
NO. _____

IN THE

Supreme Court of the United States

_____ TERM, 20__

Bryan Michael Vannausdle - Petitioner,

vs.

United States of America - Respondent.

APPENDIX TO PETITIONER'S APPLICATION FOR EXTENSION OF TIME
WITHIN WHICH TO FILE FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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United States Court of Appeals
For the Eighth Circuit

No. 24-3509

United States of America

Plaintiff - Appellee

v.

Bryan Michael Vannausdle

Defendant - Appellant

Appeal from United States District Court
for the Southern District of Iowa - Western

Submitted: November 20, 2025

Filed: January 23, 2026

Before BENTON, GRASZ, and STRAS, Circuit Judges.

BENTON, Circuit Judge.

Bryan M. Vannausdle pled guilty to receiving child pornography. The district court enhanced his sentence under U.S.S.G. § 2G2.1(b)(4)(A). He appeals. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

Vannausdle exchanged sexually explicit pictures and videos with a 13-to-14-year-old girl. He sent five pictures of his penis, said he wanted to “fuck u hard,”

suggested they have anal sex, and asked: “wat if it hurts u when we are having sex.” He also asked: “wat would u do if I got u a sex toy.” When the child mentioned taking a shower, Vannausdle said: “Mmmmm can I see.” After she sent him a picture of her vagina, he said: “Mmmmmm more.” She sent him a picture of a dildo inserted into her vagina. Vannausdle responded: “Mmmmm baby show me more” and “Wat bout a video.” She responded with a 10-second video of the dildo inserted in her vagina and a one-minute-and-50-second video of her inserting the dildo into her rectum.

Vannausdle was arrested and charged with sexual exploitation of a minor, receipt of child pornography, possession of child pornography, and transfer of obscene material to a minor. He pled guilty only to receipt of child pornography. The district court¹ applied a four-level sentence enhancement under U.S.S.G. § 2G2.1(b)(4)(A). The court sentenced him to 240 months in prison.

Vannausdle appeals, arguing that the pictures and videos he received do not justify the enhancement. “When reviewing the district court’s calculation of the United States Sentencing Guidelines advisory sentencing range, we review the district court’s factual findings for clear error and its construction and application of the Guidelines *de novo*.” *United States v. Cannon*, 703 F.3d 407, 415 (8th Cir. 2013) (citation and internal quotation marks omitted).

The sentencing guidelines authorize a four-level enhancement if the offense involves “material that portrays . . . sadistic or masochistic conduct or other depictions of violence.” *See* U.S.S.G. § 2G2.1(b)(4)(A). A minor’s “self-penetration by a foreign object qualifies as violence.” *United States v. Starr*, 533 F.3d 985, 1001 (8th Cir. 2008), *citing* *United States v. Parker*, 267 F.3d 839, 847 (8th Cir. 2001) (“Given the plain meaning of ‘violence,’ it is difficult to imagine that

¹The Honorable Stephen H. Locher, United States District Judge for the Southern District of Iowa.

the sexual penetration with a foreign object of a minor female would not qualify as ‘violence’ even if self-inflicted.”).

Vannausdle argues the enhancement was not appropriate because: (1) the child was not prepubescent, (2) she used a sex toy instead of another foreign object, and (3) she appeared to masturbate for sexual pleasure. But this court has upheld the enhancement regardless of the minor’s age, the foreign object used, or whether the minor experienced pain. See *Starr*, 533 F.3d at 1001–02 (holding that the enhancement was appropriate where a 17-year-old sent a defendant videos of her masturbating and performing anal penetration); *United States v. Schnekenburger*, 788 Fed. Appx. 1044, 1045 (8th Cir. 2020) (per curiam) (same where 15-year-old inserted a foreign object into her vagina and anus); *United States v. Vogelpohl*, 827 Fed. Appx. 621, 622 (8th Cir. 2020) (per curiam) (same where a minor inserted a finger into her vagina and anus, and a mascara applicator into her vagina).

In *Starr*, a defendant had sexual conversations with a 17-year-old girl. 533 F.3d at 990. He asked her to send him videos. *Id.* She sent him videos of her masturbating and performing anal penetration. *Id.* The defendant argued that because the minor was not “very young” and because there was no “evidence of any pain or injury suffered on the part of [the minor],” the enhancement should not have applied. *Id.* at 1001. This court rejected those arguments, upholding the enhancement. *Id.* at 1001–02.

Here, Vannausdle told a 13-to-14-year-old girl he wanted to have rough sex with her, including anal sex. He introduced the prospects of pain and using a sex toy. He requested pictures and videos. The child responded with pictures and videos of her penetrating her vagina and anus with a foreign object. This court’s precedent “all but decides” the issue. See *Vogelpohl*, 827 Fed. Appx. at 623 (Kelly, J., concurring).

* * * * *

The judgment is affirmed.

GRASZ, Circuit Judge, concurring in the judgment.

