PETITION APPENDIX

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APPENDIX A

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United States District Court, M.D. Florida,
Tampa Division.

UNITED STATES of America
v.
Jordan Jysae PULIDO

Case No. 8:20-cr-292-VMC-CPT
|
Signed 07/02/2021

Attorneys and Law Firms

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REPORT AND RECOMMENDATION

CHRISTOPHER P. TUITE, United States Magistrate Judge

***1** Before the Court are Defendant Jordan Jysae Pulido's *Motion to Suppress* (Doc. 58), the government's response in opposition (Doc. 73), and Pulido's reply to the government's response (Doc. 84). Following oral argument, I conducted an evidentiary hearing on the matter (Doc. 104) and also received a set of stipulated facts from the parties (Doc. 98). After careful review, I respectfully recommend that Pulido's motion be denied.

I.[1]

1 Unless otherwise noted, the background set forth herein is derived from the parties' stipulated facts and the evidence adduced at the hearing.

Pulido stands charged in a four-count indictment with enticement and coercion of a minor, in violation of 18 U.S.C. § 2422(b); traveling with the intent to engage in illicit sexual conduct with a minor, in violation of 18 U.S.C. § 2423(b); conspiracy to transport a minor with the intent to engage in sexual activity, in violation of 18 U.S.C. §§ 2423(a), (e); and transportation of a minor with the intent to engage in sexual activity, in violation of 18 U.S.C. § 2423(a). (Doc. 1). These charges stem from an investigation performed by state and federal law enforcement into Pulido's relationship with a minor female from Croatia (Victim 1), which began as early as September 2017 and ended in August 2018. (Doc. 98 at 1).

According to the evidence obtained during the investigation, Victim 1 met Pulido over the internet when she was around fourteen years old and eventually became romantically involved with him. (Doc. 98 at 2; Doc. 104 at 36). Pulido was twenty-three years old at the time. (Doc. 98 at 2). Throughout their relationship, Pulido and Victim 1 used a variety of social media platforms to communicate, including Facebook. *Id.* at 3.

In June 2018, Pulido traveled from his residence in Tampa, Florida, to Victim 1's home in Croatia, where he stayed with Victim 1 and her family for approximately six weeks. *Id.* at 2. During that visit, Pulido engaged in sexual intercourse with Victim 1 and asked her to marry him. *Id.* Sometime thereafter, Pulido and his father— co-defendant Roberto Santana Jimenez—arranged for Victim 1 and her family to travel to Tampa at Pulido and Jimenez's expense. *Id.* Victim 1 claimed that she and Pulido again engaged in sexual activity once she and her family arrived in Florida. *Id.*

Although Victim 1 was supposed to return to Croatia with her family in early August 2018, she and Pulido left his residence the morning she and her family were scheduled to depart so she would miss her flight. *Id*. Jimenez subsequently persuaded Victim 1's family to travel back to their home country without their child, warning Victim's 1 mother that there could be adverse law enforcement consequences if she complained about the matter to the police. *Id*.

Upon the family's arrival in Croatia, Victim's 1 mother received a "distress[ed] text message" from her daughter indicating that Pulido and his family were holding Victim 1 against her will and that she wanted to come home. *Id.* Victim 1's mother alerted the Croatian authorities, who then contacted the International Criminal Police Organization and the Florida Department of Law Enforcement (FDLE). *Id.*

***2** On August 12, 2018, FDLE went to Pulido's residence and took Victim 1 into their charge. *Id.* at 2–3. The next day, Pulido fled to Mexico where he stayed with his parents' extended family. *Id.* at 3. Later that month, one of Pulido's family members sent him a Facebook message advising him that it was safe to return to Tampa. *Id.*

Around the same time, FDLE sought the assistance of Homeland Security Investigations (HSI) Special Agent Tavey Garcia. *Id.*; (Doc. 104 at 36). A seasoned HSI agent by that time, Garcia had spent the last several years of her career investigating child exploitation offenses.[2] *Id.* at 32–34.

2 At the hearing, Garcia defined child exploitation offenses as including the receipt, production, and distribution of child pornographic material, as well as traveling with the intent to meet a minor and transporting a minor with the intent to engage in sexual activity. (Doc. 104 at 32–33).

At the hearing, Garcia testified that law enforcement agents interviewed Victim 1 on several occasions throughout the investigation. *Id.* at 36–37, 44–45. According to Garcia, the statements Victim 1 provided during these interviews were consistent with each other, except as they related to Victim 1's sexual involvement with Pulido, which she initially denied but later acknowledged. *Id.* at 36–37. Garcia also testified that she was able to gather independent evidence corroborating much of what Victim 1 told the agents, including Facebook communications between Pulido and Victim 1 (Doc. 98 at 6; Doc. 104 at 7–10, 41), as well as travel records confirming that Pulido traveled from Tampa to Victim 1's home in Croatia (Doc. 98 at 6). Garcia further testified that the Facebook messages Pulido sent to Victim 1 were often “suggestive in nature” and included a shirtless photo of Pulido coming out of a shower or sauna. (Doc. 104 at 42–44). In addition to these messages, Garcia discovered a photograph of Victim 1 wearing an engagement ring Pulido gave her. (Doc. 98 at 6).

One of Victim 1's interviews with law enforcement occurred in November 2018 and was conducted by a forensic examiner. (Doc. 98 at 4; Doc. 104 at 46–50). During that interview, which Garcia observed, Victim 1 admitted to having sex with Pulido but maintained she and Pulido never exchanged sexually explicit pictures or videos with each other, nor did they ever take such pictures or record such videos while in each other's presence. (Doc. 98 at 4; Doc. 104 at 48–50). As Garcia later testified at the hearing, however, as an experienced investigator she views such representations with a fair amount of skepticism. (Doc. 104 at 34–36). She advised in this regard that victims of child enticement are not always forthcoming about “the complete nature of their communications with the accused,” and explained that law enforcement finds child pornographic images and videos “about [eighty] percent of the time” in cases where a child is being enticed. *Id.* at 34–35.[3]

3 Indeed, Garcia testified that she later confirmed after the challenged border search of Pulido in June 2019 that Victim 1 and Pulido had, in fact, “engaged in sexual acts” for one another while livestreaming over the internet. (Doc. 104 at 50–51, 56–59).

As part of her investigation, Garcia twice attempted to have Customs and Border Protection (CBP) intercept Pulido at the border and seize his electronic devices. (Doc. 98 at 3–5). The first of these attempts took place two months prior to the November 2018 forensic interview after Garcia learned that Pulido would be reentering the United States from Mexico. *Id.* at 4. In advance of this expected border crossing by Pulido, Garcia issued the following “lookout” to CBP:

> ***3** On or about August 27, 2018, the [FDLE] requested investigative case assistance from HSI Tampa. The investigative case involves a United States citizen, Jordan Jysae Pulido, who travelled from the United States to Croatia to meet with a minor female child after having an online/internet relationship with her. Pulido ultimately enticed the child to come to the United States with him where the two allegedly engaged in sexual acts. The child was maintained in the United States against her will and FDLE had to intervene and rescue the child who has since been returned to her family in Croatia. The day following the child's rescue, Pulido fled to Mexico.

Id. Despite this "lookout," Pulido entered the United States without his devices being seized. *Id.*

In May 2019, Pulido again traveled to Mexico. (Doc. 98 at 4). In anticipation of him coming back across the border, Garcia forwarded the following additional information to CBP:

> The subject of my investigation met a juvenile female from Croatia online. The two had an online relationship and he traveled to Croatia where he engaged in sexual activity with a minor. [He] then convinced the minor to travel to the United States with him where he and his parents held her against her will and he continued to engage in sexual relations with her. The child managed to contact her family in Croatia and through MLAT she was rescued last summer. However, when she was rescued the subject fled to Mexico. When he returned from Mexico several months later there was confusion and he wasn't inspected. Now, his mother and father are believed to be here, illegally, from Mexico. We have done a [search warrant] on the subjects [sic] social media and discovered that they paid [$5,000] to get "papers" for his oldest brother who was a minor when he and his parents arrived. The [Facebook] communications between the subject and said brother included conversations about their needing to raise enough money to get papers for their parents – we have not been able to fully [identify] the parents.
>
> The subject now has a new "girlfriend" possibly in Mexico and that is where it is believed he travelled. I desperately want to get his electronics detained and sent to me for full imaging and analysis.

Id. at 4–5.

On June 4, 2019, Pulido reentered the United States through the Dallas/Fort Worth International Airport. *Id.* at 5. CBP conducted a border search of Pulido and sent two electronic devices he had with him at the time—an Apple iPhone and an Apple MacBook—to Garcia in Tampa. *Id.* A subsequent forensic analysis of these items revealed, among other things, "photographs of Pulido cuddling and kissing Victim 1, headshots of Victim 1 and her family that were used in obtaining their visas to travel from Croatia to the United States, an asylum application, screenshots of messages to Victim 1 and her family members on a variety of social medial platforms," including Facebook, as well as iMessage and Skype chat communications. *Id.* Garcia reviewed the electronic reports for both the iPhone and MacBook and, in doing so, read the messages contained in those reports in their entirety. *Id.* at 5–6. While no child pornography was located on either device (Doc. 104 at 13, 17, 52), [4] it is undisputed that "[s]ome of th[e] messages are incriminating" (Doc. 58 at 2).

4 According to Garcia, the devices did contain images of females who appeared to be young but who could not be initially classified as minors. (Doc. 104 at 13–14, 39–40, 52). Garcia testified that at least some of these images were sexual in nature. *Id.* at 14–15, 39.

By way of the instant motion, Pulido now seeks to exclude "any messages in any

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form, including any images or screenshots of any messages" obtained from his iPhone and MacBook.[5] (Doc. 95). In support of this request, Pulido argues, *inter alia*, that the government's review of these messages exceeded its authority under the so-called "border exception" to the Fourth Amendment. (Doc. 58; Doc. 104 at 23–25). The government opposes Pulido's motion, asserting that the seizure of the challenged communications falls within the ambit of the border exception as interpreted by the Eleventh Circuit and other courts.[6] (Doc. 73).

5 The parties did not submit the messages to the Court because they are voluminous. (Doc. 104 at 20–22).

6 The government clarified in its response to Pulido's suppression motion (Doc. 73 at 11) and at oral argument that it was not relying on either the plain view doctrine or the good faith exception.

II.

***4** The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause ...." U.S. Const. amend. IV. A border search, however, constitutes a "historically recognized exception" to the Fourth Amendment's warrant requirement, *United States v. Ramsey*, 431 U.S. 606, 621, 97 S.Ct. 1972, 52 L.Ed.2d 617 (1977), and is grounded in "the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country," *United States v. Flores-Montano*, 541 U.S. 149, 152, 124 S.Ct. 1582, 158 L.Ed.2d 311 (2004) (quoting *Ramsey*, 431 U.S. at 616, 97 S.Ct. 1972). As the Supreme Court has explained:

> At the border, customs officials have more than merely an investigative law enforcement role. They are also charged, along with immigration officials, with protecting this Nation from entrants who may bring anything harmful into this country, whether that be communicable diseases, narcotics, or explosives.

United States v. Montoya de Hernandez, 473 U.S. 531, 544, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985) (citations omitted).

The Supreme Court has instructed courts to employ a two-prong inquiry in evaluating the legality of a border search. *Ramsey*, 431 U.S. at 615–16, 97 S.Ct. 1972; *see also* *United States v. Alfaro-Moncada*, 607 F.3d 720, 726 (11th Cir. 2010) (citing *Ramsey*, 431 U.S. at 611–16, 97 S.Ct. 1972). Under this approach, courts must first determine whether the search was authorized by statute and, if so, they must then decide whether the search was reasonable under the Fourth Amendment. *Ramsey*, 431 U.S. at 611–16, 97 S.Ct. 1972; *Alfaro-Moncada*, 607 F.3d at 726

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(citing *Ramsey*, 431 U.S. at 611–16, 97 S.Ct. 1972).

In addressing the second prong, courts must weigh the extent to which the border search intrudes upon an individual's privacy against the legitimate governmental interests it advances. *Riley v. California*, 573 U.S. 373, 385, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014) ("Absent more precise guidance from the founding era, we generally determine whether to exempt a given type of search from the warrant requirement by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.") (internal quotation marks and citation omitted); *Alfaro-Moncada*, 607 F.3d at 727 ("To determine the reasonableness of a border search, or of any search for that matter, we weigh 'its intrusion on [an] individual's Fourth Amendment interests against its promotion of legitimate governmental interests.' ") (quoting *Denson v. United States*, 574 F.3d 1318, 1338 (11th Cir. 2009)). The Supreme Court has cautioned, however, that "the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior." *Montoya de Hernandez*, 473 U.S. at 538, 105 S.Ct. 3304. This is because, at the border, an individual's expectation of privacy is diminished, *Alfaro-Moncada*, 607 F.3d at 728, while the government's interest in preventing the entry of unwanted persons and effects "is at its zenith," *Flores-Montano*, 541 U.S. at 152, 124 S.Ct. 1582. As a result, the "Fourth Amendment balance of interests leans heavily to the [g]overnment" in the context of border searches. *Montoya de Hernandez*, 473 U.S. at 544, 105 S.Ct. 3304; *see also Alfaro-Moncada*, 607 F.3d at 728 (stating that "the balance between the interests of the government and the privacy right of the individual is struck more favorably to the government" where border searches are involved) (citation omitted).

In this case, the first prong of the border search inquiry—i.e., whether the forensic examination of Pulido's iPhone and MacBook was authorized by statute—can be readily disposed of. The statute and regulatory section governing a customs officer's authority to search a passenger can be found in, *inter alia*, 19 U.S.C. §§ 1496 and 1582, and one of their implementing regulations, 19 C.F.R. § 162.6, the latter of which the government cites in its response (Doc. 104 at 10). In relevant part, section 1496 states that a customs officer may examine "the baggage of any person arriving in the United States in order to ascertain what articles are contained therein," 19 U.S.C. § 1496, while section 1582 provides that "all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the [g]overnment," 19 U.S.C. § 1582. Section 162.6, in turn, states, in pertinent part, that "[a]ll persons, baggage, and merchandise arriving in the Customs territory of the United States from places outside thereof are liable to inspection and search by a [c]ustoms officer." 19 C.F.R. § 162.6; *see also Denson*, 574 F.3d at 1340 (noting that U.S. Customs adopted section 162.6 after Congress enacted section 1582, which, along with other laws governing border inspections, "provide[ ] that when Customs Officers first encounter an individual seeking entry into the United States the officer has discretion to stop the person and conduct a preliminary border search without fear of running afoul of the Constitution”). In light of these provisions, I agree with the government that the forensic examination of Pulido's devices was statutorily supported. Pulido does not meaningfully argue otherwise. (Doc. 104 at 11–12).[7]

7 At the hearing, Pulido acknowledged that there may be additional statutory bases for the border search of his devices, including—as the government argued—19 U.S.C. § 1467 (special inspection, examination, and search). *See* (Doc. 104 at 10–12); *see also* *United States v. Wanjiku*, 919 F.3d 472, 480 (7th Cir. 2019) (noting that the modern analogues of the customs law passed by the First Congress include 19 U.S.C. §§ 482, 1467, 1496, 1581, and 1582).

***5** Although Pulido effectively concedes that the search of his iPhone and MacBook was permitted by statute, he challenges whether the second prong of the border search analysis —i.e, the reasonableness of the inspection —has been met. The crux of his argument in this regard is that the border exception only allows the government to search for contraband. (Doc. 58 at 3). And, while acceding that child pornography constitutes such illicit material, Pulido maintains that there was no child pornography immediately apparent on the face of his messages and that the government was therefore prohibited from reviewing them without a warrant. *Id.*[8] (contending that a border search for contraband only “authorized a cursory glance at the messages on [Pulido's] devices to ensure that the messages did not contain contraband [i.e. child pornography, but that] the agents exceeded the scope of the border-search warrant exception by reading the content of th[ose] written messages”). Pulido's argument does not survive scrutiny.

8 Pulido also maintains that the border search of his electronic devices required a warrant, probable cause, and/or reasonable suspicion but recognizes that these contentions are foreclosed by binding Eleventh Circuit precedent. (Doc. 58 at 3 n.*; Doc. 84 at 8).

