the law." *See id.* Courts should not presume "that any result consistent with their account of the statute's overarching goal must be the law but will presume more modestly instead that the legislature says . . . what it means and means . . . what it says." *See id.* citing *Dodd v. United States*, 545 U.S. 353, 357 (2005) (internal quotation marks omitted).

In 2018, Congress amended 18 U.S.C. § 2423(b) to change "for the purpose" to "with a motivating purpose." *See* Abolish Human Trafficking Act of 2017, Pub. L. No. 115-392, § 14, 132 Stat. 5250, 5256 (Dec. 21, 2018). If Congress intended a conviction based on any motivating purpose, even if not the purpose, it could have made a similar change to § 2251(a). That Congress did not, reinforces the conclusion that Congress meant what it said in § 2251(a). Courts should not rewrite the law.

The misreading of the statute by the Fourth Circuit is also reflected in the jury instructions approved by the Ninth and Eleventh Circuits. *See United States v. Rosenow*, 50 F.4th 715, 739 (9th Cir. 2022) (the purpose must be "dominant, significant *or* motivating") (emphasis added); *United States v. Gatlin*, 90 F.4th 1050, 1062 (11th

Cir. 2024) ("[t]he government was not required to prove that making explicit photographs was [Gatlin's] sole or primary purpose for engaging in sexual activity with E.H.; instead, it was enough to show that it was 'a purpose' for doing so.")

The Eighth Circuit, however, has recently read the statute in a manner that causes a split with these circuits, ruling that "[t]he intent requirement of § 2251(a) is satisfied if there is sufficient evidence that one of the defendant's 'dominant purposes' was to create a visual depiction of his sexual acts with the girls." *See Lemicy*, 122 F.4th at 309-310.

The Sixth Circuit seems to have taken yet a third approach. It relies on a pattern jury instruction that states: "'for the purpose of' means that the defendant acted with the intent to create visual depictions of sexually explicit conduct, and that the defendant knew the character and content of the visual depictions." *United States v. Frei*, 995 F.3d 561, 563, 566 (6th Cir. 2021). *See also United States v. McShan*, No. 22-1275, 2023 WL 3035218, at *2 (6th Cir. Apr. 21, 2023) (unreported) ("The purpose of" element is met if the defendant has the "intent to create visual depictions of sexually explicit conduct," and shows that he "knew the character and content of the visual depictions."). Thus, the Sixth Circuit does not even require that the government show that creating a visual depiction was the dominant, significant, or motivating purpose of using the minor to engage in sexual conduct. Rather, it finds that the purpose element is met if the defendant understood that he was creating a visual depiction of sexual conduct, regardless of his purpose in doing so. The Sixth Circuit reads "for the purpose of" as addressing knowledge, rather than motivation.

This Court should *grant certiorari* to clarify the law, resolve the split in the circuits, and ensure that conduct less than that required by the plain language of the statute does not result in conviction.

III. The questions presented are important and frequently recurring, and this case is a good vehicle for resolving the issues.

This case involves issues of significant importance with far-reaching implications that are frequently re-occurring.

First, there are many criminal statutes with lists of *actus reus* verbs that contain common terms like "uses" that, in isolation, have broad ordinary meanings, but whose meaning in the statute is derived from context:

- 21 U.S.C. § 856—Maintaining drug-involved premises: "it shall be unlawful to knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance;"

- 18 U.S.C. § 231(a)(1)—Civil disorders: "Whoever teaches or demonstrates to any other person the use, application, or making of any firearm or explosive or incendiary device, or technique capable of causing injury or death to persons, knowing or having reason to know or intending that the same will be unlawfully employed for use in, or in furtherance of, a civil disorder which may in any way or degree obstruct, delay, or adversely affect commerce or the

movement of any article or commodity in commerce or the conduct or performance of any federally protected function;"

- 18 U.S.C. § 1586—Service on vessels in slave trade: "Whoever, being a citizen or resident of the United States, voluntarily serves on board of any vessel employed or made use of in the transportation of slaves from any foreign country or place to another, shall be fined under this title or imprisoned not more than two years, or both."

A consistent approach to statutory interpretation throughout the circuits achieves the dual purpose of consistent application of the laws and ensuring that laws are made by Congress.

Second, several circuits have gone beyond the plain language of 18 U.S.C. § 2251(a) allowing criminal conviction based on **a** non-incidental purpose to create a visual depiction of sexual activity involving a minor, even though the statute proscribes doing so only when **the** purpose is the visual depiction of sexual activity involving a minor. Given the severity of the 15-year mandatory minimum for first time offenders, it is particularly important that the statute be construed strictly.

This case is the right vehicle for resolving these issues. The case arises on direct appeal. The opinion below is unambiguous with respect to each of the issues raised in this Petition. There are no jurisdictional problems, no preservation issues, and no factual disputes as to the questions presented. The record is not voluminous.

CONCLUSION

For the foregoing reasons, the Court should grant Mr. Sanders' petition for a writ of *certiorari*.

Respectfully submitted,

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January 15, 2024

APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED JULY 9, 2024 . . . . . 1a

APPENDIX B — EXCERPTS OF TRANSCRIPT OF TRIAL PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, DATED NOVEMBER 27, 2021 . . . . . 58a

APPENDIX C — EXCERPTS OF TRANSCRIPT OF TRIAL PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, DATED NOVEMBER 26, 2021 . . . . . 64a

APPENDIX D — EXCERPTS OF TRANSCRIPT OF TRIAL PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, DATED NOVEMBER 25, 2021 . . . . . 71a

APPENDIX E — EXCERPTS OF TRANSCRIPT OF TRIAL PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, DATED NOVEMBER 22, 2021 . . . . . 77a

TABLE OF APPENDICES

Page

APPENDIX F — EXCERPTS OF TRANSCRIPT OF TRIAL PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, DATED NOVEMBER 20, 2021 . . . . . 95a

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED SEPTEMBER 17, 2024 . . . . . 104a

APPENDIX H — RELEVANT STATUTORY PROVISIONS. 105a

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED JULY 9, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4242

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ZACKARY ELLIS SANDERS,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
T. S. Ellis III, Senior District Judge.
(1:20-cr-00143-TSE-1)

Argued: March 22, 2024 Decided: July 9, 2024

Before NIEMEYER, KING and BENJAMIN, Circuit Judges.

Affirmed by published opinion. Judge King wrote the opinion, in which Judge Niemeyer and Judge Benjamin joined.

Appendix A

KING, Circuit Judge:

Following a jury trial in October 2021 in the Eastern District of Virginia, defendant Zackary Ellis Sanders was convicted of five offenses involving the illegal production of child pornography, six offenses involving the illegal receipt of child pornography, and a single offense for illegal possession of child pornography. The district court sentenced Sanders to 216 months in prison. Sanders now pursues a multifaceted appeal, maintaining that the court committed reversible error at nearly every stage of the underlying proceedings.

Sanders's appellate contentions broadly manifest in four different forms — first, that the district court erred in denying motions to suppress evidence seized pursuant to a search warrant for his residence, plus Sanders's related efforts to inquire into alleged misrepresentations in the affidavit supporting the issuance of that warrant; second, that the court erred in admitting statements Sanders made to FBI agents during the search of his residence; third, that the court improperly excluded purported evidence of the victims' voluntary participation in the production of child pornography, including expert testimony about a so-called "BDSM culture;"[1] and, fourth, that the court erred in giving three types of challenged jury instructions.

1. The acronym "BDSM" relates to the conduct of Sanders and the minor victims, and has been used by the lawyers throughout the district court proceedings and in the briefs, allegedly standing for bondage, discipline, dominance, submission, sadism, and masochism.

As explained herein, we reject each of Sanders's appellate contentions and affirm the judgment of the district court.

I.

Before reviewing the procedural history and assessing the legal issues presented, we will summarize the pertinent facts. The facts and reasonable inferences drawn therefrom are recited in the light most favorable to the Government, as the prevailing party at trial and in the suppression proceedings. *See United States v. Burgos*, 94 F.3d 849, 854 (4th Cir. 1996) (regarding jury verdict); *United States v. Jones*, 356 F.3d 529, 533 (4th Cir. 2004) (regarding suppression hearing).

A.

1.

In August 2019, a law enforcement agency in another country (the "Foreign Agency") provided an intelligence report to the FBI, advising that a specific Internet Protocol address (an "IP address") had accessed "child sexual abuse and exploitation material."[2] *See* J.A. 1406.[3] The report of the Foreign Agency further advised that this

2. An IP address is a unique numerical figure that identifies an electronic device accessing the Internet, and it is used to route information between Internet-connected devices.

3. Citations herein to "J.A. " refer to the contents of the Joint Appendix filed by the parties in this appeal.

particular IP address, on May 23, 2019, at approximately 10:00 PM EST:

> [W]as used to access online child sexual abuse and exploitation material, with an explicit focus on the facilitation of sharing child abuse material (images, links and videos), emphasis on BDSM, hurtcore, gore, and death-related material including that of children. Users were required to create an account (username and password) in order to access the majority of the material.

Id. (the "August Report").[4]

A month later, in September 2019, the FBI received a second report from the Foreign Agency. This submission represented to the FBI that the information provided in the August Report was "lawfully obtained" pursuant to a warrant. *See* J.A. 1408. Additionally, it advised that "at no time was any computer or device interfered with in the United States," and that the Foreign Agency "did not access, search or seize any data from any computer in the United States." *Id.*

Soon thereafter, the Foreign Agency named and described the website that the subject IP address had used to access the child pornography — entitled "Hurt

4. The website at issue defines "hurtcore" as "rape, fighting, wrestling, bondage, spanking, pain, mutilation, gore, dead bodies, and etc., (no limits)." *See* J.A. 1445. The term "hurtcore" is thus a reference to violent pornography. *Id.* at 1444.

Meh." The Hurt Meh website is a so-called "TOR hidden service." The term "TOR" is a reference to the TOR network — a unique network that routes an Internet user's communications over the Internet through a randomly assigned path of relay computers. The purpose of the TOR network is to mask the IP address of the Internet user.

If an Internet user wishes to access the TOR network, he must use the "TOR browser" — which can be obtained for free by downloading it from the private entity that maintains the TOR network. When using the TOR browser, an Internet user can access "open" Internet websites — such as google.com or wikipedia.org. The TOR browser, however, makes it possible for users to access websites that are accessible only to users operating within the TOR network. These TOR-based websites are called "hidden services." *See* J.A. 1443. And, as identified above, Hurt Meh was one of these hidden services.

There are additional differences between TOR-based hidden services and open websites. The website addresses of a TOR hidden service are comprised of a string of randomly generated characters followed by an ".onion" suffix. The nature of hidden TOR-based services means that they are "much more difficult" to locate through a typical Internet search, as compared to an open Internet website. *See* J.A. 1448. Usually, to locate a specific hidden service, a TOR user would have to access a TOR directory — which is also a TOR hidden service — that would identify and advertise the web addresses for multiple other hidden services. These combined features create anonymity and obscurity, making TOR hidden services,

the TOR browser, and the TOR network, very appealing vehicles for criminal activity. They have particularly been a boon for the online sexual exploitation of children.

Hurt Meh is one such website. It is an online bulletin board, dedicated to the advertisement and distribution of child pornography, and it was operational from July 2016 until June 2019.[5] The homepage for the Hurt Meh website contained a search bar and various links, including a link titled "Announcements." *See* J.A. 1777. If a TOR user clicked on the "Announcements" link, a message called "Welcome, Please read before registering" would be visible. *Id.* at 1444. The content of the message provided:

> Welcome abusers and abusees and those that enjoy watching. This website was created to host videos, photos and discussions of 18 (twinks) and younger of Hurtcore materials (videos & pictures) as well as discussion of such. . . . PS Please register to see all the forums, and use strong password for user profile.

Id. No pornographic material was displayed on Hurt Meh's homepage. To access such material, the TOR user had to create a username and password.

The FBI was well aware of the above-described nature of Hurt Meh and TOR when it received the initial reports

5. Hurt Meh's operation ceased in June 2019, when an unidentified foreign law enforcement agency located and seized the computer server that was hosting the website.

from the Foreign Agency. Notably, the FBI and other domestic law enforcement agencies had a longstanding relationship with the Foreign Agency and had developed a regular and mutually beneficial practice of sharing reliable investigative information concerning TOR users who appear to be engaged in online sexual exploitation. *See* J.A. 1448.

2.

Based on the foregoing, the FBI opened an investigation into the IP address identified in the August Report. The IP address was associated with an 11,000-square-foot mansion in McLean, Virginia, where the then 24-year-old defendant Zackary Sanders was known to reside with his parents. As part of the investigation, FBI Special Agent Ford prepared a 36-page affidavit (the "Affidavit"), summarizing not only the FBI's investigation, but also, inter alia, the nature of Hurt Meh, the TOR network, and the various reports received from the Foreign Agency. Of relevance to Sanders's appellate contentions today are the Affidavit's ¶¶ 23 and 25, which specify information contained in the Foreign Agency's shared reports and domestic law enforcement's relationship with the Foreign Agency. Those two paragraphs of Agent Ford's Affidavit relate, in relevant part:

> 23. In August 2019, [the Foreign Agency] . . . notified the FBI that the [Foreign Agency] determined that on May 23, 2019, a user of IP address [omitted] accessed online child sexual abuse and exploitation material via a website

> that the [Foreign Agency] named and described as [Hurt Meh].
>
> 25. The [Foreign Agency] . . . advised U.S. law enforcement that it obtained that information through independent investigation that was lawfully authorized in the [Foreign Agency]'s country pursuant to its national laws. The [Foreign Agency] further advised U.S. law enforcement that the [Foreign Agency] had not interfered with, accessed, searched, or seized any data from any computer in the United States in order to obtain that IP address information.

See J.A. 1447-48.

The Affidavit also describes pertinent characteristics of individuals who access child pornography on the Internet. Such persons, according to the Affidavit, may electronically possess, collect, and maintain such materials. Those materials are stored electronically, thereby making evidence of such activity, including even deleted child pornography, recoverable on those individuals' computers for a long period.

On February 10, 2020 — approximately nine months after the target IP address had accessed the Hurt Meh website — the FBI submitted Agent Ford's Affidavit to the district court in Eastern Virginia, and requested a search warrant for the identified residence in McLean, Virginia, in addition to any structure or person on the

property. The search warrant was issued that same day by a federal magistrate judge in Alexandria (the "February Warrant").

3.

