Nos. 08-6465 & 08-6503

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee/Cross-Appellant,

v.

TIMOTHY RYAN RICHARDS,

Defendant-Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

PRINCIPAL BRIEF FOR THE UNITED STATES

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STATEMENT REGARDING ORAL ARGUMENT

The government respectfully suggests that oral argument will aid the Court's resolution of this case, and therefore joins in defendant's request (Br. viii) for oral argument.

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TIMOTHY RYAN RICHARDS,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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PRINCIPAL BRIEF FOR THE UNITED STATES

STATEMENT OF JURISDICTION

Defendant Richards appeals from the amended judgment of conviction entered by the district court (Trauger, J.) on December 1, 2008. R. 392. The district court had jurisdiction under 18 U.S.C. § 3231. Defendant timely filed a notice of appeal. R. 395 (notice filed 12/5/08). This Court has jurisdiction under 28 U.S.C. § 1291.

The government cross-appeals the sentence. R. 397 (notice of appeal timely filed 12/10/08). This Court has jurisdiction over that appeal under 18 U.S.C. § 3742.

STATEMENT OF THE ISSUES

I. Whether the denial of defendant's suppression motion was reversible error.

II. Whether defendant waived his claim that the government "over" identified its case-in-chief evidence; if not, whether the district court committed reversible error.

III. Whether the district court abused its discretion by admitting age-labeled discs of child pornography.

IV. Whether the district court abused its discretion by precluding the defense from cross-examining a witness about past conduct.

V. Whether two counts charging transportation of child pornography through different websites were multiplicitous.

VI. Whether defendant's sentence was substantively unreasonable.

STATEMENT OF THE CASE

On September 27, 2006, a federal grand jury returned a third superseding indictment charging defendant with various child pornography offenses: four

counts of transportation (via the Internet), in violation of 18 U.S.C. § 2252A(a)(1) (Counts 1, 9, 16, 21); seven counts of advertising, in violation of 18 U.S.C. § 2251(d)(1)(A) (Counts 2-3, 10, 13-15, 19); four counts of production, in violation of 18 U.S.C. § 2251(a) (Counts 4, 6, 23, 25); four counts of possession, in violation of 18 U.S.C. § 2252A(a)(5)(B) (Counts 5, 7, 24, 26); two counts of conspiring to advertise, in violation of 18 U.S.C. § 2251(e) (Counts 12, 18); one count of conspiring to transport, in violation of 18 U.S.C. § 2252A(b)(1) (Count 20); four counts of record-keeping violations under 18 U.S.C. § 2257(f)(4) (Counts 8, 11, 17, 22); and one count of transferring obscene material to a minor, in violation of 18 U.S.C. § 1470 (Count 27). R. 157.

As relevant here, before trial, the district court denied defendant's (1) motion to suppress evidence seized from computer servers, R. 101; (2) motion to compel compliance with the court's order requiring the government to identify images to be used in its case-in-chief, R. 114; and (3) motion to dismiss counts as multiplicitous, R. 160.

Trial commenced on October 10, 2006. Six charges were not submitted to the jury: the court dismissed Counts 10, 13, 14, 17, and 27 on the government's motion and granted judgment of acquittal on Count 8. *See* R. 165, 176, 189, 196, 230. On October 26th, the jury convicted defendant on eleven counts: three

transportation counts (1, 16, 21), three advertising counts (2-3, 19), two record-keeping counts (11, 22), one conspiracy-to-transport count (20), one production count (23), and one possession count (24). The jury acquitted defendant on Counts 4-7, 9, 12, 15, 18, 25-26. R. 203.

On November 7, 2008, the district court sentenced defendant to sixteen years of imprisonment, to be followed by eight years of supervised release. R. 392, Amended Judgment, pp.1-3.

STATEMENT OF FACTS

Defendant operated gay pornographic websites for profit, including CaseyandKylesCondo.com, PenisClub.com, CaseysCondo.com, and JustinsFriends.net. TTR-VI at 1082.[1] The jury found that defendant conspired to distribute child pornography on one site, distributed child pornography on three sites, advertised for two sites containing child pornography, failed to display a Section 2257-compliant notice on two sites, and produced and possessed the video "Casey@16," in which he engaged in sexually-explicit conduct with Patrick Lombardi, a minor more than four years his junior.

[1] References to "TTR-" followed by volume number are to the trial transcripts, which correspond to record entries: 209 (TTR-V), 210 (TTR-I), 211 (TTR-II), 212 (TTR-III), 213 (TTR-IV), 214 (TTR-VI), 215 (TTR-VII), 216 (TTR-VIII), 217 (TTR-IX), 218 (TTR-X), 219 (TTR-XI), and 220 (TTR-XII).

A. Defendant Enters Into A Sexual Relationship With Then-14-Year-Old Patrick Lombardi.

Defendant met Lombardi on the Internet in May 2000. TTR-III at 281. Lombardi was 14 years old and living with his family in Barnstable, Massachusetts. *Id.* at 279-80. Defendant was about to turn 19. TTR-VI at 970 (defendant's date of birth).[2] It was a difficult time in Lombardi's life because his grandparents were sick and he did not have many friends; he sought people to talk to on the Internet. TTR-III at 280.

Two days after meeting Lombardi online, defendant and his friend Missy picked up Lombardi on a school-day morning and spent the day with him in Boston, also visiting defendant's apartment in Somerville. TTR-III at 281-83, 286. Lombardi testified that he had been feeling lonely and that "[i]t was nice to be acknowledged by another person" who was interested in what he "like[d] to do." *Id.* at 283-84.

Later that night, Lombardi decided to run away from home; defendant again picked him up. TTR-III at 285-86. A few days later, defendant and Lombardi drove to defendant's parents' house in Maryland. *Id.* at 285-88. Defendant initiated sexual contact with Lombardi in defendant's bedroom. *Id.* at 288-89. It

[2] Defendant erroneously states (Br. 16) that he had "just turned 18" when he met Lombardi.

was Lombardi's first sexual experience, and defendant knew that Lombardi was only 14. *Id.* The Somerville police picked up Lombardi six days after he ran away, and Lombardi was returned home. *Id.* at 290-91. Lombardi had "never had someone pay that much attention to [him]." *Id.* at 291.

Defendant and Lombardi had a sexual relationship for the next three-and-a-half years. TTR-III at 291-92, 322. Defendant visited Lombardi in Barnstable, but after Lombardi turned 15, Lombardi spent weekends at defendant's house in Everett, Massachusetts. *Id.* at 291-92. Defendant and Lombardi engaged in sexual conduct every time they saw each other. *Id.* at 292. When Lombardi was 16, defendant sold his house and came to live with Lombardi and his family for a few months. *Id.* at 292-93. The two then lived with defendant's parents in Maryland. *Id.* at 293-95. The move upset Lombardi's parents, who "thought [Lombardi] was too young" and did not want him to leave; at defendant's direction, Lombardi ignored his parents' wishes. *Id.* at 294-95. In July 2003, defendant and Lombardi spent Lombardi's 18th birthday in Los Angeles. *Id.* at 355-56. They then moved to Florida, into a house defendant had ordered built. *Id.* at 295, 388. Defendant and Lombardi broke up in December 2003, less than six months after Lombardi's 18th birthday. *Id.* at 322-23.

B. Defendant Makes Child Pornography Of Lombardi.

Throughout their relationship, defendant recorded pornographic images and videos of Lombardi. At first, defendant photographed Lombardi in sexually-suggestive poses. TTR-III at 303-04. For example, he took photos of Lombardi at age 14 in Barnstable showing Lombardi with his rear end partially exposed and his underwear pulled down to just above his genitals. Gov't Trial Ex. ("GX") 12; TTR-III at 307-08; *see also* GX 11 (Everett photos); TTR-III at 309 (testimony about Everett photos). After Lombardi turned 15, defendant made videos of him and Lombardi having sex and of Lombardi masturbating. TTR-III at 304-05. Defendant made those videos once or twice a month, and made "probably more than 15 to 20" before Lombardi turned 18. *Id.* at 306, 385. One set of sexually-explicit movies, "Casey@16" (GX 31), was recorded at defendant's Everett home when Lombardi was 15. TTR-III at 328-29. "Casey" was defendant's alias. *Id.* at 296.

Defendant also made pornography of Lombardi when the two were on vacation overseas. At age 17, Lombardi traveled with defendant to Australia and Iceland. TTR-III at 317-18; TTR-IV at 479-82, 487-88. In Australia, defendant recorded himself receiving oral sex from Lombardi; the content was later published on the Internet in "jpeg" files called "Sydney/Xphotos" (GX 7). TTR-II

201-03; TTR-III at 310. In Iceland, defendant recorded them having anal sex in their hotel room, GX 14 ("Fucking.wmv"); TTR-III at 310, 366-67, and photographed Lombardi naked in the shower, GX 119.

Lombardi testified that sexually-explicit videos were made of him at age 18, TTR-III at 370, but that more videos were made of him as a minor, *id.* at 385.

C. Defendant Distributes Child Pornography Of Lombardi Through CaseyandKylesCondo.com.

Before Lombardi turned 18, defendant operated a sexually-explicit website called CaseysApartment.com. TTR-III at 296. Defendant charged a fee to access the site's content, which consisted mostly of pictures and videos of him masturbating. *Id.* at 296-99. Lombardi (online alias "Kyle") started his own website, Kylesroom.com, when he was 15; the site contained suggestive photos of Lombardi but no sexually-explicit content. *Id.* at 299-300; TTR-II at 196. Defendant handled the billing and web server hosting for Kylesroom.com. TTR-III at 301-02. A server is a computer with a large storage capacity, from which websites can be operated. TTR-II at 76. Kylesroom.com was part of "Webcamfam" – an association of reality-based websites operated by defendant for a percentage of the fees earned by each site. TTR-VI at 982-86.[3]

[3] Lombardi had previously operated a website that showed images and live videos of himself, including of him masturbating. TTR-III at 335-38. Contrary to

Defendant prohibited Lombardi from appearing on CaseysApartment.com or appearing nude on Kylesroom.com. TTR-III at 298, 348, 384. Shortly before Lombardi's 18th birthday (in 2003), defendant and Lombardi started planning a new website, CaseyandKylesCondo.com. The website was defendant's idea; defendant registered the internet domain for CaseyandKylesCondo.com in his name, and controlled the content of, advertising for, and profits from the site. TTR-III at 302-03, 332-33, 386-87; TTR-IV at 659. The site contained gay pornography, with links to photos, videos, web cameras, games, and daily journals. TTR-II at 209-11; *see* GX 16 (website page); GX 25 (preview video). Customers could purchase a "standard" or "premium" membership that provided access to the sexually-explicit content. TTR-II at 160-62; TTR-IV at 566.

Defendant waited until Lombardi turned 18 to launch CaseyandKyles Condo.com because he knew the depictions of an underage Lombardi were illegal. TTR-III at 302-03; *compare* TTR-VI at 994 (defendant testifying site went online in October 2003) *with* TTR-III at 330 (Lombardi recalling site went online "a little bit sooner after [he] turned 18"). Once CaseyandKylesCondo.com was

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defendant's contention (Br. 21), Lombardi was not "[i]nspired" to do so by his father's example. TTR-III at 336. Lombardi testified that he "[u]nfortunately" discovered sexually-explicit films made by his father, *id.* at 337, and that he filmed himself because he was lonely and wanted attention, *id.* at 382.

operational, defendant uploaded the child pornography of Lombardi. *Id.* at 306, 323. Defendant told Lombardi, falsely, that it was legal to put the underage videos on their site once Lombardi was 18, but said that "if anyone asked any questions, [to] just say [Lombardi] made it after he turned 18." *Id.* at 306, 324; *see* TTR-II at 254 (agent testifying that operators of websites containing child pornography can more easily lie about age of teenagers than pre-teenagers). Although defendant did not advertise Lombardi as being underage, TTR-III at 386, and the site mostly contained adult pornography, TTR-V at 758-59, defendant uploaded the child pornography of Lombardi because Lombardi "looked really young then" and therefore "would attract customers," TTR-III at 324. Lombardi went along because he "wanted to make [defendant] happy." *Id.* at 333.

