No. _____

In The

Supreme Court of the United States

KENNETH SCHNEIDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

HOWARD J. BASHMAN*
LAW OFFICES OF
HOWARD J. BASHMAN
2300 Computer Avenue
Suite G-22
Willow Grove, PA 19090
(215) 830-1458
hjb@hjbashman.com

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether applicability of the extended statute of limitations set forth in 18 U.S.C. §3283 – for "an offense involving the sexual or physical abuse of a child under the age of 18 years" – should be determined based on a categorical approach considering solely the elements of the charged offense, as the Fifth and Eighth Circuits have held, or based on a defendant's alleged uncharged conduct before and after the charged offense occurred, as the Third Circuit ruled in this case.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

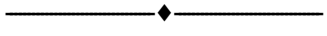
PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Third Circuit (App., *infra*, 1a-40a) is reported at 801 F.3d 186 (2015). The decision of the U.S. District Court for the Eastern District of Pennsylvania setting aside petitioner Kenneth Schneider's conviction under 18 U.S.C. §2421 but upholding Schneider's conviction under 18 U.S.C. §2423(b) (App., *infra*, 56a-100a) is reported at 817 F. Supp. 2d 586 (2011). The district court's pretrial decision issued September 15, 2010 denying Schneider's motion to dismiss both counts of the criminal indictment due to expiration of the five-year statute of limitations (App., *infra*, 102a-14a) is unreported.

JURISDICTION

The Third Circuit's judgment was entered on September 9, 2015. (App., *infra*, 41a-42a.). On October 5, 2015, the Third Circuit issued an order denying Schneider's petition for rehearing and suggestion for rehearing en banc. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).



STATUTORY PROVISIONS INVOLVED

The version of 18 U.S.C. §3283 in effect at the time of the crime of conviction provided that:

> No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse of a child under the age of 18 years shall preclude such prosecution before the child reaches the age of 25 years.

18 U.S.C. §3283 (2000).

And the version of 18 U.S.C. §2423(b) that Schneider was convicted of violating provides, in pertinent part:

> **Travel with intent to engage in sexual act with a juvenile.** – A person who travels in interstate commerce, or conspires to do so, or a United States citizen * * * who travels in foreign commerce, or conspires to do so, for the purpose of engaging in any sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States shall be fined under this title, imprisoned not more than 15 years, or both.

18 U.S.C. §2423(b) (2000).

STATEMENT

The Third Circuit in this case created a split among the circuits on an important issue of federal law: namely, whether applicability of the extended statute of limitations titled "Offenses against children" set forth in 18 U.S.C. §3283 is determined based on the elements of the offense charged, as the Fifth and Eighth Circuits have held, or based on a defendant's alleged uncharged conduct before and after the charged offense occurred, as the Third Circuit held in this case.

As explained herein, if defendant Kenneth Schneider had been indicted in 2010 in either the Fifth or Eighth Circuit for violating 18 U.S.C. §2423(b) for travel that occurred in 2001, those courts of appeals would have ruled that the statute of limitations extension contained in 18 U.S.C. §3283 did not apply, and Schneider's prosecution would have been time-barred under the general five-year federal statute of limitations for criminal offenses found in 18 U.S.C. §3282(a).

But, because Schneider was instead indicted in the Third Circuit, Schneider's indictment was timely under the rationale that the court of appeals applied in this case.

If the Third Circuit's approach is correct, defendants who could otherwise be criminally convicted of offenses relating to children are escaping federal prosecution in the Fifth and Eighth Circuits. And if the approach of the Fifth and Eighth Circuits is

correct, as Schneider seeks to demonstrate, then he is unlawfully being required to serve the balance of a 15-year federal criminal sentence, and others facing similar offenses indicted in the Third Circuit will also be required to defend against and possibly serve terms of imprisonment for offenses for which any prosecution should have been precluded as time-barred.

A. Relevant Factual Background[1]

On August 22, 2001, Kenneth Schneider, then a 36-year-old American citizen, returned to his home and employment of many years in Moscow, Russia, on the return leg of a pre-booked, annual round-trip visit to the United States to spend time with his parents in Berwyn, Pennsylvania and to perform certain work-related tasks. CA3 App.1544a.

Traveling with him both ways, also on a pre-scheduled basis, was Roman Zavarov, then a 15½-year-old Russian citizen, whom Schneider had allowed to stay at his home in Moscow on some weekdays for Zavarov's convenience, at the request and with the permission of Zavarov's parents, during the previous three years while Zavarov attended the

[1] The case went to trial with Schneider asserting and testifying under oath to his complete innocence. This recitation of the facts is based on the district court's description of facts in its opinion denying post-trial motions, 817 F. Supp. 2d 586, 590-93 (E.D. Pa. 2011); App., *infra*, at 57a-64a. This recitation does not constitute an admission by Schneider that any of the "facts" set forth herein are true.

prestigious Bolshoi Academy, which happened to be nearby. CA3 App.1426a-27a, 1465a, 1544a. Zavarov testified at trial that during the year immediately preceding the round-trip from Moscow to Philadelphia with Schneider in the summer of 2001, he and Schneider had engaged in sexual activity. CA3 App.466a-67a.

In 1998, when Zavarov was 12 years old, he had been prevented from continuing to attend the Bolshoi Academy because his parents defaulted over an extended period in paying his dormitory fees. CA3 App.309a-10a, 433a. Zavarov's parents wanted their son to continue his professional training and considered sending him to an equally prestigious academy in St. Petersburg, where he could attend and live for free. CA3 App.269a-70a. That summer, by coincidence, Schneider met Zavarov's former Bolshoi Academy instructor, Tatiana Dokukina, and her husband, Nikolai Dokukin, at a cultural event. CA3 App.718a. The Dokukins raised the possibility of Schneider's helping Zavarov, as Schneider had for some time been working in Moscow as an attorney on behalf of a major New York-based law firm and had expressed an interest in creating a charitable organization to support gifted artists in the former Soviet Union. CA3 App.723a-25a, 731a-32a.

Schneider had recently begun assisting the Academy, arranging for his firm to donate furniture to it, sponsoring needed footwear for the students, and providing grants to the instructors. CA3 App.694a. Dokukina told Schneider about Zavarov's

expulsion and asked if Schneider would be willing to help Zavarov as well. CA3 App.694a-95. Schneider indicated he might be willing to help but told Dokukina that Zavarov's potential had to be assessed and that Dokukin – a leading instructor at the Academy – would be the best judge of Zavarov's potential. CA3 App.1397a.

Schneider and the Dokukins went to Zavarov's house and asked him to perform some standard Academy audition exercises, and they videotaped this demonstration for possible use in having Zavarov admitted for further training at the Academy or elsewhere. CA3 App.439a, 441a-43a, 563a. During the demonstration, Dokukina told Schneider, "if you show this recording, they will grab him for ballet and throw you into the bargain. They'll be asking where did you dig up this treasure?" CA3 App.301a. Dokukina testified that having such a tape would provide Zavarov a "huge chance to be admitted to school." CA3 App.739a.

Zavarov's parents were interested in having Schneider help their son and agreed to additional meetings with Schneider. During one of these meetings, Zavarov's father asked Schneider for a loan so that he could repay the debt he owed to the Academy for Zavarov's delinquent dorm fees. CA3 App.278a-79a. Schneider agreed, loaning Zavarov's father 4,300 rubles, approximately $470 (U.S.) at the time. CA3 App.279a. The Zavarovs promised to repay the loan over four months, although with Schneider's indulgence

they did not fully repay the loan until two years later. CA3 App.282a-84a, 354a-55a.

When Zavarov was finally re-admitted to the Academy on the first day of its term, Schneider offered to allow Zavarov to stay temporarily at his home in Moscow, as Zavarov had not been allowed to re-enroll in the Academy dormitory following the earlier default that brought about his expulsion. CA3 App.1426a-27a. Zavarov's father, who operated an illegal gypsy cab in Moscow at the time, could have driven his son to the Academy each day, which would have allowed Zavarov to reside at home, but his parents did not want to do that. CA3 App.1422a-23a. Zavarov's parents also did not wish for their son to commute using public transportation to and from the Academy, even though that was another option that would have allowed Zavarov to reside at home. *Id.*

Before Zavarov began spending time at Schneider's home, the Zavarov family visited Schneider's apartment. The Zavarovs were satisfied with the arrangements, and Schneider made accommodations to ensure Zavarov's privacy. CA3 App.333a, 1443a.

When the new Academy term started, Zavarov began staying with Schneider on school nights, to avoid the commute from his parents' home, returning to his family's home for all weekends, holidays, illnesses, and vacations. CA3 App.464a-65a. It was uncontested that Schneider never interfered with Zavarov's choice of when to telephone or go home, which Zavarov did on a regular basis. CA3 App.331a.

While staying at Schneider's apartment, Zavarov was primarily taken care of by Schneider's housekeeper who lived across the hall, Ludmila Kozyreva. CA3 App.487a, 1022a. Kozyreva woke Zavarov up, prepared his breakfast, helped him get ready for school, watched him after school, and prepared his dinner. CA3 App.1028a-29a. Because the Zavarovs did not know Schneider well, Zavarov's father advised his son to tell Kozyreva immediately if he was ever mistreated by Schneider. CA3 App.257a. Kozyreva had her own keys to the apartment and was in and out all the time. CA3 App.1068a. During the periods when Zavarov stayed with Schneider, Schneider provided his food, some of his clothing, and some other items for Zavarov. CA3 App.463a. Schneider also arranged for Dokukin to provide a few training sessions to Zavarov, *id.*, and provided Zavarov with a cellular phone, which Zavarov often used to call or receive calls from his parents or anyone else at any time. CA3 App.421a. The Dokukins never saw anything improper between Schneider and Zavarov. CA3 App.750a. Neither did Kozyreva, the housekeeper. CA3 App.1059a.

In 2001, when Zavarov was 15 years old, he applied to summer training programs in the United States and elsewhere, and Schneider agreed to accompany Zavarov to Philadelphia when he was accepted on a full scholarship (including round-trip airfare) to study there at the Rock School for a short summer training program, as this coincided with Schneider's annual vacation to visit his family in

Berwyn, Pennsylvania, a trip he had made every summer since moving abroad in 1994. CA3 App.497a, 581a-82a. Zavarov testified that, in the year before he and Schneider traveled to Philadelphia, Schneider had been engaging in sexual conduct with him approximately three to four times a week. CA3 App.466a-67a. Schneider, testifying in his own defense, denied ever engaging in sexual conduct with Zavarov. CA3 App.1516a.

Zavarov said that he thought of Schneider as his friend and role model. CA3 App.503a. In an essay he later wrote as part of his application for yet another prestigious performing arts academy in 2002, Zavarov said Schneider had made him very happy by re-enrolling him in the Bolshoi Academy and by helping him with any problems he had, describing Schneider as a "friend" and "second father." CA3 App.593a.

Upon Schneider and Zavarov's arrival in Philadelphia, Zavarov stayed with Schneider's parents at their home in suburban Berwyn. CA3 App.499a. In his direct examination, Zavarov testified that Schneider had stayed in Berwyn throughout the entire trip. CA3 App.499a-501a. But, during his cross-examination, Zavarov testified that Schneider did not stay in Berwyn most of the time Zavarov was there, because Schneider was traveling for work, only visiting occasionally. CA3 App.582a-83a. It is undisputed that Schneider and Zavarov did not engage in any unlawful sexual activity while in the United States. CA3 App.500a-01a.

On August 22, 2001, Schneider and Zavarov returned from Philadelphia to Moscow, as originally scheduled, on the return leg of the same round-trip flights that had brought them to Philadelphia three weeks earlier. CA3 App.1544a. After arriving in Moscow, Zavarov went directly to his parents' house in Frazino – a nearby town – and stayed with them for over a week before returning to his studies at the Academy. CA3 App.323a-24a, 1479a. When Zavarov returned to the Academy, he chose to resume staying at Schneider's very large apartment on school nights. CA3 App.1479a-80a. According to Zavarov, the sexual activity between Schneider and Zavarov resumed after his return to the Academy, though occurring less frequently than before the visit to Philadelphia. CA3 App.502a.

Despite spending a considerable amount of time with them from 1998 to 2002, and speaking with them frequently, Zavarov never told his parents that he had been mistreated in any way or subjected to any sexual contact whatsoever by Schneider. CA3 App.289a, 394a. Zavarov eventually moved to the United States to graduate from an elite New England prep school, CA3 App.611a-12a, 1493a-94a, and then to perform with several of this country's most prestigious ballet companies in New York, Boston, and Phoenix. CA3 App.508a, 614a, 616a, 1495a-96a. In 2008, Zavarov told his wife, Gina D'Amico – whom he had married in 2007 when he was 20 and she was 18, only six months after they had met, to assure his continued ability to reside in the United States – that

Schneider had sexually abused him while he stayed with Schneider in Russia. CA3 App.523a, 1146a.

Approximately two months later, after demanding $20 million in damages, Zavarov and his wife filed a civil lawsuit against Schneider, members of Schneider's family, and the charity they supported, asserting claims based on this alleged sexual abuse. CA3 App.536a-37a, 1570a-79a. After Zavarov and D'Amico jointly filed suit, their lawyers in the civil case contacted prosecutors to see if they would be willing to pursue criminal charges against Schneider. CA3 App.1158a-69a. This federal prosecution eventually ensued.

B. The District Court Proceedings

This case began with the filing of a sealed criminal complaint in the Eastern District of Pennsylvania on December 4, 2009. CA3 App.76a. On January 14, 2010, petitioner Kenneth Schneider was charged in a two-count indictment filed under seal. CA3 App.106a-08a. Count one alleged a violation of 18 U.S.C. §2423(b) (traveling in foreign commerce for the purpose of engaging in sex with a minor), and count two charged a violation of 18 U.S.C. §2421 (a "Mann Act" charge of transporting a person with intent to engage in sexual activity in violation of foreign criminal law). Both offenses are alleged to have occurred on the same, single occasion – that is, on August 22, 2001 – when Schneider returned to his home and employment in Moscow from his annual summer visit to his

parents, who reside in suburban Philadelphia, on the same flights that the alleged victim used to return to his own family's home in Frazino, a town located near Moscow.

Schneider was taken into custody in Cyprus on March 27, 2010 and was released on bail March 29. CA3 App.1314a. On March 30, 2010, the indictment was unsealed. CA3 App.76a. Schneider returned to custody on May 17, 2010, upon his voluntary surrender to the court in Cyprus, after consenting to extradition in connection with this case. CA3 App.1314a-15a.

Schneider was brought to the Federal Detention Center in Philadelphia on May 28, 2010. CA3 App.77a. Schneider has remained continuously in custody throughout the pretrial, trial, and post-trial periods, and has since served nearly six years of his 15-year sentence while pursuing his appellate remedies.

On September 15, 2010, the district court denied a pretrial motion to dismiss the charges on statute of limitations grounds. App., *infra*, 102a-14a.

Trial commenced on September 21, 2010 before Judge Sánchez and a jury. CA3 App.203a. The government rested its case on September 27. On October 14, 2010, after the close of all the evidence, argument of counsel, and the jury charge, the jury returned verdicts of guilty on both counts. CA3 App.89a. On post-trial motions, by order filed September 21, 2011, the district court granted a judgment of acquittal on count two pursuant to *Mortensen v. United States*,

322 U.S. 369, 375 (1944). App., *infra*, 76a. However, the district court upheld Schneider's conviction on count one based on a view that *Mortensen* did not require an acquittal on that charge. App., *infra*, 79a.