Two days after the February Warrant was issued, in the early morning hours of February 12, 2020, the FBI executed it. When the FBI agents arrived at the residence, Sanders's father admitted them. Sanders was located and then taken to an office therein to be interviewed. Once situated in the office, the FBI agents explained to Sanders that he was not under arrest and that it was his choice as to whether to speak to the agents. Sanders agreed to be interviewed and understood that the interview was being recorded. Sanders did not receive any *Miranda* warnings.

The FBI interview of Sanders lasted approximately three hours, and during the interview other FBI agents searched the residence. That search uncovered multiple electronic devices in Sanders's bedroom, including a flash drive containing child pornography.[6] When the interviewing FBI agents began asking about the flash drive, Sanders asked if he could speak with his mother. The agents promptly brought his mother into the room. After speaking with his mother for about 15 minutes, the FBI interview of Sanders resumed. Sanders acknowledged that he recognized the flash drive. He explained that he had transferred the child pornography to the flash drive

6. A flash drive is a small and portable electronic device, which is commonly used for storing electronic data transferred from a computer or digital device.

himself and that he had accessed the material by using the TOR browser and a TOR directory. Approximately two hours later, the search and the interview concluded, and the FBI left without making any arrests.

4.

The electronic devices that were seized by the FBI from Sanders's residence on February 12, 2020, were subjected to extensive forensic examination. That examination uncovered several messages that Sanders had sent to six different boys — aged 13 to 17 — through a mobile messaging application. In his conversations with five of those minor children, Sanders instructed them to record and send videos and pictures that depicted themselves nude. Sanders would frequently tell the minors to verbally degrade themselves with insults while recording the videos. Four of the minors were instructed to "slap" their genitals "as hard as [they] can," record themselves doing so, and send the video to Sanders. *See, e.g.*, J.A. 71. Sanders told two of the minors to record themselves masturbating. One boy sent a video to Sanders, depicting the minor engaged in oral sex. Additionally, the FBI found multiple videos of child sexual abuse on Sanders's electronic devices. These videos include depictions of infants and minors being sexually abused, including being orally and anally raped by adult men.

B.

On June 24, 2020, an Indictment was returned in the Eastern District of Virginia naming Sanders as the sole defendant. The Indictment alleged twelve offenses:

- Five counts alleging production of child pornography in violation of 18 U.S.C. § 2251(a) (the "Production Charges");

- Six counts alleging receipt of child pornography in violation of 18 U.S.C. § 2252(a)(2) (the "Receipt Charges"); and

- One count alleging possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B) (the "Possession Charge").

See J.A. 86. The district court's deadline for pre-trial motions was initially set for August 20, 2020, but was extended to August 27.

1.

In July 2020, Sanders sought to compel the Government to produce discovery related to the Affidavit, pursuant to Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure.[7] Sanders asserted that he was entitled to such discovery because Agent Ford had misled the magistrate

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7. The relevant portion of Rule 16(a)(1)(E) provides as follows:

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and . . . *the item is material to preparing the defense.*

Fed. R. Crim. P. 16(a)(1)(E) (emphasis added).

judge by (1) misrepresenting the content of the Foreign Agency's reports, and (2) swearing that the Foreign Agency, in generating the August Report, did not interfere with a computer in the United States, when Agent Ford knew or should have known that the contrary was true. Sanders wanted to probe these alleged misrepresentations to bolster his planned pretrial attack on the validity of the February Warrant.

On August 21, 2020, the district court denied Sanders's motion to compel for failure to satisfy the materiality requirement of Rule 16(a)(1)(E). As explained in more detail below, the court ruled Sanders had not presented sufficient facts to indicate that the discovery would have actually helped prove his defense.[8]

2.

On August 27, 2020 — the day of the district court's pretrial motion deadline — Sanders filed a motion to suppress, seeking the suppression of the fruits of the search and a *Franks* hearing.[9] The motion — after first being struck for exceeding the 30-page limit under the

8. When Sanders subsequently renewed his motion to compel — which occurred multiple times throughout the proceedings — the district court denied those efforts as well. *See* J.A. 400, 1650, 1833-35, 4035.

9. The term "*Franks* hearing" is a reference to a hearing conducted by a trial court pursuant to the Supreme Court's decision in *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). The purpose of a *Franks* hearing is to probe the truthfulness of an affidavit used to support a search warrant.

pertinent local rule — was later refiled as four separate motions to suppress. Those four suppression motions raised slightly varied arguments that (1) there was a lack of probable cause to support the issuance of the February Warrant, and (2) Agent Ford had intentionally misled the magistrate judge in the supporting Affidavit.

The district court, in an October 26, 2020, Sealed Memorandum Opinion, rejected all of Sanders's suppression efforts (the "Suppression Opinion"). The court began its ruling by determining that the February Warrant was facially valid. From there, the court ruled that Sanders was not otherwise entitled to a *Franks* hearing because he had "failed to make a substantial preliminary showing that [Agent Ford] made a false statement knowingly and intentionally, or with reckless disregard for the truth that is necessary to find probable cause." *See* J.A. 1677.[10]

3.

On December 17, 2020 — 112 days after the district court's extended pre-trial motion deadline and 52 days after his four separate motions to suppress had been denied — Sanders filed an untimely fifth motion to suppress. In this fifth suppression motion, Sanders argued that his interview with the FBI agents on February 12, 2020, had been involuntary, and was in violation of the Fifth Amendment. The court ordered Sanders to show cause for his substantial delay in asserting that issue. In

10. The district court denied Sanders's multiple subsequent attacks on the validity of the February Warrant. *See* J.A. 514, 2665, 4037.

January 2021, the court ruled that Sanders had failed to show good cause for his tardiness and denied the fifth motion to suppress as untimely. *See* J.A. 288.[11]

C.

The prosecution of Sanders proceeded to a jury trial in October 2021, and it lasted seven days. During the trial, the Government called nine witnesses — including two of the minor victims — and admitted more than 175 exhibits. Sanders presented a relatively brief defense, which included Sanders testifying on his own behalf. On appeal, Sanders challenges several of the court's evidentiary rulings and three of the jury instructions. The procedural history of those challenges is discussed below.

1.

a.

During the pretrial proceedings, the Government moved *in limine* to exclude evidence relating to the minor victims' purported voluntary participation in their conduct with Sanders. The district court granted the motion and excluded such voluntary participation evidence, ruling that the alleged minor victims' state of mind was irrelevant and inadmissible. *See* J.A. 2469.

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11. The district court also rejected Sanders's subsequent requests for reconsideration and renewed motions to suppress his interview statements on Fifth Amendment grounds. *See* J.A. 361, 410.

This *in limine* ruling was reinforced at several points by the district court in the trial. *See, e.g.*, J.A. 2830-32 (precluding Sanders from using screenshots of minor victim's online dating profile on BDSM-themed dating application to establish that minor victim was "into" BDSM), 3286 (excluding portions of chat transcripts that were offered to establish allegedly consensual nature of relationship between Sanders and minor victim). In these later rulings, the court expanded its reasoning to exclude evidence of the victims' purported voluntary participation under Rule 403 of the Federal Rules of Evidence, ruling that such evidence could confuse the jury on the issue of consent.[12] *Id.* at 3286, 3609.

b.

The district court also excluded the defendant's proposed expert testimony of Dr. Fredrick Berlin, a professor in the Department of Psychiatry and Behavioral Sciences at the Johns Hopkins University School of Medicine. Sanders designated Dr. Berlin as an expert to testify about the so-called BDSM culture, including how it "can also involve more than just sex" and that "such

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12. Rule 403 allows for the exclusion in limited circumstances of otherwise relevant evidence. It provides as follows:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, *confusing the issues*, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

See Fed. R. Evid. 403 (emphasis added).

relationships are based upon mutual consent." *See* J.A. 2701. Dr. Berlin was prepared to testify that Sanders's ordering of the minor children to take photographs or videos of themselves was consistent with a consensual BDSM relationship. Additionally, Dr. Berlin would have testified on the meaning of certain terms frequently used in the BDSM culture, including "sub, dom, master, slave, owner, sir, boy, blackmail, bitch, pup, and collaring." *Id.* at 2700.

The district court excluded Dr. Berlin's purported expert testimony from the trial as irrelevant. The court again ruled that evidence of consent was irrelevant to Sanders's charges, and thus Dr. Berlin's testimony as to the purported consensual and non-sexual nature of BDSM relationships was excluded. The court also ruled that an expert was not needed to define certain BDSM terms, as their meanings "are not so different from their common meaning as to require expert explanation." *See* J.A. 2758.

Even if Dr. Berlin's testimony was somehow relevant, the court ruled, it was nevertheless excludable under Rule 403 because the slight probative value of such testimony "would mislead the jury into thinking that the consent of alleged minor victims in this case . . . is somehow exculpatory." *See* J.A. 2760. The court also found that Dr. Berlin's testimony would be duplicative and unnecessary, because Sanders had already testified on his behalf and had explained various terms used in BDSM culture.

2.

The district court, throughout the trial, gave instructions to the jury regarding the Production Charges, the Receipt Charges, and the Possession Charge, alleged as violations of 18 U.S.C. § 2251(a), § 2252(a)(2), and § 2252(a)(4)(B), respectively. Before assessing those instructions, some background on the pertinent statutory language on the charged offenses is in order.

First, Section § 2251(a) of Title 18 — which sets forth the offense of production of child pornography — provides:

> 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 . . . shall be punished as provided under [this section].

See 18 U.S.C. § 2251(a). The offense of receipt of child pornography is defined in 18 U.S.C. § 2252(a)(2), which provides:

> Any person who . . . knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce . . . if — (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct; . . . shall be punished as provided in . . . this section.

See 18 U.S.C. § 2252(a)(2). Similarly, 18 U.S.C. § 2252 (a)(4)(B), which outlines the offense of possession of child pornography, provides:

> Any person who knowingly possesses . . . 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been . . . shipped or transported using any means or facility of interstate or foreign commerce . . . if — (i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (ii) such visual depiction is of such conduct; shall be punished as provided in . . . this section.

See 18 U.S.C. § 2252(a)(4)(B). With the foregoing statutory language in mind, we turn to the district court's instructions.

a.

During Sanders's trial, the district court repeatedly instructed the jury that the consent of the minor victims was irrelevant to each of the charged offenses. The first instruction came during the testimony of the first witness — one of the minor victims Sanders had communicated with — and it was provided to the jury in response to a line of questioning pursued on cross-examination by Sanders's lawyers. The instruction was, in relevant part:

> A minor cannot consent to sexual activity or to engaging in child sexual abuse. So whether or

> not he wanted to do it or didn't want to do it is irrelevant.

See J.A. 2861. The court repeated substantially similar instructions at other appropriate times during the trial. *Id.* at 3317 (during defense's cross-examination of Agent Ford), 3789-91 (during defense's closing argument).

During the charge conference — after the evidence was completely presented and prior to the arguments of counsel — the district court informed the parties that it would instruct the jury "that a minor cannot consent to the production of child pornography . . . [and] any argument regarding a minor's consent to the production of child pornography is irrelevant in reaching your verdict." *See* J.A. 577. Sanders objected to this instruction, requesting to add thereto that the jury could "consider the assent or voluntariness of the minor in determining the defendant's intent and purpose." *Id.* at 3731-32. In line with its prior rulings, the court rejected that request and charged the jury as it had proposed. Thus, each of the related instructions (collectively, the "Consent Instructions") consistently advised the jury that the consent or voluntary participation of minor victims in the alleged offenses is irrelevant.

b.

The production of child pornography in violation of 18 U.S.C. § 2251(a) requires that a person have a minor engage in sexually explicit conduct for "the purpose of producing any visual depiction of such conduct."

Throughout the trial, Sanders argued that this statutory language required that such production had to be the predominant purpose of the defendant. *See* J.A. 474 (proposed jury instruction), 529-32 (midtrial written objection), 2771-72 (oral argument on second day of trial), 3263-72 (oral argument on fourth day of trial). In each instance, the trial court rejected Sanders's contention in that regard. *Id.* at 2772 ("I've ruled. . . . [I]t's not going to be dominant."), 3263 ("It has to be a motivating purpose. It doesn't have to be predominant.").[13] And on the fourth day of trial, the court gave two midtrial jury instructions that production of each visual depiction need be only "a motivating purpose." *See* J.A. 3225, 3272-75.

When the district court explained and gave its proposed instructions at the charge conference, it again used the "motivating purpose" language — and this time Sanders did not object. When the court charged the jury, it gave, in relevant part, the following instruction:

---

13. There is no doubt that the district court considered and rejected Sanders's "predominant" purpose contention. When it denied Sanders's Rule 29 motion after the government's submission of evidence was completed, the court stated:

> Now, I know that the defendants also argue that I'm not construing the statute properly, that it ought to be the . . . predominant or sole purpose. Well, I've rejected that. And if I'm wrong the Court of Appeals will tell me, and the Court of Appeals would have to instruct me to vacate the convictions on those five counts that that pertains to.

See J.A. 3518-19.

> In deciding whether the Government has proven that the defendant acted for the purpose of producing a visual depiction of sexually explicit conduct, you may consider all of the evidence concerning the defendant's conduct. The production of a visual depiction of sexually explicit conduct must have been a significant or motivating purpose of the defendant, and not merely incidental to engaging in the sexually explicit conduct.
>
> It is not necessary, however, for the Government to prove that the defendant was single-minded in his purpose or that the production of a visual depiction of sexually explicit conduct was the defendant's sole or primary purpose. Rather, it is sufficient for the Government to prove that the defendant had a significant or motivating purpose of producing a visual depiction of sexually explicit conduct when he employed or used or persuaded or induced or enticed or coerced [a minor] to engage in sexually explicit conduct.

See J.A. 573 (the "Purpose Instruction").

c.

Each of the twelve counts of the Indictment required the Government to prove that the visual depictions were of children engaging in "sexually explicit conduct." *See* 18 U.S.C. §§ 2251(a), 2252(a)(2), 2252(a)(4)(B). And

§ 2256(2)(A)(v) of Title 18 specifically defines "sexually explicit conduct" to include, in relevant part, "lascivious exhibition of the anus, genitals, or pubic area of any person." *See* 18 U.S.C. § 2256(2)(A)(v).

