No. _____

IN THE

Supreme Court of the United States

ROBERT SYLVESTER KELLY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Consistent with the presumption against retroactive legislation, whether the 2003 amendment to 18 U.S.C. § 3283, which extended the statute of limitations for sex offenses against children, was inapplicable to charged conduct from the 1990s, such that Defendant's charges were brought outside the applicable statute of limitations.

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The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at *United States v. Kelly,* 99 F. 4th 1018 (7th Cir. 2024). [App. A] Unofficial reports to the Opinion can be found at 2024 U.S. App. LEXIS 10133 and 2024 WL 1814054.

The Order of the United States District Court for the Northern District of Illinois is not reported *United States v. Kelly*, No. 19 CR 567 (N.D. Ill., June 30, 2022). [App. C]

STATEMENT OF JURISDICTION

The District Court for the Northern District of Illinois entered judgment against the Defendant on March 7, 2023. [App. B] A timely notice of appeal was filed on March 9, 2023. The jurisdiction of the United States Court of Appeals for the Seventh Circuit was founded upon 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

The Court of Appeals for the Seventh Circuit entered its judgment on April 26, 2024. This Petition for Writ of Certiorari is being filed within 90 days of the Seventh Circuit's Opinion. Sup. Ct. R. 13(1). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3283 (2024)

> No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse, or kidnaping, of a child under the age of 18 years shall preclude such prosecution during

> the life of the child, or for ten years after the offense, whichever is longer.

18 U.S.C. § 3283 (2003)

> No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse of a child under the age of 18 years shall preclude such prosecution before the child reaches the age of 25 years.

18 U.S.C. § 3283 (1994)

> No person shall be prosecuted, tried or punished for any violation of the customs laws or the slave trade laws of the United States unless the indictment is found or the information is instituted within five years next after the commission of the offense.

STATEMENT OF THE CASE

On February 13, 2020, the government filed a 13-count superseding indictment charging Defendant Kelly with (1) four counts of violating 18 U.S.C. § 2251(a) ("the child pornography counts"); (2) one count of conspiracy to obstruct justice in connection with his 2008 state-court acquittal; (3) three counts of violating 18 U.S.C. § 2252(A) related to receiving the aforementioned child pornography; and (4) five counts of violating 18 U.S.C. § 2422(b) ("the inducement counts") Kelly's co-defendants were charged in connection with obstruction of justice and receipt of child pornography.

After a four-week jury trial, the jury returned a guilty verdict against Defendant as to three of the child pornography counts and three inducement counts. Defendant was acquitted as to the remaining

counts. His co-defendants were acquitted of all counts.

The charges for which Defendant was convicted (counts one through three and nine) related primarily to minor 1 who used the pseudonym "Jane" at trial. One inducement count (count ten) related to minor 3 who used the pseudonym "Nia" at trial, and one inducement count (count twelve) related to minor 5 who used the pseudonym "Pauline" at trial.

The superseding indictment in the case largely charged Defendant with conduct from the mid to late 1990s. Prior to trial, Defendant moved to dismiss all counts related to sexual exploitation of a child on statute of limitations grounds.

The District Court denied the motion.

A. Evidence Related to Jane

Jane testified that she was born in September 1984 and was raised in Oak Park, Illinois. When Jane was a junior in high school, she started being home schooled because she was performing in a musical group with other members of her family. Her entire family was involved in the music industry.

Jane was introduced to the Defendant through her aunt Stephanie ("Sparkle") who was a singer who had collaborated with the Defendant. The Defendant and "Sparkle" also had a romantic relationship. When Jane was 13 or 14 years old, she would hang out at the Defendant's recording studio with her aunt. Jane explained that she would go to the studio and watch Defendant record with her aunt and it was nice to see them working and producing music.

"Sparkle" began encouraging Jane to foster a "closer" relationship with the Defendant. (R. 726)

According to Jane, "Sparkle" told her to ask Defendant to be her "godfather" and instructed her to sit on his lap and rub his head. Jane wanted to have a closer relationship with the Defendant and did what her aunt advised, asking Defendant to be her "godfather." The Defendant agreed. Jane told her parents that the Defendant agreed to be her Godfather, and they were pleased.

Jane testified that her relationship and conversations with the Defendant began to change, becoming more sexual and leading to "phone sex." When Jane was 14, she and the Defendant began to engage in sexual contact. The sexual contact involved touching and rubbing each other's genitalia, oral sex, and kissing and hugging. These occasions were frequent and occurred at Defendant's studio, his home, and on his tour bus. Jane's parents allowed her to stay with the Defendant, including overnight. After Jane turned 15, she and the Defendant started to have sexual intercourse.

Defendant started video-recording his sexual activities with Jane when she was 14 years old. Jane testified that prior to taking the stand, she viewed video footage of three separate sexual encounters with the Defendant, one occurred in the living room of his home, one occurred in his bedroom, and one occurred in a room referred to as the "log cabin" room in Defendant's home. The videos depicted touching and oral sex but did not involve sexual intercourse. Jane testified that she was 14 years old in all three videos that she identified. The three videos were introduced into evidence as Government's Exhibits 1 and 2; one of the videos was captured on Government's Exhibit 1 and the two of the videos were captured on Government's Exhibit 2. The three

videos formed the basis of counts one through three of the superseding indictment.

B. Evidence Related to Nia

Nia testified that she met Defendant in a shopping mall in Atlanta in 1996 when she was 15 years old. Nia was born in August of 1980. (Nia obtained an autograph from the Defendant on which he allegedly wrote down his phone number. Nia admitted that she did not discuss her age with the Defendant, and she no longer had the autograph he gave her.

Nia testified that the Defendant asked her if she was going to his concert in Atlanta that evening. When she told the Defendant she did not have tickets, Defendant arranged for her to obtain tickets. Nia did not attend the Defendant's concert but began calling the Defendant that evening. Nia explained that she had several conversations with the Defendant and that she liked him. According to Nia, the Defendant arranged for her to travel to Minnesota to attend his concert. Nia attended the Defendant's concert but did not see him until the following morning in her hotel room. Nia testified that Defendant kissed her, touched and kissed her breasts, and then masturbated. Defendant told her that he wanted her to visit him in Chicago.

Defendant did not follow up on the invitation and did not book any arrangements for Nia to come to Chicago. However, Nia made her own arrangements and went to stay with family in Chicago the summer on 1996 - unbeknownst to the Defendant. Once in Chicago, Nia called the Defendant; he invited her to his studio but made no arrangements for her to come there. Nia convinced her cousins to take her to the studio.

Nia arrived at the studio with her cousins and Defendant showed them around and took them to a waiting area where they could see him record. Nia and her cousins stayed most of the evening, but Defendant was recording and was not hanging out with Nia and her cousins for most of the evening. At some point, Nia was told Defendant wanted to talk to her in the hallway and Nia went into the hallway to see him. Nia testified, "he greeted me with a hug, with a kiss, and held on to her for a moment" and they "kind of made out a little." Nia elaborated, "I remember his hand being around my waist on my bottom, my butt. And then he motioned his hands into my pants as we kissed. And he fondled my chest, and he, you know, kissed we just kind of made out within the time frame that we were in the hallway." Nia stated, "he touched my vagina, and he caressed my bottom, my behind." Nia testified that before she left, she had a second encounter with Defendant. She stated they "embraced, hugged. He held on to me, held my bottom and things of that nature but it wasn't as long as the first on. It was more of like, you know, kind of, like a good-bye, see you later."

Nia never saw or spoke to the Defendant again. But in 2002, Nia sued the Defendant, and the case settled for $500,000.

C. Evidence Related to Pauline

Pauline testified that she was born in October 1984 and grew up in Oak Park, Illinois with Jane. Pauline and Jane became friends in middle school. Pauline met the Defendant through Jane when she was 14 years. Pauline explained that when she was 14 or 15 years old, she discovered Jane and the Defendant in the "log cabin" room; Jane was naked.

