No. 26-

IN THE

Supreme Court of the United States

FRANCISCO ORTIZ COLÓN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the Double Jeopardy Clause prohibit two convictions and two punishments for the same acts when the violation of 18 U.S.C. § 2251(a) charged in one count of an indictment, also serves as the "offense for which a person can be charged" in another count alleging violation of 18 U.S.C. §2422(b)?

II. When charged under 18 U.S.C. §2442(b), is the incorporated "offense for which any person can be charged" an element, or merely a means of violating that statute?

PARTIES TO THE PROCEEDING

Petitioner, Francisco Ortiz-Colón, was the defendant in the District of Puerto Rico and the appellant in the First Circuit.

Respondent, United States of America, was the plaintiff in the District of Puerto Rico and appellee in the First Circuit.

CORPORATE DISCLOSURE STATEMENT

There are no corporations involved in this matter. Francisco Ortíz Colón is an individual. The only other party is the United States of America.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

United States v. Francisco Ortiz-Colón, No. 23-1504, reported at 178 F.4th 1 (1st Cir. 2026). It is included as Appendix A, 1a-53a.

United States v. Francisco Ortiz-Colón, 3:20-cr-00262 (D.P.R.).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, related to this case within the meaning of Rule 14.1(b)(iii) of this Court.

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PETITION FOR A WRIT OF CERTIORARI

Francisco Ortiz-Colón petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit in his case.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported as *United States v. Colon-Ortíz* at 178 F.4th 1 (1st Cir. 2026). It appears in Petitioner's Appendix ("Pet. App.") as Appendix A, 36a-53a.

JURISDICTION

The judgment of the First Circuit Court of Appeals was entered on May 6, 2026. No motion for rehearing was filed. On July 28, 2026, this Court extended the time to file a petition for writ of certiorari to September 3, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment of the U.S. Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any

> person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The relevant statutory provisions of are reproduced the Petition Appendix , Pet.App.96a-101a.

STATEMENT

This case presents a perfect vehicle to resolve a long-standing question of Constitutional and federal criminal law that has divided the lower courts and affects hundreds of defendants every year facing mandatory minimum sentences: one of fifteen years, the other, of ten years to life in prison. At least absent express Congressional intent to the contrary, the Fifth Amendment protection against Double Jeopardy is violated whenever the government secures two convictions and two punishments for a single offense. *Barrett v. United States*, 607 U.S. 128, 146 S.Ct. 482 (2026).

It was violated when Mr. Ortíz Colón was sentenced to thirty years in prison for violation of 18 U.S.C. §2422 (b) and twenty years in prison for violation of 18 U.S.C. §2251(a) when, based upon the same facts, §2251 it served as the predicate "criminal offense" required for conviction of §2422(b).

The question clearly and starkly presented here is: when relied upon to secure a conviction for §2422(b), does §2251(a) become a lesser included offense under

Blockburger v. United States, 284 U.S. 299 (1932), *Ball v. United States*, 470 U.S. 856 (1985), and *Richardson v. United States*, 526 U.S. 813, 817 (1999) so that they merge into a single offense? The answer requires application of *Blockburger* to the elements of the two statutes, at least as a first step.

This Court has never addressed *Blockburger*'s application to these statutes, or to any of the four other offenses found together with §2422(b) in Chapter 117 of Title 18 that require proof of "any sexual activity for which any person can be charged with a criminal offense."[1] The circuits are locked in a disagreement about whether the chargeable predicate offense is an element of these statutes, or a mere means of violating it.

The First Circuit below joined the Sixth, Tenth and Eleventh in holding that double jeopardy is not violated by conviction on both §2422(b) and the predicate offense, including when that is §2251 charged in the same indictment. They parse the statutes as having incompletely overlapping elements.

Those Circuits explicitly reject the view of the Seventh that because §2422 incorporates another statute, the elements of that other statute are also its elements. However, many of the circuits that reject that view now follow the Seventh to include the predicate offense in the indictment, and recommend or require its elements be explained in the instructions for the Chapter 117 offenses.

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1. All the relevant statutes, including others from Chapter 117 of Title 18, using the term at issue here, are set out at Appendix F at 96a-101a.

The conflict between these two views has persisted for at least quarter of a century. It is also openly acknowledged. *See, e.g.* "We note that there is some disagreement among our sister circuits as to whether the underlying sex crimes with which a defendant could be charged are themselves an element of a § 2423 (a) or (e) offense" (*United States v. David Vickers*, 708 F.App'x 732, 735 (2d Cir. 2017)(non-precedential).

This is the perfect vehicle to resolve this important controversy because it directly presents a question of statutory interpretation and double jeopardy law that controls indictments, instructions and sentencing in every district and circuit in the country.

A. Statutory Background

The two statutes at issue here are found in two different titles of Title 18. §2422(b) is part of Chapter 117, encompassing 18 U.S.C. §§2421 - 2428 (2018) originated in the "White Slave Traffic Act of June 25 1910," subsequently known as "the Mann Act", as amended in 1948. It created federal jurisdiction for illegal sexual activity in the stream of interstate commerce. Until 1986, its language prohibited acts related to the transportation of "women or girls" for purposes of prostituting them or for purposes of "debauchery" or "any other immoral practice."

In 1986, former §§2421-2423 were stricken and replaced by the current sections, replacing "debauchery" and "immoral practice" with the current "any "sexual activity for which any person can be charged with a criminal offense" in the re-titled "Transportation for Illegal Sexual Activities and Related Crimes". Public Law 99-628, Nov. 7, 1986, 100 Stat. 3511.

Section 2251 is part of Chapter 110, titled "Sexual Exploitation and other Abuse of Children". It is of much more recent vintage, dating from 1978,[2] and repeatedly amended. It is concerned with child pornography. In 1998, Congress inserted in Chapter 117's "transportation" offenses, a new provision (18 U.S.C. §2427) explicitly defining the term "sexual activity for which any person can be charged with a criminal offense" used in the Chapter 117 to include "the production of child pornography as defined in section 2256(8))." Public Law 105-314, Oct. 30, 1998, Title I §305, 112 Stat. 2974. It clearly knew about the relation between the two offenses and the possibility that §2251 could be used as a predicate for §2422(b). It expressed no intent to authorize more than one sentence if that happened.

B. Factual and Procedural Background

1. On August 19, 2020, Francisco Ortiz Colón was charged in a thirteen-count indictment that included twinned counts alleging, in pertinent part, violation of 18 U.S.C. §§2251 and 2442(b) for each of five minors. It also included one count each of receipt and possession of child pornography in violation of 18 U.S.C. §§2251A(a)(2) and 2252A(5)(B). Plea negotiations having failed, a superseding 19-count indictment was filed adding three additional victims. Superseding Indictment, Pet.App.Appendix D, Pet. 75a-90a.

The evidence produced at trial consisted of internet communications seeking to secure and securing sexually

2. P.L. 95-225, §2(a), 92 Stat.7, Feb. 6, 1978, 92 Stat. 8 (the current 2251(a) appearing there as §2253).

explicit images of from girls between eleven and fourteen and the younger sister of one. After six days of trial and one of deliberation, a jury determined that over a period of nine months, the 22 year-old autistic Mr.Ortíz Colón used social media to secure sexually explicit images from nine minors. It was not contended that any image was other than for his own use.

The District Court's instructions, in part pertinent to this Petition, identified the following three elements for the offense of production of child pornography.

> First: that on or about the date charged, Mr. Ortiz-Colón knowingly employed, used, persuaded, induced, enticed or coerced a minor to engage in sexually explicit conduct.
>
> Second: That [he] did so for the purpose of producing or transporting a visual depiction of such conduct, and,
>
> Third: That the visual depiction was actually produced or transmitted using a means or facility of interstate or foreign commerce or in or affecting interstate commerce.

Instruction 17, Pet.App. Appendix E 91a-93a.

The instructions on §2422(b) in pertinent part, identified four elements:

> First, that on or about the date charged, Mr. Ortíz knowingly persuaded, induced enticed and coerced a person in question to engage in criminal activity [*sic.*].

> Second, that he did so by using a facility or means of interstate or foreign commerce.
>
> Third, that the person at the time was less than 18 years old.
>
> [F]ourth, that the sexual activity was a criminal offense. Sexual activity includes the production of sexually explicit images of minors. The production of sexually explicit images of minors is a criminal offense.

Instruction 18, Pet.App. Appendix E 93a-95a.

Mr. Colón Ortíz was sentenced on May 23, 2023, to nine terms of thirty years on each of the §2251(a) and §2422(b) counts in which he was charged, and two terms of 240 months for the receipt and possession counts, all to be served concurrently. Pet.App. Appendix C, 60a.

2. On May 6, 2026 The First Circuit agreed with the vast majority of circuits that have concluded that under *Ball v. United States*, 470 U.S. 856, 861 (1985), be it guns or pornography, receipt necessarily involves possession of the same object so that those two counts merged. Pet Ap. Appendix A at 46a.

The panel rejected the claim that double jeopardy was similarly violated when the production convictions (§2251) served as the predicate offense for the coercion counts (§2422(b), finding that the statutes "did not trigger the *Blockburger* presumption." *Id.* at 38a. Noting that it was following the three circuits that had ruled on this precise question, it held:

> The production of child pornography offense requires the government to prove that an individual acted intentionally to produce a visual depiction, a fact not required for the coercion or enticement of a minor offense. * * * The coercion or enticement of a minor offense requires the government to prove that the defendant knowingly coerced a minor to engage in "any sexual activity for which any person can be charged with a criminal offense," a fact immaterial to proving the elements of the production offense.

Id. at 49a. It did not comment upon the fact that the fact "immaterial to proving the elements of the production offense" was the fact of that offense.

3. No motion for re-argument or rehearing *en banc* was submitted.

REASONS FOR GRANTING THE PETITION

This petition presents the question of whether the term "sexual activity for which any person can be charged with a criminal offense" used in five Chapter 117 offenses incorporates a predicate offense so that conviction and sentence on both violates double jeopardy. The conflict among circuits on this question and the inherent one of whether the predicate offense is an element or a mere means, is deep and intractable.

The First, in this case, joined the Sixth, Tenth and Eleventh Circuits treating the offenses incorporated as chargeable sex crimes as mere means of violating the statutes using this language. The Seventh concludes the opposite: that the "criminal offense" language makes that offense a lesser included one. Other circuits and district courts adopt this view, or disagree with their Circuit's adherence to that of the Sixth, and many, if not most, follow the Seventh in their jury instructions.

The conflict was established a quarter of a century ago, is notorious and persists to this day, causing confusion in circuits and districts throughout the nation. In addition to *Vickers*, quoted on page 4, *supra*, *see, e.g.*, "[i]n fact, as the government's response points out, there appears to be a circuit split." *United States v. Lettieri*, No. 21-CR-20-LJV (W.D. New York, May 31,2023). Indeed, in opposition to the petition for certirorari filed in *United States v. Lopez,* 4 F.4th 706 (9th Cir. 2021), *pet. for reh'g and reh'g en banc denied*, *certiorari denied*, 143 S.Ct. 121 (2022) the United States did not describe the question of whether §2442(b) created a predicate offense as an element, or merely described a means as unimportant, or the conflict non-existent, but because that case was not an appropriate vehicle. *Lopez v. United States*, No. 21-7624, Brief for the United States in Opposition at 7- 8. This issue will not go away without this Court's intervention.

The questions related to these frequently-charged statutes have never been addressed by this Court. The elements/means issue arises in the context of double jeopardy, but also in relation to the sufficiency, multiplicity, and constructive amendment of indictments, and jury instructions. It has serious consequences: Conviction on one count of §2251(a) implies a mandatory minimum of 15 years in prison, while conviction on one §2422 count carries a mandatory minimum of ten years and a potential life sentence.

This is the perfect vehicle to answer these purely legal questions clearly and starkly presented here. Simply put, it is whether the relation between the statutes is one of "the classic relation" of lesser and greater offenses wherein "the very same conduct violates two statutes, one of which is fully subsumed in the other." *Barrett*, *supra*, at 146 S.Ct.491, quoting *Garrett v. United States*, 471 U.S. 773, 787 (1985).

Left unresolved, this important controversy regarding statutory interpretation of constitutional dimensions will only compound itself, perpetuating uncertainty, unfairness and unacceptable disparities among persons charged with identical offenses based upon where they are prosecuted.

Finally, this case presents an opportunity to establish that the Double Jeopardy Clause does not distinguish between subsequent and concurrent prosecutions. This Court has never identified a post-*Garret* case authorizing legislative override of the Double Jeopardy Clause for concurrent prosecutions. This case offers an opportunity to reject that distinction and affirm that "the constitutional phrase 'the same offence'" does not mean different things in different contexts. *Barrett*, *supra* at 146 S.Ct. 496 (Justice Gorsuch, concurring).

I. THE CIRCUITS ARE CLEARLY DIVIDED.

The circuits are clearly divided over whether 18 U.S.C. §2422(b) incorporates a predicate "sexual activity for which any person can be charged with a criminal offense" as one of its elements, so that conviction and punishment for both violates the Fifth Amendment's Double Jeopardy Clause.

As a matter of fact.

1. As a matter of first impression, four circuits, including the one below, have adopted the Sixth Circuit's Decision in *United States v. Hart*, 635 F.3d 850, 855 (6th Cir. 2011). The *Hart* panel explicitly disagreed with the decision in *United States v. Mannava,* 565 F.3d 412 (7th Cir. 2009), and refused to follow it in applying *Richardson*, *supra*, to §2422(b).

Hart found the language of §2422(b) "materially different from" that of 21 U.S.C. §848 without identifying the difference that was material. 635 F.3d 855. That position is entrenched in the Sixth Circuit. *See, e.g., United States v. Roman*, 795 F.3d 511 519, n. 2 (6th Cir. 2015), citing *United States v. Hackworth*, 483 F.App'x 972, 976-77 (6th Cir. 2012).

The First Circuit identified the unequal elements as the "visual depiction" element for §2521, and the "criminal offense" element for §2422(b), citing *Hart'* s one paragraph discussion of the issue. Pet.App.Appendix A, 48a-49a.[3]

The Tenth Circuit, in *United States v. Isabella*, 918 F.3d 816, 848, 849, n. 28 (10th Cir. 2019) agreed with Hart's conclusion, but rested its decision on the determination that §2251 was broader that §2242. It interpreted the additional "uses"and "employs" in §2251 as elements distinct from the verbs shared in the initial "whoever . . . " clause by both statutes: "persuades, induces, entices or

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3. *Hart*'s more thorough discussion of the issue at 635 F.3d 855-856 appears in relation to the jury unanimity issue, discussed *infra*.

coerces". Appendix F Pet.Ap. 96(a)(§2251) and *id*. at 97a, 98a, 99a.

Most recently, in *United States v. Sanchez*, 30 F.4th 1063, 077 (2022), the Eleventh Circuit merely concluded that "[t]he statutes have some different elements. They pass the *Blockburger test*," after quoting the same language from *Hart* adopted by the First Circuit and citing *Isabella*, *supra*. However, in the context of sufficiency of an indictment, its district courts now recognize that including this predicate offense in the indictment is "best practice." *See, e.g.*, *United States v. Doak*, 47 F.4th 1340, 11353 (11th Cir. 2022)(charging 18 U.S.C. §2423).

2. The position of those circuits is contrary to that of the Seventh in *United States v. Mannava*, 565 F.3d 412, 415 (2009). The Seventh Circuit holds that because liability under §2422(b) requires proof that a defendant was, or could be prosecuted under another statute, "the elements of the offense under that other statute must be elements of the federal offense" –there, and in *Hart*– for the purposes of preserving jury unanimity. 565 F.3d at 415. *Mannava* reads *Richardson* as requiring treatment of the "incorporated statute" as an element of §2422(b), and clearly distinguishes means ("the details of the defendant's conduct") from elements. *Id*. at 416.

3. The Ninth Circuit is internally divided. In *United States v. Lopez,* 4 F.4th 706 (9th Cir. 2021), *pet. for reh'g and reh'g en banc denied*, *certiorari denied*, 143 S.Ct. 121 (2022), the majority agreed with the Seventh that the failure to define "the laws of Guam" for which Mr. Lopez could have been prosecuted was error (there, in the context of jury instructions), but found it harmless, citing *Hart*, *supra*.

Judge Bennett dissented on the ground that the offense specified in the indictment was one for which the defendant could not (for jurisdictional reasons) have been prosecuted. He asserted that the jury instructions porvided, based upon a predicate offense other than the one charged in the indictment, constructively amended it. *Id*. at 738-39. "The term 'any sexual activity for which any person can be charged with a criminal offense' is an element that requires statutes to give it meaning", he observed."Thus, the different facts required to prove those elements must be presented to a grand jury." *Id*. at 741.