The district court, to provide the jury with guidance on what constitutes a "lascivious exhibition," informed the parties during the charge conference that it intended to give the jury a non-exhaustive multi-factor test, as spelled out by a 1986 federal trial court in California in *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986) (the "*Dost* Factors"). Sanders objected to the *Dost* Factors and countered that lascivious exhibition of the genitals "means depictions showing a minor engaged in . . . hard core sexual conduct." *See* J.A. 3740. Sanders's contention was rejected, and the court gave the following instruction on lascivious exhibition:

> For the visual depiction of an exhibition of the genitals or pubic area of a minor to be considered sexually explicit conduct, the exhibition must be lascivious. Whether a picture or image of the genitals or pubic area constitutes such lascivious exhibition requires a consideration of the overall context of the material. In determining whether an exhibition of the genitals or pubic area of a minor is lascivious, you may consider the following factors:
>
> Whether the focal point of the visual depiction is on the minor's genitals or pubic area; two, whether the setting or visual depiction is sexually suggestive — that is, a place or pose

> generally associated with sexual activity; whether the minor is depicted in an unnatural pose or in inappropriate attire considering the age of the minor; whether the minor is fully or partially clothed or nude; whether the visual depiction suggests coitus or a willingness to engage in sexual activity; and whether the visual depiction is intended or designed to elicit a sexual response in the viewer.
>
> . . . [A] picture or image need not involve all of these factors to be lascivious exhibition of the genitals or pubic area. It is for you to decide the weight or lack of weight to be given to any of these factors. Ultimately, you must determine whether the visual depiction is lascivious based on its overall content.

See J.A. 584-85 (the "Lascivious Instruction").

* * *

After the lawyers argued their positions to the jury, the district court gave its instructions. The jury deliberated for approximately two hours and returned its verdict of guilty on all twelve counts. On April 1, 2022, the district court sentenced Sanders to 216 months in prison on each of Counts 1 to 11, to run concurrently, plus 120 months on Count 12, to also run concurrently with the sentences on Counts 1 to 11. Sanders has appealed his convictions and sentences, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

II.

Sanders's appellate contentions broadly manifest in four different forms — with additional issues nested therein. Those four broad contentions are: first, that the district court erred in denying motions to suppress evidence seized pursuant to a search warrant for his residence, plus Sanders's related efforts to inquire into alleged misrepresentations in the Affidavit; second, that the court erred in admitting statements Sanders made to FBI agents during the search of his residence; third, that the court improperly excluded purported evidence of the victims' voluntary participation in the production of child pornography, including expert testimony about BDSM culture; and, fourth, that the court erred in giving the jury the Consent Instructions, the Purpose Instruction, and the Lascivious Instruction.

A.

Sanders's principal contention on appeal is that all of his convictions should be reversed on Fourth Amendment grounds. More specifically, he argues that the district court's Suppression Opinion erroneously denied his various motions to suppress, in ruling that the February Warrant was facially valid. Alternatively, Sanders contends he was entitled to a *Franks* hearing and discovery under Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure.

1.

We begin by reviewing whether the magistrate judge had a substantial basis for finding probable cause to support the issuance of the February Warrant. As a

general proposition, the legal conclusions underlying the denial of a motion to suppress are reviewed de novo, and the court's factual findings relating thereto are reviewed for clear error. *See United States v. Kolsuz*, 890 F.3d 133, 141-42 (4th Cir. 2018). Because a magistrate judge issued the February Warrant, however, "our task isn't to assess probable cause de novo," rather, "we apply a deferential and pragmatic standard to determine whether the judge had a substantial basis for concluding that a search would uncover evidence of wrongdoing." *See United States v. Bosyk*, 933 F.3d 319, 325 (4th Cir. 2019) (internal quotation marks omitted). And in assessing a suppression ruling, "we view the evidence in the light most favorable to the prevailing party below." *See United States v. Jones*, 356 F.3d 529, 533 (4th Cir. 2004).

The Government is generally obliged to obtain a search warrant prior to searching a residence. *See* U.S. Const. amend. IV. And a search warrant must be supported by probable cause. *See Fernandez v. California*, 571 U.S. 292, 298, 134 S. Ct. 1126, 188 L. Ed. 2d 25 (2014). Probable cause is not a high bar, requiring only "a fair probability that contraband or evidence of a crime will be found in a particular place." *See Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). And we readily acknowledge — as a general proposition — that a "single click" of an Internet link will not establish probable cause to search a residence for evidence of child pornography. That is, unless there are solid additional facts to suggest that "the person behind that click plausibly knew about and sought out" child pornography. *See Bosyk*, 933 F.3d at 326.

Appendix A

Several pertinent facts spelled out in the Affidavit establish beyond doubt that the magistrate judge had a substantial basis to issue the challenged February Warrant:

- The Foreign Agency — known to be reliable — had notified the FBI that the target IP address had accessed online child sexual abuse and exploitation material on Hurt Meh.

- The Hurt Meh website was a TOR hidden service, and therefore accessible only through the TOR network, making it "extremely unlikely that any user could simply stumble upon [Hurt Meh] without first understanding its purpose and content." *See* J.A. 1450.

- To access the child sexual abuse and exploitation material on Hurt Meh, an Internet user would have to register an account.

- Individuals with a sexual interest in children are known to possess, collect, and maintain child pornography in an electronic format on computers.

- Due to the nature of electronic storage, even if an individual deletes child pornographic material, evidence of the material remains on the computer for an extended period.

Although this search warrant relied on a single instance of accessing child pornography on the Hurt Meh website, the requisite affirmative steps to access that website and the pornographic material thereon strongly suggest that the Internet user knew that such content was located on the site and had actively sought out such material.

Our 2019 decision in *United States v. Bosyk* is very instructive. *See Bosyk*, 933 F.3d 319. In *Bosyk*, the DHS was investigating a particular TOR hidden service, which was a website dedicated to advertising and distributing child pornography. *Id.* at 322. One day a link appeared on this hidden website (the "Link"), which was accompanied by a message graphically describing the contents of the Link, making it unmistakable that the contents were child pornography. Importantly, the Link was to an open Internet site, i.e., not a TOR hidden service. That same day, an IP address associated with the defendant's residence accessed the Link. The prosecutors did not have an electronic record establishing whether Bosyk's IP address had ever visited the TOR hidden service.

Despite the absence of direct evidence that Boysk had previously visited the TOR hidden service and viewed the incriminating description of the Link's contents, we relied on the circumstantial facts to establish that Boysk had probably accessed the TOR hidden service. *See Bosyk*, 933 F.3d at 330. That is, we ruled that there were sufficient additional facts to show that the person who accessed the link knew it contained child pornography, in that (1) the Link was accessed the same day it was posted on the TOR hidden service with the incriminating description; and (2) because the methods of disseminating

child pornography on the Internet made more innocent routes — e.g. stumbling onto the Link while browsing benign Internet content — less likely.

Here, the circumstantial gap is not nearly as wide as that which existed in *Boysk*. Unlike in *Boysk*, this Affidavit revealed that Sanders's IP address not only accessed a TOR hidden service — Hurt Meh — but had "accessed online child sexual abuse and exploitation material" using that site. *See* J.A. 1447. To access the website's illegal material, a user had to engage in several affirmative steps, including using the TOR browser, locating the obscure web address, and registering an account with Hurt Meh.[14] Additionally, the chain of affirmative steps makes Sanders's innocent explanations for accessing the abuse and exploitation material very doubtful. Thus, there are sufficient additional facts to suggest that "the person behind that click plausibly knew about and sought out" child pornography. *See Bosyk*, 933 F.3d at 326.

We are also not impressed by Sanders's appellate contention that the facts in the Affidavit were so "stale" as to negate probable cause. Sanders emphasizes, of course, the approximately nine-month period that elapsed between the time Sanders's IP address accessed the child pornography on Hurt Meh in May 2019 and the issuance of the February Warrant. And indeed, "there is no question that time is a crucial element of probable cause,"

14. Sanders argues that the Government has no evidence that he ever registered an account with Hurt Meh. This assertion ignores the fact that the Foreign Agency advised the FBI that Sanders's IP address had accessed child pornography on Hurt Meh — which would not grant access until a user registered with it.

and "evidence seized pursuant to a warrant supported by 'stale' probable cause is not admissible." *See United States v. McCall*, 740 F.2d 1331, 1335-36 (4th Cir. 1984). The question of whether probable cause is stale, however, "must be determined by the circumstances of each case." *See Sgro v. United States*, 287 U.S. 206, 211, 53 S. Ct. 138, 77 L. Ed. 260 (1932). And we have recognized that the "staleness inquiry is unique in [the] child pornography context." *See Bosyk*, 933 F.3d at 330. That is — due to (1) the tendency of individuals who intentionally access to collect child pornography, and (2) the material's electronic nature causing evidence of collection to be recoverable long after it is deleted — search warrants can reasonably be sustained "months, and even years, after the events that gave rise to probable cause." *Id.* at 331 (ruling that search warrant issued five months after "click" was valid). Here, the Affidavit conveyed the same critical information to the magistrate judge — the person who deliberately accessed the pornographic material on the Hurt Meh website probably had a sexual interest in children and was therefore likely to be a collector of child pornography. And the evidence of such activity would be recoverable for long periods of time, even after the pornographic material had been deleted from the computer.

Thus, the record evidence convincingly reveals that the magistrate judge was correct, and had a substantial basis for concluding that probable cause existed and supported issuance of the February Warrant. And because of the nature of child pornography — including the unique nature of such unlawful activity and the contraband to be seized — probable cause was not at all "stale."

2.

Next, Sanders contends that, even if the Affidavit is sufficient to support probable cause, he was nevertheless entitled to a *Franks* hearing and the Suppression Opinion erroneously denied him that opportunity. More specifically, Sanders argues that Agent Ford "baldly misrepresented the tip documents received by the FBI" in ¶ 23 of the Affidavit by swearing that a user of the subject IP address had "access[ed] online child sexual abuse and exploitation material via [Hurt Meh]." *See* Appellant's Br. 18.[15] We review legal determinations underlying the denial of Sanders's *Franks* hearing de novo, while the court's related factual findings are reviewed for clear error. *See United States v. Allen*, 631 F.3d 164, 171 (4th Cir. 2011).

A defendant is entitled to attack an otherwise facially valid search warrant affidavit under the "narrow exception" created in *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). To obtain a "*Franks* hearing," the defendant "must make a substantial preliminary showing that the affiant made (1) a false statement (2) knowingly and intentionally, or with reckless disregard for the truth that was (3) necessary to the finding of probable cause." *See United States v. White*, 850 F.3d 667, 673 (4th Cir. 2017) (internal quotation marks omitted).

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15. Although Sanders also argued to the district court that Agent Ford's alleged misrepresentation in ¶ 25 supported his request for a *Franks* hearing, Sanders has not pursued that proposition on appeal.

Appendix A

In assessing the *Franks* issue, the Suppression Opinion concluded that a comparison between the August Report from the Foreign Agency and ¶ 23 reveals no meaningful difference or falsity. As a result, Sanders's request for a *Franks* hearing faltered on the first prong. Our own comparison reaches the same result. The August Report recited, in relevant part, that Sanders's IP address:

> [W]as used to *access online child sexual abuse and exploitation material*, with an explicit focus on the facilitation of sharing child abuse material (images, links and videos), emphasis on BDSM, hurtcore, gore, and death-related material including that of children. Users were required to create an account (username and password) in order to access the majority of the material.

See J.A. 1406 (emphasis added). Paragraph 23 of the Affidavit stated as follows:

> In August 2019, [the Foreign Agency] . . . notified the FBI that the [Foreign Agency] determined that on May 23, 2019, a user of [Sanders's] IP address *accessed online child sexual abuse and exploitation material via a website* that the [Foreign Agency] named and described as [Hurt Meh].

Id. at 1447 (emphasis added).

On appeal, Sanders contends that "the only sensible way to understand the [August Report] is that it reported access *to the website*, not to specific images," and therefore the Report only suggests that Sanders visited Hurt Meh's "plain vanilla homepage." *See* Appellant's Br. 18-20. Not so — the August Report makes it quite clear that child pornography was accessed. Nowhere does the August Report state that the Internet user merely visited Hurt Meh's homepage. And the fact that Hurt Meh's homepage does not display child pornography in no way alters the fact that the Affidavit accurately reiterated the August Report.

Sanders also argues that Agent Ford's inclusion of the term "via a website" in ¶ 23 fundamentally alters the meaning of the August Report. But the August Report explicitly stated that child pornography was accessed online, and an Internet user cannot access such pornographic material without first accessing a website that distributes it. Although the term "via a website" is found nowhere in the August Report, it is a readily understandable phrase used to naturally describe how the pornographic material was accessed. In these circumstances, the Suppression Opinion properly rejected Sanders's request for a *Franks* hearing.

3.

Next, we turn to Sanders's contention that the district court improperly denied his motion to compel discovery pursuant to Rule 16(a)(1)(E). A denial of such discovery, however, is reviewed for abuse of discretion only. *See United States v. Caro*, 597 F.3d 608, 616 (4th Cir. 2010).

Rule 16(a)(1)(E) affords a defendant a right to obtain discovery of any item "within the government's possession" if "the item is material to preparing the defense." *See* Fed. R. Crim. P. 16(a)(1)(E). To establish materiality, the defendant bears the burden of showing "some indication that the pretrial disclosure of the disputed evidence would have enabled the defendant significantly to alter the quantum of proof in his favor." *See Caro*, 597 F.3d at 621 (internal quotation marks omitted). A conclusory allegation of materiality does not satisfy the defendant's burden. *Id.*

Sanders sought evidence from the Government to aid his *Franks* argument and his suppression motions. Specifically, Sanders wished to pursue discovery to support his theory that Agent Ford had (1) knowingly misrepresented the August Report in ¶ 23 of the Affidavit, and (2) misled the magistrate judge by swearing — in ¶ 25 of the Affidavit — that the Foreign Agency had not interfered with any device in the United States when it generated its August Report.

We agree with Sanders that evidence altering the quantum of proof in a defendant's favor concerning either a *Franks* motion or a suppression motion would satisfy the materiality standard of Rule 16(a)(1)(E). Nevertheless, we find no reversible error in the district court's ruling that Sanders did not present sufficient facts "indicating that the [requested] information would have actually helped prove his defense." *See Caro*, 597 F.3d at 621. More specifically, as to Sanders's contention regarding ¶ 23, there is no misrepresentation included in ¶ 23. Thus, we agree with the trial court that an inquiry into the so-called

"misrepresentation" is unnecessary. Regarding ¶ 25, the information conveyed therein is the same as that contained in the reports provided by the Foreign Agency. That is, both ¶ 25 of the Affidavit and the contents of the Foreign Agency's reports show that the Foreign Agency had not interfered with any computer in the United States in order to obtain the target IP address. *See* J.A. 1408, 1447-48.

Sanders argued to the district court that, even if ¶ 25 accurately restates the information provided by the Foreign Agency, Agent Ford should have known that it was technologically implausible for the Foreign Agency to obtain the IP address without interfering with a domestic computer. To support this proposition, Sanders relied on declarations of his experts and affidavits by FBI agents in prior investigations. The court ruled against him, however, explaining that those arguments were unpersuasive, because (1) the expert declarations only speculated that the Foreign Agency had interfered with a domestic computer, and (2) a subsequent affidavit provided by Agent Ford, which established that he knew about methods of de-anonymizing TOR users that do not require interference with the user's computer.