A sentencing hearing began on the afternoon of November 30, 2011 and concluded on December 1, 2011. CA3 App.2117a-291a. The district court adopted the PSI with certain changes. CA3 App.2294a-300a. Although the defense had argued that the Sentencing Guidelines, properly applied, produced a range of 33-41 months, the district court calculated the applicable Guidelines range as 168-210 months (capped by the statutory maximum at 180 months). CA3 App.2157a-58a. On December 1, 2011, the district court imposed sentence, consisting of a 180-month term of imprisonment and $35,000 in restitution. CA3 App.2285a-88a.

An amended judgment was filed January 17, 2012. App., *infra*, 43a-55a. Schneider thereafter timely appealed to the Third Circuit from the judgment of conviction and sentence. CA3 App.1a.

C. The Third Circuit's Decision

Following briefing and oral argument, the Third Circuit held in a precedential opinion issued on September 9, 2015 that "a violation of §2423(b) for 'travel[ing] in foreign commerce . . . for the purpose of engaging in any sexual act . . . with a person under 18 years of age that would be in violation of chapter 109A,' 18 U.S.C. §2423(b) (2000), involves the sexual

abuse of a person under age 18" for purposes of the extended statute of limitations contained in 18 U.S.C. §3283. App., *infra*, at 19a.

The Third Circuit based its holding on conduct that Schneider was alleged to have engaged in Russia before briefly visiting the United States in late July 2001 and after his travel back to his home in Russia on August 22, 2001, even though that alleged conduct was disputed and denied by the defendant and was not the subject of any findings by the jury to establish the timeliness of this §2423(b) prosecution. App., *infra*, at 20a.

Thus, based on Schneider's alleged uncharged conduct occurring before and after the lone offense Schneider stands convicted of committing, the Third Circuit held that Schneider's conviction for having violated §2423(b) constituted "an offense involving the sexual or physical abuse of a child under the age of 18 years," even though during the flight to Moscow on August 22, 2001 – which contained both the beginning and end points of Schneider's travel in violation of §2423(b) – it is undisputed that no sexual abuse of a child (or otherwise improper conduct of any nature) occurred.

The Third Circuit panel also rejected all of Schneider's other arguments for setting aside the judgment of conviction, for a new trial, and for resentencing. App., *infra*, at 1a-40a.

Schneider filed a timely petition for rehearing with suggestion for rehearing en banc, focusing on

the statute of limitations issue that is the subject of this Petition for a Writ of Certiorari. The rehearing petition asserted that rehearing en banc was proper, among other reasons, because the Third Circuit's decision gave rise to a circuit split with the Fifth and Eighth Circuits concerning whether the extended statute of limitations in 18 U.S.C. §3283 should apply based on a categorical approach, focused on the elements of the charged offense, as the Fifth and Eighth Circuits have held, or based on a defendant's alleged uncharged conduct occurring before and after the charged offense, as the Third Circuit held in this case.

On October 5, 2015, the Third Circuit denied Schneider's petition for rehearing with suggestion for rehearing en banc, allowing the circuit split that is the subject of this petition to persist and necessitating this Court's intervention to address and resolve that critically significant division of authority.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Divided As To Whether The Extended Statute Of Limitations In 18 U.S.C. §3283 Should Apply Based On A Categorical Approach Focused On The Elements Of The Charged Offense Or Based On A Defendant's Alleged Uncharged Conduct Before And After The Charged Offense

Petitioner Kenneth Schneider stands convicted of a single federal criminal offense, one count of having

violated 18 U.S.C. §2423(b) for having traveled from Philadelphia, Pennsylvania (on his annual visit to see his elderly parents) to return to his home in Moscow, Russia (where he worked as an attorney) on August 22, 2001. Schneider was indicted for this offense on January 14, 2010, more than eight years later.

The statute of limitations for a non-capital offense is five years "except as otherwise expressly provided by law." 18 U.S.C. §3282(a). Here, the district court ruled, and the Third Circuit thereafter has affirmed in conflict with the Fifth and Eighth Circuits, that the indictment was timely under 18 U.S.C. §3283, a provision extending the limitations period for offenses involving the "sexual abuse" of a child.

It is undisputed that, if §3283 applies, the indictment was timely, but if §3283 does not apply, then the indictment must be dismissed as time-barred and Schneider's conviction vacated.

As demonstrated below, the Third Circuit's ruling in this case directly conflicts with the categorical, elements-based approach that two other federal appellate courts have employed in determining whether a charged federal criminal offense constitutes "an offense involving the sexual or physical abuse of a child under the age of 18 years" so as to make applicable the extended statute of limitations contained in 18 U.S.C. §3283. Thus, the Third Circuit's ruling in this case has created a circuit split on that important question of federal law, necessitating this Court's review and resolution.

A. The Fifth and Eighth Circuits correctly apply a categorical, elements-based approach to determining whether the extended statute of limitations contained in 18 U.S.C. §3283 applies to a charged offense

The Third Circuit's statute of limitations holding in this case squarely conflicts with the Eighth Circuit's ruling in *United States v. Coutentos*, 651 F.3d 809, 816-17 (8th Cir. 2011), and the Fifth Circuit's ruling in *United States v. Diehl*, 775 F.3d 714, 720 (5th Cir. 2015).

In *Coutentos*, the Eighth Circuit examined whether the extended statute of limitations provided in 18 U.S.C. §3283 applied to render timely a defendant's criminal prosecution for (1) producing child pornography and (2) thereafter possessing the very child pornography that he had previously produced. *See* 651 F.3d at 817. In applying a categorical approach that focused on the elements of the two crimes charged, the Eighth Circuit held that while the extended statute of limitations applied to the charge of creating child pornography, the extended statute of limitations *did not apply* to the charge of thereafter possessing the very same child pornography that the defendant previously had produced. *Id.* The Eighth Circuit reasoned:

> Does someone who merely possesses child pornography sexually abuse the child portrayed in the images? No more than the offense of possessing methamphetamine

> involves the act of producing it, does the offense of possessing child pornography involve the sexual abuse of a child. That a producer of child pornography will possess it at the time of the abuse is insufficient to change our view that the offense of possessing child pornography itself does not involve an act against a child, *i.e.*, the sexual abuse of a child. Thus, we conclude that §3283 is inapplicable and that §3282 [the ordinary five-year period] is the governing limitations period on the possession count.

Id.

The Eighth Circuit ruled in *Coutentos* that, notwithstanding that the defendant sexually abused the victim in order to produce the child pornography that the defendant later possessed, because possession of child pornography does not require that the possessor abuse the victim, the act of possessing child pornography does not qualify as "an offense involving the sexual or physical abuse of a child under the age of 18 years" for purposes of the statute of limitations extension provided in 18 U.S.C. §3283. By contrast, employing the rationale of the Third Circuit in this case, the defendant's engaging in sexual abuse of a minor for the purpose of possessing the child pornography would cause the possession itself to be governed by §3283's extended statute of limitations. The Third Circuit's decision in this case thus creates a clear circuit split with the Eighth Circuit's ruling in *Coutentos*.

The Third Circuit's ruling in this case also directly conflicts with the Fifth Circuit's decision in *Diehl*. There, the Fifth Circuit held that even though the defendant's actual conduct "did not involve physical contact" with a minor, the charge of producing child pornography in violation of 18 U.S.C. §2251(a) nevertheless categorically constituted "sexual abuse" for purposes of the extended limitations period in 18 U.S.C. §3283 based solely on "[t]he plain language of the statutory definitions" of that offense. *Diehl*, 775 F.3d at 720-21. The Fifth Circuit's decision recognizes that the text of §2251(a) requires that the defendant "cause[ ] a minor to engage in 'any sexually explicit conduct for the purpose of producing any visual depiction of such conduct * * *.'" *Diehl*, 775 F.3d at 719 (quoting §2251(a)).

As in *Coutentos*, the Fifth Circuit in *Diehl* looked solely to the language of the crime charged and the statutory definitions of that language, rather than to the defendant's actual conduct, in deciding whether the extended statute of limitations in 18 U.S.C. §3283 applied to the offense charged. Thus, the Third Circuit's ruling in this case also squarely conflicts with the Fifth Circuit's decision in *Diehl*.

B. The Third Circuit's ruling in this case not only unnecessarily created a circuit split but also is plainly incorrect

Based on conduct alleged to have occurred before and after (but not during) Schneider's commission of

the travel offense prohibited in §2423(b) – conduct as to which the jury was neither asked to nor did make any findings beyond a reasonable doubt – the Third Circuit in this case has ruled that Schneider's act of traveling in foreign commerce on August 22, 2001 with the state of mind prohibited under §2423(b) constituted "an offense involving the sexual or physical abuse of a child under the age of 18 years" for which §3283's extended statute of limitations applies. App., *infra*, 20a-21a.

In *Toussie v. United States*, 397 U.S. 112, 115 (1970) (internal quotations omitted), this Court recognized that "statutes of limitations normally begin to run when the crime is complete," meaning that the defendant has committed the requisite elements of the crime. *See also id.* at 124 (White, J., dissenting) ("In the typical case, an offense is complete as soon as every element in the crime occurs, and the statute of limitations begins to run from that date."). It necessarily follows, unless Congress has expressly indicated to the contrary, that the applicability of an extension of a criminal statute of limitations should likewise be determined based on the requisite elements of the crime.

"[B]y its unambiguous terms, §2423(b) criminalizes interstate travel for an illicit purpose." *United States v. Tykarsky*, 446 F.3d 458, 469 (3d Cir. 2006). Thus, a defendant can be convicted of having violated §2423(b) whether or not an actual minor is involved or any sexual act involving an actual minor occurs. *Id.*; *United States v. Kelly*, 510 F.3d 433, 441 (4th Cir.

2007) ("we join our sister circuits in this regard, holding that the government need not prove an actual minor was placed at risk in order to secure a conviction under §2423(b)"); *United States v. Hicks*, 457 F.3d 838, 841 (8th Cir. 2006) ("a defendant may be convicted of violating §2423(b) if he or she travels in interstate commerce with the purpose of engaging in criminal sexual conduct with a person believed to be a minor regardless of whether such person is actually a minor"); *United States v. Root*, 296 F.3d 1222, 1231 (11th Cir. 2002) (same). The crime "turns simply on the purpose for which [the defendant] traveled." *Tykarsky*, 446 F.3d at 469 (quoting *Root*, 296 F.3d at 1231 (11th Cir. 2002)).

The federal courts of appeals are in agreement that the offense proscribed in §2423(b) consists simply and exclusively of travel in interstate or foreign commerce with the prohibited state of mind. *See United States v. Pendleton*, 658 F.3d 299, 304 (3d Cir. 2011) (violation of §2423(b) "is complete as soon as one begins to travel with the intent to engage in a sex act with a minor"); *United States v. Sims*, 428 F.3d 945, 959 (10th Cir. 2005) (§2423(b) merely prohibits "traveling with a specific purpose"); *United States v. Bredimus*, 352 F.3d 200, 210 (5th Cir. 2003) ("the criminal act under §2423(b) is foreign travel with criminal intent; and thus, the offense is complete even if the illicit intent is never realized"); *United States v. Hersh*, 297 F.3d 1233, 1245-46 (11th Cir. 2002) (§2423(b) merely requires the government to prove that the defendant "had formed the intent to

engage in sexual activity with a minor when he crossed state lines"); *United States v. Vang*, 128 F.3d 1065, 1069 (7th Cir. 1997) (§2423(b) "punishes mere 'travel' in interstate commerce – even if no transportation of a minor was involved" if the requisite intent is found).

In accordance with the federal appellate court rulings cited in the preceding two paragraphs, the offense prohibited in §2423(b) cannot constitute "an offense involving the sexual or physical abuse of a child under the age of 18 years" for purposes of the extended statute of limitations provided in §3283, because the offense as statutorily defined begins and ends before any sexual abuse of a child occurs, an actual child need not even be involved, nor must any sexual abuse of a child occur.

Nevertheless, the Third Circuit ruled in this case that §2423(b) does constitute "an offense involving the sexual or physical abuse of a child under the age of 18 years" for purposes of the extended statute of limitations provided in §3283 – apparently in any prosecution brought under §2423(b), even where no actual child is involved and even where no sexual abuse of a child is alleged to have occurred after the travel took place – based on conduct that Schneider is alleged to have engaged in before and after the travel in question, even though that conduct was denied by the defendant and was not the subject of any findings by the jury to establish the timeliness of this §2423(b) prosecution.

The Third Circuit's opinion explains:

> Schneider's conduct "involves sexual abuse" as contemplated by §3283. Schneider was convicted of traveling with the purpose of engaging in sex with the victim, a minor. The victim testified that before the trip to Philadelphia, he and Schneider engaged in oral and anal sex three to four times per week; that upon returning to Moscow the sexual activities between Schneider and the victim resumed and continued to occur two to three times per week; and that Schneider engaged in psychological manipulation, urging the victim to keep Schneider's conduct secret, conceal any physical injuries, and stay away from girls.
>
> Sexual abuse includes the "persuasion, inducement, enticement, or coercion of a child to engage in . . . sexually explicit conduct." 18 U.S.C. §3509(a)(8) (2000). Sexual abuse as defined here encompasses a wider set of behavior than just rape or other unwanted sexual touching. Schneider agreed to sponsor the victim on the basis of his talent, paid for the victim's ballet academy fees, had the victim move into his apartment where he raped and sexually abused him repeatedly, and traveled with the victim to the United States so that the victim could attend a prestigious summer ballet school. This series of actions sufficiently involves the "persuasion, inducement, enticement or coercion of a child to engage in . . . sexually explicit conduct" to invoke the longer statute of limitations for

> offenses "involving the sexual . . . abuse of a child." *See* 18 U.S.C. §3509(a)(8) (2000); 18 U.S.C. §3283 (2000). We will affirm the District Court's ruling that Schneider's violation of §2423(b) involves sexual abuse of a child.

App., *infra*, 20a-21a.[2]

All of the conduct described in the above two paragraphs of the Third Circuit's opinion was alleged to have occurred either before or after Schneider's return flight to Russia on August 22, 2001 for which he was charged with the §2423(b) offense; none of the conduct was alleged to have occurred during that travel. As a result, the jury in this case was not asked to find whether Schneider sexually abused a minor in Russia, nor did the jury so find.[3]

---

[2] The Third Circuit's holding that Schneider's conduct "sufficiently involves the 'persuasion, inducement, enticement or coercion of a child to engage in . . . sexually explicit conduct' to invoke the longer statute of limitations for offenses 'involving the sexual . . . abuse of a child' " (App., *infra*, 20a) itself conflicts with the Sixth Circuit's recognition that "§2423(b) requires interstate travel and intent to engage in sexual conduct, but has no requirement that there be an element of enticement or coercion." *United States v. Hughes*, 632 F.3d 956, 961 (6th Cir. 2011).

[3] The district judge specifically instructed the jury immediately before deliberations that the government did not need to prove that any form of sexual abuse occurred to find Schneider guilty of the travel offense set forth in 18 U.S.C. §2423(b). CA3 App.1710a (district judge's charge to the jury that, to convict Schneider under §2423(b), "the Government does not have to prove that Schneider actually engaged in illicit sexual conduct once he was abroad").

Thus, the Third Circuit upheld as timely Schneider's prosecution for having violated 18 U.S.C. §2423(b) based on conduct that allegedly occurred either before or after that offense, which conduct the jury did not find to have occurred beyond a reasonable doubt in finding Schneider guilty of having traveled in foreign commerce on August 22, 2001 in violation of §2423(b). *Cf. United States v. Oliva*, 46 F.3d 320, 324-35 (3d Cir. 1995) (holding that where the timeliness of a criminal prosecution is challenged, the facts establishing the timeliness of the prosecution must be established "beyond a reasonable doubt").