I begin with two recent Eleventh Circuit decisions—*United States v. Vergara*, 884 F.3d 1309 (11th Cir. 2018) and *United States v. Touset*, 890 F.3d 1227 (11thCir. 2018)—which together lay the foundation for resolving Pulido's challenge. In *Vergara*, the defendant (Vergara) was returning to the United States on a cruise from Mexico with three smartphones in his luggage. 884 F.3d at 1311. A CBP agent searched one of these phones and found it to contain child pornography. *Id.* A subsequent forensic examination[9] of two of the devices revealed “more than 100 images and videos ... involv[ing] the use of a minor engag[ed] in sexually explicit conduct.” *Id.*

9 A “forensic” examination (sometimes referred to as an “advanced” search) is different from a “basic” or “manual” search of an electronic device. *See* *Alasaad v. Mayorkas*, 988 F.3d 8, 13 (1st Cir. 2021), *cert. denied*, ––– U.S. ––––, ––– S.Ct. ––––, ––– L.Ed.2d ––––, 2021 WL 2637881 (June

28, 2021) (noting that CBP policy categorizes an "advanced" search as one "in which an Officer connects external equipment, through a wired or wireless connection, to an electronic device not merely to gain access to the device, but to review, copy, and/ or analyze its contents" and a "basic" search as any "non-advanced" search) (citation omitted). The parties agree that HSI's examination of Pulido's devices constituted a forensic search. (Doc. 104 at 13).

Upon being charged with various child pornography-related offenses, Vergara moved to suppress the evidence seized from his smartphones, arguing, *inter alia*, that under the Supreme Court's decision in *Riley v. California*, the agents were required to secure a warrant beforehand. *Id.* In *Riley*, the Supreme Court held that the government could not conduct a warrantless search of a cell phone seized incident to a lawful arrest because such an inspection would significantly intrude upon an individual's privacy and would not meaningfully promote the governmental interests behind the search-incident-to-arrest exception to the warrant requirement. *Riley*, 573 U.S. at 386, 395–96, 134 S.Ct. 2473. The district court rejected Vergara's argument and denied his motion. *Vergara*, 884 F.3d at 1311. On appeal to the Eleventh Circuit, a divided panel affirmed the district court's decision, ruling that "[b]order searches have long been excepted from warrant and probable cause requirements," and that "the holding of *Riley* d[id] not change this rule." *Id.* at 1312–13.

In *Touset*, a series of investigations by private organizations and the government suggested that the defendant (Touset) was involved with child pornography. 890 F.3d at 1230. When Touset returned to the United States from a trip abroad, a CBP officer inspected his luggage and located two iPhones, a camera, two laptops, two external hard drives, and two tablets. *Id.* The CBP agent manually inspected the iPhones and the camera and found that they did not contain any illicit images. *Id.* A forensic search of the remaining devices, however, led to the discovery of child pornography on both the laptops and the external hard drives. *Id.*

***6** Touset was thereafter charged with receipt, transportation, and possession of child pornography, and moved to suppress the evidence seized from his computer equipment. *Id.* at 1231. The district court denied Touset's motion and the Eleventh Circuit affirmed, ruling "that the Fourth Amendment does not require any suspicion for forensic searches of electronic devices at the border," and that—alternatively—"the searches of Touset's electronic devices were supported by reasonable suspicion." *Id.* at 1230–32.

In support of its decision, the Eleventh Circuit observed that the Supreme Court "has never required reasonable suspicion for a search of property at the border, however non-routine and intrusive," nor has it "been willing to distinguish ... between different types of property." *Id.* at 1233 (internal quotation marks and citation omitted). Based on the lack of such Supreme Court precedent, the Eleventh Circuit saw "no reason why the Fourth Amendment would require suspicion for a forensic search of an electronic device when it imposes no such requirement for a search of other personal property." *Id.*

The Eleventh Circuit also contrasted searches of property with the type of " 'highly intrusive [border] searches of a person's body' " that do require reasonable suspicion. *Id.* at 1234 (quoting *Alfaro-Moncada*, 607 F.3d at 729). It noted that the three elements the latter searches share—namely, "(1) physical contact between the searcher and the person searched; (2) exposure of intimate body parts; and (3) use of force"—were not implicated by the search of computer equipment. *Id.* (internal quotation marks and citation omitted). The court elaborated:

> A forensic search of an electronic device is not like a strip search or an x-ray; it does not require border agents to touch a traveler's body, to expose intimate body parts, or to use any physical force against him. Although it may intrude on the privacy of the owner, a forensic search of an electronic device is a search of property. And our precedents do not require suspicion for intrusive searches of any property at the border.

Id. (citing *Alfaro-Moncada*, 607 F.3d at 728–29, 732).

The Eleventh Circuit then went on to juxtapose the "diminished privacy interests of travelers" at the border against the "paramount interest [of the sovereign] in protecting ... its territorial integrity" against "unwanted persons and effects." *Id.* at 1235 (alterations in original) (quoting *Flores-Montano*, 541 U.S. at 152–53, 124 S.Ct. 1582). It emphasized that "child pornography, no less than drugs or other kinds of contraband, is prohibited from 'enter[ing] the country,' and the government interest in stopping contraband at the border does not depend on whether child pornography takes the form of digital files or physical photographs." *Id.* (quoting *Ramsey*, 431 U.S. at 620, 97 S.Ct. 1972).

As it did in *Vergara*, the Eleventh Circuit additionally found that the Supreme Court's decision in *Riley* did not alter the balancing of the competing interests at stake at the border, reiterating that *Riley* did not apply to border searches and that "[p]roperty and persons are different" in any event. *Touset*, 890 F.3d at 1234–35 (citation omitted). Indeed, the court in *Touset* commented that, "[i]f anything, the advent of sophisticated technological means for concealing contraband only heightens the need of the government to search property at the border unencumbered by judicial second-guessing." *Id.* at 1235.

The Eleventh Circuit's opinions in *Vergara* and *Touset* are instructive but they do not answer the particular question posed by Pulido's suppression motion—i.e., whether the government's border search authority is confined to contraband, such as child pornography. *Vergara*, 884 F.3d at 1312; *Touset*, 890 F.3d at 1236–37. Notably, the court's opinions in *Vergara* and *Touset* did not restrict the parameters of an advanced border search solely to such illegal items. *Vergara*, 884 F.3d at 1312; *Touset*, 890 F.3d at 1236–37. That said, the extent of the searches in those actions was arguably not at issue because the forensic examinations revealed child pornography. To resolve Pulido's challenge, it is helpful to look to decisions handed down by other circuit courts of appeal that directly address the permissible boundaries of an advanced border search of an electronic device. As explained below, these appellate courts have reached differing conclusions.

***7** In *United States v. Cano*, for example, the Ninth Circuit determined that "cell phone searches at the border, whether manual or forensic, must be limited in scope to a search for digital contraband." *United States v. Cano*, 934 F.3d 1002, 1007 (9th Cir. 2019), *cert. denied*, ––– U.S. ––––, ––– S.Ct. ––––, ––– L.Ed.2d ––––, 2021 WL 2637990 (June 28, 2021). *Cano* involved a defendant who was arrested for transporting cocaine in his vehicle as he attempted to enter the United States from Mexico. *Id.* at 1008. CBP seized the defendant's cell phone in connection with his arrest and performed an advanced search that revealed incriminating data. *Id.* at 1008–09. In response to Cano's challenge on appeal to the use of this information, the government contended that "searches for evidence that would aid in prosecuting past and preventing future border-related crimes are tethered to the purpose of the border search exception—namely, interdicting foreign contraband—and thus fall within its scope." *Id.* at 1016–17.

Although describing the matter as a "close question," the Ninth Circuit disagreed. *Id.* In doing so, the court opined that the "strongest historic rationale" for the border search exception is to prevent the importation of contraband into the country. *Id.* at 1018 (quoting *United States v. Molina-Isidoro*, 884 F.3d 287, 295 (5th Cir. 2018) (Costa, J., specially concurring) (collecting cases)). As a result, the court concluded that "the border search exception authorizes warrantless searches of a cell phone only to determine whether the phone contains contraband." *Id.*

In *Alasaad v. Mayorkas*, the First Circuit took issue with the Ninth Circuit on this point, stating that "*Cano* fails to appreciate the full range of justifications for the border search exception beyond the prevention of contraband itself entering the country." 988 F.3d at 21. In *Alasaad*, the plaintiffs brought a civil action to enjoin the policies promulgated by the CBP and Immigration and Customs Enforcement (ICE) regarding searches of electronic devices at the border. *Id.* at 12, 14, 16. The First Circuit concluded after careful analysis that border searches of electronic devices need not be constrained to searches for contraband. *Id.* at 19.

In arriving at this conclusion, the court stated that the constitutionality of warrantless border searches emanates from " 'the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country.' " *Id.* (quoting *Flores-Montano*, 541 U.S. at 152, 124 S.Ct. 1582). The First Circuit also noted that Supreme Court precedent "makes clear that the border search exception's purpose is not limited to interdicting contraband" but instead "serves to bar entry to those 'who may bring *anything* harmful into this country.' " *Id.* at 20 (emphasis in original) (quoting *Montoya de Hernandez*, 473 U.S. at 544, 105 S.Ct. 3304). And, the court explained, "[s]earching for *evidence* is vital to achieving the border search exception's purposes of controlling 'who and what may enter the" United States. *Id.* (quoting *Ramsey*, 431 U.S. at 620, 97 S.Ct. 1972) (emphasis added).

Based on these reasons (as well as others), the First Circuit determined that it could not ascribe to the "narrow view" adopted by the Ninth Circuit in *Cano* that the border search exception is restricted merely to contraband. *Id.* at 21. To the contrary, it held that even an advanced border search of an electronic device may be used to look "for contraband, evidence of contraband, or for evidence of activity in violation of the laws enforced or administrated by CBP or ICE." *Id.*

Akin to the First Circuit's opinion in *Alasaad*, the Fourth Circuit held in *United States v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018), that the parameters of a forensic border search of an electronic device are not confined to digital contraband. *Id.* at 143–44. In that case, the defendant (Kolsuz) was arrested at an airport while attempting to leave the country with firearm parts in his luggage. *Id.* at 136. A subsequent advanced search of his cell phone "yielded an 896–page report that included Kolsuz's personal contact lists, emails, messenger conversations, photographs, videos, calendar, web browsing history, and call logs, along with a history of Kolsuz's physical location down to precise GPS coordinates." *Id.* at 139. The district court denied Kolsuz's motion to suppress this evidence, and Kolsuz challenged that ruling on appeal. *Id.* at 139–142.

***8** In affirming the district court's decision, the Fourth Circuit dismissed Kolsuz's assertion that the border search exception was restricted "to intercepting contraband as it crosses the national border." *Id.* at 143. Rather, the court found that "[t]he justification behind the border search exception is broad enough to accommodate not only the direct interception of contraband as it crosses the border, but also the prevention and disruption of ongoing efforts to export contraband illegally, through searches initiated at the border." *Id.* at 143–44 (citations omitted). The court also found that there was a "direct link" between this justification for the border search exception and the predicate of the challenged search—namely, Kolsuz's alleged attempt to export firearms illegally without a license. *Id.* at 143, 147 n.7. And, the court determined that "[b]ecause the forensic search of Kolsuz's phone was conducted at least in part to uncover *information* about an ongoing transnational crime—in particular, *information* about [further] illegal firearms exports already underway, by freight or in the custody of a coconspirator," the search "fit[ ] within the core of the rationale underlying the border search exception." *Id.* at 144 (emphasis added) (internal quotation marks and citation omitted). [10]

10 In a later opinion, the Fourth Circuit clarified that "where a search at the border is so intrusive as to require some level of individualized suspicion, the object of that suspicion must bear

> some nexus to the purposes of the border search exception." *United States v. Aigbekaen*, 943 F.3d 713, 723 (4th Cir. 2019). The Fourth Circuit held, however, that the "[g]overnment may not 'invoke[ ] the border exception on behalf of its generalized interest in law enforcement and combatting crime,' " such that a search of a device to locate evidence in support of an ongoing *domestic* criminal investigation with "no transnational component" would be improper. *Id.* at 721, 723 (alteration in original) (quoting *Kolsuz*, 890 F.3d at 143).

In addition to the First Circuit's decision in *Alasaad* and the Fourth Circuit's opinion in *Kolsuz*, it appears that the Tenth, Seventh, and Fifth Circuits have likewise declined to limit the scope of advanced border searches of electronic devices to contraband. *See United States v. Williams*, 942 F.3d 1187, 1191 (10th Cir. 2019), *cert. denied*, ––– U.S. ––––, 141 S. Ct. 235, 208 L.Ed.2d 16 (2020); *Wanjiku*, 919 F.3d at 485–88; *Molina-Isidoro*, 884 F.3d at 291–92. In *Williams*, the Tenth Circuit was unpersuaded by the defendant's argument that a border search of his laptop and cell phone was unlawful because he was not suspected of importing any contraband *or* violating any customs laws. *Id.* at 1191. Similarly, in *Wanjiku*, the Seventh Circuit permitted a forensic border examination of a defendant's electronic devices based upon reasonable suspicion that the search "would reveal *evidence* of [the defendant's] criminal activity involving minors." 919 F.3d at 488 (emphasis added) (internal quotation marks omitted). And, in *Molina-Isidoro*, the Fifth Circuit upheld the border search of a defendant's phone because the government had probable cause to believe the defendant was engaged in drug trafficking, which "created a fair probability that that [her] phone contained *communications*" relevant to those crimes. 884 F.3d at 291–92 (emphasis added).

As the above survey of appellate court decisions reveals, the greater weight of authority largely supports the government's position that an advanced border search of an electronic device is not confined to contraband. I find this decisional law—particularly *Alasaad*—persuasive and respectfully recommend that the Court follow it. Several considerations inform my recommendation.

To begin, the Supreme Court has never expressly limited the government's border search authority to contraband. Instead, the Court has broadly described the border search exception as being rooted in the sovereign's interest in controlling "who and what may enter the country," *Ramsey*, 431 U.S. at 620, 97 S.Ct. 1972, and "in protecting[ ] its territorial integrity," *Flores-Montano*, 541 U.S. at 153, 124 S.Ct. 1582. In fact, as previously referenced, the Court has emphasized that "[t]he [g]overnment's interest in preventing the entry of unwanted persons and effects is at its zenith" at the border. *Id.* at 152, 124 S.Ct. 1582.

***9** By contrast, the Court has made clear that an individual has a decreased privacy expectation at the border. *Id.* at 154, 124 S.Ct. 1582 (noting that a traveler's "expectation of privacy is less at the border") (citation omitted). And, the Eleventh Circuit has explicitly rejected the argument that a traveler's privacy

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concerns at the border are heightened simply because computer equipment is involved, *Touset*, 890 F.3d at 1234; *Vergara*, 884 F.3d at 1312–13, or that a traveler lacks practical options to protect the privacy of his digital devices upon entering the country, *Touset*, 890 F.3d at 1234–35 (citing *United States v. Cotterman*, 709 F.3d 952, 968 (9th Cir. 2013) (en banc)). Rather, it has expressed the view that those crossing the border are on notice of a potential search and their corresponding diminished privacy interest. *Id.*

Furthermore, declining to confine the border search exception to contraband does not unmoor that exception from the justifications upon which it is grounded. [11] It is important to highlight in this regard that the Supreme Court has rejected the distinction between evidence and contraband, stating that "[n]othing in the language of the Fourth Amendment supports the distinction between 'mere evidence' and instrumentalities, fruits of crime, or contraband." *Warden v. Hayden*, 387 U.S. 294, 301, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); *see also* *United States v. Gurr*, 471 F.3d 144, 149 (D.C. Cir. 2006) (holding in the context of the border search exception that "[t]he distinction that [defendant] would draw between contraband and documentary evidence of a crime is without legal basis") (citing *Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782). Nor does the rationale for the border search exception appear to be constrained simply to interdicting contraband. *Alasaad*, 988 F.3d at 20; *Kolsuz*, 890 F.3d at 143. Instead, as noted above, it also includes "controlling 'who and what may enter the country.' " *Alasaad*, 988 F.3d at 20 (emphasis added) (quoting *Ramsey*, 431 U.S. at 620, 97 S.Ct. 1972). And, as the First Circuit explained in *Alasaad*, "[s]earching for *evidence* is vital to achieving th[is] purpose[.]" *Id.* at 20 (emphasis added) (quoting *Ramsey*, 431 U.S. at 620, 97 S.Ct. 1972). This is particularly true in this case since Pulido's alleged child enticement activities involved a "transnational component." *Aigbekaen*, 943 F.3d at 721–22.

