No. 25-

IN THE

# Supreme Court of the United States

VINCENT DERITIS,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

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

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does a video voyeur produce visual depictions of a minor engaged in "sexually explicit conduct" when he records images showing the minor engaged in only ordinary, nonsexual activities?

## RELATED PROCEEDINGS

*United States v. Deritis*, No. 5:21-cr-00042-KDB (W.D.N.C., judgment entered Mar. 2, 2023)

*United States v. Deritis*, No. 23-4150 (4th Cir., judgment entered May 14, 2025)

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Vincent Deritis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

## INTRODUCTION

Deritis is serving a 30-year sentence for placing a camera on a bathroom counter, absenting himself from the room, and surreptitiously recording a minor while she got in and out of the shower. Based on this voyeuristic conduct, Deritis was convicted of violating 18 U.S.C. § 2251(a), which proscribes the production of child pornography. The Fourth Circuit Court of Appeals affirmed the conviction by applying a statutory definition in a manner that construes ordinary grooming activities as sexually explicit conduct.

An essential element of federal child pornography crimes, and what distinguishes them from crimes for surreptitiously filming a minor,[1] is that the images depict minors engaged in "sexually explicit conduct." *E.g.*, 18 U.S.C. § 2251(a). Under § 2256(2)(A), "sexually explicit conduct" is defined as "actual or simulated (i) sexual intercourse …; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the anus, genitals, or pubic area of any person." Central to this case is the lower courts' definition of "lascivious exhibition."

[1] At least 46 states, including North Carolina, have criminalized the surreptitious recording of a minor. *See* Valerie Bell, Craig Hemmens, & Benjamin Steiner, *Up Skirts and Down Blouses: A Statutory Analysis of Legislative Responses to Video Voyeurism*, 19 CRIM. JUST. STUDIES 301, 306-07 (2006) (collecting state statutes). Video voyeurism is also a federal crime if it occurs in the special maritime and territorial jurisdiction of the United States. 18 U.S.C. § 1801.

This Court has addressed the term "lascivious exhibition" in the context of § 2256(2)(A). *United States v. Williams*, 553 U.S. 285, 288, 294 (2008). *Williams* compels the conclusion that a minor's innocent grooming activities do not meet the definition of "lascivious exhibition," regardless of whether the activities are recorded, and therefore do not satisfy the definition of "'sexually explicit conduct." 18 U.S.C. § 2256(2)(A).

The Fourth Circuit overlooked this Court's precedent when construing the definitions of "lascivious exhibition" and "sexually explicit conduct." Instead, it focused on its own precedent (which also disregarded this Court's binding precedent) and on the applicability of non-textual factors known as the *Dost* factors.[2] In reliance on these sources, the Fourth Circuit held that the surreptitiously-recorded images of a minor simply entering and exiting a shower and toweling off could qualify as "lascivious exhibitions." Pet. App. 11a-19a.

While most circuit courts have reached the same conclusion reached by the Fourth Circuit, the D.C. Circuit Court of Appeals stands in stark contrast. The D.C. Circuit has followed *Williams* and its necessary antecedents to interpret "lascivious exhibition" and has held that images of a minor engaged in ordinary activities while nude do not depict a minor engaged in "sexually explicit conduct." *United States v. Hillie*, 39 F.4th 674, 686 (D.C. Cir. 2022).

[2] *See United States v. Dost*, 636 F. Supp. 828, 831-32 (S.D. Cal. 1986).

The question presented is critically important. Thousands of defendants are prosecuted federally every year for crimes involving child pornography, and they are punished harshly. The Court's intervention would resolve an irreconcilable split between the courts of appeals over the interpretation of a statutory element of child pornography crimes, and this case is an ideal vehicle to resolve it. The Court should grant certiorari.

## OPINION BELOW

The Fourth Circuit's opinion, *United States v. Deritis*, No. 23-4150 (4th Cir. May 14, 2025), is reported at 137 F.4th 209 and reproduced at Pet. App. 1a-25a.

## JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit were entered on May 14, 2025. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

## FEDERAL STATUTES INVOLVED

18 U.S.C. § 2251(a) (2008) provides in relevant part:

> Any person who … uses … 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 subsection (e), ….

18 U.S.C. § 2256 (2018) provides in relevant part:

> (2)(A) … "sexually explicit conduct" means actual or simulated—
>
> (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
>
> (ii) bestiality;
>
> (iii) masturbation;
>
> (iv) sadistic or masochistic abuse; or
>
> (v) lascivious exhibition of the anus, genitals, or pubic area of any person; ….

## STATEMENT

### A. Proceedings below.

*Factual background.* Deritis placed a camera in a bathroom in his residence. Pet. App. 6a. The camera captured video footage of a 12-year-old girl who entered and exited the shower and toweled off while nude. Pet. App. 6a. Deritis later transferred the video to his computer and accessed it multiple times over the subsequent six months. Pet. App. 6a.

*Western District of North Carolina Proceedings.* Based on the events recounted above, Deritis was charged in Count One of his Indictment with sexually exploiting a minor by causing a minor's participation in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, in violation of 18 U.S.C. § 2251(a), *i.e.*, producing child pornography. Pet. App. 2a. Deritis was charged with two additional violations of § 2251(a) (Counts Two and Three), and with possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) (Count Four). Pet. App. 2a. (In this Petition, Deritis challenges only his conviction on Count One).

During trial, Deritis challenged the district court's jury instruction defining "lascivious exhibition," Pet. App. 14a-15a, which was part of the definition of sexually explicit conduct with respect to the child pornography production charges. Deritis relied on the analysis set out by the United States Court of Appeals for the D.C. Circuit in *United States v. Hillie*, 39 F.4th 674 (D.C. Cir. 2022). Pet. App. 15a. The district court overruled the objection and instructed the jury that "lascivious

exhibition means a depiction that displays or brings to view to attract notice to the genitals or pubic area of children in order to excite lustfulness or sexual stimulation in the viewer." Pet. App. 14a. The district court further instructed the jury on use of the *Dost* factors:

> Not every exposure of the genitals or pubic area constitutes a lascivious exhibition. In deciding whether the government has proved that a particular visual depiction constitutes a lascivious exhibition, you should consider the following factors:
>
> First, whether the focal point of the visual depiction is on the minor's genitals or pubic area;
>
> Second, whether the setting of the visual depiction makes it appear to be sexually suggestive, for example, in a place or pose generally associated with sexual activity;
>
> Third, whether the minor is displayed in an unnatural pose or in inappropriate attire, considering the age of the minor;
>
> Fourth, whether the child is fully or partially clothed or nude;
>
> Fifth, whether the visual depiction suggests coyness or a willingness to engage in sexual activity; and
>
> Sixth, 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 a 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 the overall content.

Pet. App. 14a-15a.

Deritis was convicted as charged. Pet. App. 2a. The district court imposed a 50-year sentence of imprisonment, Pet. App. 2a, consisting of concurrent 30-year terms on Counts 1, 2, and 3, and a consecutive 20-year term on Count 4.

*Fourth Circuit Court of Appeals Proceedings*. On appeal, Deritis again challenged the district court's definition of "lascivious exhibition" in reliance on the analysis set out by the D.C. Circuit in *Hillie*. Pet. App. 15a. In that context, Deritis argued that precedent from this Court rendered the challenged jury instruction erroneous. Pet. App. 15a.

The Fourth Circuit affirmed. Pet. App. 17a, 25a. Based strictly on adherence to its own binding opinions, The Fourth Circuit approved use of the *Dost* factors and reaffirmed a previous holding that defined "lascivious exhibition" as "a depiction that displays or brings to view to attract notice to the genitals or pubic area of children in order to excite lustfulness or sexual stimulation in the viewer." Pet. App. 14a-17a.

**B. Legal background.**

1. An essential element of federal child pornography crimes, including the production crime at issue here, is that the offending image depicts a minor engaged in "sexually explicit conduct." *E.g.*, 18 U.S.C. §§ 2251(a)(1), 2256(2)(A). The term "sexually explicit conduct" "means actual or simulated—(i) sexual intercourse …; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the anus, genitals, or pubic area of any person." § 2256(2)(A).

The predecessor to the current definition of "sexually explicit conduct" was enacted when Congress passed the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95225, 92 Stat. 7 (1978).[3]

Congress rejected a proposal for the definition of "prohibited sexual acts" to include nudity, even "if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction," in favor of the alternative definition of "lewd exhibition of the genitals" out of concerns about vagueness and overbreadth. Annemarie J. Mazzone, *United States v. Knox: Protecting Children from Sexual Exploitation Through the Federal Child Pornography Laws*, 5 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 167, 174–79 (1994) (discussing congressional debates).

The phrase, "lewd exhibition of the genitals," had recently been used by the Court in *Miller v. California* to describe one type of conduct that could be prohibited under state obscenity statutes. 413 U.S. 15 (1973). In *Miller*, the Court upheld a state statute prohibiting the mailing of unsolicited obscene materials against a First Amendment challenge. *Id.* at 17. The Court clarified that the "obscene material" it was discussing "is more accurately defined as 'pornography' or 'pornographic material,'" which is a "a subgroup of all 'obscene' expression." *Id.* at 18 n.2. In holding that this kind of "obscene material" is categorically unprotected by the First

[3] Section 2253(2) of the 1977 Act, which ultimately became § 2256, defined "sexually explicit conduct" as actual or simulated sexual intercourse, bestiality, masturbation, sado-masochistic abuse (for the purpose of sexual stimulation), and lewd exhibition of the genitals or pubic area of any person.

Amendment, *id*. at 23, the Court proceeded to articulate basic guidelines for proscribing works that depicted sexual conduct:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interests; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Id*. at 24–25 (cleaned up).

A "plain example[ ]" of the kind of pornographic, obscene material a state can regulate includes "[p]atently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id*. at 25. The Court was satisfied that "[u]nder the holdings announced today,[4] no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law." *Id*. at 27. These "concrete guidelines," the Court was confident, would "isolate 'hard core' pornography from expression protected by the First Amendment." *Id*. at 29; *see also id.* at 35 ("the public portrayal of hard-core sexual conduct for its own sake" is not protected by the First Amendment).

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[4] The Court decided *United States v. 12 200-Foot Reels of Super 8mm Film*, 413 U.S. 123 (1973), on the same day as *Miller*, and clarified that the "standards for testing the constitutionality of state legislation regulating obscenity" announced in *Miller* "are applicable to federal legislation." *Id*. at 129-30. It noted that "[i]f and when such a 'serious doubt' is raised as to the vagueness of the words 'obscene,' 'lewd,' 'lascivious,' 'filthy,' 'indecent,' or 'immoral' as used to describe regulated material" in federal statutes, "we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller v. California*." *Id*.

2. The Court first held that child pornography was a category of unprotected speech in *New York v. Ferber*, 458 U.S. 747 (1982). The Court rejected a constitutional overbreadth challenge to a New York statute prohibiting "the use of a child in a sexual performance," which was defined as a performance "includ[ing] sexual conduct by a child." *Id.* at 750-51. The statute defined "sexual conduct" as "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." *Id.* at 751. The Court held that child pornography may be regulated without infringing on the First Amendment, regardless of whether it is obscene, because of the harm it causes to the children who appear in it. *Id.* at 756-58, 761. The Court emphasized, however, that "[t]here are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment." *Id.* at 764. That is, "[t]he category of 'sexual conduct' proscribed must ... be suitably limited and described." *Id.* The New York law was suitably limited, the Court explained, because the forbidden acts "are listed with sufficient precision and represent the kind of conduct that, if it were the theme of a work, could render it legally obscene: 'actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.'" *Id.* at 765. The Court noted that "[t]he term 'lewd exhibition of the genitals,'" in particular, "is not unknown in this area and, indeed, was given in *Miller* as an example of a permissible regulation." *Id.* The Court then reiterated that "the reach of the statute is directed at the hard core of child

pornography," *id*. at 773, repeating the kind of prohibited "sexual conduct" articulated in *Miller*.