In this case, as in most, the district court considered the defendant's statute of limitations challenge before trial began. *See United States v. Schneider*, 2010 WL 3656027 (E.D. Pa. Sept. 15, 2010) (App., *infra*, 102a-14a). Although the district court's opinion discussed the prosecution's factual theories (*id.*), at that point the actual evidence in the case was not yet before the district court. By contrast, the district court at the pretrial stage was capable of definitively ascertaining the elements of an offense under §2423(b) – interstate or international travel with the prohibited state of mind – and that neither any actual minor nor any sexual abuse of anyone were required elements of that offense.

The Third Circuit's use of Schneider's alleged uncharged conduct before and after his commission of the travel offense proscribed in 18 U.S.C. §2423(b) to hold that Schneider was convicted of "an offense involving the sexual or physical abuse of a child

under the age of 18 years," and thus subject to the extended statute of limitations provided under 18 U.S.C. §3283, not only conflicts with a proper understanding of the offense of conviction, but it also conflicts with decisions requiring that the facts governing whether a prosecution is timely for statute of limitations purposes must be determined by the jury beyond a reasonable doubt. In convicting Schneider of having violated 18 U.S.C. §2423(b), the jury was not asked to find, nor did the jury in fact find, beyond a reasonable doubt the facts on which the Third Circuit relied in concluding that Schneider's offense was one "involving the sexual or physical abuse of a child under the age of 18 years" for purposes of the extended statute of limitations contained in 18 U.S.C. §3283.

Because the Third Circuit's statute of limitations ruling unnecessarily gives rise to a circuit split on an important question of federal criminal statute of limitations law that only this Court can correct, and because the Third Circuit's ruling is plainly erroneous, this Court should grant certiorari to resolve the question presented herein.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HOWARD J. BASHMAN*
LAW OFFICES OF
HOWARD J. BASHMAN
2300 Computer Avenue
Suite G-22
Willow Grove, PA 19090
(215) 830-1458
hjb@hjbashman.com

**Counsel of Record*

JANUARY 2016

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 12-1145 and 13-1491

UNITED STATES OF AMERICA

v.

KENNETH SCHNEIDER,
Appellant

On Appeal from United States District Court
for the Eastern District of Pennsylvania
(E.D. Pa. No. 2-10-cr-00029-001)
District Judge: Honorable Juan R. Sanchez

Argued January 20, 2015
Before: FISHER, JORDAN and
GREENAWAY, JR., *Circuit Judges.*

(Filed: September 9, 2015)

Howard J. Bashman, Esq. ***ARGUED***
Suite G-22
2300 Computer Avenue
Willow Grove, PA 19090

Joseph J. McHale, Esq.
Stradley, Ronon, Stevens & Young
2600 One Commerce Square
2005 Market Street
Philadelphia, PA 19103

Barbara Schneider, Esq.
Suite 202
1 North Bacton Hill Road
Frazer, PA 19355
Counsel for Appellant

Vineet Gauri, Esq.
Michelle Morgan, Esq. ***ARGUED***
Daniel A. Velez, Esq.
Office of United States Attorney
615 Chestnut Street
Suite 1250
Philadelphia, PA 19106
Counsel for Appellee

OPINION OF THE COURT

FISHER, *Circuit Judge.*

These appeals concern the criminal conviction of Kenneth Schneider on the charge of traveling in foreign commerce with the intent to engage in sex with a minor between the ages of twelve and sixteen, in violation of 18 U.S.C. § 2423(b) (2000). They pose questions involving pre-and post-trial motions, evidentiary issues, and a sentencing issue, each of which Schneider asserts was incorrectly decided by the

District Court. Because the District Court did not err or abuse its discretion, we will affirm each of these rulings.

I.

The victim in this case was born in Russia in 1986. At age ten, he was sent to study ballet at the Bolshoi Academy in Moscow, approximately three hours from his family's house. Within a year and a half, the victim's parents owed the Academy just under $500 for unpaid dormitory fees. Those unpaid fees prevented him from continuing to attend the Academy. In 1998, two of the victim's ballet teachers introduced Kenneth Schneider, an American lawyer who had lived in Moscow for many years, to the victim and his family. Schneider had previously been financially generous in supporting artists in Russia. The teachers told Schneider about the victim's circumstances, and Schneider indicated that he might be able to help.

One day that summer, Schneider and the instructors went to the victim's house for a ballet demonstration. During the demonstration, one of the teachers commented to Schneider that the victim was very talented. After subsequent meetings, Schneider agreed to financially assist the victim's parents so that the victim could pursue further ballet studies at the Academy. Schneider proposed to pay for the victim's studies and housing, and extended the victim's father a loan to pay the delinquent dormitory fees.

Schneider, with the victim's parents' permission, had the victim live at his Moscow apartment, close to the Academy. The victim was twelve years old when he began living with Schneider during the week.

At some point, Schneider began engaging in sexual activity with the victim. As of August 2000, Schneider and the victim were engaging in oral sex on Schneider's bed approximately three times per week. Thereafter, Schneider and the victim moved to a second apartment near the Academy. At this point, Schneider and the victim were also engaging in anal sex, with sexual activities occurring approximately three to four times per week. Near this time, a school nurse examined the victim. Schneider told the victim that if the nurse asked questions about the condition of the victim's anus, the victim should tell her that he had been using a solid stick of hemorrhoid medication. Schneider told the victim that if anyone discovered their sexual activity, Schneider would go to jail and the victim would not achieve his goals of becoming a famous ballet dancer or going to America. Around this time, Schneider showed the victim a movie about a famous male ballet dancer and his older male mentor and lover, and compared their relationship to the one in the film.

In 2001, when the victim was fifteen, he, with assistance from Schneider, applied to and was accepted into a summer ballet program in Philadelphia. The victim's parents agreed to let him attend. The victim and Schneider traveled together to Philadelphia, where the victim resided at Schneider's parents' home

while attending the program. Schneider did not stay in Philadelphia the entire time, as he was traveling for work. During this time in the United States, Schneider and the victim held hands, hugged, and kissed on the lips, but no oral or anal sex occurred. On August 22, 2001, Schneider and the victim returned together to Moscow.

Upon their return, the victim returned to living at Schneider's apartment, and Schneider and the victim resumed engaging in oral and anal sex. When the victim was sixteen, Schneider and the victim moved to Massachusetts, where the victim attended school and danced professionally. In 2008, the victim filed a civil complaint against Schneider and members of Schneider's family, among others, alleging that Schneider had sexually abused the victim for years.

That civil suit was stayed in December 2009 when Schneider was charged in a criminal complaint. In January 2010, a federal grand jury returned an indictment against Schneider, charging him with traveling in foreign commerce for the purpose of engaging in illicit sexual conduct with another person, in violation of 18 U.S.C. § 2423(b) (2000), and transporting an individual in foreign commerce with intent that such individual engage in a sexual activity for which any person can be charged with a criminal offense, in violation of 18 U.S.C. § 2421 (2000). These charges related to the victim and Schneider's travel from Philadelphia to Moscow on August 22, 2001. On March 27, 2010, Schneider was arrested in Cyprus.

After two days in custody, he was released on bail, and subsequently returned to custody just under two months later, on May 17, 2010. On May 28, 2010, Schneider was brought to the Federal Detention Center in Philadelphia, remaining there through his trial.

The trial commenced on September 21, 2010. On October 1, 2010, a jury found Schneider guilty on both counts. Schneider subsequently moved for a judgment of acquittal, which the District Court granted as to the § 2421 count, but not the § 2423(b) count. Schneider was sentenced on December 1, 2011, to the statutory maximum fifteen years' incarceration, in addition to three years' supervised release, a $20,000 fine, and $35,000 in restitution. Schneider timely appealed. On August 12, 2012, Schneider filed a timely motion for a new trial based on newly-discovered evidence. The District Court denied this motion on February 15, 2013, and Schneider timely appealed. Those appeals have been consolidated before us.

II.

The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

III.

Schneider raises six issues on appeal. First, did the District Court err when it denied Schneider's

motion for a judgment of acquittal for his conviction under 18 U.S.C. § 2423(b)? Second, did the District Court err when it denied Schneider's motion to dismiss the indictment as barred by the statute of limitations? Third, did the District Court abuse its discretion in ruling evidence of Schneider's pretrial incarceration inadmissible? Fourth, did the District Court abuse its discretion in admitting excerpts of and testimony regarding a film into evidence? Fifth, did the District Court abuse its discretion when it did not grant a motion for a new trial based on newly-discovered evidence? Finally, did the District Court err when it invoked a Sentencing Guidelines cross-reference to calculate Schneider's final offense level? We consider each issue in turn.

A.

Schneider, in a post-trial motion, sought a judgment of acquittal on both counts. App. at 18. The District Court granted this motion in part, writing that the "innocent round trip" exception established in *Mortensen v. United States*, 322 U.S. 369 (1944), a prosecution under the Mann Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (2012)), applied to the 18 U.S.C. § 2421 conviction. It went on to deny Schneider a judgment of acquittal in connection with his conviction under 18 U.S.C. § 2423(b), stating that the *Mortensen* exception did not apply to that conviction. Schneider appeals the latter ruling.

"An appeal from a denial of a motion for judgment of acquittal is subject to [de novo] review, where the question is one of statutory interpretation." *United States v. Schneider*, 14 F.3d 876, 878 (3d Cir. 1994). We will affirm if "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 424-25 (3d Cir. 2013) (en banc) (internal quotation marks omitted).

1. Mann Act precedent's application to 18 U.S.C. § 2423(b)

Schneider argues on appeal that application of the "innocent round trip" exception, first set out in *Mortensen*, should result in a reversal of the District Court's denial of his motion for a judgment of acquittal on the § 2423(b) charge. Whether Mann Act precedent applies to prosecutions under § 2423(b) is an issue of first impression in this Circuit.

"The statutory antecedents of § 2423(b) date back to the Mann Act, enacted in 1910. Section 2423 evolved from the same legislative initiative as the Mann Act, and both are . . . components of the same general legislative framework." *United States v. Garcia-Lopez*, 234 F.3d 217, 220 n.3 (5th Cir. 2000) (citation omitted). "Section 2421 is the original Mann Act, as amended in minor respects. . . . Section 2423(b), the provision under which the defendant was prosecuted,

was added to expand the protection of minors still further; it punishes travel in interstate commerce even if no minor is transported, if the purpose of the travel is sex with a minor." *United States v. McGuire*, 627 F.3d 622, 624 (7th Cir. 2010).

In 1997, the Seventh Circuit noted that "[j]udicial interpretations of the Mann Act necessarily color our reading of § 2423(b)." *United States v. Vang*, 128 F.3d 1065, 1069 (7th Cir. 1997). It concluded that:

> [Section] 2423(b) and the Mann Act are part of the same general legislative framework. More importantly, the crucial language of § 2423(b) employs the same "for the purpose of" phrase used in the original Mann Act and construed by the Supreme Court and a number of lower courts. . . . [Furthermore, t]he familial relationship between § 2423(b) and the Mann Act suggests that Congress intended the same meaning for identical phrases in the two statutes.

Id. at 1069, 1070 n.6. The Fifth Circuit has noted that "early cases interpreting the original Mann Act are authoritative in construing § 2423(b)." *Garcia-Lopez*, 234 F.3d at 220 n.3. We agree, so we proceed on the basis that Mann Act precedent such as *Mortensen* is instructive and persuasive in § 2423(b) cases.

2. The "innocent round trip" exception to the Mann Act

Next, we consider whether the *Mortensen* "innocent round trip" exception should be extended from prosecutions under § 2421 to those under § 2423(b). *Mortensen* involved a husband and wife who jointly operated a "house of prostitution" in Grand Island, Nebraska. 322 U.S. at 372. In 1940, they planned a car trip to Salt Lake City, Utah, to visit the wife's parents. *Id.* Two women who were employed by the Mortensens as prostitutes "asked to be taken along for a vacation and the Mortensens agreed to their request." *Id.* On this vacation, they drove to and visited Yellowstone National Park and Salt Lake City. They visited Mrs. Mortensen's parents, went to shows and parks, and visited other parts of the city. *Id.* Upon completing the trip, they all returned together to Grand Island, where the two women subsequently returned to working as prostitutes. *Id.* Importantly, "[n]o acts of prostitution or other immorality occurred during the two-week trip and there was no discussion of such acts during the course of the journey." *Id.* The women were not obligated to return to Grand Island to work for the Mortensens and were free at any time to leave their jobs for other pursuits. *Id.* at 372-73.

The Mortensens were subsequently charged with two violations of the Mann Act – that they "aided and assisted in obtaining transportation for and in transporting, two girls in interstate commerce from Salt Lake City to Grand Island for the purpose of prostitution and debauchery." *Id.* at 373. The Supreme Court

noted that any "intention that the women or girls shall engage in the conduct outlawed by [the Mann Act] must be found to exist before the conclusion of the interstate journey and must be the dominant motive of such interstate movement. And the transportation must be designed to bring about such result." *Id.* at 374. It ultimately held that the trip was not taken with such an intent, but rather that "[i]t was a complete break or interlude in the operation of petitioners' house of ill fame and was entirely disassociated therefrom." *Id.* at 375. In a crucial section of the opinion, the Supreme Court wrote that:

> The fact that the two girls actually resumed their immoral practices after their return to Grand Island does not, standing alone, operate to inject a retroactive illegal purpose into the return trip to Grand Island. Nor does it justify an arbitrary splitting of the round trip into two parts so as to permit an inference that the purpose of the drive to Salt Lake City was innocent while the purpose of the homeward journey to Grand Island was criminal. The return journey under the circumstances of this case cannot be considered apart from its integral relation with the innocent round trip as a whole. There is no evidence of any change in the purpose of the trip during its course. If innocent when it began it remained so until it ended. Guilt or innocence does not turn merely on the direction of travel during part of a trip not undertaken for immoral ends.

Id. This language gave birth to what has become known as the "innocent round trip" exception to § 2421. *See, e.g.*, *Forrest v. United States*, 363 F.2d 348, 350 n.1 (5th Cir. 1966); *United States v. Nichol*, 323 F.2d 633, 634 (7th Cir. 1963). Schneider invokes this exception here and argues that it should apply to his conviction under § 2423(b). In the end, we need not determine whether the exception is a feature of § 2423(b) cases because, even if it is, Schneider's conduct would not fall within it.

3. The exception's application to Schneider's conviction

We turn, then, to the question of whether Schneider's conviction could qualify for the "innocent round trip" exception. The modern-day version of the Mann Act, 18 U.S.C. § 2421, states that "[w]hoever knowingly transports any individual in . . . foreign commerce . . . with intent that such individual engage in . . . any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be [fined or imprisoned, or both]." 18 U.S.C. § 2421 (2000). On the other hand, the statute under which Schneider was convicted, 18 U.S.C. § 2423(b), states that "a United States citizen . . . who travels in foreign commerce . . . for the purpose of engaging in any sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A . . . shall be [fined, imprisoned, or both]." 18 U.S.C. § 2423(b) (2000). As applicable to Schneider, one of the sexual acts defined in § 2246

that would be in violation of chapter 109A is an adult knowingly engaging in a sexual act with a minor between the ages of twelve and sixteen years old who is at least four years younger than the adult. 18 U.S.C. § 2243(a) (2000). Schneider argues that § 2421 and § 2423(b) use similar language and have been interpreted in parallel; therefore, he contends, the District Court erred when it found the "innocent round trip" exception a basis for a judgment of acquittal on the § 2421 transport charge but not on the § 2423(b) travel charge.

We disagree. As an initial matter, we decline Schneider's invitation to compare his two counts of conviction. The District Court's disposition of Schneider's conviction under § 2421 is not before us, and therefore we do not comment on it.