11 In *Alasaad*, the First Circuit observed that in the "*non-border* context[,] the Supreme Court has held that warrantless searches 'must be limited in scope to that which is justified by the particular purposes served by the exception,' " and that the Supreme Court's decision in "*Riley* did not purport to extend this rule to the border search context." *Alasaad*, 988 F.3d at 19 (emphasis added) (quoting *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)). I assume, without deciding, that such a limitation applies to the challenged border search here.

Moreover, as discussed previously, the courts that have narrowed the scope of the border search exception in some fashion have relied on the Supreme Court's decision in *Riley* in one or more respects. *See, e.g.*, *Aigbekaen*, 943 F.3d at 722 (citing *Riley* to buttress its finding that it "would be patently unreasonable to permit highly intrusive forensic [g]overnment searches of travelers' digital devices, without warrants, on bases unrelated to the United States's sovereign authority over its borders"); *Cano*, 934 F.3d at 1014–16 (citing *Riley* as further support for affording increased protections to cell phones at the border); *see also* *Vergara*, 884 F.3d at 1317 (J. Pryor, J., dissenting) ("Excepting forensic cell phone searches [at the border] from the warrant requirement because those searches may produce evidence helpful in future criminal investigations would thus 'untether the rule from [its] justifications.' ") (quoting *Riley*, 573 U.S. at 386, 134 S.Ct. 2473). As noted above, however, the Eleventh Circuit has twice held that *Riley* does not apply at the border, at least with respect to an individual's privacy interests. *Touset*, 890 F.3d at 1234 ("[O]ur decision in *Vergara* made clear that *Riley*, which involved the search-incident-to-arrest exception, does not apply to searches at the border."); *Vergara*, 884 F.3d at 1312 ("[T]he Supreme Court expressly limited its holding [in *Riley*] to the search-incident-to-arrest exception.").

***10** Finally, relying on "judicial standard-setting" to limit the border search exception merely to inspections for contraband runs counter to the deference the Eleventh Circuit and other courts have traditionally shown to the executive and legislative branches in this rather complex and delicate area. As the Eleventh Circuit cautioned in *Touset*:

> Instead of charging unnecessarily ahead, we must allow Congress to design the appropriate standard through the more adaptable legislative process and the wider lens of legislative hearings. Such a legislative process would be informed by numerous representatives of the executive branch, who can lend their practical insights and experience to the inquiry. The dangers of judicial standard-setting in an area as sensitive as border searches are apparent. Simply put, we must apply the law and leave the task of developing new rules for rapidly changing technologies to the branch most capable of weighing the costs and benefits of doing so. Judicial restraint is especially important in the context of border searches, where there is a longstanding historical practice of deferring to the legislative and executive branches.

890 F.3d at 1237 (internal alterations, quotation marks, and citations omitted); *see also Alasaad*, 988 F.3d at 20 ("Congress is better situated than the judiciary to identify the harms that threaten us at the border.") (citations omitted); *Kolsuz*, 890 F.3d at 151 (Wilkinson, J., concurring) (describing "[t]he dangers of judicial standard-setting in an area as sensitive as border searches"). In light of this preference for judicial restraint in the border context, along with the other reasons articulated above, the Eleventh Circuit has signaled that any limitations on the border search exception should be confined solely to "highly intrusive searches of a person's body" or searches involving the use of force. *Touset*, 890 F.3d at 1234 (quoting *Alfarao-Moncada*, 607 F.3d at 729); *Vergara*, 884 F.3d at 1312.

In sum, given the absence of any explicit Supreme Court authority limiting border searches to contraband; the Supreme Court's broad pronouncements regarding the government's "paramount interest" in protecting and controlling its boundaries, *Flores-Montano*, 541 U.S. at 153, 124 S.Ct. 1582, as compared with the diminished privacy expectations of travelers entering and exiting the country; the Eleventh Circuit's resistance to placing restrictions on the border search exception other than where the searches at issue involve physical contact between the searcher and the person searched, the exposure of intimate body parts, or the use of force —none of which are present here; and the Eleventh Circuit's emphasis on the need for judicial restraint in the highly sensitive area of border crossings, I find that HSI's forensic examination of Pulido's iPhone and MacBook, along with Garcia's subsequent reading of the messages on those devices, was reasonable. As such, the government's challenged conduct satisfies the second prong of the border search analysis. *Ramsey*, 431 U.S. at 611–16, 97 S.Ct. 1972; *Alfaro-Moncada*, 607 F.3d at 726 (citing *Ramsey*, 431 U.S. at 611–16, 97 S.Ct. 1972).

Contrary to Pulido's assertions, the Supreme Court's decision in *Ramsey* does not dictate a different result. In *Ramsey*, customs officials opened envelopes mailed from Thailand to Washington, D.C. that appeared to contain merchandise or contraband, rather than only correspondence. 431 U.S. at 609, 97 S.Ct. 1972. The customs officials undertook these actions based on regulatory provisions which authorized the opening of envelopes upon "reasonable cause to believe" that the customs laws were being violated but prohibited the "reading of correspondence absent a search warrant." *Id.* at 623, 97 S.Ct. 1972.

***11** In response to an argument that searching the envelopes violated the First Amendment, the Court held that the customs officials' act of opening the envelopes, without reading the letters, did not "impermissibly chill[ ] the exercise of free speech." *Id.* at 624, 97 S.Ct. 1972. The Court, however, did not decide the question of whether, "in the absence of the regulatory restrictions," a search of the mail would violate the First Amendment, and —if so—"whether the appropriate response would be to apply the full panoply of Fourth Amendment requirements." *Id.* at 624, 97 S.Ct. 1972 n.18. Thus, *Ramsey* does not stand for the broad proposition advocated by Pulido here that the mail searches in that case accorded with the Constitution *only* "because the inspector limited himself to the legitimate object of a border search." (Doc. 58 at 6).

III.

The government alternatively argues, *inter alia*, that it had reasonable suspicion to search Pulido's iPhone and MacBook for evidence of violations of the laws enforced or administered by HSI, including the child exploitation crimes alleged in the indictment. (Doc. 73 at 12; Doc. 104 at 25–27). Pulido counters that, to the extent the reasonable suspicion standard applies in this case, there had to be reasonable suspicion of actual child pornography on his devices—not reasonable suspicion of evidence of a past crime—because the parameters of the forensic examination of those devices should have been restricted only to a search for contraband. *Id.* at 26–27. Pulido's contention fails.

Reasonable suspicion requires that a government agent be able to point to specific and articulable facts which, taken together with rational inferences from those facts, provide a particularized and objective basis for suspecting that a defendant has engaged in criminal activity. *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In assessing whether a government agent had reasonable suspicion, courts "look at the totality of the circumstances from the perspective of an objectively reasonable police officer." *United States v. Smith*, 448 F. App'x 936, 938 (11th Cir. 2011) (per curiam) (citation omitted). [12] This " 'inquiry focuses on the information available to the officers at the time of the stop,' " not at some other juncture. *Touset*, 890 F.3d at 1237 (quoting *United States v. Lewis*, 674 F.3d 1298, 1305 (11th Cir. 2012)).

12 Unpublished opinions are not considered binding precedent but may be cited as persuasive authority. 11th Cir. R. 36-2.

Based on the parties' joint stipulation of facts, the testimony tendered by Garcia at the hearing, and the reasonable inferences to be drawn therefrom, I find that law enforcement possessed the following material information prior to the June 2019 border search of Pulido's iPhone and MacBook: (1) Pulido had engaged in online communications with a minor female (i.e., Victim 1) that evidenced enticement of Victim 1 for sexual activity, as demonstrated by Victim 1's statements to law enforcement and the messages obtained from Pulido and Victim 1's Facebook accounts before the search; (2) Victim 1—per her statements to law enforcement—had engaged in sexual acts with Pulido upon his arrival in Croatia and her arrival in Florida; (3) Garcia was aware from her years investigating child exploitation offenses that investigators discover child pornography in the vast majority of instances when a child is being enticed; (4) Pulido assisted Victim 1 in avoiding her flight back to Croatia with her family; (5) Victim 1 sent a distressed text message to her mother after missing her flight home; and (6) Pulido subsequently fled the country after Victim 1 was rescued by law enforcement. This information established reasonable suspicion to believe, at a minimum, that Pulido's electronic devices contained child pornography and/or evidence of child exploitation offenses, all of which—for the reasons stated previously—law enforcement had the authority to search for under the border search exception.

***12** The fact that Victim 1 denied Pulido asked her to send him pictures or videos of herself does not, as Pulido now asserts, undermine this finding. (Doc. 58 at 1–2; Doc. 104 at 29). As noted, Garcia testified that, in her extensive experience, victims of child enticement are not always forthcoming about "the complete nature of their communications with the accused." (Doc. 104 at 34–36). Not only was Garcia's testimony on this matter credible, it was also bolstered by the particular facts of this case. As Garcia explained at the hearing, Victim 1 initially denied engaging in sexual activity with Pulido (Doc. 104 at 37) only to later admit that she had (Doc. 98 at 2; Doc. 104 at 38). In addition, as further noted above, Victim 1 acknowledged after the search of Pulido's devices that, when the two were apart, they livestreamed videos of themselves engaging in sexual explicitly conduct. (Doc. 104 at 58).

IV.

For all of the above stated reasons, I respectfully recommend that the Court deny Pulido's motion to suppress. (Doc. 58).

Respectfully submitted this 2nd day of July 2021.

NOTICE TO PARTIES

A party has fourteen (14) days from this date to file written objections to the Report and Recommendation's factual findings and legal conclusions. A party's failure to file written objections, or to move for an extension of time to do so, waives that party's right to challenge on appeal any unobjected-to factual finding(s) or legal conclusion(s) the District Judge adopts from the Report and Recommendation. *See* 11th Cir. R. 3-1; 28 U.S.C. § 636(b)(1).

All Citations

Not Reported in Fed. Supp., 2021 WL 3476600

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APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. Case No. 8:20-cr-292-VMC-CPT

JORDAN PULIDO

_______________________________/

ORDER

This matter is before the Court on consideration of United States Magistrate Judge Christopher P. Tuite's Report and Recommendation (Doc. # 109), filed on July 2, 2021, recommending that Defendant Jordan Pulido's Motion to Suppress (Doc. # 58) be denied.

Pulido filed an objection to the Report and Recommendation on July 13, 2021. (Doc. # 112). As of the date of this Order, the government has not filed a response to the objection and the time to do so has lapsed.

The Court accepts and adopts the Report and Recommendation and denies the Motion to Suppress.

Discussion

After conducting a careful and complete review of the findings and recommendations, a district judge may accept, reject or modify the magistrate judge's report and recommendation. 28 U.S.C. § 636(b)(1); Williams v.

Wainwright, 681 F.2d 732 (11th Cir. 1982). If a party files a timely and specific objection to a finding of fact by the magistrate judge, the district court must conduct a *de novo* review with respect to that factual issue. Stokes v. Singletary, 952 F.2d 1567, 1576 (11th Cir. 1992). The district judge reviews legal conclusions *de novo*, even in the absence of an objection. See Cooper-Houston v. S. Ry. Co., 37 F.3d 603, 604 (11th Cir. 1994); Castro Bobadilla v. Reno, 826 F. Supp. 1428, 1431-32 (S.D. Fla. 1993), aff'd, 28 F.3d 116 (11th Cir. 1994).

Upon due consideration of the record, including Judge Tuite's Report and Recommendation, as well as Pulido's objection thereto, the Court overrules the objection and adopts the Report and Recommendation. The Court agrees with Judge Tuite's detailed and well-reasoned findings of fact and conclusions of law. The Report and Recommendation thoughtfully addresses the issues presented, and the objection does not provide a basis for rejecting the Report and Recommendation.

Accordingly, it is now

ORDERED, ADJUDGED, and **DECREED:**

(1) The Report and Recommendation (Doc. # 109) is **ACCEPTED** and **ADOPTED.**

(2) Defendant Jordan Pulido's Motion to Suppress (Doc. # 58) is **DENIED.**

DONE and **ORDERED** in Chambers in Tampa, Florida, this 6th day of August, 2021.

VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA — **Case Number: 8:20-cr-292-VMC-CPT**

v. — **USM Number: 11176-509**

JORDAN JYSAE PULIDO — **Samuel Landes, AFPD**

JUDGMENT IN A CRIMINAL CASE

Defendant was found guilty to Counts One, Two, Three, and Four of the Indictment. Defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 2422(b)	Enticement and Coercion of a Minor	August 12, 2018	One
18 U.S.C. § 2423(b)	Travel with Intent to Engage in Illicit Sexual Conduct	June 15, 2018	Two
18 U.S.C. §§ 2423(a) and (e)	Conspiracy to Transport Minor with Intent to Engage in Sexual Activity	July 23, 2018	Three
18 U.S.C. § 2423(a)	Transportation of a Minor with Intent to Engage in Sexual Activity	July 23, 2018	Four

Defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

Date of Imposition of Judgment:

February 23, 2022

Virginia M. Hernandez Covington

VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

March 3, 2022

IMPRISONMENT

Defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of term of **ONE HUNDRED and TWENTY (120) MONTHS**. This term consists of a 120-month term as to each of Counts 1, 2, 3, and 4, all such terms to run concurrently.

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

- Confinement at FCI Coleman so the defendant may be near family and friends.
- Defendant be allowed to study for and obtain his GED.
- Defendant be allowed to participate in the UNICOR program, if eligible.
- Defendant be allowed to participate in vocational training in the area of culinary arts, music, and engineering.

Defendant is remanded to the custody of the US Marshal to await designation by the Bureau of Prisons.

RETURN

I have executed this judgment as follows:

____

____

____

____

Defendant delivered on ____________________ to ______________________________________

at ____, with a certified copy of this judgment.

____
UNITED STATES MARSHAL

By:____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, Defendant will be on a Life term of supervised release. This term consists of a Life term as to each of Counts 1, 2, 3, and 4, all such terms to run concurrently.

MANDATORY CONDITIONS

1. Defendant shall not commit another federal, state or local crime.
2. Defendant shall not unlawfully possess a controlled substance.
3. Defendant shall refrain from any unlawful use of a controlled substance. 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.
   - The mandatory drug testing provisions of the Violent Crime Control Act are suspended. However, the Court orders Defendant to submit to random drug testing not to exceed 104 tests per year.
4. Defendant shall cooperate in the collection of DNA as directed by the Probation Officer.
5. Defendant shall make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution.

Defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

Defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

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

1. Defendant shall report to the Probation Office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the Probation Officer instructs you to report to a different Probation Office or within a different time frame. After initially reporting to the Probation Office, Defendant will receive instructions from the court or the Probation Officer about how and when Defendant must report to the Probation Officer, and Defendant must report to the Probation Officer as instructed.
2. After initially reporting to the Probation Office, you will receive instructions from the court or the Probation Officer about how and when Defendant shall report to the Probation Officer, and Defendant shall report to the Probation Officer as instructed.
3. Defendant shall not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the Probation Officer.
4. Defendant shall answer truthfully the questions asked by your Probation Officer
5. Defendant shall live at a place approved by the Probation Officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), Defendant shall notify the Probation Officer at least 10 days before the change. If notifying the Probation Officer in advance is not possible due to unanticipated circumstances, Defendant shall notify the Probation Officer within 72 hours of becoming aware of a change or expected change.
6. Defendant shall allow the Probation Officer to visit you at any time at your home or elsewhere, and Defendant shall permit the Probation Officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. Defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the Probation Officer excuses you from doing so. If you do not have full-time employment Defendant shall try to find full-time employment, unless the Probation Officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), Defendant shall notify the Probation Officer at least 10 days before the change. If notifying the Probation Officer at least 10 days in advance is not possible due to unanticipated circumstances, Defendant shall notify the Probation Officer within 72 hours of becoming aware of a change or expected change.
8. Defendant shall not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, Defendant shall not knowingly communicate or interact with that person without first getting the permission of the Probation Officer.
9. If you are arrested or questioned by a law enforcement officer, Defendant shall notify the Probation Officer within **72 hours**.
10. 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).
11. Defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the Probation Officer determines that you pose a risk to another person (including an organization), the Probation Officer may require you to notify the person about the risk and Defendant shall comply

with that instruction. The Probation Officer may contact the person and confirm that you have notified the person about the risk.