I agree with the court that our precedent compels affirmance. This is especially true if the alleged error on appeal is categorized as a finding of fact (reviewed for clear error) rather than an erroneous application of the Guidelines (reviewed de novo). Because of this, I concur in the judgment. I write separately, though, to emphasize the need for en banc clarification of our precedent, as well as the need for the Supreme Court to provide guidance in this decidedly unpleasant and confused area of law.

The recent decision in *United States v. Vowels*, 159 F.4th 1095 (6th Cir. 2025), provides a useful overview of the bases for my concern about how § 2G2.1(b)(4)(A) is being applied. Such concern is not new — either nationally or in this circuit — and I believe it is time that it be addressed. *See, e.g., United States v. Vogelpohl*, 827 F. App'x 621, 623 (8th Cir. 2020) (Kelly, J., concurring). Our earliest precedent in this area is not necessarily problematic. Rather, as I see it, the problem is that it has been extended beyond its foundational facts and applied with such a broad stroke that we now appear to have adopted a per se rule applying the four-level sadistic or masochistic sentencing enhancement any time an already-unlawful image depicts penetration, regardless of the facts. While determining on a case-by-case basis whether the enhancement under § 2G2.1(b)(4)(A) applies can require difficult and odious factual determinations, relying on a per se rule is inconsistent with our overarching precedent and basic principles of law for several reasons.

First, it is the government's burden to prove the applicability of sentencing enhancements. *See United States v. Foard*, 108 F.4th 729, 736 (8th Cir. 2024). Adopting a per se rule for application of the four-level enhancement under § 2G2.1(b)(4)(A) relieves the government of this burden. Second, the plain meaning of the guideline text requires that the image must depict infliction of pain or involve violence, humiliation, or physical cruelty for the enhancement to apply. *See United*

States v. Parker, 267 F.3d 839, 847 (8th Cir. 2001) (“[T]he conduct portrayed is sufficiently painful, coercive, abusive, and degrading to qualify as sadistic or violent”); accord *United States v. Diaz*, 368 F.3d 991, 992 (8th Cir. 2004). This understanding of the meaning of “sadistic” has undergirded our precedent for many years, and it is sound. A per se rule diverges from this sound understanding. And third, determining whether an image depicts masochism or sadism for purposes of imposing the sentencing enhancement is an *objective* inquiry. See *United States v. Raplinger*, 555 F.3d 687, 694–95 (8th Cir. 2009); see also *United States v. Nesmith*, 866 F.3d 677, 680 (5th Cir. 2017) (“In line with the text, the six other circuits to consider this issue have held that the determination of whether the sadism enhancement applies is an objective inquiry.”). A per se rule is incompatible with an objective inquiry.

This does not mean common sense cannot inform an objective determination. In fact, even if common sense results in the enhancement being applied almost uniformly, so long as the decision is made on a case-by-case basis using the established definitions of the terms set forth in the Guidelines, the enhancement may be applied without running afoul of either our earlier precedent or foundational law.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 24-3509

United States of America

Plaintiff - Appellee

v.

Bryan Michael Vannausdle

Defendant - Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Western
(1:24-cr-00030-SHL-1)

JUDGMENT

Before BENTON, GRASZ, and STRAS, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

January 23, 2026

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Susan E. Bindler

Adopted April 15, 2015
Effective August 1, 2015

Revision of Part V of the Eighth Circuit Plan to Implement the Criminal Justice Act of 1964.

V. Duty of Counsel as to Panel Rehearing, Rehearing En Banc, and Certiorari

Where the decision of the court of appeals is adverse to the defendant in whole or in part, the duty of counsel on appeal extends to (1) advising the defendant of the right to file a petition for panel rehearing and a petition for rehearing en banc in the court of appeals and a petition for writ of certiorari in the Supreme Court of the United States, and (2) informing the defendant of counsel's opinion as to the merit and likelihood of the success of those petitions. If the defendant requests that counsel file any of those petitions, counsel must file the petition if counsel determines that there are reasonable grounds to believe that the petition would satisfy the standards of Federal Rule of Appellate Procedure 40, Federal Rule of Appellate Procedure 35(a) or Supreme Court Rule 10, as applicable. *See Austin v. United States*, 513 U.S. 5 (1994) (per curiam); 8th Cir. R. 35A.

If counsel declines to file a petition for panel rehearing or rehearing en banc requested by the defendant based upon counsel's determination that there are not reasonable grounds to do so, counsel must so inform the court and must file a written motion to withdraw. The motion to withdraw must be filed on or before the due date for a petition for rehearing, must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for rehearing, and must request an extension of time of 28 days within which to file *pro se* a petition for rehearing. The motion also must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for writ of certiorari.

If counsel declines to file a petition for writ of certiorari requested by the defendant based on counsel's determination that there are not reasonable grounds to do so, counsel must so inform the court and must file a written motion to withdraw. The motion must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for writ of certiorari.