Though *Mortensen* uses the language of a "dominant" purpose, our sister Circuits have held that "[i]t suffices if one of the efficient and compelling purposes in the mind of the accused in the particular transportation was [illegal sexual] conduct." *United States v. Campbell*, 49 F.3d 1079, 1082 (5th Cir. 1995) (internal quotation marks omitted); *see also Vang*, 128 F.3d at 1072. This is because the statement in *Mortenson* that the immoral purpose must be the defendant's most significant motivation has long been held to be dictum. "It now appears settled that . . . immoral conduct, need not be the sole reason for the transportation; the Act may be violated if [immoral conduct] is a dominant or a compelling and efficient purpose. Despite the contrary implication suggested by

the word 'dominant,' it need not be the most important of defendant's reasons when multiple purposes are present." *United States v. Snow*, 507 F.2d 22, 24 (7th Cir. 1974) (footnotes omitted); *accord United States v. Lebowitz*, 676 F.3d 1000, 1014-15 (11th Cir. 2012); *United States v. Miller*, 148 F.3d 207, 212 (2d Cir. 1998); *United States v. Tyler*, 424 F.2d 510, 512 (10th Cir. 1970); *United States v. Bennett*, 364 F.2d 77, 78-79 & n.4 (4th Cir. 1966); *Nunnally v. United States*, 291 F.2d 205, 208 (5th Cir. 1961); *Bush v. United States*, 267 F.2d 483, 485 (9th Cir. 1959); *Daigle v. United States*, 181 F.2d 311, 314 (1st Cir. 1950); *Mellor v. United States*, 160 F.2d 757, 764 (8th Cir. 1947). Thus, resuming sexual contact with the victim need not be Schneider's only or most important purpose for a jury to convict him of violating § 2423(b).

Several facts directly link Schneider's travel from Russia to the United States and back with his desire to continue a sexually abusive relationship with the victim. The victim and Schneider's relationship was, from the outset, grounded in Schneider's promise that he would "make [the victim] a star," which was the victim's father's dream. App. at 274. Further, from their very first meeting, Schneider had discussed with the victim his "interest[ ] in going to America." App. at 567-68. The victim was "interested about [sic] America" and "interested in going to America to study and, perhaps, to have a career." App. at 580-81. Schneider only had access to the victim because he was able to help him stay enrolled in a prestigious

ballet academy and provide the resources to help propel the victim's ballet career. With this trip, Schneider was providing the victim with an exciting overseas excursion as part of Schneider's promise to propel his ballet career forward.

Thus, the trip to Philadelphia was a critical component of Schneider's scheme to sexually abuse the victim; it was not a "complete break or interlude" in the illicit activities. *See Mortensen*, 322 U.S. at 375. The trip was not an "innocent" recreational trip or vacation that may have had the incidental effect of currying favor with the victim and therefore is distinguishable from *Mortensen* and the other cases where the innocent round trip exception has been applied. *See, e.g.*, *United States v. Ross*, 257 F.2d 292 (2d Cir. 1958) (defendant and prostitute took weekend recreational trips from New York to New Jersey); *Oriolo v. United States*, 324 U.S. 824 (1945) (per curiam) (defendant and prostitute took recreational trip to Atlantic City). Because the trip was part of Schneider's calculated plan to manipulate and abuse the victim, the *Mortensen* exception is inapplicable.

The "verdict must be assessed from the perspective of a reasonable juror, and the verdict must be upheld as long as it does not fall below the threshold of bare rationality." *Caraballo-Rodriguez*, 726 F.3d at 431 (internal quotation marks omitted). "Unless the jury's conclusion is irrational, it must be upheld. In our role as reviewers, we must resist the urge to hypothetically insert ourselves into the jury room for deliberations." *Id.* at 432. Reviewing the evidence in

the light most favorable to the prosecution, based on the facts and testimony described above, a rational jury could conclude that one of Schneider's efficient and compelling purposes of the trip from Moscow to Philadelphia and back was to further Schneider's sexually abusive relationship with the victim by continuing to lay the groundwork for the victim's dependence on Schneider. This conclusion disqualifies Schneider from the protection provided by the "innocent round trip" exception.

We will affirm the District Court's denial of Schneider's motion for a judgment of acquittal.

B.

Before trial, Schneider moved to dismiss the indictment as barred by a five-year statute of limitations. The District Court denied this motion, holding that the indictment was timely under 18 U.S.C. § 3283, a special provision extending the statute of limitations for offenses involving the sexual abuse of a child. We review de novo the denial of a motion to dismiss on statute of limitations grounds. *United States v. Hoffecker*, 530 F.3d 137, 168 (3d Cir. 2008).

Schneider was indicted on January 14, 2010. The general statute of limitations is five years after the offense is committed. 18 U.S.C. § 3282. Because the offense with which Schneider was charged occurred on August 22, 2001, he argues that § 3282 bars his prosecution. The Government argues that the statute of limitations does not apply because the version of

18 U.S.C. § 3283 in effect at the time of the offense expressly provided that "[n]o statute of limitations that would otherwise preclude prosecution for an offense involving the sexual . . . abuse of a child under the age of 18 years shall preclude such prosecution before the child reaches the age of 25 years." 18 U.S.C. § 3283 (2000). Thus, because the victim was under twenty-five years old at the time of the prosecution, we must determine whether the offense with which Schneider was charged "involve[ed] the sexual . . . abuse of a child."

The extension of the statute of limitations for offenses "involving the sexual . . . abuse of a child under the age of 18 years" in § 3283 was originally codified at 18 U.S.C. § 3509(k) as part of the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (1990), and later transferred verbatim to § 3283. There, "sexual abuse" is defined as including the "employment, use, persuasion, inducement, enticement, or coercion of a child to engage in . . . the rape, molestation, prostitution, or other form of sexual exploitation of children." 18 U.S.C. § 3509(a)(8).

Schneider argues that this extension of the statute of limitations cannot apply to an offense under 18 U.S.C. § 2423(b) because § 2423(b) merely "criminalizes interstate travel for an illicit purpose," *United States v. Tykarsky*, 446 F.3d 458, 469 (3d Cir. 2006), and does not require that any action be taken that "involv[es] the sexual . . . abuse of a child," 18 U.S.C. § 3283. The statute on its face does not require any actual illicit sexual conduct, but merely travel with

the intent to engage in such conduct. Schneider therefore contends that by this plain reading, the sexual abuse of a child is not an "essential ingredient" of the offense of conviction.

In support, Schneider analogizes to *Bridges v. United States*, 346 U.S. 209 (1953). In that case, the Supreme Court examined the Wartime Suspension of Limitations Act ("WSLA"), 18 U.S.C. § 3287, which applied to offenses "involving the defrauding of the United States," *Bridges*, 346 U.S. at 215. The United States had charged the petitioner with making a false statement in his application for naturalization. *Id.* at 213. The Court had to determine whether such conduct "involv[ed] the defrauding of the United States," much as we here must determine whether Schneider's conduct "involv[ed] the sexual . . . abuse of a child." The Court stated that Congress, in passing the WSLA, "was concerned with the exceptional opportunities to defraud the United States that were inherent in its gigantic and hastily organized procurement program. It sought to help safeguard the treasury from such frauds by increasing the time allowed for their discovery and prosecution." *Id.* at 218. As a result, the Court held that the WSLA did not apply to the offense of knowingly making a false statement under oath in a naturalization proceeding because "fraud is not an essential ingredient" of it. *Id.* at 222.

Schneider urges that we adopt a similar "essential ingredient" test in this case and rule that because sexual abuse is not an essential ingredient of a

violation of § 2423(b), the statute of limitations remains at five years. He notes that a violation of § 2423(b) requires neither an actual child nor actual abuse, that Congress has not evinced a clear intent in § 3283 to eliminate the statute of limitations for "bad intent" crimes, and that statutes of limitations are to be "liberally interpreted in favor of repose." *Toussie v. United States*, 397 U.S. 112, 115 (1970) (internal quotation marks omitted).

We disagree. We hold that a violation of § 2423(b) for "travel[ing] in foreign commerce . . . for the purpose of engaging in any sexual act . . . with a person under 18 years of age that would be in violation of chapter 109A," 18 U.S.C. § 2423(b) (2000), involves the sexual abuse of a person under age 18. At the time of the offense, chapter 109A made it a crime to knowingly engage in a sexual act with a person between the age of twelve and sixteen years if the offender was more than four years older than the minor. *See* 18 U.S.C. § 2243(a).

Schneider's reliance on *Bridges* is inapposite. While *Bridges* did adopt an "essential ingredient" test, the limitations-extending statute at issue was a narrowly drafted exception specifically intended to target frauds related to war procurement. Unlike the WSLA, § 3283 has no such restrictive language or legislative history suggesting congressional intent to limit its application to a specific subset of circumstances. Congress, rather, has evinced a general intention to "cast a wide net to ensnare as many offenses against children as possible." *United States*

v. Dodge, 597 F.3d 1347, 1355 (11th Cir. 2010) (en banc). The District Court's ruling is consonant with, not contrary to, that intent.

In particular, Schneider's conduct "involves sexual abuse" as contemplated by § 3283. Schneider was convicted of traveling with the purpose of engaging in sex with the victim, a minor. The victim testified that before the trip to Philadelphia, he and Schneider engaged in oral and anal sex three to four times per week; that upon returning to Moscow the sexual activities between Schneider and the victim resumed and continued to occur two to three times per week; and that Schneider engaged in psychological manipulation, urging the victim to keep Schneider's conduct secret, conceal any physical injuries, and stay away from girls.

Sexual abuse includes the "persuasion, inducement, enticement, or coercion of a child to engage in . . . sexually explicit conduct." 18 U.S.C. § 3509(a)(8) (2000). Sexual abuse as defined here encompasses a wider set of behavior than just rape or other unwanted sexual touching. Schneider agreed to sponsor the victim on the basis of his talent, paid for the victim's ballet academy fees, had the victim move into his apartment where he raped and sexually abused him repeatedly, and traveled with the victim to the United States so that the victim could attend a prestigious summer ballet school. This series of actions sufficiently involves the "persuasion, inducement, enticement or coercion of a child to engage in . . . sexually explicit conduct" to invoke the longer statute of

limitations for offenses "involving the sexual . . . abuse of a child." *See* 18 U.S.C. § 3509(a)(8) (2000); 18 U.S.C. § 3283 (2000). We will affirm the District Court's ruling that Schneider's violation of § 2423(b) involves sexual abuse of a child.

C.

During his trial, Schneider sought to inform the jury that he had been continuously incarcerated for four to five months before trial, and was therefore unable to obtain treatment during that time for a medical condition. The District Court did not allow this statement because it was concerned with its prejudicial effect on the jury. The Court did allow Schneider to testify that it had been impossible for him to seek treatment during this period without mentioning his incarceration. He appeals the District Court's evidentiary ruling. "We review the District Court's decisions as to the admissibility of evidence for abuse of discretion." *United States v. Serafini*, 233 F.3d 758, 768 n.14 (3d Cir. 2000).

In July 2008, Schneider learned of the victim's allegations of sexual abuse, and in August 2008, the victim filed a civil complaint against Schneider. In November 2009, in connection with the civil case, the victim drew two pictures of Schneider's erect penis which depict a curvature, and on January 22, 2010, the victim signed an affidavit in the civil case describing Schneider's penis when erect, and attached the two drawings to the affidavit. As of January 27, 2010,

the victim's attorneys had provided the affidavit and drawings to Schneider's attorneys.

On March 27, 2010, Schneider was arrested abroad. He was held for two days and released on bail on March 29, 2010. On May 17, 2010, Schneider was returned to custody, and on May 28, 2010, Schneider was brought to the Federal Detention Center in Philadelphia, where he was held through the trial. On August 4, 2010, while Schneider was detained, Dr. Victor Carpiniello, an expert urologist, examined Schneider's erect penis.

Dr. Carpiniello testified that the victim's description and drawings of Schneider's erect penis were consistent with a condition known as Peyronie's disease. This disease is caused by a formation of plaque, or hard fibrous tissue, on the penile shaft, which causes abnormal curvature. The curvature resulting from Peyronie's disease is mainly treated by surgical removal of the plaque, but potentially also by "injectable collagenase, radiation, oral vitamin E, topical vitamin E, Verapamil, Interferon Alpha 2B, iontoforesis and electro corporeal shock wave therapy," none of which are likely to leave scarring. App. at 984-85. Dr. Carpiniello also testified that when he examined Schneider, on August 4, 2010, he determined that Schneider had a normal erection without curvature and noted "no scarring or evidence of a procedure." App. at 969. Finally, Dr. Carpiniello noted that, in his opinion, Schneider does not have and never had Peyronie's disease.

Following Dr. Carpiniello's testimony, but prior to Schneider's testimony, Schneider's counsel informed the District Court that he intended to elicit testimony from Schneider that Schneider had been incarcerated for the prior four months, since May 27, 2010. The District Court instructed that Schneider could testify that from the date he went back into custody until the date of his testimony, it was impossible for him to seek treatment for Peyronie's disease. The District Court further ruled that Schneider could not "say or mention anything along the lines of prison," App. at 1315, on the basis that evidence of Schneider's incarceration would be unfairly prejudicial and would create sympathy for him with the jury.

Evidence may only be admitted if it is relevant; that is, if it "has any tendency to make a fact more or less probable than it would be without the evidence; and . . . the fact is of consequence in determining the action." Fed R. Evid. 401. Not all relevant evidence, however, is admissible. A District Court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice." Fed. R. Evid. 403. In this context, unfair prejudice means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403 advisory committee's note. Because the District Court allowed Schneider to testify that he could not receive treatment during the period from May 2010 until September 2010, but not that he was incarcerated during this period, we review only the judge's ruling prohibiting Schneider

from commenting on his incarceration for abuse of discretion. *See Serafini*, 233 F.3d at 768 n.14. The District Court abuses its discretion if its decision "rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165-66 (3d Cir. 2001) (internal quotation marks omitted). "In order to justify reversal, a [D]istrict [C]ourt's analysis and resulting conclusion must be arbitrary or irrational." *United States v. Universal Rehab. Servs. (PA), Inc.*, 205 F.3d 657, 665 (3d Cir. 2000) (en banc) (internal quotation marks omitted). Therefore, we examine whether the District Court arbitrarily or irrationally weighed this evidence's probative value against its danger of unfair prejudice.

1. Probative value

Schneider contends that this testimony holds probative value because it supports his argument to the jury that his penis did not match the victim's drawings and description, thus undermining a key piece of the evidence. He states that the facts that he was unable to receive treatment prior to the expert examination due to his incarceration and that the expert's testimony was that his penis – examined while incarcerated – did not match the victim's drawings and descriptions, support his argument that the victim did not have knowledge of what his penis looked like, and that Schneider therefore did not have sexual contact with the victim. Schneider contends

that this adverse ruling "made it far more likely [that he] would be convicted on these charges by excluding compelling evidence that [the victim] had fabricated his claims of sexual abuse." Appellant's Br. at 47.

Schneider overstates the probative value of this testimony, as he had the ability to alter his penile condition prior to his ultimate incarceration before trial. Schneider first learned of the victim's accusations of sexual abuse in August 2008, eighteen months before he was initially arrested, and first learned of the victim's affidavit and drawings by January 27, 2010, two months before he was arrested. Furthermore, Schneider was free on bail for six weeks from March 29, 2010 to May 17, 2010. Because Schneider had multiple periods to receive treatment before he was incarcerated, the fact that he could not receive treatment in the months leading up to the trial has little probative value to the crucial issue of the victim's familiarity with Schneider's penis. In addition, because Schneider was permitted to mention that he could not receive treatment during the pre-trial period, the incremental probative value of mentioning his incarceration is low.

