

No. 25-

IN THE
Supreme Court of the United States

BILLY J. GRIFFITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the district court erred in refusing to give Griffith's proposed "Defendant's Instruction No. 3" which included language that in order for the jury to find Griffith guilty of Count One of the Second Superseding Indictment (receipt of child pornography) that Griffith had to know "at the time of the receipt" that the video being downloaded contained child pornography.

RULE 14.1(b)(I) STATEMENT

Pursuant to Rule 14.1(b)(1), Petitioner states that the parties include:

1. Billy J. Griffith, Petitioner, who was the Appellant in the United States Court of Appeals for the Fourth Circuit.
2. United States of America, Respondent, who was the Appellee in the United States Court of Appeals for the Fourth Circuit.

RULE 14.1(b)(iii) STATEMENT

United States v. Billy J. Griffith, 2:22-CR-218, U.S. District Court for the Southern District of West Virginia. Judgment entered February 26, 2024.

United States v. Billy J. Griffith, No. 24-4118, U.S. Court of Appeals for the Fourth Circuit. Judgment entered January 30, 2026.

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OPINIONS BELOW

The United States Court of Appeals for the Fourth Circuit filed an unpublished opinion on January 30, 2026 affirming the petitioner's conviction and sentence. *U.S. v. Billy J. Griffith*, ___ Fed.Appx. ___, (No. 24-4118)(4th Cir. 2026). The unpublished opinion of the Court of Appeals for the Fourth Circuit is attached to this Petition as Appendix A. (Appendix pgs. 1a-4a).

Excerpts of Transcript from the United States District Court for the Southern District of West Virginia at Charleston, Dated June 14, 2023, attached to this Petition as Appendix B. (Appendix pgs 5a-18a).

JURISDICTION

On January 30, 2026, the United States Court of Appeals for the Fourth Circuit rendered its decision and entered judgment whereby it affirmed the sentence imposed upon Billy J. Griffith (“Griffith”) in the district court. The United States District Court for the Southern District of West Virginia had jurisdiction pursuant to 18 U.S.C. §3231 which provides in part that “the district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.” The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 18 U.S.C. §1291 which provides in part that “the courts of appeals (other than the United States Court of Appeals for the Federal circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States” and by Rule 4(b) of the Federal Rules of Appellate Procedure. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) and Rule 10 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED18 U.S.C. §2252A(a)(2)

(a) Any person who-

(2) knowingly receives or distributes-(A) any child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; or (B) any material that contains child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

18 U.S.C. §2252A(5)(B)

(5) either-(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or (B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

18 U.S.C. §2252A(b)(1)

(b) (1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but, if such person has a prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

18 U.S.C. §2252A(b)(1)

(b)(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, but, if any image of child pornography involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

STATEMENT OF THE CASE

On December 6, 2022 a federal Grand Jury returned a single count Indictment against the appellant, Billy J. Griffith (“Griffith”), in the Southern District of West Virginia. (JA 12-13). A forfeiture allegation was also returned by the Grand Jury.

The Indictment charged Griffith with possession of child pornography in violation of 18 U.S.C. §2252A(a)(2) and 2252A(b)(2).

On January 10, 2023 a federal Grand Jury returned a single count Superseding Indictment against the appellant, Billy J. Griffith (“Griffith”), in the Southern District of West Virginia. (JA 14-15). As before, a forfeiture allegation was also returned by the Grand Jury. The Superseding Indictment again charged Griffith with possession of child pornography in violation of 18 U.S.C. §2252A(a)(2) and 2252A(b)(2). The only difference between the original Indictment and the Superseding Indictment was the addition of the word “prepubescent” before “minors.”

By an order entered on April 10, 2023, the district court granted Griffith’s motion to continue the trial and reset the trial to commence on June 13, 2023.

On May 17, 2023 Griffith filed Defendant’s Motion in Limine to Request the Government to Specifically Identify Which Alleged Depictions of Child Pornography will be Introduced at Trial (JA 16-19) and Defendant’s Motion in Limine to Limit the Number of Files Containing Child Pornography which are Shown to the Jury at Trial. (JA 20-21). On May 23, 2023 the government filed its response to Griffith’s motions in limine. (JA 22-25).

Just weeks before the June 13, 2023 trial date the government went back before the Federal Grand Jury and on June 1, 2023 the federal Grand Jury this time returned a two count Second Superseding Indictment against the appellant, Billy J. Griffith (“Griffith”), in the Southern District of West Virginia. (JA 26-28). A forfeiture allegation was again also returned by the Grand Jury. The Second Superseding Indictment this time charged Griffith that he “did knowingly receive child pornography” in violation of 18 U.S.C. §2252A(a)(2) and 2252A(b)(1) (Count One) and that he “did knowingly possess” child pornography in violation of 18 U.S.C. §2252A(a)(2) and 2252A(b)(2) (Count Two).