A motion to withdraw must be accompanied by counsel's certification that a copy of the motion was furnished to the defendant and to the United States.

Where counsel is granted leave to withdraw pursuant to the procedures of *Anders v. California*, 386 U.S. 738 (1967), and *Penson v. Ohio*, 488 U.S. 75 (1988), counsel's duty of representation is completed, and the clerk's letter transmitting the decision of the court will notify the defendant of the procedures for filing *pro se* a timely petition for panel rehearing, a timely petition for rehearing en banc, and a timely petition for writ of certiorari.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 24-3509

United States of America

Appellee

v.

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(1:24-cr-00030-SHL-1)

ORDER

The petition for rehearing en banc is denied. The petition for panel rehearing is also denied.

Judge Kelly, Judge Erickson, and Judge Grasz would grant the petition for rehearing en banc.

GRASZ, Circuit Judge, dissenting from the denial of rehearing en banc.

Were we a policy-making body, I would have no qualms about adopting a stringent sentencing enhancement for those convicted of sexually exploiting children. However, we are not a policy-making body and are normally vigorous to avoid assuming that role. But not today. Likewise, we normally follow the text of the applicable statute, regulation, or U.S. Sentencing Guidelines. But not today. If we claim to be textualists but refuse to follow the plain language of the Guidelines, we deceive ourselves. We normally assiduously adhere to the prior panel precedent rule. But today, we drift still further from our earliest precedent in this area. I suspect the reason for these departures from our norms stems from the difficult subject matter.

As with the panel opinion, I write separately to emphasize the continued need for en banc clarification of our precedent — or in its absence, the need for the Supreme Court to provide guidance in this decidedly unpleasant and confused area of law.

Our sister circuit’s decision in *United States v. Vowels*, 159 F.4th 1095 (6th Cir. 2025), provides a useful overview of the basis for my concern about how U.S. Sentencing Guidelines § 2G2.1(b)(4)(A) is being applied. Such concern is not new — across the country or in this circuit — and I continue to believe it is time the matter be addressed. *See, e.g., United States v. Vogelpohl*, 827 F. App’x 621, 623 (8th Cir. 2020) (Kelly, J., concurring).

Our earliest precedent in this area is not problematic. *See, e.g., United States v. Parker*, 267 F.3d 839, 847 (8th Cir. 2001) (conducting an individualized analysis rather than applying a per se rule to determine the “violent and depraved nature of the images” depict sadistic or violent acts, thus warranting a four-level enhancement). Rather, as I see it, the problem is that we have extended this precedent beyond its foundational facts and applied it with such a broad stroke that we appear to have adopted a per se rule applying the four-level sadistic or masochistic sentencing enhancement any time an already-unlawful image depicts penetration, regardless of the facts. While determining on a case-by-case basis whether the enhancement under § 2G2.1(b)(4)(A) applies can require difficult and odious factual determinations, relying on a per se rule is inconsistent with our overarching precedent and basic principles of law for several reasons.

First, it is the government’s burden to prove the applicability of sentencing enhancements. *See United States v. Foard*, 108 F.4th 729, 736 (8th Cir. 2024). Adopting a per se rule for application of the four-level enhancement under § 2G2.1(b)(4)(A) effectively relieves the government of this burden. Second, the

plain meaning of the Guidelines text requires that for the sentencing enhancement to apply, the unlawful image must depict infliction of pain or involve violence, humiliation, or physical cruelty for the enhancement. *See Parker*, 267 F.3d at 847 (“[T]he conduct portrayed is sufficiently painful, coercive, abusive, and degrading to qualify as sadistic or violent. . . .”); accord *United States v. Diaz*, 368 F.3d 991, 992 (8th Cir. 2004). This understanding of the meaning of “sadistic” has undergirded our precedent for many years, and it is sound. A per se rule diverges from this sound understanding. Third, determining whether an image depicts masochism or sadism for purposes of imposing the sentencing enhancement is an *objective* inquiry. *See United States v. Raplinger*, 555 F.3d 687, 694–95 (8th Cir. 2009); see also *United States v. Nesmith*, 866 F.3d 677, 680 (5th Cir. 2017) (“In line with the text, the six other circuits to consider this issue have held that the determination of whether the sadism enhancement applies is an objective inquiry.”). A per se rule is blatantly incompatible with an objective inquiry.

As I noted in my separate panel opinion, this does not mean common sense cannot inform an objective determination. In fact, even if common sense results in the enhancement being applied almost uniformly, so long as the decision is made on a case-by-case basis using the established definitions of the terms set forth in the Guidelines, the enhancement may be applied without running afoul of either our earlier precedent or foundational law. Unfortunately, the majority today has, perhaps for a variety of reasons, chosen to pass up the opportunity to address this situation, leaving our adjudicative norms turned on their head.

April 23, 2026

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Susan E. Bindler