2. Potential for unfair prejudice

Schneider argues that allowing him to make this statement would have presented little potential for unfair prejudice. Schneider contends that "any general inclination to exclude from evidence the fact of a criminal defendant's pretrial incarceration is to

protect the *defendant*, not the *prosecution*, from unfair prejudice." Appellant's Br. at 47-48. We disagree. While this argument is facially plausible, it is supported by no citation to any case law or secondary authority. *See* Appellant's Br. at 47-48. Nor do the Federal Rules of Evidence, either in their text or in the advisory committee's notes, contain any instruction or indication that evidence of incarceration is inadmissible if the defendant would be prejudiced, but admissible if the prosecution would be prejudiced.

The Government, on the other hand, argues that allowing Schneider to testify in this manner holds great potential for unfair prejudice. It contends that Schneider sought to stir sympathy with the jury, and identifies other cases where evidence was ruled inadmissible due to its potential to induce sympathy for the defendant in the jury. *See United States v. Harris*, 491 F.3d 440, 447 (D.C. Cir. 2007); *United States v. Pintado-Isiordia*, 448 F.3d 1155, 1158 (9th Cir. 2006) (per curiam). When a District Court decides whether evidence, such as Schneider's testimony, is admissible, it must weigh the probative value of the testimony with the potential for unfair prejudice. Only when the probative value is "substantially outweighed" by the potential for unfair prejudice is the evidence inadmissible. Schneider's testimony on incarceration has little probative value, but the potential for unfair prejudice is real. The District Court did not abuse its discretion in making this judgment.

We therefore will affirm the District Court's ruling on this issue.

D.

At trial, the victim testified that Schneider showed him the film *Nijinsky*, which told the story of Vaslav Nijinsky, a ballet dancer in the early 1900s, and his older patron and lover, Sergei Diaghilev. The District Court admitted into evidence excerpts of the film which depict Diaghilev kissing Nijinsky, Nijinsky performing in a ballet that includes an act of simulated masturbation, and Nijinsky marrying a woman and becoming mentally ill. At various points, the Court also allowed the introduction of other testimony regarding a birthday card, porcelain figurines of faun-like creatures, payment for goods, and Schneider's psychological relationship with the victim.

After the trial, Schneider moved for a new trial due to the introduction of unduly prejudicial evidence, claiming that evidence relating to Count Two, upon which Schneider was ultimately granted a judgment of acquittal, prejudicially spilled over to the jury's assessment of Count One. The District Court ruled that while it committed error in admitting the evidence because it was unduly prejudicial, the introduction of the evidence was harmless. Schneider argues that the District Court erred, while the United States argues that the District Court properly admitted the evidence as intrinsic, and that the evidence was not unfairly prejudicial, or the error, if any, was harmless.

We review the District Court's decision for an abuse of discretion. *United States v. Butch*, 256 F.3d

171, 175 (3d Cir. 2001). If we find that the District Court abused its discretion, we review de novo whether that error was prejudicial or harmless. *United States v. Cross*, 308 F.3d 308, 317-18 (3d Cir. 2002).[1] An error is harmless when it is "highly probable that it did not prejudice the outcome." *Id.* at 318 (internal quotation marks omitted). "While the Government bears the burden of showing that the error was harmless, we can affirm for any reason supported by the record." *Id.* at 326 (citation omitted).

"In practice, therefore, prejudicial spillover analysis . . . begins by asking whether any of the evidence used to prove the [count on which the defendant was acquitted] would have been inadmissible to prove the remaining count. . . . [I]f the answer is 'yes,' then we must consider whether the verdict on the remaining count was affected adversely by the evidence that would have been inadmissible at a trial limited to that count." *Id.* at 318. If all evidence on the discarded counts would remain admissible to prove the remaining count, our inquiry ends. *Id.*

As already noted, a court may exclude relevant evidence if "its probative value is substantially outweighed by a danger of . . . unfair prejudice." Fed. R. Evid. 403. Schneider argues that the *Nijinsky*

---

[1] The error alleged here is not of constitutional dimension. If it were, it could only be called "harmless" if we could say that, beyond reasonable doubt, it did not contribute to the verdict. *See Mitchell v. Esparza*, 540 U.S. 12, 17-18 (2003).

excerpts were inadmissible to prove Count One because they "included sexual content unrelated to the charges in this case," were "extremely prejudicial," and were "compelling and emotional." Appellant's Br. at 50-51, 53, 64. He contends that the prosecutor "was permitted to show the jury highly prejudicial excerpts from that film that portrayed the older Diaghilev seducing and then controlling the much younger Nijinsky," Appellant's Br. at 53, which was admitted solely to establish the victim's dependence on Schneider, a unique element of Count Two – a count on which Schneider was later granted a judgment of acquittal. In support, he notes that when the attorneys were discussing the admissibility of the *Nijinsky* excerpts at trial, the prosecutor stated that "[i]t shows his . . . control over the victim and the psychological inference." App. at 481. Furthermore, in her closing argument, the prosecutor mentioned the *Nijinsky* evidence as supporting an element of Count Two which was not required in Count One – compulsion. App. at 1625-26. Finally, ruling on the motion for a new trial after Schneider's conviction, the District Court wrote that it "agree[d that] excerpts of the film were unduly prejudicial inasmuch as they included sexual content unrelated to the charges in this case." App. at 49.

This argument is unpersuasive. The *Nijinsky* evidence is admissible as evidence intrinsic to Count One. Rule 404(b) "does not apply to evidence of uncharged offenses committed by a defendant when those acts are intrinsic to the proof of the charged

offense." *Hoffecker*, 530 F.3d at 189 (internal quotation marks omitted). "[A]cts are intrinsic when they directly prove the charged [offense]." *Cross*, 308 F.3d at 320 (internal quotation marks omitted). "Even if the evidence is 'extremely prejudicial to the defendant,' the court would have no discretion to exclude it because it is proof of the ultimate issue in the case.' *Hoffecker*, 530 F.3d at 189 (quoting *United States v. Gibbs*, 190 F.3d 188, 218 (3d Cir. 1999)). For example, the fact that Schneider showed the victim the movie and told him that he should not leave Schneider in the way that Nijinsky left Diaghilev made it more likely that Schneider and the victim had a sexual relationship before the trip to Philadelphia, which consequently made it more likely that Schneider intended to resume a sexual relationship upon returning to Moscow. Furthermore, the other evidence of Schneider's prolonged psychological entanglement with the victim also directly proved the crime charged in Count One because it spoke to Schneider's purpose in traveling back to Russia – a key component of his ultimate conviction.

Because the conduct was intrinsic to Count One, *Cross*, 308 F.3d at 320, and the District Court's initial evidentiary ruling was not "clearly contrary to reason," *Butch*, 256 F.3d at 175 (internal quotation marks omitted), we hold that the District Court did not abuse its discretion in denying the motion for a new trial. More specifically, we hold that *Nijinsky* evidence is admissible as intrinsic evidence, in contrast to the District Court deeming its admission erroneous

as unfairly prejudicial, but ultimately harmless. "[W]e can affirm for any reason supported by the record," *Cross*, 308 F.3d at 326, and we do so in this instance. Though we base our decision on a different ground, we will affirm the District Court's dismissal of a motion for a new trial on this issue.

E.

Schneider appeals the District Court's denial of his motion for a new trial under Federal Rule of Criminal Procedure 33(b)(1). Schneider claims he discovered new evidence in connection with the ongoing civil suit that the victim is pursuing against him "strongly suggest[ing] perjury by [the victim] at trial and a significant *Brady* violation." Appellant's Br. at 64-65.[2] The District Court did not grant an evidentiary hearing on the matter and denied Schneider's motion for a new trial. We review the District Court's denial of a motion for a new trial for abuse of discretion. *United States v. Salahuddin*, 765 F.3d 329, 346 (3d Cir. 2014).

In order to succeed on a motion for a new trial based on newly-discovered evidence, the defendant carries the burden of establishing five elements:

---

[2] We have granted a motion to seal portions of the appendix filed in this case. In this section, we find it necessary to include some of the sealed information, but have revealed it in such a way as to carry out the intent and purpose of the motion to seal.

> (a) [T]he evidence must be in fact newly discovered, i.e.[,] discovered since trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

United States v. Quiles, 618 F.3d 383, 388-89 (3d Cir. 2010) (internal quotation marks omitted).

1. Newly-discovered *Brady* violation

Schneider first asserts that he should be granted a new trial based on a newly-discovered violation of the rule in *Brady v. Maryland*, 373 U.S. 83 (1963). "To establish a due process violation under *Brady*, then, a defendant must show that: (1) evidence was suppressed; (2) the suppressed evidence was favorable to the defense; and (3) the suppressed evidence was material either to guilt or to punishment." *United States v. Pelullo*, 399 F.3d 197, 209 (3d Cir. 2005) (internal quotation marks omitted). Schneider's basis for his claim is that the victim testified in a deposition in his civil case that he was paid for his testimony in the criminal case – payments that were undisclosed to the defense. While ordinarily this would raise a red flag, *see, e.g.*, *United States v. Bagley*, 473 U.S. 667, 683-84 (1985) (holding that there was a *Brady* violation when federal prosecutors withheld evidence of inducements made to witnesses to encourage them to

testify against the defendant), in this case these revelations are insufficient to establish a *Brady* violation or other grounds for a new trial. In the victim's deposition, the following exchange occurred:

> Q: Okay. Did you ever get witness vouchers from the government for testifying?
>
> A: What is witness vouchers?
>
> Q: I'm asking you. Do you know what they are?
>
> A: I was paid for testifying.
>
> Q: How did you get paid?
>
> A: Michelle, Mrs. Morgan[3] went with me to the place to withdraw money.
>
> . . .
>
> Q: Did she go over to the place like to cash a check and she'd give them a slip of paper, they'd give you money?
>
> A: Yes.
>
> Q: And who was the slip of paper from?
>
> A: From Michelle Morgan Kelly. [sic]

App. at 2353.

Schneider cannot carry his burden based on this testimony. First, he has not established that the evidence was undisclosed under *Brady* or that it was

[3] Assistant U.S. Attorney Michelle Morgan-Kelly.

newly-discovered under Rule 33. The witness fees and per diem stipends that the victim was paid are required by statute. *See* 28 U.S.C. § 1821. Furthermore, the payments were disclosed on the second day of trial – and two days before the victim testified – in an email from an Assistant United States Attorney to Schneider's trial counsel, who responded that he did not intend to cross-examine the victim on it. Nor can Schneider establish that the payment of fees was favorable to the defense (the second *Brady* element) because the victim, an alleged crime victim, was paid via statutorily-mandated vouchers, unlike the witness in *United States v. Bagley*, who was paid in cash as a cooperating informant in exchange for information. 473 U.S. at 683. The District Court "[found] Schneider's argument as to the witness vouchers baseless," and denied the motion for a new trial on this ground. App. at 65.

Therefore, we will hold that District Court did not abuse its discretion in denying Schneider's motion for a new trial on this basis.

2. Newly-discovered perjury

Schneider next asserts that he should be granted a new trial based on his discovery that the victim perjured himself in connection with the civil trial. The District Court rejected this argument, which we review for abuse of discretion. *Salahuddin*, 765 F.3d at 346. Schneider contends that here we should use the test from *Larrison v. United States*, 24 F.2d 82

(7th Cir. 1928), to determine whether he should be granted a new trial. This test has three prongs:

> (a) The court is reasonably well satisfied that the testimony given by a material witness is false. (b) That without it the jury might have reached a different conclusion. (c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.

Larrison, 24 F.2d at 87-88. Not only has "[t]he *Larrison* test . . . not been adopted by this Court," *Gov't of V.I. v. Lima*, 774 F.2d 1245, 1251 n.4 (3d Cir. 1985), but even the Seventh Circuit has subsequently abandoned it, *United States v. Mitrione*, 357 F.3d 712, 718 (7th Cir. 2004) ("Today, we overrule *Larrison* and adopt the reasonable probability test"), *vacated on other grounds*, 543 U.S. 1097 (2005). Therefore, we use the same five-factor test from *Quiles* identified above. 618 F.3d at 388-89.

Schneider says that he discovered "notes taken by a professional quoting the lone accuser saying that he committed perjury in relation to the same case, fears going to prison if found out, and is concerned that the conviction will be overturned." Appellant's Br. at 65-66. His argument fails at least on the fifth prong – "[the newly discovered evidence] must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal." *Quiles*, 618 F.3d at 388-89 (internal quotation marks omitted). The evidence of this alleged

perjury that Schneider complains of consists of the victim's psychologist's notes and summaries of sessions in May and June 2012. These notes and summaries describe the victim's worry about minor inconsistencies in the civil case and the victim's trial strategy.

Schneider's argument is unavailing. First, Schneider is unable to identify any specific alleged perjury. Further, when these excerpts are placed in context of the overall timeline of the civil case, it becomes clear that there is no perjury and that the victim was concerned about inaccuracies in his testimony about Susan Schneider,[4] Kenneth Schneider's sister, in a civil case deposition. As noted above, the victim sued Schneider, Schneider's parents, Schneider's siblings, and the Apogee Foundation[5] in a civil suit. The victim was first deposed in connection with this suit on February 28, 2012, where he discussed, among other things, Schneider's sister. In April 2012, he spoke with his initial attorney about the civil case, and expressed his concerns about his testimony in the civil case to his psychologist in May 2012. The psychologist's notes were obtained by the defense on August 3, 2012, and turned over to the victim's new attorneys

[4] Susan Schneider was not a party to the criminal prosecution and did not testify in connection with the criminal prosecution.

[5] The Apogee Foundation is Schneider's purported charitable foundation for gifted children in the fine arts. The victim was nominally a board member of the foundation.

shortly thereafter. A few days later, the victim, through his attorneys, provided two points of errata to correct his February deposition regarding statements he previously had attributed to Susan Schneider. *See* Supp. App. at 59-69. Given this context, it appears that the victim's comments to his psychologist concern testimony he gave about Susan Schneider's comments, and do not constitute testimony that would rise to the level of perjury which would be "of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal." *Quiles*, 618 F.3d at 388-89 (internal quotation marks omitted). In addition, the psychologist's notes are also strongly corroborative of the victim's testimony at trial. They include statements about Schneider's predatory and abusive relationship with the victim. App. at 2325.

Because the District Court did not abuse its discretion when it declined to hold an evidentiary hearing on or grant Schneider's motion for a new trial based on the newly-discovered "perjury," we will affirm the District Court's ruling.

F.

When it sentenced Schneider, the District Court began by selecting United States Sentencing Guideline ("U.S.S.G.") § 2A3.2 as the starting point for its offense level calculation. The District Court then invoked a cross-reference found in § 2A3.2, which dictates that "[i]f the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as

defined in 18 U.S.C. 2241 or 2242), apply § 2A3.1." U.S. Sentencing Guidelines Manual § 2A3.2(c)(1) (2000). The District Court determined that Schneider's offense level under § 2A3.1 was thirty-five. Schneider appeals the District Court's use of the § 2A3.1 cross-reference.

"We exercise plenary review over a district court's interpretation of the Sentencing Guidelines." *United States v. Solomon*, 766 F.3d 360, 364 (3d Cir. 2014). As the first step in calculating the Guidelines range, a court must "[d]etermine the offense guideline section in Chapter Two (Offense Conduct) applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted)." U.S.S.G. § 1B 1.2(a). Next, "[a]fter determining the appropriate offense guideline section pursuant to subsection (a) of this section, determine the applicable guideline range in accordance with § 1B1.3 (Relevant Conduct)." *Id.* § 1B1.2(b).

The term "offense," as used in the cross-reference, "means the offense of conviction and all relevant conduct under § 1B1.3." *Id.* § 1B1.1 cmt. n.1(H). Therefore, the cross-reference may be invoked if Schneider's offense of conviction "involved . . . sexual abuse" or if Schneider's relevant conduct under § 1B1.3 "involved . . . sexual abuse." *Id.* § 2A3.2(c)(1). The District Court found that Schneider's relevant conduct under § 1B1.3 "involved sexual abuse" sufficient to trigger the cross-reference. It is this ruling that Schneider appeals.