Although Sanders insists that the district court improperly weighed the strength of his arguments, we are reviewing a Rule 16(a)(1)(E) ruling for abuse of discretion only. And Sanders has identified no errors of law or erroneous factual determinations by the court. We thus also reject Sanders's Rule 16 contentions.[16]

16. Sanders also argues that this Country and the Foreign Agency were in some joint venture where we would outsource the FBI's investigative process to the Foreign Agency. We see no abuse

B.

Sanders maintains on appeal that his statements to the FBI agents during the February 12 search of his residence should be suppressed as unconstitutional under the Fifth Amendment. The district court ruled, however, that Sanders's suppression effort was fatally untimely and that he had failed to establish "good cause" to excuse his tardy filing. We review a court's finding on a lack of good cause under Rule 12(c)(3) for abuse of discretion. *See United States v. Mathis*, 932 F.3d 242, 256 (4th Cir. 2019).

Pursuant to Rule 12 of the Federal Rules of Criminal Procedure, a motion for the suppression of evidence must be presented prior to trial or by the deadline established by the district court, "if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits." *See* Fed. R. Crim. P. 12(b)(3)(C), 12(c). If a defendant fails to satisfy such a deadline, he has waived his right to pursue a suppression motion. *Id.* 12(c)(3); *see also Mathis*, 932 F.3d at 256; *United States v. Sweat*, 573 F. App'x 292, 295 (4th Cir. 2014). A court can only consider an untimely suppression motion if the moving party can show good cause for the untimeliness. *See* Fed. R. Crim. P. 12(c).

Here, the district court ruled that Sanders had failed to show good cause for his 112-day delay. In assessing whether good cause had been established, the court ruled (1) that the motion and corresponding evidentiary hearing

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of discretion in the district court's conclusion that this assertion is "pure hopeful speculation." *See* J.A. 1580.

would be certain to delay the trial, (2) that Sanders had given no adequate or persuasive reason for his 112-day delay in filing the motion, (3) that the untimely motion would prejudice the Government as it prepared for trial, and (4) that Sanders had made no plausible argument about new information alerting him to new or additional facts on which the motion could be based. *See* J.A. 291-93.[17]

On appeal, Sanders does not claim that the district court abused its discretion in ruling that he did not establish good cause, nor does he contest the propriety of the legal test applied by the court. He simply emphasizes that he filed his motion "nearly two months before the then-scheduled trial date" and that he renewed his motion when the trial was later delayed. *See* Appellant's Reply Br. 24. But the court carefully addressed the timing of the trial, along with the rescheduled trial dates, in its various rulings. Absent an argument on why and how the court abused its discretion, we are constrained to conclude that the court did not reversibly err in denying the suppression effort as untimely and without good cause.

Sanders also maintains that his suppression effort concerning the interview was not waived because the

17. In ruling that Sanders had failed to establish good cause, the court utilized the framework provided by *United States v. Samuel*, 1:14-cr-351, 2015 U.S. Dist. LEXIS 39554, 2015 WL 1442884 (E.D. Va. Mar. 26, 2015), at *3 (ruling that "courts generally consider (i) the extent of the untimeliness, (ii) the reason for late filing, (iii) prejudice to the other party, and (iv) whether the receipt of additional information after the filing deadline alerted defendant to facts on which a motion to suppress might be based" to determine whether a party has demonstrated good cause for untimely suppression motion.).

district court was required by 18 U.S.C. § 3501(a) to "determine any issue as to voluntariness" before admitting his statements at trial. *See* 18 U.S.C. § 3501(a). Sanders, however, then concedes that the court complied with § 3501(a) when it "ultimately made a voluntariness finding." *See* Appellant's Reply Br. 24; *see also* J.A. 2726 n.13. And the court's compliance with § 3501(a) would not displace its earlier waiver ruling. *See United States v. Moore*, 769 F.3d 264, 268 (4th Cir. 2014).[18]

C.

Next, we address Sanders's challenges to the district court's evidentiary rulings concerning exclusion of (1) the voluntary participation of the various minors in the sexually explicit conduct and (2) the proposed expert testimony of Dr. Berlin. Principally, Sanders argues that the court improperly interpreted the elements of the Production Charges, the Receipt Charges, and the Possession Charge. He thus argues that those improper

18. Even if we were to review the district court's voluntariness ruling, we are satisfied that it was correct — based on "the totality of the circumstances" — and that Sanders's Fifth Amendment rights were not violated. *See United States v. Giddins*, 858 F.3d 870, 880 (4th Cir. 2017). Sanders was interviewed in his own home, permitted to interrupt the interview to talk to his mother, was informed he was not under arrest, and never "expressed his desire to deal with the police only through counsel." *See Edwards v. Arizona*, 451 U.S. 477, 484, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). Although the circumstances of the interview may have been intimidating, the record reveals that the intimidation was "no greater than that which is characteristic of police questioning generally," and was insufficient to transform the interview into a custodial interrogation. *See United States v. Azua-Rinconada*, 914 F.3d 319, 326 (4th Cir. 2019).

interpretations resulted in the court erroneously deciding that the evidence was irrelevant.

Generally, we review a trial court's rulings on the admission of evidence for abuse of discretion. *See Macsherry v. Sparrows Point, LLC*, 973 F.3d 212, 221 (4th Cir. 2020). And insofar as a trial court excludes evidence under Rule 403, we afford the court broad discretion — overturning an evidentiary ruling only "under the most extraordinary circumstances, where that discretion has been plainly abused." *See United States v. Udeozor*, 515 F.3d 260, 265 (4th Cir. 2008).

1.

To understand Sanders's evidentiary contentions, we will recite the applicable legal principles. Sanders argues that the Government was required — on each of the criminal offenses being tried — to prove that the will of the depicted minor was overcome during the production of the pornographic material. He further contends that a minor child's voluntary participation in the production of pornographic material would tend to establish that his will was not overcome.

We begin by reviewing the five Production Charges under § 2251(a), which imposes criminal penalties on

> 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.

See 18 U.S.C. § 2251(a). Sanders maintains that the word "uses" in § 2251(a) must be interpreted narrowly, and requires that the defendant "overcome the will of the minor participants." *See* Appellant's Br. 32. Put differently, Sanders argues that proof of "uses" requires "some action to achieve assent" of the minor boy. *Id.* at 34.

This proposition is, as the trial court ruled, without merit. The term "uses" is not defined in § 2251(a), and we must apply its ordinary meaning. *See United States v. George*, 946 F.3d 643, 646 (4th Cir. 2020). And the ordinary meaning of "uses" includes "to put into action or service," "avail oneself of," or "employ." *See Merriam-Webster Online Dictionary*, http://www.merriam-webster.com/dictionary/use [https://perma.cc/5P95-7MH9] (last visited June 10, 2024). This meaning is confirmed by *Black's Law Dictionary*, which defines "use" as "[t]o employ for the accomplishment of a purpose" or "to avail oneself of." *Use*, Black's Law Dictionary (11th ed. 2019).

Importantly, the definition of "uses" in § 2251(a) is not a question of first impression for this Court. We have heretofore ruled that the ordinary meaning of "uses" does not require a defendant to overcome the will of the minor or obtain the minor's assent. *See United States v. Engle*, 676 F.3d 405, 418 n.9 (4th Cir. 2012) ("A defendant 'uses' a minor for purposes of § 2251(a) if he photographs the minor engaging in sexually explicit conduct to create a visual depiction of such conduct.").[19]

19. We are not alone in the view that the term "uses" does not require a defendant to overcome the will of the minor child. The First, Second, Sixth, Eighth, Tenth, and D.C. Circuits uniformly agree — "uses" can be satisfied by photographing the child to create

We will thus decline Sanders's invitation to reinterpret the term "uses" to require a defendant to "overcome the will of the minor." Not only are we bound by precedent, but the phrase "overcome the will of the minor" is found nowhere in § 2251. And Sanders has pointed us to no authority supporting his proposed interpretation.

Despite Sanders's contention to the contrary, the plain meaning of the word "uses" is bolstered — rather than diminished — by "the company it keeps," and the doctrine of *noscitur a sociis* (Latin for "it is known by its associates"). *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995). As pointed out by the Ninth Circuit, one of the other means of violating § 2251(a) — to "employ" the minor child — is listed as an ordinary synonym for "use." *See United States v. Laursen*, 847 F.3d 1026, 1032 (9th Cir. 2017).

Additionally, we readily reject Sanders's contention that our interpretation of "uses" would render the other verbs superfluous. As highlighted by the First Circuit — our shared interpretation of the term "uses" reaches a defendant's active involvement in the production of the pornographic material even when "the interpersonal

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child pornography, regardless of whether the child assented to the photography, or if their participation was voluntary. *See Ortiz-Graulau v. United States*, 756 F.3d 12, 17-18 (1st Cir. 2014); *United States v. Sirois*, 87 F.3d 34, 41 (2d Cir. 1996); *United States v. Wright*, 774 F.3d 1085, 1091 (6th Cir. 2014); *United States v. McCloud*, 590 F.3d 560, 566 (8th Cir. 2009); *United States v. Theis*, 853 F.3d 1178, 1181 (10th Cir. 2017); *United States v. Hillie*, 39 F.4th 674, 691, 457 U.S. App. D.C. 333 (D.C. Cir. 2022).

dynamics between the defendant and the depicted minor are unknown" but "the terms employ, persuade, induce, entice, and coerce reach various types of external pressure that a defendant might apply on a minor to get him or her to engage in sexually explicit conduct." *See Ortiz-Graulau v. United States*, 756 F.3d 12, 19 (1st Cir. 2014).

The inclusion of a list of similar verbs in § 2251(a) indicates that Congress intended to criminalize as broad of a range of conduct as possible — rather than to narrow the proscribed conduct. *See United States v. Helton*, 944 F.3d 198, 208 (4th Cir. 2019) (ruling that Congress's use of "broad terms without limiting them or defining them" reflects its decision to utilize sweeping ordinary meaning); *see also Ortiz-Graulau*, 756 F.3d at 19. And "[g]iven Congress's broad interest in preventing sexual exploitation of children," — i.e., persons who are vulnerable and unable to legally consent — our existing application of the term "uses" is eminently rational. *See United States v. Malloy*, 568 F.3d 166, 179 (4th Cir. 2009).

Turning to the six Receipt Charges and single Possession Charge — governed by § 2252(a)(2)(A) and § 2252(a)(4)(B)(i) — Sanders argues that his proposed narrow interpretation of "uses" in § 2251(a) is similarly applicable to those statutory provisions as well. Those provisions apply only when the production of the visual depiction "involves the *use* of a minor engaging in sexually explicit conduct." *See* 18 U.S.C. §§ 2252(a)(2)(A), 2252(a)(4)(B)(i) (emphasis added). Again, Sanders points to no statutory language or court decision supporting his interpretation. We therefore decline to rule that the

verb "use" requires the Government to prove — in every prosecution for receipt or possession of child pornography under §§ 2252(a)(2) or 2252(a)(4)(B) — that the production of the visual depiction involved "overcoming the will of the minor."

2.

Now having briefly reviewed the applicable legal principles, we turn to the district court's ruling that evidence of the minors' voluntary participation in the production of pornographic material was inadmissible under Rule 402 of the Federal Rules of Evidence. Irrelevant evidence — as defined by Rule 401 of the Federal Rules of Evidence — is inadmissible under Rule 402. *See* Fed. R. Evid. 402. Rule 401 provides that evidence is "relevant" if "it has any tendency to make a fact more or less probable" and "the fact is of consequence in determining the action." *See* Fed. R. Evid. 401. Consequently, what constitutes relevant evidence depends on the facts of the case, the nature of the charges, and the associated defenses.

Put succinctly, the district court was correct — no matter how it is phrased — that a minor's consent, assent, or voluntary participation, does not go to any element or defense of Sanders's various offenses. The court properly read and applied §§ 2251(a), 2252(a)(2), and 2252(a)(4)(B) to mean that evidence of the minors' voluntary participation in the production of the pornographic material was irrelevant. And in affirming the court, we join the other courts of appeals that have ruled similarly. *See United States v. Wells*, 843 F.3d 1251, 1255 (10th Cir. 2016); *United*

States v. Raplinger, 555 F.3d 687, 692 (8th Cir. 2009); *see also United States v. Sibley*, 681 F. App'x 457, 461 (6th Cir. 2017).[20]

3.

Next, we address the district court's exclusion of the expert testimony of Dr. Berlin. The court considered two subsets of Dr. Berlin's testimony — (1) testimony concerning the consensual and non-sexual components of BDSM relationships, and (2) testimony concerning various terms utilized within his views of BDSM culture.

a.

Insofar as Dr. Berlin would have testified about the consensual and non-sexual elements of a BDSM relationship — the court excluded such testimony as irrelevant. And, as discussed above the court was correct in that exclusion ruling, and thus did not err in excluding that portion of Dr. Berlin's testimony as irrelevant.

Sanders maintains that the existence of a "non-sexual component" of BDSM relationships would tend to undermine his knowledge that the material depicted "sexually explicit conduct." *See* Appellant's Br. 43. This "non-sexual component" argument, however, is

20. The district court also excluded evidence of the minors' voluntary participation under Rule 403. And we have identified no situation where the court "plainly abused" its discretion to exclude evidence under Rule 403. *See Udeozor*, 515 F.3d at 265. Accordingly, we agree that the exclusion rulings were also proper under Rule 403.

necessarily intertwined with testimony regarding the minors' voluntary participation in the BDSM relationships. And the court emphasized that such expert testimony would "mislead the jury into believing that the minor victims' alleged consent to production of these images is exculpatory," and is therefore excludable under Rule 403. *See* J.A. 2758.

We afford trial courts "broad discretion" to determine whether the probative value of proposed evidence would outweigh the danger of misleading the jury. *See Steves and Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 713 (4th Cir. 2021). And we will overturn such a ruling only "under the most extraordinary circumstances, where that discretion has been plainly abused." *See Udeozor*, 515 F.3d at 265. Here, no such abuse of discretion occurred.

b.