In response to the petition for certiorari in that case, the Government bypassed the issue of whether the "predicate offense" was an element or a means of committing the offense. It rejected the case as an inappropriate vehicle for the issue stated as a conflict between the Ninth Circuit's decision and the Seventh's in *Mannava*, as not truly raised there. *United States v. Lopez*, no 21-7624, Brief for the United States in Opposition at p. 12. It is here.

The internal disagreement in the Ninth Circuit did not end with *Lopez*. In *United States v. de Leon Guerrero*, 89 F.4th 694 (9th Cir. 2023)(*per curiam*), Judge Berzon's concurring opinion, joined Judge Bennett's objection to affirming a §2442(b) conviction on the basis of a "predicate offense" not charged in the indictment. "I am convinced that *Lopez*'s reasoning and holding are seriously mistaken" and "the reasoning of *Lopez* is at war with the statutory text," she wrote. 89 F.4th at 699 .

4. The circuits that have not squarely ruled on the double jeopardy issue treat the question of whether the predicate offense is an element in different procedural

contexts, or have simply left standing the contradictory results in their district courts.

For example, within the Second Circuit, in *United States v. Thompson*, 141 F.Supp. 188 (E.D.N.Y. (2015)(conviction *aff'd*. 896 F.3d 155 (2d Cir. 2018)), the district court dismissed counts alleging merely that the defendant had induced a minor to engage in "any sexual activity for which person could be charged" as deficient.[4] 141 F.Supp. at 197. The failure to identify the predicate offense did not meet the constitutional functions of indictments, including protection against double jeopardy. *Id.* at 193, citing *Russell v. United States*, 369 U.S. 749, 760 (1962).

Thompson also quotes Charles Allen Wright, *et al.* 1 Fed. Prac. & Proc. Crim § 124 (4th ed. 2014) for the proposition that "[i]f a statute makes it a crime to engage in certain conduct "contrary to law,' it is not enough simply to cite that statute, . . . the pleading must show what other law was violated,". . . ". It concluded: "[W]here an indictment charges a crime that depends in turn on violation of another statute, the indictment must identify the underlying offense." 141 F.Supp. at 195 (bracket in the original), quoting *United States v. Pirro*, 212 F.2d 86, 93 (2d Cir. 2000).

4. The indictment in this case concluded each §2422(b) count with: "to engage in sexual activity, and to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct, for which the defendant could be charged with a criminal offense under the laws of the United States of America and Puerto Rico." Pet. App. Apendix D, 76a (Count Two).

Within that Circuit, district judges and prosecutors appear to assume that instruction on the elements of the predicate offenses is required. *See, e.g., United States v. Terranova*, 766 F.Supp. 3d 397, (E.D.N.Y. 2025) (jury instructed on the elements of Texas and New York laws alleged in the indictment). Judges within the Second Circuit have also recognized an apparent "circuit split" or "disagreement" among the circuits about whether the underlying sex crimes are themselves elements. *Lettieri*, *supra*.

The Third Circuit has no relevant precedent, but, like the Second, its district judges assume that in prosecutions under the Chapter 117 offenses, the predicate "criminal offense" is an element. In one unpublished order, the indictment charging violation of §2422(b) was dismissed as insufficient for failure to specify the laws that would have been violated, citing double jeopardy. *United States v. Haynes*, Criminal Action No. 15-100 (E.D. Pa. 2015).

In another, the district judge began his analysis with the observation that §2422(b) "requires as an element of it, that another crime be charged". A bare-bones indictment had been amended to identify §2521 as the predicate offense in that count. In response to the defendant's assertion that §2422(b) incorporated only state, not federal offenses, he looked to the Eighth Circuit pattern instructions to conclude that the statute authorizes both state and federal offenses.[5] *In United*

5. Judicial Committee on Model Jury Instructions for the Eighth Circuit, *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit* (2025, 6.18.2422B).

States v. Lewis, No. 4:17-CR-0242, 2018 WL3008008 (M.D. Pa., June 15, 2018).[6]

The Fourth Circuit stated, while ruling on an "impossibility" defense (no minor involved) "[t]o obtain a conviction under § 2422(b), the Government must also prove that the additional elements of Va. Code Ann. § 18.2-370, . . . were satisfied," *United States v. Kaye*, 243 F.App'x 763 (4th Cir. 2007))(*per curiam).*

The Fifth Circuit appears to allow 18 U.S.C. §2251 to serve as the predicate offense for a 2422(b) prosecution, but expressed no opinion about the double jeopardy question because the only issue before the court was whether the 2422(b) requires physical contact. *United States v. Jimenez*, 158 F.4th 628 (5th Cir. 2025). In *United States v. Albarado*, No. 6:25-CR-00355-1 (W.D. La. March 2, 2026), the district judge found that a bill of particulars sufficed to cure the failure to identify the predicate for the §2422(b) charge. This, notwithstanding that Circuit's pattern instruction requiring identification of the elements of the predicate crime as alleged in the indictment.[7]

Finally, in *United States v. Ward*, 150 F.4th 908 (8th Cir. 2025), the indictment specified the predicate state offense and the district judge instructed on its elements,

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6. *Lewis* was more recently cited as requiring inclusion of the predicate offense in *United States v. Fahmy*, Crim. No. 1:23-CR-00024, 2025 WL 345081 (M.D. Pa. Jan. 30, 2025), referencing the same Eighth Circuit instruction.

7. Committee on Pattern Jury Instructions District Judges Association Fifth Circuit, *Pattern Instructions (Criminal Cases)* 2024 Edition, 2.93 Enticement of a Minor 18 U.S.C. §2422(b).

but rejected a requested instruction on the state law affirmative defense as to the age of the minor. (The twelve year old told him she was seventeen.) It quoted *Mannava*'s rule that liability under §2422(b) depends on the defendant's having violated another statute, thereby incorporating its elements, but affirmed the convictions on the ground that §2442(b) requires only that a defendant "can be charged", making any affirmative defense irrelevant.

5. While not definitive statements of the elements of an offense, pattern jury instructions reflect an apparent consensus that predicate offenses should be included in instructions of §2422(b) and others using the "sexual activity for which any person can be charged with a criminal offense" language. This includes the First.[8]

The Second and Third Circuits do not use pattern instructions.

In the Fourth, the instruction for 18 U.S.C. §2422(a) and (b) explain "the court must identify the elements of the criminal offense," citing *Kaye*, *supra*. "[T]o obtain a conviction under 2422(b), the Government must also prove the additional elements [of the state law] were satisfied".[9]

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8. *Pattern Criminal Jury Instructions for the District Courts of the First Circuit,* District of Maine Internet Site ed. (Updated February 6, 2024) includes, following the fourth element ("was a criminal offense"): "Define the criminal offense that the government claims the sexual activity amounted to."

9. Ruschky & Shealy, *Pattern Jury Instructions for Federal Criminal Cases, District of South Carolina*, (2024 Online Edition) at p. 455, 458.

The Fifth Circuit Pattern Jury Instruction on §2442(b) follows suit, concluding: "As a matter of law, the following is a crime . . . under state law [federal law]: ______ (describe elements of the crime as alleged in the indictment."[10]

The Seventh Circuit's pattern instructions (2023 ed.) explain that *Richardson*, *supra* requires unanimity as to the elements of the underlying offense.[11]

The Eighth Circuit does the same, instructing district courts to "[s]et out elements of applicable federal or state law . . .).[12]

The Ninth Circuit requires that the third element of §2422(b) identify the "state or territory" with jurisdiction over the predicate offense. Its Comment cites *Lopez*, *supra*, at 730. "Where a federal prosecution hinges on an interpretation or application of state law, it is the district court's function to explain the relevant law to the jury". The pattern instruction also cites *De Leon Guerrero*, *supra* 89 F.4th 694, 696 (2023).[13]

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10. Committee on Pattern Jury Instructions District Judges Association Fifth Circuit, *Pattern Instructions (Criminal Cases)* 2024 Edition, 2.93 Enticement of a Minor 18 U.S.C. §2422(b).

11. Committee on Federal Criminal Jury Instructions of the Seventh Circuit, *William J. Bauer Pattern Criminal Jury Instructions* (2023 ed.) 4.04 ("Unanimity on Specific Acts" and 18 U.S.C. §2422(b).

12. *Manual of Model Criminal Jury Instructions* for the District Courts of the Eighth Circuit (2025), 6.18.2422B, *supra*.

13. Ninth Circuit Jury Instructions Committee, *Manual of Criminal Jury Instructions*, Instruction 20.29 (18 U.S.C. §2422(b)(2024 version).

II. THIS CASE IS A PERFECT VEHICLE FOR RESOLVING THIS IMPORTANT QUESTION.

This is the perfect vehicle for resolving the purely legal question of whether, when §2251 is both separately charged and included in a separate §2422(b) count as the "sexual activity for which any person can be charged with a criminal offense", it is a lesser included offense. The questions presented are pure questions of law. It is presented clearly and starkly here.

The indictment (Appendix D) presents twinned charges for both offenses, making §2251 a separate offense while incorporating it in §2422(b) as its predicate. The judgment (Appendix C) reflects separate punishment for each pair. This is all the case information needed to resolve the issues presented. There is no need to comb a record with disputed facts, or review the exercise of judicial discretion or inferences made by a jury.

Each of the twinned charges alleges in identical language: that the defendant used a facility or means of interstate commerce to induce the same minor, within the same time frame, to engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct to be transmitted through channels of interstate commerce. *See, e.g.* Superseding Indictment, Counts 1-2, Appendix D at 75a-76a. And the Judgment reflects separate punishments on each of those charges. *See, e.g.*, Appendix C, at 58a. Nothing more is needed from the record.

As shown above, the conflicting answers to the questions presented have been percolating for decades.

Percolation has only muddied the waters and the confusion spreads beyond the double jeopardy context. The solution requires nothing more than the straightforward application of this Court's double jeopardy jurisprudence law to a phrase incorporated in five statutes.

Finally, it also presents an opportunity to establish that the Fifth Amendment's Double Jeopardy Clause applies in the same manner for concurrent and consecutive prosecutions.

III. THE DECISION BELOW IS WRONG. IT IS INCONSISTENT WITH THIS COURT'S LONGSTANDING DOUBLE JEOPARDY JURISPRUDENCE.

The decision below is wrong. First, because *Blockburger* says so. Second, because it ignores this Court's double jeopardy jurisprudence in the context of predicate acts (*Richardson*). The rule that when "'the very same conduct violates two statutes, one of which is fully subsumed in the other'" is not novel. *(Barrett, supra*, at 146 S.Ct. at 492 quoting *Garrett, supra*, 471 U.S. 787. With respect to this issue, it was ignored below.

1. When charged for the same acts, Sections 2251(a) and 2422(b) are the same offense under *Blockburger.*

Blockburger, supra, announced: "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. at 304.

Straightforward application of that rule makes clear that the indictment here fully incorporated §2251(a) for each §2422(b) offense, requiring proof of no additional fact for either offense.

The Court of Appeals below followed *Hart*, *Sanchez* and *Isabella*, to distinguish §2251(a)'s requirement of a visual depiction in one and 2422(b)'s requirement of "any sexual activity for which any person can be charged with a criminal offense" in the other, as elements that made them separate and distinct under *Blockburger*. (Appendix A at 49a). It engages in a comparison of the elements of the two offenses, ignoring that in the §2422(b) count §2251 *is* that "criminal offense". It ignores this Court's decisions in *Richardson* regarding compound offenses that explicitly incorporate others.[14]

The decision below parsed the statutes as follows:

18 U.S.C. §2251(a) requires proof of the following facts.

> (1) the defendant [induced] a minor to engage in any sexually explicit conduct
>
> (2) [he] did so for the purpose of producing a visual depiction of such conduct, and
>
> (3) [he] knew or had reason to know that the visual depiction would be transported or transmitting using any means of interstate or foreign commerce.

14. Because this case involves only two federal statutes, the "separate sovereignties" question that may arise when the predicate offense is a state, not federal law. That question is therefore not addressed herein.

18 U.S.C. §2251(a) requires proof of the following facts.

> (1) the defendant knowingly [induced]
>
> (2) through the mail or any facility of interstate or foreign commerce
>
> (3) any individual who has not attained the age of 18 years
>
> (4) to engage in . . . any sexual activity for which any person can be charged with a criminal offense.

Appendix A at 49a.

The one sentence distinction made in *Hart*, *supra* (635 F.3d at 858), and adopted below (Appendix A, at 49a), is apparent, not real. When §2251 serves as predicate for 2422(b) it brings with it every fact required for proof of §2422(b) count. Under these circumstances, the apparent difference between three elements of one, and four in the other, is illusory.

The court below grouped as one element of §2251 (induced "a minor" to engage in "sexually explicit conduct") what it counted as two for §2422(b). Elements (1) (knowingly induced . . ." and (3) (any individual who has not attained the age of 18 years").[15] In both statutes, the object of "knowingly induced" is "a minor" (element 3).

15. "Knowingly" in element one logically modifies "who has not attained 18 years of age" because one cannot unknowingly do any of the adjacent verbs (persuade, induce, entice or coerce"). Those verbs all require the actor's knowledge and deliberate acts to achieve an identified objective–the minor's participation in sexual activity.

Blockburger does not depend upon the number of elements, or how they are distributed, but what must be proven to establish each element. And here, §2422(b) cannot be established without proving that the defendant could have been prosecuted for violation of §2151, as indeed, he was, for the very same acts in the same indictment.

The only other element of both statutes –the jurisdictional one– is shared. Thus, once §2251 serves the "can be charged" function for 2422(b), the distinction between the elements of the two offenses disappears. Neither "requires proof of a fact which the other does not". *Blockburger*, 284 U.S. at 304.

First principle: "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence." *Ex parte Lange* 85 U.S 16, 168 (1873). Among the "nice questions in the application of this rule" (*id.*) is the question presented here: the determination of exactly what are the elements of the two offenses. This, in turn, depends upon a distinction between elements and means, a question that divided the Court in *Richardson* in the context of the requirement of jury unanimity in a different compound offense: 21 U.S.C. §848, creating a "continuing criminal enterprise."

Richardson asked whether the requirement to prove a "continuing series of violations"[16] "refers to one element",

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16. 21 U.S.C. §848(a) provided, in pertinent part:

> [A] person is engaged in a continuing criminal enterprise if—
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(a series) with each individual violation constituting mere "brute facts" or means, "or whether those words create several elements, namely the several '"violations'". 526 U.S 817-818. It rejected the conclusion that the "series", not its predicate "violations" constituted the element, in part because a "violation" is not simply an act or conduct", but one "contrary to law". *Id*. An "offense" is no less so.

The dissenting opinion questioned the view that the "series of violations" was "a shorthand for some number of other elements corresponding to individual violations" (526 U.S. at 825), and echoed the pre-eminence given to legislative history in *Garrett*, *supra*.

Garrett inverted the double jeopardy analysis for the "continuing criminal enterprise" statute using of the same phrase, in a decision which demoted *Blockburger* from a bulwark against Double Jeopardy to a "useful cannon of statutory interpretation." *Id*. at 779. The result ultimately depended upon the Court's review of the legislative history of the statute (*id*. at 781-784) and upon the analogy to the pre-*Blockburger* decision, *Díaz v United States*, 233 U.S. 442 (1912)(murder charge following assault conviction later resulting in death does not violate Double Jeopardy).

Barrett returns to *Blockburger* as not only the "first step" in resolving the issue, but also reiterating that it carries with it a longstanding presumption "that Congress intends to authorize only one conviction per offense." 146 S.Ct. At 487. This was hardly news. The presumption that

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(2) such violation is part of a continuing series of violations of this subchapter or subchapter II of this chapter.

the Double Jeopardy Clause prohibits two convictions and two punishments for the same offense is not overcome just because the statutes use different language. *See, e.g., Whalen v. United States*, 445 U.S. 684 (1980)(rape and felony murder); *Harris v. Oklahoma*, 433 U.S. 682 (1970). (*per curiam*) (robbery with firearm prosecution barred by felony murder conviction because it is not "a separate offense distinct from its various elements." *Grady v. Corbin*, 495 U.S. 508, 520 (1990)(quoting *Illinois v. Vitale*, 477 U.S. 410, 420 (1980).

Richardson distinguishes between "brute facts" that are mere ways of committing an offense (murder by gun, knife, or poison) and elements which establish what the jury must determine beyond a reasonable doubt. Sometimes those factual elements are camouflaged within a stated element (felony murder), or "any provision of specific federal drug laws (*Richardson).* Defining those elements as "brute facts" rather than elements would not only deprive the defendant of the right to jury unanimity, but also leave her unable to establish a double jeopardy violation.