Section 1B1.3 provides that, "[u]nless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) *cross references in Chapter Two*, and (iv) adjustments in Chapter Three, *shall be determined on the basis of the following*:

> (1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense; . . . [and]
>
> . . .
>
> (3) all harm that resulted from the acts and omissions specified . . . above, and all harm that was the object of such acts and omissions."

Id. § 1B1.3 (emphases added). Thus, the District Court was correct to consider all of Schneider's acts that occurred in preparation for his offense and during the commission of his offense, as well as all harm that resulted from those acts. Furthermore, "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range." U.S.S S.G. § 1B1.3 cmt. background.

Schneider's offense was a violation of 18 U.S.C. § 2423(b) (2000) – foreign travel with the intent to

engage in a sexual act with a minor between the ages of twelve and sixteen. The District Court provided a list of Schneider's actions that were relevant to this offense and pertained to Schneider's sexual relationship with the victim. First, it noted that Schneider was able to commit the offense because he had cultivated a years-long sexual relationship with the victim by means of sexual abuse enabled by the victim's dependence on Schneider. App. at 2296. It also wrote that "Schneider fostered the illicit relationship through physical and psychological manipulation and economic threats with the intent of maintaining the sexual abuse until and beyond the time of the conduct constituting the offense of conviction." *Id.*

The District Court did not err. These actions are relevant offense conduct that "involve sexual abuse" because they were "acts . . . that occurred . . . in preparation for [the] offense" – Schneider's plan to travel back to Russia in order to continue sexually abusing the victim – and because they facilitated "harm that resulted from [these] acts" – Schneider's sexual abuse by force of the victim when he returned to Russia. U.S.S.G. § 1B1.3. We will affirm the District Court's invocation of the cross-reference in U.S.S.G. § 2A3.2(c)(1).

IV.

For the reasons set forth above, we will affirm the judgment of the District Court.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 12-1145 and 13-1491

UNITED STATES OF AMERICA

v.

KENNETH SCHNEIDER,
Appellant

On Appeal from United States District Court
for the Eastern District of Pennsylvania
(E.D. Pa. No. 2-10-cr-00029-001)
District Judge: Honorable Juan R. Sanchez

Argued January 20, 2015
Before: FISHER, JORDAN and
GREENAWAY, JR., *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on January 20, 2015.

On consideration whereof, it is now hereby ORDERED and ADJUDGED that the judgment of the District Court entered December 13, 2011 at No. 12-1145 and order of the District Court entered February 15, 2013 at No. 13-1491, be and the same are hereby AFFIRMED. All of the above in accordance with the opinion of this Court.

Costs shall not be taxed.

Attest:

s/ Marcia M. Waldron
Clerk

Dated: September 9, 2015

[Certificate Of Service Omitted]

UNITED STATES DISTRICT COURT

EASTERN District of PENNSYLVANIA

UNITED STATES OF AMERICA

V.

KENNETH SCHNEIDER

(Filed Jan. 17, 2012)

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 07-00412-001

USM Number: 65465-066

SAMUEL STRETTON, ESQ
Defendant's Attorney

Date of Original Judgment: December 1, 2011 **(Or Date of Last Amended Judgment)**

Reason for Amendment:

☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))

☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))

☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))

☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reason (18 U.S.C. § 3582(c)(1))

X Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))

☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

☐ Direct Motion to District Court Pursuant
☐ 28 U.S.C. § 2255 or
☐ 18 U.S.C. § 3559(c)(7)

☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

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

X was found guilty on count(s) ONE _____ after a plea of not guilty. _____

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18:2433(b)	TRAVELING FOR THE PURPOSE OF ENGAGING IN SEX WITH A MINOR	August 22, 2001	1
18:2421	TRANSPORTING A PERSON FOR CRIMINAL SEXUAL CONDUCT	August 22, 2001	2

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

_____

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

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

JANUARY 5, 2012
Date of Imposition of Judgment

Juan R. Sanchez
Signature of Judge

JUAN R. SÁNCHEZ, USDJ-EDPA
Name and Title of Judge

1/17/12
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 180 MONTHS

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

DEFENDANT SHALL BE HOUSED CLOSE TO PENNSYLVANIA SO HE CAN PARTICIPATE IN DEFENSE OF HIS CIVIL SUIT.

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY
UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 YEARS.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter as determined by the court.

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

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as

directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

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

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation

officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may

be occasioned by the defendant's criminal record, personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL STANDARD CONDITIONS OF SUPERVISION

Defendant shall provide the U.S. Probation Office with full disclosure of his financial records to include yearly income tax returns upon the request of the U.S. Probation Office. The defendant shall cooperate with the probation officer in the investigation of his financial dealings and shall provide truthful monthly statements of his income.

The defendant shall participate in a mental health program for evaluation and/or treatment as approved by the Court after receiving a recommendation by the U.S. Probation Office. The defendant shall remain in treatment until satisfactorily discharged with the approval of the Court.

Defendant is prohibited from incurring new credit charges or opening additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with a payment schedule for any fine or restitution obligation. The defendant shall not encumber or liquidate interest in any assets unless it is in direct service of the fine or restitution obligation or otherwise has the express approval of the Court.

The defendant shall report to the U.S. Probation Office any regular contact with children of either sex under the age of 18. The defendant shall not obtain employment or perform volunteer work which includes regular contact with children under the age of 18.

The defendant shall register with the state sex offender registration agency in any state where the defendant resides, is employed, carries on a vocation, or is a student, as directed by the probation officer.

Defendant shall cooperate in the collection of DNA as directed by the probation officer.

The fine in this case has been vacated, waived and remitted.

It is further ordered that the defendant shall pay Restitution to Roman Zavarov in the amount of $35,000 for payment of necessary medical and related professional services relating to victim's psychiatric and psychological care.

The $35,000 restitution is due immediately and is payable to the Clerk of Courts. The Clerk of Court shall put that amount in an interest bearing account. Invoices for payment for medical and professional psychiatric and psychological services from this account, after being submitted for review by the Government with notice to the defendant and defense counsel, shall be submitted to this Court for approval.

In connection with the order for Restitution, upon submission of a proposed order by the Government, the Court will freeze any of the defendant's current

investment accounts, banking accounts, money-market accounts, and financial accounts until the Restitution amount is paid to the Court.

It is further ordered that the Defendant shall pay the United States a total special assessment of **$100.00** which shall be due immediately.

CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution
TOTALS	**$** 100.00	**$**	**$** 35,000.00

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

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

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

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Clerk of Court	**$35,000.00**	**$35,000.00**	**100%**
TOTALS	$ 35000	$ 35000	

☐ Restitution amount ordered pursuant to plea agreement $ _____

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

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

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

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

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

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

A X Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

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

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

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

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

F X Special instructions regarding the payment of criminal monetary penalties:

Restitution – $35,000 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

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

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

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

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	No. 10-29
v.	:	
	:	
KENNETH SCHNEIDER	:	

MEMORANDUM

Juan R. Sanchez, J. **September 21, 2011**

On October 1, 2010, Defendant Kenneth Schneider was convicted by a jury of traveling in foreign commerce with the intent to engage in sex with a minor between the ages of 12 and 16, in violation of 18 U.S.C. § 2423(b) (Count I), and transporting a person in foreign commerce with the intent that such person engage in criminal sexual conduct, in violation of 18 U.S.C. § 2421 (the Mann Act) (Count II). Schneider asks this Court to enter a judgment of acquittal on both Counts, to dismiss the Indictment or arrest judgment, or to grant a new trial. For the reasons that follow, this Court will grant in part and deny in part Schneider's motion.

FACTS[1]

The charges against Schneider, an American citizen who, in 2001, was 36 years old, stem from his travel on August 22, 2001, from the United States to Russia in the company of Roman Zavarov, a 15-year-old Russian boy. At the time of his travel, Schneider had housed Zavarov in his Moscow apartment for three years and, during the year immediately preceding the flight, had engaged in regular sexual activity with him.[2]

Schneider first met Zavarov in 1998 when Zavarov was 12 years old. Zavarov had recently been forced to leave a prestigious ballet training program in Russia at the Moscow Academy of Ballet (the Academy) – also known as the Bolshoi Academy – after his parents

---

[1] In reviewing a post-verdict motion challenging the sufficiency of the evidence, a court must review the evidence "in the light most favorable to the Government, and credit all reasonable inferences that support the verdicts." *United States v. Perez*, 280 F.3d 318, 342 (3d Cir. 2002). Where, as here, the defendant moves for judgment of acquittal after the close of the Government's evidence and the court reserves its decision on the motion, a court "must decide the motion on the basis of the evidence at the time the ruling was reserved." Fed. R. Crim. P. 29(b). Accordingly, in weighing the sufficiency of the evidence as to Count II, this Court shall consider only the evidence introduced during the Government's case-in-chief.

[2] Although the Government asserted Schneider sexually molested Zavarov for the entire three-year period preceding their travel to the United States, this Court limited evidence of such illicit sexual conduct to the period between August 22, 2000, and November 22, 2001, pursuant to Federal Rule of Evidence 403. *See* Memorandum, Sept. 3, 2010, Doc. 95.

became unable to pay his dormitory fees. Zavarov's parents wanted their son to continue his ballet training and considered sending him to a ballet school in St. Petersburg, where he had a scholarship. In the summer of 1998, however, two of Zavarov's former Academy instructors, Nikolai Dokukin and Tatiana Dokukina, raised the possibility of securing payment for Zavarov's education at the Academy from Schneider, a ballet afficionado, who had told the Dokukins he was interested in creating a charitable organization to provide scholarships to talented arts students in Russia.

At the time, Schneider was working in Moscow as an attorney and had became acquainted with the Dokukins because of his interest in ballet. After meeting the Dokukins, Schneider became involved at the Academy, donating furniture to the Academy, paying for ballet footwear for the students, and providing grants to the instructors. He also visited ballet classes at the Academy and videotaped the students, telling Dokukina he planned to send the videos to his friend, Olga Kostritzky, an instructor at the School of American Ballet. Within a month of meeting Schneider, Dokukina told him about Zavarov's financial troubles and asked if he would be willing to sponsor Zavarov's ballet education. Schneider indicated he might be interested, but told Dokukina he wished to meet Zavarov and see a demonstration of his ballet ability before agreeing to sponsor him.

Schneider and the Dokukins went to Zavarov's house and asked him to perform a number of ballet

exercises. Schneider videotaped this demonstration, during which Zavarov was dressed in only a pair of black underpants.[3] During the demonstration, Dokukina told the Zavarovs, "if you show this recording, they will grab him for ballet and throw you into the bargain. They'll be asking where did you dig up this treasure?" Trial Tr. vol. 2, 41. Dokukina testified that having such a tape would provide Zavarov a "huge chance to be admitted to [a ballet] school." *Id.* at 60.

Zavarov's parents were interested in having Schneider finance their son's education and agreed to additional meetings with Schneider. During one of these meetings, Zavarov's father asked Schneider for a loan so that he could repay the debt he owed to the Academy for Zavarov's delinquent dorm fees. Schneider agreed, loaning Zavarov's father 4,300 rubles, approximately $470 at the time. A notary public in Russia drafted a loan agreement, which was signed by Schneider and Zavarov's parents, requiring the Zavarovs to repay the loan over four months, with the final payment due December 31, 1998.[4]

---

[3] Zavarov's mother testified that, although she felt uncomfortable that Zavarov was not fully dressed, such limited dress is necessary for ballet demonstrations as it enables a viewer to see all of the dancer's movements.

[4] Although the final loan payment was due at the end of 1998, the Zavarovs did not fully repay the debt until August 5, 2000.

At another meeting, Schneider told Zavarov's father that after Zavarov re-enrolled at the Academy he would not live in the dormitory, but would instead live with Schneider. Schneider explained he could provide better accommodations because Zavarov would have his own room in Schneider's apartment, would get better rest and better food, and would have access to a personal ballet instructor. Although this arrangement made Zavarov's father uncomfortable, he felt he had to agree to it to ensure his son was able to re-enroll at the Academy. Before Zavarov moved in, the Zavarov family visited Schneider's apartment, a two-room apartment with one small bedroom and a larger main room. Schneider told the Zavarovs he would sleep in the bedroom and Zavarov would sleep on a pull-out couch in the main room. The Zavarovs were satisfied that this was an appropriate sleeping arrangement for their son.

When the new school term started, Zavarov began living with Schneider from Monday to Friday, returning to his parents' home on weekends, holidays, and in the summer. Schneider discouraged Zavarov's father from visiting him during the week, telling him Zavarov had everything he needed. While at Schneider's apartment, Zavarov was primarily taken care of by a woman who lived across the hall from Schneider, Ludmila Kozyreva. Kozyreva woke Zavarov up, prepared his breakfast, helped him get ready for school in the morning, watched him after school, and prepared his dinner. Because the Zavarovs did not know Schneider well, Zavarov's father advised his

son to tell Kozyreva if he was sexually molested by Schneider.[5] During the time Zavarov lived with Schneider, Schneider paid for his food and some of his clothing and purchased other items for Zavarov, including a Playstation video game console and a bicycle. Schneider also paid for Dokukin to provide private dance lessons to Zavarov in Schneider's apartment, and bought Zavarov a cellular phone.

In 2001, when Zavarov was 15 years old, Schneider encouraged Zavarov to apply to summer ballet programs in the United States and elsewhere, and offered to take Zavarov to Philadelphia so he could study at the Rock School. Zavarov testified that in the year before he and Schneider traveled to the United States, Schneider had been engaging in oral and anal sex with him approximately three to four times a week, with the encounters typically taking place at night in Schneider's bedroom.[6] Schneider told Zavarov to keep these encounters secret because people would not understand their relationship, and Schneider would go to jail.[7] Schneider also told Zavarov that if

---

[5] Zavarov never told Kozyreva that Schneider was molesting him, though he sought her help on one occasion when Schneider became angry after Zavarov's father appeared at the apartment unannounced.

[6] Schneider denied ever having had any sexual contact with Zavarov.

[7] Schneider also worried the effects of his contact with Zavarov would be discovered by a nurse at the Bolshoi Academy, and told Zavarov if the nurse asked about any injuries to his rectum, he should say he was using a hemorrhoid stick. When

(Continued on following page)

Schneider was gone, Zavarov "[wouldn't] be able to fulfill [his] dreams as a ballet dancer and [would] stay in Russia." Trial Tr. vol. 1, 16.

Zavarov also testified that Schneider had previously told him their relationship was similar to the relationship of the famous Russian ballet dancer, Vaslav Nijinsky, and his mentor and director, Sergei Diaghilev. When Zavarov was 13, Schneider showed him *Nijinsky*, a film that depicts Diaghilev and Nijinsky as lovers, and suggests that Nijinsky was emotionally destroyed after he ended his relationship with Diaghilev to pursue a heterosexual marriage.[8] After the film, Schneider told Zavarov that Nijinsky made a mistake by leaving Diaghilev, and warned him not to make the same mistake. Schneider also told Zavarov relationships with girls were disgusting, and Zavarov should avoid girls because they would take advantage of him. That same year, Schneider gave Zavarov a birthday card inscribed with the message, "Romanicov, until trillion thirty years, your friend, Ken," and told Zavarov they should be together "until trillion thirteen years." Trial Tr., vol. 1, 18. Before they traveled to the United States, Zavarov thought of Schneider as his friend and role model. In an essay he wrote as part of a school application, Zavarov said

---

the nurse attempted to examine Zavarov, Schneider called the school to complain about her, and she was eventually fired.

[8] At trial, the Government played portions of this movie to the jury, including a portion in which Nijinsky's character simulated masturbation during a ballet performance.