13. Defendant shall follow the instructions of the Probation Officer related to the conditions of supervision.

U.S. Probation Office Use Only

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

Defendant's Signature:____________________________ Date:________________________

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

1. Defendant shall participate in a mental health treatment program (outpatient and/or inpatient) and follow the probation officer's instructions regarding the implementation of this court directive. Further, defendant shall contribute to the costs of these services not to exceed an amount determined reasonable by the Probation Office's Sliding Scale for Mental Health Treatment Services.

2. Defendant shall participate in a mental health program specializing in sexual offender treatment and submit to polygraph testing for treatment and monitoring purposes. Defendant shall follow the probation officer's instructions regarding the implementation of this court directive. Further, defendant shall contribute to the costs of such treatment and/or polygraphs not to exceed an amount determined reasonable by the probation officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Treatment Services.

3. Defendant shall register with the state sexual offender registration agency(s) in any state where the defendant resides, visits, is employed, carry on a vocation, or is a student, as directed by the probation officer.

4. The probation officer shall provide state officials with all information required under Florida sexual predator and sexual offender notification and registration statutes (F.S. 943.0435) and/or the Sex Offender Registration and Notification Act (Title I of the Adam Walsh Child Protection and Safety Act of 2006, Public Law 109-248), and may direct the defendant to report to these agencies personally for required additional processing, such as photographing, fingerprinting, and DNA collection.

5. Defendant shall have no direct contact with minors (under the age of 18) without the written approval of the probation officer and shall refrain from entering into any area where children frequently congregate including: schools, daycare centers, theme parks, playgrounds, etc.

6. Defendant is prohibited from possessing, subscribing to, or viewing, any images, videos, magazines, literature, or other materials depicting children in the nude and/or in sexually explicit positions.

7. Without prior written approval of the probation officer, defendant is prohibited from either possessing or using a computer (including a smart phone, a hand-held computer device, a gaming console, or an electronic device) capable of connecting to an online service or an internet service provider. This prohibition includes a computer at a public library, an internet cafe, your place of

employment, or an educational facility. Also, defendant is prohibited from possessing an electronic data storage medium (including a flash drive, a compact disk, and a floppy disk) or using any data encryption technique or program. If approved to possess or use a device, you must permit routine inspection of the device, including the hard drive and any other electronic data storage medium, to confirm adherence to this condition. The United States Probation Office must conduct the inspection in a manner no more intrusive than necessary to ensure compliance with this condition. If this condition might affect a third party, including your employer, you must inform the third party of this restriction, including the computer inspection provision.

8. Defendant shall have no contact, direct or indirect, with the victim, I.G. or her family.

9. Defendant shall submit to a search of his person, residence, place of business, any storage units under defendant's control, computer, or vehicle, conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition. Failure to submit to a search may be grounds for revocation.

10. Defendant shall be prohibited from incurring new credit charges, opening additional lines of credit, or making an obligation for any major purchases without approval of the Probation Officer. Defendant shall provide the Probation Officer access to any requested financial information.

11. Defendant shall provide the probation officer access to any requested financial information.

CRIMINAL MONETARY PENALTIES

Defendant must pay the following total criminal monetary penalties under the schedule of payments set forth in the Schedule of Payments.

Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment*
$400.00	**$2,715**	**WAIVED**	**N/A**	**N/A**

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

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

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pu. L. No. 115-299.

* Justice for Victims of Trafficking Act of 2015, Pub.L. No. 114-22.

Name of Payee	Restitution Ordered
Clerk, U.S. District Court ATTN: DCU 401 W Central Boulevard Suite 1200 Orlando, FL 32801	$2,715

for distribution to the victims.

Please contact:
Financial Distribution Unit
U.S. Attorney's Office
for victim information
813-274-6000

SCHEDULE OF PAYMENTS

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

Special Assessment shall be paid in full and is due immediately.

Restitution obligation shall be payable to the Clerk, U.S. District Court, for distribution to the victims. While in Bureau of Prisons custody, you shall either (1) pay at least $25 quarterly if you have a non-Unicor job or (2) pay at least 50% of your monthly earnings if you have a Unicor job. Upon release from custody, you will be evaluated, and the Court may establish a new payment schedule accordingly. At any time during the course of post-release supervision, the victim, the government, or the defendant, may notify the Court of a material change in the defendant's ability to pay, and the Court may adjust the payment schedule accordingly.

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 penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court, unless otherwise directed by the Court, the Probation Officer, or the United States attorney.

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, and (9) penalties, and (10) costs, including cost of prosecution and court costs.

Joint and Several

Restitution shall be paid jointly and severally:

Of the restitution obligation, $2,715.00 is joint and several with Roberto Santana Jimenez (Docket No.: 8:20-CR-00292-VMC-CPT.)

FORFEITURE

Defendant shall forfeit to the United States those assets previously identified in the Order of Forfeiture, that are subject to forfeiture. **[SEE ATTACHED ORDER]**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. Case No. 8:20-cr-292-VMC-CPT

JORDAN JYSAE PULIDO

PRELIMINARY ORDER OF FORFEITURE

Following a jury trial, the defendant was found guilty of enticement of a minor, in violation of 18 U.S.C. § 2422(b) (Count One); transportation of a minor, in violation of 18 U.S.C. § 2423(a) (Counts Two and Four); and conspiracy to transport a minor, in violation of §§ 2423(a) and (e) (Count Three), as charged in Counts One through Four of the Indictment.

The United States moves, pursuant to 18 U.S.C. § 2428 and Rule 32.2(b)(2) of the Federal Rules of Criminal Procedure, for a Preliminary Order of Forfeiture for an iPhone 7+ (S/N F2LSFE18HG00), model A1661, and a MacBook Pro laptop computer (S/N C02T56W5GTFM), model A1707.

The United States has established the required connection between the crimes of conviction and the assets. Because the United States is entitled to forfeit the property, the motion is GRANTED. Pursuant to 18 U.S.C. § 2428 and Rule 32.2(b)(2) of the Federal Rules of Criminal Procedure, the assets are FORFEITED to the United States of America for disposition according to law, subject to the provisions of 21 U.S.C. § 853(n).

This order shall become a final order of forfeiture as to the defendant at sentencing.

The Court retains jurisdiction to complete the forfeiture and disposition of the assets sought by the government.

DONE and ORDERED in Tampa, Florida, this 2 day of November, 2021.

Virginia M. Hernandez Covington
VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

Copies to:
All Parties/Counsel of Record

APPENDIX D

133 F.4th 1256
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Jordan Jysae PULIDO, Roberto Santana Jimenez, Defendants-Appellants.

No. 22-10709
|
Filed: 04/08/2025

Synopsis
Background: Defendants, who were father and son, were convicted in the United States District Court for the Middle District of Florida, No. 8:20-cr-00292-VMC-CPT-1, Virginia M. Hernandez Covington, J., of conspiring to transport a minor with the intent that she engage in sexual activity, and son was additionally convicted of using the internet to persuade, induce, entice, or coerce a minor to engage in sexual activity, traveling with the intent to engage in illicit sexual contact, and transporting a minor with the intent that she engage in sexual activity. Defendants appealed.

Holdings: The Court of Appeals, Newsom, Circuit Judge, held that:

son's charge of using internet to knowingly persuade, induce, entice, and coerce minor to engage in sexual activity was duplicitous;

error in son's indictment charging him with duplicitous count of using internet to knowingly persuade, induce, entice, and coerce minor to engage in sexual activity was not harmless, and thus, vacatur of conviction on that count was warranted;

count of traveling with intent to engage in illicit sexual contact was constitutional as applied to defendant son;

statute criminalizing traveling with intent to engage in illicit sexual contact did not unconstitutionally burden rights under First and Fifth Amendments;

interpretation errors in translating minor's mother's testimony from Croatian to English did not render the trial fundamentally unfair in violation of defendant's rights to due process;

evidence was sufficient to support finding that defendant father had the requisite knowledge or intent for minor to engage in sexual activity in United States with defendant son, as would support conviction for conspiring to transport a minor with the intent that she engage in sexual activity;

defendant father failed to demonstrate that special agent's testimony that father was in United States illegally caused a miscarriage of justice that would warrant mistrial or a new trial;

district court did not clearly err in finding defendant father exercise undue influence over minor, as would support two-level sentencing enhancement; and

district court's imposition of two-level custody, care, or supervisory control over sentencing enhancement against defendant father was warranted.

Affirmed in part, vacated in part, and remanded in part.

Rosenbaum, Circuit Judge, concurred with opinion.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion; Trial or Guilt Phase Motion or Objection; Post-Trial Hearing Motion; Sentencing or Penalty Phase Motion or Objection.

***1263** Appeals from the United States District Court for the Middle District of Florida, D.C. Docket No. 8:20-cr-00292-VMC-CPT-1

Attorneys and Law Firms

Julia Kapusta, U.S. Attorney Service - Middle District of Florida, U.S. Attorney, DOJ-USAO, Appellate Division, Tampa, FL, Linda Julin McNamara, Oberheiden, PC, Tampa, FL, for Plaintiff-Appellee.

Adeel Bashir, Laura Daines, Samuel Landes, Alec Fitzgerald Hall, Federal Public Defender's Office, Middle District of Florida, Tampa, FL, Katherine Grace Howard, Federal Public Defender's Office, Middle District of Florida, Orlando, FL, for Defendant-Appellant Jordan Jysae Pulido.

Frank W. McDermott, McDermott Law Firm, P.A., St Petersburg, FL, for Defendant-Appellant Roberto Santana Jimenez.

Before Rosenbaum, Newsom, and Abudu, Circuit Judges.

Opinion

Newsom, Circuit Judge:

Jordan Pulido started an online relationship with a Croatian girl, I.G., and with the aid of his father, Roberto Jimenez, eventually traveled to Croatia to have sex with her—and then, again with his father's help, brought her to the United States, where he continued to have sex with her. A grand jury indicted Pulido on multiple counts: (1) using the internet to persuade, induce, entice, or coerce a minor to engage in sexual activity; (2) traveling with the intent to engage in illicit sexual conduct; (3) conspiring to transport a minor with the intent that she engage in sexual activity; and (4) transporting a minor with the intent that she engage in sexual activity. The grand jury separately indicted Jimenez for conspiring with Pulido to transport a minor with intent that she engage in sexual activity.

Before trial, Pulido moved to dismiss his indictment on several grounds, to suppress evidence found on various electronic devices, and to exclude testimony about I.G.'s sexual predisposition. The district court denied Pulido's motions, and Pulido and his father went to trial together. Both Pulido and Jimenez filed motions for a judgment of acquittal at the close of the government's case, which the court denied. After a nine-day trial, a jury convicted both Pulido and Jimenez on all counts. Jimenez moved for a new trial and a mistrial, and Pulido joined the new-trial motion. The district court denied the defendants' post-trial motions. The court thereafter enhanced Jimenez's sentence on the grounds that he had exercised both (1) "undue influence" and (2) "custody, care, or supervisory control" over I.G.

On appeal, Pulido challenges the district court's denials of his pre- and post-trial motions, including his motion for judgment of acquittal. Jimenez challenges the district court's denial of his motion for judgment of acquittal, his post-trial motions, and the court's imposition of two sentencing enhancements. After careful review, and with the benefit of oral argument, we affirm in all respects save one: We vacate Pulido's conviction on the enticement count and remand for resentencing on the ground that the indictment was duplicitous.

I

Pulido, then a 23-year-old man, developed an online relationship with I.G., a 14-year-old Croatian girl, that, all told, spanned some 10 months, from the fall of 2017 to the summer of 2018. I.G. initially ***1264** told Pulido that she was 15 but later admitted to him that she was only 14. Pulido and I.G.'s friendship eventually developed into a romantic relationship, and the two "officially" became boyfriend and girlfriend by the end of March 2018.

Pulido and I.G.'s relationship was intimate. They shared their social-media passwords, for instance, so that they couldn't keep any secrets from one another. The two also discussed marriage and children, and at one point Pulido even told I.G. that he had bought her a ring. Importantly, Pulido told I.G. that the legal age to consent to sex in Croatia was 15. During video chats, Pulido and I.G. would engage in what Pulido referred to as "pillow talk"; Pulido masturbated on camera for I.G. and directed her to do the same for him.

Jimenez played an active role in Pulido's relationship with I.G. Pulido kept Jimenez apprised of his communications with I.G. and told his father that he had been "trying to convince [I.G.] to have sex with [him]." Ex. 30(G) part 1 at 82, Doc. 231-67. Jimenez often advised Pulido on what to say to I.G., and he told Pulido that I.G. was "the one who ha[d] to start something" and to "[k]eep [his] class" "[e]ven with girls that are old eno[u]gh." *Id.* at 82–83. Jimenez also communicated directly with I.G. on social media. He lectured I.G. about her behavior with other boys, told her that she wasn't sufficiently committed to Pulido, and scolded her for making mistakes in the relationship.

In June 2018, with Jimenez's financial assistance, Pulido traveled to Croatia the day before I.G.'s fifteenth birthday. Before the trip, he had told I.G. over social media that he wanted to have sex with her and perform oral sex on her during his visit. During their chats, Pulido and I.G. sometimes used a code, with the number "15"—the age of consent in Croatia and I.G.'s impending birthday—signifying sex.

Pulido proposed to I.G. the day she turned fifteen. The two had sex shortly thereafter and a number of other times during his stay. They didn't always use protection, and Jimenez, who had stayed behind in Florida, advised them—after falsely holding himself out as a doctor—about how they could avoid pregnancy.

Pulido stayed in Croatia for six weeks. At the end of Pulido's trip, Jimenez invited I.G. and her family to Florida for a visit. Pulido helped them apply for passports and visas, and Jimenez planned the trip and paid for their applications and airline tickets.

In July 2018, Pulido, I.G., and I.G.'s mother, brother, and sister traveled to Florida. Pulido and I.G. continued to have sex in Florida, usually at Pulido's initiation. When, after two weeks, I.G. and her family were set to return to Croatia, Jimenez instructed one of Pulido's brothers to hide I.G.'s passport and ID, and called his travel agent to cancel I.G.'s return ticket.

The night before I.G. and her family were supposed to leave, Pulido's family told I.G.'s brother and sister that I.G. wasn't going with them. Pulido and Jimenez convinced I.G. to tell her mother the same thing. I.G. testified at trial that she didn't want to stay in Florida but felt like she had to. I.G.'s mother told her that she had to return to Croatia with the family.

Early the next morning, Pulido and I.G. went to a restaurant and sat there for hours. I.G.'s mother realized when she woke up that I.G. wasn't in the house and panicked. When I.G.'s mother said she wanted to call the police, Jimenez told her that she shouldn't because Pulido would have I.G. request asylum—meaning that no one could see I.G. for months and he wouldn't be able to help get her home. Jimenez promised I.G.'s mother that he would help return I.G. safely to Croatia. In ***1265** fact, at the same time, Jimenez was texting Pulido to keep him informed regarding I.G.'s family's departure. When I.G. received a message from her mother while she and Pulido were in the restaurant parking lot, Pulido told her how to reply. After I.G.'s family left for the airport, she and Pulido returned to his house.

I.G. testified that when she told Pulido and Jimenez the next morning that she wanted to go home, they got angry. Jimenez yelled at I.G. for being irresponsible and not appreciating all the sacrifices that they had made for her. He told I.G. that he would try to get her a ticket back to Croatia as soon as possible, but he also repeatedly told her that he couldn't find one. According to Jimenez's travel agent, after he cancelled I.G.'s initial return flight, he never contacted her to book a new one.

At the same time Jimenez said he was trying to find I.G. a flight back to Croatia, he and Pulido were restricting her ability to communicate with her mother, allowing her to use their phones only briefly, and telling her what to say when she did so. I.G. further testified that, in the meantime, Jimenez completed asylum paperwork for her, had her sign it, and took her to see an immigration lawyer.

Eventually, I.G. was able to tell her mother that she wanted to come home. I.G.'s mother contacted the police, who promptly intervened. Florida Department of Law Enforcement officials were dispatched to Pulido's house for a welfare check, where Jimenez greeted and spoke with them about the situation. Jimenez told the agents that I.G. had indicated that she wanted to stay in Florida and showed them the immigration form that he said I.G. had completed.

During their visit, the agents asked to speak with I.G., so Jimenez went and got her. The officers spoke with I.G. alone and, after

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hearing her version of events and assessing the situation, they asked to speak with Pulido but were told that he wasn't there.