CaseyandKylesCondo.com was hosted on a server in Los Angeles operated by BlackSun Technologies (the "BlackSun server"). TTR-II at 166. James Fottrell, a computer forensics expert, examined the contents of the server, which had been imaged pursuant to a search warrant. *See infra*. By examining the directory and folder structure of files and web access logs, Fottrell determined which photos and videos had been published on CaseyandKylesCondo.com. TTR-IV at 501-05, 603-04. Those files depicting Lombardi as a minor included the "Sydney/Xphotos" (GX 7), the photos taken of Lombardi in Massachusetts (GX

11, 12), and the Iceland video "Fucking.wmv" (GX 14). GX 57 (summary exhibit); TTR-IV at 603; *see also* TTR-V at 824-29 (computer forensics expert Kristi Witsman testifying that hash value analysis of files showed that many files on defendant's home computer matched images/videos on BlackSun server). Defendant's transportation conviction on Count 1 was based on child pornography distributed through CaseyandKylesCondo.com. R. 157, p. 4.[4]

The server directory for CaseyandKylesCondo.com contained the video "Welcome.wmv" (GX 25), a copy of which was found on a computer seized from defendant's home. TTR-II at 190; TTR-IV at 601-02; TTR-V at 840. The video, which at one point showed a young male masturbating, previewed and encouraged people to join CaseyandKylesCondo.com. TTR-II at 224-25. Defendant's advertising conviction on Count 2 was based on that video. R. 157, p. 5.

Defendant controlled CaseyandKylesCondo.com after he and Lombardi broke up. TTR-III at 323. Lombardi signed a release allowing defendant to keep the depictions of him, but soon regretted that decision; defendant refused to return them and never paid Lombardi the money promised him for the release. *Id.* at

[4] Defendant contends (Br. 32) that Fottrell's "many forensics tools" did not reveal that any Lombardi material was produced before Lombardi's 18th birthday. But Fottrell testified that he did not expect to find data relevant to dating the age of individuals appearing in the pornography in the materials he analyzed. TTR-V at 770-71, 778-79.

325-26.[5]

D. Defendant Advertises CaseyandKylesCondo.com On PenisClub.com.

Defendant also operated PenisClub.com – another commercial, gay pornographic website. GX 17 (webpage); TTR-II at 160-62, 211-15 (testimony about site); TTR-IV at 659 (stipulation that domain name registered to defendant); TTR-V at 852-53 (testimony that apparent PenisClub homepage found on defendant's computer).

One video on PenisClub.com, Tory_DVD.wmv (GX 13), depicted a young male called "Tory" getting body-painted, masturbating, and receiving oral sex from a female. TTR-II at 220-21; TTR-IV at 608-09; *see also* TTR-V at 853-54 (information about Tory_DVD.wmv found on defendant's computer). Tory was still 17 when the video was made. GX 29 (birth certificate); TTR-VI at 1039-40 (defendant testifying that video made in Las Vegas during pornography convention); TTR-II at 96-97 (testimony that pornography convention occurred in January 2002). Tory_DVD.wmv indicated it could be viewed on

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[5] Defendant contends that Lombardi threatened harm to him in a journal entry (Br. 24). In fact, Lombardi testified that, although he had been angry at defendant, he later forgave him. TTR-III at 375. The journal referenced by defendant is *not* evidence; defense counsel did not introduce it because it would have opened the door to unfavorable testimony about defendant's relationship with a 12-to-13-year-old boy. *Id.* at 375-79.

CaseyandKylesCondo.com. Defendant's Count 3 conviction for advertising was based on that video. R. 157, p.6.[6]

Section 2257 of Title 18 requires operators of pornographic websites to display a notice disclosing the custodian and physical location of records that document the age of performers on the site. TTR-IV at 664. The notice on PenisClub.com stated: "All Models are 18 or Older. US 2257 Proof On File." GX 65; TTR-IV at 674-75. Defendant's Count 11 conviction was based on that notice. R. 157, p. 14.

E. Defendant Distributes Child Pornography On CaseysCondo.com.

In January 2005, defendant registered the CaseysCondo.com domain name. TTR-IV at 660. That site eventually replaced CaseyandKylesCondo.com. TTR-V at 783.

CaseysCondo.com was another commercial, gay pornographic website offering members access under "standard" and "premium" plans. GX 40, 41; TTR-II at 160-62; TTR-IV at 545-50. Defendant testified that CaseysCondo.com and CaseyandKylesCondo.com were the "exact same website." TTR-VI at 1010-11. But defendant re-did pages on CaseyandKylesCondo.com. *Id.* The two

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[6] The jury acquitted defendant of transporting child pornography via PenisClub.com (Count 9) and of producing and possessing "Painting Tory" (Counts 25, 26), which contained some of the same scenes as Tory_DVD.

websites had different HTML pages, causing the web browser to display them differently. TTR-IV at 543; TTR-V at 783-84. Defendant required members to watch a 17-minute video of himself reviewing the features of CaseysCondo before canceling their memberships. GX 49; TTR-IV at 556-62.

Defendant's transportation conviction on Count 16 was based on child pornography distributed through CaseysCondo.com, R. 157, p. 21, which included the Sydney/Xphotos. TTR-IV at 563; GX 50 (summary exhibit).[7]

F. Defendant Distributes Child Pornography Through The JustinsFriends Site.

JustinsFriends.com was a gay pornographic site featuring Justin Berry and other male models, and was run by Berry and Greg Mitchel. TTR-VI at 1051-53, 1059; GX 21 (webpage). In mid-June 2005, Berry sought out defendant's assistance as the site was about to go online. TTR-VI at 1051, 1055. Defendant and Berry had previously cross-promoted, and exchanged content from, their websites. *Id.* at 1052. Defendant agreed to assist with JustinsFriends.com for a percentage of its profits. *Id.* at 1055.

[7] Web access logs showed that the Sydney/Xphotos and other files on defendant's websites were disseminated widely. TTR-IV at 703-05.

Defendant soon became deeply involved in JustinsFriends.com. *See, e.g.*, GX 78 (recording of defendant admitting he advertised for JustinsFriends as of June 19th); TTR-V at 858-59, 863-67 (testimony about emails showing defendant's involvement in website). On June 21st, defendant emailed Berry and Mitchel about changes to the site's content, plans for advertising, and billing issues worked out with Aaron Brown – the owner of the payment processor (Neova.net) and server used by JustinsFriends.com. GX 93; TTR-V at 814, 863-67. In mid-July 2005, defendant took over JustinsFriends.com after Mitchel and Berry got into a fight and decided to abandon the site. GX 95 (email); TTR-VI at 1062-63 (defendant's testimony). Defendant transferred the site to the BlackSun server and changed the site's internet domain to "JustinsFriends.net," which he registered in his name. TTR-IV at 659, 715-17; TTR-VI at 1062.

Like defendant's other sites, JustinsFriends.net offered access to sexually-explicit content for a fee. TTR-II at 160-62; TTR-IV at 618-21; GX 61. The site cross-promoted CaseysCondo.com by offering a discount to members of both sites. TTR-V at 873-74. JustinsFriends.net also advertised through an "affiliate" program, which gave webmasters a financial incentive to provide a link to JustinsFriends.net. TTR-IV at 621-25.

The content on JustinsFriends.net included the following child pornography: JF_Fucking.wmv (GX 22), Taylor.jpg (GX 23), and Justin901.jpg to Justin920.jpg (GX 63). GX 64 (summary exhibit); TTR-IV at 652-56 (Fottrell testimony). The first (JF_Fucking.wmv) was a renamed version of the Iceland video ("Fucking.wmv") of Lombardi and defendant. TTR-IV at 653-55. The second and third depicted sexual activity involving"Taylor," a boy who was only 15 when defendant took over JustinsFriends. TTR-II at 173-74; TTR-IV at 641, 653. Justin901.jpg to Justin920.jpg (GX 63) are freeze-frame images of Taylor and Berry masturbating on a bed, from the video "Justinpreview2.wmv." Agents saw that video playing in the free section of JustinsFriends.net in July 2005, TTR-IV at 653; TTR-V at 802-06, 871, and later found images associated with the video, as well as JustinsFriends-related data, on defendant's computer, TTR-V at 854, 857-58.

Defendant knew that Taylor was underage. In an online chat between defendant ("eurocasey") and Mitchel ("patoda00") on July 15, 2005, defendant said that Berry had told Aaron Brown that Taylor was 15; defendant had agreed that Taylor "looked young." When Mitchel said to "take down all the taylor stuff," and certain content involving Berry, defendant agreed to "clean up the

site." GX 116; TTR-VI at 1150-53, 1160-61, 1165.[8] In an online chat between Mitchel and Brown ("soniQue") – the log for which was sent to defendant's email address on July 29, 2005 and later found on defendant's computer, TTR-V at 867-70 – Mitchel referred to Taylor's age when asking Brown for help in reaching an arrangement with defendant about JustinsFriends:

> do me a favor see what you can work out with kc [defendant] im acceptable to all tay vids comming off the site (its all child porn anyway since hes well underage) and 50/50 on the site plus he sends the name back with no questions asked and ill provide new age verified content.

GX 94. Defendant never removed the child pornography of Taylor. TTR-VI at 1165; *see also id.* at 1154-56 (testimony that Taylor pornography could be downloaded from JustinsFriends.net when BlackSun server seized).

Defendant's convictions on Counts 19-22 for advertising, conspiring to transport, and transporting child pornography and for violating § 2257 all concerned JustinsFriends.com/net. R. 157, pp. 26-30; *see also* GX 65 (JustinsFriends 2257 notice); TTR-IV at 663-69.

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[8] Berry was then 18, but defendant knew that child pornography of Berry existed. GX 117 (defendant referencing underage content of Justin in email); TTR-VI at 1141-49 (testimony about GX 117).

G. Agents Arrest Defendant In Between Executing Search Warrants In California And Nashville.

On September 12, 2005, agents executed a search warrant for the BlackSun server in Los Angeles, which had been identified as the host for JustinsFriends.net. TTR-II at 105-06. The server also hosted CaseysCondo.com, CaseyandKylesCondo.com, and PenisClub.com. *Id.* at 117-18, 166, 210-11. Also on September 12th, agents executed a search warrant for the server in the San Francisco area associated with Brown (the "Hurricane Electric server"), which had hosted JustinsFriends.com. *Id.* at 88-93; TTR-V at 864; TTR-VI at 1062.

On September 22, 2005, defendant was arrested at his Nashville home. TTR-V at 919-20. Six days later, agents executed search warrants for that residence and another Nashville residence to which defendant was moving. TTR-III at 443-45.

The items seized during the Nashville searches included eight computers, computer disks, cameras, videotapes, and documents. *Id.* at 446-47, 454. Agents also seized fourteen 8mm tapes from a filing cabinet, including the "Casey@16" tape depicting defendant engaged in sexually-explicit conduct with then-15 Lombardi. *Id.* at 449-50; TTR-V at 926-27. Defendant's convictions on Counts

23 and 24 for producing and possessing child pornography were based on Casey@16. R. 157, pp. 31-32.

H. Defendant's Trial Testimony And The Government's Rebuttal.

The defense did not dispute that defendant operated CaseysCondo.com, CaseyandKylesCondo.com, PenisClub.com, and JustinsFriends.net, but contended that the case came down to whether the pornography on the site depicted minors and, if so, whether defendant knew that. TTR-I at 55; TTR-IX at 1514.

Defendant testified that Lombardi was 18 in all of the images/videos, TTR-VI at 1018, 1026-27, 1032-35, 1044-45, 1102, except in some sexually-suggestive photos (GX 12) where defendant agreed Lombardi was under 18, *id.* at 1099-1100. Defendant agreed that they had vacationed abroad when Lombardi was 17, but testified: that they made only G-rated photos of themselves in Australia and later spliced in X-rated content of Lombardi at age 18, *id.* at 1033-35; that he did not recall taking photos of Lombardi naked in the shower in Iceland, *id.* at 1096; and that "Fucking.wmv" (GX 14) was shot in the United States when Lombardi was 18, *id.* at 1018. Defendant testified that he was not familiar with Casey@16, and he suggested that the X-rated content had been spliced in after the first scene depicting the outside of his Everett home. *Id.* at 1047-49.