Schneider had made him very happy by re-enrolling him in the Academy and by helping him with any problems he had, and described Schneider as a "friend" and "second father." Trial Tr. vol. 1, 141.

Schneider helped Zavarov complete his application for the Rock School, which admitted Zavarov to its summer program and awarded him a scholarship, which paid for Zavarov's travel to and from Philadelphia. After his acceptance to the summer program, Zavarov and his parents went to the United States Embassy in Moscow to apply for a travel visa. In the application, Zavarov's parents authorized Schneider to take Zavarov to the United States from July 4, 2001, until August 31, 2001. When Schneider and Zavarov traveled to Philadelphia, Zavarov stayed with Schneider's parents at their home in Berwyn, a suburb of Philadelphia. Schneider did not stay at the Berwyn home for the summer because he was traveling for work, although he visited Zavarov there occasionally. While Schneider and Zavarov were in United States, they did not engage in any sexual activity, though Schneider held Zavarov's hand, hugged him, and kissed him once.

On August 22, 2001, Schneider and Zavarov flew from Philadelphia to Moscow. After arriving in Moscow, Zavarov went to his parents' house and stayed with them for a week before he returned to school. When Zavarov returned to school and moved back into Schneider's apartment, the sexual activity between Schneider and Zavarov resumed, and continued to occur two to three times per week.

Zavarov never told his parents that he had been sexually abused by Schneider. After he began living with Schneider, however, his personality changed. His father noticed he was more withdrawn and silent, and seemed to be keeping something to himself. Zavarov eventually moved to the United States and, in 2008, Zavarov told his girlfriend, Gina D'Amico – whom he has since married – about Schneider's sexual molestation, revealing that Schneider had sexually abused him while he lived with Schneider in Russia.

On August 12, 2008, Zavarov filed a civil lawsuit against Schneider and others, bringing claims stemming from Schneider's sexual abuse. After Zavarov filed his lawsuit, he was contacted by the Federal Bureau of Investigation, which thereafter launched a criminal investigation into Schneider's conduct with Zavarov. On January 14, 2010, Schneider was charged in a two-count indictment with (1) traveling in foreign commerce for the purpose of engaging in sex with a minor, in violation of 18 U.S.C. § 2423(b) (Count I), and (2) transporting a person in foreign commerce with the intent that such person engage in criminal sexual conduct, in violation of 18 U.S.C. § 2421 (Count II). Schneider was convicted of both charges on October 1, 2010, following a jury trial.

DISCUSSION

Schneider asks this Court to enter a judgment of acquittal on both Counts, arguing the evidence

presented at trial was insufficient to support the verdict on either Count. In the alternative, he seeks dismissal of the Indictment, contending this Court lacks jurisdiction over the offenses charged and the statutes he is charged with violating are facially unconstitutional and unconstitutional as applied to him. Finally, Schneider argues the introduction of unduly prejudicial evidence at trial entitles him to a new trial.

A court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction."[9] Fed. R. Crim. P. 29(a). A court must find the evidence at trial was insufficient to sustain a conviction if a rational trier of fact could not have found proof of guilt beyond a reasonable doubt. *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005). In reviewing the sufficiency of the evidence, a court must not "usurp the role of the jury by weighing credibility and assigning weight to the evidence, or by substituting its judgment for that of the jury" and should only find insufficient evidence "where the prosecution's failure [to prove its case] is clear." *Id.*

Schneider argues the evidence at trial was insufficient to sustain his convictions because the Government failed to prove (1) a dominant purpose of his

[9] Schneider preserved his sufficiency of the evidence challenge by moving for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(a) on both Counts at the close of the Government's case. This Court denied his motion as to Count I and reserved ruling on Count II.

travel and transportation of Zavarov was illegal sexual activity, (2) he transported Zavarov with intent to violate Article 133 of the Russian Criminal Code, (3) and he intended to compel Zavarov to engage in sexual activity, because (4) Zavarov was materially or otherwise dependent upon him.

Schneider first asserts the evidence at trial was insufficient to sustain his convictions because a rational jury could not have determined he traveled and transported Zavarov for the purpose of illegal sexual activity. Count I of the Indictment charged that Schneider traveled in foreign commerce on August 22, 2001, "for the purpose of engaging in any sexual act;" specifically, for the purpose of engaging in a sexual act with Zavarov, a person who had reached the age of 12 but had not yet reached the age of 16. Indictment Count I ¶ 6. At the close of trial, this Court instructed the jury that in order to prove Schneider was guilty of Count I, the Government must prove beyond a reasonable doubt (1) Schneider was a United States citizen, who (2) traveled in foreign commerce on August 22, 2001, (3) for the purpose of engaging in sexual activity with a minor, and (4) the specific sexual act he intended to engage in was a sexual act with someone between the age of 12 and 16. *See* Trial Tr. vol. 8, 140, Sept. 30, 2010. Schneider does not contest that he is a United States citizen who traveled from the United States to Russia on August 22, 2001, or that Zavarov was 15 on the date of travel. Instead, he argues the Government did

not present sufficient evidence to prove the purpose of his travel was to engage in illegal sexual conduct.

To secure a conviction pursuant to § 2423(b), the Government is not required to prove criminal activity was "*the* dominant purpose of interstate travel." *See United States v. Hayward*, 359 F.3d 631, 638 (3d Cir. 2004). Instead, when multiple motives for interstate travel exist, the Government must prove illegal sexual activity was "a dominant purpose" of the defendant's travel. *Id.*; *see also United States v. Vang*, 128 F.3d 1065, 1072 (7th Cir. 1997) (explaining "[d]espite the contrary implication suggested by the word 'dominant,' an immoral purpose need not be the most important of defendant's reasons when multiple purposes are present" (quoting *United States v. Snow*, 507 F.2d 22, 23 (7th Cir. 1974)); *United States v. Campbell*, 49 F.3d 1079, 1082-83 (5th Cir. 1995) (holding, with regard to a § 2421 conviction, a jury may find a "dominant purpose" to engage in illegal activity existed when such activity is 'one of the efficient and compelling purposes' or "one motivating purpose" of the defendant's travel (citation omitted)).[10] In evaluating whether trial evidence proved an illicit travel purpose in "cases in which the travel prosecuted under [§] 2423(b) may have had dual purposes, only one of

[10] As the Seventh Circuit explained, "[j]udicial interpretations of the Mann Act (§ 2421) necessarily color [courts'] reading of § 2423(b)" because they are "part of the same general legislative framework" and "employ[] the same 'for the purpose of' phrase." *Vang*, 128 F.3d at 1069.

which was to have sex with minors," a court must consider whether a rational juror could have found illicit intentions were the but-for cause of the travel, asking "whether, had a sex motive not been present, the trip would not have taken place or would have differed substantially." *United States v. McGuire*, 627 F.3d 622, 624-25 (7th Cir. 2010).

At trial, the Government presented evidence showing Schneider engaged in frequent sexual activity with Zavarov from August 2000 until sometime in July 2001. That same month, Schneider flew with Zavarov and then accompanied him to Schneider's parents' house in Berwyn. For the next two months, Schneider was traveling elsewhere and only occasionally spent time at the Berwyn home. At the end of August, following the conclusion of Zavarov's summer ballet program, Schneider returned to Berwyn, picked up Zavarov, traveled to the airport with him, and boarded a plane to Moscow with him. Schneider argues because he lived and worked in Moscow, and thus had a need to return there independent of any sexual relationship with Zavarov, the jury could not reasonably have found the desire to resume sexual activity with Zavarov was a dominant purpose of his return travel to Moscow. However, because Schneider flew from Pennsylvania with Zavarov at the conclusion of Zavarov's summer program, the jury could have reasonably inferred that Schneider did not choose the location or date of his travel to Moscow for business or personal reasons, but rather flew on that day and from that location to further his intent to

resume his sexual activity with Zavarov. The evidence was therefore sufficient to permit a rational juror to find a dominant purpose of Schneider's August 22, 2001, travel to Moscow was to engage in sex with Zavarov. *See id.* at 626 (holding a priest who traveled internationally to hold spiritual retreats also traveled for the purpose of engaging in illicit sex because he "configured his travels to optimize his [illicit] sexual activity").

Schneider similarly argues the evidence presented at trial was insufficient to sustain his conviction for a violation of § 2421. Count II of the Indictment charged

> [o]n or about August 22, 2001, in the Eastern District of Pennsylvania, and elsewhere, defendant KENNETH SCHNEIDER transported a person in foreign commerce with the intent that such person engage in any sexual activity for which any person can be charged with a criminal offense, to wit, defendant SCHNEIDER transported [Zavarov], . . . from Philadelphia, Pennsylvania to Moscow, Russia with the intent that [Zavarov], under compulsion based on [Zavarov's] dependence on Schneider, engage in anal intercourse, which would be a violation of Article 133 of the Russian Criminal Code. All in violation of Title 18, United States Code, Section 2421.

Indictment Count II ¶ 2. At the close of trial, this Court instructed the jury that in order to prove Schneider was guilty of Count II, the Government must prove beyond a reasonable doubt that (1) Schneider knowingly

transported Zavarov in foreign commerce, (2) with the intent that Zavarov engage in criminal sexual activity with Schneider, and (3) Schneider specifically intended to compel Zavarov to engage in sodomy by taking advantage of Zavarov's material or other dependence on Schneider. *See* Trial Tr. vol 8, 143. The jury was further instructed, "the Government need not prove that a criminal sexual act was the sole purpose for Schneider transporting Zavarov to Russia, but the Government must prove that it was a dominant purpose as opposed to an incidental one." Trial Tr. vol. 8, 144.

Schneider asserts the evidence was insufficient to show his primary purpose in transporting Zavarov from Philadelphia to Moscow was to engage in illegal sexual activity, arguing because he did not pay for Zavarov's transportation, and because Zavarov's flight to Moscow was necessary to return him to his parents' home and the Bolshoi Academy, no reasonable jury could conclude Zavarov was transported by Schneider for the purpose of engaging in criminal sexual activity. Alternatively, Schneider argues even if the evidence was sufficient to prove his intent in transporting Zavarov to Moscow on August 22, 2001, was to engage in criminal sexual activity, such illicit motivations on that date cannot have been his dominant purpose as a matter of law because no illegal sexual activity took place during Zavarov's time in Philadelphia, and it is inappropriate to examine Schneider's intent only with regard to Zavarov's return trip to Moscow. Schneider argues that, viewing

the trip as a whole, no reasonable jury could conclude the dominant purpose of the trip was to engage in criminal sexual activity.[11]

In support of his argument, Schneider relies on *Mortenson v. United States*, 322 U.S. 369 (1941), a case in which the Supreme Court overturned a Mann Act conviction, holding two owners of a Nebraska house of prostitution who vacationed in Utah with two of their prostitute-employees did not transport the women back to Nebraska "for the purpose of" furthering illegal sexual activity because the entirety of the trip was recreational and included no acts of prostitution or immorality. Although the transported women resumed their activities as prostitutes within ten days of returning from the vacation, the Court ruled the women's resumption of prostitution was unrelated to the Mortensons' transportation of the women from Utah to Nebraska. *Id.* at 376.

In *Mortenson*, the Court explained the jury could have "assumed [the Mortensons] anticipated that the two girls would resume their activities as prostitutes upon their return to [Nebraska]," but held such anticipation, without more, does not "operate to inject a retroactive illegal purpose into the return trip[,] . . .

---

[11] Because the Court finds this alternative argument has merit, the Court need not address the sufficiency of the evidence regarding Schneider's purpose in transporting Zavarov on August 22, 2001. This Court notes, however, the Government introduced no evidence that Schneider paid for or scheduled Zavarov's transportation.

[n]or does it justify an arbitrary splitting of the round trip into two parts so as to permit an inference that the [outbound] trip was innocent while the purpose of the homeward journey [ ] was criminal." *Id.* at 375. The Court further explained, "[t]he return journey under the circumstances of this case cannot be considered apart from its integral relation with the innocent round trip as a whole. There is no evidence of any change in the purpose of the trip during its course. If innocent when it began it remained so until it ended. Guilt or innocence does not turn merely on the direction of travel during part of a trip not undertaken for immoral ends." *Id.*

In the years since *Mortenson* was decided, courts have infrequently applied its holding to prosecutions under § 2421, perhaps because it is uncommon for defendants operating houses of prostitution or sexually abusing minors to take their prostitutes or sexual abuse victims on vacations or other innocent journeys. A review of cases that have discussed *Mortenson*, however, is instructive. In the year after the decision was issued, the Third Circuit considered a case in which a defendant who employed a woman as a prostitute in Philadelphia took her on an innocent day trip to Atlantic City, after which she resumed her prostitution activities in Philadelphia. *United States v. Oriolo*, 146 F.2d 152 (3d Cir. 1944). Although there was no evidence any illegal activity took place during the Atlantic City trip, the court distinguished the case from *Mortenson* because, on the return trip, the defendant told the woman she would have to resume

her prostitution once back in Philadelphia, and the court held this statement constituted evidence of a change in the purpose of the trip during its course. *Id.* at 154. The Supreme Court summarily reversed the court's judgment, citing *Mortenson. Oriolo v. United States*, 324 U.S. 824 (1945).

Ten years later, the Supreme Court again summarily reversed a case in reliance on *Mortenson. See Becker v. United States*, 348 U.S. 957 (1955). In *Becker*, the Eighth Circuit reviewed the Mann Act conviction of a defendant who encouraged a woman employed as an exotic dancer – a profession viewed at the time as falling within the Mann Act's prohibition on sexual immorality – to travel across interstate lines. *Becker v. United States*, 217 F.2d 555 (8th Cir. 1954). The woman worked in Wisconsin, and traveled to Minneapolis to spend Thanksgiving with her mother and daughter. When she embarked on her trip, she intended to return to Wisconsin, though she had not determined the date of her return or purchased a round trip ticket. After Thanksgiving, the woman became uncertain whether she still wished to return to Wisconsin. Learning of her uncertainty, the defendant begged her to come back, then paid the cost of her return trip. *Id.* at 556-57. The Eighth Circuit held, because of this inducement, the jury could have concluded the woman did not return to Wisconsin because of her original intention to return, but was induced by the defendant to return and engage in illicit sexual activity. The Supreme Court reversed, citing *Mortenson. Becker*, 348 U.S. at *1.

Other courts have relied on *Mortenson's* innocent round trip analysis to reverse Mann Act convictions after finding the purpose of a round trip journey was wholly lawful, even when the return trip delivered the transported person back to resume illicit sexual behavior. *See, e.g.*, *Smart v. United States*, 202 F.2d 874, 875 (5th Cir. 1953) (reversing Mann Act conviction where defendant's interstate transportation of two women who worked for her as prostitutes was for the sole purpose of resolving legal matters and where no act of prostitution took place during the trip); *United States v. Ross*, 257 F.2d 292 (2d Cir. 1958) (reversing conviction of defendant who took prostitute on weekend trips from New York to New Jersey upon finding it "clear beyond peradventure of doubt that [the defendant] and [the prostitute] considered these weekends as devoted to recreation and refreshment" apart from any illegal purpose); *cf. United States v. Hon*, 306 F.2d 52 (7th Cir. 1962) (reversing conviction of defendant who traveled with a female companion from Nevada to Maryland to visit the companion's mother, despite that the companion engaged in prostitution during the course of the trip, after holding there was insufficient evidence the defendant was involved in or encouraged the prostitution, making the illegal sexual acts merely incidental to the journey), *abrogated on other grounds by United States v. Snow*, 507 F.2d 22, 26 (7th Cir. 1974).

The Third Circuit recently reviewed a defendant's Mann Act conviction for transporting a minor among multiple states as part of a prostitution ring.