The agents contacted the Florida Department of Children and Families, which took I.G. into temporary custody. I.G. reunited with her mother at the Tampa airport a few days later, and the two flew back to Croatia together.

During interviews with various law-enforcement officers in the United States, I.G. denied having sex with Pulido. But once she was back in Croatia, I.G. admitted that she and Pulido had indeed had sex. I.G. said that she changed her mind about telling investigators because she had started to lose feelings for Pulido and that it was more important for them to know the truth than for her to avoid embarrassment.

Meanwhile, Pulido had fled to Mexico the day after Florida officials took temporary custody of I.G. He remained there until a family member informed him that it was safe to return. Homeland Security Investigations Special Agent Tavey Garcia, who had been assigned to I.G.'s case, advised Customs and Border Protection ("CBP") officers to be on the lookout for Pulido's return to the United States and to seize all of his electronic devices for a border search. Notwithstanding her alert, Pulido returned to the United States in September 2018 without detection.

Pulido traveled to Mexico again in May 2019. When he reentered the United States in early June, CBP agents stopped him, seized his iPhone and MacBook, and sent the devices to Agent Garcia.

Agent Garcia gave the iPhone and MacBook to a computer analyst who performed forensic searches of the devices by copying all of their data and making the ***1266** devices' files available for review.[1] The resulting report contained photographs of Pulido and I.G. cuddling and kissing, headshots of I.G. and her family used for their passports and visas, I.G.'s asylum application, screenshots of messages to I.G. on various social media platforms (*e.g.*, Face-book, WhatsApp), and iMessage and Skype chats. Agent Garcia reviewed the reports for both devices and took notes that she included in a written report.

1 A "forensic" search of an electronic device (alternatively called an "advanced" search) is distinct from a "basic" or "manual" search. *See Alasaad v. Mayorkas*, 988 F.3d 8, 13 (1st Cir. 2021) (noting that CBP policy categorizes an "advanced" search as one "in which an Officer connects external equipment, through a wired or wireless connection, to an electronic device not merely to gain access to the device, but to review, copy, and/or analyze its contents") (quotation marks and citation omitted).

II

A grand jury indicted both Pulido and Jimenez on a variety of charges. In particular, it charged Pulido with four counts: (1) using the internet to knowingly persuade, induce, entice, and coerce someone under the age of 18 to engage in sexual activity for which a person could be charged with a criminal offense, in violation of 18 U.S.C. § 2422(b); (2) traveling with intent to engage in illicit sexual conduct, in violation of 18 U.S.C. § 2423(b); (3) conspiring to transport a minor with intent that she engage in sexual activity, in violation of 18 U.S.C. § 2423(a) and (e); and (4) transporting a minor with intent that she engage in sexual activity, in violation of 18 U.S.C. § 2423(a). The grand jury indicted Jimenez on one count of conspiring to transport a minor with intent that she engage in sexual activity, in violation of 18 U.S.C. §§ 2423(a) and (e).

Pulido moved to dismiss the indictment against him on several grounds. He contended that (1) the enticement count was duplicitous because although it nominally charged him with only one crime, it in fact improperly charged two or more separate and distinct offenses; (2) the traveling-with-intent count was unconstitutional because the statute on which it was predicated exceeded Congress's Foreign Commerce Clause power and impermissibly burdened his rights of "travel and free thought"; and (3) the transportation-of-a-minor counts were legally insufficient because they failed to identify an underlying Florida statute that he intended to violate.

The district court denied Pulido's motion. The court rejected Pulido's duplicitousness contention, reasoning that enticement of a minor is a "continuing offense" and, therefore, that the count was not duplicitous as charged. [2] The district court also held that the traveling-with-intent statute was constitutional, and that the transportation-of-a-minor counts were legally sufficient.

2 "A continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse ...." *United States v. Midstate Horticultural Co.*, 306 U.S. 161, 166, 59 S.Ct. 412, 83 L.Ed. 563 (1939) (quotation marks and citation omitted). It "is not complete upon the first act, but instead continues to be perpetrated over time." *United States v. Rojas*, 718 F.3d 1317, 1320 (11th Cir. 2013) (quotation marks and citation omitted). Conspiracy and possession of a firearm are illustrative examples. *See United States v. Gilbert*, 136 F.3d 1451, 1453 n.4 (11th Cir. 1998) (conspiracy); *United States v. Rivera*, 77 F.3d 1348, 1351 (11th Cir. 1996) (possession of a firearm).

Before trial, Pulido moved to suppress evidence recovered from his iPhone and MacBook. Pulido contended that the agents' review of the messages on his electronic devices violated the Fourth Amendment. In particular, he argued that under ***1267** the so-called "border search" exception, officials may make a warrantless search only for contraband and that, in doing so, they may only take a cursory glance. Relying on *Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014), Pulido asserted that officials needed, but lacked, a warrant to search his devices, or, at the very least, needed probable cause or reasonable suspicion to believe that they contained contraband. A magistrate judge held an evidentiary hearing and then recommended denying Pulido's motion, concluding that the border-search exception isn't limited to contraband and that the officers' search didn't violate the Fourth Amendment. Over objection, the district court accepted the magistrate judge's recommendation and denied Pulido's motion to suppress.

Pulido and Jimenez separately moved in limine to exclude two items of evidence. Pulido sought to exclude I.G.'s testimony that she was predisposed to chastity on the ground that it was inadmissible under Federal Rule of Evidence 412(a)(2), which bars the introduction of evidence offered to prove a victim's sexual predisposition. The district court denied the motion without prejudice, preferring to decide the matter at trial. [3] Jimenez moved to exclude evidence about his immigration status on the ground that it was irrelevant and prejudicial, but the government agreed that his legal status was irrelevant to the charged crime and explained that it had no intention of presenting any such evidence.

3 At trial, Pulido lodged repeated objections when I.G. testified about her predisposition to chastity, which the district court overruled.

Several issues arose during trial that have given rise to challenges on appeal. First, there were a few translation issues at the start of I.G.'s mother's testimony. For instance, during the first 27 minutes of her testimony, the government's lawyer initially asked I.G.'s mother questions in English, and she attempted to answer in English with some difficulty, raising a concern that she might not be properly understanding the questions. To ameliorate that risk, the judge asked her to answer in Croatian and allow an interpreter to translate. Even then, though, the judge also expressed concern that some of the interpreter's translations were summaries rather than word-for-word recitations.

Second, when the government called Agent Garcia to testify, Jimenez requested a sidebar conference because he was concerned that Garcia would testify that he was in the country illegally. The government repeatedly assured the judge that it had no intention of eliciting that information and that it only envisioned Garcia testifying that Jimenez wasn't a medical doctor. Immediately after the conference, though, when the prosecutor asked Garcia if she could determine whether Jimenez was a doctor, she responded that "[b]ased on [her] investigation, [she] determined that Mr. Jimenez entered the United States legally in the '80s, but he remained in the United States—." Trial Tr. Day 7 at 140:18–24, Doc. 218. Jimenez promptly objected, and the judge struck Garcia's response from the record and instructed the jury to disregard it. When Jimenez later moved for a mistrial based on Agent Garcia's testimony about his immigration status, the judge (while acknowledging that the testimony was "really inappropriate") reserved ruling on the issue. *Id.* at 165:5, 7; 168:19.

At the close of the government's case, Pulido moved for a judgment of acquittal on the same duplicitousness ground that he had raised in his motion to dismiss. ***1268** Jimenez separately moved for a judgment of acquittal, arguing that no reasonable juror could find beyond a reasonable doubt that he was guilty of the conspiracy. Specifically, he contended, there was no evidence that he intended to transport I.G. to Florida for the purpose of her engaging in unlawful sexual acts there. The district court denied both motions, and the jury convicted Pulido and Jimenez on all counts.

Following the verdict, Jimenez moved for a new trial based on (1) the translation irregularities involving I.G.'s mother's testimony, (2) the admission of evidence regarding I.G.'s virginity and sexual inexperience, and (3) Agent Garcia's testimony regarding his immigration status. Pulido joined Jimenez's motion, which the district court denied on all counts. The district court acknowledged that the law generally requires continuous word-for-word translation, but it held that the summaries didn't render the trial fundamentally unfair in the light of all the evidence presented: I.G.'s mother testified for more than four and a half hours, and only the first 27 minutes were in English; when she testified in English, her responses indicated that she understood the questions. The court further held that I.G.'s testimony about her sexual inexperience was admissible under Rule 412. That rule, the court concluded, protects alleged victims from cross-examination about their sexual histories and sexual dispositions; it does not prevent a victim from producing relevant evidence regarding her virginity, chastity, etc. And finally, the court held that Agent Garcia's testimony necessitated neither a new trial nor a mistrial because (1) her statement was unelicited and unresponsive, (2) it was followed immediately by a curative instruction, and (3) there was substantial evidence of Jimenez's guilt.

At sentencing, the district court enhanced Jimenez's sentence over his objection. As relevant here, the court applied both (1) a two-level enhancement under U.S.S.G. § 2G1.3(b)(1)(B) on the ground that Jimenez exercised "custody, care, or supervisory control" over I.G. and (2) a two-level enhancement under § 2G1.3(b)(2)(B) on the ground that he exercised "undue influence" over her.

Pulido and Jimenez both appealed.

III

We divide our discussion into two parts. We first address Pulido's challenges to the district court's orders denying his motion to dismiss, his motion to suppress, and his motion for a new trial.[4] We then consider Jimenez's motion for acquittal based on sufficiency of the evidence, his motion for a mistrial, and his challenges to the two sentence enhancements.

4 For reasons explained below, we find that we needn't reach Pulido's Rule 412 argument that the district court erred in refusing to exclude evidence that I.G. was predisposed to chastity.

A

1

Pulido first argues that the district court erred in denying his motion to dismiss. In particular, he contends (1) that the enticement-of-a-minor count is duplicitous, (2) that the traveling-with-intent count violates the Foreign Commerce Clause, and (3) that the traveling-with-intent count impermissibly burdens his rights of travel and "free thought."[5] We'll take each challenge in turn.

5 Pulido initially contended that the transportation-of-a-minor count was legally insufficient, but he has since conceded that a decision issued after his indictment forecloses his insufficiency challenge, and he raises that challenge before us solely to preserve it. *See* *United States v. Doak*, 47 F.4th 1340, 1352–53 (11th Cir. 2022).

***1269 a**

i

Pulido contends that the district court should have dismissed his indictment on the ground that the enticement-of-a-minor count was "duplicitous."[6] Although the issue is not without some complexity, we agree with him.[7]

6 For ease of reference, we will refer to "enticement" as a stand-in for the four distinct means of violating 18 U.S.C. § 2422(b): persuading, inducing, enticing, and coercing a minor to engage in sexual activity.

7 We normally review a district court's decision to deny a motion to dismiss for abuse of discretion, *United States v. Di Pietro*, 615 F.3d 1369, 1370 n.1 (11th Cir. 2010), but because determining whether an indictment was duplicitous requires a legal inquiry, we review the decision here de novo, *see* *United States v. Burton*, 871 F.2d 1566, 1573 (11th Cir. 1989); *United States v. Hassoun*, 476 F.3d 1181, 1185 (11th Cir. 2007). But, as with most non-structural errors, we will assess the district court's holding for harmlessness. *Cf.* *Hicks v. Head*, 333 F.3d 1280, 1285 (11th Cir. 2003) ("[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [non-structural] errors that may have occurred are subject to harmless-error analysis." (quoting *Rose v. Clark*, 478 U.S. 570, 579, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986))); *cf.* *United States v. Deason,* 965 F.3d 1252, 1267–68 & n.3 (11th Cir. 2020) (stating that charging duplicitous counts is not a structural error).

"A count in an indictment is duplicitous if it charges two or more separate and distinct offenses." *United States v. Seher*, 562 F.3d 1344, 1360 (11th Cir. 2009) (quotation marks and citation omitted). The risk of a duplicitous count is that "(1) [a] jury may convict a defendant without unanimously agreeing on the same offense; (2) [a] defendant may be prejudiced in a subsequent double jeopardy defense; and (3) [a] court may have difficulty determining the admissibility of evidence." *United States v. Deason*, 965 F.3d 1252, 1267 (11th Cir. 2020) (citation omitted). To determine whether a count is duplicitous, we "look to the text of the underlying statute" and consider "what conduct constitutes a single offense." *Id.* (citations omitted).

The indictment here charged Pulido with violating 18 U.S.C. § 2422(b), in conjunction with Fla. Stat. §§ 800.04(4)(a) and (b). Section 2422(b) reads as follows:

> Whoever, using ... any ... facility or means of interstate or foreign commerce, ... knowingly persuades, induces, entices, or coerces an individual who has not attained the age of 18 years, to engage in ... any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years of life.

Here, the criminal "sexual activity" that served as the hook for § 2422(b)'s application was "lewd or lascivious battery" under Fla. Stat. § 800.04(4). At the relevant time, that statute read as follows:

> (a) A person commits lewd or lascivious battery by:
>
> 1. Engaging in sexual activity with a person 12 years of age or older but less than 16 years of age; or
>
> 2. Encouraging, forcing, or enticing any person less than 16 years of age to engage in sadomasochistic abuse, sexual bestiality, prostitution, or any other act involving sexual activity.

Fla. Stat. § 800.04(4)(a) (2014). The Florida statute defines "sexual activity" as "the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object." *Id.* § 800.04(1)(a). ***1270** Accordingly, for our purposes, Pulido violated § 2422(b) if he enticed I.G. to have oral, vaginal, or anal intercourse with him.

Importantly here, "[t]he underlying criminal conduct that Congress expressly proscribed in passing § 2422(b) is the persuasion, inducement, enticement, or coercion of the minor rather than the sex act itself." *United States v. Murrell*, 368 F.3d 1283, 1286 (11th Cir. 2004).[8] Thus, put simply, a person can be guilty of violating § 2422(b) if he entices a minor to engage in sexual activity, regardless of whether the sexual activity ever occurs. *See id.* at 1287.

8 Although *Murrell* arose under § 2422(b)'s "attempts" clause, *see* 368 F.3d at 1286, its description of what constitutes a violation applies equally to the completed version of the crime.

Pulido contends before us that because § 2242(b) criminalizes the act of enticement itself, the criminal offense is complete the moment the minor is enticed. It's possible, he argues, for a minor to have been enticed on multiple occasions regardless of when—or again, even whether—any sexual activity occurred. In such a case, Pulido contends, an indictment would need to list multiple enticement counts to cover each criminal act. He faults his indictment for listing only one enticement count to cover a 10-month period during which he and I.G. engaged in numerous conversations about sex and had numerous sexual encounters. This is problematic, he says, because it allows for the possibility that the jurors didn't unanimously agree on the *same* act of enticement. By way of illustration, Pulido posits that some jurors might have concluded that he enticed I.G. in messages that he sent before he traveled to Croatia; others might have concluded that he did so while he was in Croatia; and still others might have found that he did so only when he and I.G. returned to Florida.

The government denies that the indictment was duplicitous. It contends that enticement can be demonstrated through a pattern of activity because, it says, "[w]e know enticing a child to engage in illicit sexual activity is ordinarily a process, not a discrete act; each act in the process need not be charged separately."[9] Br. of Appellee at 49–53.

9 The government argued before the district court that § 2422(b) is a "continuing offense." As already explained, *see supra* at 1266 n.2, a continuing offense is a crime that "is not complete upon the first act, but instead continues to be perpetrated over time." *Rojas*, 718 F.3d at 1320. Significantly, though, "offenses should not be considered continuing unless the explicit language of the ... statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing offense." *Id.* (quotation marks and citation omitted and alteration adopted). The government seems to have abandoned its continuing-offense theory on appeal.

It seems to us that Pulido and the government are talking past one another. It's true, as the government asserts, that it can point to a pattern of activity to prove the commission of the enticement offense. But it's also true that such a pattern culminates in a discrete episode of enticement. In that moment, the instant when the minor has been enticed after days (or weeks, or months) of conduct by the defendant, the § 2422(b) offense has occurred.