An arraignment was held on June 6, 2023 on the Second Superseding Indictment at which time the trial was pushed back one day and now was to commence on June 14, 2023.

On June 6, 2023 Griffith filed Defendant’s Motion in Limine to Preclude the Government’s Introduction of an Image Containing Child Pornography at Trial. (JA 29-32).

On June 7, 2023 Griffith filed Defendant’s Proposed Jury Instructions. (JA 35-65).

On June 12, 2023 the government filed its Response of the United States to Defendant’s Motion in Limine to Preclude the Government’s Introduction of an Image File Containing Child Pornography at Trial. (JA 66-79).¹

¹ This motion in limine was addressed on the morning of the first day of trial and was overruled by the district court. (JA 92-94).

On June 14 and 15, 2023 Griffith exercised his right to a jury trial on the Second Superseding Indictment at the United States District Court for the Southern District of West Virginia in Charleston, West Virginia, before the Honorable Joseph R. Goodwin. (JA 80-349). The jury trial lasted two days at the conclusion of which the jury returned a guilty verdict on both counts of the Superseding Indictment. (JA 350-351).

At trial the government called as its first witness Jared Jankowski, a special agent with the Federal Bureau of Investigation (hereinafter “SA Jankowski). (JA 163-200). SA Jankowski testified that he was the task force coordinator fo the West Virginia Child Exploitation and Human Trafficking Task Force. (JA 164). His investigation into Griffith began when he was notified by another task force officer that “a certain IP address was downloading child pornography.” (JA 166). After subpoenaing companies to determine more details regarding such ISP address he learned that the account owner for such ISP address was Griffith. (JA 166). Based on that information a federal search warrant was obtained to search Griffith’s residence and seize items involved in the possible possession of child pornography. The federal search warrant was executed on August 24, 2022 and a desktop computer, a laptop computer and a cell phone as well as some external hard drives were seized. (JA 167-171). During the execution of the search warrant SA Jankowski interviewed Griffith during which Griffith informed him that his internet and Wi-Fi, along with his desktop computer, laptop computer and cell phone were password protected and he was the only one to use those devices. (JA 170-171). SA

Jankowski also testified that the FBI's Forensic Examiner Melinda Cash was present during the search and was the person who decided which electronic devices were to be seized. (JA 173).

Items seized during the search were analyzed for the presence of child pornography at the FBI laboratory. The external hard drive, located in a guest bedroom, contained 115 images of child pornography. (JA 174-175). SA Jankowski testified to one of the 115 images of child pornography that was found on the external hard drive and such image was entered as an exhibit and published to the jury. (JA 176-177).

The next item seized from Griffith's residence and identified by SA Jankowski was a Dell laptop computer also found in the guest room area of the house. (JA 177-178). The laptop was password protected and Griffith gave SA Jankowski the password to the device. (JA 178). Upon its being analyzed at the FBI laboratory 245 images of child pornography were identified. (JA 179). Two images depicting child pornography found on this laptop were admitted into evidence and published to the jury. (JA 179-181).

After the discussion of the Dell laptop the government then inquired of SA Jankowski of a desktop computer seized from Griffith's "office/guest room area." (JA 181-182). An analysis of this desktop computer by the FBI laboratory revealed that on the hard drive of such computer 2,657 images of child pornography were found. (JA 183). As before one image from the hard drive computer in this desktop computer was admitted into evidence and published to the jury. (JA 184). A LG

phone located in the master bedroom was the next item to be admitted into evidence during trial. (JA 185-188). Griffith admitted to SP Jankowski that the cell phone was his (JA 185) and an analysis of the cell phone revealed 366 images of child pornography. (JA 186). A video of child pornography was also found on the LG cell phone. (JA 187).

SA Jankowski was then presented with a chart prepared by the government indicting the various devices seized and testified that on those four devices (external hard drive, Dell laptop computer, desktop computer and LG cell phone) that there were “3,383 images of child pornography along with four vides of child pornography . . .” (JA 190).

SA Jankowski was then subjected to cross examination by Griffith’s attorney. (JA 193-200).

The next witness called to testify on behalf of the government was Melinda Cash, a digital forensic examiner who has worked at the FBI for 31 years (hereinafter “Cash”). (JA 201-202). Without objection by Griffith’s counsel she was qualified as an expert witness to testify as an expert in digital forensics and analysis of electronic devices and file sharing programs. (JA 204). Cash proceeded to testify about the process of analyzing electronic devices for the presence of child pornography, peer-to-peer software, cleaner programs, her analysis of the external hard drive, Dell laptop computer, desktop computer and LG cell phone seized from Griffith’s residence during the execution of the federal search warrant, (JA 205-232). After the close of

her direct examination Griffith's attorney proceeded to cross examine Cash (JA 233-271) followed by redirect on the part of the government. (JA 271-274).

At the conclusion of Cash's testimony the government rested its case. (JA 277).