3. Congress revised the child pornography statutes after *Ferber* by enacting the Child Protection Act of 1984 to broaden "its application to those sexually explicit materials that, while not obscene as defined by *Miller*, could be restricted without violating the First Amendment as explained by *Ferber*." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 74 (1994); *see also* Pub. L. No. 98-292, §§ 2–9, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. §§ 2251–2254) (1988 & Supp. IV 1992). Among the amendments, Congress replaced the word "lewd" with "lascivious" as part of the definition of "sexually explicit conduct," but provided no clarifying definition. Pub. L. No. 98-292, § 5(4), 98 Stat. at 205.

4. In 1986, the United States District Court for the Southern District of California interpreted the term "lascivious exhibition" in the federal child pornography statutes' post-1984 definition of "sexually explicit conduct." *United States v. Dost*, 636 F. Supp. 828, 830-31 (S.D. Cal. 1986). In *Dost*, two defendants were prosecuted for conspiracy, production, and receipt and distribution of child pornography. *Id*. at 829-30.

The *Dost* court acknowledged *Miller* and *Ferber*, but not the Court's discussions about the meaning of "lewdness" or "lasciviousness." *Id*. at 831-32. The Dost court reasoned that, because "legal scholars have struggled for years" over the definition of either lewdness or lasciviousness, "lascivious exhibition" should be determined "on a

case-by-case basis using general principles as guides for analysis." *Id*. at 832. The court then offered a non-exhaustive list of six factors the trier of facts should examine:

> 1) whether the focal point of the visual depiction is on the child's genitalia or public 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.

*Id*. Applying these factors, the court found that the photographs depicted the "lascivious exhibition of the genitals or pubic area." *Id*. at 833.

The Ninth Circuit affirmed, endorsing the district court's reading. *United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987). Its examination focused on whether the pictures themselves were lascivious exhibitions "and presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur," rather than the minor's conduct recorded on camera. *Id*. It explained that "[p]lainly the pictures were an exhibition. The exhibition was of the genitals. It was a lascivious exhibition because the photographer arranged it to suit his peculiar lust." *Id*. The court then concluded that, "[i]n the context of the statute applied to the conduct of children, *lasciviousness is not a characteristic of the child photographed but of the exhibition which the photographer sets up for an audience that consists of himself or likeminded pedophiles*." *Id*. (emphasis added).

5. Unlike the district court in *Dost*, which expressed confusion over the meaning of "lascivious exhibition," this Court has been consistent and straightforward in its long-held understanding of that term. In *X-Citement Video,* the Court rejected vagueness and overbreadth challenges to the statutory term "lascivious exhibition of the … genitals." 513 U.S. at 78-79. The challenges were premised on Congress having "replaced the term 'lewd' with the term 'lascivious' in defining illegal exhibition of the genitals of children." *Id*. The Court regarded these challenges as "insubstantial." *Id*. (adopting the reasoning of the Court of Appeals in *United States v. X-Citement Video, Inc.*, 982 F.2d 1285, 1288 (9th Cir. 1992) ("'lascivious' is no different in its meaning than 'lewd,' a commonsensical term whose constitutionality was specifically upheld" in *Miller* and *Ferber*)) (cleaned up). In his dissent, Justice Scalia agreed with that portion of the Court's holding that incorporated the "hard core" characterization of the prohibited "lascivious exhibition of the genitals" from *Miller* onto the construction of the federal child pornography statute. *Id*. at 84 (Scalia, J., dissenting) ("'[S]exually explicit conduct,' as defined in the statute, does not include mere nudity, but only conduct that consists of 'sexual intercourse … between persons of the same or opposite sex,' 'bestiality,' 'masturbation,' 'sadistic or masochistic abuse,' and 'lascivious exhibition of the genitals or pubic area.' What is involved, in other words, is not the clinical, the artistic, nor even the risqué, but hardcore pornography.").

6. The Court subsequently identified limits to the reach of the federal child pornography crimes when it held facially overbroad two provisions of the federal child

pornography statutes in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 241 (2002). The first provision—relevant here—banned the possession and distribution of "'any visual depiction'" that "'is, or appears to be, of a minor engaging in sexually explicit conduct,'" even if it contained only youthful looking adults or virtual images of children generated by a computer. *Id.* at 239-41 (quoting 18 U.S.C. § 2256(8)(B)). This provision was deemed invalid because the prohibited images did not involve actual minors. *Id.* at 249-51, 254. The Court explained that "*Ferber*'s judgment about child pornography was based upon how it was made, not on what it communicated." *Id.* at 250-51. Thus, where child pornography "is neither obscene nor the product of sexual abuse," the Court reasoned that "it does not fall outside the protection of the First Amendment." *Id.* at 251. Because the government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts," the Court rejected arguments by the government that it could "prohibit speech [in the form of virtual child pornography] on the ground that it may encourage pedophiles to engage in illegal conduct." *Id.* at 252-54.

7. In *United States v. Williams*, the Court upheld the statutory subsection prohibiting the pandering or solicitation of child pornography against overbreadth and vagueness challenges. 553 U.S. 285, 288 (2008). Relevant here, the Court construed § 2256(2)(A)'s definition of "sexually explicit conduct." *Id.* at 296. It explained that Congress "used essentially the same constitutionally approved definition" as the definition of "sexual conduct" in *Ferber*. *Id.* at 296. But the federal definition rendered itself "more immune from facial constitutional attack," because

"'[s]exually explicit conduct' connotes actual depiction of the sex act rather than merely the suggestion that it is occurring." *Id.* at 296-97 (emphasis in original). And a "simulated" sex act is one "that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred," "caus[ing] a reasonable viewer to believe that the actors actually engaged in that conduct on camera." *Id.* at 297. The Court reiterated that "lascivious exhibition of the anus, genitals, or pubic area" is "essentially the same constitutionally approved definition" from *Ferber*. *Id.* at 296. Because the statute focuses on whether the depicted "actors actually engaged in that conduct on camera," *id.* at 301, the Court rejected the Eleventh Circuit's reasoning that "the statute could apply to someone who subjectively believes that an innocuous picture of a child is 'lascivious." *Id.* at 301. That is because the "material in fact … must meet the statutory definition. Where the material at issue is a harmless picture of child in a bathtub … the statute has no application." *Id.*

## REASONS FOR GRANTING THE WRIT

### I. The courts of appeals are divided over the interpretation of a frequently used federal criminal statute.

1. The Fourth Circuit's interpretation and application of "sexually explicit conduct" under 18 U.S.C. § 2256(2)(A), which is an element of the child pornography production crime at issue, is in direct conflict with the D.C. Circuit's decision in *United States v. Hillie*, 39 F.4th 674 (D.C. Cir. 2022). The courts have taken irreconcilable approaches to the fundamental questions of (1) whether the *Dost* factors provide a permissible framework for determining whether there has been a

"lascivious exhibition of [a person's] anus, genitals, or pubic area," § 2256(2)(A), and (2) whether the lascivious exhibition consists of the conduct depicted or of the depiction itself.

In *Hillie*, as here, the defendant took surreptitious videos of a minor engaged in routine, non-sexual bathroom activities. *Compare Hillie*, 39 F.4th at 678, 686, with Pet. App. 6a. And as in this case, a jury found the defendant guilty of producing child pornography under 18 U.S.C. §§ 2251(a). *Hillie*, 39 F.4th at 678-79. On appeal, Hillie, like Deritis, argued the minor's conduct depicted in the recordings could not meet the definition of a lascivious exhibition of the genitals or pubic area, *id*. at 680-81, which, as in the conviction challenged here, was the only category of "sexually explicit conduct" at issue. *Id*. at 681, 691.

The D.C. Circuit reversed the child pornography convictions. The court applied the *noscitur a sociis canon* of statutory interpretation to interpret "sexually explicit conduct" under § 2256(2)(A) and construed "lascivious exhibition" by considering the other terms surrounding it, consistent with this Court's decisions in *Williams*, *Ferber*, and *Miller*. *Hillie*, 39 F.4th at 681-86. It held that the videos—which depicted the minor in "ordinary grooming activities, some dancing, and nothing more," albeit with some nudity and "fleeting views of her pubic area"—could not be reasonably described as "hard core" sexually explicitly conduct. *Id*. at 686. Because the minor "never engage[d] in any sexual conduct whatsoever, or any activity connoting a sex act," the Court held "no rational trier of fact could find [the minor's] conduct depicted in the

videos … to be a 'lascivious exhibition of the ... genitals…' as defined by § 2256(2)(A)." *Id*. Accordingly, acquittal was compelled as a matter of law. *Id*.

In reaching this conclusion, the D.C. Circuit expressly rejected the government's argument that "lascivious exhibition" should be construed in accordance with the *Dost* factors. *Hillie*, 39 F.4th at 686-90. It concluded the premise of the *Dost* factors was "fatally flawed" and inconsistent with the Court's precedents in *Miller*, *X-Citement Video*, and *Williams* that tie the statutory term "lascivious exhibition" to the "minor's conduct that the visual depiction depicts." *Id*. at 687-88 (emphasis added). The D.C. Circuit faulted courts that have adopted the *Dost* factors, especially the sixth factor's consideration of whether the picture is presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur, because such an approach did not abide by the Court's construction of almost identical language in similar statutes, and this Court had "expressly rejected" reliance on the photographer's subjective sensibilities. *Id*. at 687, 688; *see Williams*, 553 U.S. at 301.

In his opinion concurring in the denial of the government's petition for rehearing en banc in *Hillie*, Judge Katsas reiterated the panel's commonsense reading of the statute: "'[L]ascivious' modifies the 'exhibition' … to define one category of sexually explicit conduct. 'Lascivious' does not modify the 'visual depiction' of the exhibition …." *United States v. Hillie*, 38 F.4th 235, 237 (D.C. Cir. 2022) (denying reh'g en banc) (Katsas, J., concurring in the denial of rehearing en banc). Thus, "[a] child who uncovers her private parts to change clothes, use the toilet, clean herself, or bathe does not *lasciviously* exhibit them." *Id*. Opinions from other circuits that

reason that "the videos themselves 'were an exhibition,' which were made 'lascivious' when 'presented by the photographer so as to arouse or satisfy the sexual cravings of the voyeur' … cannot be reconciled with the governing statutory text." *Id*. at 238. It is the "child who must make a 'lascivious exhibition' under § 2256(2)(A)." *Id*.

The Fourth Circuit reached the opposite conclusion on analogous facts without addressing the precedential effect of *Williams* and its antecedents. Pet. App. 11a-18a. Instead, the Fourth Circuit relied exclusively on its own case law, which in turn lacked any analysis of this Court's binding precedent. Pet. App. 12a-13a, 16a-17a (discussing *United States v. Sanders*, 107 F.4th 234 (4th Cir. 2024), *cert. denied,* 145 S. Ct. 1434, 221 L. Ed. 2d 557 (2025); *United States v. Courtade*, 929 F.3d 186 (4th Cir. 2019), *as amended* (July 10, 2019)). Based on these authorities, the Fourth Circuit held that a jury could conclude the surreptitiously recorded images underlying Deritis' conviction on Count One met the statutory requirement of "sexually explicit conduct," and "lascivious exhibition" in particular, even though the images depicted the minor engaged in only non-sexual activities, such as entering or exiting the shower. Pet. App. 11a-18a. The Fourth Circuit defines "lascivious exhibition" as "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." *United States v. Courtade*, 929 F.3d 186, 192 (4th Cir. 2019), as amended (July 10, 2019) (emphasis added, quotation marks omitted). Additionally, it approves use of the *Dost* factors for determining lasciviousness. Pet.