So, as applied to this case, it may be that it took Pulido weeks or months to entice I.G. to engage in illicit sexual activity with him. But the moment that Pulido was able to move I.G.'s mental state from one of hesitation to one of agreement *for the first time*, he violated § 2422(b). Subsequent episodes in which he successfully moved her mind would constitute distinct acts of enticement, and thus independent ***1271** violations of the statute. By failing to charge multiple enticement counts in a case that involved a 10-month relationship, numerous online conversations about sex, and multiple sexual encounters in both Croatia and Florida, the government produced an indictment that creates the risk that the jury "may [have] convict[ed Pulido] without unanimously agreeing on the same offense." *Deason*, 965 F.3d at 1267. And that makes the § 2422(b) count duplicitous.

ii

Before vacating the § 2242(b) count and conviction, we must assess whether allowing the count to go to trial was harmless. It wasn't.

D-11

"The harmless-error test is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *United States v. Cannon*, 987 F.3d 924, 947 (11th Cir. 2021) (quotation marks and citation omitted). The government has the burden to prove that an error was harmless. *Id.*

Here, the government contends that any duplicitousness was harmless because "[t]here is no risk that the jury found Pulido guilty without unanimously agreeing that Pulido's conduct satisfied the elements of enticement." Br. of Appellee at 55. It asserts that the district court's instruction requiring the jury to unanimously agree to the method of the commission (*i.e.*, whether Pulido persuaded, induced, enticed, or coerced) was sufficient to allay any concerns about lack of unanimity.

That is incorrect. The problem isn't that the jury might not have unanimously agreed to the *method* by which Pulido violated § 2422(b). Rather, the problem is that it might not have unanimously agreed about the *moment* that I.G. was enticed. I.G. testified at trial that she and Pulido had sex several times in Croatia, and also frequently in Florida at Pulido's initiation. The government never demonstrated the moment at which I.G. was enticed, nor did it seek to prove I.G.'s mental state at any particular point during the 10-month period. With so many episodes of sexual activity—each of which may (or may not) have been induced by one or more acts of enticement—we cannot say that the government has carried its burden of proving harmlessness beyond a reasonable doubt.

* * *

Because the enticement-of-a-minor count was duplicitous, and because the error wasn't harmless, we vacate Pulido's conviction on that count and remand with instructions for the district court to dismiss it.

b

Pulido next asserts that the district court should have dismissed his traveling-with-intent count on the ground that Congress violated the Foreign Commerce Clause in enacting § 2423(b). [10]

10 We review de novo a district court's denial of a motion to dismiss on constitutional grounds. *United States v. Ibarguen-Mosquera*, 634 F.3d 1370, 1377 n.3 (11th Cir. 2011).

The Constitution authorizes Congress "[t]o regulate Commerce with foreign Nations." U.S. Const. art. I, § 8, cl. 3. "Neither [we] nor the Supreme Court has thoroughly explored the scope of the Foreign Commerce Clause." *United States v. Baston*, 818 F.3d 651, 667 (11th Cir. 2016). But we have assumed (without deciding) in recent cases that Congress's authority under the Foreign Commerce Clause is at least as broad as its authority under the Interstate Commerce Clause. *Id.* at 668; *United States v. Davila-Mendoza*, 972 F.3d 1264, 1271 (11th Cir. 2020). "In other words," we have said:

***1272** Congress's power under the Foreign Commerce Clause includes at least the power to regulate the "channels" of commerce between the United States and other countries, the "instrumentalities" of commerce between the United States and other countries, and activities that have a "substantial effect" on commerce between the United States and other countries.

Baston, 818 F.3d at 668 (citing *Gonzales v. Raich*, 545 U.S. 1, 16–17, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005)).

Pulido resists that equivalency. He accepts that Congress can regulate "the use of the channels of [foreign] commerce," and "the instrumentalities of [foreign] commerce, or persons or things in [foreign] commerce, even though the threat may only come from [intranational] activities." *See* Br. of Appellant Pulido at 55–56 (quoting *United States v. Lopez*, 514 U.S. 549, 558, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995)). But, he says, the "substantial effects" category recognized in the Interstate Commerce Clause context shouldn't extend to Foreign Commerce Clause cases like this one. *Id.* And, the argument goes, because the conduct for which he has been charged—traveling with an intent to engage in illicit sexual conduct with I.G.—is a non-commercial act, his § 2423(b) count would have to rest on a "substantial effects" rationale.

We disagree. This isn't a "substantial effects" case; it's a "channels of [foreign] commerce" case. The power over channels of commerce under the Interstate Commerce Clause permits Congress to "keep the channels of interstate commerce free from immoral and injurious uses." *Lopez*, 514 U.S. at 558, 115 S.Ct. 1624 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964)). Because § 2423(b) criminalizes traveling in foreign commerce with an intent to engage in illicit sexual activity, it's directed at people who, for example, buy plane tickets—as Pulido did here—to commit illicit activity in foreign countries. That is a regulation of a channel of foreign commerce with a purpose of keeping it "free from immoral and injurious uses." *Id.*

Because we conclude that Congress acted within its Foreign Commerce Clause power to regulate the channels of foreign commerce when it enacted § 2423(b), we hold that the travel-with-intent count was constitutional as applied to Pulido.[11] Accordingly, we affirm the district court's judgment on that count.

11 In concluding that the enactment of § 2423(b) was a valid exercise of Congress's Foreign Commerce Clause power over channels of foreign commerce, we join our sister circuits. *See, e.g.*, *United States v. Han*, 230 F.3d 560, 562–63 (2d Cir. 2000); *United States v. Tykarsky*, 446 F.3d 458, 470 (3d Cir. 2006); *United States v. Bredimus*, 352 F.3d 200, 205–08 (5th

Cir. 2003); *United States v. Stokes*, 726 F.3d 880, 894–95 (7th Cir. 2013).

c

Pulido finally contends that the district court should have dismissed his indictment on the ground that § 2423(b) impermissibly burdens his rights of "travel and free thought" under the First and Fifth Amendments.[12] We are unpersuaded.

12 As with Pulido's Foreign Commerce Clause argument, we review de novo the district court's denial of his motion to dismiss on First and Fifth Amendment grounds. *Ibarguen-Mosquera*, 634 F.3d at 1377 n.3.

To be clear, contrary to Pulido's framing, § 2423(b) doesn't criminalize "thought" in the abstract. Nor does it "prohibit traveling with an immoral thought, or even with an amorphous intent to engage in sexual activity with a minor." ***1273** *United States v. Tykarsky*, 446 F.3d 458, 471 (3d Cir. 2006). Rather, it criminalizes a concrete act—namely, the act of traveling in foreign commerce with the purpose of committing an illegal sex act with a minor. And "no federal court has ever held that an individual has a fundamental right to travel for an illicit purpose." *Id.* at 472 (quotation marks and citation omitted).

It remains unclear whether Pulido challenges § 2423(b) on its face or as applied. To the extent that he challenges the statute's constitutionality facially, he hasn't demonstrated that it "prohibits a substantial amount of protected speech relative to its plainly legitimate sweep." *United States v. Hansen*, 599 U.S. 762, 769–70, 143 S.Ct. 1932, 216 L.Ed.2d 692 (2023) (quotation marks and citation omitted). And to the extent that Pulido challenges § 2423(b) as applied to his case, he did far more than think immoral thoughts or travel with amorphous intentions—he bought a plane ticket, traveled to Croatia, and had sex with a 15-year-old girl.[13]

13 *See United States v. Gamache*, 156 F.3d 1, 8 (1st Cir. 1998) ("[A]ppellant, at a minimum, engaged in a *series of acts* long past the 'mere thinking' stage.... [I]t can hardly be claimed that punishment for 'mere thought' is at issue.").

Because Pulido has not sustained his burden to show that § 2423(b) unconstitutionally burdens his First or Fifth Amendment rights either facially or as applied, we affirm the district court's denial of his motion to dismiss on this count.

2

Pulido next challenges the district court's denial of his motion to suppress evidence found on his iPhone and MacBook because, he says, the searches of those devices violated the Fourth Amendment. More specifically, he contends that the district court erred in holding that the Fourth Amendment's "border search" exception covers the warrantless, suspicionless searches of his devices.[14]

14 In reviewing a motion-to-suppress decision, "we review the district court's factual findings for clear error and its legal conclusions *de novo*." *United States v. Vergara*, 884 F.3d 1309, 1312 (11th Cir. 2018) (citation omitted).

We apply a two-step analysis to evaluate the validity of a search at the border. *United States v. Alfaro-Moncada*, 607 F.3d 720, 726 (11th Cir. 2010). Step one focuses on whether there was statutory authority to conduct the search. *Id.* (citing *United States v. Ramsey*, 431 U.S. 606, 611–15, 97 S.Ct. 1972, 52 L.Ed.2d 617 (1977)). Step two asks whether the search was reasonable under the Fourth Amendment. *Id.* (citing *Ramsey*, 431 U.S. at 615–16, 97 S.Ct. 1972). Here, no one disputes that there was statutory authority, so we proceed directly to the Fourth Amendment reasonableness inquiry.

The Fourth Amendment states that "[t]he right of the people to be secure in their persons, ... papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Under Supreme Court precedent, police generally need a warrant to conduct a search. *United States v. Vergara*, 884 F.3d 1309, 1312 (11th Cir. 2018). "[F]rom before the adoption of the Fourth Amendment," however, border searches "have been considered to be 'reasonable' by the single fact that the person or item in question has entered into our country from outside." *Ramsey*, 431 U.S. at 619, 97 S.Ct. 1972. This is because border searches implicate the "long-standing right of the sovereign to protect itself," *id*. at 616, 97 S.Ct. 1972, a right that is "at its zenith at the international border," ***1274** *United States v. Flores-Montano*, 541 U.S. 149, 152, 124 S.Ct. 1582, 158 L.Ed.2d 311 (2004). And because the government has such a strong interest in searching at the border, "the balance between the interests of the government and the privacy right of the individual is struck more favorably to the government." *Alfaro-Moncada*, 607 F.3d at 728.

In that vein, we have held that border searches never require a warrant—or even probable cause—to be reasonable. *Vergara*, 884 F.3d at 1312 (citing *Ramsey*, 431 U.S. at 619, 97 S.Ct. 1972). Indeed, we have gone further to say that "we require reasonable suspicion at the border only 'for highly intrusive searches of a person's body such as a strip search or an x-ray examination.' " *Id.* (quoting *Alfaro-Moncada*, 607 F.3d at 729). And even more specifically, and more relevantly here, we have held that "the Fourth Amendment does not require any suspicion for forensic searches of electronic devices at the border." *United States v. Touset*, 890 F.3d 1227, 1231 (11th Cir. 2018); *see also id.* at 1233 ("The Supreme Court has never required reasonable suspicion for a search of property at the border, however non-routine and intrusive, and neither have we."). Together, *Vergara* and *Touset* make this an easy affirmance.

Not so, Pulido says. Despite our decisions' categorical language, he asserts that we should treat searches of private messages on cell phones differently for two reasons. First, relying on *Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014), in which the Supreme Court held that an officer's search of a cell phone didn't fall within the Fourth Amendment's search-incident-to-arrest exception, Pulido insists that searching a cell phone is so intrusive of a person's privacy that it (in effect) warrants an exception to the border-search exception. Second, he contends that searching private text messages on a person's devices exceeds the historical justification for the border-search exception—namely, detecting contraband—and, therefore, that the exception's indulgent reasonableness rule shouldn't apply.

We rejected similar *Riley*-based arguments in *Vergara* and *Touset*. In *Vergara*, we stated expressly that "[b]order searches have long been excepted from warrant and probable cause requirements, and the holding of *Riley* does not change this rule." 884 F.3d at 1312–13. And in *Touset*, we reiterated that "[a]lthough the Supreme Court stressed in *Riley* that the search of a cell phone risks a significant intrusion on privacy, our decision in *Vergara* made clear that *Riley*, which involved the search-incident-to-arrest exception, does not apply to searches at the border." 890 F.3d at 1234. In particular, we explained in *Touset* that in those instances when we have required reasonable suspicion for a border search, we have defined "intrusiveness" by reference to bodily integrity —"the indignity that will be suffered by the person being searched." *Id.* (citation omitted). Intrusiveness, therefore, is a function of the "personal indignity" that a search causes, not of its scope or extent. *Id.* And in *Touset*, "we fail[ed] to see how the personal nature of data stored on electronic devices could trigger this kind of [personal] indignity" when existing precedent recognized no such afront to one's personal dignity even in the search of his home. *Id.* (citing *Alfaro-Moncada*, 607 F.3d at 729, 732). Simply put, we said that "[p]roperty and persons are different." *Id.* (citing *Flores-Montano*, 541 U.S. at 152, 124 S.Ct. 1582).

Vergara and *Touset* likewise foreclose Pulido's argument that government officials exceeded the scope of the border-search exception, which, he says, is limited by the government's sovereign interest in excluding contraband from the country. ***1275** Forensically extracting and then reading all his private messages, Pulido contends, transgresses the scope of a permissible border search. But again, *Vergara* and *Touset* are not so easily cabined. Neither opinion purports to restrict the operation of the border-search exception to searches for contraband. To the contrary, both opinions use categorical language. *See, e.g.*, *Vergara*, 884 F.3d at 1312 ("[W]e require reasonable suspicion at the border *only* for highly intrusive searches of a person's body ...." (emphasis added) (quotation marks and citation omitted)); *Touset*, 890 F.3d at 1233 ("The Supreme Court has never required reasonable suspicion for a search of property at the border, however non-routine and intrusive, and neither have we."); *id.* at 1234 ("Property and persons are different."); *id.* at 1231 ("[T]he Fourth Amendment does not require any suspicion for forensic searches of electronic devices at the border.").

Because our precedents in the border-search context state both (1) that we require reasonable suspicion only for highly intrusive searches of a person's body and (2) that forensic searches of electronic devices don't require any level of suspicion, we affirm the district court's holding that the government's search of Pulido's iPhone and MacBook didn't violate the Fourth Amendment.

3

Pulido finally challenges the district court's denial of his new-trial motion based on translation irregularities during I.G.'s mother's testimony, which he contends violated his due-process rights. [15]

15 "We review the district court's denial of a motion for new trial for abuse of discretion." *United States v. Sweat*, 555 F.3d 1364, 1367 (11th Cir. 2009). We review de novo questions of law, including whether a defendant's due-process rights have been violated. *See United States v. Underwood*, 446 F.3d 1340, 1345 (11th Cir. 2006); *United States v. Savage*, 701 F.2d 867, 868 n.1 (11th Cir. 1983).

For constitutional purposes, we must determine whether any of the irregularities rendered Pulido's trial "fundamentally unfair." *United States v. Gomez*, 908 F.2d 809, 811 (11th Cir. 1990) (quotation marks and citation omitted). The "general standard" requires continuous word-for-word translation of everything relating to the trial. *United States v. Joshi*, 896 F.2d 1303, 1309 (11th Cir. 1990). " '[O]ccasional lapses,' " however, "will not render [a] trial 'fundamentally unfair' " because "defendants have no constitutional 'right' to flawless, word for word [interpretations]." *Gomez*, 908 F.2d at 811 (citation omitted). "[I]nterpreters should nevertheless strive to translate exactly what is said," and "courts should discourage interpreters from 'embellishing' or 'summarizing' live testimony." *Id.*

Pulido asserts that the interpretation irregularities during I.G.'s mother's testimony rendered his trial fundamentally unfair. In particular, he says (1) that I.G.'s mother struggled to understand the interpreter's accent and got confused listening to both English and Croatian, and (2) that some interpretations were notably shorter than I.G.'s mother's responses, indicating that they weren't accurate translations. The district court disagreed, and so do we.

The district court reasonably allowed I.G.'s mother to answer questions in English but encouraged her to use the interpreter if she was unsure. While the court noted some irregularities in I.G.'s mother's testimony, it exercised due care to ensure that any errors were remedied. Once the court observed that I.G.'s mother was having difficulty responding in English, it directed her to answer in Croatian and allow ***1276** the interpreter to translate her answers into English. It also sustained Jimenez's objection to ensure that all remaining questions asked to I.G.'s mother would be translated to her in Croatian. It then reminded the interpreter that the translations of her testimony needed to be word-for-word. The interpreter had assured the court moments before that he was translating everything and not summarizing. And in its order denying the motion for a new trial, the court emphasized that the portion of I.G.'s mother's testimony that was in English occupied only 27 minutes out of four and a half hours she spent on the stand. The court further confirmed that for these 27 minutes, I.G.'s mother understood what she was being asked. [16]

16 Additionally, we conclude that there was no "cumulative error." *See* Br. of Appellant Pulido at 67. There was, at most, only one error—the district court's refusal to exclude evidence of I.G.'s predisposition for chastity. And because we have vacated the enticement count of Pulido's indictment, we needn't reach Pulido's Rule 412 challenge to that ruling.