Pauline testified that she had her first sexual encounter with the Defendant when she was 14. She began having sexual encounters with both the Defendant and Jane which included oral sex. Pauline eventually began having sexual intercourse with the Defendant when she was around 15 or 16. When Jane discovered Pauline was having a separate sexual relationship with Defendant, it became very problematic for their friendship.

Pauline admitted that she continued to have a sexual relationship with the Defendant until she was grown and was out of college. Pauline did not report to any authorities that she had a sexual relationship with the Defendant when she was a minor until 2019.

The government presented lengthy excerpts of the video recordings depicting Defendant's sexual conduct with Jane on three separate occasions. Much of the government's case centered on the Defendants' alleged efforts to obstruct the state court prosecution of Defendant in connection with one of the videos depicting his sexual conduct with Jane in 2008. The jury acquitted all Defendants of the obstruction of justice count and all counts related to the receipt of child pornography. The jury also acquitted Defendant of two inducement counts related to Tracy and Brittany.

The jury returned a verdict of guilty against the Defendant in connection with the child pornography counts involving Jane (counts one through three), the inducement count as to Jane (count nine), and two additional inducement counts in connection with Nia and Pauline (counts ten and twelve).

Defendant's post-trial motions were subsequently denied. The District Court judge sentenced the

Defendant to 240 months' imprisonment. Judgment was entered on March 7, 2023.

Defendant's convictions and sentence were affirmed by the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit rejected Defendant's argument that his charges were barred by the applicable statute of limitations. *United States v. Kelly,* 99 F. 4th 1018 (7th Cir. 2024). [App. A, 5a-9a]

ARGUMENT

BECAUSE CONGRESS DID NOT EXPRESS AN INTENT FOR THE PROTECT ACT TO APPLY RETROACTIVELY, DEFENDANT'S CHARGES FOR CONDUCT COMMITTED IN THE 1990s WAS TIME-BARRED.

In contrast with this Court's decision in *Toussie v. United States*, 397 U.S. 112, 115 (1970) and *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994), the Seventh Circuit sanctioned the retroactive application of the 2003 amendment to 18 U.S.C. § 3283 ("the PROTECT Act") which extended the statute of limitations for child sex offenses, reasoning that its application did not offend the Ex Post Facto Clause. This Court should grant review to reaffirm the long-standing principles that criminal limitations are to be liberally interpreted in favor of repose and that legislation is presumed to apply prospectively, regardless of Ex Post Facto considerations unless Congress expressly states otherwise.

This Court should clarify that *Landgraf* provides broader protections for criminal defendants than the Ex Post Facto Clause because criminal statutes of limitations are designed to protect individuals from

having to defend themselves against charges supported by facts that are remote in time. Statutes of limitations are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. *Order of R. Telegraphers v. Railway Express Agency, Inc.* 321 U.S. 342, 348 (1944). To allow Congress to continue to extend criminal statutes of limitations so as to abolish them altogether interferes with a Defendant's ability to fairly defend against ancient conduct in violation of the Sixth Amendment and Due Process Clauses, even if a Defendant's Ex Post Facto rights have technically been preserved.

Because Congress did not expressly state that the PROTECT Act should apply retroactivity and even rejected a version of the bill that include a retroactive provision, the PROTECT Act did not extend the statute of limitations and Defendant was convicted of time-barred offenses. Federal law imposes a five-year limitations period for most non-capital offenses. 18 U.S.C. § 3282(a). Over the years, Congress has provided a longer limitations period for "offense[s] involving the sexual or physical abuse, or kidnapping" of a minor. 18 U.S.C. § 3283. At the time Defendant committed the conduct for which he was charged and convicted, namely the child pornography counts (counts one through three) and the inducement counts (counts nine, ten, and twelve), section 3283 provided as follows:

> No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse of a child under the age of 18 years shall preclude such prosecution before the child

> reaches the age of 25 years. 18 U.S.C.§ 3283 (1994). [App. D]

Consistent with the foregoing provision, at the time of the charged conduct, the statute of limitations for offenses involving sexual abuse were extended until the victim/minor reached 25 years old. Thus, section 3283 extended the five-year limitations period for the conduct alleged in counts one through three and nine of the superseding indictment until September 2009 when Jane reached her 25th birthday. The statute of limitations for count ten was extended until 2005 when Nia turned 25 years old, and the statute of limitations for count twelve was extended until October 2009 when Pauline turned 25 years old. Defendant was not charged until more than a decade after the expiration of the statute of limitations under the applicable law at the time of the alleged conduct.

Unless subsequent amendments to section 3283 apply retroactively in this case, Defendant's charges were time barred. In 2003, Congress amended the statute, extending the statute of limitations through the life of a minor. 18 U.S.C. § 3283 (2003).[1] Congress did not express an intent for the 2003 amendment to apply retroactively. Consistent with the well-established presumption against retroactive legislation, the 2003 amendment is inapplicable to the charged conduct as is any subsequent amendments to section 3283. *See United States v. Diehl*, 775 F. 3d 714, 720 (5th Cir. 2015) (applying the version of 18 U.S.C. § 3283 in effect at the time of the defendant's offense rather

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[1] Congress amended the statute again in 2006 to its current version which provides a limitations period for the life of the victim or 10 years after the offense, whichever is longer. 18 U.S.C. § 3283.

than the amended version in effect at the time of the indictment).

It is axiomatic that "criminal limitations statutes are 'to be liberally interpreted in favor of repose,'" *Toussie v. United States*, 397 U.S. 112, 115 (1970). "[R]etroactivity is not favored in the law." *Velásquez-Garcia v. Holder*, 760 F. 3d 571, 579 (7th Cir. 2014) quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). This Court has explained that the aversion to retroactive rulemaking is deeply rooted in our jurisprudence and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct; accordingly, settled expectations should not be lightly disrupted. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal. *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994).

With these principles in mind, the Seventh Circuit erred when it retroactively applied the 2003 (or 2006) versions of section 3283 and denied Defendant's motion to dismiss on statute of limitations grounds. This Court's decision in *Landgraf* set forth a framework for determining whether a federal statute of limitations applies to past conduct:

> [T]he court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new

> statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result. *Id*. at 280.

Thus, under *Landgraf*, if Congress has expressly prescribed that a statute applies retroactively or will not apply retroactively, the inquiry ends. If the statute is silent on the issue, courts proceed to the second step of the *Landgraf* analysis and determine whether the new statute would have retroactive effects. *Id.*

Here, the 2003 amendment of section 3283 contains no language expressly prescribing retroactive application of the amendment. Although the statute does not expressly provide that it may only apply prospectively, it employs language that points toward prospective application. The section twice uses forward-looking modal verbs: "would" and "shall." 18 U.S.C. § 3283 ("[n]o statute of limitations that *would* otherwise preclude prosecution for an offense involving the sexual or physical abuse, or kidnaping, of a child under the age of 18 years *shall* preclude . . ."); *See Appalachian Power Co. v. E.P.A,* 249 F. 3d 1032, 1057 (D.C. 2001) (characterizing the phrase "would emit" as a future conditional phrase."); *Salahuddin v. Mean,* 174 F. 3d 271, 275 (2d Cir. 1999) ("[t]here is no doubt that "shall" is an imperative, but it is equally clear that it is an imperative that speaks to future conduct."); *Martin v.*

Hunter's Lessee, 14 U.S. 304, 314 (1816) ("[t]he word *shall,* is a sign of the future tense . . ."). [App. D]

The Legislative history of the statute further supports Defendant's contention that Congress used prospective language in the statute to evince its intent that the statute apply *prospectively* and not retroactively. Critically, Congress considered and rejected language that expressly prescribed retroactive effect, showing its intent that the amendment only apply prospectively. In fact, the House of Representatives version of the bill provided for the complete elimination of a statute of limitations and included an express retroactivity provision, declaring "the amendments made by this section shall apply to the prosecution of any offense committed before, on, or after the date of enactment of this section." Child Abduction Prevention Act, H.R. 1104, 108th Cong. § 202 (2003). The Senate version contained no retroactivity provision. PROTECT Act, S. 151, 108th Cong. When the House and Senate conferenced to resolve differences between the bills, the retroactivity provision was omitted. Senator Leahy, one of the bill's original co-sponsors and a former chair of the Senate Judiciary Committee, stated on the Senate floor, the omission was intentional: "I am pleased that the conference agreed to drop language from the original House-passed bill that would have extended the limitations period retroactively." Senator Leahy, Amber Legislation, Cong. Rec. 149:50, S5147 (2003).