"Offenses", like "violations" are terms of art, not brute facts. Just as the factors of language, tradition, and unfairness led this Court to conclude that when an offense requires proof of "violations", it did not refer to a mere means of committing the offense, neither does one requiring proof that a defendant engaged in conduct that was a chargeable "offense".

Blockburger establishes that, by definition, the fourth element of §2442(b) fully encompasses every element of §2251. Any number of additional elements in the former would not change the status of the latter. The failure of the Court of Appeals to address the function or character of §2251 as a predicate offense of 2422(b) was fatal to its analysis.

2. The First Circuit was led astray by its own jurisprudence.

It addressed none of this Court's relevant cases to decide this question, but relied on its own inapposite ones, principally. *United States v. Colón-Osorio*, 10 F.3d 41 (1993) led it astray. That case involved successive prosecutions for violation of 18 U.S.C. § 3146(a) and 18 U.S.C. §922(g)(2). It reversed a district judge's grant of a motion to dismiss the indictment on double jeopardy grounds during the short life of the soo-to-be overruled "same conduct" test of *Grady*.

By the time the case reached the First Circuit, *Grady* was no longer good law, and the district court was reversed on authority of *United States v. Dixon*, 509 U.S. 688 (1993). At that juncture, the Court of Appeals logically focused upon the difference wrought by *Grady* and its reinstatement of *Blockburger's* focus on elements of the offenses. All of this ancient history ignores this Court's subsequent decisions on the question relevant here: are the "criminal offenses" for which a defendant could have been (or was) prosecuted, mere means of violating the statute, or lesser-included elements.

The court below ignored entirely the significance of the "long-settled," *Blockburger* presumption "muscular, and fundamental to our law" (*Barrett* at 497): when Congress legislates, it does not lightly create an exception to the Fifth Amendment's Double Jeopardy Clause. And so, when it does, it must clearly express that intention.[17]

The court of appeals below did not reach the question of Congressional intent because it found an unequal number of elements for the two offenses. But *Barrett* would require reversal even if it had found §2422(b) a lesser included offense. Far from creating one statute independent of the other and keeping them that way, Congress married the two when it explicitly incorporated §2251's definition of child pornography (at 2256) §2427. Not a word is said about separate punishments. End of story.

17. At this point in its discussion, the Court cites *Gamble v. United States*, 587 U.S. 678, 710 (2019). *Gamble* discussed whether felon-in-possession prosecutions dependent upon convictions by two separate sovereigns violated the Double Jeopardy clause. There was no suggestion that it would not, had the sovereigns been the same. At least after *Puerto Rico v. Sanchez Valle*, 579 U.S. 59 (2016)(Puerto Rico and the United States are the same sovereign), *Colón-Osorio* would appear to be a slender thread upon which to hang the decision below.

CONCLUSION

For all the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

Cited Authorities

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED MAY 6, 2026

UNITED STATES COURT OF APPEALS,
FIRST CIRCUIT

No. 23-1504

UNITED STATES OF AMERICA,

Appellee,

v.

FRANCISCO XAVIER ORTIZ-COLÓN,

Defendant, Appellant.

May 6, 2026

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO
[Hon. Raúl M. Arias-Marxuach, *U.S. District Judge*]

Before Barron, Chief Judge, Thompson and Gelpí, Circuit Judges.

OPINION

Thompson, Circuit Judge.

On November 9, 2022, a jury for the United States District Court of Puerto Rico concluded its deliberations, re-entered the courtroom where it had spent the last six days, and returned nineteen guilty verdicts against appellant-defendant Francisco Xavier Ortiz-Colón ("Ortiz").[1] Ortiz now appeals his convictions for producing, possessing, and receiving child pornography, and for coercing and enticing a minor, along with the substantive reasonableness of his 360-month sentence.

Ortiz claims the district court committed a plethora of plain errors throughout his trial as follows: while empaneling the jury, excusing jurors during trial, allowing overview testimony from government witnesses, responding to juror notes, and allowing multiple convictions based on the same alleged conduct. And Ortiz claims that, after the jury returned its findings, the district court abused its discretion by not varying downward even more than it did when issuing his sentence. After careful scrutiny of the trial record and due consideration of the arguments presented, we affirm in part and remand for further proceedings.

I

We begin with a brief rundown of the relevant facts as the jury might favorably have found them, supported by the appellate record. *See United States* v. *Burgos-Montes*, 786 F.3d 92, 99 (1st Cir. 2015); *United States* v.

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1. Although Ortiz's appellate briefing spells his name "Ortíz," his district court filings and the rules of the Royal Academy of the Spanish Language (Real Academia de la Lengua Española) suggest Ortiz is correctly spelled without an accent. Therefore, we proceed without the accent.

Bradshaw, 281 F.3d 278, 280 (1st Cir. 2002).[2] As we present our exposition, we take a big-picture approach and leave more acute details for our forthcoming discussions of Ortiz's specific claims.

A.

In December 2019, a team from the Crimes Against Children Task Force (based within Homeland Security Investigations) launched an investigation after receiving a troubling complaint from a school social worker in San Juan, Puerto Rico. The social worker reported that an Instagram user under the account "axilas_promocion"[3] had contacted a twelve-year-old student, KMC,[4] initially requesting photos of her underarms and, later, requesting sexually explicit photos. Federal investigators interviewed KMC and learned that her classmate, SMG, received similar Instagram messages and provocative requests from the axilas_promocion account.

The following month, authorities obtained a search warrant for the axilas_promocion Instagram account that produced subscriber information, a list of internet protocol

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2. Because Ortiz challenges the substantive reasonableness of his sentence, we will pull our background facts for that later discussion from the undisputed portions of the presentence investigation report and the transcript of his sentencing hearing. *See United States* v. *Brown*, 26 F.4th 48, 53 n.1 (1st Cir. 2022).

3. This account handle means "armpit promotion" in Spanish.

4. Throughout this opinion, we use initials to protect the identities of the minor victims involved.

("IP") addresses, photographs, videos, and messages associated with the account. These recovered materials included messages between the axilas_promocion user and KMC and SMG, along with sexually explicit photos of KMC. Investigators reviewed the list of IP addresses associated with the axilas_promocion account and ultimately flagged one as repeatedly being used to log in and upload media. Equipped with this IP address, authorities tracked it back to a physical address in San Juan.

While this investigation was underway, authorities received additional complaints matching the pattern of events experienced by KMC and SMG. This time an Instagram account called "axila_promociones"[5] had contacted eleven-year-old APR, fourteen-year-old ACM, and fourteen-year-old DAR. In each instance, the axilas_promociones user first solicited underarm photos from the minors before escalating to requests for sexually explicit images. Another round of search warrants ensued and produced a swath of records from Instagram including more subscriber information, messages, photos, and videos associated with the second axilas account. Further inspection of these records revealed illicit messages with an additional four minor victims and sexually explicit photographs of those victims, along with one more.

On June 10, 2020, authorities executed a search warrant at the San Juan residence located through the axilas_promocion account's IP address. Through this

5. This second Instagram account listed in its bio a third linked account, axila_promociones_promociones.

search warrant, law enforcement agents were authorized to seize any electronic device on the premises that could have been used to access the axilas accounts. When they arrived, authorities found Ortiz on site and ultimately recovered several cell phones (including a black Samsung cell phone seized from Ortiz's person that he said he was the sole user of), a computer, and a tablet. A later review of Ortiz's Samsung cell phone revealed sexually explicit photos of six of the minor victims previously identified through the Instagram records. Other seized electronics furnished additional depictions of child pornography and further links between Ortiz and the axilas accounts—including phone numbers verified by Instagram and email addresses used to register the accounts. Ortiz was arrested on August 19, 2020.

B.

Based on the above-mentioned conduct, Ortiz was charged with nine counts of production of child pornography (based on his nine minor victims) in violation of 18 U.S.C. § 2251(a), eight counts of coercion and enticement of a minor in violation of 18 U.S.C. § 2422(b), one count of receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(2), and one count of possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B)—amounting to nineteen counts in total. Ortiz opted to go to trial and, after six eventful days of evidence production and one day of deliberating, the jury found Ortiz guilty on all nineteen counts. Sentencing ensued thereafter, and the district court issued Ortiz a downwardly variant sentence of 360 months' (i.e., thirty years') imprisonment.

II.

On appeal, Ortiz raises six claims of error. Four of these claims pertain to the trial proceedings below, specifically the empanelment of jurors, the excusing of empaneled jurors, the scope of the government's witness testimony, and the fielding of juror notes. Ortiz also argues that his convictions violate the Fifth Amendment's Double Jeopardy Clause by effectively punishing him twice for the same conduct. And Ortiz's final challenge claims the district court's sentence was substantively unreasonable.

Before unpacking each of Ortiz's appellate asseverations, we'll pause to articulate the standard of review guiding our discussions. As Ortiz concedes, our plain-error standard applies to most of his claims because he failed to lodge the appropriate objections (and thus to preserve his arguments) during trial. *See United States* v. *Casanova*, 886 F.3d 55, 59 (1st Cir. 2018). Under this demanding standard, Ortiz "must show that (1) an error occurred, (2) the error was obvious, (3) the error affected substantial rights, and (4) the error seriously impaired the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quoting *United States* v. *Espinal-Almeida*, 699 F.3d 588, 600 (1st Cir. 2012)). As we've explained time and again, appellants face an uphill charge in establishing these four criteria. *See, e.g.*, *United States* v. *Galíndez*, 999 F.3d 60, 64-65 (1st Cir. 2021) (contextualizing the four prongs of plain error review).

With these criteria as our guideposts, we may proceed to Ortiz's first claim of plain error.

A. Empaneling Jurors

Ortiz first argues that the district court failed to pose more specific questions to prospective jurors, questions that would have warned them about the disturbing nature of the offenses charged. As a result, Ortiz contends the court's voir dire[6] prevented him from intelligently using his peremptory juror challenges and inadequately protected his right to a fair trial and an impartial jury.

To properly address Ortiz's arguments, we first need to provide a bit more info about what happened below. Before Ortiz's trial began, he submitted a list of proposed juror questions for voir dire. The district court received his list and proceeded to ask Ortiz's proposed questions practically verbatim. The court informed potential jurors that Ortiz had been charged with "sex offenses" and asked if anyone felt he was more likely to be guilty as a result. The court next asked whether anyone felt "that because of the nature of the case, it would be difficult for [them] to try to issue a verdict fairly and impartial[ly] without any prejudice or bias." Continuing, the court told the jury pool that they "may be shown nude images of what the [g]overment alleges constitutes child pornography" and that those images "may be unpleasant to view." Due to this potential evidence, the court asked whether seeing such images would prevent any jurors from being impartial.

6. "Voir dire" originates from the French phrase meaning "to speak the truth." It has been co-opted by the legal community to refer to the jury selection process, where telling the truth remains quintessential.

Several potential jurors heeded the court's warning and, outside the earshot of the other potential jurors, expressed their personal concerns based on these questions.[7] The court probed each concerned potential juror with more questions about their views of child pornography and if they had any history of sexual abuse. All the while, as prospective jurors approached and answered questions related to the nature of the offenses for voir dire, defense counsel for Ortiz was present and afforded the opportunity to ask follow-up questions. After court and counsel concluded all questioning, the court implored a final time whether the government or defense counsel had any further questions for voir dire. Both sides said no. Eventually eight jurors (six of whom expressed an inability to be fair and impartial) were excused for cause.

Ortiz now asserts that the district court's limited questioning and "bland euphemism[s]" constituted plain and obvious error.[8] We plainly disagree.

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7. For instance, one juror confided to the court, "[f]rom six years old to fifteen, I was a sexual abuse victim and I don't think I can handle this." That juror was subsequently excused for cause.

8. The government claims Ortiz failed to develop this argument (and practically all others) according to the four plain-error prongs, which would mean Ortiz has waived this claim on appeal. *See United States* v. *Pabon*, 819 F.3d 26, 33 (1st Cir. 2016). We reject this casting of Ortiz's briefing and, unless stated otherwise, proceed to review his claims for plain error.

Trial courts have broad discretion in conducting voir dire "subject only to the essential demands of fairness." *United States* v. *Delgado-Marrero*, 744 F.3d 167, 201 (1st Cir. 2014) (quoting *United States* v. *Misla-Aldarondo*, 478 F.3d 52, 60 (1st Cir. 2007)). Accordingly, we do not ascribe a "hard-and-fast formula" to the district court's decisions regarding the "necessary depth or breadth of *voir dire*." *Id.* (quoting *Skilling* v. *United States*, 561 U.S. 358, 386, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010)). Here, "the court asked a series of questions to identify potential biases and inquired as to whether prospective jurors could be fair and impartial in deciding the case." *Id.* Moreover, the court did not refuse to ask any questions requested by Ortiz, and it gave defense counsel ample opportunity to make further inquiries. Ortiz's counsel declined that invitation, and Ortiz has failed to present a specific error committed by the district court in conducting voir dire. *See id.*; *see also Galíndez*, 999 F.3d at 64-65 (explaining the need for appellant to show "an irrefutable error given binding precedent" under plain error review).

Before departing from this issue, we note that Ortiz says that the district court also erred by: (1) failing to inform prospective jurors that the government planned to call law enforcement agents as witnesses; and (2) failing to account for the "demographics" of the jury (specifically jurors' sex and their relationships to children) when considering their impartiality. Aside from a sparse summary of some events that occurred and some additional details about the empaneled jurors, Ortiz has presented these possible claims "unaccompanied by some effort at developed argumentation." *United States* v. *Zannino*, 895

F.2d 1, 17 (1st Cir. 1990). Accordingly, as is our settled appellate rule, these claims are waived. *Id.*[9]

B. Excusing Jurors

Ortiz next claims the district court erred by excusing three jurors prior to deliberations. He concedes that no objections were raised before the trial court, and thus we continue to apply our plain error standard of review. *See Galíndez*, 999 F.3d at 64-65. The government disputes Ortiz's version of events and says that only two jurors departed during trial. So, before we can address Ortiz's claim of error, we need to set the record straight.

On the second day of trial, proceedings abruptly stopped when one juror bolted from the courtroom. This juror—who was simultaneously labeled juror thirteen and alternate juror one—eventually came back and explained that she made for the exit because she was "coughing a lot." The court informed both parties that it was inclined to excuse juror thirteen, in part due to the availability of three more alternate jurors. Both counsel for the government and for Ortiz assented to excusing the juror

9. Even if Ortiz had not waived his law enforcement-related claim, his briefing incorrectly accuses the district court of not asking potential jurors whether they would tend to credit law enforcement witnesses simply by virtue of their employment. The court asked that precise question, right after telling the jury pool that agents for the federal government were likely to testify. Furthermore, the court (while not saying so explicitly) asked the jury pool if anyone knew the law enforcement agents the government planned to call as witnesses and read their names on the record, contrary to Ortiz's appellate retelling.

and continuing the trial. With everyone in agreement, the court thanked juror thirteen for her service and excused her from duty. That concludes the story of one excused juror.

Ortiz claims the court excused another alternate juror that day. This time, Ortiz points to a note from an unnamed juror ("juror note nine") and the court's written response "Alternate juror excused." The government has provided us with a certified translation of juror note nine in its briefing. The note reads: "May I go to the bathroom for a moment? I'm trying not to cough loudly." The trial minutes docketed after the second day of trial show us that the court received juror note nine and excused alternate juror one (a.k.a. juror thirteen whom we've already discussed) that day. Ortiz claims the unidentified author of juror note nine was not alternate juror one, but rather a different juror who the court excused off the record and without explanation.

Based on our reading of the record, the court excused only one alternate juror on the second day of trial. Unfortunately, the juror notes are not time-stamped. But the content of juror note nine and alternate juror one's reference to coughing, along with the court's record of only excusing one juror that day, alleviate any concern.

Ortiz's arguments to the contrary fail to prove a second alternate juror was ever excused. Ortiz speculates that the author of juror note nine must have been someone other than alternate juror one because the contents of the note "reflect[ed] the instruction given only after [alternate juror one] was dismissed." Not so. On the first day of trial the court informed all jurors multiple times that they could send a note if an issue arose and merely repeated that instruction after alternate juror one's dismissal. Thus, the official count remains at one excused juror.

The record shows (and the parties agree) that the court excused another juror on the fifth day of trial. Right after calling the case, the court informed opposing counsel that former juror twelve had called the jury office in the night and had been excused "for a personal matter that ha[d] nothing to do with the case itself." The court stated that an alternate would be promoted to the jury, and neither party objected.