App. 16a. Thus, under the Fourth Circuit, analysis, the focus of the "lascivious exhibition" inquiry is the depiction, not the minor.

2. Eight other federal courts of appeals expressly use the *Dost* factors to determine whether there was a lascivious exhibition. *See, e.g., United States v. Amirault*, 173 F.3d 28 (1st Cir. 1999); *United States v. Rivera*, 546 F.3d 245 (2d Cir. 2008); *United States v. Villard*, 885 F.2d 117 (3d Cir. 1989); *United States v. Wilkerson,* 124 F.4th 361 (5th Cir. 2024); *United States v. Brown*, 579 F.3d 672 (6th Cir. 2009); *United States v. Horn*, 187 F.3d 781 (8th Cir. 1999); *United States v. Boam*, 69 F.4th 601 (9th Cir. 2023); *United States v. Wolf*, 890 F.2d 241 (10th Cir. 1989).

Moreover, at least nine other circuits are aligned with the Fourth Circuit in concluding that surreptitious recordings of minors engaged in non-sexual activities depict "lascivious exhibition[s]," and thus "sexually explicit conduct." *See, e.g., United States v. Goodman*, 971 F.3d 16, 19 (1st Cir. 2020) (depicting minor undressing and entering and exiting the shower); *United States v. Spoor*, 904 F.3d 141, 149 (2d Cir. 2018) (bathroom videos that "d[id] not involve suggestive posing, sex acts, or inappropriate attire"); *United States v. Anthony*, No. 21-2343, 2022 WL 17336206, at *3 (3d Cir. Nov. 30, 2022) (surreptitious videos of minors showering); *United States v. Wilkerson,* 124 F.4th 361, 364-65 (5th Cir. 2024) (images of nude minor engaged in innocent conduct in bedroom); *United States v. Donoho*, 76 F.4th 588, 591, 600-01 (7th Cir. 2023) (bathroom videos and images of minors showering and using the toilet); *United States v. McCoy*, 108 F.4th 639 (8th Cir. 2024) (en banc) (bathroom videos of minor showering); *United States v. Boam*, 69 F.4th 601, 609-12 (9th Cir. 2023) (same);

*United States v. Wells*, 843 F.3d 1251, 1255-57 (10th Cir. 2016) (same); *United States v. Holmes*, 814 F.3d 1246, 1247 (11th Cir. 2016) (videos of minor "performing her daily bathroom routine"). These cases, like the decision below, would come out differently in the D.C. Circuit, insofar as they uphold convictions for depictions of "sexually explicit conduct" where the recordings in question depicted the minor engaged in ordinary, non-sexual activities. *See Hillie*, 39 F.4th at 689.

3. Among courts that endorse use of the *Dost* factors, reliance on the *Dost* factors has "produced a profoundly incoherent body of case law." Amy Adler, *Inverting the First Amendment*, 149 U. PENN. L. REV. 921, 953 (2001). That is because the circuits, and even some panels of the same court,[5] apply the *Dost* factors differently. Conflicts exist over whether more than one *Dost* factor is required to support lasciviousness;[6] whether showers and bathrooms are sexually suggestive settings;[7] and whether the sixth factor—whether the image is intended or designed to elicit a

[5] *Compare United States v. McCall*, 833 F.3d 560, 564 (5th Cir. 2016) (finding images lascivious because the defendant created them "for the admitted purpose of satisfying himself during masturbation") (emphasis added) with *Wilkerson*,124 F.4th 361, 371 & n.46 (rejecting the concern that the sixth *Dost* factor is contingent upon the arousal of the defendant).

[6] *Compare Villard*, 885 F.2d at 122 (requiring more than one *Dost* factor but not all six factors), with *Spoor*, 904 F.3d at 151 n.9 (rejecting jury instruction that more than one *Dost* factor must be present as an incorrect statement of law); *Wolf*, 890 F.2d at 245 n.6 ("We do not hold that more than one *Dost* factor must be present[.]").

[7] *Compare Spoor*, 904 F.3d at 149 ("bathrooms also can be the subject of sexual fantasy"); *Wells*, 843 F.3d at 1256 (same); *Larkin*, 629 F.3d at 183 (same); *with Brown*, 579 F.3d at 681-82 ("The setting of most of the photographs—the bathtub, the toilet, and the floor—is not sexually suggestive[.]"); *Doe v. Chamberlin*, 299 F.3d 192, 196 (3d Cir. 2002) (open shower near a beach not associated with sexual activity).

sexual response in the viewer—must be evaluated under an objective standard.[8] Courts have referred to the sixth *Dost* factor as the "most confusing and contentious," *Amirault*, 173 F.3d at 34, and "[p]articularly divisive," ensnaring judges in a confusing "thicket," *Courtade*, 929 F.3d at 192. The sixth factor "does not make clear whether a factfinder should focus only on the content of the image at issue, or whether it may consider the images in context with other images and evidence presented at trial." *Brown*, 579 F.3d at 682.

In sum, an irreconcilable circuit split exists over the statutory interpretation of an essential element of the federal criminal statute about whether "sexually explicit conduct," and "lascivious exhibition," in particular, describe the minor's conduct depicted in the image, or whether the image itself is the "lascivious exhibition" as determined by one or more of the non-textual *Dost* factors. The D.C. Circuit has expressly rejected the use of the *Dost* factors, in contrast to the Fourth Circuit's approval of their use. The D.C. Circuit instead followed this Court's decisions in *Williams*, *Ferber*, *X-Citement Video*, and *Miller* to hold that a minor engaged in

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[8] *Compare Amirault*, 173 F.3d at 34 ("If Amirault's subjective reaction were relevant, a sexual deviant's quirks could turn a Sears catalog into pornography.") (cleaned up); *Villard*, 885 F.3d at 125 ("If we were to conclude that the photographs were lascivious merely because Villard found them sexually arousing, we would be engaging in conclusory bootstrapping"); *with Spoor*, 904 F.3d at 151 ("the subjective intent of the photographer can be relevant to whether a video or photograph is child pornography."); *United States v. Larkin*, 629 F.3d 177, 183–84 (3d Cir. 2010) (holding that "trafficking [a] photograph over the internet to an interested pedophile" "tip[ped] the balance on the side of qualifying the photograph as exhibiting lascivious conduct"); *United States v. Cohen*, 63 F.4th 250, 256 (4th Cir. 2023) (finding that pictures were not, on their face, lascivious, but their exchange "in the context of a sexual conversation" was sufficient to render them so).

ordinary activities does not depict the kind of hard-core pornography that a "lascivious exhibition" requires. *Hillie*, 39 F.4th at 688-89. Other circuits that have approved use of the *Dost* factors have rejected these precedents as controlling on the question presented. *See United States v. Wilkerson,* 124 F.4th 361, 368-69 (5th Cir. 2024) (*Williams* does not abrogate circuit precedent adopting *Dost* factors); *United States v. Jakits*, 129 F.4th 314, 323-34 (6th Cir. 2025) (same); *Boam*, 69 F.4th at 613 (*Hillie*'s reasoning incompatible with circuit precedent upholding use of *Dost* factors); *McCoy*, 108 F.4th at 643-44 (same). And the Fourth Circuit omitted any discussion of Supreme Court precedent from its analysis. Pet. App. 11a-18a.

## II. The Fourth Circuit's decision below is wrong and conflicts with this Court's precedent.

Where, as with respect to the conviction challenged here, the only sexually explicit conduct alleged was the lascivious exhibition of the genitals and pubic area, the question of whether Deritis' surreptitious recording was illegal "depends on whether the [minor] engaged in any sexually explicit conduct" as depicted in the recording at issue. *Hillie*, 38 F.4th at 236 (Katsas, J., concurring in the denial of rehearing en banc). This, in turn, "depends on whether [the minor] made a lascivious exhibition of her genitals." *Id*. Thus, "[a] child engages in 'lascivious exhibition' under section 2256(2)(A)(v) if, but only if, she reveals her ... genitals, or pubic area in a sexually suggestive manner." *Id*. In other words, at an absolute minimum, the minor must "display[] his or her ... genitalia, or pubic area in a manner connoting that the minor, or any person or thing appearing with the minor in the visual depiction,

exhibits sexual desire or an inclination to engage in any type of sexual activity." *Hillie*, 39 F.4th at 685.

The Fourth Circuit's interpretation of § 2251(a), which ties the meaning of "lascivious exhibition" to the depiction of the image itself, rather than the minor's conduct, violates canons of statutory interpretation and is contrary to the Court's precedent. The term "lascivious exhibition" in § 2256(2)(A)(v) refers to one of the five types of "sexually explicit conduct" that must be captured in the "visual depiction" produced. *See* § 2251(a). Under this Court's precedent, what makes a visual depiction illegal is not whether the image created and viewed is a "lascivious exhibition," but whether the minor's conduct on camera constitutes a "lascivious exhibition of the genitals"—or sexual intercourse, bestiality, masturbation, or sado-masochistic abuse. *See Williams*, 553 U.S. at 296-97.[9]

In *Williams*, the Court emphasized that "sexually explicit conduct" means the "actual or simulated" conduct "engaged in by an actual minor" on camera—not merely the depiction itself. 553 U.S. at 296-97. And consistent with *X-Citement Video*, *Ferber*,

[9] Under the "commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated," *Williams*, 553 U.S. at 294-the meaning of "lascivious exhibition of the anus, genitals, or pubic area" must be understood consistently with "sexual intercourse," "bestiality," "sado-masochistic conduct," and "masturbation." § 2256(2)(A). The district court's definition of lascivious exhibition runs afoul of this canon. The other four types of conduct listed in the statute defining sexually explicit conduct qualify for that designation regardless of whether an image is created, and regardless of how a viewer might respond to an image. *Id*. Given this context, whether conduct constitutes lascivious exhibition cannot be dependent either on whether a depiction is created or on the response a later viewer may have to that depiction.

and *Miller*, a "lascivious exhibition" requires that the minor's conduct be more than mere nudity or that which is risqué in order to connote "hard core" pornography. *X-Citement Video*, 513 U.S. at 84 (Scalia, J., dissenting) ("What is involved … is not the clinical, the artistic, nor even the risqué, but hard-core pornography").

This natural limitation on the plain language of § 2256(2)(A)—which ties "lascivious exhibition" to the minor's conduct—is made further obvious when compared to the federal statute that makes "video voyeurism" a crime. 18 U.S.C. § 1801. Section 1801 is violated when a person "has the intent to capture an image of a private area of an individual without their consent, and knowingly does so under circumstances in which the individual has a reasonable expectation of privacy." *Id*. North Carolina has a similar statute. N.C. Gen. Stat. § 14-202. The federal child pornography statute under which Deritis was convicted does not encompass mere voyeurism but instead requires that the image depict a "lascivious exhibition of the ... genitals," rather than merely a recording of an individual's "private area." 18 U.S.C. § 2251(a); *Hillie*, 39 F.4th at 685, 692 n.1. Congress chose to criminalize video voyeurism only within specified federal jurisdictions, leaving prosecution of offenses occurring in other jurisdictions to the states. H.R. Rep. No. 108-504, at 2-3 (2004); *see supra* n.3.

By directing the jury to focus on the image, rather than the minor's conduct depicted therein, the Fourth Circuit conflated two distinct elements of the offense of conviction, 18 U.S.C. § 2251(a). It conflates the statute's requirement for "sexually explicit conduct" (*e.g.*, "lascivious exhibition") with the separate requirement

regarding a "depiction" of "such conduct." *Id*. Whether the minor's nudity constituted a lascivious exhibition must be considered independently of the depiction that was produced. *United States v. Hillie*, 39 F.4th 674, 688 (D.C. Cir. 2022) ("'lascivious exhibition'...refers to the minor's conduct that the visual depiction depicts, and not the visual depiction itself"). The Fourth Circuit also erred by allowing consideration of a future viewer's reaction to depictions of the minor's conduct. That a defendant "may have found the images sexually exciting ... can't suffice" where there is no sexually explicit conduct "in the videos" themselves. *Donoho*, 76 F.4th at 602 (Easterbrook, J., concurring in the judgment). No one would "say that a girl performing [ordinary] acts" such as "tak[ing] a shower" "is engaged in sexually explicit conduct just because someone else looks at her with lust." *Hillie*, 38 F.4th at 238 (Katsas, J., concurring in the denial for rehearing en banc).