The legislative history of the bill expresses Congress's intent that the amendment apply prospectively. *See Martin v. Hadix*, 527 U.S. 343, 355-57 (1999) (examining "structure and legislative history" as part of first *Landgraf* step); *see also*, *Food and Food & Drug Admin. v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 144 (2000); *Lattab v.*

Ashcroft, 384 F. 3d 8, 14 (1st Cir. 2004) ("our inquiry is not limited to the statutory text but may include an examination of standard ensigns of statutory construction, such as the statute's truck and legislative history.") In sum, Congress affirmatively rejected the proposed retroactive application provision, indicating its intent that the statute apply prospectively.

Even if Congress's intent is not express, retroactive application of the 2003 amendment fails to pass the second prong of the *Landgraf* test. This Court held in *Stogner v. California*, 539 U.S. 607, 618 (2003) that retroactive applications of extended statutes of limitations to revive time-barred claims violate the Ex Post Facto Clause. Admittedly, the 2003 (and 2006) amendments did not revive time-barred claims in this case but rather extended the limitations period for prosecuting those offenses before the limitations period expired. However, Defendant maintains that an analysis of the retroactivity of a criminal statute of limitations under the second step must recognize the principle that unlike civil statutes of limitations, "criminal limitations are to be liberally interpreted in favor of repose." *Toussie*, 397 U.S. at 115; *see also*, *United States v. Gentile*, 235 F. Supp. 3d 649, 655 (D.N.J. 2017) (observing that if *Landgraf* and *Toussie* "are read in conjunction," courts "must interpret the statute of limitations in a manner favoring repose for Defendant.") As the First Circuit acknowledged, *Toussie* "potentially alters the second step in the *Landgraf* approach" in criminal cases. *United States v. Miller*, 911 F. 3d 638, 645 (1st Cir. 2018) (evaluating 2003 amendment in adjudicating ineffective assistance of counsel claim). "In other words, when Congress has sounded an uncertain trumpet, a court ought to refrain from applying an

enlarged criminal statute of limitations retrospectively." *Id*. As discussed, *supra*, Congress sounded an uncertain trumpet regarding the retroactivity of the 2003 amendment when it affirmatively removed a retroactivity provision from the bill.

In light of *Toussie*, this Court should grant review and find that a retroactive application of the 2003 amendment must be rejected even if it is not the equivalent of an Ex Post Facto violation because it runs afoul of familiar considerations of fair notice, reasonable reliance, and settled expectations. Put differently, this Court should clarify that the second step of *Landgraf* provides broader protections for criminal defendants than the Ex Post Facto Clause. Statutes of limitations "applicable to criminal prosecutions are designed principally to protect individuals from having to defend themselves against charges supported by facts that are remote in time." *United States v. Rivera-Ventura*, 72 F. 3d 277, 281 (2d Cir. 1995). That concern was acute in this case where the government sought to rely on the retroactive extension of criminal statute of limitations to prosecute a case based on conduct that is more than two decades old. Retroactive application of the 2003 amendment not only fly in the face of congressional intent; it violates notions of fundamental fairness.

In sum, section 3283 by its language and its legislative history was intended to apply prospectively. The inquiry ends there. But even if this Court examined the question under step two of the *Landgraf* analysis, it should decide against retroactive application of the amendment. This Court should grant this Writ to clarify and reaffirm the teachings of *Toussie,* namely that statutes must be presumed to apply prospectively absent clear

language to the contrary and the statute should be interpreted in favor of statute of repose.

CONCLUSION

For the foregoing reasons, Defendant's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

In the
United States Court of Appeals
for the Seventh Circuit

No. 23-1449

UNITED STATES OF AMERICA,

Plaintiff- Appellee,

—v.—

ROBERT SYLVESTER KELLY,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:19-cr-00567-1 — **Harry D. Leinenweber**, *Judge.*

ARGUED FEBRUARY 22, 2024 — DECIDED APRIL 26, 2024

Before SYKES, *Chief Judge*, and RIPPLE and ST. EVE, *Circuit Judges*.

ST. EVE, *Circuit Judge*. For years, Robert Sylvester Kelly abused underage girls. By employing a complex scheme to keep victims quiet, he long evaded consequences. In recent years, though, those crimes

caught up with him at last. But Kelly—interposing a statute-of-limitations defense—thinks he delayed the charges long enough to elude them entirely. The statute says otherwise, so we affirm his conviction.

I. Background

The conduct underlying Mr. Kelly's conviction dates to the late 1990s and early 2000s. In those days, he worked in the music industry, primarily as a singer. Kelly sometimes worked with a singer called Sparkle. The two were also romantically involved.

The pair were not exclusive. To the contrary, Sparkle seems to have introduced Kelly to her teenage niece, starting Kelly along the yearslong process of grooming the young teenager. The niece, who had her own interest in a recording career, goes by "Jane" in this case. (She, like other victims discussed below, used a pseudonym at trial.) When Jane was thirteen or fourteen years old, she started visiting the Chicago studio where Kelly and Sparkle worked. Sparkle encouraged Jane to form a bond with Kelly. As part of that plan, one day she advised Jane to sit on Kelly's lap, rub his head, and ask him to be her godfather. Jane complied and Kelly agreed to take on the role.

In 1996 Kelly began taking advantage of his relationship with Jane. He started with explicit phone calls. Then when Jane was fourteen, Kelly began subjecting her to oral sex. That escalated to intercourse by age fifteen. The abuse continued throughout Jane's teenage years, and all the while Kelly memorialized his misconduct in a series of video recordings.

For much of this time Jane had a close friend, Pauline, who would sometimes visit Kelly's home. On one such visit she discovered Kelly abusing an undressed Jane. Kelly claimed he was checking Jane for bruises and then pressured Pauline to join in. Kelly proceeded to abuse both girls together, and would continue to do so for years, often calling both to his studio and frequently recording these encounters. When the victims were sixteen, Jane discovered that Pauline had been seeing Kelly without Jane present. This spelled the end of Jane and Pauline's friendship. But Kelly continued his abuse of both girls, maintaining sexual contact with Pauline until after she finished college.

Around that same time, Kelly also groomed a girl named Nia, whom he had met while on tour in Atlanta. She was fifteen then. He gave her an autograph that included his phone number, later arranging for her to attend his concert in Minnesota. Kelly put Nia up in a nearby hotel and, the morning after the show, visited her room and sexually abused her. The next summer, when Nia was sixteen, she arranged to stay with family in Chicago and met Kelly twice at his studio. Kelly fondled her both times.

The government identified more abuse involving two other underage girls, here called Brittany and Tracy. Brittany was friends with Jane and Pauline; her story closely resembles Pauline's, down to the frequent group sex on camera. Tracy met Kelly through an internship and suffered abuse at Kelly's studio.

Some years after Kelly's abuse of these young girls began, Illinois law enforcement officials took an interest in Kelly. Their efforts culminated in a 2008

criminal trial for similar conduct Kelly allegedly committed against different victims. That jury acquitted Kelly. In the leadup to that trial—and afterward—Kelly and others worked to keep his abuse under wraps. For example, Kelly's production company cut checks to Jane's father before and after the 2008 trial. And going back to 2001, Kelly's associates had worked to recover some of Kelly's videotapes, hiring private investigators and paying off third parties who possessed the tapes. Twice the group paid $200,000 or more in cash for tapes.