Griffith, through counsel, moved for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure and after hearing argument from both Griffith and the government the district court denied the motion. During his argument regarding Count One of the Superseding Indictment Griffith's counsel stated that

[t]he statutory requirement for receipt requires a knowing receipt and that the Government has to show that the defendant was aware of the sexually explicit conduct and that it involved minors at the time of the receipt. The cases I rely on that are *United States versus Miltier*. That's a Fourth Circuit case where the Court said, 'To satisfy the knowing element of a receipt count, the Government must present sufficient evidence such that a rational juror could find that the defendant had knowledge for the sexually explicit nature of the materials as well as the involvement of minors.'

Griffith's counsel continued by arguing that

I would also point out that the First Circuit has held in *United States versus Silva*, 794 F.3d 173, that '[t]he Government has to prove that the material that the defendant received met the statutory definition for child pornography and the defendant knew the facts that made his conduct fit the definition of that offense at the time of the receipt.' Basically being at the time of the download, the defendant had to know specifically that that file contained child pornography and it involved minors under the age of 18.

I would also rely on the district court's decision in *United States versus Dillingham*, 320 F. Supp. 3d 809, that the district court in that case noted that '[t]o establish that a defendant knowingly received child

pornography, the Government was obligated to present evidence sufficient for a jury to find that he actually knew the downloaded files contained child pornography when those files were received.’

And in this case, the Government has not put on any testimony or evidence that would show -- to allow a reasonable juror to conclude that Mr. Griffith was aware of the child pornography content of the video file 3-(Cat Goddess).avi at the time of its receipt on January 31st, 2023.

(JA 277-279).

Later in the argument as to ruling for a judgment of acquittal on Count One the following exchange took place between the district court and Griffith’s counsel –

THE COURT: And your argument there is he didn’t knowingly receive or possess that?

MR. BUNGARD: He did not -- the Government has not shown that he was aware of the sexually explicit content or the nature that minors were involved at the time it was downloaded.

THE COURT: But is knowing receipt not sufficient?

MR. BUNGARD: Knowing receipt has to be knowing receipt at the time of the download. Not later on. You have to know what you get. That's what distinguishes it from a possession, Your Honor. Possession is the lesser included offense to the extent that he knew what it was. If he knew what it was, then he could be found to have possessed it. But the receipt is a narrow -- that's what makes receipt different from possession. That's why it has a statutory mandatory minimum because

the Government's required to prove that extra element that he knew what the contents were of it at the time he got them.

(JA 290-291).

After hearing argument on Griffith's motion for judgment of acquittal the district court denied the motion. (JA 295). After consulting with Griffith the defense rested without putting on any evidence. (JA 298).

The jury was excused for the day and the district court held a charge conference as to the proposed jury instructions to submit to the jury. (JA 299-307). During this charge conference Griffith, as he did in his argument concerning the Rule 29 motion on Count One of the Second Superseding Indictment, again asked the district court to give his proposed language contained in "Defendant's Instruction No. 3" (JA 42-44) by asking the district court to make revisions to the proposed jury charge so that Item 4 would read that

'[t]he defendant acted knowingly such that he knew that the material contained a visual depiction of a minor engaged in sexually explicit conduct at the time of the receipt.' And that's consistent with the case law that I argued to the Court under my Rule 29 motion.

(JA 301).

The district court overruled Griffith's request to add the phrase "at the time" to the proposed jury instruction concerning the receipt of child pornography (Count One). (JA 301-302).

The second day of trial began on June 15, 2023 and after closing arguments on behalf of the government and Griffith and the jury being read the jury instructions the jury rendered its verdict of guilty as to both counts of the Second Superseding Indictment. (JA 311-329, 329-341, 343, 350-351).

On September 5, 2023 the government filed its Sentencing Memorandum of the United States (JA 352-355). After obtaining new counsel Griffith filed a Motion for New Trial on February 5, 2024. (JA 356-358). The government filed its Response of the United States to Motion for a New Trial on February 8, 2024. (JA 359-363).

On February 20, 2024 Griffith filed Defendant's Sentencing Memorandum and Motion for Downward Departure. (JA 364-375).

On February 21, 2024 the district court entered a Memorandum Opinion and Order denying Griffith's Motion for New Trial. (JA 376-380).

A sentencing hearing was held on February 26, 2024 at the conclusion of which Griffith was sentenced to 132 months of incarceration each as to Counts One and Two of the Superseding Indictment, to run concurrently with each other. (JA 381-433). In sentencing Griffith to 132 months the district court varied from the advisory guideline range of 210 to 262 months. (JA 459, 484). Additionally, the district court sentenced Griffith to serve a term of ten (10) years of supervised release each as to Counts One and Two, such terms to run concurrently. Griffith was also ordered to pay the special mandatory assessment of \$200.00. The Judgment in a Criminal Case entered on February 26, 2024 reiterated Griffith's sentence. (JA 434-444).

On February 27, 2024 Griffith filed a Notice of Appeal. (JA 445).