Defendant testified that he did not know Taylor was under 18 and that he had created Justinspreview2.wmv (*see* p. 16, *supra*) from videos that Berry had sent him, without knowing performers' ages. *Id.* at 1055-57. Defendant denied having read the chat log emailed to him on July 29, 2005 (GX 94), in which Mitchel told Brown that "tay" was "well underage." *Id.* at 1071-72.

In rebuttal, the government introduced photographs that defendant took of Lombardi naked in the shower in Iceland (GX 119). TTR-VIII at 1360-70. In the photos,"Hotel Loftleider" and "[I]celandair Hotel" are visible on the shower curtain. The government also introduced the so-called "G-rated" photos of defendant and Lombardi in Sydney. GX 120; TTR-IV at 1372-73. As the government pointed out in summation, defendant and Lombardi are each wearing the same shirts and Lombardi's hand bears the same stamp in both the G-rated photos and the Sydney/Xphotos, indicating that the photos were taken around the same time. TTR-IX at 1470-71. The government also introduced the chat log of defendant and Mitchel discussing statements about Taylor being underage. *See* p. 16, *supra*.

SUMMARY OF THE ARGUMENT

I. The search warrant was sufficiently particular and was not overbroad. The affidavit established probable cause that the JustinsFriends.com/net sites contained evidence of child pornography crimes. Because that evidence could have been stored anywhere on the BlackSun server, the warrant permissibly authorized the government to image and search the entire server.

Any defect in the warrant does not require suppression because the good-faith, independent-source, and inevitable-discovery exceptions to the exclusionary rule apply. And, defendant had no reasonable expectation of privacy in server files available for downloading over the Internet.

II. Defendant waived his claim that he was prejudiced by the government's identification of 20,000 images for use in its case-in-chief by not pursuing it at trial. Regardless, the court committed no reversible error because the government acted reasonably and in good faith, and defendant was not prejudiced.

III. The district court did not abuse its discretion by admitting discs of child pornography with labels specifying Lombardi's age at production. Lombardi authenticated the labels and was cross-examined about his age. The labels did not influence the jury, which acquitted defendant on three counts based on age-labeled discs.

IV. The district court did not abuse its discretion in precluding the defense from cross-examining Jeremy Moeder about past sexual conduct involving minors. The information did not contradict his direct testimony or reveal any bias, prejudice, or motive for testifying, but it did risk confusing the jury. Any error was harmless because the jury acquitted defendant on the counts implicated by Moeder's testimony.

V. Counts 1 and 16, which charged transportation of child pornography through CaseyandKylesCondo.com and CaseysCondo.com, respectively, were not multiplicitous. Where, as here, a defendant transports child pornography via different websites, he commits multiple offenses under § 2252A(a)(1).

VI. Defendant's sentence fails to reflect the seriousness of his offense conduct, the gravity of his sexual relationship with a 13-year-old boy, or his post-arrest conduct in jail. It is substantively unreasonable.

STANDARDS OF REVIEW

When reviewing the denial of a motion to suppress evidence, the Court reviews findings of fact for clear error and conclusions of law *de novo*. *United States v. Quinney*, 583 F.3d 891, 893 (6th Cir. 2009).

The Court reviews evidentiary and discovery rulings for an abuse of discretion, *United States v. White*, 492 F.3d 380, 388 (6th Cir. 2007), including

restrictions on cross-examination, *United States v. Payne*, 437 F.3d 540, 548 (6th Cir. 2006).

The Court reviews multiplicity issues *de novo*. *United States v. Swafford*, 512 F.3d 833, 844 (6th Cir.), *cert. denied*, 129 S. Ct. 329 (2008).

The Court reviews the substantive reasonableness of a sentence under an abuse-of-discretion standard. *Gall v. United States*, 552 U.S. 38, 51 (2007).

ARGUMENT

I. THE DENIAL OF DEFENDANT'S SUPPRESSION MOTION WAS NOT REVERSIBLE ERROR.

Defendant contends (Br. 41-51) that the warrant authorizing seizure of the BlackSun server lacked particularity and was overbroad, and that the allegedly illegal seizure tainted all of the trial evidence. Those arguments are meritless.

A. Background

1. Search Warrant

On September 12, 2005, Special Agent Monique Winkis applied in the Western District of Virginia for a warrant to seize and search the BlackSun server. R. 87A, Warrant; *see* 18 U.S.C. § 2703(a).[9]

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[9] Defendant does not challenge the warrant for the Hurricane Electric server.

The affidavit requested permission to search "for the contents of the websites known as **justinfriends.com** and/or **justinfriends.net** and stored wire and electronic communications and transactional records that may be evidence of violations of [18 U.S.C. §§] 2251, 2252, and 2252A, including the advertising, possession, transportation, and distribution of child pornography . . . ." R. 87A, Warrant Aff., ¶ 4. It stated that Justin Berry had recently provided information about the commercial production, advertising, sale, and distribution of child pornography, in which he had been involved. *Id.* ¶ 20. Berry reported that, at around age 13, he developed a pay website (later called JustinsFriends.com) offering sexually-explicit content of himself. *Id.* ¶ 21. Greg Mitchel, an adult, become involved in Berry's website and produced pornographic videos of minors, including of Berry. *Id.* ¶ 24. One video showed Berry (then 18) and "Taylor" (then 14) masturbating on a bed in Mitchel's Virginia home. *Id.* Berry also reported that Aaron Brown's company processed payments for the site. *Id.* ¶ 22. Berry reported that he had decided to discontinue his association with child pornography. *Id.* ¶ 30.

The affidavit stated that agents had made an undercover purchase of membership to JustinsFriends.net, after being redirected there by JustinsFriends.com, where they saw, *inter alia*, sexually-explicit videos of Berry

and the video of Berry and Taylor masturbating. *Id.* ¶¶ 33-45. Subsequent investigation revealed that JustinsFriends.com and JustinsFriends.net were hosted on a server (number 4, cabinet 200.02) owned and leased by BlackSun in Los Angeles (the "BlackSun server"). *Id.* ¶¶ 46-47. The affidavit concluded that probable cause existed to believe that JustinsFriends.com/net contained evidence of child pornography. *Id.* ¶ 58.

The affidavit indicated that, upon issuance of the warrant, the server would be "imaged" so that its "contents [could] be examined at an FBI field office and other locations following completion of [t]he on-site search." *Id.* ¶ 54(p.24).[10] The affidavit explained that "[a]nalyzing computer systems for criminal evidence is a highly technical process requiring expert skill and a properly controlled environment"; that "[i]t is difficult to know, prior to the search, which exact method of extracting the evidence will be needed and used and which expert possesses sufficient specialized skills to best obtain the evidence and subsequently analyze it"; and that forensic procedures could uncover "even hidden, erased, compressed, password-protected, or encrypted files." *Id.* ¶ 53(p.24). The affidavit stated that if the forensic search revealed "content and materials not

[10] One server hard drive had to be imaged off-site due to technical issues. TTR-II at 79.

related to the advertising, possessing, and/or distribution (sale) of child pornography . . ., such materials will be erased or deleted from the Government storage devices within a reasonable period of time." *Id.* ¶ 54(p.25).

A magistrate issued the warrant on September 12, 2005; it was executed that day. Attachment B, Paragraph 1, authorized seizing:

> All content of the **justinsfriends.com** and/or **justinsfriends.net** servers at BlackSun, 1200 West 7th Street, Los Angeles, California 90017, including any computer files that were or may have been used to advertise, transport, distribute, or possess child pornography, in violation of 18 U.S.C. §§ 2251, 2252, and 2252A as well as any child pornography images.

R.87A, Warrant. Paragraph 2 authorized seizing all business records pertaining to JustinsFriends.com/net.

2. Suppression Hearing & Ruling

Defendant moved to suppress the fruits of the seizure and search of the server on the grounds that the warrant authorized seizing only those sections hosting JustinsFriends.com/net or, if it authorized seizing the entire server, that it was overbroad (by exceeding the scope of probable cause). R. 81, Def. Mem., pp. 7-8.

The court held a hearing on the BlackSun-server motion. The court found that the plain language of the warrant authorized seizing the entire BlackSun

server, not just sections hosting JustinsFriends.com/net. R. 162, Suppression Tr., at 157.

James Fottrell, the government's expert, then testified that the BlackSun server was a "commercial web server," which provides configuration for websites and "serves up" those webpages for computers requesting access through the Internet. *Id.* at 172-73. Each website's files are stored in the server's directory, either in a folder structure that distinguishes between websites or in an "intermeshed" structure containing elements common to the websites. *Id.* at 187-88. Each server has an operating system and an account for an administrator, who has access to and complete control over the files stored on the server. *Id.* at 189. A server may also provide individual users with storage space and directory structure; that content would be accessible by the administrator. *Id.* at 190.

JustinsFriends.net was stored in one of two hard drives on the server with six other websites, including CandKcondo.com, PenisClub.com, and Premium.ckcondo.com. *See id.* at 167, 176, 196. CaseysCondo.com and CollegeBoysLive.com were also hosted on the server. *Id.* at 167; TTR-II at 117-18. Fottrell found an administrator account and user accounts for "Casey" and "Aaron" on the server. R. 162, Suppression Tr., at 190. Fottrell testified that, up to that point, he had not detected any "locks or barriers" at the website level that

would have precluded users from accessing the entire server, and he confirmed that the BlackSun administrator had unfettered access to the server. *Id.* at 206-07.

Fottrell explained that searching the BlackSun server for child pornography offenses related to JustinsFriends.com/net required reviewing the entire server. *Id.* at 179-80, 208. People mislabel directory structures to hide the presence of child pornography, storing it anywhere on the server. *Id.* at 181-84. Servers also have unallocated space, which might contain relevant emails, deleted files, and log records. *Id.* at 182, 210-13. And, without looking at individual server files, Fottrell would not know whether any websites were related. *Id.* at 210-11, 219.

The district court denied the motion to suppress. *Id.* at 252-53. Defendant had conceded that unallocated server space could be searched. *Id.* at 253. The court found probable cause to search the entire server because: (1) the agents did not know how many websites were on the server before seizing it; and (2) the server administrator had access to all of the sites and, therefore, "could have secreted in any other web sites the information relevant to the investigation concerning the child pornography contained on the Justin's friends web site." *Id.* The court concluded that the warrant was not overbroad. *Id.*

B. Argument

1. The Warrant Was Sufficiently Particular And Was Not Overbroad.

The Fourth Amendment requires that a search warrant particularly describe the place to be searched and the evidence to be seized. The purpose of that requirement is to prevent general searches. *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). "By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Id.*; *see also Andresen v. Maryland*, 427 U.S. 463, 480 (1976).

The particularity requirement is applied in a common-sense manner. *See Illinois v. Gates*, 462 U.S. 213, 235-36 (1983). "[T]he degree of specificity required is flexible and will vary depending on the crime involved and the types of items sought." *United States v. Greene*, 250 F.3d 471, 477 (6th Cir. 2001) (internal quotation marks omitted). "It is enough if the description is such that the officer with a search warrant can, with reasonable effort[,] ascertain and identify the place intended." *Steele v. United States*, 267 U.S. 498, 503 (1925).

Contrary to defendant's claim (Br. 44), the BlackSun warrant was neither ambiguous nor misleading in authorizing the seizure and search of "[a]ll content of the **justinsfriends.com** and/or **justinsfriends.net** servers." The terms "justinsfriends.com" and "justinsfriends.net" were used as adjectives to identify the server to be seized. As the district court concluded, the warrant's plain language authorized seizure and search of the entire server. R. 162, Suppression Tr., at 157 ("The search warrant clearly says the servers. It doesn't just say one web site on the server.").