In 2019, federal prosecutors secured an indictment against Kelly. The thirteen counts included in the superseding indictment comprised four for producing child pornography, three for receiving child pornography, five for inducing each of Jane, Pauline, Nia, Brittany, and Tracy to engage in sexual activities, and one for obstructing justice in the state case. At the trial, the government put three videos of Jane and Kelly into evidence. Each depicted oral sex. The jury convicted Kelly of inducing Jane, Pauline, and Nia to engage in sexual activities, and convicted him on the three child pornography production counts corresponding to the three videos in evidence. The jury acquitted Kelly on the other seven counts.

At Kelly's sentencing, the district court calculated a Guidelines range of 135 to 168 months' imprisonment based on Kelly's criminal history category (III) and his offense level (31). A significant factor at sentencing was Kelly's 2022 conviction for similar conduct in New York and corresponding 30-year sentence. The district court grappled at length with its discretion to run its sentence concurrently or consecutively with the New York sentence. After considering Kelly's likely lifespan, the nature and circumstances of his crimes, Kelly's history and

characteristics, deterrence, the need to protect the public from Kelly, and mitigating factors like Kelly's own childhood abuse, the district court varied upwards from the Guidelines to impose a sentence of 240 months. As a practical matter, though, the sentence added just twelve months to Kelly's incarceration. The district court ordered the other 228 months to run concurrently with the New York sentence.[1]

Kelly appealed.

II. Analysis

Kelly raises three arguments on appeal: (1) a statute of limitations excuses him from liability on these six counts; (2) the district court should have severed his trial so that one jury decided the charges relating to Jane and another the rest of the charges; and (3) his sentence is improper both procedurally and substantively.

A. Statute of Limitations

Today, the statute of limitations for sex crimes against children extends through the life of the victim. The text could not be clearer on that:

> No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse, or kidnaping, of a child under the age of 18 years shall preclude such prosecution during

[1] Kelly has also appealed that sentence. *See* Notice of Criminal Appeal, *United States v. Kelly*, No. 22-1481 (2d Cir. July 12, 2022).

> the life of the child, or for ten years after the offense, whichever is longer.

18 U.S.C. § 3283. Jane, Pauline, and Nia are still alive—indeed, all three testified at trial. So if the present-day statute applies here, the verdict against Kelly is safe from a statute of limitations challenge.

Kelly, though, asks us not to apply it, instead submitting that a previous version of the statute with a shorter limitations period governs his case. Recall that Kelly's abuse of these victims took place in the 1990s and early 2000s. At that time prosecutors had to move faster: the statute of limitations barred prosecutions after the victim's 25th birthday. The law changed to the above-quoted version in 2003 with the PROTECT Act, thereby extending the window to the life of the victim. *See* Pub. L. 108–21, title II, § 202, Apr. 30, 2003. By that time Jane, Pauline, and Nia had all turned eighteen, though none had yet turned 25. Therefore, when the PROTECT Act passed in 2003, the government could have prosecuted Kelly for the abuse he had perpetrated against Jane, Pauline, and Nia while they were underage, even though the ongoing contact was not the illegal inducement of a minor.

Putting the pieces together, Kelly maintains that the old, pre-2003 statute of limitations should control. All the inducement of minors in this case, he points out, took place when he could expect a more generous statute of limitations.

The law does not support Kelly's position.

As a threshold matter, it is not unconstitutional to apply a newer statute of limitations to old conduct when the defendant was subject to prosecution at the time of the change, as Kelly was in 2003. Similarly

situated defendants have argued the Constitution's prohibition on retroactive punishment bars this sort of change—without success. *See, e.g.*, *United States v. Gibson*, 490 F.3d 604, 609 (7th Cir. 2007). Kelly has no constitutional argument that survives those cases.

Instead, he argues the district court misinterpreted the statute to reach conduct (like his) that predated its passage—a contention that hinges on the "presumption against statutory retroactivity." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994). We assess arguments like this one in two stages. A "court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." *Id.* at 280. If so, we carry out Congress's wishes. If not, we "must determine whether the new statute would have retroactive effect," and if it would, the "traditional presumption teaches that it does not govern." *Id.* By way of example, a statute that "would impair rights a party possessed when he acted**"** or "increase a party's liability for past conduct" brings that presumption into play. *Id.*

Here, Congress has spoken clearly, instructing us to apply the statute across the board. "No statute of limitations that would otherwise preclude prosecution for [child sexual abuse] shall preclude such prosecution during the life of the child." 18 U.S.C. § 3283. If we agreed with Kelly, we would be applying the pre-2003 statute to "preclude prosecution during the life of the child." *Id.* The statute commands otherwise, unambiguously and with no reservations. It is not for us to second-guess that directive.

None of Kelly's arguments to the contrary persuade us. First, he points to the "shall" language in the

statute: "*shall* preclude such prosecution." *Id.* (emphasis added). Seizing on that one word, he urges that "[t]he word shall is a sign of the future tense." *Martin v. Hunter's Lessee*, 14 U.S. 304, 314 (1816). While "shall" does point to the future, here it points to a future "prosecution" rather than future conduct. § 3283. The "prosecution" Kelly complains of took place twenty years after the PROTECT Act passed. It thus falls well within the statute's forward-looking scope.

Second, Kelly directs us to the statute's legislative history. But "legislative history can never defeat unambiguous statutory text." *Bostock v. Clayton County*, 590 U.S. 644, 674 (2020). This statute is unambiguous. And even if some ambiguity lingered, the legislative history does not help Kelly. He points out that an earlier version of the bill used different language, providing that "the amendments made by this section shall apply to the prosecution of any offense committed before, on, or after the date of enactment of this section." Child Abduction Prevention Act, H.R. 1104, 108th Cong. § 202 (2003). The final version of the law did not include that language. Though Kelly asserts this proves Congress did not want the statute to apply to his case, a fuller picture of the statute's history belies that notion. Senator Leahy, who pushed to cut the language, did so to alleviate his doubts about the bill's "constitutionality," since it "would have revived the government's authority to prosecute crimes that were previously time-barred." 149 Cong. Rec. S5137, S5147 (Apr. 10, 2003) (statement of Sen. Leahy). Because Kelly was subject to prosecution in 2003, the Constitution was never at issue here, so this change to the bill does not help him.

By reaching this conclusion about § 3283's temporal range, we find ourselves in good company. Faced with the same statute, the Ninth Circuit held that "Congress evinced a clear intent to extend … the statute of limitations applicable to sexual abuse crimes." *United States v. Leo Sure Chief*, 438 F.3d 920, 924 (9th Cir. 2006). In like vein, the Eighth Circuit reached the same conclusion about a precursor statute of limitations under what was then 18 U.S.C. § 3509(k), which used nearly identical language. (This is the pre-2003 version of the statute Kelly asks us to apply.) *See United States v. Jeffries*, 405 F.3d 682, 683 (8th Cir. 2005) ("No statute of limitation that would otherwise preclude prosecution for an offense involving the sexual or physical abuse of a child under the age of 18 years shall preclude such prosecution before the child reaches the age of 25 years."). *See also United States v. Maxwell*, 534 F. Supp. 3d 299, 314–16 (S.D.N.Y. 2021).

Because Congress specified that § 3283 reaches Kelly's conduct, we need not opine on the second step. We turn, then, to his second point of error.

B. Severance

Kelly faults the district court for conducting a singular trial on all the charges against him and denying his motion to sever the counts involving Jane from the rest, including his abuse of Pauline and Nia. Kelly complains of a prejudicial spillover impact of the video evidence relating to Jane on the other counts. He also asserts a "coerced testimony" theory, claiming that he would have liked to testify about the Nia and Pauline conduct but opted not to for fear of cross-examination about the Jane videos.