On June 24, 2024 counsel for Griffith filed his Opening Brief and Joint Appendix and on August 14, 2024 the government filed its Response Brief. No reply brief was filed.

On January 30, 2026, the Court of Appeals affirmed the judgment and sentence of the district court in an unpublished opinion *U.S. v. Billy J. Griffith*, ___ Fed.Appx. ___, (No. 24-4118)(4th Cir. 2026). The unpublished opinion of the Court of Appeals for the Fourth Circuit is attached to this Petition. (Appendix pgs. 1a -4a).

REASON FOR GRANTING THE PETITION

I. THE DISTRICT COURT ERRED IN REFUSING TO GIVE GRIFFITH'S PROPOSED "DEFENDANT'S INSTRUCTION NO. 3" WHICH INCLUDED LANGUAGE THAT IN ORDER FOR THE JURY TO FIND GRIFFITH GUILTY OF COUNT ONE OF THE SECOND SUPERSEDING INDICTMENT (RECEIPT OF CHILD PORNOGRAPHY) THAT GRIFFITH HAD TO KNOW "AT THE TIME OF THE RECEIPT" THAT THE VIDEO BEING DOWNLOADED CONTAINED CHILD PORNOGRAPHY.

Prior to trial Griffith filed Defendant's Proposed Jury Instructions. (JA 35-65). The proposed jury instruction related to "Receipt of Child Pornography," set forth in Griffith's proposed "Defendant's Instruction No. 3" provided in pertinent part that

The Government contends that one video file identified in Government's Exhibit Nos. ____ was received by the defendant and constitutes the evidence to be considered for Count One. For you to find the defendant guilty of the receipt of child pornography charged in Count One, you must be convinced that the Government has established the following elements with proof beyond a reasonable doubt:

- (1) The defendant knowingly received the identified video file;
- (2) The identified video file contained child pornography, that is, a visual depiction of a minor engaged in sexually explicit conduct;
- (3) At the time of the receipt, the defendant knew that the identified video file contained a visual depiction of a minor engaged in sexually explicit conduct; and
- (4) The receipt was undertaken through any means or facility of interstate or foreign commerce.

(JA 42-43).

As provided in section (3) of such proposed jury instruction, and as posited by Griffith both as part of his argument related to his Rule 29 motion for judgment of

acquittal as well as his argument during the charge conference, Griffith advanced his position that in order for the government to prove that Griffith knowingly received child pornography on or about January 31, 2022 that it had to prove that Griffith knew that the material being received met the statutory definition of child pornography “at the time of receipt” of such material.

The district court denied both the addition of this language as part of the jury instructions and as a basis for granting Griffith’s motion for judgment of acquittal. (JA 300-302).

Although not a Fourth Circuit case, Griffith cited in *United States v. Silva*, 794 F.3d 173 (1st Cir. 2015) in support of his position that the language “at the time of receipt” be included in the jury instruction to the jury concerning the receipt of child pornography.

In *Silva* it was argued by the defense that the government did not prove that Mr. Silva knowingly received child pornography. The First Circuit held that for a charge of receipt of child pornography pursuant to 18 U.S.C. § 2252(a)(2) “ the government had to prove the material that Silva received as described in each count in fact met the statutory definition for child pornography and that Silva knew ‘the facts that ma[d]e his conduct fit the definition of the offense’ at the time of receipt.” *Silva* at 182.

The conclusion reached by the First Circuit that to be found guilty of the charge of receipt of child pornography a person must know that material being downloaded was indeed child pornography “at the time of [the] receipt” is sound and the district

court erred in denying the addition of such language in its charge to the jury. Without the “at the time of receipt” language the distinction between receipt of child pornography and simple possession of child pornography blurs and makes it confusing to a jury who, as in Griffith’s case, is asked to make a distinction between the receipt of child pornography statute (18 U.S.C. 2252A(a)(2)) and the possession of child pornography statute (18 U.S.C. 2252A(a)(5)(B)).

CONCLUSION

For all of the foregoing reasons, Billy J. Griffith respectfully requests that this Petition for Writ of Certiorari be granted. The decisions of the district and appellate court must be overruled and Griffith respectfully requests that this Court vacate his conviction as to Count One of the Second Superseding Indictment and remand the case to the district court for a new trial on that count.