*Williams* established that statutes criminalizing depictions of "sexually explicit conduct" cannot apply simply because "someone … subjectively believes that an innocuous picture of a child is 'lascivious.'" 553 U.S. at 301. "[The] material in fact (and not merely in [the defendant's] estimation) must meet the statutory definition." *Id*. For example, "[w]here the material at issue is a harmless picture of a child in a bathtub" but the defendant subjectively "believes that it constitutes a 'lascivious exhibition of the genitals,' the statute has no application." *Id*.

The fact that a minor is at times nude while engaging in everyday, nonsexual activities is insufficient to transform a depiction of innocent activity into a depiction of "sexually explicit conduct." The Fourth Circuit erred as a matter of law by allowing

a jury to convict Deritis for producing images depicting "sexually explicit conduct" when they do not.

## III. This question presented is critically important and regularly recurs.

Every year, federal courts sentence close to 2,000 defendants for offenses incorporating the definition of "sexually explicit conduct."[10] The stakes are significant because expanding the reach of child pornography crimes beyond the First Amendment limitation articulated in *Ferber* threatens protected speech and subjects defendants to severe punishments. Criminal liability should not turn on non-textual factors, including mere nudity, that "move[] the law decidedly away from the statute's text and into the vague and uncertain arena of subjective intent." *McCoy*, 108 F.4th at 652 n.11 (Grasz, J., with whom Smith, C.J., and Kelly, Erickson, and Stras, J.J., join, dissenting). Nor should this indeterminacy of the statutory interpretation of a criminal element turn on the geographic circuit in which the defendant happens to be charged.

## IV. This case is an ideal vehicle for addressing the question presented.

This case presents a purely legal issue for which there are no jurisdictional problems, factual disputes, or preservation issues. The images on which Deritis' convictions depend depict a minor engaged in nonsexual activities while nude and whose pubic area is incidentally visible (but not a particular focus of the images). The question presented—whether such images depict "sexually explicit conduct," and the

[10] *See supra* n.1.

"lascivious exhibition of the anus, genitals, or pubic area," in particular, were raised, thoroughly briefed and argued, and addressed in the Fourth Circuit in a precedential opinion. If the surreptitious videos of a minor engaged in nonsexual activity cannot as a matter of law depict "lascivious exhibition" or "sexually explicit conduct" under 18 U.S.C. § 2256(2)(A), the Court should grant the petition and reverse the Fourth Circuit on the merits with respect to Count 1.

## CONCLUSION

This Court should grant this petition for a writ of certiorari.

Respectfully submitted,

/s/ Anne M. Hayes
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# APPENDIX

## TABLE OF APPENDICES

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**PUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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**No. 23-4150**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

VINCENT DERITIS,

Defendant - Appellant.

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Appeal from the United States District Court for the Western District of North Carolina, at Statesville. Kenneth D. Bell, District Judge. (5:21-cr-00042-KDB-DSC-1)

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Argued: March 21, 2025 Decided: May 14, 2025

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Before THACKER, QUATTLEBAUM, and RUSHING, Circuit Judges.

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Affirmed in part and vacated and remanded in part by published opinion. Judge Thacker wrote the opinion in which Judge Quattlebaum and Judge Rushing joined.

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**ARGUED:** Anne Margaret Hayes, Cary, North Carolina, for Appellant. Anthony Joseph Enright, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee. **ON BRIEF:** Dena J. King, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee.

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THACKER, Circuit Judge:

On April 21, 2023, a jury convicted Vincent Deritis ("Appellant") of four offenses involving child sexual abuse material.[1] Count One charged Appellant with using a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction in violation of 18 U.S.C. § 2251(a), based on a video that Appellant took of his minor stepdaughter while she was showering. Counts Two and Three charged Appellant with violating the same statute, based on certain photographs Appellant took of his stepdaughter while she was sleeping. And Count Four charged Appellant with possessing child sexual abuse material in violation of 18 U.S.C. § 2252A(a)(5)(B). The district court sentenced Appellant to 600 months of imprisonment and imposed a special assessment of $117,000 pursuant to 18 U.S.C. § 2259A.

Appellant asserts a litany of arguments on appeal. First, Appellant argues that the district court erred by denying his motion to suppress evidence obtained from his Google account. Second, Appellant argues that the district court erroneously instructed the jury as to the term "lascivious exhibition," and that such instruction incurably prejudiced his trial. Third, Appellant argues that the district court erred by denying Appellant's Rule 29 motion for acquittal with respect to Counts One and Two. Fourth, Appellant argues that the district court erroneously excluded exculpatory testimony from Appellant's ex-wife. Last,

[1] *See United States v. Kuehner*, 126 F.4th 319, 322 n.1 (4th Cir. 2025) (referring to "child pornography" as "child sexual abuse material" to "reflect more accurately the abusive and exploitative nature of child pornography").

Appellant argues that the district court erred by imposing a special assessment without considering the applicable statutory factors.

We hold that the district court did not err in denying Appellant's motion to suppress because the Government obtained the challenged evidence from an independent source. Appellant's challenge to the district court's instruction on the definition of "lascivious exhibition" is foreclosed by our decision in *United States v. Sanders*, 107 F.4th 234 (4th Cir. 2024). The district court did not err in denying Appellant's Rule 29 motion with respect to Counts One and Two because substantial evidence supported both convictions. Moreover, any error in the district court's evidentiary ruling was harmless. Finally, we hold that the district court plainly erred by imposing a special assessment without considering the mandatory statutory factors on the record.

Therefore, as explained below, we affirm in part and vacate in part.

I.

A.

In March 2019, the Government received a cyber tip from Microsoft linking child sexual abuse material to an IP address at Appellant's residence in Hickory, North Carolina. On April 3, 2019, Hickory Police Investigator Marisa Rogers executed a search warrant at Appellant's residence, but when she knocked on Appellant's door, Appellant did not answer. Instead, Appellant began searching on the internet about how to report child sexual abuse material and erasing the data on his two hard drives. He also began running encryption software on his hard drives, which, if successful, would have made the data

permanently unrecoverable. Investigator Rogers returned to Appellant's home later that morning, at which point she and other officers executed the search warrant.

When the officers entered Appellant's home, they saw that Appellant was running a program on his computer to attempt to permanently delete his data. Hickory Police Analyst Mathew Rogers stopped the destruction process and copied Appellant's hard drive while "on the scene with the computer running." J.A. 906.[2] On Analyst Rogers' direction, the Government contemporaneously submitted a preservation request to Google pursuant to the Stored Communications Act, 18 U.S.C. § 2703(f), for Appellant's Gmail account, which was visible on his computer when the Government executed the warrant. The preservation request asked Google to pull and hold the records associated with Appellant's Gmail account and stated that a warrant would follow "within 30 days." J.A. 738. The Government informed Appellant that "he might still have access to his account," but would not "be able to go in and delete stuff." *Id.* at 116.

Upon completing their search of Appellant's residence, the police officers seized Appellant's computer, and his current and former cell phones. In his review of the data on Appellant's computer, Analyst Rogers found images of Appellant's 12 year old stepdaughter naked in Appellant's bathroom. From his professional experience, Analyst Rogers could tell that the photographs were taken from a hidden recording device. Since no such device was recovered in the initial search of Appellant's residence, the police officers obtained another warrant to search Appellant's residence for the camera, which

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

they executed on April 4, 2018. In the course of executing the warrant, the officers asked Appellant about the image of his stepdaughter they had found on his computer. Appellant admitted that he had placed a hidden camera in his bathroom and admitted to viewing the image. With Appellant's assistance, the officers then found and seized two small cameras that were stored in a case in Appellant's office. Appellant admitted that he had previously placed one of the cameras in the master bathroom.

Appellant's ex-wife was also present at the residence when the police officers executed the warrant for Appellant's hidden camera.[3] After Investigator Rogers showed Appellant's ex-wife the image of her daughter, the two of them stepped onto the front porch. According to a subsequent police report created by Investigator Rogers, Appellant's ex-wife said that Appellant "was always telling [his stepdaughter] not to take showers in the[] [master] bathroom." J.A. 740. Appellant's ex-wife nevertheless would let the minor use the bathroom when Appellant "was not looking." *Id.* While the two of them were talking on the porch, Appellant walked from the living room to the kitchen and stabbed himself with a kitchen knife. Appellant testified at trial that he had a history of depression and suicide attempts.

Following the two searches, the Government conducted a full forensic examination of Appellant's computer. In that examination, the Government recovered a collection of "thumbnail" images -- smaller copies of larger images or frames from videos that had been

[3] Appellant and his then wife were married at the time of these events but divorced thereafter prior to Appellant's trial. Therefore, we refer to her throughout this opinion as Appellant's ex-wife.

saved to Appellant's hard drives before he erased them. Appellant's thumbnail collection contained thousands of images of child sexual abuse material that Appellant had downloaded from the internet. It also contained frames from a video Appellant had taken of his stepdaughter in October 2018 using his hidden camera.

The October 2018 video was of Appellant's stepdaughter using the shower in the master bathroom at Appellant's residence. According to the testimony elicited at trial, on October 29, 2018, Appellant's stepdaughter was staying home from school due to a teacher workday. Appellant, who worked remotely, was also at home, while Appellant's ex-wife was at her job at Lowe's. By that date, Appellant had installed a hidden camera in the master bathroom of the house. Using that camera, Appellant captured video footage of his twelve year old stepdaughter nude, entering and exiting the shower, and toweling off. According to the stills of the video tendered at trial, the images depict the minor's genitals, pubic area, and upper torso. The minor appeared to be "entirely unaware of the camera." Appellant Br. at 28. Appellant transferred the video of his stepdaughter from his camera to his computer that same day and accessed it multiple times over the subsequent six months.

On May 28, 2019, the Government obtained a warrant to search Appellant's Google account and served it on Google. Google provided two sets of data in response. The first set contained data preserved in response to the April 3, 2019 preservation request. The second set contained data "that was still associated with the account at the time the [May 28, 2019] search warrant was executed." J.A. 782. There were only "minor differences" between the two sets of data. *Id.* at 122. In the datasets, the Government found

photographs that Appellant had taken of his stepdaughter. Specifically, the Government found a photograph taken on Appellant's Google Pixel phone on January 19, 2019, between 2:00 and 4:00 a.m., of Appellant's stepdaughter's hand touching his penis. And the Government found another photograph, taken on March 17, 2019, of Appellant pulling his stepdaughter's shorts and underwear aside and touching her genitals with his hand. Appellant's stepdaughter was 13 years old at the time.[4]

B.

On June 15, 2021, Appellant was indicted in the Western District of North Carolina and charged with four counts. Count One charged Appellant with using or attempting to use a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction in violation of 18 U.S.C. § 2251(a), based on the October 29, 2018 video of Appellant's stepdaughter in the master bathroom. Count Two alleged a violation of the same statute based on the January 2019 photograph of Appellant's stepdaughter's hand on his penis. And Count Three alleged another violation of the statute based on the March 2019 photograph of Appellant's stepdaughter's genitals. Count Four charged Appellant with possessing child sexual abuse material in violation of 18 U.S.C. § 2252A(a)(5)(B), based on the thousands of images of child sexual abuse material obtained from Appellant's computer.