The Federal Rules of Criminal Procedure contemplate joinder of charges in most cases. "The indictment or information may charge a defendant in separate counts with 2 or more offenses." Fed. R. Crim. P. 8(a). Sometimes, though, severance is in order. If the joinder "appears to prejudice a defendant or the government, the court may order separate trials of counts." Fed. R. Crim. P. 14(a). District court judges enjoy "wide discretion in determining when the prejudice of joinder outweighs the benefits of a single trial." *United States v. Jett*, 908 F.3d 252, 275 (7th Cir. 2018) (citations omitted). Kelly's spillover and coerced testimony theories are two ways a defendant might show the prejudice Rule 14 requires. But here, neither theory prevails—especially under the applicable abuse of discretion standard of review. *See United States v. Maggard*, 865 F.3d 960, 970 (7th Cir. 2017).

A heavy burden falls on Kelly, who must "establish that the denial of severance actually prejudiced him by preventing the jury from arriving at a reliable judgment as to guilt or innocence." *United States v. Ervin*, 540 F.3d 623, 629 (7th Cir. 2008).

At the outset, the spillover theory faces two hurdles: "the dual presumptions that a jury will capably sort through the evidence and will follow limiting instructions from the court to consider each count separately." *United States v. Turner*, 93 F.3d 276, 284 (7th Cir. 1996). Kelly can surmount neither. When the trial reached its end, the jury *did* "capably sort through the evidence"—it acquitted Kelly on seven counts. And "where, as here, the jury returns a guilty verdict on only some of the counts charged in the indictment, we can be confident that the jurors were able to sift the evidence and to weigh the merits of each count separately." *United States v. Peterson*,

823 F.3d 1113, 1124 (7th Cir. 2016) (cleaned up). Further still, the district court instructed the jury: "You must consider each charge separately. Your decision on one charge, whether it is guilty or not guilty, should not influence your decision on any other charge." We presume juries follow instructions, *Samia v. United States*, 599 U.S. 635, 646 (2023), and nothing here suggests otherwise. The jury was properly instructed and discharged its duty with care, acquitting on seven counts.

The coerced testimony theory fares no better. A defendant advancing such a theory must make "a convincing showing that he has both important testimony to give concerning one count and the strong need to refrain from testifying on the other." *Ervin*, 540 F.3d at 629 (cleaned up). Kelly never identifies what testimony he would have given about Pauline and Nia. In the same way, he never explains why there was an especially strong need not to testify about Jane. Kelly has failed to make any showing, much less a convincing one.

The district court did not abuse its discretion. The court took care to properly instruct the jury to consider the evidence for each count on its own merits. In turn, the jury did its part, convicting Kelly on six of the thirteen counts.

C. Sentencing

That leaves the sentence, which Kelly challenges on three fronts: two procedural, one substantive. First, Kelly disagrees with the district court's discussion of acquitted obstruction of justice conduct at sentencing. Second, he takes issue with the district court's reference to present-day Guidelines ranges, which punish sex crimes more harshly than those in

place when he committed the offenses, in imposing the variance up to 240 months. Finally, and more generally, he contends that the sentence is too harsh as a substantive matter.

On acquitted conduct, Kelly concedes—as he must—that district courts may include such conduct in the calculation without offending due process. *See United States v. McClinton*, 23 F.4th 732, 735 (7th Cir. 2022). Instead his quarrel lies with the district court's statement at sentencing that "there certainly was evidence that I could find by preponderance that he obstructed justice." As Kelly notes, relevant conduct at sentencing "may include uncharged or acquitted conduct as long as the court makes specific findings identifying the relevant conduct based on a preponderance of the evidence." *United States v. Oros*, 578 F.3d 703, 711 (7th Cir. 2009).

Kelly's argument boils down to a complaint that the district court included acquitted conduct without making those "specific findings." Like other procedural challenges to sentencing, we review de novo. *United States v. Rollerson*, 7 F.4th 565, 570 (7th Cir. 2021). The transcript defies Kelly's characterization, for the district court never relied on any obstruction of justice as relevant conduct. Rather, it soundly grounded the sentence in the 18 U.S.C. § 3553(a) factors: the district court expounded on "the seriousness of the offense," Kelly's "history and characteristics," and the prospects of deterring Kelly and protecting the public from similar offenses in the future. The district court's aside that it "*could* find" obstruction by a preponderance does not undermine the district court's evaluation of the § 3553(a) factors, which justifies the sentence and supplies an adequate rationale. The district court thought it unnecessary to make such a finding precisely because it had chosen

not to rely on obstruction of justice in imposing Kelly's sentence.

The district court's variance from the advisory Guidelines range is likewise free from error. After correctly calculating Kelly's Guidelines range using the Guidelines in place at the time Kelly committed the offenses, the court gestured at the current version of the Guidelines. It stated: "because of the increase in the current Guidelines … in all probability, if I was sentencing Mr. Kelly … I would probably give him a sentence in the neighborhood of 240 months." It explained that this represents "a variance upwards from the top end of the Guidelines, which was 168." So the district court properly calculated the range and then used the current Guidelines to justify a variance.

We have held—as Kelly acknowledges—that "a sentencing court may consider subsequent Guideline amendments" for certain purposes. *United States v. Coe*, 220 F.3d 573, 578 (7th Cir. 2000). These, *Coe* established, include considering later-added aggravating elements and "consider[ing] later amendments as guides for determining how much of a departure is warranted." *Id.* We went so far as to add that "reference to subsequent amendments may be one of the best ways a sentencing court can be assured that the magnitude of a departure is consistent with the sentencing scheme envisioned by Congress." *Id.* By extension, changes to the Guidelines may also inform a variance. Variances have supplanted the departures *Coe* envisioned now that "the concept of a departure … is obsolete and beside the point after *United States v. Booker*, 543 U.S. 220 (2005)." *United States v. Gardner*, 939 F.3d 887, 891 (7th Cir. 2019) (cleaned up). Yet "district courts can still take guidance from the departure

provisions and apply them by way of analogy." *United States v. Pankow*, 884 F.3d 785, 793 (7th Cir. 2018) (cleaned up). It follows that updates to the Guidelines may justify a variance—as the district court did here, tying its variance to "the sentencing scheme envisioned by Congress" in "one of the best ways" possible. *Coe*, 220 F.3d at 578. That was no error.

We review the substantive reasonableness of Kelly's sentence only for abuse of discretion. *Rollerson*, 7 F.4th at 570. A sentence's substantive reasonableness turns on "the totality of the circumstances, including the extent of any variance from the Guidelines range." *Gall v. United States*, 552 U.S. 38, 51 (2007). Kelly challenges the 72 months added to the high end of his Guidelines range. That challenge is beside the point. What matters most is the 30-year New York sentence, which the district court called "the elephant in the room" at sentencing. The sentence Kelly ultimately received was fashioned with the New York sentence in mind. Kelly's nominal above-Guidelines sentence cannot be fairly assessed without reference to its running concurrently with the New York sentence—what looks like 240 months for this Illinois conduct is, with that context, more like twelve.

Even without that, though, the district court did not abuse its discretion in imposing an above-Guidelines sentence. In its words, "the nature of [Kelly's] offense is horrible, horrific." It considered Kelly's arguments in mitigation and weighed the 18 U.S.C. § 3553(a) factors in detail. We will not second-guess that exercise of discretion.

III. Conclusion

An even-handed jury found Kelly guilty, acquitting him on several charges even after viewing those abhorrent tapes. No statute of limitations saves him, and the resulting sentence was procedurally proper and—especially under these appalling circumstances—substantively fair.

AFFIRMED.

Appendix B

UNITED STATES DISTRICT COURT
Northern District of Illinois

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:19-CR-00567(1)

USM Number: 09627-035

UNITED STATES OF AMERICA

—v.—

ROBERT SYLVESTER KELLY

Jennifer A. Bonjean
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

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

☒ was found guilty on count(s) 1 – 3, 9, 10 and 12 of the superseding indictment after a plea of not guilty

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense
18 USC Section 2251(a), 18 USC Section 2251(d) Child Pornongraphy

18 USC Section 2422(b) Enticement of a Minor
18 USC Section 2422(b) Enticement of a Minor

Offense Ended	**Count**
October 2001	1s – 3
October 2001	9s, 12s
Summer 1996	10s

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) 4s - 8s, 11s and 13s of the superseding indictment.