Respectfully submitted,

BILLY J. GRIFFITH, Petitioner

By: /s/ Scott C. Brown

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT,
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APPENDIX B — EXCERPTS OF TRANSCRIPT FROM THE
UNITED STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF WEST VIRGINIA AT CHARLESTON,
DATED JUNE 14, 2023.....5a

UNPUBLISHEDUNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-4118

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BILLY J. GRIFFITH,

Defendant - Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Joseph R. Goodwin, District Judge. (2:22-cr-00218-1)

Submitted: January 22, 2026

Decided: January 30, 2026

Before WYNN and THACKER, Circuit Judges, and KEENAN, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ON BRIEF: Scott C. Brown, SCOTT C. BROWN LAW OFFICE, Wheeling, West Virginia, for Appellant. William S. Thompson, United States Attorney, Andrew J. Tessman, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

A federal jury convicted Billy J. Griffith of receipt of child sexual abuse material, in violation of 18 U.S.C. § 2252A(a)(2), (b)(1) (Count 1), and possession of child sexual abuse material involving prepubescent minors, in violation of 18 U.S.C. § 2252A(a)(5)(B), (b)(2) (Count 2). The district court sentenced Griffith to 132 months' imprisonment, a downward variance from his advisory Sentencing Guidelines range. On appeal, Griffith challenges his conviction on Count 1, arguing that the district court abused its discretion in declining to add the phrase "at the time of the receipt" to the jury instructions for the knowledge element of the receipt charge. Finding no reversible error, we affirm.

"This court reviews the district court's refusal to provide a requested jury instruction under the abuse of discretion standard." *United States v. Contreras*, 149 F.4th 349, 366 (4th Cir. 2025). A district court reversibly errs in declining to provide a "jury instruction only when the instruction (1) was correct; (2) was not substantially covered by the court's charge to the jury; and (3) dealt with some point in the trial so important, that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense." *United States v. Ravenell*, 66 F.4th 472, 481 (4th Cir. 2023) (internal quotation marks omitted). "This review is holistic: we do not view a single instruction in isolation; rather we consider whether, taken as a whole and in the context of the entire charge, the instructions accurately and fairly state the controlling law." *United States v. Hickman*, 626 F.3d 756, 771 (4th Cir. 2010) (alteration and internal quotation marks omitted). "A party challenging instructions faces a heavy burden, for we accord the district court much

discretion to fashion the charge.” *United States v. Henderson*, 136 F.4th 527, 533 (4th Cir. 2025) (internal quotation marks omitted).

Section 2252A(a)(2) “prohibit[s] the (1) knowing (2) receipt . . . of child [sexual abuse material] (3) using any means in or affecting interstate or foreign commerce, including by a computer.” *United States v. Miltier*, 882 F.3d 81, 86 (4th Cir. 2018). We have explained that, “[t]o satisfy the ‘knowing’ element . . . , the government must present sufficient evidence such that a rational juror could find that the defendant had knowledge of the sexually explicit nature of the materials as well as the involvement of minors in the materials’ production.” *Id.* (alteration and internal quotation marks omitted).

The description of the knowledge element in *Miltier* substantially matches the district court’s jury instruction here. Nevertheless, relying on *United States v. Silva*, 794 F.3d 173 (1st Cir. 2015), Griffith contends that the instruction was incomplete because the district court did not advise that the Government had to prove that he had knowledge of the nature of the materials “at the time of the receipt.”

Even if adding the phrase “at the time of the receipt” to the jury instructions would have been a “correct” statement of the law, Griffith has offered no argument to establish that this phrase “was not substantially covered by the court’s charge to the jury[] and . . . dealt with some point in the trial so important, that failure to give the requested instruction seriously impaired [his] ability to conduct his defense.” *Ravenell*, 66 F.4th at 481 (internal quotation marks omitted). Griffith says only that, without the phrase, the jury might have been confused between the receipt and possession charges. But Griffith does not explain why or how the jury might have been confused. *See* Fed. R. App. P. 28(a)(8)(A) (requiring

argument section of brief to include “appellant’s contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies”); *United States v. Miller*, 41 F.4th 302, 313 (4th Cir. 2022) (finding argument not comporting with Rule 28(a)(8)(A) “waived”). And we have found no apparent danger of such confusion on the record.

Because Griffith has not met his heavy burden of establishing reversible error in the district court’s failure to add the phrase “at the time of the receipt” to the jury instructions, we affirm the district court’s judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

	_____	x
		:
4	UNITED STATES OF AMERICA,	:
		:
5	Plaintiff,	: Civil Action Number:
	-vs-	: 2:22-cr-218
6		:
7	BILLY J. GRIFFITH,	:
		:
8	Defendant.	: Volume I
	_____	x

JURY TRIAL
BEFORE THE HONORABLE JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE
JUNE 14, 2023

APPEARANCES:

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JA134

1 MADAM CLERK: That's correct.

2 MS. WHITE: I also note that Exhibits 7, 8, 9, 10,
3 11, 12, 13, 14, 15 and 16 have been received into evidence.

4 MADAM CLERK: That's correct.

5 MS. WHITE: Thank you, Your Honor. Given that,
6 the Government rests.

7 THE COURT: Ladies and gentlemen of the jury, the
8 Government having rested, we have matters I told you we
9 would be taking up. So we're going to have a short break.

10 Go back to the jury room and I'll call you back as soon
11 as we're ready. Don't discuss the case. Don't do anything
12 with regard to the case.

13 (The jury exits the courtroom.)