[4] The Government executed a subsequent search warrant to seize items that appeared in the photographs, such as Appellant's clothes and his wedding band.

On November 24, 2021, Appellant moved the district court to suppress the information supplied to the Government by Google pursuant to the May 2019 warrant. Appellant argued that the Government effected a "warrantless seizure" by serving the April 3, 2019 preservation request. J.A. 715–17. Appellant also argued that the 55 days that passed before the officers obtained a search warrant rendered the search unreasonable pursuant to the Fourth Amendment. In response, the Government argued that the preservation request did not constitute a seizure, and that exclusion was not appropriate because the Government acted in good faith. The Government also argued that the second data set that Google provided -- the data associated with Appellant's account at the time the Government executed the May 28, 2019 search warrant on Google -- was untainted by the preservation request and provided an independent source for admitting the evidence.

Following an evidentiary hearing, the district court denied Appellant's motion. The court held that the Stored Communications Act, 18 U.S.C. § 2703(f), authorized the Government's preservation request. The court further held that the Government's preservation request did not constitute a "seizure" pursuant to the Fourth Amendment. J.A. 785 ("[S]ending a preservation request that provides the government zero information and does not affect the user's access to the information is clearly not [a seizure]."). The court then reasoned that because there was no seizure prior to the execution of the search warrant, the court did not need to "examine whether the time between 'seizure' and the warrant[] was reasonable." *Id.* at 786.

Appellant's jury trial began on June 21, 2022. In his defense, Appellant testified that he had set up the hidden camera as part of his sexual relationship with his ex-wife and

had only caught the videos of his stepdaughter by mistake. J.A. 1089 (Appellant testifying: "I made it specifically clear that [the minor] wasn't to use our bathroom."). Appellant denied knowledge of the photograph of his stepdaughter's hand with an adult penis, and of his stepdaughter's genitals while she was sleeping. But the Government proffered evidence identifying that it is Appellant in the pictures based on his wedding band and other distinguishing features. Appellant admitted in his direct testimony to downloading the images of child sexual abuse material found on his computer.[5]

In support of his position, Appellant sought to elicit testimony from his ex-wife on cross-examination that Appellant had forbidden his stepdaughter from using the master bathroom that contained the hidden camera. Specifically, Appellant's counsel asked Appellant's ex-wife if "there was a time when [Appellant] had told [his ex-wife] not to allow [Appellant's stepdaughter] to use that bathroom." J.A. 1059. And counsel asked Appellant's ex-wife: "Did [the minor] have permission to go into that bathroom [from Appellant]?" *Id.* The district court sustained the Government's objections because the statements were "impermissible hearsay." *Id.* at 1060.

Appellant moved for judgment of acquittal at the close of evidence, which the district court denied. Following two days of trial, the jury found Appellant guilty on all counts.

[5] Appellant testified that he liked to "clean up all the clutter or the trash that was on the web" in his spare time. J.A. 1099. To do that, he would "mass download," *id.*, materials from websites, review them, and then report anything "nefarious" to the website administrator, *id.* at 1105. Appellant admitted that the materials he downloaded contained "a large amount of child [sexual abuse material]." *Id.* at 1120.

C.

At sentencing, the district court "adopt[ed] the information in the [Presentence Investigation Report ("PSR")] without change." J.A. 1268. It sentenced Appellant to 600 months of imprisonment with a special assessment of $50,000 on each of Counts Two and Three, and $17,000 on Count Four pursuant to 18 U.S.C. § 2259A, for a total of $117,000. Appellant did not object to the special assessments.

Appellant timely noted his appeal.

II.

A.

We begin with Appellant's challenge to the district court's denial of his motion to suppress the evidence obtained from the search warrant issued to Google. In reviewing the denial of a motion to suppress, "we review legal conclusions de novo and factual findings for clear error." *United States v. Bailey*, 74 F.4th 151, 156 (4th Cir. 2023) (quoting *United States v. Pulley*, 987 F.3d 370, 376 (4th Cir. 2021)). When, as here, "a suppression motion has been denied, this Court reviews the evidence in the light most favorable to the government." *Id.* (citing *United States v. Abdallah*, 911 F.3d 201, 209 (4th Cir. 2018)).

Appellant's theory is that by serving the preservation request on Google pursuant to the Stored Communications Act, 18 U.S.C. § 2703(f), the Government seized his data. And, according to Appellant, because that was a warrantless seizure, the Government's 55 day delay between seizing the data through the preservation request and obtaining the warrant was unreasonably lengthy, in violation of the Fourth Amendment.

As the Government notes, however, we need not reach any of these questions since the Government received an identical set of data from Google that was not the fruit of the preservation request. As the Supreme Court has explained, the "independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source." *Utah v. Strieff*, 579 U.S. 232, 238 (2016). Because the officers obtained the photographs Appellant took of his stepdaughter from a separate independent source in this case, we need not inquire whether any part of the Government's search of Appellant's Gmail account was unlawful.

Appellant offers no response to this argument other than to say that the district court did not rely on this ground in its decision.[6] This point is immaterial since "[w]e are not limited to evaluation of the grounds offered by the district court to support its decision[] but may affirm on any grounds apparent from the record." *U.S. v. Smith*, 395 F.3d 516, 519 (4th Cir. 2005). And the record in this appeal makes clear that this argument was in fact presented to the district court.

Accordingly, the district court's denial of Appellant's motion to suppress is affirmed.

B.

Next, we turn to Appellant's assertion that the district court erroneously instructed the jury with respect to Counts One, Two, and Three as to the definition of "lascivious

[6] Therefore, we need not consider whether any exception would apply on the facts of this case.

exhibition." We review whether a jury instruction incorrectly stated the law de novo. *United States v. McCauley*, 983 F.3d 690, 694 (4th Cir. 2020). This review requires us to consider the jury instruction "in light of the whole record," to determine whether it "adequately informed the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party." *Id.* (quoting *United States v. Miltier*, 882 F.3d 81, 89 (4th Cir. 2018)). Even if a jury was erroneously instructed, however, we will not set aside a resulting verdict unless the erroneous instruction seriously prejudiced the challenging party's case. *Id.*

Counts One, Two, and Three charged Appellant with violating the same statute, 18 U.S.C. § 2251(a). Section 2251(a) criminalizes using a minor to engage in "sexually explicit conduct for the purpose of producing any visual depiction of such conduct." *Id.* "[S]exually explicit conduct" is defined by 18 U.S.C. § 2256(2)(A) as "lascivious exhibition of the anus, genitals, or pubic area of any person." Appellant's challenge to the district court's instruction turns on the definition of "lascivious exhibition."

1.

At the time of Appellant's trial, we had one decision defining "lascivious exhibition" as contemplated in § 2256: *United States v. Courtade*, 929 F.3d 186, 191–92 (4th Cir. 2019), *as amended* (July 10, 2019). As we recognized in *Courtade*, defining "lascivious exhibition [was] not always easy." *Id.* at 192 (quotation marks omitted). We explained, many courts sought guidance in the six factors articulated in *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986). But the *Dost* factors had been "subject to criticism over the years." *Courtade*, 929 F.3d at 192. Particularly the "divisive" sixth factor, which

"potentially implicates subjective intent and asks whether the depiction is intended or designed to elicit a sexual response in the viewer." *Id.*

Rather than wade into this "thicket" regarding the *Dost* factors in *Courtade*, we instead interpreted "lascivious exhibition" according to its plain and unambiguous meaning as: "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." *Courtade*, 929 F.3d at 192. This definition was sufficient to resolve the facts at issue in *Courtade*, where the appellant tricked his minor stepdaughter into taking a camera into a shower and directed her to hold it in a way that recorded her nude body. *Id.* at 192–93. *Courtade* explained, "the video depict[ed] not simply a young girl nude in the shower." *Id.* at 193. Rather, it showed "a young girl deceived and manipulated by an adult man into filming herself nude in the shower, and methodically directed to do so in a way that ensures she records her breasts and genitals." *Id.* (citing *United States v. Ward*, 686 F.3d 879, 883–84 (8th Cir. 2012) ("When a photographer selects and positions his subjects, it is quite a different matter from the peeking of a voyeur upon an unaware subject pursuing activities unrelated to sex." (citation omitted))).

*Courtade* held that these facts "objectively depict[ed] a 'lascivious exhibition' because the images and audio . . . make clear that the video's purpose was to excite lust or arouse sexual desire in the viewer." *Courtade*, 929 F.3d at 193. Sitting as a factfinder, the court did not need to probe the appellant's "subjective intent" or his motives. Rather, the holding followed "from the video itself, and would thus be apparent to any reasonable viewer." *Id.*

What *Courtade* stands for, then, is that cases where an adult obtains a video of a naked minor's genitals through manipulative means such as a hidden camera do not present a close question for finding "lascivious exhibition." Still, after *Courtade* the permissibility of using the *Dost* factors remained an open question in this circuit.

2.

The district court defined "lascivious exhibition" based on this footing. Accordingly, in the district court's instruction to the jury on Counts One, Two, and Three, the court applied *Courtade* and explained: "lascivious exhibition means a depiction that displays or brings to view to attract notice to the genitals or pubic area of children in order to excite lustfulness or sexual stimulation in the viewer." J.A. 1198 (quotation marks omitted).

Over Appellant's objection, the district court also instructed the jury that it could rely on the six *Dost* factors to make its decision. In full, the court instructed the jury as follows:

> Not every exposure of the genitals or pubic area constitutes a lascivious exhibition. In deciding whether the government has proved that a particular visual depiction constitutes a lascivious exhibition, you should consider the following factors:
>
> First, whether the focal point of the visual depiction is on the minor's genitals or pubic area;
>
> Second, whether the setting of the visual depiction makes it appear to be sexually suggestive, for example, in a place or pose generally associated with sexual activity;
>
> Third, whether the minor is displayed in an unnatural pose or in inappropriate attire, considering the age of the minor;

> Fourth, whether the child is fully or partially clothed or nude;
>
> Fifth, whether the visual depiction suggests coyness or a willingness to engage in sexual activity; and
>
> Sixth, 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 a 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 the overall content.

J.A. 624–25.

Below and on appeal, Appellant argued that this jury instruction was erroneous, tracking the analysis of the D.C. Circuit in *United States v. Hillie*, 39 F.4th 674 (D.C. Cir. 2022). There, the D.C. Circuit construed "lascivious exhibition" to mean that "the minor displayed his or her anus, genitalia, or pubic area in a manner connoting that the minor, or any person or thing appearing with the minor in the image, exhibits sexual desire or an inclination to engage in *any* type of sexual activity." *Id.* at 685 (emphasis in original). The D.C. Circuit reached this construction by applying a plain reading of the text of the statute, filtered through the Supreme Court's First Amendment case law addressing vagueness and overbreadth challenges to child sexual abuse material statutes. *See id.* at 681–86 (discussing *Miller v. California*, 413 U.S. 15 (1973); *New York v. Ferber*, 458 U.S. 747 (1982); *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994); *United States v. Williams*, 553 U.S. 285 (2008)). At its core, that construction rejects the viability of the *Dost* factors as a tool for defining a "lascivious exhibition." *Hillie*, 39 F.4th at 686 ("In reaching this conclusion, we reject the [] argument . . . that 'lascivious exhibition of the

genitals,' as defined in § 2256(2)(A), should be construed in accordance with the so-called *Dost* factors.").

But whatever utility *Hillie*'s interpretation of "lascivious exhibition" may have held after our decision in *Courtade*, such arguments are now foreclosed in this circuit pursuant to our decision in *United States v. Sanders*, 107 F.4th 234 (4th Cir. 2024). In *Sanders*, issued several months after the completion of briefing in this appeal, we affirmed a trial court's reliance on the *Dost* factors to explain "lascivious exhibition" for a series of sexually explicit conduct charges, including a violation of § 2251(a). 107 F.4th at 263. We also put to rest any contention in this circuit about the propriety of the sixth *Dost* factor: "[the sixth 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 [from the viewer]." *Id.* at 262 (emphasis in original). Restated, the Sixth *Dost* factor assesses whether the defendant made the visual depiction with the intent to elicit a sexual response.