☒ The forfeiture allegation is dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this District within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

February 23, 2023
Date of Imposition of Judgment

/s/ Harry D. Leinenweber
Harry D. Leinenweber,
United States District Judge

Date: March 7, 2023

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

228 months on 1s – 3s concurrent to all other counts and Docket Number 19 CR 286(S-3)-001 EDNY – Eastern District of New York, 12 months on 1s – 3s to run concurrent to all other counts but consecutive to Docket Number 19 CR 286(S-3)-001 EDNY – Eastern District of New York.
180 months on 9s and 12 s to run concurrent to all other counts and EDNY Docket Number 19 CR 286.
120 months on 10s to run concurrent to all other counts and EDNY Docket Number 19 CR 286.

☐ The court makes the following recommendations to the Bureau of Prisons:

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

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at on
- ☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
  - ☐ before 2:00 pm on
  - ☐ as notified by the United States Marshal.
  - ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have excuted this judgment as follows: _____

_____

_____

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

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

MANDATORY CONDITIONS OF SUPERVISED RELEASE PURSUANT TO 18 U.S.C § 3583(d)

Upon release from imprisonment, you shall be on supervised release for a term of:
Three (3) years on counts 1s – 3s, 9s, 10s and 12 s to run concurrent to each other and to Docket Number 19 CR 286(S-3)-001 EDNY – USDC Eastern District of New York.

During the period of supervised release:

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*

STANDARD CONDITIONS OF SUPERVISION

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

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in

advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours p r week) at a lawful type of employment unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines based on your criminal record, personal history and characteristics, and the nature and circumstances of your offense, you pose a risk to another person (including an organization), the probation officer, with prior approval of the Court, may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

13. You must follow the instructions of the probation officer related to the conditions of supervision.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall comply with any applicable state and/or federal sex offender registration requirements, as instructed by the probation officer, the Bureau of Prisons, or any state offender registration agency in state where he resides, works or, or is student.
2. The defendant shall participate in a mental health treatment program, which may include participation in a treatment program for sexual disorders. as approved by the U.S. Probation Department. The defendant shall contribute to the cost of such services rendered and/or any psychotropic medications prescribed to the degree he is reasonably able and shall cooperate in securing any applicable third-party payment. The defendant shall disclose all financial information and documents to the Probation Department to assess his ability to pay. As part of the treatment program for sexual disorders, the defendant shall participate in polygraph exan1inations and/ or visual response testing to obtain information necessary for risk management and correctional treatment.
3. The defendant shall not associate with or have any contact with convicted sex offenders unless in a therapeutic setting and with the permission of the U.S. Probation Department.
4. The defendant shall not associate with children under the age of 18, unless a responsible adult is present, and he has prior approval from the Probation Department. Prior approval does not apply to contacts which are not known in advance by the defendant where children are accompanied by a

parent or guardian or for incidental contacts in a public setting. Any such non-pre-approved contacts with children must be reported to the Probation Department as soon as practicable, but no later than 12 hours. Upon commencing supervision, the defendant shall provide to the Probation Department the identity and contact information regarding any family members or friends with children under the age of 18, whom the defendant expects to have routine contact with, so that the parents or guardians of these children may be contacted and the Probation Department can approve routine family and social interactions such as holidays and other family gatherings where such children are present and supervised by parents or guardians without individual approval of each event.

5. If the defendant cohabitates with an individual who has minor children, the defendant will inform that other party of his prior criminal history concerning his sex offense. Moreover, he will notify the party of his prohibition of associating with any child(ren) under the age of 18, unless a responsible adult is present.

6. The defendant shall report to the Probation Department any and all electronic communications service accounts [as defined in 18 U.S.C. § 2510(15)] used for user communications, dissemination and/or storage of digital media files (i.e. audio, video, images). This includes, but is not limited to, email accounts, social media accounts, and cloud storage accounts. The defendant shall provide each account identifier and password, and shall report the creation of new accounts, changes in identifiers and/or passwords, transfer, suspension and/or deletion of any account within 5 days of such action. Failure to provide accurate

account information may be grounds for revocation of release. The defendant shall permit the Probation Department to access and search any account(s) using the defendant's credentials pursuant to this condition only when reasonable suspicion exists that the defendant has violated a condition of his supervision and that the account(s) to be searched contains evidence of this violation. Failure to submit to such a search may be grounds for revocation of release.

7. The defendant shall submit his person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(I)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to **a** search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that the defendant has violated a condition of his supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

8. The defendant is not to use a computer, Internet capable device, or similar electronic device to access any "visual depiction" (as defined in 18 U.S.C. § 2256), including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct" (as defined in 18 U.S.C. § 2256). The defendant shall also not use a computer, Internet capable device or similar electronic device

to view images of naked children. The defendant shall not use his computer to view sexually explicit conduct or visual depictions of naked children stored on related computer media, such as CDs or DVDs, and shall not communicate via his computer with any individual or group who promotes the sexual abuse of children. The defendant shall cooperate with the United States Probation Office's Computer and Internet Management/Monitoring ("CIMP") program. Cooperation shall include, but not be limited to, identifying computer systems (as defined in 18 U.S.C. § 1030(e)(I)), Internet-capable devices, and/or any electronic media capable of data storage the defendant has access to, allowing an initial examination of the device(s), and installation of monitoring software/hardware on the device(s), at the defendant's expense. The monitoring software/hardware is authorized to capture and analyze all data processed by and/or contained on the device, including the geolocation of the device. The Probation Office may access the device and/or data captured by the monitoring software/hardware at any time with or without suspicion that the defendant has violated the conditions of supervision. The defendant may be limited to possessing only one personal Internet capable device, to facilitate the Probation Office's ability to effectively manage and monitor the device. The defendant shall also permit seizure and removal of computer systems, Internet-capable devices, and any electronic media capable of data storage for further analysis by law enforcement or the Probation Office based upon reasonable suspicion that a violation of a condition of supervision or unlawful conduct by the defendant has or is about to occur. Failure to comply with the

monitoring, seizure and/or search of any computer systems, Internet-capable devices, and any electronic media capable of data storage may result in adverse action such as sanctions and/or revocation. The defendant shall inform all parties that access a monitored device, that the device is subject to search and monitoring.

9. The defendant shall refrain from contacting the victims of the offense. This means that he shall not attempt to meet in person, communicate by letter, telephone, email, the Internet, or through a third party, without the knowledge and permission of the Probation Department.

10. Upon request, the defendar1t shall provide the U.S. Probation Department with full disclosure of his financial records, including co-mingled income, expenses, assets, and liabilities, to include yearly income tax returns. With the exception of the financial accounts repo1ted and noted within the presentence repo1t, the defendant is prohibited from maintaining and/or opening any additional individual and/or joint checking, savings, or other financial accounts, for either personal or business purposes, without the knowledge and approval of the U.S. Probation Department. The defendant shall cooperate with the Probation Officer in the investigation of their financial dealings and shall provide truthful monthly statements of their income and expenses. The defendant shall cooperate in the signing of any necessary authorization to release information forms permitting the U.S. Probation Department access to their financial information and records.

11. The defendant shall comply with any possible restitution orders.

CRIMINAL MONETARY PENALTIES

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

	Assessment	Restitution	Fine
TOTALS	$600.00	$42,000.00	$.00

AVAA Assessment*	JVTA Assessment*
$.00	$.00

☐ The determination of restitution is deferred until . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

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

Restitution of $42,000.00 to:

Pauline

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant **to 18 U.S.C. § 3612(f)**. All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to **18 U.S.C. § 3612(g)**.