14 THE COURT: Please ask him to close that interior
15 door. Officer?

16 COURT SECURITY OFFICER: Yes, sir.

17 MS. WHITE: Mr. Bungard, a motion?

18 MR. BUNGARD: Yes, Your Honor. I'm going to move
19 for dismissal on both counts under Rule 29 to the extent
20 that the Government has presented insufficient evidence
21 required to prove all the elements of both of those counts.

22 Let me start with Count 1, the knowing receipt of child
23 pornography. Again, the Government's evidence is solely one
24 video file that was entitled 3-(Cat Goddess).avi. The
25 statutory requirement for receipt requires a knowing receipt

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JA277

1 and that the Government has to show that the defendant was
2 aware of the sexually explicit conduct and that it involved
3 minors at the time of the receipt. The cases I rely on that
4 are *United States versus Miltier*. That's a Fourth Circuit
5 case where the Court said, "To satisfy the knowing element
6 of a receipt count, the Government must present sufficient
7 evidence such that a rational juror could find that the
8 defendant had knowledge for the sexually explicit nature of
9 the materials as well as the involvement of minors."

10 The same knowledge requirement was also previously
11 stated in *United States versus Matthews*. It's also a Fourth
12 Circuit case, 309 F.3d 338. That came out in 2000.

13 I would also point out that the First Circuit has held
14 in *United States versus Silva*, 794 F.3d 173, that "The
15 Government has to prove that the material that the defendant
16 received met the statutory definition for child pornography
17 and the defendant knew the facts that made his conduct fit
18 the definition of that offense at the time of the receipt."
19 Basically being at the time of the download, the defendant
20 had to know specifically that that file contained child
21 pornography and it involved minors under the age of 18.

22 I would also rely on the district court's decision in
23 *United States versus Dillingham*, 320 F. Supp. 3d 809, that
24 the district court in that case noted that "To establish
25 that a defendant knowingly received child pornography, the

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JA278

1 Government was obligated to present evidence sufficient for
2 a jury to find that he actually knew the downloaded files
3 contained child pornography when those files were received."

4 And in this case, the Government has not put on any
5 testimony or evidence that would show -- to allow a
6 reasonable juror to conclude that Mr. Griffith was aware of
7 the child pornography content of the video file
8 3-(Cat Goddess).avi at the time of its receipt on
9 January 31st, 2023.

10 Ms. Cash indicated that the -- that particular time
11 stamp on the Excel spreadsheet would have been the date and
12 time when that file downloaded. The Government has no
13 forensic evidence to show what search terms were used by
14 Mr. Griffith in Frostwire to obtain that specific file in a
15 download. There was no evidence of any such search history
16 in Frostwire. The name of that file did not contain any
17 words that would inherently suggest that the content
18 contained child pornography or any type of pornography. To
19 that extent, Ms. Cash's identification of Cat Goddess being
20 a known series comes from her experience as being a law
21 enforcement officer for the past 31 years for the FBI. It's
22 not as a common citizen coming up there and saying, well, I
23 recognize Cat Goddess being consistent with child
24 pornography. That's not what the testimony was.

25 More importantly, I would submit the words -- that her

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1 images arrived on his computer, Your Honor.

2 THE COURT: Right.

3 MR. BUNGARD: We don't know that. There's no --

4 THE COURT: But we do know they're there. We do
5 know they're there.

6 MR. BUNGARD: The Government has presented
7 evidence they're there. But they can't show how they got
8 there or how he knew that they existed. And, again, this is
9 -- my argument on Count 1 just goes to the Government's
10 allegations with respect to the CP that was downloaded on
11 January 31st, not the rest of the case.

12 THE COURT: And your argument there is he didn't
13 knowingly receive or possess that?

14 MR. BUNGARD: He did not -- the Government has not
15 shown that he was aware of the sexually explicit content or
16 the nature that minors were involved at the time it was
17 downloaded.

18 THE COURT: But is knowing receipt not sufficient?

19 MR. BUNGARD: Knowing receipt has to be knowing
20 receipt at the time of the download. Not later on. You
21 have to know what you get. That's what distinguishes it
22 from a possession, Your Honor. Possession is the lesser
23 included offense to the extent that he knew what it was. If
24 he knew what it was, then he could be found to have
25 possessed it. But the receipt is a narrow -- that's what

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JA290

1 makes receipt different from possession. That's why it has
2 a statutory mandatory minimum because the Government's
3 required to prove that extra element that he knew what the
4 contents were of it at the time he got them.

5 THE COURT: Okay. And if I'm right, it's in the
6 second count that it's -- the peer-to-peer stuff is in the
7 second count, not the receipt count, right?

8 MR. BUNGARD: No. The peer-to-peer is in the --
9 Count 1.

10 THE COURT: Is that the one you're arguing about?

11 MR. BUNGARD: Yes.

12 THE COURT: Well, how do you distinguish
13 *United States versus Stanley* from the Fourth Circuit an
14 unpublished case that says, "Downloading, storing or sharing
15 images using a peer-to-peer program on one's computer can
16 establish knowing receipt, possession, transportation of
17 child pornography."