Therefore, the final tally comes to two excused jurors, and Ortiz incorrectly claims that the district court excused two jurors ex parte. The court excused only two jurors total, one of whom (juror thirteen a.k.a. alternate juror one) was excused in the presence of counsel without objection. Ortiz's remaining claim is that the excusal of former juror twelve (who phoned in with a personal matter) outside the courtroom and not in the presence of counsel violated Federal Rule of Criminal Procedure 43 and his Sixth Amendment rights.[10]

10. Federal Rule of Criminal Procedure 43 provides, in relevant part to Ortiz's claim, that a defendant must be present at "every trial stage." While Ortiz does not differentiate between the protections afforded by Rule 43 and the Sixth Amendment, we note the scope of Rule 43 may be broader in certain circumstances. *See United States* v. *Ofray-Campos*, 534 F.3d 1, 17 (1st Cir. 2008) (holding that "a judge's responding to a jury note outside the

We have previously determined that the right to be present at all critical stages of a trial and a defendant's Sixth Amendment rights are not necessarily violated when a judge excuses a juror based on ex parte communications. *See Olszewski* v. *Spencer*, 466 F.3d 47, 64 (1st Cir. 2006). In that prior instance, a prospective juror initially asked to be excused because his wife was ill, and he needed to care for her. *Id.* The court did not excuse the juror, and he was empaneled. *Id.* That night, the juror's son called the judge and reiterated his father's request because his mother could not be left alone. *Id.* After contacting the wife's physician, the court excused the juror on grounds of hardship. *Id.* Counsel was informed of these events in court the next day, and an alternate juror replaced the excused juror. *Id.*

Upon hearing these facts, we found "no basis for Olszewski's claim that the judge's action in excusing the juror violated his Sixth Amendment rights." *Olszewski*, 466 F.3d at 64. Nor did we find that the judge's ex parte communication amounted to prejudicial error. *Id.* at 64-65. And much like in *Olszewski*, the court here, in open court, informed counsel and the defendant of its communications with the excused juror the next morning, and when it did, counsel made no complaint of prejudice to Ortiz, nor was there a request for any curative action from the court.

presence of counsel and defendant" violates Rule 43); *see also United States* v. *Adekoya*, No. 95-1123, 1996 WL 402049, at *3 n.6 (1st Cir. July 18, 1996) ("Defendant's right under Rule 43 to be present at trial proceedings is broader than the constitutional right alone."). Regardless, Ortiz's claim falls short under either standard as he has failed to demonstrate harm or prejudice. More on this point shortly.

See id. at 64-65. Trial judges are in a better position than us to decide whether a juror can continue to fulfill their duties, and we decline Ortiz's invitation, in a situation like this one, to second-guess that decision. *See United States* v. *Doherty*, 867 F.2d 47, 71 (1st Cir. 1989) (citing *United States* v. *Molinares Charris*, 822 F.2d 1213, 1223 (1st Cir. 1987)). Therefore, Ortiz has failed to show the district court judge committed an obvious error. *See Galíndez*, 999 F.3d at 64-65.

To the extent Ortiz raises a challenge beyond the procedural nature of the district court's decision, that claim is rejected as Ortiz has not demonstrated that the ex parte communication prejudiced him or deprived him of a fair trial. "Unrecorded *ex parte* communications between a trial judge and a juror are subject to harmless error review." *Olszewski*, 466 F.3d at 64 (citing *Rushen* v. *Spain*, 464 U.S. 114, 119-120, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983)); *see also United States* v. *Adekoya*, No. 95-1123, 1996 WL 402049, at *4 (1st Cir. July 18, 1996) (rejecting defendant's argument under Rule 43 to be present during the sidebar questioning of prospective jurors because there was no harm or prejudice to defendant). An error in these circumstances is harmless where "the jury's deliberations, as a whole, are not biased by the undisclosed communication." *Olszewski*, 466 F.3d at 64 (citation modified). Jury deliberations had not begun, meaning that the excusal could not have influenced deliberations, and the judge's communication with the excused juror occurred beyond earshot of those who remained empaneled. *See Doherty*, 867 F.2d at 72. As such, we discern neither error nor prejudice to Ortiz.

C. Overview Testimony

In the next segment of Ortiz's appeal, he claims that three of the government's witnesses provided impermissible "overview testimony." To Ortiz, these witnesses for the prosecution testified to matters beyond the scope of their expertise and advocated from the witness stand. We review these unpreserved evidentiary challenges for plain error and will affirm even in the presence of error if that error was harmless. *United States* v. *García-Sierra*, 994 F.3d 17, 26 (1st Cir. 2021); *United States* v. *Rosado-Perez*, 605 F.3d 48, 54 (1st Cir. 2010).

Before diving into the testimonial details, a quick word on what we mean by impermissible overview testimony. "The prohibition on overly broad overview testimony arises from the basic principle in the Federal Rules of Evidence that witnesses, other than experts giving expert opinions, should testify from personal knowledge." *Rosado-Perez*, 605 F.3d at 55. And "[t]estimony by a law enforcement agent constitutes impermissible 'overview' testimony when it effectively opines that a defendant is guilty 'based on the totality of information gathered' in the agent's investigation, rather than relaying the agent's first-hand experiences and observations." *García-Sierra*, 994 F.3d at 26 (quoting *United States* v. *Meises*, 645 F.3d 5, 15 (1st Cir. 2011)).

With these principles in mind, we will address each witness and argument seriatim.

i. Agent Wilkins

On the second day of trial, the government called Agent Richard James Wilkins, who was accepted as an expert in computer forensics without objection. Agent Wilkins testified that he extracted data from Ortiz's Samsung cell phone and sent that data to investigating authorities in San Juan. Wilkins explained the details of his extraction process and informed the jury that such extractions produced user accounts, chats, messages, call logs, images, videos, thumbnails, and internet search history from cell phones. When asked a follow-up question about the role of internet search history in child pornography investigations (which he had done hundreds of), Wilkins said that it "shows what somebody is interested in, or what they are looking for, or what they are trying to do." On redirect examination, Wilkins elaborated on his process for connecting a specific user to a device based on extracted data. He told the jury:

> A phone, I'm not saying this phone, but many phones I analyze, what we will go and we will look for is email accounts, Facebook accounts, Instagram, and we find all of these accounts. Typically, they all come back to the same person. Maybe they have a different name on the account, but it comes back to the same subscriber ultimately.

That is the extent of Wilkins's testimony that Ortiz argues was impermissibly overbroad "personal opinion."

Even assuming Agent Wilkins's testimony amounts to lay opinion (rather than expert testimony of a computer forensics expert), the court did not commit an evidentiary error because Wilkins also testified to having years of experience and to having done hundreds of phone extractions. *See United States* v. *Belanger*, 890 F.3d 13, 25 (1st Cir. 2018) (explaining that lay witnesses may testify to expertise acquired through job experience). Wilkins's statements were logically connected to his experience and his personal involvement in extracting data from Ortiz's cell phone. *See id.* at 26. Moreover, Wilkins's testimony aided the jury's consideration of the extracted cell phone data that was later entered into evidence. *See id.* And, if more were needed, Ortiz has not argued (let alone proven) that Wilkins's testimony harmed him. *See García-Sierra*, 994 F.3d at 28. Therefore, sans error or prejudice, Ortiz's challenge to Wilkins's testimony "falters on the shoals of plain error review." *Id.* at 29.

ii. Agent Segarra

Ortiz next claims the government's witness, Agent Darien Victor Segarra-Cardona ("Segarra"), "abandoned his expertise" and "advocate[d] from the witness stand." Specifically, Ortiz argues that Segarra skipped over the details of his expertise and told the jury that he processed the seized cell phones "[t]o try to find evidence." And when describing for the jury the evidence that he found (particularly photos), Segarra used the words "victims" and "child pornography."

At first glance, Segarra's testimony raises some concerns. On direct examination, the government presented Segarra with an evidence disk he had prepared and asked him to state the names of the files therein. Segarra identified fourteen files on the disk and rattled off the names he assigned to those files which included "child pornography" and "victims," along with more objective titles like "device photos" and "web history." The government then asked Segarra whether those files were his personal findings related to his analysis, and he answered yes.

The government probed further into the files Segarra organized. For the file titled "child pornography," Segarra testified the evidence consisted of "355 tags which contain images of child pornography." Then, in similar fashion, the government asked Segarra to describe the "victims" file, and Segarra unsurprisingly said that it contained "[i]mages of the identified victims." Segarra further testified that he identified the photos of victims with help from Agent De Jesús (whose testimony we will be addressing shortly) and did so before the jury heard from Agent De Jesús or the victims.

A few things need unpacking before we can evaluate whether the court erred, let alone plainly erred, in admitting Segarra's testimony as Ortiz claims. First, unlike common examples of impermissible overview testimony, this is not an instance where one law enforcement officer testifies about the entirety of an investigation and evidence that had not been admitted. *See United States* v. *Flores-De-Jesus*, 569 F.3d 8, 17-18

(1st Cir. 2009) (discussing common examples of overview testimony). Agent Segarra's testimony commented on already-admitted evidence that he oversaw the extraction of and personally reviewed. *Cf. García-Sierra*, 994 F.3d at 26 (explaining that overview testimony is when a law enforcement agent "effectively opines that a defendant is guilty based on the totality of information gathered in the agent's investigation, rather than relaying the agent's first-hand experiences and observations" (citation modified)).

Second (as we mentioned before), so long as proper foundation is laid, "government witnesses may testify about matters within their personal knowledge and give lay . . . opinion testimony." *Rosado-Perez*, 605 F.3d at 56. Segarra opened his testimony by telling the jury about his experience working for the Crimes Against Children Task Force as a computer forensics expert. He went on to inform the jury that he has worked on hundreds of cases involving child pornography and child exploitation, handled hundreds of cell phone extractions, and received specialized training to analyze extracted data in child pornography and child exploitation cases. So, when Segarra later testified to placing extracted cell phone data into files and titling one such file "child pornography," sufficient foundation had been laid to both his personal knowledge of how the data was produced and what he found when personally reviewing that data.

Lastly, even if Segarra's opinions as to what the content of the data revealed were problematic, Ortiz has failed to explain why this testimony prejudiced him considering the overwhelming evidence against him. *See García-Sierra*, 994 F.3d at 28 ("[O]n plain error review [the defendant] bears the burden of persuading us that the errors plaguing [the witness's] testimony harmed him."). Agent De Jesús testified after Segarra and identified the minor victims DAR, ARR, ACM, CAR, VOM, and ASR in the photos from the folder titled "victims." Furthermore, three of the six victims depicted in the "victims" file testified at trial and identified sexually explicit photos of themselves along with their communications with Ortiz through the axilas Instagram accounts (DAR also identified photos of her younger sister). Therefore, Segarra's testimony that the files contained child pornography and images of identified victims "was consistent with other competent evidence proffered by the government." *Id.*[11] Accordingly, Ortiz has not demonstrated that the district court committed plain error in allowing Segarra's testimony.

iii. Agent De Jesús

The third and final witness Ortiz claims provided impermissible overview testimony is Agent Elizabeth De Jesús. According to Ortiz, De Jesús's expertise in child

11. To put a final nail in this coffin, Ortiz never argued or attempted to poke holes in the government's presentation of the extracted child pornography or the identification of the minor victims. His theory of defense at trial (which he loosely carries on appeal) was that he was not the individual behind the axilas Instagram accounts, and that none of the evidence or testimony connected the offenses to him as the offender. Based on this position, we are further convinced Segarra's testimony did not substantially affect Ortiz's rights.

pornography should not have permitted her to "identify intimate body parts of strangers without establishing a basis for their ability to do so." Furthermore, Ortiz says that the court should have prevented De Jesús from testifying to the "modus operandi"[12] of the individual behind the axilas accounts.

We will address the modus operandi claim first and explain why the district court did not plainly err. First off, we struggle to see how De Jesús's use of modus operandi falls under the ambit of impermissible overview testimony. Nevertheless, by our count, she spun this Latin phrase twice for the jury during her testimony. The first time, De Jesús explained that, after her investigation began, she received two additional complaints from the families of APR and ACM reporting an Instagram account "using the same modus operandi of requesting, soliciting underarm photographs from female minors and escalating it to solicit sexually explicit images from them." The second time, De Jesús explained that the second axilas Instagram account (identified via the additional complaints) "had the same modus operandi which was requesting underarm photos from female minors and progressively leading them to produce other images until it got to the point where they were being solicited for sexually explicit videos and/or images." She later described the same escalating pattern of requests that she observed in another complaint and when reviewing the axilas account records, but did not utter the words "modus operandi."

12. "Modus operandi" is Latin for "mode of operating" and legalese for a predictable pattern of behavior that indicates how an individual operates.

Both times De Jesús used the term modus operandi, she described a pattern of events that she personally observed and that the jury could later review in the evidence to reach the same (or a different) conclusion. *See Rosado-Perez*, 605 F.3d at 56 (finding a witness's testimony permissible where it was based on personal knowledge and the jury "could independently evaluate" the witness's interpretation). Furthermore, we find ourselves again in no position wherein we could somehow conclude that this testimony in some way prejudiced Ortiz. For example, De Jesús's use of the term modus operandi did not serve as a link between Ortiz's prior conduct and the alleged crimes. *Cf. García-Sierra*, 994 F.3d at 31 (discussing a challenge to prior-bad-acts evidence unrelated to overview testimony). The government connected Ortiz to the axilas Instagram accounts in a myriad of other ways including his email addresses used to access the accounts, the IP address connected to where he lived, and his seized cell phone used to access the accounts which also had sexually explicit images of victims downloaded from those accounts. In short, the court did not plainly err in allowing De Jesús to testify on the modus operandi she observed. *See Flores-De-Jesus*, 569 F.3d at 19 (distinguishing overview testimony from an agent's description of her investigation based on personal knowledge).

As for identifying victims, we again reject Ortiz's claim that De Jesús submitted impermissible overview testimony. On the third day of trial, De Jesús began her testimony by explaining how she got involved in Ortiz's case following the first complaint filed by KMC's school social worker. De Jesús then expounded on the search warrants she obtained for the axilas Instagram accounts and how she reviewed the copious documents produced. Upon her review, she recognized messages to victims based on their complaints and discovered pornographic images of other minors who had not sought help. De Jesús personally combed through thousands of files to identify images of known victims and, using the victims' Instagram accounts contacted by the axilas accounts, De Jesús learned the identities of the previously unknown victims. From there, De Jesús told the jury that she personally met and saw all nine victims.

Still on direct examination, De Jesús explained how she processed all the Instagram data, burned it on to an evidence disk, and separated the documents into folders based on victim. She testified that she could organize the data by victim, in part because she knew which Instagram accounts the victims used to message and send photos to the axilas accounts. From the witness stand, she also identified each victim in photographs taken during interviews around the time the sexually explicit photos were taken and sent.

Even though De Jesús identified photos of the victims before they testified, De Jesús limited her testimony to her personal knowledge of evidence that had already been admitted. And, when "a law enforcement agent's testimony is limited to what [she] has gleaned from [her] first-hand observations, there is nothing wrong with the agent 'describing the course of [her] investigation in order to set the stage for the testimony to come.'" *García-Sierra*, 994 F.3d at 27 (citation modified). However, from our read of the testimony, we agree with Ortiz that it is not always clear what images De Jesús was referring to while responding to questions. For instance, when asked about the Instagram records De Jesús received involving one axilas account and CAR's Instagram account, she seems to run through images with sporadic descriptions such as "[t]hose are images of CAR, her underarm followed by a photo of her breast," but then "[t]hose are genitals" or "[t]hese two images are of female genitals." But even with plausible error afoot (which itself falls short of the "obvious" requirement), Ortiz fails to explain, as is his burden, how this testimony harmed him. *See id.* at 28. Nor is such harm evident to us, particularly because many of the victims (aside from CAR and ASR) later proffered competent testimony and identified themselves in the photos they sent.[13] So, once again, Ortiz's claim succumbs to plain error review.

iv. Conviction on Count Seven

In presenting his overview testimony arguments, Ortiz also contends (somewhat confusingly) that this testimony allowed the jury to convict him of an offense involving a victim for which there was no evidence. That offense, count seven of the indictment, accused Ortiz of producing child pornography involving "a nine (9) year-old female with initials AMR." Ortiz says that the evidence established that some victims had three-letter initials ending in "R" but that DAR testified her younger sister's

13. The youngest victim, ADMRR, did not testify at trial but was nevertheless identified by the competent testimony of someone with personal knowledge—her older sister and fellow victim DAR.

initials were ADMRR. Therefore, according to Ortiz, his conviction must be reversed.

Ortiz raises this purported error as the consequence of impermissible overview testimony, but we've identified none of the sort. And to the extent Ortiz attempts to formulate a different argument based on the sufficiency of the evidence supporting count seven, he has not done so clearly and provided mere fleshless bones for that argument and thus waived that claim. *See Zannino*, 895 F.2d at 17.