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

- ☒ the interest requirement is waived for the restitution.
- ☐ the interest requirement for the is modified as follows:

☐ The defendant's non-exempt assets, if any, are subject to immediate execution to satisfy any outstanding restitution or fine obligations.

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payment of $ due immediately.

☐ balance due not later than , or

☐ balance due in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal (*e.g. weekly, monthly, quarterly)* installments of $ over a period of *(e.g., months or years)*, to commence *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal (*e.g. weekly, monthly, quarterly)* installments of $ over a period of *(e.g., months or years)*, to commence *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those

payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

☐ Joint and Several

Case Number **Total Amount**
Defendant and Co-Defendant Names (including defendant number)

Joint and Several Amount **Corresponding Payee, if Appropriate**

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

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 19 CR 567

Judge Harry D. Leinenweber

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

ROBERT SYLVESTER KELLY, a/k/a "R. Kelly," DERREL McDavid, and MILTON BROWN, a/k/a "June Brown",

Defendants.

ORDER

Before the Court is Defendants' Motion to Dismiss Counts One through Four and Counts Six through Thirteen of the Superseding Indictment (Dkt. No. 189). Also before the Court is Defendant Kelly's Motion to Sever (Dkt. No. 196). For the reasons stated herein, the Motions are denied.

STATEMENT

A. Motion to Dismiss

On February 13, 2020, the Government filed a Superseding Indictment charging Defendant Kelly with thirteen counts, Defendant McDavid with four counts, and Defendant Brown with one count. (Dkt. No. 93.) Defendant McDavid previously moved to dismiss Count Five. (Dkt. No. 71.) This Court denied that Motion. (Dkt. No. 89). On May 2, 2022, Defendants filed another Motion toDismiss, arguing that all counts, except Count Five, should be dismissed. (Dkt. No. 189). Defendants argue that the counts are untimely and barred by the statute of limitations.

1. Counts One Through Four

Counts One through Four of the Indictment charge Defendant Kelly with producing four videos of a minor engaged in sexually explicit conduct in violation of 18 U.S.C. §2251(a). (Indict. at 1–4, Dkt. No. 93.) The indictment states that the videos were produced between 1998 and 1999. (*Id.*) At the time of the charged conduct, the statute of limitations expired once the minor reached the age of 25. 18 U.S.C. § 3283 (1994) (amended 2006). Kelly argues that, as a result, these counts are time barred. In response, the Government argues that the limitations period was extended when the statute was amended, and the extended date should apply.

18 U.S.C. § 3283 was amended in 2003, extending the statute of limitations to the life of the minor. 18 U.S.C. § 3283 (2003) (amended 2006). The statute was amended again in 2006, extending the statute of limitations to the life of the child or ten years after

the offense, whichever is longer. 18 U.S.C. § 3283. If the operative limitations period is the one set out in the 1994 version of the statute, Counts One through Four expired in 2009. If the amended statute of limitations applies, the Counts are timely brought.

The Supreme Court has set out a two-step test to decide whether a federal statute applies to past conduct. *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994). The first step is to "determine whether Congress has expressly prescribed the statute's proper reach." *Id.* If the statute's proper reach is clear, the inquiry ends there. *Id.* However, if the statute is silent, the next step is to determine whether applying it retroactively would impair a party's rights. *Id.* Defendants urge the Court to look to the legislative history of 18 U.S.C. § 3283 and rule that Congress expressly prescribed that the statute does not apply retroactively. Defendants point to the House version of the bill, which contained an express retroactivity provision. Child Abduction Prevention Act, H.R. 1104, 108th Cong. § 202 (2003). The final version of the bill omitted this provision, and Senator Leahy confirmed that the omission was intentional. Senator Leahy, Amber Legislation, Cong. Rec. 149:50, S5147 (2003). Judge Nathan of the Southern District of New York recently dealt with this precise issue in the prosecution of Defendant Ghislaine Maxwell. *United States v. Maxwell*, 534 F.Supp.3d 299 (S.D.N.Y, 2021). There, Judge Nathan analyzed 18 U.S.C. § 3283, finding that Congress not only permitted, but intended, 18 U.S.C. § 3283 to allow prosecutions for past conduct for which the statute of limitations has not expired. *Id.* at 316. The Court agrees with Judge Nathan's analysis. With each amendment to 18 U.S.C. § 3283, the statute of limitations increased. In light of the lack of

retroactivity provision, but steadily increasing statutes of limitations, the Court finds that the statute does not prescribe its proper reach.

The Court next moves to the second step of the *Landgraf* test. The Court finds that applying the current version of 18 U.S.C. § 3283 would not impair the Defendants' rights. In the Seventh Circuit, "applying procedural statutes . . . which effectively [enlarge] the limitations period, does not violate the *ex post facto* clause so long as the statute is passed before the given prosecution is barred." *U.S. v. Gibson*, 490 F.3d 604, 609 (7th Cir. 2007) (citing *Stogner v. California*, 539 U.S. 607 (2003)). However, in their Motion to Dismiss Defendants "[urge] this Court to read the second step of *Landgraf* as providing broader protections for *criminal defendants* than the *Ex Post Facto* clause." (Mot. to Dismiss p. 8, Dkt. No. 189) (emphasis in original). The Court declines to do so. Applying the current version of 18 U.S.C. § 3283 does not impair any of the Defendants' rights because the statute was amended before the original limitations period expired. This Court will not disturb well-settled law to create new statutory rights where none currently exist. Counts One through Four are timely.

2. Counts Six Through Eight

Counts Six charges all Defendants with conspiring to receive child pornography in violation of 18 U.S.C. §2252A (a)(2) and (b)(1). (Indict. at 17.) The Indictment states that the conspiracy took place between 2001 and 2007. (*Id.*) Count Seven charges Defendants Kelly and McDavid with receiving two videos of child pornography, in violation of 18 U.S.C. §2252A (a)(2) and (2). (*Id.* at 18.) The Indictment

alleges that Kelly and McDavid received these videos in August 2001. (*Id.*) Count Eight charges Defendants Kelly and McDavid with receiving one video of child pornography, in violation of 18 U.S.C. §2252A (a)(2) and (2). (*Id.* at 19.) The Indictment states that Kelly and McDavid received this video in April 2007. (*Id.*)

Defendants argue that Counts Six through Eight are subject to the general five-year statute of limitations and are now untimely. 18 U.S.C. § 3282 (a) (stating that, unless otherwise provided by law, the statute of limitations for a non-capital offense is five years). The Government argues that the Court should apply the statute of limitations set forth in 18 U.S.C § 3299. According to 18 U.S.C § 3299, there is no statute of limitations for an offense under chapter 110 of Title 18 of the United States Code. Counts Six through Eight all charge Defendants with violations of § 2252, which fall under chapter 110 of Title 18. As such, § 3299 applies to Counts Six through Eight. § 3299 became effective on July 27, 2006.

The Court finds that counts Six through Eight are timely. First, Counts Six and Eight of the indictment both state that the conduct in question concluded after 18 U.S.C § 3299 was enacted. Therefore, 18 U.S.C § 3299 clearly applies, and a prosecution for these counts can be brought at any time, including in the current indictment.

The accused conduct in Count Seven took place before 18 U.S.C § 3299 was enacted. The Court applies the *Landgraf* test to this Count. In the first step, the Court finds that the text of 18 U.S.C § 3299 is silent as to its proper reach. In the second step, the Court finds that applying the statute would not impair the Defendants' rights. In drawing this conclusion, the Court once again applies *Gibson*.

Gibson, 490 F.3d 604. 18 U.S.C § 3299 was enacted on July 27, 2006. The parties dispute what statute of limitation applied to Count Seven during the time of the accused conduct. The Defendants argue that Count Seven is subject to the general five-year statute of limitations. 18 U.S.C. § 3282 (a) The Government argues that the limitations period extended until the relevant minors turned 25, as specified in 18 U.S.C. § 3283. The Court notes the dispute is largely irrelevant here. Either way, Count Seven is timely. Applying the shorter limitations period of five years, the statute of limitations would have expired in August 2006. As 18 U.S.C § 3299 was enacted before the original limitations period expired, there is no *ex post facto* problem, meaning Defendants' rights are not infringed. *Gibson*, 490 F.3d at 609. The Court applies 18 U.S.C § 3299 here; Count Seven is timely.