The warrant's directive to seize the entire server did not lack particularity or result in a general search. *See United States v. Upham*, 168 F.3d 532, 535 (1st Cir. 1999) (warrant directing seizure of "[a]ny and all computer software and hardware" sufficiently particular because it was "easily administered based on objective criteria"). Apart from that unambiguous directive, Attachment B (¶ 1) specified that the items to be seized on the server "includ[ed] any computer files that were or may have been used as a means to advertize, transport, distribute, or possess child pornography, . . . as well as any child pornography." That language guided the search of the imaged server. *See Greene*, 250 F.3d at 477-78 ("the language of a warrant is to be construed in light of an illustrative list of seizable items") (internal quotation marks omitted).

Courts, including this one, repeatedly have rejected particularity challenges to warrants authorizing the seizure of entire computers to search for evidence of child pornography or obscenity crimes. *See, e.g.*, *Guest v. Leis*, 255 F.3d 325, 336 (6th Cir. 2001); *United States v. Clark*, 257 Fed. Appx. 991, 992 (6th Cir. 2007) (unpublished); *United States v. Banks*, 556 F.3d 967, 973 (9th Cir. 2009); *United States v. Gleich*, 397 F.3d 608, 612 (8th Cir. 2005); *United States v. Hall*, 142 F.3d 988, 996-97 (7th Cir. 1998); *see also United States v. Williams*, 592 F.3d 511, 520 (4th Cir. 2010) (warrant to search for violations of computer harassment statute); *United States v. Sassani*, 1998 WL 89875, *5 (4th Cir. Mar. 4, 1998) (unpublished) (noting that courts allow more generic terms in child pornography warrants).

The affidavit, which was cross-referenced in the warrant's probable cause section (R. 87A), provided further guidance. *See Baranski v. Fifteen Unknown Agents of Bureau of ATF*, 452 F.3d 433, 439-40 (6th Cir. 2006). The affidavit requested permission to search "for the contents of . . . **justinsfriends.com** and/or **justinsfriends.net** . . . that may be evidence of" child pornography crimes. R. 87A, Warrant Aff., ¶ 4. It also stated that, in the event "content and materials *not related* to the advertising, possessing, and/or distribution (sale) of child pornography [we]re found" on the imaged server, they would be deleted in a

reasonable period of time. *Id.* ¶ 54(p.25) (emphasis added). The warrant thus guided agents to search for evidence of child pornography pertaining to JustinsFriends.com/net – it did not permit the free-ranging search that defendant alleges (Br. 49). In short, it was sufficiently particular.

Nor was the warrant overbroad. "Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based." *Banks*, 556 F.3d at 972-73. Here, the warrant was no broader than necessary to allow the agents to locate the JustinsFriends-related content on the server. They could not know, before searching the server, how and where that content would be stored. *See United States v. Henson*, 848 F.2d 1374, 1383 (6th Cir. 1988) (upholding warrant that used generic terms; inspector "could not have known at the time he applied for the warrant what precise records and files . . . contain[ed] information concerning the odometer tampering scheme").[11]

In *Guest*, this Court addressed the related question of whether officers exceeded the scope of a warrant by seizing entire servers, where the warrant limited seizure to communications relating to obscene material posted on

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[11] Because the warrant was not overbroad, the plain-view doctrine would allow the government to seize evidence of child pornography discovered on sites other than JustinsFriends during the search of the imaged server. Defendant does not raise a plain-view challenge.

computer bulletin board systems. 255 F.3d at 329-31, 334. The Court noted that "'[a] search does not become invalid merely because some items not covered by a warrant are seized.'" *Id.* at 334 (quoting *Henson*, 848 F.2d at 1383) (second alteration in original). The Court held that the officers reasonably seized the computers and took them off-site because "when the seizures occurred, [officers] were unable to separate relevant files from unrelated files." *Id.* at 335.

The *Guest* Court cited three decisions rejecting overbreadth challenges to warrants authorizing the seizure of entire computers related to child pornography or obscenity crimes. 255 F.3d at 335 (citing *United States v. Hay*, 231 F.3d 630, 637-38 (9th Cir. 2000); *Upham*, 168 F.3d at 536; *Davis v. Gracey*, 111 F.3d 1472, 1481 (10th Cir. 1997)). In *Hay*, the Ninth Circuit reasoned that "[t]he government knew that [an individual] had sent 19 images [of child pornography] to Hay's computer, but had no way of knowing where the images were stored." 231 F.3d at 637. In *Upham*, the First Circuit found that "the seizure and subsequent off-premises search of the computer and all available disks was about the narrowest definable search and seizure reasonably likely to obtain the images [of child pornography]," concluding that "[a] sufficient chance of finding some needles in the computer haystack was established by the probable-cause showing in the warrant." 168 F.3d at 535. And, in *Davis*, the Tenth Circuit held that the warrant

permissibly authorized seizing computer equipment that stored a bulletin board system, which also contained communications unrelated to the alleged obscenity offense. 111 F.3d at 1478-79.

Guest and the cases on which it relies fatally undermine defendant's overbreadth claim. *See also United States v. Meeks*, 290 Fed. Appx. 896, 903 (6th Cir. 2008) (unpublished) (rejecting overbreadth challenge in child pornography case, where "the warrant described computer equipment and computer-related materials, which is as specific as the circumstances allowed"); *Banks*, 556 F.3d at 973 (similar); *United States v. Lacy*, 119 F.3d 742, 746-47 (9th Cir. 1997) (similar). The warrant here was limited (in relevant part) to the server hosting JustinsFriends.com/net, and defendant does not dispute that the government had probable cause to believe those sites were involved in child pornography. The affidavit explained that "[i]t is difficult to know, prior to the search, which exact method of extracting the evidence will be needed and used and which expert possesses sufficient specialized skills to best obtain the evidence and subsequently analyze it." R. 87A, Warrant Aff., ¶53 (p.24). It also indicated that a forensic procedure could uncover "even hidden, erased, compressed, password-protected, or encrypted files." *Id.* Searching the entire server was necessary to look for child pornography related to JustinsFriends.com/net because people often mislabel

directory files; the unallocated server space might contain material pertaining to those websites; and the server might contain related websites. *See* pp. 27-28, *supra*; *see also United States v. Mann*, 592 F.3d 779, 782-83 (7th Cir. 2010) (recognizing that subject images "could be essentially anywhere on the computer" and that "computer files may be manipulated to hide their true contents"); *Williams*, 592 F.3d at 521-22 (similar). Moreover, the administrator could access the entire server and could have "put material related to JustinsFriends on the other web sites and in the unallocated space." R. 162, Suppression Tr., at 253. Because child pornography could have been anywhere, the court correctly found probable cause to image and search the entire server.

Defendant contends (Br. 42-43) that the warrant failed to distinguish "shared" servers (hosting multiple websites) from "dedicated" servers (hosting one website). To the contrary, the affidavit (¶ 8(h)) explained that distinction. Nor is defendant correct (Br. 9) that, on a shared server, website operators are necessarily precluded from accessing other websites. A server hosting related websites might allow such access, and Fottrell testified that his analysis of the BlackSun server to that point had not uncovered evidence of internal barriers at the website level. R. 162, Suppression Tr., at 206. Regardless, before the search, the government did not know whether the server was shared or dedicated, and, if shared, whether

any websites were related, how the directory was organized, and whether any users had access to the entire server. *See id.* at 219-21, 233-34.

The trial evidence confirmed that websites on the server were related. For example, a video appearing on PenisClub.com (Tory_DVD, GX 13) advertised for CaseyandKylesCondo.com; JustinsFriends.net cross-promoted CaseysCondo.com by offering a discount to members of both sites (TTR-V at 873-74); the same video of defendant and Lombardi in Iceland appeared on JustinsFriends.net (GX 22) and CaseyandKylesCondo.com (GX 14); and CaseysCondo.com linked to CollegeBoysLive.com (GX 44). The trial evidence also showed that user "Casey" (defendant) "ha[d] administrative rights over [the BlackSun server] to control all the contents associated with that machine." TTR-IV at 698-99.

The cases on which defendant relies (Br. 47) do not support his claim. Indeed, *Upham* undermines his claim; the court there observed that "a search of a computer and co-located disks is not inherently more intrusive than the physical search of an entire house for a weapon or drugs." 168 F.3d at 535. Likewise, the Tenth Circuit has since limited *United States v. Carey*, 172 F.3d 1268 (10th Cir. 1999), to "the proposition that law enforcement may not expand the scope of a search beyond its original justification" – which is not at issue here – and has rejected the notion that "computer disks and hard drives are closed containers

somehow separate from the computers themselves." *United States v. Grimmett*, 439 F.3d 1263, 1268-69 (10th Cir. 2006) (internal quotation marks omitted). Finally, *United States v. Kow*, 58 F.3d 423 (9th Cir. 1995), is inapposite because it involved a tax fraud warrant with no limit on which documents could be seized. *Id.* at 425-28. The warrant here limited the search to evidence of child pornography, "which is a sufficiently specific definition to focus the search." *Hay*, 231 F.3d at 638.

"The prohibition of general searches is not to be confused with a demand for precise ex ante knowledge of the location and content of evidence related to the suspected violation." *United States v. Meek*, 366 F.3d 705, 716 (9th Cir. 2005). Defendant's claims should be rejected.

2. Suppression Is Not Warranted.

a. The Good-Faith Exception Applies.

Even if the Court were to hold that the BlackSun warrant lacked particularity or was overbroad, suppression would not be warranted because the agents relied on the warrant in good faith.[12] In *United States v. Leon*, 468 U.S.

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[12] Although the government did not raise this argument below, the Court may consider it, especially because it is related to the merits of the warrant issue and does not require further record development. *See United States v. Ellison*, 462 F.3d 557, 560-61 (6th Cir. 2006).

897 (1984), the Court held that the exclusionary rule should not be applied where "an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." *Id.* at 919-20. In *Massachusetts v. Sheppard*, 468 U.S. 981, 989-91 (1984), the Court applied the good-faith exception to an insufficiently-particular search warrant. *Accord United States v. Logan*, 250 F.3d 350, 365-66 (6th Cir. 2001); *see also United States v. Burgess*, 576 F.3d 1078, 1090, 1095-96 (10th Cir.) (applying *Leon* to allegedly overbroad warrant), *cert. denied*, 130 S. Ct. 1028 (2009).

Leon made clear that, only in exceptional circumstances, is law enforcement to disregard a magistrate's authorization – for example, when a "warrant [is] based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," 468 U.S. at 923 (internal quotation marks omitted), or when a warrant is "so facially deficient . . . in failing to particularize . . . the things to be seized [] that the executing officers cannot reasonably presume it to be valid," *id.*

Neither scenario is present here. The affidavit explained in detail the facts establishing probable cause to believe that child pornography was distributed through JustinsFriends.com/net. R. 87A, ¶¶ 20-47. The warrant was not "so facially deficient" in describing the things to be seized that the agents could not

"reasonably presume it to be valid." *See United States v. Potts*, 586 F.3d 823, 834 (10th Cir. 2009) (applying *Leon* where warrant limited by references to child pornography). The affidavit explained why it was necessary to image the server. This was not a case where "even a cursory reading of the warrant . . . would have revealed a glaring deficiency." *Groh v. Ramirez*, 540 U.S. 551, 564 (2004). The good-faith exception should be applied.

b. The Independent-Source And Inevitable-Discovery Doctrines Apply.

If the Court does not apply the good-faith exception, it should sever any overbroad portions from the sufficiently particular portions. *See United States v. Ford*, 184 F.3d 566, 578 (6th Cir. 1999). But in no event should evidence be suppressed. Defendant's unsupported assertion (Br. 50) that the BlackSun evidence tainted all of the evidence at trial is simply wrong.