D. Juror Notes

We continue our march through Ortiz's appeal by reviewing what he considers to be three problematic juror notes submitted to the court during his trial. Because Ortiz failed to object to the district court's handling of these notes, his unpreserved claims receive plain error scrutiny at best (we say at best because, as the government points out and we will address momentarily, his acquiescence at trial drifts these claims toward outright waiver). *See United States* v. *Cassiere*, 4 F.3d 1006, 1017 (1st Cir. 1993); *see also United States* v. *Corbett*, 870 F.3d 21, 30 (1st Cir. 2017) (discussing the standard of review applicable to an unpreserved challenge to a response to a juror's question).

In our circuit, as we've previously explained, "[a]llowing jurors to pose questions during a criminal trial is a procedure fraught with perils. In most cases, the game will not be worth the candle." *Cassiere*, 4 F.3d at 1017 (alteration in original) (quoting *United States* v.

Sutton, 970 F.2d 1001, 1005 (1st Cir. 1992)). In the same vein, trial judges possess "wide latitude to manage trials" and, despite the risks associated with allowing jurors to pose questions, the practice will not amount to reversible error if conducted properly based on the circumstances. *Id.* (quoting *Sutton*, 970 F.2d at 1005).

i. Note 10

The first of three juror notes that Ortiz requests appellate examination of came to the court after the government's direct examination of Agent Segarra. This note sought clarification of a term Segarra used on the stand and asked (verbatim): "JB jail bate or jailbake at what is he referring to?" The court called counsel to sidebar, and said that it planned to ask Segarra what the initials "JB" meant to him personally before defense counsel started its cross-examination so that Segarra's answer could be subject to further questioning if warranted. Defense counsel responded, "No problem, sir," to this proposal.

The next day, as promised and before cross-examination began, the court asked Segarra, based on his knowledge and experience, what the term "jailbait" means and what the initials "JB" stand for. Segarra stated that JB is an abbreviation for jailbait, a term he'd seen used to search for images of pre-adolescent girls in explicit poses. Defense counsel did not object to either question nor to the response and proceeded with cross-examination of the witness.

Where, as here, "the district court unmistakably placed the issue of how to respond to" a "juror note on the table" and defense counsel "affirmatively stated that he had 'no problem' with the court's proposed response," the appellant has waived the issue. *Corbett*, 870 F.3d at 31; *see also United States* v. *Chen*, 998 F.3d 1, 9 (1st Cir. 2021) (finding challenges waived where counsel did not object and affirmatively accepted the court's proposals). Ortiz may not volte-face his prior position in this court.[14]

ii. Note 12

The second of three juror notes at issue in this appeal confused both opposing counsel and the trial judge on first read (admittedly, us too). The district court understood the note to read: "I noticed a file that called my attention. The name is Claro. It concerns me that this supposed exposition of images of victims creates a risk of abduction." Outside the presence of the jury, the district court proposed a solution to opposing counsel: it would explain to the note's author that they shouldn't be concerned for the safety of anyone in Puerto Rico and that this case was not about the Claro website (to be sure, neither is this appeal),[15] and then ask whether the juror had discussed

14. Equally problematic, Ortiz concedes right in his opening brief that the district court's question and Segarra's response "[p]robably [did] not" "turn the tide" of his case, thereby eviscerating an essential prong of plain error review—that an error was prejudicial and affected the proceeding's outcome. *Galíndez*, 999 F.3d at 65.

15. For the curious reader, Claro is a telecommunications provider in Puerto Rico that offers mobile, internet, TV, and

their concerns with any other jurors and whether they could still be fair and impartial. Both prosecution and defense agreed to this proposal.

Later, the proposed plan proceeded without a hitch. Outside the presence of the other jurors, the court called the note's author (juror number 16, an alternate) and alleviated their concern. The juror informed counsel and the court that they hadn't shared their thoughts with any other jurors and that they could still serve as a fair and impartial juror. The audience ended without further comment, objection, or request made by defense counsel.

Now, Ortiz claims error; however, he concedes "this incident itself does not warrant reversal." Between defense counsel's acquiescence to the district court's response and Ortiz's concession on his meritless appellate position, Ortiz has abandoned, and thus waived, this claim. *See Corbett*, 870 F.3d at 30; *see also Zannino*, 895 F.2d at 17 (explaining that our court will not do counsel's work and develop arguments). And even setting all waiver aside, the court erred neither by responding to this juror note nor in the manner it responded. *Cf. United States* v. *Sandoval*, 6 F.4th 63, 82 (1st Cir. 2021) (finding no error in the court's remedial actions where juror notes expressed fear, in the context of a motion for a mistrial).

landline phone services and provides voice and data connectivity for residents and businesses. It operates as part of the América Móvil group and evolved from the historic Puerto Rico Telephone Company.

iii. Note 17

The third and final juror note poised for appellate scrutiny presents a deeper quagmire. On the fifth day of trial, the court received a note that read:

> Is it necessary to listen to all the victims? We can tell, throughout the other interviews of witnesses, the process of getting these pictures. There is a word. It's by persistency and blackmailing, by actual threatening the witnesses. There is plenty of evidence at hand. What else is needed to provide a verdict for each count? Can we proceed and simply have the Defendant testify? Please excuse my little prior knowledge of how a trial is completed. I am just a bit impatient.

The court discussed this note with opposing counsel and proposed a response explaining that the government has the burden of proof and must present evidence as to each of the nineteen counts charged. Additionally, the court's proposed response stated that Ortiz had no obligation to testify and that no adverse inference or conclusion could be drawn from his decision not to. Lastly, the court told opposing counsel that he would inform the jurors that they must keep an open mind until all the government's evidence had come in and until it was time to deliberate. Throughout the conversation, at each step of the proposed response, defense counsel did not object; in fact, they expressly agreed.[16]

With the proper response settled, the court then asked opposing counsel, “Do we impart this to all the jurors?” Defense counsel said, “Why not? They are part of the instructions anyway.” The government expressed cautionary concern because no one knew if the author of this note had shared their thoughts and impatience with other jurors. In response to the government’s qualm, the court said that “[f]or the avoidance of doubt, I think it’s better to impart it to all of them.” And the jury was brought back in.

The court proceeded to read the note aloud to all jurors and swiftly quashed the sentiment raised according to the agreed-upon response. After reading both question and response, the court once again asked opposing counsel for further input or objections. Neither party accepted the invitation, and the trial continued.

On appeal, Ortiz claims the note proved “disastrous pre-instruction deliberation by one juror” and the court’s decision to read the note to the entire jury dealt a “mortal blow to the presumption of innocence.” And due to this irreconcilable prejudice to Ortiz, he demands “[n]othing short of a new trial.” The government offers three grounds for rejecting Ortiz’s request: (1) his claims were

16. One slight caveat. Defense counsel asked the court to phrase Ortiz’s right not to testify as his “decision” rather than the court’s initial phrasing as his “failure” not to testify. The government and court agreed with this reasonable request.

affirmatively waived at trial (much like Ortiz's previous two challenges to juror notes); (2) under plain error review, Ortiz has failed to establish obvious error through binding precedent; and (3) the court's decision to read the note to all jurors was not prejudicial to him.

This time around, despite the general approval of the proposed response and lack of objection afterward, Ortiz did not intentionally relinquish or abandon a known right. *See Corbett*, 870 F.3d at 30-31. Unlike the previously discussed juror notes, the court's question "[d]o we impart this to all the jurors?" did not provide notice to counsel with sufficient clarity that the court intended to impart not only the approved response but also, the contents of the note itself. Thus, we disagree with the government's first response that Ortiz has waived this issue. Still, Ortiz's lack of objection nevertheless leaves his claims to the perils of plain error review. *See, e.g.*, *Chen*, 998 F.3d at 7.

Recall that for us to grant the relief Ortiz seeks, he must prove: (1) that an error occurred (2) which was clear or obvious under binding precedent and not only (3) affected his substantial rights, but also (4) "seriously impaired the fairness, integrity, or public reputation of judicial proceedings." Id. (quoting *United States* v. *Salley*, 651 F.3d 159, 164 (1st Cir. 2011)). To reverse on plain error review, the error below must be a "blockbuster" and sufficiently prejudicial to create a "reasonable probability that the outcome of the trial would have been different had it not occurred." Id. (citation modified).

To meet the first prong of plain error review (that an error occurred), Ortiz appears to claim two separate errors entangled in this series of events, either of which he says warrant a new trial.[17] First, he argues that this note evidenced "disastrous pre-instruction deliberation by one juror" and second, that it was error for the district court to "read the note aloud, contaminating all." We will discuss each claim of error in turn.

Within Ortiz's first claim of error, we struggle to fully discern the extent of the alleged premature deliberations. When first introducing this argument, Ortiz specifically accuses "one juror" of impermissible premature deliberation. Yet, like dancing the Bomba y Plena,[18] it typically takes more than one juror to deliberate and, thus, one juror cannot prematurely deliberate alone—so long as they keep an open mind about guilt or innocence until the appropriate time. *See McGonagle* v. *United States*, 137 F. App'x 373, 377 (1st Cir. 2005) (explaining that "there is nothing wrong with jurors engaging in

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17. We read Ortiz's briefing to make two separate claims of error involving this juror note; however, his blending of the inquiries and smattered legal citations complicates the endeavor.

18. Bomba y Plena are vibrant, percussion-driven Afro-Puerto Rican musical traditions, often grouped but distinct, rooted in the experiences of enslaved Africans, serving as powerful expressions of culture, resistance, and community storytelling through unique rhythms, call-and-response singing, and dance. Bomba, older and with West African roots, features dynamic drumming (barriles) and dancer-drummer interactions. Plena, from the early 20th century, acts as the "sung newspaper," telling stories of daily life with pandereta drums.

'mental deliberations' during trial" so long as they keep an open mind); *see also United States* v. *Esso*, 684 F.3d 347, 351 (2d Cir. 2012) (finding "no harm" in individual jurors thinking about a case and engaging in "private 'deliberations'" with themselves). And here, while the juror note uses inflammatory terms like "blackmailing" and "plenty of evidence," the note posed two questions indicating a still-existent open mind. Contrary to Ortiz's version of the note, it did not say the evidence at hand was sufficient to "convict," but instead used "verdict" in formulating a question. Moreover, the fact that the juror asked if the defendant could testify demonstrates that they felt Ortiz's fate hadn't been sealed.

A subtle switch emerges in Ortiz's reply brief. There, he expands the scope of this claim of error to premature deliberations between multiple jurors. But neither Ortiz nor the government asked the court to question the author of the juror note about whether they'd shared their thoughts with other jurors. Consequentially, the record is silent on whether any premature discussions took place between the author of this juror note and any of the other jurors, and the note itself does not prove otherwise. *Cf. United States* v. *Jadlowe*, 628 F.3d 1, 21 (1st Cir. 2010) (concluding the record was silent regarding premature deliberations despite a flawed instruction permitting discussions between jurors during trial).

What we can glean from the record is that, consistent with what had been agreed upon at least in part, after reading the note aloud, the district court explicitly informed the jury that the government needed to present evidence of each count and that every juror needed to keep an open mind until all evidence had been presented and until they retired to deliberate. "Pursuant to well-established precedent, we presume juries understand and follow the court's instructions." Id. (citation modified). As such, without indication to the contrary, we presume the author of this juror note did not prematurely deliberate or express their opinions of Ortiz's guilt or innocence with their peers. *See id.* at 22. So, whichever way Ortiz slices his premature deliberation claim, we see no error warranting a new trial.

For Ortiz's second claim of error stemming from the same juror note, he appears to argue the court's reading aloud of the note destroyed the presumption of innocence that he is constitutionally entitled to.[19] Ultimately, we find the district court's reading of the juror note did not corrupt Ortiz's presumption of innocence nor did it implicate his Sixth Amendment right to a fair trial.

Before going any further, our forthcoming analysis does not endorse the court's decision to read the note to the jury, nor suggest it could not have been handled better. Any possible negative implications from reading

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19. The heading of Ortiz's brief frames all juror-note related arguments as falling under the Sixth Amendment right to a fair trial and Fifth Amendment "rights to remain silent and the presumption of innocence." Yet at oral argument, Ortiz classified this argument for the first time as raising due process concerns; that's too late, meaning the due process aspect is waived. *E.g.*, *United States* v. *Calderon-Zayas*, 102 F.4th 28, 37 n.9 (1st Cir. 2024).

the note could have been avoided by either only imparting the agreed-upon response to the entire jury or calling the author of the note aside for further inquiry. However, we recognize "[j]udges, like the rest of humankind, are not perfect" and inadvertent mistakes unavoidably crop up on occasion. *United States* v. *Maguire*, 918 F.2d 254, 267 (1st Cir. 1990); *see also United States* v. *Espinal-Almeida*, 699 F.3d 588, 608 (1st Cir. 2012) (finding a judge's possibly "inappropriate commentary" permissible because "a criminal defendant is entitled to a fair trial, not necessarily a perfect one" (citation modified)).

Nevertheless, the question before us is whether this misstep presents an error of constitutional magnitude. *Maguire*, 918 F.2d at 267. And, as we've previously held, some inadvertent missteps fall short of the constitutional threshold and can be corrected without prescribing the strong medicine of a new trial. *See* id. (rejecting a claim for a new trial where the district court erroneously read a severed count of the indictment to the jury); *see also United States* v. *Rosario-Pérez*, 957 F.3d 277, 296 (1st Cir. 2020) (affirming the denial of defendant's mistrial motion where the district court referenced a potential appeal in front of the jury). Here, the district court read the juror note in the context of its immediate curative instruction without objection. That instruction clearly and concisely explained the relevant law including that no negative inference could come from Ortiz's decision not to testify. The court later reiterated in its final charge to the jury the importance of the presumption of innocence and that Ortiz had a constitutional right not to testify. Emphasizing the latter point, the court cautioned the jury that drawing any negative inference from Ortiz's decision not to testify would violate the oath they had taken as jurors.

Due to these remedial measures taken by the court after reading the note aloud, Ortiz has not presented a clear or obvious error warranting a new trial. *See United States* v. *Polito*, 856 F.2d 414, 419 (1st Cir. 1988) ("[T]he strong, firm, and twice-repeated prophylactic instructions were adequate to dispel any possible damage."). The court's curative instructions—immediately ensuing the reading of the note and repeated before the jury retired—left no doubt that Ortiz had a constitutional right not to testify and that he was entitled to an unwavering presumption of innocence. Furthermore, the complete lack of objection to the instructions "deprived the trial judge of an earlier opportunity to fully evaluate the effect of his . . . comments upon the jury" and "further militates against a finding of reversible error." *United States* v. *Ayala-Vazquez*, 751 F.3d 1, 25 (1st Cir. 2014). Thus, on this record, we perceive no clear or obvious error.

E. Double Jeopardy

As we mentioned in our recapitulation of the events leading to Ortiz's present appeal, the jury (after deliberating) returned guilty verdicts for all nineteen counts charged in the indictment. Ortiz alleges that some of these counts impermissibly punished him twice for the same conduct—thereby violating the Fifth Amendment's Double Jeopardy Clause. Because Ortiz did not object or raise this claim at trial, we (again) review for plain error. *United States* v. *Henry*, 519 F.3d 68, 71 (1st Cir. 2008).

The Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. We have drawn three general protections from this text: "it shields a defendant from a second prosecution for the same offense after either conviction or acquittal, and it also prohibits multiple punishments for the same offense." *United States* v. *Pacheco*, 434 F.3d 106, 111-12 (1st Cir. 2006) (quoting *United States* v. *Morris*, 99 F.3d 476, 478 (1st Cir. 1996)). Ortiz invokes the third class of protection by claiming he has received multiple punishments for the same conduct.

To remind the reader, Ortiz was charged and convicted of nine counts of production of child pornography in violation of 18 U.S.C. § 2251(a), eight counts of coercion and enticement of a minor in violation of 18 U.S.C. § 2422(b)(2), one count of receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(2), and one count of possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). He asserts two separate double jeopardy violations: first, that possession of child pornography is a lesser included offense of receiving child pornography and second, that because the production of child pornography served as a necessary element to convict him of coercing and enticing a minor, the former was a lesser included offense of the latter. For reasons that we will soon provide the reader, we agree with Ortiz's first constitutional contention and reject his second.

Resolving Ortiz's claims first requires an application of the "*Blockburger* test" (otherwise known as the "same-elements test"). *Rodríguez-Méndez* v. *United States*, 134

F.4th 1, 6 (1st Cir. 2025) (quoting *United States* v. *Dixon*, 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993)). This nearly-century-old test helps settle whether two offenses are really just one (and, thus, warrant just one punishment) by determining if each offense requires proof of a fact that the other does not. *Id.*; *accord Rutledge* v. *United States*, 517 U.S. 292, 297, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996). In applying this test, if one offense is a lesser included offense of the other, we say the two amount to the "same offense" and thus pose a constitutional problem in the presence of two convictions. *Rutledge*, 517 U.S. at 297, 116 S.Ct. 1241. But, if "[e]ach of the offenses created requires proof of a different element," they are not the same offense and there is no Double Jeopardy Clause violation. *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); *see also Barrett* v. *United States*, 607 U.S. 128, 146 S. Ct. 482, 491, 223 L.Ed.2d 398 (2026) (explaining that "the inquiry generally ends" if the relevant offenses satisfy the *Blockburger* test).