3. Counts Nine Through Thirteen

Counts Nine through Thirteen of the Indictment charge Defendant Kelly with knowingly enticing minors to engage in sexual activity, in violation of 18 U.S.C. § 2422(b). (Indict. at 20–24.) In addition, Counts Nine, Ten, Twelve, and Thirteen charge Defendant Kelly with aggravated criminal sexual abuse, in violation of 720 ILCS 5/12-16(d). (*Id.* at 20–21, 23–24.) The Indictment states that the activity occurred between 1996 and 2001. (*a* 20–24.) Like with charges One through Four, 18 U.S.C. § 3283 provides the relevant statute of limitations. At the time of the accused conduct, the limitation period expired when the minor turned 25 years old. The earliest date at which any minor in the accused conduct turned 25 was August 2005. As discussed earlier, 18 U.S.C. § 3283 was amended in 2003, extending the

limitations period to the life of the child. Earlier in this order, the Court analyzed the applicability of the amended version of 18 U.S.C. § 3283 to Counts One through Four of the Indictment. The analysis for counts Nine through Thirteen is largely the same. Applying the first step of the *Landgraf* test, the Court finds that 18 U.S.C. § 3283 does not explicitly prescribe its proper reach. In the second step of *Landgraf*, the Court applies *Gibson*. Defendant Kelly's rights are not infringed because 18 U.S.C. § 3283 was twice amended before the previous limitations periods for Counts Nine through Thirteen expired. The Court applies the current version of 18 U.S.C. § 3283 to Counts Nine through Thirteen. Counts Nine through Thirteen are timely as well. In sum, Defendants' Motion to Dismiss is denied in its entirety.

B. Motion to Sever

Defendant Kelly has also filed a Motion to Sever. (Dkt. No. 196.) Kelly requests that Defendant McDavid be tried separately, and that Counts Ten through Thirteen be severed from the rest of the Indictment.

Federal Rule of Criminal Procedure 14 authorizes district courts to "order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." FED. R. CRIM. P. 14. District courts have discretion to grant the relief they deem proper, whether that is severance, or something less drastic, such as a limiting instruction. *Zafiro v. U.S.*, 506 U.S. 534, 539 (1993). In cases involving conflicting defenses, severance is not required, even if prejudice to a defendant is shown. *Id.* 538-539. A court must only grant severance "if there is a serious

risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable about judgment about guilt or innocence." *Id.* at 539.

1. Severing Defendant McDavid

Defendant Kelly argues that Defendant McDavid should be tried separately because of antagonistic defenses and because one of McDavid's lawyers may have a potential conflict of interest.

In the Motion to Sever, Kelly alleges that both he and McDavid may present evidence against the other. Kelly alleges that he intends to present evidence that McDavid controlled the purse of the operation and pushed Kelly to continue to work to keep the money flowing. Kelly also alleges that McDavid might be used as a witness against him. Kelly's allegations do not provide further detail. Kelly argues that severance is required because he intends to show that McDavid had an interest in Kelly continuing to work. However, as the Government points out, this evidence is not necessarily antagonistic to, or even inconsistent with, McDavid's possible defense. It is entirely possible that McDavid pushed Kelly to continue working and also conspired with Kelly to conceal his misconduct.

As presented, Kelly's Motion reads as blame shifting. Blame shifting among co-defendants does not mandate severance. *U.S. v. Plato*, 629 F.3d 646, 650 (7th Cir. 2010). Moreover, Kelly does not specify exactly what evidence he expects to present that will compromise any of McDavid's trial rights. Nor does he specify what evidence he expects McDavid to present that will be used against him. The Motion does not raise any serious risks of impeding

Defendants' trial rights or that a jury would be prevented from making a reliable judgment.

Kelly next argues that McDavid's lawyer, Vadim Glozman ("Glozman"), may have a conflict of interest. Kelly retained a lawyer named Ed Genson ("Genson") to represent him in a criminal case, resulting in Kelly's acquittal in 2008. (Mot. to Sever ¶ 24.) Between 2008 and 2018, Kelly frequently consulted with Genson. (*Id.* ¶ 25.) Glozman was an associate at Genson's firm from 2014 to 2018. (*Id.* ¶ 28.) Kelly argues that, through this connection, Glozman may have privileged information that could be used to Kelly's detriment. Glozman denies that he has any privileged information about Kelly. (6/1/22 Hearing Tr. 29:15–16, Dkt. No. 206). Glozman stated that his only conversation with Kelly, and the first time he met Kelly, was at Kelly's indictment hearing for this case. (*Id.* 29: 14–15, 30: 23–24). Kelly does not identify any privileged information, or any class of privileged information, that he alleges Glozman accessed. Kelly submitted a Declaration on his own behalf where he states that he does "not have a specific memory of ever consulting with Vadim Glozman." (Kelly Decl. ¶ 8, Dkt. No. 201). All Kelly offers is that he has a "distinct memory of [Glozman's] name as someone who worked with Mr. Genson." (*Id.*) Kelly has not presented sufficient information to show that Glozman has an actual conflict of interest. The Court will not sever McDavid and Kelly's trials.

2. Counts Ten Through Thirteen

Kelly argues that Counts Ten through Thirteen should be severed from the rest of the Indictment because he will suffer substantial prejudice

otherwise. Severance may be warranted if a defendant is improperly coerced into testifying about a count on which he wishes to remain silent. *U.S. v. Berg*, 713 F.3d 490, 496 (7th Cir. 2013). When a defendant seeks to sever charges because he wants to testify to some charges, but not others, he must show that he has a strong need to testify on one count but not the other. *U.S. v. Ervin*, 540 F.3d 623, 629 (7th Cir. 2008).

Kelly alleges that the evidence in support of Counts One through Three is stronger than the evidence in support of Counts Ten through Thirteen. In support of his argument, Kelly states that Counts One through Three are supported by video evidence, while Counts Ten through Thirteen are supported by testimonial evidence. Kelly argues that he has "important testimony to give concerning counts ten through 13 and a need to refrain from testifying as to counts 1 through 3." (Mot. to Sever ¶ 38).

Kelly's Motion to Sever does not specify exactly how he will be prejudiced if all the Counts are tried together. Kelly does not adequately explain his assertion that the evidence in support of Counts One through Three is stronger than the evidence in support of Counts Ten through Thirteen. Kelly claims that the video evidence is much stronger than testimonial evidence of "questionable veracity," but fails to provide more detail. Further, Kelly's Motion fails to present evidence showing why he has a need to testify on only some of the counts. Kelly's Motion asserts that severance is warranted but does not provide specific evidence in support of that assertion. For that reason, the Court denies Kelly's Motion to Sever.

CONCLUSION

For the reasons stated herein, Defendants' Motion to Dismiss (Dkt. No. 189) and Kelly's Motion to Sever (Dkt. No. 196) are denied.

/s/ Harry D. Leinenweber
Harry D. Leinenweber, Judge
United States District Court

Dated: 6/30/2022

Appendix D

STATUTORY PROVISIONS INVOLVED

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18 U.S.C. § 3283 (2024)

No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse, or kidnaping, of a child under the age of 18 years shall preclude such prosecution during the life of the child, or for ten years after the offense, whichever is longer.

18 U.S.C. § 3283 (2003)

No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse of a child under the age of 18 years shall preclude such prosecution before the child reaches the age of 25 years.

18 U.S.C. § 3283 (1994)

No person shall be prosecuted, tried or punished for any violation of the customs laws or the slave trade laws of the United States unless the indictment is found or the information is instituted within five years next after the commission of the offense.