Second, the district court excluded the balance of Dr. Berlin's testimony as to the use of various terms by BDSM culture — e.g., sub, dom, master, and slave. The court ruled that such testimony was inadmissible, in that the terms' meanings were not beyond the knowledge of the average juror. To be admissible, Rule 702 of the Federal Rules of Evidence requires that the expert's testimony "will help the trier of fact." *See* Fed. R. Evid. 702(a). To determine whether expert testimony will assist the trier of fact, we have instructed the trial courts to consider "whether the testimony presented is simply reiterating facts already within the common knowledge of the jurors." *See United States v. Dorsey*, 45 F.3d 809, 814 (4th Cir. 1995). And we

accord trial judges "a great deal of discretion" in making such determinations. *Id.*

Indeed, expert testimony on relevant jargon and related terms may be helpful to a jury in some situations. *See, e.g., United States v. Simmons*, 923 F.2d 934, 946 (2d Cir. 1991) (admitting expert testimony explaining terms "used by narcotics dealers to camouflage their activities"); *United States v. Offill*, 666 F.3d 168, 175 (4th Cir. 2011) (ruling that expert testimony helps explain "unfamiliar terms and concepts"). But again, expert opinions are not generally necessary to interpret terms or phrases that jurors can understand on their own.

Aside from conclusory statements that certain terms have unfamiliar meanings as used in the BDSM context, Sanders offers little reason why the district court abused its discretion in ruling that the various terms "are not so different from their common meaning as to require expert explanation." *See* J.A. 2758. Sanders offers only one example of how the common meaning of these terms would vary from their meaning within BDSM culture — that is, Dr. Berlin would testify that the subject terms do not "convey some measure of coercion." *See* Appellant's Br. 46. Such an argument is — once again — an attempt to introduce evidence of the voluntary participation of the minor boys. As discussed above, the court was correct in excluding such evidence.

We observe that, prior to the district court excluding the proposed testimony of Dr. Berlin, the court and the jury had already heard from Sanders about what

he understood the subject terms to mean in the BDSM context. Thus, the court was well situated to assess whether the various terms sufficiently varied from their common meanings to warrant an expert's explanation. Again, we are satisfied that the court did not abuse its discretion in this context.

D.

Finally, we turn to Sanders's contentions of error regarding the trial court's jury instructions — specifically, the Consent Instructions, the Purpose Instruction, and the Lascivious Instruction. On direct appeal, "[w]e 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." *See United States v. Miltier*, 882 F.3d 81, 89 (4th Cir. 2018). In so doing, "we do not view a single instruction in isolation; rather we consider whether taken as a whole and in the context of the entire charge, the instructions accurately and fairly state the controlling law." *See United States v. Lighty*, 616 F.3d 321, 366 (4th Cir. 2010). We also review for abuse of discretion a trial court's decision not to give an instruction, reversing only if the proposed instruction "(1) was correct, (2) was not substantially covered by the charge that the 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." *See United States v. Raza*, 876 F.3d 604, 614 (4th Cir. 2017).

Appendix A

1.

Sanders first argues that the trial court's Consent Instructions — which informed the jury that a minor's consent or voluntary participation in the production of the pornographic material was irrelevant — were legally erroneous. To support this argument, Sanders relies on his interpretation of the terms "uses" and "use" as found in 18 U.S.C. § 2251(a), § 2252(a)(2), and § 2252(a)(4)(B). That is, he argues that those terms require that the production of the material involved overcoming the will of the minor. Again, we reject Sanders's proposed interpretations and thus are satisfied that the court did not err in giving the Consent Instructions.

2.

Turning to the Purpose Instruction, Sanders contends on appeal that the district court fundamentally misconstrued the statute, and that the statute actually mandates the jury to find that producing child pornography is a defendant's "predominant" purpose. The court, in the Purpose Instruction, explained that the prosecution was required to prove that "[t]he production of a visual depiction of sexually explicit conduct" was "a significant or motivating purpose of the defendant, and not merely incidental to engaging in the sexually explicit conduct." *See* J.A. 573. The "motivating purpose" language was also used in two midtrial instructions.

Section 2251(a) of Title 18 requires proof that the defendant used a minor to engage in sexually explicit

conduct "for the purpose of producing any visual depiction of such conduct." Our Court, in our 2020 *McCauley* decision, acknowledged that § 2251(a)'s use of "*the* purpose," rather than "*a* purpose," means that the purpose of production must "carr[y] some predominant weight." *See United States v. McCauley*, 983 F.3d 690, 695 (4th Cir. 2020) (emphasis added). That is, use of the phrase "'the purpose' requires that the filming be at the very least a significant purpose in the sexual conduct itself, not merely incidental." *See McCauley*, 983 F.3d at 695. It is this distinction — between a "significant" purpose and a "merely incidental" purpose — that is critical. *Id.* at 696-97. We have also explained that "[w]hether an instruction reads 'the purpose,' 'the dominant purpose,' '*a motivating purpose*' — or some other equivalent variation — may not be crucial, but the statute plainly requires something more than 'a purpose.'" *Id.* at 697 (emphasis added).

It is readily evident that the Purpose Instruction was not erroneous. It acknowledges the distinction drawn in *McCauley* — adequately contrasting "a significant or motivating purpose" from a "merely incidental" purpose. Indeed, by the Purpose Instruction and its related midtrial instructions, the court utilized a recognized "equivalent variation" of the phrase "the dominant purpose" — that is, a "motivating purpose." And, in 2020, this Court affirmed the use of an instruction with the "significant or motivating purpose" language. *See United States v. Thompson*, 807 F. App'x 251, 252 (4th Cir. 2020). Thus, we reject Sanders's claim of error in this regard.[21]

21. Rule 30(d) of the Federal Rules of Criminal Procedure provides that, in order to preserve an appellate challenge to a jury instruction, a party "must inform the court of the specific

3.

Sanders also contends that the district court's Lascivious Instruction was erroneous because the court had relied on and adopted the *Dost* Factors. More specifically, Sanders argues that it "invited the jury to convict based on nothing more than simple nudity" or to convict on "a finding that the material was designed to elicit a sexual response in the viewer." *See* Appellant's Br. 41. And Sanders complains that the court declined to instruct that a lascivious exhibition of the genitals means a depiction "showing a minor engaged in . . . hard core sexual conduct." *See* J.A. 3740, *see also* Appellant's Br. 41-42. After identifying the applicable principles, we examine each contention in turn.

a.

The district court defined the term "lascivious exhibition" because each of the twelve charges required the Government to prove that the visual depictions in question connoted a minor engaged in "sexually explicit conduct." 18 U.S.C. § 2251(a), § 2252(a)(2), and § 2252(a)(4)(B). And "sexually explicit conduct," includes, in relevant part, a "lascivious exhibition of the anus, genitals, or pubic area of any person." *See* 18 U.S.C. § 2256(2)(A)(v). Congress,

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objection and the grounds for the objection before the jury retires to deliberate." *See* Fed. R. Crim. P. 30(d). The Government maintains that we are obliged to review the Purpose Instruction contention pursued by Sanders for plain error only, because he failed to object to it at the charge conference. Because there was no error in the Purpose Instruction — plain or otherwise — we need not decide the issue of whether plain error applies.

however, did not expressly define the phrase "lascivious exhibition."

To aid in determining the meaning of "lascivious exhibition" a California district court — in *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986) — developed six factors nearly 40 years ago for the trier of fact to consider in a case such as this:

> (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
>
> (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
>
> (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
>
> (4) whether the child is fully or partially clothed, or nude;
>
> (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
>
> (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

See Dost, 636 F. Supp. at 832. The *Dost* court further explained that

> a visual depiction need not involve all of these factors to be a "lascivious exhibition of the genitals or pubic area." The determination will have to be made based on the overall content of the visual depiction, taking into account the age of the minor.

Id. In its Lascivious Instruction, the district court adopted — nearly verbatim — the *Dost* Factors when it instructed the jury as to a lascivious exhibition. *See* J.A. 584-85.

Although the *Dost* Factors have been subjected to criticism over the years, nine of our sister courts of appeals have adopted or endorsed them to aid in determining whether a certain visual depiction connotes a lascivious exhibition.[22] *See United States v. Frabizio*, 459 F.3d 80, 87 (1st Cir. 2006); *United States v. Rivera*, 546 F.3d 245, 250 (2d Cir. 2008); *United States v. Villard*, 885 F.2d 117, 122 (3d Cir. 1989); *United States v. Steen*, 634 F.3d 822, 826 (5th Cir. 2011); *United States v. Brown*, 579 F.3d 672, 680

22. As highlighted by the Second Circuit, one underlying concern of many *Dost* factor critics seems to be that the factors are "over-generous to the defendant." *See United States v. Rivera*, 546 F.3d 245, 251 (2d Cir. 2008) (internal quotation marks omitted); *see also Frabizio*, 459 F.3d at 88; *United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir.). This appeal does not afford us an opportunity to assess whether the *Dost* Factors are overly generous to defendants, as this appeal is by the defendant and the Government does not pursue such an issue.

(6th Cir. 2009); *United States v. Petroske*, 928 F.3d 767, 773 (8th Cir. 2019); *United States v. Perkins*, 850 F.3d 1109, 1121 (9th Cir. 2017); *United States v. Isabella*, 918 F.3d 816, 831 (10th Cir. 2019); *United States v. Hunter*, 720 F. App'x 991, 996 (11th Cir. 2017). But our Court has neither adopted nor rejected the *Dost* Factors. *See Courtade*, 929 F.3d at 192 (4th Cir.).

Two of the thirteen courts of appeals seem to have rejected the *Dost* Factors. The Seventh Circuit — ruling that it was not plain error to instruct on the *Dost* Factors — discouraged their "routine use" because a juror's "common understanding" is enough to identify lascivious exhibition. *See United States v. Price*, 775 F.3d 828, 840 (7th Cir. 2014). The D.C. Circuit, on the other hand, declined to adopt the *Dost* Factors because it interpreted a lascivious exhibition to mean a visual depiction "showing a minor engaged in 'hard core' sexual conduct" — something that the *Dost* Factors do not require. *See United States v. Hillie*, 39 F.4th 674, 688, 457 U.S. App. D.C. 333 (D.C. Cir. 2022).

b.

Sanders complains that the Lascivious Instruction was "freewheeling," and that the *Dost* Factors invited the jury to convict him based on either "nothing more than simple nudity," or a finding that the visual depictions subjectively elicited a sexual response in the viewer. *See* Appellant's Br. 41. That is, he targets the fourth and sixth *Dost* Factors, and asserts they are prejudicial.

Indeed, instructing the jury that it may convict based on simple nudity may be erroneous. *See Courtade*, 929 F.3d

at 191 (ruling of this court that 18 U.S.C. § 2256(2)(A)(v) "requires more than mere nudity"). Additionally, allowing a jury to convict solely because the defendant subjectively found the visual depictions arousing "would be engaging in conclusory bootstrapping," because "[c]hild pornography is not created when the pedophile derives sexual enjoyment from an otherwise innocent photo." *See Villard*, 885 F.2d at 125; *see also United States v. Amirault*, 173 F.3d 28, 34 (1st Cir. 1999); *Rivera*, 546 F.3d at 252; *United States v. Wiegand*, 812 F.2d 1239, 1245 (9th Cir. 1987). The Lascivious Instruction, however, did not permit the jury to make either of those conclusions.

For starters, the Lascivious Instruction did not advise the jurors that they could convict on nudity alone. *See* J.A. 584 ("For the visual depiction of an exhibition of the genitals . . . to be considered sexually explicit conduct, the exhibition must be lascivious"). Rather, the Lascivious Instruction stated that the jury could consider the extent of nudity in deciding whether the visual depiction is lascivious. Certainly, the extent that nudity is used in a depiction is helpful guidance in determining whether the visual depiction is lascivious. Second — as to the sixth factor — nowhere does the instruction provide that the subjective arousal of the viewer is the relevant inquiry. In fact, that factor explicitly provides that the jury is to look at "whether the *visual depiction* is *intended or designed* to elicit a sexual response," not whether a sexual response was elicited. *Id.* at 585 (emphasis added). In our view, both *Dost* Factors — the fourth and sixth — could aid a jury in determining whether the visual depiction is lascivious.[23]

23. The specific language of the sixth *Dost* Factor is similar to our definition of lascivious exhibition. That is, we define "lascivious

Additionally, any concern that the Lascivious Instruction confused the jury about whether a visual depiction was lascivious based solely on either nudity or the subjective reaction of a defendant is diminished in this situation by the district court's comprehensive explanation. The Lascivious Instruction emphasized that the *Dost* Factors were only a guide — non-exhaustive and discretionary. Indeed, the court expressly told the jury that it "*may* consider the following factors," i.e., the *Dost* Factors. *See* J.A. 585 (emphasis added).

The Lascivious Instruction also confirmed that the *Dost* Factors are not definitional by providing that a visual depiction "need not involve all of these factors" and that the jury is permitted to decide the appropriate weight for each factor. *See* J.A. 585. Importantly, the Instruction discouraged the jury from relying on a single factor — stating that whether a depiction portrays a lascivious exhibition requires consideration of the "overall context" and "overall content" of the visual depiction. *Id.* at 584-85. Put succinctly, the court properly instructed the jury that the *Dost* Factors "are not mandatory, formulaic or exclusive." *See Rivera*, 546 F.3d at 253.

What the Lascivious Instruction accomplished, however, was that it gave the jury various neutral reference points to understand the term "lascivious exhibition" —

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exhibition" in the context of child pornography offenses to mean "a depiction which displays or brings forth to view in order to attract notice to the genitals or pubic area of children, in order to excite lustfulness or sexual stimulation in the viewer." *See Courtade*, 929 F.3d at 192.

a phrase that jurors are not likely to have familiarity with. And as aptly put by the Second Circuit, neutral considerations "avoid decisions based on individual values or the revulsion potentially raised in a child pornography prosecution," and they "mitigate the risk that jurors will react to raw images in a visceral way." *See Rivera*, 546 F.3d at 252-53.

In sum, the *Dost* Factors may not be necessary or helpful in every child pornography prosecution, but we are satisfied that the trial court did not err in using those Factors in these circumstances. This appeal highlights, however, that trial courts should ensure that a jury (1) is not instructed to rely exclusively on the *Dost* Factors, (2) understands that no single *Dost* Factor is dispositive, and (3) is discouraged from a strict and mathematical application of the *Dost* Factors.

c.

Sanders's final contention about the Lascivious Instruction is that the court declined to inform the jury that the term "lascivious exhibition" means a depiction "showing the minor engaged in . . . hard core sexual conduct." *See* J.A. 3740. In so doing, Sanders champions the D.C Circuit's *Hillie* case, which ruled that a "lascivious exhibition of the anus, genitals, or pubic area of any person," as used in 18 U.S.C. § 2256(2)(A)(v) means a depiction of "hard core sexual conduct." *See Hillie*, 39 F.4th at 682. This Court's interpretation of the term lascivious exhibition, however, has never required the depiction to connote the minor engaging in sexual conduct. In fact,

we disclaimed such a requirement in our 2019 decision in *United States v. Courtade*, 929 F.3d 186 (4th Cir. 2019).