In affirming the district court's instructions in *Sanders*, we established several parameters for application of the *Dost* factors. First, we emphasized that the court's lascivious exhibition instruction "did not advise the jurors that they could convict on nudity alone." *Sanders*, 107 F.4th at 262 (affirming instruction: "For the visual depiction of an exhibition of the genitals . . . to be considered sexually explicit conduct, the exhibition must be lascivious."). Rather, we noted, the instruction "stated that the jury could consider the extent of nudity in deciding whether the visual depiction is lascivious." *Id.* Second, we emphasized the lower court's instruction that "the *Dost* [f]actors were only a guide --

non-exhaustive and discretionary." *Id.* at 263. Third, we underscored that the district court told the jurors that their assessment "need not involve all of the[] [*Dost*] factors" and that the jurors were permitted to decide the appropriate weight for each factor. *Id.* And, 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.* ("Put succinctly, the court properly instructed the jury that the *Dost* Factors are not mandatory, formulaic or exclusive.") (quotation marks omitted).

In summary, *Sanders* affirmed a district court's reliance on the *Dost* factors where the trial court ensures that the jury: (1) understands that mere nudity is not sufficient to establish a "lascivious exhibition"; (2) is not instructed to rely exclusively on the *Dost* Factors, (3) understands that no single *Dost* Factor is dispositive, and (4) is discouraged from a strict and mathematical application of the *Dost* factors. 107 F.4th at 263. This rule now governs our analysis of jury instructions defining "lascivious exhibition," including in this appeal.

3.

Post-*Sanders*, Appellant's challenge to the district court's "lascivious exhibition" instruction is confined to whether the court's instruction contained adequate safeguards. We hold that it did.

Walking through the *Sanders* analysis, the district court adequately informed the jury that "mere nudity" was insufficient to convict Appellant by its instruction that "[n]ot every exposure of the genitals or pubic area constitutes a lascivious exhibition." J.A. 1198.

Likewise, the court adequately instructed the jury that it was not to rely exclusively on the *Dost* factors by its instruction that the jury was to "determine whether the visual depiction is lascivious based on its overall content." *Id.* at 1199. And the court explained that no factor was dipositive: "[i]t is for you to decide the weight or lack of weight to be given to any of these factors." *Id.* Read together, these instructions also adequately discouraged the jury from applying the *Dost* factors in a strict or mathematical manner.

Thus, the district court committed no error in its "lascivious exhibition" instruction.

C.

We turn next to Appellant's assertion that the district court erred by denying his motion for acquittal on Counts One and Two. We review de novo a district court's denial of a motion for acquittal pursuant to Federal Rule of Criminal Procedure 29. *United States v. Rodriguez-Soriano*, 931 F.3d 281, 286 (4th Cir. 2019). In conducting our review, we "must ask whether 'there is substantial evidence, taking the view most favorable to the Government, to support the conviction." *Id.* (quoting *Glasser v. United States*, 315 U.S. 60, 80 (1942)). Substantial evidence is "evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *United States v. Alerre*, 430 F.3d 681, 693 (4th Cir. 2005).

Counts One and Two both charged Appellant with violating § 2251(a). As we have explained, in order to obtain a conviction for sexual exploitation of a minor pursuant to § 2251(a), the Government must prove that: (1) the defendant knowingly employed, used, persuaded, induced, enticed, or coerced a person under the age of 18; (2) to take part in sexually explicit conduct for the purpose of producing a visual depiction of that conduct;

and (3) that either the defendant knew or had reason to know that the visual depiction will be transported in interstate commerce, or that the visual depiction has actually been transported in interstate commerce. *See United States v. Engle*, 676 F.3d 405, 412 (4th Cir. 2012). On appeal, Appellant only challenges the jury's determination that there was substantial evidence of "sexually explicit conduct." As discussed *supra*, "sexually explicit conduct" means, inter alia, "lascivious exhibition of the anus, genitals, or pubic area of any person." § 2256(2)(A).

We readily conclude that the record in this case does not present a close question about the sufficiency of evidence for Count One. Appellant hid a camera to capture footage of his minor stepdaughter's genitals while she was naked. Since this conduct is comparable to the objectively sufficient conduct analyzed in *Courtade*, a reasonable factfinder could accept it as adequate and sufficient to support a conclusion of Appellant's guilt beyond a reasonable doubt.

Any potential argument to the contrary based on the analysis detailed in *Courtade* was resolutely foreclosed by *Sanders*, and our expansion of the scope of inquiry for a "lascivious exhibition." That analysis provides for a consideration of the surrounding circumstances, which includes the fact that Appellant had thousands of images of child sexual abuse material in his possession. From this, a reasonable factfinder could infer that the video "[Appellant] intended to capture was 'sexually explicit conduct,'" Gov't Br. at 63 (emphasis omitted), intended for no other purpose than to "elicit a sexual response in the viewer." *See Sanders*, 107 F.4th at 261 (citing *Dost*, 636 F. Supp. at 832).

The analysis of the adequacy of the evidence as to Count Two is even more straightforward. Here too, Appellant only takes issue with whether the image -- of Appellant's penis with his minor stepdaughter's hand -- depicted "sexually explicit conduct." Appellant argues that the picture could not be a "lascivious exhibition" because it does not attract notice to the genitalia of a child. Congress drafted no such limitation into the statute, which criminalizes using a minor to engage in sexually explicit conduct and defines sexually explicit conduct as "lascivious exhibition of the anus, genitals, or pubic area of *any person*." § 2256(2)(A) (emphasis supplied). Viewing this photograph through the plain language of the statute and the lens of *Courtade* and *Sanders*, a reasonable factfinder could find that it adequately supports a conclusion of Appellant's guilt beyond a reasonable doubt.

D.

Turning next to Appellant's evidentiary argument. We review evidentiary decisions for an abuse of discretion but legal conclusions concerning the Federal Rules of Evidence de novo. *United States v. Benson*, 957 F.3d 218, 228 (4th Cir. 2020). And exclusion of evidence is harmless if this court can "say with fair assurance that the jury's verdict was not swayed by the district court's ruling." *See United States v. McLean*, 715 F.3d 129, 144 (4th Cir. 2013).

Appellant asserts the district court erred by sustaining two objections during Appellant's cross-examination of his ex-wife during the Government's case in chief. The court sustained the Government's objections on the ground that Appellant sought to elicit "impermissible hearsay." J.A. 1059–60. The questioning went as follows:

> Q: [T]here was a time when [Appellant] had told you not to allow [his stepdaughter] to use that bathroom, right?
>
> MS. RANDALL: Objection.
>
> THE COURT: Sustained.
>
> . . .
>
> Q: Did [Appellant's stepdaughter] have permission to go into that bathroom?
>
> A: She did.
>
> Q: From whom?
>
> A: Me.
>
> Q: Did she have permission from [Appellant]?
>
> MS. RANDALL: Objection.
>
> THE COURT: Sustained.

*Id.* Appellant argues that this questioning sought only to elicit whether Appellant had issued a non-hearsay "command." Appellant Br. at 38. Moreover, Appellant argues, the court's error was so prejudicial that his convictions must be reversed.

Hearsay is an out of court statement offered for the truth of the matter asserted in the statement. Fed. R. Evid. 801(c). In *Kivanc*, we recognized, as other circuits have, that an out of court statement "providing directions from one individual to another do[es] not constitute hearsay." *United States v. Kivanc*, 714 F.3d 782, 793 (4th Cir. 2013) (citing *United States v. Diaz*, 670 F.3d 332, 346 (1st Cir. 2012)); *see also United States v. Dawkins*, 999 F.3d 767, 789 (2d Cir. 2021) ("The statement '[d]o not accept money from these people' was an order, *i.e.*, an imperative rather than a declarative statement, and it was

offered not for its truth, but for the fact that it was said. It was therefore not hearsay."); *United States v. Thomas*, 451 F.3d 543, 548 (8th Cir. 2006)) ("Questions and commands generally are not intended as assertions, and therefore cannot constitute hearsay.").

With the benefit of reasoned consideration without the time constraint under which the district court labored, we conclude that here both questions sought to elicit a non-hearsay command, meaning that the district court erred in sustaining the Government's objections. But this error is subject to harmlessness review. *Kivanc*, 714 F.3d at 792 ("[I]f an evidentiary ruling is found to be erroneous, we review the error for harmlessness."). And this is a hurdle that Appellant is unable to overcome.

With respect to Count One, the jury heard from Appellant himself that his stepdaughter was forbidden from entering the master bathroom where the hidden camera was located. Thus, the jury would be unlikely to be materially swayed by corroborative testimony from Appellant's ex-wife reasserting that same fact. More importantly, the jury heard evidence that Appellant set the camera up so as to capture footage of his stepdaughter in the bathroom, recorded a video of her when he was home alone with her, transferred the video to his computer that very day, and then accessed that video multiple times over the subsequent six months. And if that were not enough, the jury was also presented with evidence that Appellant had thousands of images of child sexual abuse material on his computer and immediately attempted to permanently delete his hard drive when the police showed up on his doorstep. In that context, we have no trouble concluding that the exclusion of the non-hearsay testimony did not substantially sway the jury's verdict to convict with respect to Count One.

Moreover, the excluded testimony was irrelevant to the remaining Counts. Appellant argues, though, that the jury would have been more likely to credit his testimony in general if the non-hearsay had been admitted into to evidence. This argument was rebutted most persuasively by the district court itself at sentencing, when it described Appellant's candor at trial: "[Y]ou lied every chance you got and in some of the most incredulous ways. I don't know how you could get up there with even a straight face and ask anybody to believe your testimony." J.A. 1290.

Accordingly, Appellant's assertion that the district court's erroneous exclusion of non-hearsay requires vacating his convictions is without merit.

E.

Last, Appellant challenges the district court's imposition of a special assessment. Because Appellant did not object to the special assessment below, we review his challenge on appeal for plain error. *United States v. McMiller*, 954 F.3d 670, 674 (4th Cir. 2020).

The Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018 provides that a sentencing court "shall assess not more than $17,000 on any person convicted of an offense under section 2252(a)(4) or 2252A(a)(5)" and "not more than $50,000 on any person convicted of a child [sexual abuse material] production offense." 18 U.S.C. § 2259A. In "determining the amount of the assessment . . . the court shall consider the factors set forth in sections 3553(a) and 3572." *Id.*; *see* 18 U.S.C. § 3553(a) (listing "[f]actors to be considered in imposing a sentence"); 18 U.S.C. § 3572(a) (listing factors to be considered in "determining whether to impose a fine"). Here, the district court imposed the statutory maximum of $50,000 for each of Counts Two and Three, and the

statutory maximum of $17,000 for Count Four, for a total of $117,000. Appellant argues that because the district court did not consider or make the required findings under §§ 3553(a) and 3572, the special assessments must be vacated.

The error here is straightforward, and substantively uncontested. Appellant is correct that the district court did not conduct any kind of consideration, on the record, of the relevant factors with respect to the special assessment imposed. Nor did the court make any specific findings with respect to the statutory factors prior to imposing the special assessment. Instead, the court conclusorily imposed the maximum special assessments at the end of its sentence, after separately finding that Appellant did not have the wherewithal to pay a fine.