Accordingly, we hold that any interpretation errors didn't render the trial fundamentally unfair. The district court didn't abuse its discretion in denying the new trial motion, and we affirm its decision in that respect.

* * *

To summarize, with respect to Pulido's challenges, we hold as follows: First, we affirm the district court's rejection of Pulido's challenges to his indictment except for his contention that the enticement count was duplicitous; on that count, we vacate his conviction and remand for resentencing with instructions that the enticement count be dismissed. Second, we affirm the district court's decision declining to suppress the evidence found on Pulido's electronic devices. Third, we hold that the district court did not abuse its discretion in denying Pulido a new trial based on the translation irregularities that attended I.G.'s mother's testimony.

B

We turn, then, to Jimenez. We start with the district court's rejection of his motion for judgment of acquittal, followed by the court's denial of his motion for a mistrial, and conclude with the court's imposition of two sentencing enhancements.

1

Jimenez first challenges the district court's denial of his motion for judgment of acquittal, in which he asserted that there was insufficient evidence to convict him of conspiring to transport I.G. in violation of 18 U.S.C. §§ 2423(a) and (e).[17] In particular, Jimenez argues that the record was devoid of evidence that he intended for I.G. to engage in sexual activity in the United States. We disagree.

17 "We review *de novo* a district court's denial of judgment of acquittal on sufficiency of evidence grounds." *United States v. Fleury*, 20 F.4th 1353, 1367 (11th Cir. 2021) (citation omitted). "[W]e view the evidence in the light most favorable to the prosecution and draw all reasonable inferences and credibility choices in its favor." *Id.* (quotation marks and citation omitted). "[W]e will uphold the denial of judgment of acquittal—and affirm the guilty verdict—if '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

"To support a conspiracy conviction, the government must prove 1) an agreement to commit an unlawful act and 2) an overt act by one of the conspirators in furtherance of the conspiracy." *United States v. Parker*, 839 F.2d 1473, 1477 (11th Cir. 1988). "A conspiracy may, indeed usually ***1277** must, be proven through circumstantial evidence." *Ibarguen-Mosquera*, 634 F.3d at 1385. The substantive offense underlying Jimenez's conspiracy conviction prohibits "knowingly transport[ing] an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense." 18 U.S.C. § 2423(a). When charging a person with conspiracy to commit a substantive offense, the conspiracy "cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself." *United States v. Ross*, 131 F.3d 970, 980–81 (11th Cir. 1997) (quoting *Ingram v. United States*, 360 U.S. 672, 678, 79 S.Ct. 1314, 3 L.Ed.2d 1503 (1959)). So the government had to prove that Jimenez had, as at least one of his purposes in transporting I.G. to the United States, an intent that she have sex with Pulido. *See United States v. Doak*, 47 F.4th 1340, 1354 (11th Cir. 2022). "[A]n alternative plausible innocent explanation is not enough to prove that the conduct was not motivated by illicit sexual activity." *Id.* at 1355 (quotation marks and citation omitted).

Jimenez focuses on the intent element. He explains that while he had conversations with Pulido and I.G. about sex, the government failed to provide evidence that he had the requisite knowledge or intent that the two would have sex in the United States. He asserts (1) that any conversations about sex were conducted while Pulido was in Croatia where sex with I.G. was legal and (2) that those conversations don't demonstrate that he intended for Pulido and I.G. to continue having sex in the United States.

The government responds that the circumstantial evidence introduced at trial supports the jury's verdict that at least one reason for I.G. coming to the United States was for her and Pulido to have sex. With respect to Jimenez's intent, in particular, the government emphasized that he (1) coached Pulido how to convince I.G. to have sex with him; (2) knew about the sexual activity between Pulido and I.G.; (3) spoke with I.G. regarding her sexual experiences; (4) pretended to be a doctor and instructed I.G. how she could avoid pregnancy; (5) hid Pulido's relationship with I.G. from her family; (6) paid for I.G.'s plane ticket to the United States; (7) helped ensure that I.G. didn't return to Croatia with her family; (8) filled out asylum paperwork for I.G.; (9) limited I.G.'s ability to communicate with her mother; and (10) obstructed I.G.'s efforts to return to Croatia.

We agree with the government that a reasonable jury could conclude that Jimenez conspired to transport I.G. to the United States with an intent that she engage in sex with Pulido while she was here. Jimenez knew about the sexual nature of the relationship between Pulido and I.G. He actively coached Pulido how to convince I.G. to have sex with him. He communicated with I.G. directly through social media about her sexual activity, even going so far as pretending to be a doctor to advise her how to avoid pregnancy. And, with full awareness of the nature of I.G.'s relationship with Pulido, Jimenez paid for her plane ticket to the United States. When I.G. arrived in Florida, Jimenez tried to hide her relationship with Pulido from her family. And when I.G. was scheduled to return to Croatia with her family, Jimenez helped ensure that she stayed behind, and when that was successful, he filled out asylum paperwork for her and limited her ability to communicate with her mother. That is more than enough. Accordingly, we ***1278** affirm the district court's denial of Jimenez's motion for judgment of acquittal.

2

Jimenez next challenges the district court's denial of his motion for a mistrial or a new trial, which focused on Agent Garcia's testimony about his immigration status. [18]

18 We review the denial of both types of motions for abuse of discretion. *United States v. Valois*, 915 F.3d 717, 723 n.2 (11th Cir. 2019) (mistrial); *Sweat*, 555 F.3d at 1367 (new trial).

A district court may grant a new trial "if the interest of justice so requires." Fed. R. Crim. P. 33(a). The decision to grant a new trial is within "the sound discretion of the trial court." *United States v. Martinez*, 763 F.2d 1297, 1312 (11th Cir. 1985). This determination rests with the district court because it "is in the best position to evaluate the prejudicial effect of a statement or evidence on the jury." *United States v. Blakey*, 960 F.2d 996, 1000 (11th Cir. 1992).

We have held that to obtain a new trial a defendant must show that his "substantial rights [were] prejudicially affected" and, further, that such prejudice occurs "when there is a reasonable probability that, but for the remarks, the outcome of the trial would have been different." *United States v. Emmanuel*, 565 F.3d 1324, 1334 (11th Cir. 2009) (quotation marks and citation omitted). "Prejudicial testimony will not mandate a mistrial where there is significant evidence of guilt which reduces the likelihood that the otherwise improper testimony had a substantial impact on the jury." *United States v. Anderson*, 782 F.2d 908, 916 (11th Cir. 1986) (citation omitted). Additionally, "[w]hen a curative instruction has been given to address some improper and prejudicial evidence, we will reverse only if the evidence is so highly prejudicial as to be incurable by the trial court's admonition." *United States v. Harriston*, 329 F.3d 779, 787 n.4 (11th Cir. 2003) (quotation marks and citation omitted).

The district court refused to grant a mistrial or new trial because, it found, Jimenez hadn't demonstrated that Agent Garcia's testimony caused a miscarriage of justice. We agree and, in doing so, decline Jimenez's invitation to adopt a per se rule that every mention of a defendant's illegal immigration status is incurably prejudicial.

Like the district court, we are troubled by Agent Garcia's testimony, which wasn't responsive to the question she was asked and which she offered sua sponte. Her testimony is doubly troubling given (1) that Jimenez had successfully moved in limine before trial to exclude any reference to his immigration status and (2) that the testimony was offered almost immediately after counsel had a sidebar with the district judge about the risks of such evidence.

Even so, as the district court explained in denying Jimenez's motion, Garcia's testimony was "stray, ... unelicited, and unresponsive." *United States v. Pulido*, No. 8:20-CR-292-VMC-CPT, 2022 WL 562351, at *7 (M.D. Fla. Feb. 23, 2022). Moreover, the district court acted quickly to sustain Jimenez's objection, struck the testimony from the record, and gave a curative instruction that the jury should disregard it. *Cf. United States v. Valois*, 915 F.3d 717, 726 (11th Cir. 2019) ("We presume that the jury followed the district court's curative instructions." (citation omitted)). Finally, the other evidence of Jimenez's guilt was substantial, further reducing the likelihood ***1279** that Garcia's testimony had a meaningful impact on the jury. *See supra* at 1277-78.[19]

19 *Sanchez v. Davis*, 888 F.3d 746 (5th Cir. 2018) (Costa, J., single-judge order), on which Jimenez relies, is distinguishable. First, and most obviously, the single-judge order there resolved only a threshold procedural issue, not the merits of any claim. A federal habeas corpus petitioner had sought a certificate of appealability requesting permission to challenge a district court's rejection of his contention that his state-court trial counsel had rendered ineffective assistance when he failed to object to a question about his immigration status. In *Sanchez*, the judge concluded only that the petitioner had met the baseline showing necessary to the issuance of a COA—namely, that "jurists of reason" could disagree with the district court's resolution of the claim. *Id.* at 749, 751–52; *see also* 28 U.S.C. § 2253(c)(2). Second, and in any event, there are conspicuous factual distinctions. To be sure, Judge Costa stated that "a defendant's illegal status is considered so inflammatory that it is often the subject of motions in limine, the point of which is to ensure that testimony is not revealed to the jury that is so prejudicial that even a subsequent instruction to disregard cannot undo the damage." *Davis*, 888 F.3d at 751. He also noted that "the introduction of even a single impermissible mention of a defendant's immigration status is often a highly prejudicial bell that cannot be unrung." *Id.* at 752. Notably, though, in granting the COA, Judge Costa emphasized "a jury note showing that [the petitioner's] unlawful status was a topic during deliberations." *Id.* Here, there is no such smoking gun.

Accordingly, we affirm the district court's denial of Jimenez's motion for a mistrial or a new trial.

3

Jimenez lastly challenges two sentencing enhancements. In particular, he contends that the district court erred in applying a two-level "undue influence" enhancement under U.S.S.G. § 2G1.3(b)(2)(B) and a two-level "custody, care, or supervisory control" enhancement under U.S.S.G. § 2G1.3(b)(1)(B).[20] We'll take each in turn.

20 We review a sentencing court's application of the Guidelines de novo and its factual determinations for clear error. *United States v. Demarest*, 570 F.3d 1232, 1239 (11th Cir. 2009).

a

Section 2G1.3(b)(2)(B) directs a district court to increase a defendant's offense level by two if he "unduly influenced a minor to engage in prohibited sexual conduct." We have explained that "[b]ecause undue influence is a factual finding, we review for clear error." *United States v. Whyte*, 928 F.3d 1317, 1336 (11th Cir. 2019).

Comment 3(B), which we followed in *Whyte*, states that a reviewing court should "closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior." *Id.* (quoting U.S.S.G. § 2G1.3(b)(2)(B), cmt. 3(B)). The same comment provides that there is a rebuttable presumption of undue influence if the defendant is at least 10 years older than his minor victim. *Id.* In determining whether a defendant has rebutted the presumption, the court should consider whether the defendant's conduct "displayed an abuse of superior knowledge, influence and resources." *Id.* (citation omitted).[21]

21 We have since clarified that the commentary can't alter the scope of an unambiguous provision of the Sentencing Guidelines. *See United States v. Dupree*, 57 F.4th 1269, 1273–77 (11th Cir. 2023) (en banc). We don't read Comment 3(B) as expanding § 2G1.3(b)(2)(B). Moreover, Jimenez hasn't argued that *Dupree* abrogated or otherwise undermined our decision in *Whyte* in this respect; rather, he contends that he has rebutted the presumption of undue influence articulated in the commentary.

Jimenez claims that even though he was more than 10 years older than I.G. and helped to pay for I.G. and her family ***1280** to come to the United States, he didn't abuse any superior knowledge, influence, or resources. The government responds by emphasizing that Jimenez (1) purchased I.G.'s plane ticket to the United States; (2) refused to rebook I.G.'s flight home; (3) controlled I.G.'s access to her mother after she returned to Croatia; (4) prepared I.G.'s asylum paperwork; (5) told a law enforcement officer that he shouldn't have spoken to I.G. without Jimenez's permission; (6) misleadingly told I.G. that he was a doctor so that she would talk to him about sex; and (7) instructed I.G. to tell her mother that she wouldn't be returning to Croatia.

For purposes of assessing whether the undue-influence enhancement applies, we consider a broad range of "[r]elevant conduct." U.S.S.G. § 1B1.3; *see also United States v. Castaneda-Pozo*, 877 F.3d 1249, 1251 (11th Cir. 2017). In particular, we may consider not only Jimenez's conduct "during" and "in preparation for" the offense of conspiring to transport I.G. to the United States but also any post-offense conduct aimed at "attempting to avoid detection or responsibility." U.S.S.G. § 1B1.3(a)(1)(B). "Relevant conduct" further includes all harm that "resulted from" or "that was the object of" the acts and omissions by Jimenez, *id.* § 1B1.3(a)(3), and "any other information specified in the applicable guideline," *id.* § 1B1.3(a)(4).

We hold that the district court did not clearly err in finding that Jimenez exercised undue influence over I.G. By spending his own money to pay for I.G.'s visa application and fly her to the United States, Jimenez used his "resources" to "influence" I.G.'s decision to travel. By posing as a doctor and then discussing I.G.'s fertility with her, he used his superior "knowledge" to "influence" her decisions regarding when and how to engage in sexual activity with Pulido. And by instructing I.G. to tell her mother that she wouldn't be returning to Croatia, promising—but then refusing—to book her flight home, and controlling I.G.'s communications with her mother after she returned to Croatia, he used his "influence" to compromise the voluntariness of her decision to stay in the United States. Given this evidence, we hold that the district court correctly applied the undue-influence enhancement, and we affirm its decision in that respect.

b

Last up: Jimenez's challenge to the district court's imposition of the "custody, care, or supervisory control" enhancement. Section 2G1.3(b)(1)(B) instructs a sentencing court to enhance the offense level by two if a minor involved in a sex-related crime "was otherwise in the custody, care, or supervisory control of the defendant." U.S.S.G. § 2G1.3(b)(1)(B). Jimenez contends that the district court erroneously imposed this enhancement because, among other reasons, he didn't have custody of I.G. until after he had completed his offense conduct.

The district court applied the enhancement because, in its view, Jimenez was responsible for all conduct in furtherance of the conspiracy, which it described as "getting I.G. to have sex with Pulido." Sentencing Tr. at 17:4–6, Doc. 285. We agree.

To begin, the commentary to § 2G1.3 makes clear that the enhancement is "intended to have broad application"—such that, for instance, it may be imposed even where a minor is only "temporarily" entrusted to the defendant. U.S.S.G. § 2G1.3 cmt. n.2(A). Moreover, for reasons already explained, in assessing the appropriateness of Jimenez's sentence, we may consider all "[r]elevant conduct"—*i.e.*, not only his actions undertaken in preparation for and during the conspiracy, but also his actions ***1281** thereafter that were aimed at "attempting to avoid detection or responsibility," as well as any harm that "resulted from" or "that was the object of" his acts and omissions. U.S.S.G. §§ 1B1.3 (a)(1)(B), (a)(3).

Here, the case that I.G. was entrusted to Jimenez's care is straightforward. At the very least, Jimenez unquestionably exercised supervisory control over I.G. when she stayed at his home in Florida after her family returned to Croatia. The district court found that I.G.'s mother entrusted her daughter to Jimenez, and I.G. physically lived in his house for the week following her family's departure. Jimenez hasn't demonstrated that this factual determination was clearly erroneous. *See Demarest*, 570 F.3d at 1239. Accordingly, we agree that when I.G. lived under Jimenez's roof for a full week—without her family there with her—he assumed a caretaker-like status over her, *see United States v. Isaac*, 987 F.3d 980, 992 (11th Cir. 2021) (applying the enhancement where the defendant acted as a temporary caretaker charged with looking after the victim's wellbeing), and we therefore affirm the district court's application of the “custody, care, or supervisory control” enhancement.

IV

For the foregoing reasons, we **AFFIRM** the district court's judgment on all matters related to Pulido except his enticement count. On that issue, we **VACATE** his conviction and **REMAND** for resentencing in accordance with this opinion and with instructions that the enticement count be dismissed. We **AFFIRM** the district court's judgment on all matters related to Jimenez.

AFFIRMED in part, **VACATED** in part, and **REMANDED** in part.