In *Courtade*, then-Chief Judge Gregory and our panel dealt with a minor child who was instructed by the defendant stepfather to shower with a camera "to see if the camera was waterproof." *See Courtade*, 929 F.3d at 188. The minor was deceived and was told that the camera was off and was not recording. The camera — recording from both the bathroom counter and the floor of the shower — captured the minor child undressing and showering. Courtade instructed the child on how to position the camera, which ensured that it recorded her nude body. He also took an active role in filming the minor "deliberately angling the camera lens down in such a way as to capture even more footage of [the minor's] breasts and genitals." *Id.* at 193. Although the minor's "breasts and genitals are visible at various points," she never engages in any sexual conduct or displays any inclination to do so. *Id.* at 188.

Nevertheless, we ruled that the video's objective characteristics constituted a "lascivious exhibition" of the genitals. *See Courtade*, 929 F.3d at 192-93. We explained that "lascivious exhibition" means "a depiction which displays or brings forth to view in order to attract notice to the genitals or pubic area of children, in order to excite lustfulness or sexual stimulation in the viewer." *Id.* at 192. Applying that definition to the video at issue, we ruled that the extensive nudity, which was "entirely the product of an adult man's deceit, manipulation, and direction," made it clear that "the video's purpose was to excite lust or arouse sexual desire." *Id.* Thus, our conclusion in

Courtade — that a lascivious exhibition exists without any depiction of the minor engaging in sexual conduct or conduct connoting a sex act — cannot be reconciled with *Hillie*'s requirement to the contrary.

We are bound by our *Courtade* precedent. *See McMellon v. United States*, 387 F.3d 329, 332 (4th Cir. 2004) (ruling it is a "basic principle that one panel cannot overrule a decision issued by another panel"). Likewise, the trial court did not abuse its discretion by correctly applying the law of this Circuit, and it properly rejected the defendant's legally erroneous request to instruct the jury that "lascivious exhibition" means "depictions showing a minor engaged in . . . hard core sexual conduct." *See* J.A. 3740.

III.

Pursuant to the foregoing, we reject Sanders's various contentions of error and affirm his convictions and sentences.

AFFIRMED

APPENDIX B — EXCERPTS OF TRANSCRIPT OF TRIAL PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, DATED NOVEMBER 27, 2021

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Criminal Case
No. 20-CR-00143-TSE

November 27, 2021
9:35 a.m.

JURY INSTRUCTIONS
VERDICT

UNITED STATES OF AMERICA,

Plaintiff,

v.

ZACKARY ELLIS SANDERS,

Defendant.

TRANSCRIPT OF TRIAL PROCEEDINGS
DAY 7
BEFORE THE HONORABLE T.S. ELLIS, III
UNITED STATES DISTRICT JUDGE
and a jury

[21]on or about November 14th — from the 10th to the 14th — 2019. That's Minor Victim 2.

Count 3, between on or about September 17, 2017, and on or about April 4, 2018. That's Minor Victim 3.

Count 4, between on or about November 29, 2017, and on or about December 11, 2017. That's Minor Victim 4.

And between on or about May 8th, 2017, and on or about October 21st, 2017. That's Minor Victim 5.

Now, Section 2251(a) of Title 18, which is the statute that is alleged to have been violated in Count 1, the U.S. Code at that point provides in relevant part that any person who employs, uses, persuades, induces, entices, or coerces, or attempts to employ -- let me begin again.

Any person who employs, uses, persuades, induces, entices, or coerces, or attempts to employ, use, persuade, induce, entice, or coerce any minor to engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct shall be guilty of a federal crime if such person transported or transmitted, using any means or facility of interstate or foreign commerce, or in or affecting interstate or foreign commerce or mail, if that visual depiction was produced or transmitted using material that had been — materials that had been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or such visual depiction has actually been [22]transported or transmitted using any means or facility of interstate or

foreign commerce, or in or affecting interstate or foreign commerce or mail.

Now, in order to prove the defendant guilty of producing child pornography, as charged in Count 1, the Government must prove the following elements beyond a reasonable doubt:

First, that at the time of the alleged incident, Minor Victims 1, 2, 3, 4, and 5, the alleged victims named in Count 1 through 5 of the indictment, were under the age of 18.

Two — second element. Two, that the defendant attempted to and did knowingly employ, use, or persuade, or induce or entice or coerce Minor Victims 1, 2, 3, 4, and 5 to engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct.

And three, the visual depiction was produced using materials that had been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, or such visual depiction had actually been transported or transmitted using any means or facility of interstate or foreign commerce, or in or affecting interstate or foreign commerce or mail.

So with respect to the first element that the Government must prove beyond a reasonable doubt, is that Minor Victims 1, 2, 3, and 4 and 5 were each less than 18 years old at the time of the acts alleged in the indictment.

Appendix B

[23]The Government does not have to prove that the defendant knew that the Minor Victims 1, 2, 3, 4, and 5 were less than 18 years old. Moreover, defendant's belief, reasonable or not, that Minor Victims 1, 2, 3, 4, and 5 were 18 years or older is irrelevant and not a defense to the crime charged.

I therefore instruct you that if you find that Minor Victims 1, 2, 3, 4, and 5 were, in fact, less than 18 years old at the time of the acts alleged in the indictment, then that is sufficient to satisfy the first element of the offense.

The second element of the offense that the Government must prove beyond a reasonable doubt is that the defendant employed or used or persuaded or induced or enticed or coerced Minor Victims 1, 2, 3, 4, and 5 to take part in sexually explicit conduct for the purpose of producing a visual depiction of that conduct. A visual depiction includes any photograph, film, video, or picture, including undeveloped film, and videotape and data stored on a computer disk, or by electronic means that is capable of conversion into a visual image whether or not scored in a permanent format.

The term, "producing" means producing, directing, manufacturing, issuing, publishing, or advertising. The phrase "purpose of producing" means that the defendant had the specific intent to cause the production of a video depiction. The facts [24]must support the conclusion that the defendant engaged in conduct in order to produce a visual depiction of sexually explicit conduct.

While the image itself can be probative of the defendant's intent, it cannot be the only evidence.

In deciding whether the Government has proven that the defendant acted for the purpose of producing a visual depiction of sexually explicit conduct, you may consider all of the evidence concerning the defendant's conduct. The production of a visual depiction of sexually explicit conduct must have been a significant or motivating purpose of the defendant, and not merely incidental to engaging in the sexually explicit conduct.

It is not necessary, however, for the Government to prove that the defendant was single-minded in his purpose or that the production of a visual depiction of sexually explicit conduct was the defendant's sole or primary purpose. Rather, it is sufficient for the Government to prove that the defendant had a significant or motivating purpose of producing a visual depiction of sexually explicit conduct when he employed or used or persuaded or induced or enticed or coerced Minor Victims 1 through 5 to engage in sexually explicit conduct.

The third element that the Government must prove beyond a reasonable doubt is that the visual depiction was produced using materials that had been mailed or transported in interstate or foreign commerce and that the defendant knew or

* * *

[28]was used in moving the visual depiction, then it traveled in interstate commerce.

Now, for purposes of the charges contained here, a minor is defined as any person under the age of 18. And I instruct you that, under federal law, which is the sole law governing in this case, that a minor cannot consent to the production of child pornography. Accordingly, any argument regarding a minor's consent to the production of child pornography is irrelevant in reaching your verdict.

The Government has -- the Government only has to prove venue — that is, the place where the underlying events occurred — by a preponderance of the evidence. This means that, with respect to venue, the Government only has to convince you that it is more likely so than not so that part, if not all, of the offense took place or occurred in the Eastern District of Virginia.

And the Eastern District of Virginia includes the eastern half of the state, including Northern Virginia, extending down to and including Richmond, Fredericksburg, Tidewater, Norfolk, and Newport News, and extending to the west, but not as far as Charlottesville. Charlottesville is not in the Eastern District of Virginia.

Now, Counts 6 through 11 of the indictment charge — they charge that in separate instances on or about the dates set forth -- and I'll tell you the dates -- within the Eastern

APPENDIX C — EXCERPTS OF TRANSCRIPT OF TRIAL PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, DATED NOVEMBER 26, 2021

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Criminal Case
No. 20-CR-00143-TSE

November 26, 2021
9:40 a.m.

UNITED STATES OF AMERICA,

Plaintiff,

v.

ZACKARY ELLIS SANDERS,

Defendant.

TRANSCRIPT OF TRIAL PROCEEDINGS
DAY 6
BEFORE THE HONORABLE T.S. ELLIS, III
UNITED STATES DISTRICT JUDGE
and a jury

[114]THE COURT: No, I'm not going to do it that way. I like it the way I've done it and I'll insert "knowingly." I think it's adequately clear the way it is. Proceed.

MS. CHONG-SMITH: Your Honor, I just note we think it should say that "the defendant did so with the purpose" to make clear that it's the defendant's purpose as opposed to the alleged minor victim's purpose.

THE COURT: All right. Just a moment.

MS. CHONG-SMITH: And that's what's in, currently, element 2.

THE COURT: I think that's clear from the context, and it's clear in the other portions of this instruction. I think to insert it down there confuses things. Any problem, Mr. Schlessinger?

MR. SCHLESSINGER: No, I agree with Your Honor. I think it's clear that the minor victims are the passive persons being acted upon and the purpose that's referenced is the defendant's.

THE COURT: Next, Ms. Chong-Smith.

MS. CHONG-SMITH: Yes, Your Honor. Instruction on page 34, consent of minor.

THE COURT: Yes.

MS. CHONG-SMITH: We think this Court should also add that the jury may, however, consider the assent or voluntariness of the minor in determining the defendant's intent and purpose, [115]as those terms are defined in these instructions.

THE COURT: Mr. Schlessinger?

MR. SCHLESSINGER: No, Your Honor, I don't think that's accurate and consistent with the Court's prior rulings.

THE COURT: All right. Your offer is rejected, Ms. Chong-Smith, and you have your record. Let's go on.

MS. CHONG-SMITH: Page 35, venue. The second sentence says: "This means that the Government only has to convince you that it is more likely so than not." And we would ask to omit the word "only." It should just state that the Government has to convince you.

THE COURT: How about if I begin that sentence that, "With respect to venue, therefore, this means that. . ."

MS. CHONG-SMITH: And omitting the word "only"?

THE COURT: No. Then I would put it in there. "With respect to venue"—

MS. CHONG-SMITH: If you add in that—

THE COURT: Yes. Go ahead.

MS. CHONG-SMITH: I think if you add in that language, that would clarify it.

THE COURT: Yes.

MS. CHONG-SMITH: Your Honor, page 39—

THE COURT: Just a moment.

Yes. Next.

MS. CHONG-SMITH: Page 39, attempt explained. Counts 1

* * *

[172]So also, you'll have to decide, in the context of all of the evidence, not just the few words right before and after the sending of videos, or the requesting of full-body pics, whether anything Mr. Sanders—whether Mr. Sanders actually employed these minors, whether he used them in the sense that we understand someone being used against their will, whether he persuaded them, whether he induced or enticed or coerced an actual minor into sexually explicit—to engage in sexually explicit conduct.

And I think from the days that we've spent here and the portions of the chats that we've asked the witnesses to read, you can see that these were—each of these six individuals were minors—well, may have been minors, but were adolescents who were interested in engaging in the kind of activity that Mr. Sanders had asked them to engage in, and were doing it because they had wanted to do it, had previously agreed to engage in this type of behavior—

THE COURT: Ms. Ginsberg, I'm sure you're aware of the fact that I'm going to instruct the jury that people

under the age of 18 cannot consent to the production of child pornography. So to the extent you are inferring something different from that, I don't know that you intended that, but I want that made clear.

MS. GINSBERG: Yes, sir. And I will be clear about that. Your Honor—

[173]THE COURT: Well, I will.

MS. GINSBERG: Yes, of course.

THE COURT: And what I say goes.

MS. GINSBERG: Yes. But there's a difference. There is a difference between consenting to taking a video or a photo that creates child pornography and consenting to the sexual behavior or the type of behavior that Mr. Sanders asked these individuals to engage in.

They could consent, and they asked to participate in that type of activity.

THE COURT: Well, to the extent you continue to do it, let me be clear. They cannot consent to the production of child pornography. Do you mean to imply otherwise?

MS. GINSBERG: No.

THE COURT: All right. Continue.

MS. GINSBERG: I do not mean to imply that they can consent to the taking of videos that are visual depictions of

certain conduct. But they can consent, and it is not illegal under—at least under Virginia law—

THE COURT: That is irrelevant, what is legal under Virginia law. And the Government does not contend that the conduct that the juveniles, alleged juveniles, engaged in or were asked to engage in in this case was itself illegal.

MS. GINSBERG: That is precisely my point.

THE COURT: Yes. To go on and say it's perfectly all [174]right is quite another matter, because it implies that what they did in this case is perfectly all right. And the Government has alleged production. And I'll say it one last time here, because I'll say it in my instructions: A person under the age of 18 may not legally consent to the production of child pornography. So it doesn't matter if the person under 18 wanted to do it or didn't want to do it. Do you agree with that?

MS. GINSBERG: I agree that it doesn't matter if they wanted to create the visual depiction. It does matter whether they were enticed, induced, persuaded, or used to engage in the sexual activity. And that is an element of this crime and it is an element that the Government must prove beyond a reasonable doubt.

And if this was conduct that these individuals were permitted to engage in, and chose to engage in, you—you have to decide whether the conduct—what occurred in this case was these individuals—was whether these individuals were actually induced to engage in this behavior; whether

they were persuaded by Mr. Sanders to engage in this behavior.

THE COURT: You left out used or employed—

MS. GINSBERG: Used or employed or coerced, any of those terms. But the Government has the burden of proving beyond a reasonable doubt that Mr. Sanders intended to employ, induce, use, persuade, entice, or coerce these minors, to the extent they were minors, to engage in this activity.

APPENDIX D — EXCERPTS OF TRANSCRIPT OF TRIAL PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, DATED NOVEMBER 25, 2021

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Criminal Case
No. 20-CR-00143-TSE

November 25, 2021
9:35 a.m.

UNITED STATES OF AMERICA,

Plaintiff,

v.

ZACKARY ELLIS SANDERS,

Defendant.

TRANSCRIPT OF TRIAL PROCEEDINGS
DAY 5
BEFORE THE HONORABLE T.S. ELLIS, III
UNITED STATES DISTRICT JUDGE
and a jury

[111]THE COURT: All right. The matter is before the Court on defendant's motion to dismiss—or for judgment of acquittal on all counts of the indictment on separate grounds. I listened—I was expecting a little bit different argument because I was preparing for a factual argument.