"Under the independent source doctrine, evidence will be admitted if the government can show it was discovered through sources 'wholly independent of any constitutional violation.'" *United States v. Leake*, 95 F.3d 409, 412 (6th Cir. 1996) (quoting *Nix v. Williams*, 467 U.S. 431, 442-43 (1984)). Most of the evidence in this case was admissible under that doctrine. Agent Winkis testified that the government identified defendant as an operator of child pornography

websites prior to September 22, 2005, based on information and materials obtained from Berry and Mitchel (who was arrested on September 12, 2005). R. 162, Suppression Tr., at 64-67, 92. On September 27, 2005, agents obtained warrants to search defendant's Nashville homes for evidence of child pornography. *See* R. 87C, Home Warrants.[13] The government did not rely on the fruits of the BlackSun-server search to obtain those warrants; the server had not even been analyzed when defendant's residences were searched. R. 86, Resp. to Def. Mot., p. 16. Rather, the affidavits recounted information provided by Berry and Mitchel. R. 87C, ¶¶ 45-65. They reported that defendant was involved in JustinsFriends knowing it contained child pornography; operated affiliated websites, including CaseysCondo.com and CaseyandKylesCondo.com; and had uploaded to his own websites child pornography of Berry (knowing Berry was underage). *Id.* ¶¶ 52-55, 64. The affidavit also discussed defendant's arrest on September 22nd, and the evidence that he was living and having a sexual relationship with a 13-year-old boy. *Id.* ¶¶ 70-84. Although the affidavit described the execution of the BlackSun warrant, it did not mention the server's contents. *Id.* ¶¶ 61-62.

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[13] The warrant affidavits for defendant's homes were essentially identical.

Because the government discovered defendant's involvement in distributing child pornography independently of the BlackSun search, the evidence seized from defendant's homes, and other trial evidence unconnected to the BlackSun search, were admissible under the independent-source doctrine.

The BlackSun evidence itself inevitably would have been discovered. *See Nix*, 467 U.S. at 444. The inevitable-discovery exception applies, *inter alia*, when "evidence discovered during an illegal search would have been discovered during a later legal search and the second search inevitably would have occurred in the absence of the first." *United States v. Keszthelyi*, 308 F.3d 557, 574 (6th Cir. 2002).

That was the scenario present here.[14] As discussed, the home-warrant affidavits show that, without having analyzed the BlackSun server, the government knew that defendant was involved in distributing child pornography on the Internet through multiple websites. The affidavits also stated that Justinsfriends.net, CaseyandKylesCondo.com, and CaseysCondo.com were hosted

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[14] The government raised the independent-source, but not the inevitable-discovery, doctrine below (R. 86, pp. 15-19). The two doctrines, however, are "closely related," *Nix*, 467 U.S. at 443. And, even if the inevitable-discovery doctrine had been expressly raised, the district court would not have ruled on it because it did not rule on the government's independent-source argument.

on defendant's server at BlackSun. R. 87C, ¶ 61.[15] Even if the BlackSun warrant should have been limited to JustinsFriends.net and unallocated space, the government inevitably would have obtained a warrant to search the server for content related to defendant's other websites based on the information it learned from Berry and Mitchel and from the searches of defendant's homes. Suppression of the BlackSun-server evidence is not warranted.

c. The Publicly-Accessible Files On The BlackSun Server Were Admissible.

If the Court concludes that the warrant was defective and that none of the exceptions to the exclusionary rule apply, the publicly-available server files were nevertheless admissible.

Defendant has not met his "burden of demonstrating that he had a legitimate expectation of privacy in the place that was searched." *United States v. Talley*, 275 F.3d 560, 563 (6th Cir. 2001). He contends only generally (Br. 46-47) that individuals have a reasonable expectation of privacy in the contents of a computer. But that expectation did not apply to the BlackSun server. Unlike the personal

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[15] The government knew defendant operated a server because Berry reported that he had used defendant's web-hosting service for JustinsFriends. When agents executed the BlackSun warrant, defendant spoke by telephone to an agent about the server's disrupted operation and stated that he subleased the server. R. 87C, Warrant Aff., ¶¶ 51, 63.

computers referenced in the cases cited by defendant (Br. 46), *see United States v. Walser*, 275 F.3d 981, 986 (10th Cir. 2001); *United States v. Gourde*, 440 F.3d 1065, 1077 (9th Cir. 2006) (en banc) (Kleinfeld, J., dissenting), the BlackSun server was a commercial server, whose sole purpose was to distribute pornography to the public over the Internet.

"What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967). This Court has held that subscribers to an electronic bulletin board system "would logically lack a legitimate expectation of privacy in the materials intended for publication or public posting." *Guest*, 255 F.3d at 330, 333; *accord United States v. Liftshitz*, 369 F.3d 173, 190 (2d Cir. 2004). Likewise, courts have held that an individual has no reasonable privacy expectation in material posted on the Internet, *see United States v. Gines-Perez*, 214 F. Supp.2d 205, 224-26 (D.P.R. 2002), or in computer files freely shared with others, *see United States v. Barrows*, 481 F.3d 1246, 1249 (10th Cir. 2007), including through peer-to-peer software, *see, e.g.*, *United States v. Borowy*, __ F.3d __, 2010 WL 537501, *1-*3 (9th Cir. Feb. 17, 2010); *United States v. Stults*, 575 F.3d 834, 842-43 (8th Cir. 2009).

A commercial server "serve[s] up" webpages when requested by computers over the Internet. R. 162, Suppression Tr. at 172. Anyone using the Internet could have accessed the material on the websites hosted by the BlackSun server – whether in the sites' free areas or by paying a fee to access the member sections. Defendant cannot credibly maintain that he had a reasonable privacy expectation in such publicly-available material.

II. DEFENDANT ABANDONED HIS CHALLENGE TO THE PRETRIAL IDENTIFICATION OF IMAGES; IN ANY EVENT, THE DISTRICT COURT COMMITTED NO REVERSIBLE ERROR.

Accusing the government of "deceitful gamesmanship," defendant contends (Br. 51-54) that the government's identification of 20,000 images for use in its case-in-chief was an "obfuscation of the letter and intent of Rule 16" that prejudiced him in trial preparation. Defendant waived that claim by not pursuing it at trial. In any event, the district court committed no reversible error.

B. Background

Well before trial, the government provided the defense with copies of the hard drives from defendant's computers and the BlackSun and Hurricane Electric servers. *See* R. 59 (order requiring Rule 16(a)(1)(E) production); R. 85, Resp. to Mot. for Identification, p. 1. On May 19, 2006, defendant moved for an order requiring the government to identify the images it would use in its case-in-chief.

R. 77. Defendant conceded that "Rule 16(a)(1)(E)(ii) does not require separate identification of these items in express terms," but contended that the district court had the discretion to order it. *Id.* at 2. The court granted defendant's motion, ordering the government to identify the images by August 25, 2006. R. 101. The government did so. R. 108, Resp. to Mot. to Compel, p.2.

On August 30th, the defense filed a motion to compel the government to comply with the identification order, contending that the government had provided a list of 20,429 files rather than what the defense believed was required: "a list of a dozen or so files/images with a corresponding representation of which files/images relate[d] to each count in the Indictment." R. 105, p. 3.

In response, the government explained, *inter alia*, that the seized hard drives and servers contained millions of files; that, since the court's order, a prosecutor and agent had reviewed at least a million files and selected a small fraction (about 20,000) for use at trial; that the vast majority of files came from a handful of computer subdirectories; and that the government's list specified each file's name, path, source, and hash value, and was in digital format to facilitate searching. R. 108, pp. 2-5, 9. (A hash value is like an "electronic fingerprint" for a file. TTR-V at 473.) The response further stated that, at an August 30th meeting, the government had informed defense counsel that, for evidentiary reasons, many files

contained the same images but that a database of hash values provided by the government could be used to generate a smaller list of unique images. R. 108, pp. 3-4. At that meeting, the government also previewed the charges in the second superseding indictment, identified the websites to which they pertained, and identified the child victims in the images/videos that were the subject of the charges. *Id.* at 4. The government offered to respond to future defense questions about specific files. *Id.*

The government's response also noted that its list identified not only images of child pornography, but also standard webpage files and ".gif" files used to create logos and designs. *Id.* at 3 n.2, 6-7. The government explained that it did not intend to show 20,000 images at trial, but planned to introduce "restored websites, each of which require[d] the use of thousands of files," and to display some images and identify the multiple places the images were found. *Id.* at 6.

The district court denied defendant's motion to compel. R. 241, Hr'g Tr., at 13-16. The court found that the government had complied with its order because it planned to use the images at trial. The court also found that the government had "sat down" with the defense. *Id.* at 15.

The issue was revisited on the second day of trial when Agent Brooke Donahue testified about images and videos on the BlackSun server. Defense

counsel objected that it was impossible to know, in advance, whether the files were previously identified, and that any image/video not identified on the August 25th list should be excluded. *Id.* at 136. Counsel also appeared to argue that, for cross-examination purposes, she needed to know in advance which previously-identified files would be introduced that day. *Id.* at 136-37. The court stated that it did not understand that objection, whereupon counsel responded:

> Well, it's related to my identification objection. Without knowing the specific file names and where this information is coming from, I have no way of knowing if it has been identified and whether we've actually seen it.

Id. at 137.

The court ruled that the government should preview the images it would show to the jury so that the defense could object if an image had not been identified. *Id.* at 138. The parties agreed that the government would do so over lunch and would provide an exhibit list. *Id.* at 138-43, 178-80. After lunch, the defense's sole objection was that two of the previewed exhibits (GX 9, 24) allegedly had not been identified on the government's August 25th list. *Id.* at 180-81. Those exhibits were not introduced into evidence. At the close of the second trial day, the government informed the court and defense that most of the pornography had already been admitted. *Id.* at 273-74.

On the fourth trial day, the defense objected to the admission of materials found on Mitchel's home computers. Counsel complained that "so far . . . the government has presented 15, 20, 25 images and movie files" of alleged child pornography, even though it had "identified literally 20,000 images" and "swamped [the defense] with trying to pick the needle out of the haystack literally." TTR-IV at 583-84. "So if the government hasn't identified those documents for us in the 20,000," counsel continued, "I would suggest that the court not permit the government to get into those images now." *Id.* at 584. The objection to the Mitchel material was overruled because the government did not plan to introduce the image in question. *Id.* at 645-51. At another point, the court barred the government from introducing a video depicting another child victim because it was not on the August 25th list. *Id.* at 638-39.

B. Argument

1. Defendant Abandoned His Claim.

Defendant abandoned his claim that he was prejudiced by the government's alleged over-identification of images for use in its case-in-chief.

The defense originally contended that, to prepare adequately for trial, it required notice of which images the government would introduce in its case-in-chief. R. 77, Mot., p. 3. But the defense did not renew that claim during trial.

Rather, it refocused its objections on whether each image/video had been identified on the August 25th list. The court resolved that issue by requiring the government to preview for the defense the files it would show the jury, TTR-II at 138-43, and by excluding any file not identified by August 25, TTR-IV at 638-39. If the defense believed that the government's pretrial identification of images had prejudiced its trial preparation, it could have asked the court to remedy that alleged prejudice by, for example, granting a short continuance. The defense never did so. Defendant acknowledges as much, contending (Br. 13) only that the defense "reminded" the court of the government's alleged over-identification of images. As discussed, that "reminder" came in the context of arguing that any unidentified images should be excluded. By refocusing his objections on that ground, rather than asking the court to remedy the alleged prejudice from any over-identification of images, defendant abandoned, and thereby waived, the claim he raises in this Court. *See United States v. Denkins*, 367 F.3d 537, 542-44 (6th Cir. 2004); *cf. United States v. Sloman*, 909 F.2d 176, 182 (6th Cir. 1990) ("An attorney cannot agree in open court with a judge's proposed course of conduct and then charge the court with error in following that course.").

2. The Court Committed No Error.

If not waived, defendant's claim is subject to plain-error review because he made only a passing complaint at trial about the alleged over-identification of images, rather than a specific request that the court take remedial action. *See* Fed. R. Crim. P. 51(b), 52(b); *United States v. Olano*, 507 U.S. 725, 731-32 (1993). The court did not plainly err (or abuse its discretion) in resolving the identification issue.

Fed. R. Crim. P. 16(a)(1)(E) provides that the government, upon request, must permit the defendant to inspect and copy papers or tangible objects within the government's possession, custody, or control, if the item is material to preparing the defense, intended for use in the government's case-in-chief, or "was obtained from or belongs to the defendant." As defendant conceded in his pretrial motion, the plain language of Rule 16(a)(1)(E) does not require separate identification of the government's case-in-chief evidence. R. 77, p. 2. Rather, it requires only the *production* of documents responsive to any category in (a)(1)(E). *See United States v. Perraud*, 2010 WL 228013, *1, *9-10 (S.D. Fla. Jan. 14, 2010) (so holding and citing cases). The government produced those documents pursuant to the district court's April 5, 2006 order (R. 59).