18 MR. BUNGARD: I don't -- that case -- if the facts
19 of that case were the defendant was aware what he was
20 getting and they had -- and the case had evidence as to what
21 search terms were used to get those files -- if the file
22 names in those cases were suggestive of child pornography --
23 I don't know what the evidence was in that case, Your Honor,
24 for the Court to make that finding.

25 THE COURT: I think I understand your argument and

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1 you've done a good job of presenting it. And instead of
2 arguing with you, I need to hear what they would say.

3 MS. WHITE: Your Honor, thank you.

4 THE COURT: I'll let you close.

5 MS. WHITE: Your Honor, Mr. Bungard appears to be
6 demanding that the Government only provide direct evidence
7 to support the elements of the charge in Count 1. And as
8 the Court knows, and you've already instructed the jury,
9 there's two types of evidence that you can use to find that
10 the defendant knowingly received this. It will be direct
11 and circumstantial evidence. So the direct evidence in this
12 case is that the defendant installed Frostwire on his phone
13 using the Google Play Store and that he agreed to use that
14 application to receive files. And he did a search and he
15 got the results, including multiple files of child
16 pornography. That's the direct evidence that we have.

17 But the circumstantial evidence is just as compelling
18 to support the other part of our burden. And that's that
19 the sheer number of illegal files the defendant had support
20 the idea that this wasn't a mistake and it wasn't an
21 accident. He didn't just happen to get these and keep them.
22 He knew what he was doing. His collection, just the child
23 pornography and 3,000 images. But the child erotica is
24 relevant because it's 22,000 additional ones. And so when
25 you look at all of the body of the evidence that the jury

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JA292

1 has to consider - in this case, direct and circumstantial -
2 there's more than sufficient evidence for the jury to find
3 that the defendant knowingly received the video in
4 Exhibit 11, as well as the other child pornographies on the
5 date charged in Count 1. Thank you.

6 THE COURT: I'll let you close.

7 MR. BUNGARD: Your Honor, I don't think
8 circumstantial evidence cuts it here. I think -- how can
9 you say by a circumstance child pornography -- for example,
10 let's go to the desktop and laptop computers. The images on
11 the desktop were in this thumbcache database. That was --
12 were not evidence of files in any active folder that
13 Mr. Griffith could have viewed. As the testimony of that
14 was, those were files that are automatically generated by
15 the Windows operating system.

16 THE COURT: But only have after the folder's been
17 open?

18 MR. BUNGARD: Only after the folder's been open.
19 But there's been no evidence from the Government as to where
20 those folders came from.

21 THE COURT: Except for his computer.

22 MR. BUNGARD: It's his computer, but we don't know
23 the source. Whether it came from the Internet. Whether
24 somebody sent them through the mail. Whether they were
25 copied off of another thumb drive. The source could be

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1 anywhere.

2 THE COURT: But somebody on this computer would
3 have then had to delete them, right?

4 MR. BUNGARD: Delete the folders or the files?

5 THE COURT: Yeah, the folders. All we have left
6 is the thumb.

7 MR. BUNGARD: Right. There's no active files that
8 were found.

9 THE COURT: Well, doesn't that bring you right
10 around in a circle?

11 MR. BUNGARD: It doesn't, Your Honor, for purposes
12 of the receipt count. Again, I go back to this knowing
13 aspect of it, that you've got to have direct evidence of it.
14 And the Government just doesn't have it.

15 THE COURT: So you don't think circumstantial
16 evidence can support a receipt count?

17 MR. BUNGARD: In this type of case, yes, Your
18 Honor.

19 THE COURT: All right. Bring the jury in.

20 (The jury enters the courtroom.)

21 THE COURT: Wait a minute. Wait a minute. Stop
22 them. I'm sorry.

23 MADAM CLERK: No. No. Joel, take them back.

24 THE COURT: I didn't rule.

25 MADAM CLERK: I know.

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JA294

1 MR. THOMPSON: We were guessing.

2 THE COURT: I apologize, ladies and gentlemen.

3 (The jury exits the courtroom.)

4 THE COURT: The defendant's motion under Rule 29
5 is denied. Taking and viewing the evidence in the light
6 most favorable to the non-moving party, that being the
7 United States, the Court finds that a reasonable jury can
8 certainly conclude by overwhelming evidence in this case
9 both direct and circumstantial that the defendant is guilty
10 under both counts.

11 The defendant -- the evidence certainly is that the
12 defendant knowingly received and possessed hundreds of
13 images of child pornography and videotapes, all introduced
14 into evidence here. That the devices were within his
15 custody and control on which these images were found. That
16 he said he was the only one that had access to the devices
17 by password. The Government's expert, Melinda Cash also
18 testified that child pornography was contained within
19 folders created by the user. And as I earlier mentioned,
20 the thumbnail files are only created after a folder is first
21 accessed. The sheer volume of the alleged and reasonably to
22 be concluded child pornography files and images on this
23 computer is very strong evidence of guilt as on both counts.
24 Motion's denied.