Where two statutes define the same offense, "the *Blockburger* presumption is triggered" and we presume "that Congress ordinarily does not intend to punish the same offense under two different statutes." *Barrett*, 146 S. Ct. at 491 (citation modified). But this presumption may ultimately yield to a "plainly expressed" intent from Congress to abandon it. *Id.* (citing *Garrett* v. *United States*, 471 U.S. 773, 778-79, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985)). In other words, if two statutes share common elements, such that neither requires proof of a distinct element, we "search for a clear manifestation of Congress's intent to authorize more than one punishment." *Id.* Sans that requisite congressional intent, the *Blockburger* presumption holds, and the multiple convictions will be unlawful.

i. Possession and Receipt

Ortiz first argues that his separate convictions for the possession and receipt of child pornography violate the Double Jeopardy Clause because possession is a lesser included offense of receipt. Ortiz's claim has logical fortitude and persuasive support from our sister circuits which have previously pondered this question, including under plain error review. *See United States* v. *Muhlenbruch*, 634 F.3d 987, 1002-04 (8th Cir. 2011); *United States* v. *Miller*, 527 F.3d 54, 73 (3d Cir. 2008). His argument, which relies on those circuit cases and the Supreme Court's decision in *Ball* v. *United States*, builds off a basic premise: one who receives something (including child pornography) necessarily possesses that item, at least at the moment of receipt. *See Ball* v. *United States*, 470 U.S. 856, 861, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985) (holding that Congress did not intend to punish an individual for both possession and receipt of a firearm because "proof of illegal receipt of a firearm *necessarily* includes proof of illegal possession of that weapon"); *United States* v. *Bobb*, 577 F.3d 1366, 1372 (11th Cir. 2009); *United States* v. *Davenport*, 519 F.3d 940, 943 (9th Cir. 2008); *see also United States* v. *Johnston*, 789 F.3d 934, 938 (9th Cir. 2015) ("A majority of circuits that have considered the question agree that possession of child pornography is a lesser included offense of receipt and that imposing convictions under both statutes for the same conduct violates the Double Jeopardy Clause. Two additional circuits have signaled their agreement . . . without explicitly deciding the issue."). Based on that caselaw, Ortiz asserts that the error of his two convictions for possessing and receiving child pornography is "legally obvious under established law." *See Miller*, 527 F.3d at 73 (analogizing to *Ball* to conclude that entering separate convictions for possession and receipt of child pornography was plain error).

The government acknowledges that several courts of appeals have found the possession of child pornography to be a lesser included offense of receipt. Nevertheless, it argues no error occurred because separate facts and evidence support Ortiz's separate possession and receipt convictions, thereby avoiding any double jeopardy complications.

The government peddles this "separate evidence" theory for the first time before our court. The basic idea behind this theory is that Ortiz received child pornography from his minor victims but possessed separate child pornography depicting other minors on his cell phones when they were seized. From our review of the record, the government's separate evidence theory has legs. It appears that Ortiz possessed separate images that could have formed the basis of a distinct possession conviction. The problem is that the government never (despite numerous opportunities) prosecuted Ortiz's possession charge based on those images of minors other than his victims.

Other courts have accepted a separate evidence justification when considering the same double jeopardy issue raised by Ortiz, and those courts appropriately upheld multiple convictions for the possession and receipt of child pornography where separate evidence formed the basis of each conviction. *United States* v. *Halliday*, 672 F.3d 462, 471 (7th Cir. 2012); *see also United States* v. *Schnittker*, 807 F.3d 77, 83 (4th Cir. 2015) ("The federal courts of appeals have relied on various manifestations of distinct conduct to determine that separate counts were not the same in fact."). But, unlike the circumstances where courts have affirmed multiple convictions based on separate evidence (and thus avoided this double jeopardy issue), the current record does not provide a basis for us to conclude that Ortiz's possession and receipt convictions were based on separate evidence. *See United States* v. *Benoit*, 713 F.3d 1, 17 (10th Cir. 2013) ("Based on the entire record, it is abundantly clear that the jury convicted [the defendant] of both receipt and possession based on the same visual depictions."); *United States* v. *Schales*, 546 F.3d 965, 980 (9th Cir. 2008) (holding that "[o]n this record, we cannot conclude that [the defendant] was convicted for separate conduct" after scrutinizing the indictment, jury instructions, and verdict form). Several happenings below lead us to this result.

First, neither count twelve (receipt)[20] nor count thirteen (possession)[21] of the indictment charged Ortiz with distinct conduct specific to each offense. Particularly, both counts refer to an overlapping time period and similar conduct through the vehicle of his cell phones that could have been proven by the government with the same evidence. *Compare Benoit*, 713 F.3d at 17 (finding the government failed to charge the defendant "for two distinct acts" in the indictment), *with Bobb*, 577 F.3d at 1375 (referencing an indictment's distinct dates for two separate offenses), *and United States* v. *Sturm*, 673 F.3d 1274, 1288 (10th Cir. 2012) (finding a defendant was properly convicted of distinct possession and receipt offenses, in part, due to the fact that "the indictment charged him with knowing possessing of three specific images of child pornography").

Second, the government did not specify in its opening or closing arguments that certain images formed the basis of the possession count and that other images were to be considered as the basis for the receipt count. This is not to suggest that the government's arguments are evidence, but we recognize that other courts have accepted

20. Count twelve alleged that Ortiz "received images depicting actual minor females engaged in sexually explicit conduct via internet instant messaging services and social media messages using his cellular phones" from "in or about August, 2019 through in or about May, 2020."

21. Count thirteen alleged that Ortiz "possessed still images depicting minors engaged in sexually explicit conduct on his cellular phones" from "in or about August, 2019 through on or about June 10, 2020."

clear prosecutorial arguments that tethered separate evidence to separate charges as proof that the jury did not impermissibly base multiple convictions on the same evidence. *Halliday*, 672 F.3d at 471; *see also Johnston*, 789 F.3d at 939 (rejecting the government's separate conduct theory, in part, because "[t]he prosecutor repeatedly referred to the receipt and possession counts in the same breath without any indication that the jury was required to consider separate conduct for each count"). Although the government mentioned in its closing argument the existence of child pornography that Ortiz possessed not depicting his victims, it told the jury "[a]s to the count relating to possession of child pornography, it would both include the images he possessed of the identified minors and any additional images of child pornography that were found in the phone devices." Likewise, the government also stated in its closing remarks that "the count relating to receipt of child pornography, it includes any and all images that were received of child pornography during that span of time." These statements leave us far from convinced that the prosecution clarified its separate evidence theory for the jury, or that the jury returned its guilty verdict on count thirteen based on Ortiz possessing separate images not depicting his victims.[22]

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22. The government also argued (out of the jury's presence) that the court could consider all the child pornography Ortiz received and possessed during the time span identified in the indictment when opposing Ortiz's Rule 29 motion for judgment of acquittal. The relevance being, the government was not pursuing convictions based on the separate evidence theory that it now raises to fend off Ortiz's double jeopardy claim.

Furthermore, neither the jury instructions nor the verdict form made any distinction as to what evidence should have been separately considered for Ortiz's receipt and possession charges. *Cf. Sturm*, 673 F.3d at 1288 ("The jury was specifically instructed as to which images were associated with which count, and found [the defendant] guilty on both counts."). So, after combing through the record, we cannot conclude that Ortiz was convicted of receiving and possessing child pornography based on separate evidence. *See Schales*, 546 F.3d at 980.

Beyond its separate evidence theory, the government does not advance any argument in the alternative that Ortiz's convictions for both possession and receipt of child pornography is not a double jeopardy violation. Nor does it dispute that such violation is not clear or obvious. Therefore, "the government has waived th[ose] backup position[s]." *United States* v. *Ramos-Gonzalez*, 775 F.3d 483, 506 (1st Cir. 2015) (applying appellee waiver on plain error review). Accordingly, we conclude that Ortiz has satisfied the first two plain-error prongs.

Moving to the third plain-error prong, the separate convictions for possession and receipt of child pornography were prejudicial to Ortiz. To be clear, the court imposed 240-month sentences for Ortiz's possession and receipt convictions to be served concurrently with his 360-month sentence imposed for his remaining convictions. So, Ortiz wouldn't have spent any additional time incarcerated due to the separate possession and receipt convictions. However, as the Court stated in *Ball*, "[t]he second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence." 470 U.S. at 864-65, 105 S.Ct. 1668. Various potential adverse consequences can follow from the additional conviction, *id.*, not to mention the fact that the district court ordered Ortiz to pay a mandatory $100 special assessment for each conviction, *see Muhlenbruch*, 634 F.3d at 1004. The government does not contend otherwise. Thus, the double jeopardy violation at issue subjected Ortiz to multiple punishments and prejudiced him as a result.

On our last stop in the plain-error gauntlet, we further conclude this error threatens the fairness, integrity, and public perception of our judicial system. To borrow the persuasive reasoning of our sister courts, "because the prohibition against double jeopardy is a cornerstone of our system of constitutional criminal procedure, this error threatens the fairness, integrity, and public reputation of our judicial proceedings." *Davenport*, 519 F.3d at 947-48. We agree with this sentiment, and, again, the government makes no contrary argument.

To close the loop on this issue, we reject the government's separate evidence theory raised on appeal and find that Ortiz's separate convictions for receiving and possessing child pornography violate the Double Jeopardy Clause. The government opted to paint a broad picture for the jury: Ortiz received child pornography from his minor victims and was found in possession of the same. This prosecutorial decision was well within the government's discretion, as was the choice not to limit the possession and receipt charges to specific evidence.

See Garrett, 471 U.S. at 789 n.2, 105 S.Ct. 2407 ("The Government . . . is responsible for initiating a criminal prosecution, and subject to applicable constitutional limitations it is entitled to choose those offenses for which it wishes to indict and the evidence upon which it wishes to base the prosecution."). But that decision denied Ortiz the opportunity to mount a separate defense in opposition to the government's separate evidence theory. *See Price* v. *Georgia*, 398 U.S. 323, 331, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970) ("The Double Jeopardy Clause, as we have noted, is cast in terms of the risk or hazard of trial and conviction, not the ultimate legal consequences of the verdict.").

As a result, we adopt "the most salubrious course" and remand to the district court to vacate Ortiz's conviction and sentence, including the $100 special monetary assessment, for either count twelve or count thirteen. *United States* v. *Chiaradio*, 684 F.3d 265, 284 (1st Cir. 2012); *Rutledge*, 517 U.S. at 307, 116 S.Ct. 1241 ("Accordingly, one of petitioner's convictions, as well as its concurrent sentence . . . must be vacated." (citation modified)). Because Ortiz was sentenced to 360 months' imprisonment on the remaining seventeen counts, this remedy would likely only require a monetary adjustment on remand for the district court to enter judgment consistent with this opinion. *United States* v. *King*, 554 F.3d 177, 181 (1st Cir. 2009).[23]

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23. To preview our forthcoming conclusions on Ortiz's second double jeopardy challenge and his challenge to the substantive reasonableness of his 360-month sentence, his remaining convictions and sentence may stand. The district court may resentence Ortiz on the surviving eighteen counts, or, in the alternative, allow the sentences on those counts to remain intact. *Chiaradio*, 684 F.3d at 284.

ii. Production and Coercion

Ortiz's second double jeopardy claim involves his convictions for the production of child pornography and the coercion and enticement of a minor. Here, Ortiz claims that the district court erred by allowing his production convictions to serve as essential elements of proof that he coerced or enticed minors—thereby turning the production of child pornography into a lesser included offense of coercing and enticing a minor. But unlike his previous double jeopardy claim, Ortiz has failed to establish error because the statutes for producing child pornography and coercing and enticing a minor do not trigger the *Blockburger* presumption.

To apply the *Blockburger* test, we turn our attention to the statutes of conviction. *See United States* v. *Morris*, 99 F.3d 476, 479 (1st Cir. 1996) ("[T]he *Blockburger* rule depends on statutory analysis, not on evidentiary comparisons."). The offense of producing child pornography in violation of 18 U.S.C. § 2251(a) requires proof of the following:

(1) the defendant employed, used, persuaded, induced, enticed, or coerced a minor to engage in any sexually explicit conduct;

(2) the defendant engaged in this act for the purpose of producing a visual depiction of such conduct; and

(3) the defendant knew or had reason to know that the visual depiction would be transported

> or transmitted using any means or facility of interstate or foreign commerce.

Meanwhile, the offense of coercion or enticement of a minor in violation of 18 U.S.C. § 2422(b) requires proof that:

> (1) the defendant knowingly persuaded, induced, enticed, or coerced;
>
> (2) through the mail or any facility or means of interstate or foreign commerce;
>
> (3) any individual who has not attained the age of 18 years;
>
> (4) to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense.

In resolving Ortiz's claim, we join the three circuits to have considered this question and find that the production of child pornography offense and the coercion or enticement of a minor offense each require proof of an element that the other does not. *See United States* v. *Sanchez*, 30 F.4th 1063, 1077 (11th Cir. 2022); *United States* v. *Isabella*, 918 F.3d 816, 848-49 (10th Cir. 2019); *United States* v. *Hart*, 635 F.3d 850, 858 (6th Cir. 2011). The production of child pornography offense requires the government to prove that an individual acted intentionally to produce a visual depiction, a fact not required for the coercion or enticement of a minor offense. *Compare* 18

U.S.C. § 2251(a), *with id.* at § 2422(b). The coercion or enticement of a minor offense requires the government to prove that the defendant knowingly coerced a minor to engage in "any sexual activity for which any person can be charged with a criminal offense," a fact immaterial to proving the elements of the production offense. *Compare* 18 U.S.C. § 2422(b), *with id.* at § 2251(a). *See Hart*, 635 F.3d at 858 (drawing the same distinction). Because these two offenses require proof of a fact that the other does not, they are separate offenses and Ortiz's convictions do not offend the Double Jeopardy Clause. *See, e.g.*, *Rodríguez-Méndez*, 134 F.4th at 6.

Not so fast, says Ortiz. The government proved the "criminal offense" element of the coercion offense only with evidence that he produced child pornography making the two offenses, in effect, the same offense. Not quite. For starters, multiple convictions for the same conduct are permissible so long as the charged offenses require the government to prove different elements (i.e., so long as they pass the same-elements/*Blockburger* test). *See id.* at 6 n.3; *see also United States* v. *Sepulveda*, 102 F.3d 1313, 1316 (1st Cir. 1996) ("[A] defendant can be convicted of two differently defined offenses, based on the same core of facts, so long as each offense requires an element that the other does not."). Under similar circumstances (legally, not factually, speaking) we held a defendant could be prosecuted under the fugitive in possession of a firearm statute despite an earlier conviction for failing to appear before the court. *See United States* v. *Colon-Osorio*, 10 F.3d 41, 46 (1st Cir. 1993). In that instance, after faithfully applying the *Blockburger* test, we determined that the same conduct of "bail jumping" could simultaneously establish both the elements of the failing to appear offense and the "fugitive" element of the fugitive in possession offense, without implicating double jeopardy. *See id.* at 45. Similarly, Ortiz's repeated requests for sexual images of his minor victims (his conduct) can establish the required elements of the production of child pornography offense while also serving as an element in proving the coercion or enticement of a minor. So, Ortiz has failed to show a double jeopardy violation occurred and his convictions for these offenses stand.

F. Sentencing

In the last leg of Ortiz's appeal, he challenges the substantive reasonableness of his 360-month sentence.[24] Because Ortiz argued for a shorter sentence before the

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24. Because Ortiz's sentencing claim relates only to the substantive reasonableness of his 360-month sentence, we see little reason not to address this fully briefed and argued issue despite our decision to remand for the district court to vacate either Ortiz's possession or receipt conviction. *Cf. United States* v. *Mercedes-De La Cruz*, 787 F.3d 61, 70 (1st Cir. 2015) (resolving a claim of sentencing error despite vacating defendant's conviction). To reorient the reader, the district court ordered Ortiz to a term of 360 months' imprisonment for counts one to eleven and counts fourteen to nineteen, with concurrent terms of 240 months' imprisonment for counts twelve and thirteen (the receipt and possession counts). Ortiz does not challenge his 240-month sentences, and we reject his claim of substantive reasonableness so that the district court may choose at its discretion to leave his 360-month sentence in place on remand. *Chiaradio*, 684 F.3d at 284.

district court, he preserved this challenge and, therefore, we review for abuse of discretion. *United States* v. *Melendez-Hiraldo*, 82 F.4th 48, 56 (1st Cir. 2023).