To be sure, a district court has discretion under Rule 16(d)(1) to order the government to identify its case-in-chief evidence. But, in this case, the government complied with that order, which did not limit the images for identification to child pornography. R. 101, p. 1; *accord* R. 77, p. 3 (defense request not limited to child pornography). Given the risk that unidentified images would be excluded from evidence, the government reasonably identified not only actual photographic and video images, but also .gif files and other files required to produce restored websites.[16]

In any event, the district court did not plainly err in not *sua sponte* taking remedial action, because the government proceeded in good faith and defendant was not prejudiced. *Cf. United States v. Maples*, 60 F.3d 244, 246 (6th Cir. 1995) (factors relevant to whether discovery violation warrants suppression include whether government acted in bad faith and degree of prejudice).

Defendant's charges that the government engaged in "deceitful gamesmanship" (Br. 51) and "a paper dump followed by a false promise" (Br. 54) are baseless. The electronic evidence was voluminous, and the government worked diligently to sort through it and to identify, six weeks before trial even

[16] For example, the government introduced numerous printouts of webpages, which sometime displayed thumbnail images, *see, e.g.*, GX 53, 58, and which were based on .gif and standard files identified on the August 25th list.

began, the images to be introduced in its case-in-chief. As one prosecutor explained, the government included graphic and other web-related files to provide the defense with "more guidance," thinking it was "being more generous and more specific in doing that." TTR-IV at 585. When the defense disagreed, the government worked with it to manage the list of identified files, as the district court noted. R. 241, Tr. at 15 (government "sat down with the defense"). Defendant does not even mention that the government advised the defense on August 30, 2006, that, for evidentiary reasons, many files contained duplicate images, provided suggestions on how to develop a list of unique images, previewed the charges in the second superseding indictment and the websites to which they pertained, and identified the child victims in the subject images/videos. Defendant's failure to acknowledge the government's good-faith efforts in this regard is telling.

Nor should this Court credit defendant's allegation of prejudice (Br. 53-54). The number of identified files was manageable, particularly since the identification occurred six weeks before trial, the majority of identified files were contained in a handful of computer subdirectories, and the government worked to facilitate the defense's review of the files. And defendant can hardly claim

surprise over the images/videos presented at trial when they came from his own websites and computers.

Moreover, the bases for the child pornography charges were not a mystery. The second (R. 115) and third (R. 157) superseding indictments identified the image, video, or Section 2257 notice at issue in many counts, including seven counts of conviction (Counts 2-3, 11, 19, 22-24). The government identified the child victims in the images/videos that were the subject of the charges. And, as the prosecutor informed the court and counsel, most of the pornography used in the government's case-in-chief was admitted by the second trial day – before Lombardi even testified. TTR-II at 273-74; *see also* Def. Br. 51 (acknowledging that, as of 2005, defense was aware of image of Berry and Taylor masturbating). Defendant's trial preparation was not prejudiced by the number of files identified, and the jury's acquittal on ten counts confirms it.

In sum, the district court committed no reversible error by not *sua sponte* giving defendant relief he did not seek for prejudice he did not suffer.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING AGE-LABELED DISCS OF CHILD PORNOGRAPHY INVOLVING LOMBARDI.

Defendant contends (Br. 55-57) that the admission of age-labeled discs of pornography involving Lombardi was reversible error. Defendant is wrong.

A. Background

The discs containing the pornography of Lombardi were introduced through Agent Donahue, who identified the content of each image/video. TTR-II at 120-30, 163-66, 185-94. The discs were labeled with Lombardi's age at production and contained Lombardi's and Donahue's initials. *See, e.g.*, GX 6 ("Age at production:16-17"); GX 14 ("Iceland Age 16-17"); GX 20 ("Ellicott City, MD Age 17"). The images/videos were shown to the jury during Donahue's testimony. TTR-II at 198-200, 221-225.

Defendant objected to the labels on the ground that Lombardi's age at production was not in the record. TTR-II at 120, 132. The government responded that the evidence would be linked up: Lombardi would testify to his age in each image/video, and testify that he had viewed the discs with Agent Donahue before trial and initialed them after seeing Agent Donahue mark them. *Id.* at 121, 134. The government explained that the reason it shows child-pornography exhibits when the case agent testifies is so that the victim does not have to view

pornography of himself in front of the jury. *Id.* The court ruled that the discs of Lombardi could be admitted and published in that manner, but ordered that the labels be excised before the discs went to the jury. *Id.* at 135.

On direct examination, Lombardi identified his handwriting on ten discs; identified the content of, and his age in, each image/video; and testified that he had viewed each image/video with Agent Donahue. TTR-III at 307-13, 328-29. The defense cross-examined Lombardi about his age in particular images and videos. *Id.* at 360-69.

At the conclusion of Lombardi's testimony, the court *sua sponte* commented that it no longer "seem[ed] appropriate" to redact the labels because Lombardi had authenticated them. *Id.* at 394. Defense counsel acknowledged that Lombardi had "identified his initials and the dates" on the discs, but objected to the purported "imprimatur . . . of seeing those ages written on there." *Id.* Counsel did not contend that the age notations were hearsay or inconsistent with Lombardi's testimony. Counsel's "only fear" was that the jury "[might] attach too much significance" to the notations. *Id.* at 394-95. The court disagreed:

> [Lombardi] has fully testified about that. You have cross-examined him and impeached him on things, and it seems to me the jury is either going to believe these things or not, so – because . . . the notations have been fully authenticated, I'm going to overrule your objection.

Id. at 395.

B. Argument

The district court did not abuse its discretion by admitting the age-labeled discs and letting them go to the jury. Those rulings were proper exercises of the court's "considerable discretion" under Fed. R. Evid. 611. *United States v. Moore*, 917 F.2d 215, 222 (6th Cir. 1990).

Rule 611(a) provides, in relevant part, that "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, . . . and (3) protect witnesses from harassment or undue embarrassment." By permitting the government to show the pornography of Lombardi while Agent Donahue testified, with Lombardi then being examined and cross-examined about his age, the district court balanced the need for a presentation of evidence "effective for the ascertainment of the truth" with the need to protect Lombardi from the embarrassment of watching child pornography of himself before the jury.

Defendant does not challenge the sequence of testimony or the court's determination that Lombardi authenticated the age notations. His main claim (Br. 56-57) is one of prejudice – that not redacting the notations was "tantamount to

sending a copy of Lombardi's unimpeached direct examination into the jury deliberations." That claim lacks merit. As the district court pointed out, the defense cross-examined Lombardi about his age in the images/videos, and the jury could decide for itself whether they depicted Lombardi as a minor. *See United States v. Vance*, 871 F.2d 572, 576 (6th Cir. 1989) (district court has "broad discretion" in determining whether danger of unfair prejudice outweighs probative value of evidence). The jury did so. The cross-examination of Lombardi, and defendant's own testimony that Lombardi was 18 in all but one instance (*see* p. 19, *supra*), clearly signaled to the jury that the defense contested the accuracy of the age notations. Moreover, the jury acquitted defendant, despite Lombardi's testimony, on Counts 6, 7, and 9, which were based on images/videos from age-labeled discs.[17] The jury's acceptance of Lombardi's testimony as to other counts hardly shows that the labels "minimized the impact of cross-examination" or "invaded the jury's deliberations," as defendant contends (Br. 55). During deliberations, the jury even asked to see a blown up photo from the

[17] Counts 6 and 7 charged defendant, respectively, with producing and possessing KyleBJ.wmv (age-labeled GX 6); Count 9 charged him with transporting child pornography by distributing it on PenisClub.com. R. 157, pp. 9-10, 12. The material on PenisClub.com included material from age-labeled discs GX 15 and GX 18. *See* GX 59 (App. A6); TTR-IV at 605-09; *see also* Def. Br. 19.

Sydney/Xphotos series depicting Lombardi's handstamp (GX 7) and to see Casey@16 (GX 31), TTR-X at 1642, 1660-61, both of which were from age-labeled discs. TTR-III at 310, 328; *see also* Def. Br. 19.

Defendant's analogy (Br. 56) to cases where the jury is re-read a portion of witness testimony is inapt. The concern there is that the jury might "accord undue emphasis to the testimony" or take the testimony "out of context." *United States v. Epley*, 52 F.3d 571, 579 (6th Cir. 1995). But here, defendant points to nothing indicating that the jury even focused on the disc labels, and the record affirmatively indicates it did not. The district court did not abuse its discretion by not redacting the labels.

Finally, defendant's summary contention (Br. 55) that "[t]he labeling on the discs was inadmissible hearsay" was not raised below. To the extent his contention sufficiently raises a claim on appeal, *see United States v. Sandridge*, 385 F.3d 1032, 1035-36 (6th Cir. 2004), it is reviewable only for plain error. The court did not plainly err in admitting the labels because Lombardi authenticated them and testified about his age in each image/video. The labels were akin to a witness's identification under Fed. R. Evid. 801(d)(1)(C). Defendant cannot show that any error affected his substantial rights.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY LIMITING CROSS-EXAMINATION OF A WITNESS.

Defendant contends (Br. 58-60) that the district court violated the Confrontation Clause by precluding him from cross-examining Jeremy Moeder about Moeder's previous sexual acts involving minors, one of which Moeder filmed. That contention lacks merit.

A. Background

On direct, Moeder testified that he became friends with defendant in 2000; Moeder was then operating a non-pornographic website about being gay and later operated a sexually-explicit website. TTR-III at 416-19. In early January 2002, Moeder met up with defendant in Topeka, Kansas, while defendant was on his way to Las Vegas with a group that included then-underage "Tory" and Natalie. *Id.* at 420-24. Tory appeared in the sexually-explicit video "Tory_DVD.wmv" and film "Paint Tory," which contained scenes, recorded on that trip, of Tory getting body painted. *See* pp. 12-13, *supra*; TTR-V at 950 (Tory_DVD.wmv and Paint Tory had overlapping scenes). Moeder did not observe pornography filmed in Topeka, but he testified that the group had paints with them, and that Natalie, a makeup artist, "was using [them] to do photo shoots when they would paint each other." TTR-III at 424-26. In 2003, Moeder and his boyfriend moved in with

defendant and Lombardi; Moeder ran his website off CaseyandKylesCondo.com. *Id.* at 427-28. Moeder testified, without objection, that if he had been aware that there was child pornography on CaseyandKylesCondo.com, he would not have associated with the site. *Id.* at 428-29. Moeder testified that he had never published child pornography on his websites. *Id.* at 436.

After Moeder's direct testimony, the defense informed the court that it believed Moeder had filmed child pornography. TTR-III at 437. At a hearing on the issue, Moeder testified that he previously (1) had filmed himself performing oral sex on a 15-year-old boy, but never published that material on the Internet, and (2) had engaged in group sex involving a 16-year-old boy, but the sex was not filmed. *Id.* at 439-40. The court precluded defense counsel from cross-examining Moeder about those matters because they did not contradict Moeder's testimony about not posting child pornography on his websites. *Id.* at 440-41. Counsel objected that Moeder had falsely implied that "he would have nothing to do with child pornography," and moved for a mistrial; the court overruled the objection and denied the motion. *Id.* at 441-42. The defense declined to cross-examine Moeder. *Id.* at 441.

B. Argument

The Sixth Amendment gives a defendant the right "to be confronted with the witnesses against him." That clause "guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam) (emphasis in original). "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on [] cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *accord United States v. Beverly*, 369 F.3d 516, 535 (6th Cir. 2004); *see also United States v. Chance*, 306 F.3d 356, 385 (6th Cir. 2002) (noting court's "broad discretion" regarding scope of cross-examination).