But in any event, the standard is, I think, indisputable. No one contests that the standard at the Rule 29 stage is to examine the evidence in the light most favorable to the Government and determine whether the Government has adduced Government sufficient for a jury to find beyond a reasonable doubt each and every element of the offense or offenses.

I really didn't hear argument about individual elements, but I'm prepared on those. I looked at all of those before this argument and I have no doubt that the Government has produced evidence from which a jury could find beyond a reasonable doubt each and every element.

That does not mean, however, that the defendant can't argue to the jury, as Mr. Sirkin has argued here, that his purpose had nothing to do with whatever. I'm not even sure I followed that argument. But he can argue that it isn't the requisite motivating purpose or significant purpose.

Now, I know that the defendants also argue that I'm not construing the statute properly, that it ought to be the dominant or predominant or sole purpose. Well, I've rejected that. And if I'm wrong the Court of Appeals will tell me, and [112]the Court of Appeals would have to instruct me to vacate the convictions on those five counts that that pertains to.

But I am convinced that, as I read the statute and as the Fourth Circuit has thus far—and I believe me,

Appendix D

I'm as familiar as any of you with *McCauley* and with the subsequent cases, especially a more recent case which I've cited to you in the orders I've issued in this case – that the Fourth Circuit is going to look with favor on the instruction I gave in the Hewlett case, in which I instructed the jury in circumstances dissimilar from this but not very dissimilar, that the purpose of the defendant had to be a motivating purpose. And that's what I'm going to instruct the jury here as well.

And I think the evidence adduced by the Government is sufficient that a jury could find that beyond a reasonable doubt. So I'll deny the motion for judgment of acquittal, and I didn't hear anything with respect to the receipt or possession counts that would in any way indicate a different conclusion.

But I haven't foreclosed arguments—I suppose the defendants might want to argue that a picture of a young man, a boy, standing up in the nude is not sexually explicit or lewd and lascivious. But that's a jury issue, and we shall see.

All right. Let me ask this. Are you referring, Mr. Sirkin, to Frederickson?

MR. SIRKIN: Yes.

THE COURT: Are you aware of the fact that cert was

* * *

[203]believing that the minor victims' alleged consent to the production of these images is somehow relevant to the Government's case, or the defendant's defense under 2251. But a minor person under 18 cannot consent to the production of child pornography.

Or to put it in a perhaps better way, a minor's consent to engage in lewd and lascivious conduct for the purpose of preparing for a motivating purpose of producing child pornography is irrelevant.

In other words, the fact that the child hit himself on the testicles voluntarily, or even, as Mr. Sirkin and perhaps even Mr. Sanders, that's what they wanted, they liked being hit on the testicles, that is irrelevant to the production of child pornography.

Now, Mr. Sirkin wants to argue that that wasn't the purpose. The purpose of producing child pornography was not the hitting of the testicles. He says that was just—he was just doing it to make sure that the minor victim did what he was told to do; that is, that he performed the punishment that he was required to do. I think it's fine for the defendant to make that argument and to pursue testimony in that regard, but the jury is going to be told that a consent of a person under 18 years of age to engage in lewd and lascivious conduct or child pornography—which includes, in my view, slapping your testicles and making a video of it, and sending it to the [204]defendant, which he then makes sure isn't erased—that that is not a defense to the production of child pornography.

Again, let me say, Mr. Sirkin and whoever is going to argue can argue that that wasn't the motivating purpose; that is, that there was no production of child pornography that was a motivating purpose; that the purpose was just to make sure that they had evidence that the minor had complied with the punishment. Well, it's a jury issue. I will give instructions.

But one thing that I will make unmistakably clear to the jury is that the minor's consent to engage in conduct such as slapping your testicles and taking a video of it is not an excuse or is not exculpatory, does not excuse the production of child pornography. The consent makes no difference.

The argument here is the defendant wants to say that the video was not the purpose—or, I beg your pardon, the purpose of the video was not the child pornography. Jury issue. And we'll see how that turns out. And although testimony regarding the consensual nature of BDSM, which I allowed, does not excuse producing child pornography under 2251. And, of course, that consent does not in any way eliminate whether they were coerced.

But the defendant gets an opportunity to argue that, and he gets an opportunity to have the witnesses—or his witness say that they weren't coerced. Well, the Government doesn't have to prove coercion, but they can argue coercion [205]among the others, which include employs, uses, persuades, induces, entices before you get to coerce. And that will be made clear to the jury as well.

So I say once more that a minor cannot consent to the production of child pornography. And as I said, the statute here has various ways in which the Government can prove a violation. It's in the disjunctive. A conviction under 2251(a) may be sustained by evidence that a defendant employed or used or persuaded or induced or enticed a minor victim to produce visual depictions of child pornography.

And here I understand, and why I didn't grant a judgment of acquittal under Rule 29, I understand the Government's argument that there was evidence that the defendant used, employed, persuaded—in fact, I just read again, Mr. Sanders told them, go slap your testicles and send me a video. By any rational understanding, that fits under employed, used, persuaded, induced, enticed. And the Government doesn't have to prove coercion. But the defendant is still entitled to argue that the minor was not coerced.

So the Government need not prove coercion in order to prove its case. It's sufficient to prove any one of the following that I told you about, employs, uses, persuades, induces, entices, any of those.

The reason I exclude testimony, in addition to the reasons I've given, is that it presents a grave risk of giving

APPENDIX E — EXCERPTS OF TRANSCRIPT OF TRIAL PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, DATED NOVEMBER 22, 2021

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Criminal Case
No. 20-CR-00143-TSE

November 27, 2021
9:50 a.m.

UNITED STATES OF AMERICA,

Plaintiff,

v.

ZACKARY ELLIS SANDERS,

Defendant.

TRANSCRIPT OF TRIAL PROCEEDINGS
DAY 4
BEFORE THE HONORABLE T.S. ELLIS, III
UNITED STATES DISTRICT JUDGE
and a jury

[22]all of that, and that the production of the video was a primary—not primary, I beg your pardon. A motivation for the production of the video.

MS. GINSBERG: Thank you.

(END BENCH CONFERENCE.)

THE COURT: Just a moment, ladies and gentlemen. I want to be quite clear about this.

The indictment in this case charges five instances of the production of child pornography, child sexual abuse or whatever. Now, the Government must prove beyond a reasonable doubt that the defendant employs, uses, persuades, induces, entices, or coerces, in the disjunctive, any minor to engage in sexually explicit conduct for the purpose of producing any visual depiction. That's the charge.

And that's what the Government must prove, is it a motivating factor of the defendant to use, persuade, induce, entice, or coerce any minor to engage in a sexually explicit conduct, and you'll receive other instructions on this as well, with the—it has to be a motivation, not the primary or dominant, but it must be a motivation.

I think what Ms. Ginsberg is concerned about is I want to be clear that the Government has not charged the defendant with getting these young people to slap their testicles or masturbate. The Government has charged this defendant with, as I said, employing or using or persuading or inducing or enticing [23]or coercing any minor to engage in any sexually explicit conduct for the

purpose of, a motivating purpose, of producing any visual depiction of such conduct. That's the charge.

Does that clarify it, Ms. Ginsberg?

MS. GINSBERG: Yes, thank you very much. Your Honor. Yes.

THE COURT: All right. Let's proceed.

BY MS. GINSBERG:

Q. Some of the questions that you were asked, you remember, about one of the individuals named [redacted]. Do you remember testimony—

A. I didn't say anything about a [redacted].

Q. One of the alleged victims in this case is an individual named [redacted]. Correct?

A. I didn't say anything about the name .

Q. But you know who I mean?

A. I don't.

Q. You don't know who [redacted] is?

A. I don't know who you're talking about.

Q. [redacted]?

A. I don't use that name, no, ma'am.

Q. You don't know that [redacted] is Chris the Boar Pup?

A. I know who Chris the Boar Pup is, yes.

Q. So you know who [redacted] is?

A. I know who Chris the Boar Pup is.

* * *

[59]said to the jury that it has to be a purpose --

THE COURT: And I corrected that. You asked me to. And I said a motivating purpose.

MS. GINSBERG: That's correct. And I read *McCauley* more broadly than Your Honor does.

THE COURT: Yes, but that's a reading you'll have to do in Richmond.

MS. GINSBERG: That's exactly right. But I think that we are entitled to put on evidence that would support that view. I know *McCauley* says a motivating purpose, but it also says that the instruction doesn't have to say that it is the sole purpose or the dominant purpose.

And the Court said, if it's an instruction that said the dominant purpose or a dominant purpose, it would be appropriate.

So it may be a more limited instruction—

THE COURT: I'm not going to instruct the jury at this time unless you show me some authority—

MS. GINSBERG: No, I don't—

THE COURT: Let me finish. One of us at a time.

I'm not going to instruct the jury, unless you show me some authority I haven't seen, that says it has to be a dominant or a primary or the principal purpose. It has to be a motivating purpose. That's what the jury will be instructed.

MS. GINSBERG: I understand that that's Your Honor's [60]ruling. We will object to that instruction. I read *McCauley* more broadly, and as Your Honor said, the Fourth Circuit, that's—

THE COURT: That's right.

MS. GINSBERG: I think that's where we just may be.

THE COURT: All right. And you say all you want to do on 503 is to establish at what time?

MS. GINSBERG: At 9:20 p.m. It's maybe an hour before he asks for the humiliating task that they're talking about college. That's all.

THE COURT: Have you made any more progress on college scholarships? That's what you want to bring out?

MS. GINSBERG: Have you finished your homework, have you made any more progress on college plans/ scholarships.

THE COURT: Anything other than that on page 65?

MS. GINSBERG: No.

THE COURT: And Mr. Clayman, you persist in your objection that that's irrelevant?

MR. CLAYMAN: We do. Your Honor. I don't see how this can go to anything other than the minor consented, he was in a relationship with Mr. Sanders. And I think Your Honor has already ruled that's inadmissible.

THE COURT: Yes, I have. But I'm going to allow that little bit. But I'm going to be sensitive, Mr. Clayman, to giving an instruction that makes it clear to the jury that it

* * *

[70]"motivating" is something Your Honor has used before and I believe consistent with McCauley. "Significant," I've never—I'm not aware of any case law regarding that word.

THE COURT: Well, that's it. If you think there's a difference between "significant" and "motivating"—Thompson was the case that I cited to, which I assume everyone should be familiar with, if you did research on *McCauley* and Hewlett and the other cases.

MR. CLAYMAN: Yes, Your Honor. From what we have here, we would request that it read: The Government has to prove beyond a reasonable doubt that a significant or motivating purpose in Mr. Sanders asking these individuals to engage in sexually explicit conduct was to create a visual depiction.

THE COURT: Any problem with that?

MS. GINSBERG: Yes, I think it should say "the." I think that's—

THE COURT: No, I'm going to say "a." I'm very comfortable with that. And that you can take to the Fourth Circuit. In the interest of the shortness of life, let's go on, unless you have a case that says I cannot do that.

MS. GINSBERG: I think the statute may say it. Your Honor.

THE COURT: Thompson itself said "a." Have you read Thompson?

MS. GINSBERG: I have. Your Honor. But the statute

* * *

[72]COURT SECURITY OFFICER: Your Honor, we have a late break for the bathroom so we'll be 30 seconds more.

THE COURT: All right.

Appendix E

(Jury in at 12:11 p.m.)

THE COURT: Ladies and gentlemen, thank you for your patience. Once again, I required more time. I've given you some instructions in the course of this case, and I want to be clear. I want you to understand clearly. And I don't think there's lack of clarity thus far, but I wanted to take this opportunity to make it clear.

As you know, there are three categories of charges that the Government has alleged in this case in the indictment, and the Government has to prove the essential elements of those charges beyond a reasonable doubt in order to warrant a conviction. One is production of child pornography; the next is receipt of child pornography; and the third is possession of child pornography.

Now, you're going to receive instructions at the end of the case in some greater detail as to the elements of each of those offenses that the Government must prove beyond a reasonable doubt, but you're not going to get that now.

What I am going to make unmistakably clear to you now is with respect to the production charges in the indictment, the Government has to prove beyond a reasonable doubt, among other things, that in asking these alleged minor victims to engage in [73]sexual conduct, Mr. Sanders had a significant or motivating purpose to create a visual depiction of that conduct.

Do we need to go on earphones at all, Mr. Clayman, other than what you've already said?

MR. CLAYMAN: No, Your Honor.

Appendix E

THE COURT: Ms. Ginsberg?

MS. GINSBERG: No, Your Honor.

THE COURT: All right. Now we're going to go on. Agent Ford, return to the podium and you'll recall, sir, you're still under oath.

THE WITNESS: Yes, Your Honor.

THE COURT: Now, at the time we broke last time, there was a small part of a chat, and I have overruled the objection. You may ask about that, the homework and college.

MS. GINSBERG: Thank you.

BY MS. GINSBERG:

Q. Agent Ford, if you would go back to Government Exhibit 503, page 65.

A. Yes, I'm there.

Q. That's the conversation that immediately precedes Mr. [redacted]'s request for Mr. Sanders to tell him to do something humiliating. Correct?

A. You started to fade off at the last part.

Q. I'm sorry. This conversation precedes the conversation on page 66 where Mr. [redacted] asks for a humiliating task?

* * *

[115]can see the words and he sends another one.

MR. CLAYMAN: The jury has already heard this evidence. It serves no purpose at this point. The only purpose is to show that the minor was consenting.

THE COURT: I'm very close, Ms. Ginsberg, to simply giving the jury—well, the jury will have everything that's admitted and they can read it. I'm very close to that.

MS. GINSBERG: Judge, I think I would be happy if they did. I'm not sure they'll take the time to do it.

THE COURT: That's your problem.

MS. GINSBERG: That's why I'm trying to elicit it.

THE COURT: Well, you've had enough time. You've had plenty of warning on that.

Remove the earphones.

(END BENCH CONFERENCE.)

THE COURT: All right. Ms. Ginsberg, I'm going to allow you to complete that questioning along that, but I want to remind the jury, as I've instructed you previously, that to the extent that there's any argument that these victims acquiesced or agreed or consented to the production of child pornography, that is not a defense. A minor cannot consent to the production or creation of child pornography.

All right. You may complete that series of questions.

MS. GINSBERG: Thank you. Your Honor.

THE COURT: And by "child," I mean anyone under the age

* * *

[175]primary or dominant or motivating factor of asking—

THE COURT: Well, dominant is not the Court's ruling, so you can exclude that from your vocabulary. You can take that to the Court of Appeals.