Plain error review, which applies here, requires that there was an error, that was plain, and affected Appellant's substantial rights. *United States v. Olano*, 507 U.S. 725, 732 (1993). The district court's error readily satisfies this inquiry. Our case law specifies that a district court considering the factors set forth in § 3572 "must make specific fact findings on these factors." *United States v. Taylor*, 984 F.2d 618, 621 (4th Cir. 1993) (quoting *United States v. Harvey*, 885 F.2d 181, 182 (4th Cir.1989)). And we have "vacated fines for which the district court failed to make such findings." *Id.* (collecting cases). Moreover, this error affected Appellant's substantial rights because "absent the error, a different sentence might have been imposed." *United States v. Hernandez*, 603 F.3d 267, 273 (4th Cir. 2010). Here, the court determined that Appellant did not have the wherewithal to pay a fine but nonetheless imposed the maximum special assessment. It

follows, therefore, that the court might have imposed a different special assessment if it had properly considered the statutory factors.[7]

The Government's retorts do not warrant a contrary conclusion. The Government asserts that the district court did arguably consider a § 3572 factor when it determined that Appellant did not have the wherewithal to pay a fine. *See* § 3572(a)(1) (directing the court to consider a defendant's "income, earning capacity, and financial resources"). While the Government is correct as to this single factor, this is just one of the eight factors enumerated in the statute. *See* § 3572(a)(1)–(8). The court did not satisfy its obligation by this passing reference.

Accordingly, we vacate the district court's imposition of the special assessment and remand for limited resentencing.

III.

For the foregoing reasons, Appellant's convictions on Counts One, Two, Three, and Four are each affirmed. We vacate the special assessment and remand for resentencing only as to that issue, so that the district court may consider and apply the relevant statutory factors on the record with regard to the imposition of a special assessment.

*AFFIRMED IN PART AND*
*VACATED AND REMANDED IN PART*

[7] We make no inference or speculation as to the court's ultimate disposition on remand.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | DOCKET NO. 5:21-CR-42 |
| | ) | |
| vs. | ) | VOLUME I-B |
| | ) | |
| VINCENT DERITIS, | ) | |
| | ) | REDACTED |
| Defendant. | ) | |
| | ) | |

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE KENNETH D. BELL
UNITED STATES DISTRICT COURT JUDGE
JUNE 21, 2022

APPEARANCES:

On Behalf of the Government:

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On Behalf of the Defendant:

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Cheryl A. Nuccio, RMR-CRR
Official Court Reporter
United States District Court
Charlotte, North Carolina

for that matter. I know bestiality is one of the ways this can be done. But is there any bestiality in this case?

MS. RANDALL: No, Your Honor. I mean, I haven't gone through all 6,000 thumbnails, but we've not introduced any evidence of bestiality.

THE COURT: I've given that instruction before when there was no bestiality involved and I just wonder about the reaction of the jury wondering what? Bestiality? What does that have to do with this case?

Can we just remove that as one of the ways that it can be sexually explicit conduct?

MR. JOHNSON: Your Honor, I think you should leave it in.

THE COURT: I'll be glad to leave it in. If I were you I wouldn't, but it's your call to make.

MR. JOHNSON: Your Honor, I think it shows how courts are beginning to view what is production of child pornography and the explicit nature and the sexually explicit conduct that must be included. That's the heart of the *Hillie* case. That's also discussed in *Howard*.

THE COURT: You can stop. If you want it in there, I'll leave it in there.

MR. JOHNSON: I would leave it in, Your Honor.

THE COURT: All right. That's what we'll do.

All right. Now we're to the definition of

lascivious. And I know I interrupted you, Mr. Johnson. If you would start over on that.

MR. JOHNSON: Okay. Your Honor, we agree that the second sentence, "not every exposure of the genitals or pubic region constitutes a lascivious exhibition," we agree that that is appropriate. We actually had that in our prior definition.

We are objecting to the Court giving the six *Dost* factors, and there's a variety of reasons why we think that the Court should reject *Dost*.

The first one is the *Courtade* decision, a Fourth Circuit decision. The *Dost* factors have been subject to criticism over the years. And they said the most divisive factor included is factor six, the depiction is intended or designed to elicit a sexual response in the viewer.

The Fourth Circuit in the *Courtade* case refused to, quote, venture into the thicket of the *Dost* factors. But we're asking this Court to wade into that thicket because courts are starting to recognize that the *Dost* factors are just not appropriate.

The best example is the *Hillie* decision. The DC Circuit rejected the *Dost* factors, and those are cited in our instructions. They say that the *Dost* decision disregarded the Supreme Court decisions of *Miller*, *12 200-feet Reels*, *Ferber*, and *Williams* where the courts, in looking at other cases

involving pornography and other types of cases, find that lascivious exhibition of genitals means something more serious.

The *Williams* case, which is from the Supreme Court, finds that lascivious exhibition of genitals to mean depictions showing a minor engaged in hard core sexual conduct, not visual depictions would solicit a sexual response in the viewer.

And so *Hillie* and other courts are starting to make decisions that for you to be able to sentence someone to 15 to 30 years for this type of case, the Court has to find that the images were of a hard core nature. And I'm going to go back to my count one example. I don't believe anybody would consider that to be of a hard core nature.

And so that's why courts are beginning to reject the *Dost* factors. The Fourth Circuit's already questioned whether they're appropriate. And I -- and we're asking the Court to say that they are not appropriate.

You know, our instruction includes the "not every exposure" language.

And we also think that the *Hillie* court -- the *Hillie* decision decides that "a depiction is lascivious if the minor engaged in conduct displaying their anus, genitals, or pubic area in a lustful manner that connotes the commission of sexual intercourse, bestiality, masturbation, or sadistic

masochistic abuse." And they say the "use" word has got to be more than just the concept of, oh, they were in the picture. It has to connote those very serious, hard core sexual acts.

THE COURT: All right. The *Hillie* case is what circuit and when?

MR. JOHNSON: DC Circuit last year.

THE COURT: As of right now -- and the courts of appeals are changing the law on me all the time. I hope I don't offend anybody. But the majority of circuits are still going with the *Dost* factors, right?

MS. RANDALL: That's correct, Your Honor.

MR. JOHNSON: There are a number of circuits that have followed the *Dost* factors.

THE COURT: Second, Third, Fifth, Six, Eighth, Ninth, and Tenth.

MR. JOHNSON: The DC Circuit has rejected it and the Fourth Circuit has questioned it.

THE COURT: All right. Ms. Randall.

MS. RANDALL: Your Honor, as you just pointed out, many circuits do use the *Dost* factors in defining lascivious exhibition of the genitals.

The defendant's argument is that the Fourth Circuit and the *Courtade* decision question the *Dost* factors. What they noted was that they are subject to criticism, particularly the sixth factor.

What's kind of interesting about that case, Your Honor, though, is in that case the facts were someone gave a camera to a minor inside the shower and recorded the child inside the shower and then getting out of the shower. Clearly very similar to this case. And in finding that that image or video met the definition of child pornography, the Fourth Circuit relied on the fact that the video's purpose was to excite lust or arouse sexual desire in the viewer, which is basically the exact same thing as the sixth factor of the *Dost* factors.

So to say that the Fourth Circuit is critical of the *Dost* factors, I don't think it's accurate. I think they just said that there hasn't -- they've been subject to criticism.

The Court should absolutely not follow the *Hillie* decision, Your Honor. I think that is actually an incorrect statement of the law in the Fourth Circuit. *Hillie* has said that the minor, for it to be a lascivious display of the genitals, anus, or pubic area, it has to connote the commission of one of the above factors: the sexual intercourse, the bestiality, the masturbation, or sadistic or masochistic abuse. On its face that's not what the statute says. The statute clearly uses the word "or." Those are five different things. You shouldn't have to say those four have to be in the fifth factor. That's just completely wrong on the statute.

And then if you look at the Fourth Circuit cases, Your Honor, that's clearly not how the Fourth Circuit interprets it. In the *Courtade* decision, which they found to be child pornography, that child was not engaged in sexual intercourse, bestiality, masturbation or sadistic or masochistic abuse.

There's another decision out of the Fourth Circuit, Your Honor, from even just many years ago that I found quickly. It was the *United States versus Thomas*. It's an unpublished case. 92 F. App'x 960. It's a tape depicting a sleeping 9-year-old girl. The camera zooms in on the child's panties. Shortly thereafter the hand is seen moving aside the crotch of the panties and the child's exposed genitals are filmed for approximately two minutes. The child was asleep the whole time. Clearly no sexual intercourse, no masturbation, no bestiality, no sadistic or masochistic abuse.

So *Hillie* is just not good law in this case. So not only should they not be instructed that that's the law, they shouldn't even be allowed to argue that that's the law to the jury.

THE COURT: All right. I agree with you, Ms. Randall. We're going to -- the circuit may say I'm wrong and finally weigh in definitively on this, but we're going to stick with the factors as listed for this trial.

Visual depiction.

# UNITED STATES DISTRICT COURT

Western District of North Carolina

| | | |
|---|---|---|
| **UNITED STATES OF AMERICA** | ) | **AMENDED JUDGMENT IN A CRIMINAL CASE** |
| | ) | (For Offenses Committed On or After November 1, 1987) |
| **V.** | ) | |
| | ) | |
| **VINCENT DERITIS** | ) | Case Number: DNCW521CR000042-001 |
| | ) | USM Number: 52648-509 |
| | ) | |
| **Filed Date of Original Judgment: 3/2/2023** (Or Filed Date of Last Amended Judgment) | ) | W. Kelly Johnson 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, 2, 3, 4 after a plea of not guilty.

**ACCORDINGLY,** the court has adjudicated that the defendant is guilty of the following offense(s):

| Title and Section | Nature of Offense | Date Offense Concluded | Counts |
|---|---|---|---|
| 18 U.S.C. § 2251(a), 18 U.S.C. § 2251(e) | Production of Child Pornography | 10/29/2018 | 1 |
| 18 U.S.C. § 2251(a), 18 U.S.C. § 2251(e) | Production of Child Pornography | 01/19/2019 | 2 |
| 18 U.S.C. § 2251(a), 18 U.S.C. § 2251(e) | Production of Child Pornography | 03/17/2019 | 3 |
| 18 U.S.C. § 2252A(a)(5)(B) | Possession With Intent to View Child Pornography Involving a Minor Who Had Not Attained the Age of 12 Years | 04/03/2019 | 4 |

The Defendant is sentenced as provided in pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, United States v. Booker, 125 S.Ct. 738 (2005), and 18 U.S.C. § 3553(a).

☐ The defendant has been found not guilty on count(s).

☐ Count(s) (is)(are) dismissed on the motion of the United States.

**IT IS ORDERED** that the Defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay monetary penalties, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: 2/28/2023

Kenneth D. Bell
United States District Judge

Date: July 31, 2023

Defendant: Vincent Deritis
Case Number: DNCW521CR000042-001



## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of THREE HUNDRED SIXTY (360) MONTHS AS TO EACH OF COUNTS 1, 2 AND 3, TO RUN CONCURRENT TO EACH OTHER AND TWO HUNDRED FORTY (240) MONTHS AS TO COUNT 4 TO RUN CONSECUTIVE TO THE TERM IMPOSED IN COUNTS 1, 2 AND 3 FOR A TOTAL TERM OF SIX HUNDRED (600) MONTHS.

■ The Court makes the following recommendations to the Bureau of Prisons:

1. Placed in FCI Butner, if possible, consistent with the needs of BOP.
2. Participation in any available educational and vocational opportunities.
3. Participation in any available mental health treatment programs as may be recommended by a Mental Health Professional.
4. Participation in sex offender treatment programs, if eligible.

■ The Defendant is remanded to the custody of the United States Marshal.

☐ The Defendant shall surrender to the United States Marshal for this District:

- ☐ As notified by the United States Marshal.
- ☐ At _ on _.

☐ The Defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ As notified by the United States Marshal.
- ☐ Before 2 p.m. on _.
- ☐ As notified by the Probation Office.

## RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____ at

_____, with a certified copy of this Judgment.

_____
United States Marshal

By: _____
Deputy Marshal

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of LIFE AS TO EACH OF COUNTS 1, 2, 3, AND 4 TO RUN CONCURRENT TO EACH OTHER..

☐ The condition for mandatory drug testing is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

## CONDITIONS OF SUPERVISION

The defendant shall comply with the mandatory conditions that have been adopted by this court.

1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall not unlawfully possess a controlled substance.
3. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall 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 (unless omitted by the Court).
4. The defendant shall cooperate in the collection of DNA as directed by the probation officer (unless omitted by the Court).

The defendant shall comply with the discretionary conditions that have been adopted by this court and any additional conditions ordered.

5. The defendant shall report to the probation office in the federal judicial district where he/she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
6. The defendant shall report to the probation officer in a manner and frequency as directed by the Court or probation officer.
7. The defendant shall not leave the federal judicial district where he/she is authorized to reside without first getting permission from the Court or probation officer.
8. The defendant shall answer truthfully the questions asked by the probation officer. However, defendant may refuse to answer a question if the truthful answer would tend to incriminate him/her of a crime. Refusal to answer a question on that ground will not be considered a violation of supervised release.
9. The defendant shall live at a place approved by the probation officer. The probation officer shall be notified in advance of any change in living arrangements (such as location and the people with whom the defendant lives). If advance notification is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.
10. The defendant shall allow the probation officer to visit him/her at any time at his/her home or any other reasonable location as determined by the probation office, and shall permit the probation officer to take any items prohibited by the conditions of his/her supervision that the probation officer observes.
11. The defendant shall work full time (at least 30 hours per week) at lawful employment, actively seek such gainful employment or be enrolled in a full time educational of vocational program unless excused by the probation officer. The defendant shall notify the probation officer within 72 hours of any change regarding employment or education.
12. The defendant shall not communicate or interact with any persons he/she knows is engaged in criminal activity, and shall not communicate or interact with any person he/she knows to be convicted of a felony unless granted permission to do so by the probation officer.
13. The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer.
14. The defendant shall 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).
15. The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential informant without first getting the permission of the Court.
16. The defendant shall refrain from excessive use of alcohol and shall not unlawfully purchase, possess, use, distribute or administer any narcotic or controlled substance or any psychoactive substances (including, but not limited to, synthetic marijuana, bath salts) that impair a person's physical or mental functioning, whether or not intended for human consumption, or any paraphernalia related to such substances, except as duly prescribed by a licensed medical practitioner.
17. The defendant shall participate in a program of testing for substance abuse. The defendant shall refrain from obstructing or attempting to obstruct or tamper, in any fashion, with the efficiency and accuracy of the testing. The defendant shall participate in a substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise the defendant's participation in the program (including, but not limited to, provider, location, modality, duration, intensity) (unless omitted by the Court).
18. The defendant shall not go to, or remain at any place where he/she knows controlled substances are illegally sold, used, distributed, or administered without first obtaining the permission of the probation officer.
19. The defendant shall submit to a search if the Probation Officer has a reasonable suspicion that the defendant has committed a crime or a violation of a condition of supervised release. Such a search may be conducted by a U.S. Probation Officer, and such other law enforcement personnel as the probation officer may deem advisable, without a warrant or the consent of the defendant. Such search may be of any place where evidence of the above may reasonably be expected to be found, including defendant's person, property, house, residence, vehicle, communications or data storage devices or media or office.
20. The defendant shall pay any financial obligation imposed by this judgment remaining unpaid as of the commencement of the sentence of probation or the term of supervised release in accordance with the schedule of payments of this judgment. The defendant shall notify the court of any changes in economic circumstances that might affect the ability to pay this financial obligation.
21. The defendant shall support all dependents including any dependent child, or any person the defendant has been court ordered to support.
22. The defendant shall participate in transitional support services (including cognitive behavioral treatment programs) and follow the rules and regulations of such program. The probation officer will supervise the defendant's participation in the program (including, but not limited to, provider, location, modality, duration, intensity). Such programs may include group sessions led by a counselor or participation in a program administered by the probation officer.
23. The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

ADDITIONAL CONDITIONS:

24. The defendant shall participate in a mental health evaluation and treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise the defendant's participation in the program (including, but not limited to, provider, location, modality, duration, and intensity). The defendant shall take all mental health medications as prescribed by a licensed health care practitioner.
25. The defendant shall not communicate, or otherwise interact, with the victim of the offense, either directly or through someone else, without first obtaining the permission of the probation officer.

## SEX OFFENDER

## CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court and any additional conditions ordered.

1. The defendant shall have no direct or indirect contact, at any time, for any reason with any victim(s), any member of any victim's family, or affected parties in this matter unless provided with specific written authorization to do so in advance by the U.S. Probation Officer.
2. The defendant shall submit to a psycho-sexual evaluation by a qualified mental health professional experienced in evaluating and managing sexual offenders as approved by the U.S. Probation Officer. The defendant shall complete the treatment recommendations and abide by all of the rules, requirements, and conditions of the program until discharged. The defendant shall take all medications as prescribed.
3. The defendant shall submit to risk assessments, psychological and physiological testing, which may include, but is not limited to a polygraph examination and/or Computer Voice Stress Analyzer (CVSA), or other specific tests to monitor the defendant's compliance with supervised release and treatment conditions, at the direction of the U.S. Probation Officer.
4. The defendant's residence, co-residents and employment shall be approved by the U.S. Probation Officer. Any proposed change in residence, co-residents or employment must be provided to the U.S. Probation Officer at least 10 days prior to the change and pre-approved before the change may take place.
5. The defendant shall not possess any materials depicting and/or describing "child pornography" and/or "simulated child pornography" as defined in 18 U.S.C. § 2256, nor shall the defendant enter any location where such materials can be accessed, obtained or viewed, including pictures, photographs, books, writings, drawings, videos or video games.
6. The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which the defendant resides, works, is a student, or was convicted of a qualifying offense.
7. The defendant shall have no contact, including any association such as verbal, written, telephonic, or electronic communications with any person under the age of eighteen (18) except: 1) in the presence of the parent or legal guardian of said minor; 2) on the condition that the defendant notifies the parent or legal guardian of their conviction or prior history; and, 3) has written approval from the U.S. Probation Officer. This provision does not encompass persons under the age of eighteen (18), such as waiters, cashiers, ticket vendors, etc. with whom the defendant must deal, in order to obtain ordinary and usual commercial services. If unanticipated contact with a minor occurs, the defendant shall immediately remove himself/herself from the situation and shall immediately notify the probation officer.
8. The defendant shall not loiter within 100 feet of any parks, school property, playgrounds, arcades, amusement parks, day-care centers, swimming pools, community recreation fields, zoos, youth centers, video arcades, carnivals, circuses or other places primarily used or can reasonably be expected to be used by children under the age of eighteen (18), without prior written permission of the U.S. Probation Officer.
9. Except as required for employment (see Condition 4), the defendant shall not use, purchase, possess, procure, or otherwise obtain any computer (as defined in 18 U.S.C. § 1030(e)(1)) or electronic device that can be linked to any computer networks, bulletin boards, internet, internet service providers, or exchange formats involving computers unless approved by the U.S. Probation Officer. Such computers, computer hardware or software is subject to warrantless searches and/or seizures by the U.S. Probation Office.
10. The defendant shall allow the U.S. Probation Officer, or other designee, to install software designed to monitor computer activities on any computer the defendant is authorized to use, except for that of an employer. This may include, but is not limited to, software that may record any and all activity on computers (as defined in 18 U.S.C. § 1030(e)(1)) the defendant may use, including the capture of keystrokes, application information, internet use history, email correspondence, and chat conversations. The defendant shall pay any costs related to the monitoring of computer usage.
11. The defendant shall not use or have installed any programs specifically and solely designed to encrypt data, files, folders, or volumes of any media. The defendant shall, upon request, immediately provide the probation officer with any and all passwords required to access data compressed or encrypted for storage by any software.
12. The defendant shall provide a complete record of all computer use information including, but not limited to, all passwords, internet service providers, email addresses, email accounts, screen names (past and present) to the probation officer and shall not make any changes without the prior approval of the U.S. Probation Officer.
13. The defendant shall not have any social networking accounts on networks used or reasonably expected to be used by minors without the approval of the U.S. Probation Officer.
14. The defendant shall not be employed in any position or participate as a volunteer in any activity that involves direct or indirect contact with children under the age of eighteen (18), and under no circumstances may the defendant be engaged in a position that involves being in a position of trust or authority over any person under the age of eighteen (18), without written permission from the U.S. Probation Officer.

## CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments.

| ASSESSMENT | JVTA ASSESSMENT | AVAA ASSESSMENT | RESTITUTION | FINE |
|---|---|---|---|---|
| $400.00 | TBD | $117,000.00 | $6,849.28 | $0.00 |

## INTEREST

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

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

■ The interest requirement is waived.

☐ The interest requirement is modified as follows:

## COURT APPOINTED COUNSEL FEES

☐ The defendant shall pay court appointed counsel fees.

## RESTITUTION PAYEES

The defendant shall make restitution to the following payees in the amounts listed below:

| NAME OF PAYEE | AMOUNT OF RESTITUTION ORDERED |
|---|---|
| Aprilblonde<br>payable to Restore the Child in Trust for April | $3,000.00 |
| S.W.<br>payable to Carrie Wade | $3,849.28 |

☐ Joint and Several Restitution is Ordered as follows:

- ☐ Defendant and Co-Defendant Names and Case Numbers *(including defendant number)* if appropriate:
- ☐ Associated Defendant Name(s) and Case Number(s) *(including defendant number)* if appropriate:
- ☐ Court gives notice that this case may involve other defendants who may be held jointly and severally liable for payment of all or part of the restitution ordered herein and may order such payment in the future.

The victims' recovery is limited to the amount of their loss and the defendant's liability for restitution ceases if and when the victim(s) receive full restitution. Any payment not in full shall be divided proportionately among victims.

Pursuant to 18 U.S.C. § 3364(i), all nonfederal victims must be paid before the United States is paid.

## SCHEDULE OF PAYMENTS

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

A ☐ Lump sum payment of $0.00 due immediately, balance due
☐ Not later than_____
☐ In accordance ☐ (C), ☐ (D) below; or

B ■ Payment to begin immediately (may be combined with ☐ (D) below); or

C ☐ Payment in equal **monthly** installments of **$50.00** to commence **60 days** after the date of this judgment; or

D ☐ In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, payments shall be made in equal **monthly** installments of **$50.00** to commence **60 days** after release from imprisonment to a term of supervision. The U.S. Probation Officer shall pursue collection of the amount due, and may request to modify a payment schedule if appropriate 18 U.S.C. § 3572.

Special instructions regarding the payment of criminal monetary penalties:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court costs:

■ The defendant shall forfeit the defendant's interest in the following property to the United States as set forth in the Order of Forfeiture at document 75 entered 4/3/2023:
Document No. 75 is incorporated into this amended judgment.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. **All criminal monetary penalty payments are to be made to the United States District Court Clerk, 401 West Trade Street, Room 1301, Charlotte, NC 28202**, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. All criminal monetary penalty payments are to be made as directed by the court.

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

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.

STATEMENT OF ACKNOWLEDGMENT

I understand that my term of supervision is for a period of _____months, commencing on _____.

Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

I understand that revocation of probation and supervised release is mandatory for possession of a controlled substance, possession of a firearm and/or refusal to comply with drug testing.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ Date: _____
Defendant

(Signed) _____ Date: _____
U.S. Probation Office/Designated Witness

☐ The Court gives notice that this case may involve other defendants who may be held jointly and severally liable for payment of all or part of the restitution ordered herein and may order such payment in the future.