The district court did not violate defendant's confrontation right by limiting the scope of Moeder's cross-examination. Moeder's sexual acts involving minors, one of which he filmed, were not relevant. The information did not contradict or undermine Moeder's testimony that he had never published child pornography on the Internet. Moeder did not testify on direct about whether he previously had sexual relations with a minor or had recorded such conduct. Nor did Moeder

imply that he was some "paragon of virtue." TTR-III at 440; *see* Def. Br. 60. In fact, Moeder's direct testimony that he previously had used drugs heavily and was an adult performer provided grounds for challenging his credibility. TTR-III at 418-20, 433-36. Finally, Moeder's past conduct involving minors did not reveal any "bias, prejudice, or motive for testifying," *Stevens v. Bordenkircher*, 746 F.2d 342, 346 (6th Cir. 1984), and was not probative of untruthfulness, *see* Fed. R. Evid. 608(b).

In light of the above, permitting defendant to cross-examine Moeder about conduct that was either not filmed at all or filmed but not distributed could have confused the jury about the issues implicated by his testimony – the timing of, and defendant's involvement in, the Tory_DVD/Paint Tory material. It was therefore reasonable for the district court to set this minor limitation on the scope of cross-examination. *See Beverly*, 369 F.3d at 536.

In any event, any constitutional error was harmless beyond a reasonable doubt. *Van Arsdall*, 475 U.S. at 681-84. During the charge conference, the defense conceded that "we didn't find [Moeder's] testimony to be that damaging, which is why we didn't cross-examine him after the court's ruling on the one area we did want to touch on with him." TTR-VII at 1230. During closing, the defense argued that Moeder "[was] the guy that they roll in here to try to conclusively age

the Paint Tory nonsense images that you saw," and then minimized the import of Moeder's testimony. TTR-IX at 1515-17. Indeed, the jury acquitted defendant of the production and possession charges related to Tory_DVD (Counts 4, 5) and Paint Tory (Counts 25, 26).[18] The narrow limitation on cross-examination did not leave the jury with a false impression of Moeder's credibility.

Nor did any error prejudice defendant on the Lombardi-related counts. As defense counsel was quick to remind the jury, Moeder "knew of no films or pictures made of Patrick Lombardi" as a minor. TTR-IX at 1516. The record, again, fails to support defendant's claim of prejudicial error.[19]

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[18] The conviction on Count 3 was based on the advertising for CaseyandKylesCondo.com in Tory_DVD; it did not implicate Moeder's testimony.

[19] Defendant's summary reliance (Br. 65) on the cumulative-error doctrine is unavailing. "[C]umulative-error analysis is not relevant where," as here, "no individual ruling was erroneous." *United States v. Dietz*, 577 F.3d 672, 697 (6th Cir. 2009), *cert. denied*, 2010 WL 285719 (Mar. 1, 2010). And, for the reasons discussed, none of the alleged evidentiary or discovery errors prejudiced defendant. Defendant cannot show that "the combined effect of individually harmless errors was so prejudicial as to render his trial fundamentally unfair." *United States v. Trujillo*, 376 F.3d 593, 614 (6th Cir. 2004). Defendant mounted a vigorous defense, and many of the lower court's rulings went against the government. Defendant repeatedly attacks the government's evidence (but not its legal sufficiency), *see, e.g.*, Br. 24, and repeatedly disparages the credibility of government witnesses, *see, e.g.*, Br. 20-23, 32-34. But defendant's own testimony was impeached on several points by the government's rebuttal case. *See* pp. 19-20, *supra*. More importantly, as the finder of fact, it was for the jury to decide which evidence to credit. The district court stated: "[w]e had a hard-working jury

V. COUNTS ONE AND SIXTEEN WERE NOT MULTIPLICITOUS.

Defendant contends (Br. 61-64) that Counts 1 and 16 are multiplicitous. Those counts charged him with transporting child pornography via CaseyandKylesCondo.com and CaseysCondo.com, respectively, in violation of § 2252A(a)(1). R. 157, pp. 4, 21. The district court correctly rejected defendant's claim, noting that the websites were "two different channels." R. 226, Hr'g Tr. at 32.

The Fifth Amendment prohibition against double jeopardy protects an individual from receiving multiple punishments for the same offense. *United States v. Davis*, 306 F.3d 398, 417 (6th Cir. 2002). Thus, an indictment generally "may not charge a single criminal offense in several counts." *Id.* Whether conduct is punishable as multiple offenses is largely a question of congressional intent. *See Bell v. United States*, 349 U.S. 81, 82-83 (1955); *Blockburger v. United States*, 284 U.S. 299, 302-03 (1931). Where the charged conduct involves multiple violations of the same statute, the "pertinent inquiry becomes defining the correct unit of prosecution," which "focuses in part on the identification of the key

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that gave a very individualized verdict for this case." R. 399, Sent. Tr. 233. The split verdict underscores that the trial was fair and the government's proof strong on the conviction counts. The Court should reject defendant's perfunctory claim.

element of the federal offense." *United States v. Esch*, 832 F.2d 531, 541 (10th Cir. 1987); *accord United States v. Busacca*, 936 F.2d 232, 239 (6th Cir. 1991).

The language of § 2252A(a)(1) focuses on the acts of *mailing, transporting, or shipping* in interstate commerce "any child pornography." It follows that transporting child pornography via different internet channels, *i.e.*, websites, makes that conduct punishable as separate offenses. *Cf. United States v. Reedy*, 304 F.3d 358, 367-68 (5th Cir. 2002) (defendants convicted of transporting child pornography under § 2252(a)(1) based on operation of website security screening device; holding that counts should have been grouped by website rather than individual image).

Treating the transportation of child pornography via two websites as distinct violations of § 2252A(a)(1) is consistent with cases concluding that the government may separately prosecute each mailing of child pornography, *see United States v. Gallardo*, 915 F.2d 149, 151 (5th Cir. 1990) (§ 2252(a)(1)); each distribution or receipt of a depiction of child pornography, *see United States v. Snyder*, 189 F.3d 640, 646-47 (7th Cir. 1999) (§ 2252(a)(2)); *United States v. Anson*, 304 Fed. Appx. 1, 4 (2d Cir. 2008) (unpublished) (§ 2252A(a)(2)(A), (a)(3)(B)), *cert. denied*, 129 S. Ct. 1687 (2009); and each production of a photograph of child pornography, *see United States v. Esch*, 832 F.2d 531, 541-42

(10th Cir. 1987) (§ 2251(a)). *See also Busacca*, 936 F.2d at 239 (each taking of funds from a plan was separate embezzlement offense); *United States v. Garlick*, 240 F.3d 789, 793-94 (9th Cir. 2001) (each use of wires in furtherance of same scheme was separate fraud offense).

Contrary to defendant's claim (Br. 61), CaseyandKylesCondo.com and CaseysCondo.com were not the same website. Their domain names were different and required separate acts of registration by defendant. TTR-IV at 659-60. Although the websites drew content from the same folder on the BlackSun server, they did not look identical, TTR-V at 782, and Fottrell emphatically disagreed ("certainly not") that the "two sites [we]re really the same thing," *id.* at 749. Indeed, the sites could have drawn different images from the same folder, *id.* at 783, and defendant testified that he re-did some pages for CaseysCondo.com, TTR-VI at 1010. And while CaseysCondo.com eventually replaced CaseyandKylesCondo.com, emails from customers of the sites were consistent with the sites' simultaneous operation at some point. TTR-V at 750, 783-84, 797.

Indeed, trying to attract customers, defendant marketed CaseysCondo.com as a new and different entity. On the site, defendant recounted his history of operating pornographic sites – including CaseyandKylesCondo.com – and stated that his "current website was born" when he returned in September 2004 from

living in Amsterdam and "decided to do things differently." GX 43, pp. 4-5 (App. A4-A5); TTR-IV at 544-45. Boasting that "[o]ver the past few years I have become extremely well known for providing the best gay porn on the net of guys aged 18-25," defendant described "[t]his website [CaseysCondo.com]" as "a collection of all those material." GX 43, p. 5 (App. A5). Accordingly, the transportation of child pornography via CaseyandKylesCondo.com and CaseysCondo.com constituted separate offenses.

Limiting a child pornographer's criminal exposure to one transportation offense because he does not change the server location of material he purveys through different websites would be inconsistent with Congress's intent to stop the sexual abuse of children. *See United States v. Andersson*, 803 F.2d 903, 907 n.3 (7th Cir. 1986) (noting main purpose of child pornography laws). The transportation of child pornography over the Internet not only exacerbates the original harm suffered by child victims (by circulating "a permanent record of the children's participation"), but also feeds the market for material whose production "requires the sexual exploitation of children." *New York v. Ferber*, 458 U.S. 747, 759 (1982). Punishing, through multiple offenses, a defendant who funnels child pornography through different websites to attract new customers is consistent with

redressing the harm from child pornography's dissemination. The Court should reject defendant's claim.

VI. DEFENDANT'S SENTENCE IS SUBSTANTIVELY UNREASONABLE.

Defendant's 16-year sentence fails to reflect the seriousness of his offense conduct, the gravity of his sexual relationship with a 13-year-old boy, or his post-arrest conduct in jail. The sentence is substantively unreasonable.

A. Background

1. Presentence Report ("PSR")

The PSR separated defendant's convictions into three groups; the lead group concerned CaseysCondo.com and CaseyandKylesCondo.com. PSR ¶¶ 22-49. The PSR applied a base offense level for that group of 22, U.S.S.G. § 2G2.2(a)(2) (2006), and enhancements for:

- distributing material for pecuniary gain, *id.* § 2G2.2(b)(3)(A);
- engaging in a pattern of sexual activity involving the sexual abuse/exploitation of a minor, *id.* § 2G2.2(b)(5);
- using a computer, *id.* § 2G2.2(b)(6);
- involvement of 600 or more images of child pornography, *id.* § 2G2.2(b)(7)(D);
- being an organizer/leader/manager/supervisor of criminal activity, *id.* § 3B1.1(c); and

- engaging in a pattern of prohibited sexual conduct, where conviction was for a covered sex crime, *id.* § 4B1.5(b).

PSR ¶¶ 24-30, 50. With a total offense level of 48 and a category-I criminal history, defendant's Guidelines sentence was life imprisonment. *Id.* ¶¶ 52, 55, 81.

The PSR reported that in 2005, defendant (then 22-23) had been living in Nashville with a 13-year-old boy ("Doe"), whom defendant had met through Doe's mother. Defendant had earlier married Doe's mother. PSR ¶ 63.

2. Sentencing Hearing

Three government witnesses testified at sentencing. Martha Finnegan, an expert in the field of child exploitation, testified that adolescent victims of such crimes often "participate[] in their own victimization" for several reasons, including because they are vulnerable to flattery. R. 399 (hereafter "Sent. Tr.") at 8-9. Finnegan found that Lombardi's "behaviors and actions [we]re very consistent with what is typical of a compliant victim." *Id.* at 19.

Agent Donahue testified about defendant's blogging from jail (apparently through someone not incarcerated) on a website he created, GayBoyInJail.blogsport.com, and defendant's relationship with Doe *Id.* at 30-33, 53-54. Defendant blogged about Lombardi and Doe and about his experiences in jail, including his sexual activities with an inmate and his violation of jail rules.

See Gov't Sent. Ex. ("GSX") 4 (compiling notable blog quotes) (App. A7-A20). Defendant repeatedly called Lombardi a "liar" and "cheater." *Id.* at 6-7 (App. A12-A13). He revealed that he had been having a sexual relationship with Doe, *see id.* at 8-11 (App. A14-A17), whom he called "Mountain Goat" or "Number 2," Sent. Tr. at 53-54. He professed that "[a] gay 13 year-old and 23 year-old can love each other without either of us being a predator," GSX 4 at 10 (App. A16), and bragged about the "many locations" where he and Doe had sex, *id.* at 9 (App. A15). Agent Donahue testified about photos found on defendant's home computer, including one (GSX 17) of defendant and Doe kissing, and chat communications between defendant and Doe, including one (GSX 21, App. A21-A26) where defendant wrote "Love you, Sugar [Doe]" and "I'm going to have a shirt printed that says 'married.'" Sent. Tr. at 51-52, 58; *see also id.* at 62-64 (according to Aaron Brown, defendant and Doe slept in the same room together).

Government forensics expert Christy Witsman testified about, *inter alia*, messages (GSX 36) from defendant to Doe extracted from defendant's home-computer email, which contained nude images of defendant, sometimes masturbating. *Id.* at 128-30.