MR. SIRKIN: All right. But the motivation in having him do the activities that on some occasions he had him do—

THE COURT: Yes, but what is it in his page, which is what I have before me now, that's relevant to that?

MR. SIRKIN: Because it talks about activities that he would like to learn about, and also the training period. And so from that, you know, ultimately disobedience required, in their society, punishment. And the primary motivation to having the pictures, because he couldn't believe him, was to prove that he did what he was supposed to do.

THE COURT: Again, primary motivation is not the Court's ruling.

MR. SIRKIN: But it may be a motivation but it's got to be more than just incidental.

THE COURT: Yes, that's true. But a motivating reason is all that's required. It doesn't have to be the primary one, it doesn't have to be the dominant or predominant one.

MR. SIRKIN: But it must be incidental.

THE COURT: Must not be incidental.

MR. SIRKIN: Must not be. And I have a right to explore—

* * *

[179]MR. SCHLESSINGER: Objection. Objection.

THE COURT: Put on the earphones.

(BENCH CONFERENCE ON THE RECORD.)

MR. SCHLESSINGER: The question is whether it fulfilled something that this witness was looking for. It's irrelevant whether he was looking for it or not, because, as the Court just told the jury, it's not a defense.

MR. SIRKIN: I'm looking at it as someone who would dominate him and tell him what to do.

THE COURT: And that's what you want to show?

MR. SIRKIN: Yes.

THE COURT: It's irrelevant that he wanted to be dominated and he wanted someone to tell him what to do.

MR. SIRKIN: But it goes to, then, if he violated that relationship, there would be consequences or penalties.

THE COURT: Yes. And he would be punished. How is that relevant?

MR. SIRKIN: I think it's very relevant. Motivating for the primary or dominant—I'll get rid of "primary."

THE COURT: You're not going to prevail on that in this court.

MR. SIRKIN: I'm not. What I'm trying to do is, it was only incidental in the motivation of having him film or record activity that he ended up doing.

THE COURT: Go directly to that.

* * *

[183]A. No, I pretty much had not sent anything unless it was requested of me.

Q. But the reason that you would send it to him was to let him know that you had done it?

A. Correct.

Q. So the reason, when he asked you to do that activity, hitting your scrotum or your testicles, you took that, that was a punishment?

A. Yes.

Q. And what way would he know that you had actually done that, other than you telling him?

MR. SCHLESSINGER: Objection. That's cumulative.

THE COURT: Put on the earphone.

(BENCH CONFERENCE ON THE RECORD.)

MR. SCHLESSINGER: The objection is cumulative and asked and answered. I think Mr. Sirkin has asked this several times now about whether the video is the way that Mr. Sanders would know that Mr. [redacted] had performed the punishment.

THE COURT: And so what's your objection?

MR. SCHLESSINGER: Cumulative and asked and answered.

THE COURT: All right. It is cumulative and asked and answered, but I'll overrule the objection.

How much more do you have, Mr. Sirkin?

MR. SIRKIN: Not a whole lot more.

THE COURT: What do you mean by "not a whole lot"?

[184]MR. SIRKIN: Probably not more than 10 or 15 minutes, maybe longer. It depends on how some of the answers come back.

THE COURT: All right. Proceed. But don't waste time.

MR. SIRKIN: I'm trying not to, Your Honor.

THE COURT: Well, succeed.

(END BENCH CONFERENCE.)

BY MR. SIRKIN:

Q. A way of confirming that you did would be to record it and send it to him?

A. Yes.

Q. And isn't that what really happened, like on September 30th, when you went ahead and you followed his order?

A. Whan happened on September 30th?

Q. The reason you did it and you recorded it, you had no problem doing that, and it was an easy way for you to send to him to tell him that you had performed the act.

MR. SCHLESSINGER: Objection.

THE COURT: Let me hear on the earphones.

(BENCH CONFERENCE ON THE RECORD.)

THE COURT: The question is: The reason you did it and you recorded it, you had no problem doing that, and that was an easy way to send to him to tell him that you had performed the act. And then there was an objection.

My recollection was this was asked on direct and he said that he sent the video because he was asked to send it by [185]the defendant.

Am I wrong, Mr. Schlessinger?

MR. SCHLESSINGER: No, you're correct. That was the testimony. The objection is to Mr. Sirkin's inclusion in the question of his suggestion that Mr. [redacted] had no problem doing that. Because again, Mr. [redacted]'s alleged voluntariness or consent is invalid and not recognized.

THE COURT: That's true. And I'm going to tell the jury that if I have to, yet again, Mr. Sirkin, because you seem to be aimed at that. Now, if what you're aiming is the purpose, then you need to focus on that.

Tell me, Mr. Sirkin, what's the relevance of the witness —of the alleged victim's reason for doing it?

MR. SIRKIN: It has to do with their—this master/servant or subordinate relationship. He was given an order, and that's part of their lifestyle, and in order for him to know—and then I think it builds that idea where an inference can be made of what the motive was on Mr. Sanders. And I think I can try to at least establish an inference, evidence that would provide the jury the right to make an inference that the video, in sending it to Mr. Sanders, was only incidental to the whole activity.

THE COURT: Yes, but you miss the point. There is no relevance of the victim's reason. The relevance is Mr. Sanders' reason.

[186]Now, your question suggests that Mr. Sanders asked for the video because he wanted to confirm that the action that he ordered was done. Am I correct?

MR. SIRKIN: That's part of it, yes.

THE COURT: So that's the reason, that's the motivation that is relevant, not the motivation of the victim.

MR. SCHLESSINGER: If I might. Your Honor, also, to the extent that that is—Your Honor is certainly correct, that is the only relevant person's intent, and this witness is not—witness is not qualified to testify to the intent of another person.

MR. SIRKIN: He's certainly known him for a long time.

THE COURT: But you haven't directly asked that so I'm not going to deal with that now. It seems to me the objection is well taken to the extent it focuses on the victim's reason for engaging in it. The reason the victim did it is because he was told to do it.

Now, the reason you want to establish or focus on is the reason Mr. Sanders ordered it.

MR. SIRKIN: But the filming on the part of Mr. Sanders was only incidental. It's my understanding of *McCauley* that the reason the individual—that the subject, the child of the child pornography, is if the only reason the person creates—

THE COURT: You're wrong. It's not the only reason.

MR. SIRKIN: But there could be other reasons, and if

* * *

APPENDIX F — EXCERPTS OF TRANSCRIPT OF TRIAL PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, DATED NOVEMBER 20, 2021

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Criminal Case
No. 20-CR-00143-TSE

November 20, 2021
9:20 a.m.

UNITED STATES OF AMERICA,

Plaintiff,

v.

ZACKARY ELLIS SANDERS,

Defendant.

TRANSCRIPT OF TRIAL PROCEEDINGS
DAY 2
BEFORE THE HONORABLE T.S. ELLIS, III
UNITED STATES DISTRICT JUDGE
and a jury

[11]purpose—

THE COURT: No, it doesn't. I've already ruled that.

MS. GINSBERG: Well, Your Honor, I respectfully disagree.

THE COURT: I understand you do. But I've ruled. I've said many times that it's going—it's not going to be dominant.

I understand the instructions you've submitted. This issue has come up in a number of cases. I'll hear you again at the time of instructions if you want to say more about it and to submit any additional authority. But at the moment it does not have to be a dominant purpose, it does not have to be predominant, it does not have to be primary, it does not have to be the sole purpose. It must be "a purpose."

MS. GINSBERG: Judge, we can reserve this argument for the jury instructions. But to the extent that it impacts the evidence that we're allowed to put on, I believe that the initial *McCauley* case was reversed because the instruction was it only had to be "a purpose."

THE COURT: Yes, I know that. Because unlike you, I was here.

MS. GINSBERG: I'm well aware of that, Judge.

THE COURT: And I know what *McCauley* says, probably as well as any of you. And yes, I did instruct the

McCauley jury incorrectly and I did tell them that it had to be merely—the

* * *

[31]told me once that some of these images are months later.

MR. SCHLESSINGER: Yes.

THE COURT: And what the defendant wants to show is he wants to show that these victims were participating voluntarily, happily, enjoying this. I have already ruled that that's—consent is not an issue, mistake of age is not an issue. Because these are minors, and at this point in time the law does not recognize that minors may consent to this.

Now, they also have argued that that's unconstitutional, but the statute is quite clear and the case law is quite clear. An appellate court, the Supreme Court is going to have to say that consent of minors is relevant. There is no Supreme Court authority to that; indeed, there's no Fourth Circuit or other competent authority that says that.

So, Ms. Ginsberg, I know you're conferring, but let me have your attention while I'm speaking, please. I know that you want to be sure that that argument you've made here is preserved for your appeal, and I assure you it is.

MS. GINSBERG: Judge, may I get some guidance? I think that we will need to proffer what evidence we

would put on so that the record is clear. These images, both before the chats with the minor victim and after, are being offered for the purpose of proving Mr. Sanders' intent, and for the purpose of this record, we're going to need to introduce what those images are.

* * *

[71]the past he was engaged in other sexual activity.

I was very clear in my ruling, you could establish through this witness that the images that the Government intends to rely on to show the production offense were images that existed prior to the contact with Mr. Sanders, and that they were produced for some other purpose and they were just used to satisfy the request of Mr. Sanders. That's what I ruled. I did not indicate that you were free to go into his background to show that he engaged in lewd and lascivious conduct in the past.

Let's proceed. The objection is sustained.

MS. GINSBERG: Judge, I want to make a proffer of what the evidence is.

THE COURT: Yes, after he's done, you may do so. Actually, I'll hear that proffer now.

MS. GINSBERG: It involves having the witness—apparently, it involves exhibits.

THE COURT: Well, I haven't stopped you from asking any questions about exhibits.

MS. GINSBERG: Well, my exhibits, not his exhibits.

THE COURT: All right. And what is it that you want to ask?

MS. GINSBERG: I want to show him the app that he met Mr. Sanders on, and I want him to describe what he posted as his profile. I want him to identify a naked photograph of himself on that platform, and I want him to read what he wrote about the [72] interests that he had in sexual activity.

Because he has given the impression that this is the first time he ever wanted to do this kind of thing, that he ever was exposed to it, and it's simply not true.

THE COURT: All right. Well, first of all, you may not elicit all of that information, but you can certainly ask him whether is in the first time that he—because he created that impression, you want to cross-examine that; you may do so. What you may not do is transgress Rule 412 and my ruling to do that. You understand what I'm saying to you?

MS. GINSBERG: I do. But, Judge, I say this most respectfully, I'm at a loss—

THE COURT: Look, look, thank you for putting the "respectfully" in there. I'm not sure that that's necessary.

MS. GINSBERG: It was meant—

THE COURT: I beg your pardon?

MS. GINSBERG: It was meant sincerely.

THE COURT: Oh, well, that's kind of you. I wasn't sure. It certainly wasn't displayed. But let's go on.

You may not ask the question that you did ask. I sustained that objection. Let me repeat. You may elicit any testimony you need from this witness to show that the video that he sent was already in existence and that it was created for some other purpose.

The other thing that you may not do, however, is to ask [73]about his predisposition and other sexual activity that he had engaged in prior to that, as I believe that transgresses Rule 412, and it is irrelevant to the allegations here.

So your desire to put on the website, and everything else, to show that he was active, involved in the BDSM community sexually is not admissible. Is that clear?

MS. GINSBERG: Yes. May I put this evidence in at a later time as a proffer for the record?

THE COURT: What evidence?

MS. GINSBERG: The evidence that I was going to ask her about.

THE COURT: Tell me orally right now.

MS. GINSBERG: Your Honor, there's an exhibit which is Defendant Exhibit 69, which is the Recon profile that Mr. **xxxxxxxxxx** created.

THE COURT: All right. Let's stop right there. Is that sexual at all?

MS. GINSBERG: There's no picture on it, but there are words on it. But very sexual, like "Make me your slave and fuck me hard."

THE COURT: All right. Now, how is that relevant to this allegation of production?

MS. GINSBERG: Because he was communicating no other people on this app, including Mr. Sanders, with whom he specifically chats, that's part of this exhibit, chat this is [74]what he was interested in and what he wanted to do.

THE COURT: All right. That's precisely what 412 does not allow you to do. It is irrelevant to this. The fact that he may have wanted it, the fact that he may have consented, that he was eager to do it, is all irrelevant because he was a minor. And that is not relevant.

What else did you want to include?

MS. GINSBERG: He also lists his age as 18.

THE COURT: He listed on the website, yes.

MS. GINSBERG: He listed his age as 18. He also says, "Master"—he said—Mr. Sanders asks him, "When you asked me earlier to force you, blackmail you, were you serious?" And he is insinuating by his testimony that Mr. Sanders was threatening to disclose information about him that sounds like blackmail.

And throughout this chat, the chat that the Government introduced, there are repeated statements by him that he wants to be blackmailed. He is asking to be blackmailed. And I want to establish that he made that request before, on this profile page, before he ever chatted with Mr. Sanders. And this is in a chat, a prior chat with Mr. Sanders.

THE COURT: And how is that relevant?

MS. GINSBERG: Because the Government has put on evidence—

THE COURT: I understand what the Government has put on. But why is it relevant to the offenses charged in the

* * *

[100]Mr. Sanders that you had done what your punishment was. Correct?

A. Yeah.

Q. And that's the reason you sent it?

THE COURT: All right. I think this is an appropriate time, Ms. Ginsberg, for me to instruct the jury.

Your questions are aimed at consent. A minor—and in this case a minor will be defined to you at the end of the case when I give you instructions. A minor in this context is anyone under the age of 18. A minor cannot consent to sexual activity or to engaging in child sexual abuse. So whether or not he wanted to do it or didn't want to do it is irrelevant. He cannot consent to it. Nor can a defendant claim that, well, I thought he was 18. Mistake of age is not a defense.

Those are instructions I'm giving you now, and you must follow those instructions whether you agree with them or not. And I will give you the same instructions at the conclusion of the case.

How much more do you have, Ms. Ginsberg?

MS. GINSBERG: Not very much. Your Honor.

THE COURT: Is it aimed at consent?

MS. GINSBERG: It's. . .

THE COURT: Let me say one other thing. I've allowed Ms. Ginsberg, because it was appropriate, for her to ask questions about coercion and whether the victim —in this case

* * *

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED SEPTEMBER 17, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 225-4242
(1:20-cr-00143-TSE-1)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ZACKARY ELLIS SANDERS,

Defendant-Appellant.

Filed September 17, 2024

ORDER

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 Niemeyer, Judge King, and Judge Benjamin.

For the Court

/s/ Nwamaka Anowi, Clerk

APPENDIX H — RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 2251
Sexual exploitation of children

Effective: October 13, 2008

(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.