25 Bring the jury in.

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JA295

1 bring up the key lime pie.

2 All right. You're excused. 9:00. 9:00. Be here at
3 five till 9:00.

4 (The jury exits the courtroom.)

5 THE COURT: I'm going to give counsel and parties
6 the proposed charge. We're going to settle instructions
7 before we go home, okay, so we'll be ready for argument in
8 the morning.

9 MS. WHITE: Yes, Your Honor.

10 THE COURT: Can you do that?

11 MS. FORD: Uh-huh.

12 THE COURT: Okay. The Court will be in recess to
13 give you a chance to go over the charge and I'll come back
14 once you have reached agreement with the charge if it's all
15 right.

16 (Recess taken from 4:23 p.m. to 5:24 p.m.)

17 THE COURT: Good evening.

18 MS. WHITE: Good evening, Your Honor.

19 THE COURT: My law clerk advises me that the
20 parties have been provided the final instructions as the
21 Court intends to give them. And also advises that there are
22 remaining objections to the way I have decided to give the
23 instructions. I will allow you to state those objections on
24 the record here.

25 Mr. Bungard, do you have anything?

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JA299

1 MR. BUNGARD: Yes, Your Honor. I want to start
2 with -- on page 5, Subtitle E under "General Law." With
3 respect to the on or about instruction, it would be
4 Mr. Griffith's position that that instruction should only --
5 should be limited to Count 2 because -- with respect to
6 Count 1, it's our position that -- although the Government
7 charged this on or about January 31st, 2022, the
8 Government's evidence that was presented at trial was the
9 receipt took place at the time of download on January 31st,
10 2022. So it occurred on that date. I don't want the jury
11 to be misled into thinking that, oh, just because he
12 downloaded it, he received it. That's not what -- that's
13 not what the law is. And I think now with possession, the
14 Government, again, can show that he possessed it on or about
15 that date -- that those files could have been possessed at
16 any time within a couple days of that. But receipt,
17 specifically because of the specific requirement, the
18 defendant has to know the contents and has to know it
19 involved minors. It becomes a date-specific offense.

20 THE COURT: Overruled.

21 MR. BUNGARD: The next one, Your Honor, is on
22 page 7. And this goes to the instruction for receipt.

23 I don't have a problem with the first three elements
24 that are listed in subparagraph C on page 7. But I do think
25 that the paragraph -- subparagraph 4 needs to be revised by

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JA300

1 adding a couple of words at the end. And that -- my
2 proposal would be that Item 4 read that "The defendant acted
3 knowingly such that he knew that the material contained a
4 visual depiction of a minor engaged in sexually explicit
5 conduct at the time of the receipt." And that's consistent
6 with the case law that I argued to the Court under my
7 Rule 29 motion.

8 I would also point out that I had a child pornography
9 trial about a year ago this time in front of Judge Volk in a
10 distribution case. And in that case, Judge Volk did give an
11 instruction that in order for a defendant to be convicted of
12 distribution, he had to know -- the knowledge of the content
13 of the file had to be known at the time of distribution. So
14 that phrase "at the time" is something that's important that
15 needs to be put in here. It can't be something that
16 happened a day or two later. That's not receipt. Actually,
17 the Government has no evidence to show that he ever opened
18 to see what the contents were.

19 THE COURT: But you don't have to open them to be
20 in receipt of them, do we?

21 MR. BUNGARD: You do, Your Honor, because of the
22 knowing requirement. Receipt requires the person know the
23 contents of what's in the file at the time they get it.
24 Otherwise, that's not receipt as the law provides.

25 THE COURT: Overruled.

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JA301

1 MR. BUNGARD: And specifically I would just note
2 that I had a specific knowing requirement in my proposed
3 Jury Instruction Number 3 that was submitted and filed.

4 THE COURT: Note your objection to refusal to give
5 your instruction.

6 MR. BUNGARD: Starting at the bottom of page 9,
7 the receipt and possession, that instruction. I know the
8 Court has taken out the sentence that relied on the
9 *United States versus Stanley* cite, but I still have a
10 problem with the way this is drafted because I think it
11 deletes what is required under the knowing requirement under
12 Part 4.

13 To the extent that the sentence that begins
14 "Downloading, storing and sharing images on one's computer
15 may be considered by you as evidence of knowing receipt," I
16 don't think the word sharing needs to be in there. There's
17 no evidence -- there was no testimony here that he was
18 sharing files with anyone.

19 THE COURT: All right. I'll take that out. I'll
20 take that out.

21 MR. BUNGARD: But I also think that another
22 sentence needs to be added to that so the jury understands
23 -- if we're going to define what receipt and possession is,
24 I think there needs to be a second paragraph that talks
25 about what knowingly means with respect to receipt. And

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JA302