Rosenbaum, Circuit Judge, Concurring:
I join the Majority Opinion in full but write separately to highlight two points about our decision to vacate Pulido's 18 U.S.C. § 2422(b) conviction. First, our Circuit's strict approach to duplicitous indictments requires us to vacate Pulido's conviction, even though our sister circuits may have upheld it. Second, our decision will require the government to charge § 2422(b) violations by the enticement, not by the victim. And that defies the reality of the crime Congress intended to prevent.

As the Majority Opinion points out, a defendant violates § 2422(b) when the defendant *entices* the minor to engage in illegal sexual activity, Maj. Op. at 1269-70 that is, when the minor, in part because of the defendants' actions, *decides* to engage in illegal sexual activity with the defendant. Throughout an entire relationship, a defendant may engage many times in illegal sexual activity with a minor.

So it's no stretch to say that a count alleging a single violation of § 2422(b) based on a victim's entire relationship with a defendant may include multiple enticements (and thus multiple § 2422(b) violations under our precedent).

But it does not necessarily follow under the statutory text that an indictment is improper just because it alleges § 2422(b) violations by victim, rather than by enticement. After all, outside our Circuit, the government routinely charges § 2422(b) violations by the victim, not the enticement—and courts routinely uphold those conviction without discussion of potential duplicity issues. *See, e.g.*, *United States v. Greaux-Gomez*, 52 F.4th 426, 440 (1st Cir. 2022); *United States v. Harris*, 991 F.3d 552, 554 (4th Cir. 2021).

But our duplicity precedent differs from that of other circuits. We have made clear that “two distinct offenses” must be “alleged ***1282** in a separate and distinct count of the indictment.” *United States v. Schlei*, 122 F.3d 944, 979

(11th Cir. 1997) (quoting *Bins v. United States*, 331 F.2d 390, 393 (5th Cir.), *cert. denied*, 379 U.S. 880, 85 S.Ct. 149, 13 L.Ed.2d 87 (1964)).[1] And under our prior-precedent rule, that precedent binds us. *See United States v. Davis*, 730 F.2d 669, 672 (11th Cir. 1984). So we must enforce our rule and require the government to charge individually the distinct enticements that occur throughout a victim's entire relationship with a defendant.

1 All Fifth Circuit decisions issued by the close of business on September 30, 1981, are binding precedent in this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

Other circuits, by contrast, have not taken such a strict approach to duplicitous indictments. Some have adopted a "general rule that criminal charges may aggregate multiple individual actions that otherwise could be charged as discrete offenses as long as all of the actions are part of 'a single scheme.' " *United States v. Moloney*, 287 F.3d 236, 240 (2d Cir. 2002) (quoting *United States v. Margiotta*, 646 F.2d 729, 733 (2d Cir. 1981)); *see also United States v. Canas,* 595 F.2d 73, 78–79 (1st Cir. 1979). In other words, just because the government *can* charge multiple violations separately does not mean that it *must* do so. And that makes some sense. When the "essence" of the alleged crime is a "single scheme," the risk of unfairness to the defendant is "slight," *Margiotta*, 646 F.2d at 733, because a jury must unanimously agree that the totality of the defendant's conduct violates the pertinent statute.

That is especially true for how the government prosecutes § 2422(b) offenses. The essence of the offense is often a "single scheme": a prolonged, impermissible sexual relationship with a minor. So when a jury convicts a defendant of perpetrating such a relationship in violation § 2422(b), it necessarily unanimously concludes that the defendant caused the minor's mental state to change from not agreeing to engage in a sexual relationship with the defendant to agreeing to do so. To be sure, without a proper instruction,[2] there is the chance that jurors do not debate and agree on the exact *instance* when the victim's mental state changed. But even in that case, there is no dispute that the jurors unanimously agreed that the defendant violated the statute.

2 Because a duplicitous indictment is not a structural error, we assess in each case whether the duplicitous count was harmless. *See United States v. Deason*, 965 F.3d 1252, 1267 (11th Cir. 2020). And an instruction to the jury may render a duplicitous indictment harmless. *See United States v. Damrah*, 412 F.3d 618, 623 (6th Cir. 2005) (concluding a unanimity instruction rendered any duplicity harmless); *Cf. Schlei*, 122 F.3d at 980 (concluding duplicity doomed the indictment and noting the "absence of a unanimity instruction"). For instance, if the district court had instructed the jurors that they must unanimously agree as to at least one instance where Pulido persuaded, induced, enticed, or coerced I.G. to engage in illegal sexual activity during the course of their relationship, then we could have been sure that

> the jury unanimously agreed as to at least one completed § 2422(b) offense. Any duplicity would have been harmless, and we would have upheld the conviction.

Still, our precedent forecloses us from entertaining such contentions. And that leads me to my second point: our precedent will force the government to charge § 2422(b) violations by the enticement, rather than the victim, which defies the reality of the crime Congress enacted § 2422(b) to prevent.

Congress amended § 2422(b) to its modern form in 1996 to combat the growing ***1283** trend of "cyberpredators interacting with minors online." Andriy Pazuniak, *A Better Way to Stop Online Predators: Encouraging A More Appealing Approach to § 2422(b)*, 40 SETON HALL L. REV. 691, 696 (2010). Congress was concerned that "[t]he anonymous nature of the on-line relationship allows users to misrepresent their age, gender, or interests. [So] [p]erfect strangers can reach into the home and befriend a child." H.R. REP. NO. 105-557, at 12 (1998), *reprinted in* 1998 U.S.C.C.A.N. 678, 680. In other words, Congress sought to prevent the harm and trauma of an inappropriate and illegal sexual relationship that a cyberpredator's single but ongoing enticement caused.

And that makes sense because, as a matter of reality, a victim's second and later sexual acts with the same predator are often further consequences of the initial (and continuing) enticement. After all, once a predator has, over days, weeks, months, or even years, changed a victim's mind so that the victim acquiesces in the first sexual act, the victim's reluctance to engage in sexual acts with the predator has been breached. So the victim may be more likely to acquiesce in additional sexual acts without further enticement. And in any case, even if further enticement occurs, it's often fair to say that the initial enticement was vital to convincing the victim's later sexual acts. So charging § 2422(b) violations by each sexual act enticed throughout that relationship ignores both reality and the core ill Congress sought to combat.

That, in turn, leads to some odd, and even harmful, results. For starters, it may be impossible to ascertain whether a victim's state of mind changed multiple times throughout their relationship with the defendant or whether the victim's entire relationship with the defendant derived from the initial enticement. But because the government must charge individual enticements separately, it will likely have to parse the victim's sexual activities by the event to effectively capture each time the victim's state of mind changed (or if it never did). And beyond the practical issues that may pose for a witness who may struggle to remember their thoughts and feelings at such a granular level, it will force the victim to relive before a grand jury and in open court harsher versions of the trauma they already endured.

Plus, the government will charge multiple times a crime that already carries a ten-year mandatory-minimum sentence with the possibility of up to life in prison. 28 U.S.C. § 2422(b). Congress vested judges with the discretion to determine the proper sentence within that range based on the totality of the facts before them. But forcing the government to charge by the enticement, rather than the victim, multiplies the statutory minimum;

it eliminates the application of our usual sentencing practices that secure uniform and proportionate punishments; and, in some cases, it may even impose an effectively automatic life sentence.

This is all to say the Majority Opinion arrives at the correct disposition under our precedent, but I have deep concerns about the correctness of our precedent. Congress enacted § 2422(b) to prevent the instigation of illegal sexual relationships with minors online. It understood that a single enticement, inducement, persuasion, or coercion could instigate a prolonged sexual relationship that inflicts immense and lasting trauma on minor victims. And the government has routinely charged § 2422(b) violations on that understanding. But our duplicity jurisprudence —an anomaly compared to that of other circuits —will now force the United States to charge and try cases by the enticement, rather than the victim. And that departs from the reality ***1284** of the crime the defendant perpetrated, all while harming the victim in the process.

All Citations

133 F.4th 1256, 30 Fla. L. Weekly Fed. C 2059

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APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA — **Case Number: 8:20-cr-292-VMC-CPT**

v. — **USM Number: 11176-509**

JORDAN JYSAE PULIDO — **Samuel Landes, AFPD**

AMENDED JUDGMENT IN A CRIMINAL CASE

(Amended in accordance with the Eleventh Circuit Court of Appeals mandate vacating Defendant's conviction on Count One of the Indictment and remanding the case for resentencing.)

Defendant was found guilty after a jury trial of Counts One, Two, Three, and Four of the Indictment. Defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
18 U.S.C. § 2423(b)	Travel with Intent to Engage in Illicit Sexual Conduct	June 15, 2018	Two
18 U.S.C. §§ 2423(a) and (e)	Conspiracy to Transport Minor with Intent to Engage in Sexual Activity	July 23, 2018	Three
18 U.S.C. § 2423(a)	Transportation of a Minor with Intent to Engage in Sexual Activity	July 23, 2018	Four

Defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Count One of the Indictment is dismissed in accordance with the Eleventh Circuit Court of Appeals mandate.

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

Date of Imposition of Judgment: February 23, 2022

Virginia M. Hernandez Covington
VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

September 10, 2025

IMPRISONMENT

Defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **ONE HUNDRED TWENTY (120) MONTHS**. This term consists of a 120-month term as to each of Counts Two, Three, and Four, all such terms to run concurrently.

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

- Defendant continue to be housed at FCI Coleman, so that he may be near his family and friends.
- Defendant be allowed to take college-level classes.
- Defendant be allowed to continue to participate in the UNICOR program.

Defendant is remanded to the custody of the US Marshal to await designation by the Bureau of Prisons.

RETURN

I have executed this judgment as follows:

____

____

____

____

Defendant delivered on ____________________ to ______________________________________

at ____, with a certified copy of this judgment.

____
UNITED STATES MARSHAL

By:____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, Defendant shall serve a **TWENTY (20) YEAR** term of supervised release. This term consists of a 20-year term as to each of Counts Two, Three, and Four, all such terms to run concurrently.

MANDATORY CONDITIONS

1. Defendant shall not commit another federal, state, or local crime.
2. Defendant shall not unlawfully possess a controlled substance.
3. Defendant shall refrain from any unlawful use of a controlled substance. 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.
   - The mandatory drug testing provisions of the Violent Crime Control Act are suspended. However, the Court orders Defendant to submit to random drug testing not to exceed 104 tests per year.
4. Defendant shall cooperate in the collection of DNA as directed by the Probation Officer.
5. Defendant shall make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution.

Defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

Defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of Defendant's supervised release, Defendant shall comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for Defendant's behavior while on supervision and identify the minimum tools needed by Probation Officers to keep informed, report to the court about, and bring about improvements in Defendant's conduct and condition.

1. Defendant shall report to the Probation Office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the Probation Officer instructs you to report to a different Probation Office or within a different time frame. After initially reporting to the Probation Office, Defendant will receive instructions from the court or the Probation Officer about how and when Defendant must report to the Probation Officer, and Defendant must report to the Probation Officer as instructed.
2. After initially reporting to the Probation Office, you will receive instructions from the court or the Probation Officer about how and when Defendant shall report to the Probation Officer, and Defendant shall report to the Probation Officer as instructed.
3. Defendant shall not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the Probation Officer.
4. Defendant shall answer truthfully the questions asked by your Probation Officer
5. Defendant shall live at a place approved by the Probation Officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), Defendant shall notify the Probation Officer at least 10 days before the change. If notifying the Probation Officer in advance is not possible due to unanticipated circumstances, Defendant shall notify the Probation Officer within 72 hours of becoming aware of a change or expected change.
6. Defendant shall allow the Probation Officer to visit you at any time at your home or elsewhere, and Defendant shall permit the Probation Officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. Defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the Probation Officer excuses you from doing so. If you do not have full-time employment Defendant shall try to find full-time employment, unless the Probation Officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), Defendant shall notify the Probation Officer at least 10 days before the change. If notifying the Probation Officer at least 10 days in advance is not possible due to unanticipated circumstances, Defendant shall notify the Probation Officer within 72 hours of becoming aware of a change or expected change.
8. Defendant shall not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, Defendant shall not knowingly communicate or interact with that person without first getting the permission of the Probation Officer.
9. If you are arrested or questioned by a law enforcement officer, Defendant shall notify the Probation Officer within **72 hours**.
10. 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).
11. Defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the Probation Officer determines that you pose a risk to another person (including an organization), the Probation Officer may require you to notify the person about the risk and Defendant shall comply

with that instruction. The Probation Officer may contact the person and confirm that you have notified the person about the risk.

13. Defendant shall follow the instructions of the Probation Officer related to the conditions of supervision.

U.S. Probation Office Use Only

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

Defendant's Signature:______________________________ Date:_________________________

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

1. Defendant shall participate in a mental health treatment program (outpatient and/or inpatient) and follow the Probation Officer's instructions regarding the implementation of this court directive. Further, Defendant shall contribute to the costs of these services not to exceed an amount determined reasonable by the Probation Office's Sliding Scale for Mental Health Treatment Services.

2. Defendant shall participate in a mental health program specializing in sexual offender treatment and submit to polygraph testing for treatment and monitoring purposes. Defendant shall follow the Probation Officer's instructions regarding the implementation of this court directive. Further, Defendant shall contribute to the costs of such treatment and/or polygraphs not to exceed an amount determined reasonable by the Probation Officer based on ability to pay or availability of third-party payment and in conformance with the Probation Office's Sliding Scale for Treatment Services.

3. Defendant shall register with the state sexual offender registration agency(s) in any state where Defendant resides, visits, is employed, carries on a vocation, or is a student, as directed by the Probation Officer.

4. The Probation Officer shall provide state officials with all information required under Florida sexual predator and sexual offender notification and registration statutes (F.S. 943.0435) and/or the Sex Offender Registration and Notification Act (Title I of the Adam Walsh Child Protection and Safety Act of 2006, Public Law 109-248), and may direct the Defendant to report to these agencies personally for required additional processing, such as photographing, fingerprinting, and DNA collection.

5. Defendant shall have no direct contact with minors (under the age of 18) without the written approval of the Probation Officer and shall refrain from entering into any areas where children frequently congregate, including: schools, daycare centers, theme parks, playgrounds, etc.

6. Defendant is prohibited from possessing, subscribing to, or viewing any images, videos, magazines, literature, or other materials depicting children in the nude and/or in sexually explicit positions.

7. Without prior written approval of the Probation Officer, Defendant is prohibited from either possessing or using a computer (including a smart phone, a hand-held computer device, a gaming console, or an electronic device) capable of connecting to an online service or an internet service provider. This prohibition includes a computer at a public library, an internet cafe, Defendant's place of employment, or an educational facility. Also, Defendant is prohibited from possessing an electronic data storage medium (including a flash drive, a compact disk, and a floppy disk) or using any data encryption technique or program. If approved to possess or use a device, Defendant must permit routine inspection of the device, including the hard drive and any other electronic data storage medium, to confirm adherence to this condition. The United States Probation Office must conduct the inspection in a manner no more intrusive than necessary to ensure compliance with this condition. If this condition might affect a third party, including Defendant's employer, Defendant must inform the third party of this restriction, including the computer inspection provision.

8. Defendant shall have no contact, direct or indirect, with the victim, I.G., or her family.

9. Defendant shall submit to a search of his person, residence, place of business, any storage units under Defendant's control, computer, or vehicle conducted by the United States Probation Officer at a

reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition. Failure to submit to a search may be grounds for revocation.

10. Having been convicted of a qualifying felony, Defendant must cooperate in the collection of DNA, as directed by the Probation Officer.

11. The mandatory drug testing requirements of the Violent Crime Control Act are suspended. However, Defendant must submit to random drug testing not to exceed 104 tests per year.

CRIMINAL MONETARY PENALTIES

Defendant must pay the following total criminal monetary penalties under the schedule of payments set forth in the Schedule of Payments.

Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment*
SATISFIED	SATISFIED	WAIVED	N/A	N/A

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

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

SCHEDULE OF PAYMENTS

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

Special Assessment shall be paid in full and is due immediately.

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 penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court, unless otherwise directed by the Court, the Probation Officer, or the United States Attorney.

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, and (9) penalties, and (10) costs, including cost of prosecution and court costs.

FORFEITURE

Defendant shall forfeit to the United States those assets that are subject to forfeiture as previously identified in the Order of Forfeiture and any subsequent orders.

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* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.