The government introduced defendant's record from jail, which showed disciplinary infractions. *Id.* at 146.

The district court overruled defendant's objections to the PSR's Guidelines calculations and, with limited exception, adopted the PSR's factual findings. *Id.* at 161-69, 179.

In mitigation, defendant's father testified, *inter alia*, that defendant was unable to "separate the [online] persona of Casey from the persona of Tim." *Id.* at 192. Defendant allocuted, apologizing to his parents. *Id.* at 193. Defendant said that he had been "tricked" into pornography as a child through his online interaction with an adult and had become "trapped" in it as an adult. *Id.* at 194-95, 207. Defendant "regret[ted]" not being "more responsible" when he and Lombardi were together. *Id.* at 201. Asked by the court to explain his jailhouse blogging, defendant said that blogging was his form of escape and that he had exaggerated and made things up. *Id.* at 202-04.

The district court saw this as an "atypical case of child pornography," noting that Lombardi was not a "totally innocent victim"; that defendant and Lombardi had "a committed relationship between two consenting people"; that their four-year age difference "was not that big"; and that "[b]oth sets of parents knew about the relationship." *Id.* at 233-35; *see id.* at 235 ("This was gay teenage boy activity . . . ."). The court characterized defendant's blogging as "totally outrageous," but found that he was "addicted" to the Internet, pornography, and

sex. *Id.* at 236. While acknowledging that defendant was "making alcohol, violating prison rules," and "having sexual relations apparently nonstop in the jail," the court saw "remorse and regret and hopes for the future" in him, cited character letters submitted on his behalf, and said it believed treatment for mental health issues "could bring about some reform." *Id.* at 237-38. The court sentenced defendant to sixteen years of imprisonment, to be followed by eight years of supervised release. *Id.* at 238-39. The government objected to the "very low sentence." *Id.* at 241.

The court's statement of reasons largely tracked its oral justification for the sentence, but also addressed defendant's relationship with Doe. R. 393, Ex. A (hereafter "Statement of Reasons"). The court found that defendant had befriended Doe's mother when Doe was 11 or 12 and married her, but that, at the time of his arrest, defendant was living only with Doe. *Id.* at 2. The court found that defendant was in a sexual relationship with Doe, but noted that it was with the knowledge of Doe's mother and that no pornography involving Doe, if any existed, was charged in this case. *Id.*[20]

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[20] The minor to whom defendant transferred obscene material, as charged in Count 27, was Doe. The court severed that count and dismissed it on the government's motion. R. 165, 230.

B. Argument

"A sentence is substantively unreasonable if the district court selects a sentence arbitrarily, bases the sentence on impermissible factors, fails to consider relevant sentencing factors, or gives an unreasonable amount of weight to any pertinent factor." *United States v. Camiscione*, 591 F.3d 823, 832 (6th Cir. 2010) (internal quotation marks and citation omitted). Although the Supreme Court in *Gall* rejected a requirement that "'extraordinary circumstances' [] justify a sentence outside the Guidelines range," 552 U.S. at 47, it permitted "appellate courts to require some correlation between the extent of a variance and the justification for it," *United States v. Grossman*, 513 F.3d 592, 596 (6th Cir. 2008). Thus, while a reviewing court should give "due deference to the district court's decision that the [18 U.S.C.] § 3553(a) factors, on a whole, justify the extent of the variance," it remains "uncontroversial that a major departure should be supported by a more significant justification than a minor one." *Gall*, 552 U.S. at 50-51.

The court's downward variance here – from life to 16 years' imprisonment – was excessive. The sentence is only one year above the mandatory minimum that defendant faced on just one count of producing child pornography, 18 U.S.C. §§ 2251(a), (e), and fails to reflect the seriousness of his overall offense conduct,

see *id.* § 3553(a)(2). Defendant not only produced child pornography, but advertised and distributed it for profit through multiple websites. That defendant's websites mostly contained adult pornography, Statement of Reasons at 1, does not diminish his culpability for the child pornography he did distribute, which he conceded involved more than 600 images. Sent. Tr. at 162. The 16-year sentence "erase[d]" many offense-level enhancements that the court applied. *United States v. Fink*, 502 F.3d 585, 590 (6th Cir. 2007) (vacating 70-month sentence in child pornography case where Guidelines range was 188-235 months).

The court also unduly minimized the seriousness of defendant's crimes when it noted that they involved adolescent boys, rather than babies, children, or girls. Statement of Reasons at 1. The victims in defendant's material were still underage and vulnerable, and he deserved no credit for not preying on even younger, more vulnerable victims. As the sentencing testimony showed, adolescents are often "compliant victims" of sexual exploitation; they are curious about their sexuality and can be susceptible to manipulation and flattery by the abuser – often, as in Lombardi's case, as a result of difficulties at home. Sent. Tr. at 8-12. Lombardi was no less vulnerable simply because his parents were unable or unwilling to protect him, and this is so even though he operated his own website before meeting defendant – a website he started out of loneliness. *See* p. 8

n.3, *supra*.[21] Nor could Lombardi, a minor four years younger than defendant, legally consent to a sexual relationship with defendant. *See United States v. Wise*, 278 Fed. Appx. 552, 559 (6th Cir. 2008) (unpublished).

In addition to minimizing the offense conduct, the district court gave undue weight to certain factors in defendant's history and circumstances to the exclusion of others. *See* 18 U.S.C. § 3553(a)(1). The court came to view defendant himself as a victim based on his self-serving claim (and the statements of his father and lawyer) that he had been "tricked" and "trapped" into pornography. Sent. Tr. at 207. The court saw "remorse and regret" in defendant, *id.* at 237, but that perception was based on defendant's self-serving statements.

By contrast, defendant's post-arrest conduct showed neither remorse nor acceptance of responsibility. In his blog, defendant repeatedly called Lombardi a liar and accused the government of persecuting him. *See, e.g.*, GSX 4 at 1 (App. A7) ("I remain a political prisoner of war fighting for an unpopular cause. The right to live my life, produce gay pornography, date whomever I want without interference from the US government."); *id.* ("Federal Government, Suck My D***!"); *id.* at 7 (App. A13) (asserting that Lombardi gave "false testimony").

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[21] The trial photos (*e.g.*, GX 11) and videos (*e.g.*, GX 31) showing a still-developing Lombardi and a mature defendant Richards underscores the court's failure to recognize the significance of their age difference.

Defendant bragged about violating prison rules, *see id.* at 2-4 (App. A8-A10), a fact that the district court itself acknowledged, Sent. Tr. 237-38, but erred in discounting. *Cf. United States v. Beach*, 275 Fed. Appx. 529, 532-35 (6th Cir. 2008) (unpublished) (noting relevance of defendant's remorse and voluntary cessation of child pornography activity).

Even more disturbing was the district court's failure to give due weight to defendant's exploitation of Doe, whom defendant "befriended" when Doe was 11 or 12 and defendant was about 22 years old. Statement of Reasons at 2. Defendant, who is openly gay, married Doe's mother, presumably so that he would have easy and continuous access to Doe. The district court found that defendant was in a sexual relationship with Doe, but justified the abuse on the ground that Doe's mother knew about it. *Id.* The indifference of Doe's mother, however, no more excuses defendant's criminal exploitation of Doe than the failure of Lombardi's parents to protect him excused defendant's exploitation of Lombardi. Defendant bragged about having sex with Doe "in many locations," and even alluded unwittingly to Doe's vulnerability: "[Doe] was having trouble being gay. He lived in horrible conditions and had an abusive father. He got with me and his world changed. The feds came to take me away." GSX 4 at 9-10 (App. A15-

A16). The court's understatement of defendant's exploitation of his victims was a profound error of judgment.

The sentence here does not adequately protect minors from further sexual predation by defendant. 18 U.S.C. § 3553(2)(C). At a minimum, the court should have considered a lengthier term of supervised release. *Cf. United States v. Brinda*, 321 Fed. Appx. 464, 467-68 (6th Cir.) (unpublished) (upholding lifetime of supervised release for receiving child pornography), *cert. denied*, 130 S. Ct. 261 (2009).

The court appeared to view its sentencing option as a choice between 16 years' or life imprisonment. *See* Statement of Reasons at 3-4. But the court could have imposed an intermediate prison term that balanced the seriousness of defendant's conduct, the threat he poses to minors, and the need to promote deterrence and respect for the law with the mitigating factors it discerned in the case. A sentence that is only one year above the mandatory-minimum sentence for a production offense – where the defendant advertised and distributed child pornography and sexually exploited two adolescents (bragging about that exploitation from prison) – "leaves virtually no room to make future distinctions between [defendant's] case and the cases of worthy defendants that exhibit more

compelling factual circumstances." *Fink*, 502 F.3d at 589.[22] The district court's rationale is distorted and unsound, and does not support the extraordinary variance imposed. Defendant's sentence is substantively unreasonable.

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[22] Citing two cases involving downward variances, *United States v. Grossman*, *supra*, and *United States v. Beach*, *supra*, the district court concluded that its sentence would not "result in unwarranted sentence disparities with similar records who have been guilty of similar conduct." Statement of Reasons at 3. But neither case involved a production offense or the conduct present here. In any event, the need to avoid sentencing disparities under § 3553(a)(6) concerns national disparities, not disparities between specific cases, and "the Guidelines themselves represent the best indication of national sentencing practices." *United States v. Houston*, 529 F.3d 743, 752 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 2764 (2009).

CONCLUSION

The Court should affirm defendant's convictions, vacate his sentence, and remand the case for resentencing.

Respectfully submitted,

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March 15, 2010

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B). Excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 16,456 words in Times New Roman (14 point) proportional type. The word processing software used to prepare this brief was WordPerfect X4 for Windows XP.

s/John-Alex Romano

John-Alex Romano

March 15, 2010

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a copy of the foregoing Brief for the United States was served this 15th day of March 2010, by filing it with the Court's CM/ECF system, upon the following counsel for defendant-appellant/cross-appellee:

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ADDENDUM – DESIGNATION OF DISTRICT COURT DOCUMENTS

Pursuant to 6th Cir. R. 30, the United States hereby designates the following portions of the record below not already designated by Defendant-Appellant.

Description of Item	**Date filed with District Court**	**Record Entry No.**
Discovery Order	04/05/06	R. 59
Gov't Resp. to Mot. for Identification of Images	06/19/06	R. 85
Gov't Resp. to Mot. to Suppress Fruits of Seizures and Subsequent Searches of Computer Servers	06/19/06	R. 86
Notice of Filing of Attachments to Resp. to Mot. to Suppress: Ex. 87A (search warrant for BlackSun server); Ex. 87B (search warrant for Hurricane Electric server); Ex. 87C (search warrants for defendant's Nashville homes).	06/20/06	R. 87
Gov't Resp. to Mot. to Compel Compliance with Identification Order	09/04/06	R. 108
Trial Exhibit/Witness List	10/26/06	R. 201
Presentence Report (as revised 07-18/07); first addendum (07/18/07); second addendum (10/07/08)	n/a	n/a
Sentencing Exhibit List	11/07/08	R. 379
Sealed Statement of Reasons	12/01/08	R. 393 (Ex. A)
Defendant's Notice of Appeal as to Amended Judgment	12/05/08	R. 395

Gov't Notice of Appeal as to Amended Judgment	12/10/08	R. 397
Sentencing Transcript	02/05/09	R. 399

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AUTHORIZATION TO PROSECUTE AN APPEAL UNDER THE SENTENCING REFORM ACT OF 1984, AS AMENDED

UNITED STATES OF AMERICA,

Plaintiff-Appellee/Cross-Appellant,

v.

TIMOTHY RYAN RICHARDS,

Defendant-Appellant/Cross-Appellee.

Pursuant to the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. 2, § 213, 98 Stat. 2011-2012, as amended by the Crime Control Act of 1990, Pub. L. No. 101-647, Tit. XXXV, § 3501, 104 Stat. 4921 (codified at 18 U.S.C. 3742(b)), I hereby approve the further prosecution of this appeal.

Elena Kagan

Solicitor General

June 17, 2009

Date