The twin pillars of a substantively reasonable sentence are a plausible rationale from the sentencing court and a defensible outcome. *See, e.g.*, *United States* v. *Colcord*, 90 F.4th 25, 30 (1st Cir. 2024). And for any given defendant there exists "a universe of reasonable sentencing outcomes." *Id.* (quoting *United States* v. *Clogston*, 662 F.3d 588, 592 (1st Cir. 2011)). Our role is not to second-guess a sentencing court's reasoned judgment, but to correct a sentence only if it lies beyond the expansive boundaries of the universe of reasonable sentences. *United States* v. *Matos-de-Jesús*, 856 F.3d 174, 179-80 (1st Cir. 2017). Lastly, we add that Ortiz faces a particularly heavy burden to prove his sentence is unreasonable because he challenges a downwardly variant sentence from the sentence calculated using the United States Sentencing Guidelines ("Guidelines"). *See United States* v. *Concepcion-Guliam*, 62 F.4th 26, 36 (1st Cir. 2023).

To attempt to meet that heavy burden, Ortiz argues that the district court's downward variance represented a "wide-spread rejection of the Guidelines," but the court failed to "acknowledge factors that mitigate this offense and offender."[25] But, contrary to Ortiz's vantage, our review

25. Ortiz also refences various statistics and studies on district courts' rejections of Guidelines sentences for child pornography production. We too have recognized this trend. *See Colcord*, 90 F.4th at 31 & n.2. But the fact that Ortiz's sentence exceeds the out-of-context average he cites, alone, does not make

of the sentencing transcript indicates due consideration of both offense and offender. At Ortiz's sentencing hearing, the court provided a thorough recitation of its reasoning. It first noted the Presentence Investigation Report correctly calculated a Guideline imprisonment term of life.[26] The court then acknowledged Ortiz's mental health and medical conditions, his dependent daughter, his limited criminal history, his family ties, and his employment history. However, the court also weighed "the heinous nature and circumstances of the offense" which involved "nine female minor victims who were coerced into taking pornographic images under circumstances that evidenced great malice and cruelty." Given the court's attention to the relevant factors and the Guidelines, we cannot give credence to Ortiz's assertion that "[t]he record holds no answer" as to why he received a thirty-year sentence.

Likewise, the court's imposed sentence represents a defensible result. In just a few months, Ortiz contacted and coerced eight minor females into sending him sexually explicit photographs. Ortiz began by requesting photos of victims' armpits, sometimes with the promise of payment. After receiving armpit photos, he would post the pictures to his Instagram page often tagging the minor victims. When the minors asked Ortiz to remove the posts, he said only in exchange for more photos, but this time of

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the district court's judgment unreasonable. *See* id. (explaining that there is no requirement for a district court to conform to the categorical policy disagreements of other courts).

26. Ortiz has not appealed the calculation of the Guidelines sentencing range.

their faces, breasts, and genitals. After Ortiz convinced his victims to send sexually explicit images, he once again escalated his demands for more pictures (including pictures of one victim's younger sister) and videos of his victims masturbating (a word he often had to explain to his unaware victims). When Ortiz's victims resisted and pleaded for him to stop, he threatened to post their nude photos on the internet or send them to the victim's classmates, and the latter threat he followed through on by disbursing nude images of KMC to her peers. Ortiz also took the opportunity to send one eleven-year-old victim images of his penis.

Based on the district court's reasoned consideration of the relevant factors, and the facts of Ortiz's offenses, we cannot say that his downwardly-variant sentence stretched beyond the universe of reasonable sentences. *See Concepcion-Guliam*, 62 F.4th at 36.

III.

For the reasons elucidated above, we reject all of Ortiz's claims of error, except for his double jeopardy claim pertaining to counts twelve and thirteen.

Affirmed in part and ***remanded*** for further proceedings consistent with this opinion.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, FILED MAY 6, 2026

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 23-1504

UNITED STATES OF AMERICA,

Appellee,

v.

FRANCISCO XAVIER ORTIZ-COLÓN,

Defendant, Appellant.

JUDGMENT

Entered: May 6, 2026

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's judgment is affirmed in part, and the matter is remanded for further proceedings consistent with the opinion issued this day.

By the Court:

Anastasia Dubrovsky, Clerk

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO, FILED MAY 23, 2023

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

Case Number: 3:20-cr-0262-01 (RAM)
USM Number: 54142-069

UNITED STATES OF AMERICA

v.

FRANCISCO XAVIER ORTIZ-COLON

Melanie Carrillo-Jimenez Defendant's Attorney

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:

☐ pleaded guilty to count(s) ________________________

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

☒ was found guilty on count(s) One (1) to Nineteen (19) of the Superseding Indictment on 11/9/2022.
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18:2251(a) AND (e)	PRODUCTION OF CHILD PORNOGRAPHY	10/31/2019	1s
18:2422(b)(2)	COERCION AND ENTICEMENT OF A MINOR	3/3/2020	2s-3s
18:2251(a) AND (e)	PRODUCTION OF CHILD PORNOGRAPHY	3/3/2020	4s

The defendant is sentenced as provided in pages 3 through __8__ of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

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

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

5/23/2023
Date of Imposition of Judgment

S/ Raul M. Arias-Marxuach
Signature of Judge

Raul M. Arias-Marxuach, U.S. District Judge
Name and Title of Judge

5/23/2023
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18:2422(b)(2)	COERCION AND ENTICEMENT OF A MINOR	5/9/2020	5s
18:2251(a) AND (e)	PRODUCTION OF CHILD PORNOGRAPHY	5/9/2020	6s-7s
18:2422(b)(2)	COERCION AND ENTICEMENT OF A MINOR	3/9/2020	8s
18:2251(a) AND (e)	PRODUCTION OF CHILD PORNOGRAPHY	3/9/2020	9s
18:2422(b)(2)	COERCION AND ENTICEMENT OF A MINOR	1/31/2020	10s

18:2251(a) AND (e)	PRODUCTION OF CHILD PORNOGRAPHY	1/31/2020	11s
18:2252A (a)(2)	RECEIPT OF CHILD PORNOGRAPHY	5/31/2010	12s
18:2252A (a)(5)(B)	POSSESSION OF CHILD PORNOGRAPHY	6/10/2020	13s
18:2422(b) (2)	COERCION AND ENTICEMENT OF A MINOR	4/11/2020	14s
18:2251(a) AND (e)	PRODUCTION OF CHILD PORNOGRAPHY	4/11/2020	15s
18:2422(b) (2)	COERCION AND ENTICEMENT OF A MINOR	4/15/2020	16s
18:2251(a) AND (e)	PRODUCTION OF CHILD PORNOGRAPHY	4/15/2020	17s
18:2422(b) (2)	COERCION AND ENTICEMENT OF A MINOR	3/15/2020	18s
18:2251(a) AND (e)	PRODUCTION OF CHILD PORNOGRAPHY	3/15/2020	19s

IMPRISONMENT

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

Three hundred and sixty (360) months as to Counts One to Eleven and Fourteen to Nineteen and two hundred and forty (240) months as to Counts Twelve and Thirteen to be served concurrently with each other for a total imprisonment term of three hundred and sixty (360) months.

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

1. The defendant be designated to Devens.
2. The defendant be enrolled in the skills program.

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

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

☐ before __________ ☐ a.m. ☐ p.m. on __________

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on __________________ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on ______________________ to __________________ at _____________________ , with a certified copy of this judgment.

____
UNITED STATES MARSHAL

By ___________________________________
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Ten (10) years.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.

2. You must not unlawfully possess a controlled substance.

3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*

4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*

5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*

6. ☒ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex

offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*

7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

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

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report

to the probation officer, and you must report to the probation officer as instructed.

3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4. You must answer truthfully the questions asked by your probation officer.

5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

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

7. You must work full time (at least 30 hours 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 you must try to find full-time employment, unless the probation officer excuses

you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

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

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

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

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

12. If the probation officer determines 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 you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

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

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 ________

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not commit another Federal, state, or local crime, and shall observe the standard conditions of supervised release recommended by the United States Sentencing Commission and adopted by this Court.

2. The defendant shall not unlawfully possess controlled substances.

3. The defendant shall refrain from possessing firearms, destructive devices, and other dangerous weapons.

4. The defendant shall consent to the installation of computer monitoring software and/or systems that will enable the Probation Office, or its designee, to monitor and filter any internet accessing and data storage devices, owned and/or controlled by the defendant. Accordingly, to ensure compliance with the computer monitoring condition, the defendant must allow the probation officer to conduct initial and periodic unannounced searches/ examinations on any computers (as defined in 18 U.S.C. § 1030(e)(1)) and/or electronic devices, owned or controlled by the defendant, and subject to computer monitoring, prior to and after the installation of the monitoring software. These searches shall be conducted to determine whether the computer or device contains any prohibited data prior to installation of the monitoring software, whether the monitoring software is functioning effectively after its installation, and whether there have been attempts to circumvent the monitoring software after its installation. Such examinations may result in retrieval and copying of all data from the device and any internal or external peripherals and may involve removal of such equipment for the purpose of conducting a more thorough inspection. Additionally, the defendant shall immediately notify the Probation Office upon registration for access to any website or internet service that allows for: communication with other users, uploading/downloading of files, posting of any material, etc. Notification shall include the site address, username, passwords, pseudonyms and logons.

This includes, but is not limited to, social networks, cloud storage services, message boards, etc. The defendant must warn any other people who use his computers or electronic devices that they may be subject to searches pursuant to this condition. Failure to consent may be grounds for revocation. The defendant shall pay for the cost of the monitoring service at the prevailing rate.

5. The defendant shall not engage in a specified occupation, business, or profession bearing a reasonable direct relationship to the conduct constituting the offense. Specifically, the defendant shall not work with persons under the age of 18, or hold a job that gives him authority over and/or access to potential victims. The only exception relies in the incidental contact in normal commercial life. Any employment must be notified in advance; the Probation Officer will make an assessment of the job placement and set employment restrictions based on the Sex Offender Management Procedures Manual. The defendant shall consent to third party disclosure to any employer or potential employer.

6. The defendant shall not participate in any volunteer activity or be involved in any children's or youth organization or any group that would bring him into close contact with a person or persons under the age of 18, without prior approval of the U.S. Probation Officer.

7. The defendant shall cooperate in the collection of a DNA sample as directed by the Probation Officer, pursuant to the Revised DNA Collection Requirements, and Title 18, U.S. Code Section 3563(a)(9).

8. The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. Sec. 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state, U.S. Territory or Indian Tribe, sex offender registration agency in which he resides, works, is a student, carry on a vacation, or was convicted of a qualifying offense.

9. The defendant shall be required to submit to an initial polygraph examination and subsequent maintenance testing intervals to be determined by the probation office to assist in treatment planning, case monitoring and with the requirements of his supervision or treatment program. Polygraph tests will be conducted at least once annually; however, they may be conducted on a continuous basis commensurate with risk as determined by the U.S. Probation Office.

10. The defendant shall submit his person, property, house, vehicle, papers, computers (as defined in 18 U.S.C. Section 1030(e)(1)), other electronic communication or data storage devices, and media, to a search conducted by a 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. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition.

11. The defendant shall undergo a sex-offense-specific evaluation and/or participate in a sex offender treatment/

and or mental health treatment program arranged by the United States Probation Officer. The defendant shall abide by all rules, requirements, and conditions of the sex offender treatment program(s) and any testing as approved by the Court. The defendant shall waive his right of confidentiality in any records for mental health assessment and treatment, and sign any necessary release form required to obtain such records to allow the U.S. Probation Officer to review and adjust defendant's course of treatment and progress with the treatment provider. The defendant will be required to contribute to the costs of services rendered, by means of co-payment, based on his ability to pay or availability of third-party payment.

CRIMINAL MONETARY PENALTIES

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

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 1,900.00	$	$	$	$ 5,000.00

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

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

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

Name of Payee	**Total Loss*** **	**Restitution Ordered**	**Priority or Percentage**
TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ ____________________

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

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

☐ the interest requirement is waived for the
☐ fine ☐ restitution.

☐ the interest requirement for the
☐ fine ☐ restitution is modified as follows:

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

SCHEDULE OF PAYMENTS

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

A ☒ Lump sum payment of $ 6,900.00 due immediately, balance due

☐ not later than ____________ , or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below, or

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

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

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

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

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

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

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

☐ Joint and Several

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

Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

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

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

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

APPENDIX D — SUPERSEDING INDICTMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO, DATED APRIL 14, 2021

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

Criminal No. 20-262 (RAM)

Violations:
18 U.S.C. § 2251(a) and (e)
18 U.S.C. § 2252A(a)(2)
18 U.S.C. § 2252A(a)(5)(B)
18 U.S.C. § 2422(b)(2)

(Nineteen Counts and Forfeiture Allegation)

UNITED STATES OF AMERICA

v.

FRANCISCO XAVIER ORTIZ COLON,

Defendant.

SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE
Production of Child Pornography
(Title 18, United States Code, Section 2251(a))

From in or about August, 2019 through in or about October, 2019, in the District of Puerto Rico and within the jurisdiction of this court, the defendant,

FRANCISCO XAVIER ORTIZ COLON,

did knowingly employ, use, persuade, induce, entice and coerce a twelve (12) year-old female with initials KMC, to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct, and the visual depiction was produced and transmitted using materials that have been mailed, shipped, and transported in and affecting interstate and foreign commerce. All in violation of Title 18, United States Code, Section 2251(a) and (e).

COUNT TWO
Coercion and Enticement of a Minor
(Title 18, United States Code, Section 2422(b)(2))

From in or about August, 2019 through in or about October, 2019, in the District of Puerto Rico and within the jurisdiction of this court, the defendant,

FRANCISCO XAVIER ORTIZ COLON,

did use a facility and means of interstate commerce, that is a cellular phone that was not manufactured in Puerto Rico, as well as internet instant messaging services and social media, to knowingly persuade, induce, entice, and coerce a minor, that is, a twelve (12) year-old female with initials KMC, to engage in sexual activity, and to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct, for which the defendant could be charged with a criminal offense under the laws of the United States of America and Puerto Rico. All in violation of Title 18, United States Code, Section 2422(b)(2).

COUNT THREE
Coercion and Enticement of a Minor
(Title 18, United States Code, Section 2422(b)(2))

From on or about February 28, 2020 through on or about March 3, 2020, in the District of Puerto Rico and within the jurisdiction of this court, the defendant,

FRANCISCO XAVIER ORTIZ COLON,

did use a facility and means of interstate commerce, that is a cellular phone that was not manufactured in Puerto Rico, as well as internet instant messaging services and social media, to knowingly persuade, induce, entice, and coerce a minor, that is, an eleven (11) year-old female with initials APR, to engage in sexual activity, and to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct, for which the defendant could be charged with a criminal offense under the laws of the United States of America and Puerto Rico. All in violation of Title 18, United States Code, Section 2422(b)(2).

COUNT FOUR
Production of Child Pornography
(Title 18, United States Code, Section 2251(a))

From on or about February 28, 2020 through on or about March 3, 2020, in the District of Puerto Rico and within the jurisdiction of this court, the defendant,

FRANCISCO XAVIER ORTIZ COLON,

did knowingly employ, use, persuade, induce, entice and coerce an eleven (11) year-old female with initials APR to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, using materials that were mailed, shipped and transported in and affecting interstate and foreign commerce by any means including by computer. All in violation of Title 18, United States Code, Section 2251(a) and (e).

COUNT FIVE
Coercion and Enticement of a Minor
(Title 18, United States Code, Section 2422(b)(2))

From on or about April 16, 2020 through on or about May 9, 2020, in the District of Puerto Rico and within the jurisdiction of this court, the defendant,

FRANCISCO XAVIER ORTIZ COLON,

did use a facility and means of interstate commerce, that is a cellular phone that was not manufactured in Puerto Rico, as well as internet instant messaging services and social media, to knowingly persuade, induce, entice, and coerce a minor, that is, a fourteen (14) year-old female with initials DAR, to engage in sexual activity, and to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct, for which the defendant could be charged with a criminal offense under the laws of the United States of America and Puerto Rico. All in violation of Title 18, United States Code, Section 2422(b)(2).

COUNT SIX
Production of Child Pornography
(Title 18, United States Code, Section 2251(a))

From on or about April 16, 2020 through on or about May 9, 2020, in the District of Puerto Rico and within the jurisdiction of this court, the defendant,

FRANCISCO XAVIER ORTIZ COLON,

did knowingly employ, use, persuade, induce, entice and coerce a fourteen (14) year-old female with initials DAR, to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, using materials that were mailed, shipped and transported in and affecting interstate and foreign commerce by any means including by computer. All in violation of Title 18, United States Code, Section 2251(a) and (e).

COUNT SEVEN
Production of Child Pornography
(Title 18, United States Code, Section 2251(a))

From on or about April 16, 2020 through on or about May 9, 2020, in the District of Puerto Rico and within the jurisdiction of this court, the defendant,

FRANCISCO XAVIER ORTIZ COLON,

did knowingly employ, use, persuade, induce, entice and coerce a nine (9) year-old female with initials AMR, to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, using materials that were mailed, shipped and transported in and affecting interstate and foreign commerce by any means including by computer. All in violation of Title 18, United States Code, Section 2251(a) and (e).

COUNT EIGHT
Coercion and Enticement of a Minor
(Title 18, United States Code, Section 2422(b)(2))

From on or about March 4, 2020 through on or about March 9, 2020, in the District of Puerto Rico and within the jurisdiction of this court, the defendant,

FRANCISCO XAVIER ORTIZ COLON,

did use a facility and means of interstate commerce, that is a cellular phone that was not manufactured in Puerto Rico, as well as internet instant messaging services and social media, to knowingly persuade, induce, entice, and coerce a minor, that is, a fourteen (14) year-old female with initials ACM, to engage in sexual activity, and to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct, for which the defendant could be charged with a criminal offense under the laws of the United States of America and Puerto Rico. All in violation of Title 18, United States Code, Section 2422(b)(2).

COUNT NINE
Production of Child Pornography
(Title 18, United States Code, Section 2251(a))

From on or about March 4, 2020 through on or about March 9, 2020, in the District of Puerto Rico and within the jurisdiction of this court, the defendant,

FRANCISCO XAVIER ORTIZ COLON,

did knowingly employ, use, persuade, induce, entice and coerce a fourteen (14) year-old female with initials ACM, to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, using materials that were mailed, shipped and transported in and affecting interstate and foreign commerce by any means including by computer. All in violation of Title 18, United States Code, Section 2251(a) and (e).

COUNT TEN
Coercion and Enticement of a Minor
(Title 18, United States Code, Section 2422(b)(2))

On or about January, 2020, in the District of Puerto Rico and within the jurisdiction of this court, the defendant,

FRANCISCO XAVIER ORTIZ COLON,

did use a facility and means of interstate commerce, that is a cellular phone that was not manufactured in Puerto Rico, as well as internet instant messaging services and social media, to knowingly persuade, induce, entice, and coerce a minor, that is, a twelve (12) year-old female with initials KDR, to engage in sexual activity, and to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct, for which the defendant could be charged with a criminal offense under the laws of the United States of America and Puerto Rico. All in violation of Title 18, United States Code, Section 2422(b)(2).

COUNT ELEVEN
Production of Child Pornography
(Title 18, United States Code, Section 2251(a))

In or about January, 2020, in the District of Puerto Rico and within the jurisdiction of this court, the defendant,

FRANCISCO XAVIER ORTIZ COLON,

did knowingly employ, use, persuade, induce, entice and coerce a twelve (12) year-old female with initials KDR, to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, using materials that were mailed, shipped and transported in and affecting interstate and foreign commerce by any means including by computer. All in violation of Title 18, United States Code, Section 2251(a) and (e).

COUNT TWELVE
Receipt of Child Pornography
(Title 18, United States Code, Section 2252A(a)(2))

From in or about August, 2019 through in or about May, 2020, in the District of Puerto Rico and within the jurisdiction of this court, the defendant,

FRANCISCO XAVIER ORTIZ COLON,

did knowingly receive child pornography, as defined in Title 18, United States Code, Section 2256(8), using any means and facility of interstate and foreign commerce and that has been mailed, shipped and transported in or affecting interstate and foreign commerce, by any means, including by computer, that is: the defendant received images depicting actual minor females engaged in sexually explicit conduct via internet instant messaging services and social media messages using his cellular phones, which were manufactured outside of Puerto Rico. All in violation of Title 18, United States Code, Section 2252A(a)(2).

COUNT THIRTEEN
Possession of Child Pornography
(Title 18, United States Code, Section 2252A(a)(5)(B))

From in or about August, 2019 through on or about June 10, 2020, in the District of Puerto Rico and within the jurisdiction of this court, the defendant,

FRANCISCO XAVIER ORTIZ COLON,

knowingly possessed at least one matter containing one or more images of child pornography, as defined in Title 18, United States Code, Section 2256(8), including images of a prepubescent minor or a minor who has not attained twelve (12) years of age, such child pornography having been shipped and transported using a means and facility of interstate and foreign commerce, and in or affecting interstate and foreign commerce, and having been produced using materials which had been mailed and so shipped and transported, by any means, including by computer, that is: the defendant possessed still images depicting minors engaged in sexually explicit conduct on his cellular phones. All in violation of Title 18, United States Code, Section 2252A(a)(5)(B).

COUNT FOURTEEN
Coercion and Enticement of a Minor
(Title 18, United States Code, Section 2422(b)(2))

From on or about March 10, 2020 through on or about April 11, 2020, in the District of Puerto Rico and within the jurisdiction of this court, the defendant,

FRANCISCO XAVIER ORTIZ COLON,

did use a facility and means of interstate commerce, that is a cellular phone that was not manufactured in Puerto Rico, as well as internet instant messaging services and social media, to knowingly persuade, induce, entice, and coerce a minor, that is, an eleven (11) year-old female with initials CAR, to engage in sexual activity, and to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct, for which the defendant could be charged with a criminal offense under the laws of the United States of America and Puerto Rico. All in violation of Title 18, United States Code, Section 2422(b)(2).

COUNT FIFTEEN
Production of Child Pornography
(Title 18, United States Code, Section 2251(a))

From on or about March 10, 2020 through on or about April 11, 2020, in the District of Puerto Rico and within the jurisdiction of this court, the defendant,

FRANCISCO XAVIER ORTIZ COLON,

did knowingly employ, use, persuade, induce, entice and coerce an eleven (11) year-old female with initials CAR, to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, using materials that were mailed, shipped and transported in and affecting interstate and foreign commerce by any means including by computer. All in violation of Title 18, United States Code, Section 2251(a) and (e).

COUNT SIXTEEN
Coercion and Enticement of a Minor
(Title 18, United States Code, Section 2422(b)(2))

From on or about February 27, 2020 through on or about April 15, 2020, in the District of Puerto Rico and within the jurisdiction of this court, the defendant,

FRANCISCO XAVIER ORTIZ COLON,

did use a facility and means of interstate commerce, that is a cellular phone that was not manufactured in Puerto Rico, as well as internet instant messaging services and social media, to knowingly persuade, induce, entice, and coerce a minor, that is, an thirteen (13) year-old female with initials VOM, to engage in sexual activity, and to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct, for which the defendant could be charged with a criminal offense under the laws of the United States of America and Puerto Rico. All in violation of Title 18, United States Code, Section 2422(b)(2).

COUNT SEVENTEEN
Production of Child Pornography
(Title 18, United States Code, Section 2251(a))

From on or about February 27, 2020 through on or about April 15, 20200, in the District of Puerto Rico and within the jurisdiction of this court, the defendant,

FRANCISCO XAVIER ORTIZ COLON,

did knowingly employ, use, persuade, induce, entice and coerce an thirteen (13) year-old female with initials VOM, to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, using materials that were mailed, shipped and transported in and affecting interstate and foreign commerce by any means including by computer. All in violation of Title 18, United States Code, Section 2251(a) and (e).

COUNT EIGHTEEN
Coercion and Enticement of a Minor
(Title 18, United States Code, Section 2422(b)(2))

From on or about March 3, 2020 through on or about March 15, 2020, in the District of Puerto Rico and within the jurisdiction of this court, the defendant,

FRANCISCO XAVIER ORTIZ COLON,

did use a facility and means of interstate commerce, that is a cellular phone that was not manufactured in Puerto Rico, as well as internet instant messaging services and social media, to knowingly persuade, induce, entice, and coerce a minor, that is, a fifteen (15) year-old female with initials ASR, to engage in sexual activity, and to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct, for which the defendant could be charged with a criminal offense under the laws of the United States of America and Puerto Rico. All in violation of Title 18, United States Code, Section 2422(b)(2).

COUNT NINETEEN
Production of Child Pornography
(Title 18, United States Code, Section 2251(a))

From on or about March 3, 2020 through on or about March 15, 2020, in the District of Puerto Rico and within the jurisdiction of this court, the defendant,

FRANCISCO XAVIER ORTIZ COLON,

did knowingly employ, use, persuade, induce, entice and coerce fifteen (15) year-old female with initials ASR, to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, using materials that were mailed, shipped and transported in and affecting interstate and foreign commerce by any means including by computer. All in violation of Title 18, United States Code, Section 2251(a) and (e).

FORFEITURE ALLEGATION

The allegations of this Indictment are re-alleged as if Cully set forth herein, for the purpose of alleging forfeiture, pursuant to Title 18, United States Code, Section 2253.

If convicted of the offenses set forth above, **FRANCISCO XAVIER ORTIZ COLON,** the defendant herein, shall forfeit to the United States any and all materials or property used or intended to be used in the production, possession, receipt, distribution, or transportation of child pornography. Such property includes, but is not limited to the following items found in his possession on June 10, 2020: a Samsung cellphone, Model: SM-5260 DL, IMEI: 353689105696549, S/N: RF8M61QBADB and LG cellphone, Model: LML413DL, S/N: 804VTFW0145523. All pursuant to Title 18, United States Code, Section 2253.

Appendix D

W. STEPHEN MULDROW
United States Attorney

TRUE BILL,

Foreperson
Date: April 14, 2021

/s/ Timothy R. Henwood
Timothy R. Henwood
Chief, Criminal Division

/s/ Jenifer Y. Hernández-Vega
Jenifer Y. Hernández-Vega
Assistant U.S. Attorney

APPENDIX E — JURY INSTRUCTIONS 17 AND 18 OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO, DATED NOVEMBER 8, 2022

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

CASE NO.: 20-CR-262-RAM

UNITED STATES OF AMERICA,

Plaintiff,

v.

FRANCISCO JAVIER ORTIZ-COLON,

Defendant.

HATO REY, PUERTO RICO
NOVEMBER 8, 2022
TUESDAY – 9:30 A.M.

JURY TRIAL PROCEEDINGS – DAY 6
BEFORE THE HONORABLE CHIEF JUDGE
RAUL ARIAS-MARXUACH
UNITED STATES DISTRICT COURT OF
PUERTO RICO (Pages 1 – 93)

* * *

Jury Instruction Number 17, Elements of Production of Child Pornography, Title 18, United States Code, Section 2251(a).

In Counts 1, 4, 6, 7, 9, 11, 15, 17 and 19 of the superseding indictment, the Defendant is charged with production of child pornography. The Defendant is accused of knowingly employing, using, persuading, inducing, enticing or coercing a minor to engage in sexually explicit conduct for the purpose of producing or transmitting any visual depiction of such conduct and actually producing or transmitting such visual depiction using a means or facility of interstate or foreign commerce or in and affecting interstate or foreign commerce

In order to find the Defendant guilty of this offense, you must find that the Government proved each of the following three elements beyond a reasonable doubt:

First: That on or about the date charged, Mr. Ortiz-Colon knowingly employed, used, persuaded, induced, enticed or coerced a minor to engage in sexually explicit conduct.

Second: That Mr. Ortiz-Colon did so for the purpose of producing or transporting a visual depiction of such conduct and,

Third: That the visual depiction was actually produced or transmitted using a means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce.

"Knowingly" means that the act was done voluntarily or intentionally and not because of mistake or accident.

Appendix E

Sexually explicit conduct includes but is not limited the lascivious exhibition of the genitals or pubic area of any person. Whether an image of the genitals or pubic area constitutes a lascivious exhibition requires consideration of the overall content of the material.

In considering the overall content of the image you may or not required to consider the following factors:

Whether the genitals or pubic area are the focal point of the image,

Whether the setting of the image is sexually suggestive, for example, a location generally associated with sexual activity,

Whether the child is depicted in an unnatural pose or inappropriate attire considering the age of the child,

Whether the child is fully or partially clothed or nude,

Whether the image suggests sexual coyness or a willingness to engage in sexual activity,

Whether the image appears intended or designed to elicit a sexual response from the viewer and images may not involve all of these factors to constitute a lascivious exhibition. It is for you to decide the weight or lack of weight to be given to any of the factors I just listed. This list of factors is not comprehensive and you may consider other factors specific to this case that you may find relevant.

A visual depiction includes data which is capable of conversion into a visual image that has been transmitted by any means whether or not stored in a permanent format.

Interstate commerce includes commerce between one state, territory, possession or the District of Colombia and or another state, territory, possession and the District of Colombia.

Foreign commerce includes commerce with a foreign country.

A visual depiction that has been transmitted using a means and facility of interstate and foreign commerce and in and affecting interstate and foreign commerce if it has been transmitted over the Internet or over telephone lines.

A visual depiction has equally been transmitted using a means and facility of interstate and foreign commerce and in and affecting interstate and foreign commerce if it passes between one state, territory, possession or the District of Colombia and another state, territory, possession and the District of Colombia.

Jury Instruction Number 18, Elements of the Coercion and Enticement of a Minor, Title 18, United States Code, Section 2422(b).

In Counts 2, 3, 5, 8, 10, 14, 16 and 18 of the superseding indictment, the Defendant is charged with coercion and enticement of a minor.

The Defendant is accused of using a facility or means of interstate or foreign commerce to persuade, induce, entice and coerce someone under age 18 to engage in sexual activity for which a person can be charged with a criminal offense. It is against federal law to engage in such conduct.

In order to find Defendant guilty of this offense, you must find that the Government proved each of the following four elements beyond a reasonable doubt:

First, that on or about the date charged, Mr. Ortiz-Colon knowingly persuaded, induced enticed and coerced a person in question to engage in criminal activity.

Second, that he did so by using a facility or means of interstate or foreign commerce.

Third, that the person at the time was less than 18 years old.

fourth, that the sexual activity was a criminal offense.

Sexual activity includes the production of sexually explicit images of minors. The production of sexually explicit images of minors is a criminal offense.

"Knowingly" means that the act was done voluntarily and intentionally and not because of mistake or accident.

Interstate commerce includes commerce between one state, territory, possession or the District Colombia and another state, territory, possession and the District of Colombia.

The telephone and Internet are considered facilities or means of interstate commerce. Foreign commerce includes commerce with a foreign country.

* * * *

APPENDIX F — STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2251—Sexual exploitation of children

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

* * *

18 U.S.C. § 2256—Definitions for chapter

(8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer

or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

* * *

18 U.S.C. § 2421—Transportation generally

(a) In General.—

Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or 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 or imprisoned not more than 10 years, or both.

(b) Requests To Prosecute Violations by State Attorneys General.—

(1) In general.—

The Attorney General shall grant a request by a State attorney general that a State or local attorney be cross designated to prosecute a violation of this section unless the Attorney General determines that granting the request would undermine the administration of justice.

(2) Reason for denial.—

If the Attorney General denies a request under paragraph (1), the Attorney General shall submit to the State attorney general a detailed reason for the denial not later than 60 days after the date on which a request is received.

* * *

18 U.S.C. § 2422 Coercion and Enticement

(a) Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or 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 or imprisoned not more than 20 years, or both.

(b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or 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 or for life.

* * *

18 U.S.C. § 2423—Transportation of minors

(a) Transportation With Intent To Engage in Criminal Sexual Activity.—

A person who knowingly transports 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, shall be fined under this title and imprisoned not less than 10 years or for life.

(b) Travel With Intent To Engage in Illicit Sexual Conduct.—

A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United

States who travels in foreign commerce, with intent to engage in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

* * *

(g) Definition.—As used in this section, the term "illicit sexual conduct" means—

(1) a sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States;

(2) any commercial sex act (as defined in section 1591) with a person under 18 years of age; or

(3) production of child pornography (as defined in section 2256(8)).

* * *

18 U.S.C. § 2425—Use of interstate facilities to transmit information about a minor

Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, knowingly initiates the transmission of the name, address, telephone number, social security number, or electronic mail address of another individual, knowing that such other individual has not attained the age of 16 years, with the intent to entice, encourage, offer, or solicit any person 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, imprisoned not more than 5 years, or both.

* * *

18 U.S.C. § 2427—Inclusion of offenses relating to child pornography in definition of sexual activity for which any person can be charged with a criminal offense

In this chapter, the term "sexual activity for which any person can be charged with a criminal offense" does not require interpersonal physical contact, and includes the production of child pornography, as defined in section 2256(8).

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