United States v. Williams, No. 08-4895, 2011 U.S. App. LEXIS 10399 (3d Cir. May 23, 2011). In affirming the conviction, the court distinguished the defendant's actions from the actions of the defendants in *Mortenson*, stating "[i]n no sense was [the defendant's] transport of [the minor] a vacation, à la *Mortensen*, and more than sufficient evidence permitted the jury to conclude that he possessed the requisite intent for conviction – i.e., the 'calculated means for effectuating' [the minor's] prostitution." *Id.* at *10 (quoting *Mortenson*, 322 U.S. at 375).

The facts of the instant case are on point with *Mortenson.* Here, Zavarov applied to a number of ballet programs for the summer of 2001, and eventually decided to enroll at the Rock School in Philadelphia, which awarded Zavarov with a scholarship covering his tuition and transportation costs. Zavarov's parents applied for a travel visa with the American Embassy and authorized Zavarov to travel to and from the United States escorted by Schneider. Zavarov traveled to Philadelphia in July 2001, and returned a little over a month later, on August 22, 2001, after the conclusion of his summer program. Although Schneider accompanied Zavarov on his flight to Philadelphia, and delivered Zavarov to Schneider's parents' house, he visited the house sporadically throughout the summer. From July until August, Zavarov attended ballet classes. The Government concedes Schneider and Zavarov did not engage in sexual activity while Zavarov was in Pennsylvania. Viewing the round trip as a whole, it is apparent Zavarov's travel to

Pennsylvania was solely for the purpose of continuing his ballet education. There is no evidence of any change in the purpose of his trip during its course, and his time in Pennsylvania constituted a complete interlude from Schneider's sexual activity with him insofar as no such activity took place in Pennsylvania.

Upon consideration of the record, the outcome in this case is controlled by *Mortenson*. Even if the evidence introduced at trial was sufficient for a jury to infer Schneider transported Zavarov on August 22, 2001, with the intent to engage in criminal sexual activity, such a conclusion can only be drawn if Zavarov's return trip to Moscow is examined in isolation, without consideration of the purpose of Zavarov's round trip journey to Philadelphia. Viewing the evidence in this manner is expressly prohibited by *Mortenson*, which denounced an "arbitrary splitting of [a] round trip into two parts so as to permit an inference that the purpose of the [outbound trip] was innocent while the purpose of the homeward journey [ ] was criminal." 322 U.S. at 375. Because the sole purpose of Zavarov's journey from beginning to end was to receive ballet instruction in the United States, and Schneider's transport of Zavarov to Philadelphia was therefore innocent as well, this Court cannot hold that Schneider's guilt "turn[s] merely on the direction of travel during part of a trip not undertaken for immoral ends." *Id.* Schneider's conviction for a violation of § 2421 must therefore be reversed. *See id.* at 376 ("People of not good moral character, like others,

travel from place to place and change their residence. But to say that because they indulge in illegal or immoral acts they travel for that purpose, is to emphasize that which is incidental and ignore what is of primary significance.") (quoting *Hansen v. Haff*, 291 U.S. 559, 562-63 (1934)).

The Government concedes *Mortenson* remains good law, but argues this case is distinguishable because the purpose of Zavarov's trip to Philadelphia was not wholly innocent. Although conceding no criminal sexual activity took place during Zavarov's trip, the Government asserts the travel was still tainted by improper purpose because it was organized by Schneider to coerce Zavarov to continue submitting to his sexual abuse. The Government points to no evidence, however, justifying the inference Zavarov would have refused to continue engaging in sexual activity with Schneider if he had not traveled to Philadelphia. *See Van Pelt v. United States*, 240 F. 346, 348 (4th Cir. 1917) (explaining a defendant cannot be seen to have used transportation to induce a woman to engage in illicit sexual activity where their sexual activity had been ongoing and there was no evidence the transportation served the purpose of "more surely, more readily, or more safely induc[ing] her to yield to his wishes"); *cf. Langford v. United States*, 178 F.2d 48, 52 (9th Cir. 1949) (holding a defendant used interstate transport to induce a woman to continue engaging in prostitution where the woman had twice left him, but was persuaded to return by the promise of the journey).

The Government also contends the instant case is distinguishable from *Mortenson* because, unlike the prostitutes in *Mortenson*, who were "under no obligation or compulsion of any kind to return to [Nebraska] to work [as prostitutes]," 322 U.S. at 372, Zavarov was being psychologically manipulated by Schneider insofar as he was not free to travel in the manner he would have preferred. The Government, however, points to no evidence suggesting Schneider compelled or coerced Zavarov to travel to Philadelphia or to later return to Moscow. Rather, Zavarov wanted to study ballet in the United States.

Schneider argues, if this Court determines his Count II conviction should be reversed pursuant to *Mortenson*, then his conviction under Count I should also be reversed on the same basis because the innocent round trip rationale should apply not only to Zavarov's transport but also to Schneider's travel. Schneider, however, points to no case in which a court has extended the rationale of *Mortenson* to a § 2423(b) violation. Moreover, Schneider's August 22, 2001, travel is distinct from Zavarov's August 22, 2001, travel. While Zavarov's trip was the return portion of a pre-planned, round trip journey from Moscow to Philadelphia, Schneider's August 22, 2001, flight did not constitute the conclusion of an innocent round trip to Philadelphia. Instead, Schneider's journey occurred that day so he could escort Zavarov back to Russia after several weeks apart. As previously discussed, Schneider embarked on such travel to return in Zavarov's company to Moscow, where he could

more readily resume his sexual abuse and run a reduced risk of detection. Because the Government presented evidence Schneider's travel to Moscow was not part of an innocent round trip, but was a flight made after he had traveled throughout the United States and elsewhere, the rationale of *Mortenson* does not apply, and it is not improper to focus only on Schneider's intent in making the trip from Philadelphia to Russia. As previously discussed, the evidence was sufficient to convict Schneider of violating § 2423(b).

Schneider brings further challenges to the sufficiency of the evidence underlying his § 2421 conviction, arguing the Government produced insufficient evidence to prove (1) he transported Zavarov with the purpose of violating Article 133 of the Russian Criminal Code, (2) he intended to compel Zavarov to engage in sexual activity, or (3) Zavarov was dependent upon him to such an extent that Schneider could take advantage of such dependence to compel Zavarov's participation in sexual acts. At the close of trial, this Court instructed the jury as follows:

> The Government has charged Kenneth Schneider with intent to violate Article 133 of the Russian Criminal Code, which establishes that the compelling of a person to perform sexual intercourse, sodomy, [a] lesbian act or other actions of sexual character by means of blackmail, threat of destruction, damaging or seizure of property or by taking advantage of the material or other dependence of the victim is a crime.

Trial Tr. vol. 8, 143. The Court stated one of three elements the Government must prove to secure a conviction on this count is "that Mr. Schneider specifically intended to compel Zavarov to engage in sodomy by taking advantage of the material or other dependence of Zavarov," and further instructed,

> [t]o show a person is materially dependent, the Government must prove the person was financially dependent on another, so that if such financial support was interrupted or withdrawn, the dependent person is left without any means of sustenance or support.
>
> Russian law also allows you to find a person was otherwise dependent. The Russian Criminal Code does not give an example of what other dependence is, so you as the jury, may at your discretion decide whether a person was otherwise dependent.
>
> To prove Schneider compelled Zavarov to engage in sexual acts, the Government must prove Schneider knowingly took advantage of the material dependency or other dependency to compel Zavarov to engage in anal intercourse.
>
> To knowingly take advantage of another's dependence, the Government must prove the defendant exerted some sort of pressure on his dependent's free will to suggest to the dependent that the material or other support on which he relied would be withdrawn, if he did not engage in the sexual act.

> Such exertion of pressure must consist of words or acts by the defendant which would cause a reasonable person in the dependant's position to feel pressure to engage in sexual activity.
>
> Compelling is not the same as allurement. If you find Schneider merely promised to give gifts or benefits to Zavarov in exchange for engaging in sexual behavior, you must find he did not compel Zavarov in violation of Article 133.

Trial Tr. vol. 8, 144-45. Schneider argues because Zavarov never lived with him full time and always had the option of returning to his parents' house for food and shelter, the evidence at best showed Schneider promised to give Zavarov gifts in exchange for engaging in sexual behavior. Because such allurement is not sufficient to prove compulsion under Russian law, Schneider asserts the Government presented insufficient evidence showing he compelled Zavarov to engage in sexual activity. The Government contends the evidence was sufficient for the jury to rationally infer Schneider took advantage of Zavarov's material and emotional dependence on him, arguing the implication that Zavarov would have been expelled from Schneider's apartment and the Academy if he refused to engage in sexual acts with Schneider constituted a "quid pro quo so obvious even a twelve-year-old could not have missed it." Gov't's Resp. 5. The Government further asserts, even if Schneider's financial support of Zavarov was not sufficient to prove Zavarov was materially dependent on him, the jury was instructed

they could find evidence of "other dependence" which Schneider took advantage of to compel Zavarov to engage in sexual acts with him.

Here, the jury heard evidence that when Zavarov and Schneider met, Zavarov had recently been withdrawn from ballet school because of his parents' inability to pay his dormitory fees. Schneider agreed to sponsor Zavarov's education and offered to house, clothe, and feed Zavarov during the week. He also loaned money to Zavarov's parents so they could repay their debt to the Academy.[12] Schneider purchased a cellular phone and other items for Zavarov, and paid for him to receive private ballet instruction. Such material support, although significant, is not enough to prove Zavarov was materially dependent on Schneider insofar as it does not show he would be "left without any means of sustenance or support" if Schneider's financial support was withdrawn. *See* Trial Tr. vol. 8, 144. Zavarov returned to his parents' home on the weekends, holidays, and during the summer, and his father provided him with some clothing for school. Given the high burden the Russian statute imposes to show a person was financially dependent, there was insufficient evidence for a rational trier of

[12] The Government asserts this debt made Zavarov and his parents financially dependent upon Schneider, and Schneider took advantage of this dependence, of which the Government asserts Zavarov was aware. However, by the time Schneider and Zavarov traveled to the United States, the Zavarovs had repaid their loan to Schneider.

fact to conclude beyond a reasonable doubt Zavarov was so financially dependent upon Schneider that he would have been left without any means of support if Schneider's material support was withdrawn.

The jury was also instructed, however, Russian law allowed it to find compulsion based on a person's "other dependence" on the defendant, and it was thus permitted to consider whether Zavarov was "otherwise dependent" on Schneider such that Schneider could have intended to take advantage of such dependence to compel Zavarov to engage in sexual acts. The evidence revealed Zavarov became emotionally close to Schneider, viewing him as a friend and second father. Additionally, Schneider showed Zavarov a film about the ballet dancer Nijinsky and his older male patron and lover Diaghilev, telling Zavarov if he left Schneider the way Nijinsky left Diaghilev, he would suffer Nijinsky's fate of emotional ruin and psychological despair. Based on the close emotional relationship which developed between Zavarov and Schneider, and Schneider's suggestion that Zavarov would be emotionally devastated if he left Schneider, there was sufficient evidence for the jury to conclude Schneider compelled Zavarov to engage in sexual activity with him by taking advantage of Zavarov's "other dependence" on him.[13]

---

[13] Schneider also challenges the language of this jury instruction, arguing it was too vague to be constitutional. This Court's discussion of Schneider's argument will be addressed herein.

Schneider next brings a number of constitutional challenges, arguing his prosecution under § 2423(b) is (1) facially unconstitutional insofar as it unduly restricts his right to travel and (2) exceeds Congress's authority under the Commerce Clause, and his prosecution under § 2421 is unconstitutional as applied to him because (3) it is void for vagueness (4) invokes another country's criminal code, and (5) criminalizes conduct which is not a crime in the United States.

Schneider first argues Count I of the Indictment should be dismissed because it is facially unconstitutional as an undue restriction on his right to travel internationally. "While the right to travel is well-established, no federal court has ever held that an individual has a fundamental right to travel for an illicit purpose." *United States v. Bredimus*, 352 F.3d 200, 210 (5th Cir. 2003). Instead, the Third Circuit has explicitly rejected the argument that § 2423(b) impermissibly burdens the fundamental right to travel. *United States v. Tykarsky*, 446 F.3d 458, 472 (3d Cir. 2006) ("Congress clearly has a compelling interest in punishing individuals who travel interstate to engage in illicit sexual activities with minors, and § 2423(b) is narrowly tailored to serve that interest"); *accord United States v. Hornaday*, 392 F.3d 1306 (11th Cir. 2004) (holding Congress did not exceed its Commerce Clause authority in enacting § 2423(b)); *United States v. Han*, 230 F.3d 560, 565 (2d Cir. 2000) (same). Because the Third Circuit has held § 2423(b) does not unconstitutionally burden the right to travel,

Count I of the Indictment will not be dismissed on this ground.

Schneider also argues § 2423(b) unconstitutionally exceeds Congress's power under the Commerce Clause.[14] This argument was also flatly rejected in *Tykarsky*, in which the Third Circuit held § 2423(b) "fall[s] squarely within Congress's power" to regulate the use of the channels of interstate commerce because it criminalizes "interstate travel with intent to engage in illicit sexual conduct with a minor." 446 F.3d at 470 (emphasis omitted); *see also Bredimus*, 352 F.3d at 208 (holding § 2423(b) constituted a valid exercise of the power to regulate the channels of foreign commerce as applied to an American who traveled to foreign countries with the intent to engage in illegal sexual activity); *cf. United States v. Pendleton*, No. 10-1818, 2011 U.S. App. LEXIS 18565, at *18 (3d Cir. Sept. 7, 2011) ("Congress's authority to regulate the *channels* of commerce is not confined to regulations with an economic purpose or impact.").

---

[14] Schneider urges this Court to adopt the position taken by the dissenting opinion in *United States v. Bianchi*, 386 F. App'x 156, 160-62 (3d Cir. 2010), which argued § 2423(c) exceeds Congress's power under the Commerce Clause to the extent it criminalizes non-commercial activity abroad. Not only is *Bianchi* inapposite because it addressed § 2423(c), and not § 2423(b), the provision at issue here, but the Third Circuit recently held § 2423(c) is a valid exercise of the power granted Congress under the Commerce Clause, even when applied to non-commercial sexual activity abroad. *See United States v. Pendleton*, No. 10-1818, 2011 U.S. App. LEXIS 18565, at *18 (3d Cir. Sept. 7, 2011).

Schneider's argument therefore fails, and Count I will not be dismissed on this ground.

Schneider next challenges the constitutionality of § 2421 as applied to him. First, he asserts it is void for vagueness because his prosecution incorporated an offense under Russian law which includes terms with uncertain meanings, has no official English translation, and is so ill-defined as to permit arbitrary enforcement thereof. Section 2421 criminalizes "knowingly transport[ing] any individual in interstate or foreign commerce . . . with intent that such individual engage in . . . any sexual activity for which any person can be charged with a criminal offense." The Indictment charged the sexual activity in which Schneider intended to engage was a violation of Article 133 of the Russian Criminal Code, which criminalizes compelling a person to engage in a sexual act "by means of blackmail, threat of destruction, damaging, or seizure of property or by taking advantage of the material or other dependence of the victim." William E. Butler, trans., *Criminal Code of the Russian Federation*, 86, 4th ed. (2004) (translating *Ugolovnyi Kodeks Rossiiskoi Federatsii* [UK RF] (Criminal Code) art. 133 (Russ.) (hereinafter Butler translation).[15] In mounting his vagueness challenge,

[15] Although it is now a crime in Russia to have sex with a person under 16 years of age, in 2001 the age of consent in Russia was 15, so the Government could not have charged Schneider with intending to violate Russian criminal prohibitions on engaging in sexual acts with a minor because Zavarov was 15 in August 2001.

Schneider does not challenge the language of § 2421 itself, but challenges the Russian statute and the jury instruction regarding the statute.

The jury instruction regarding Article 133 was considered by this Court before trial, after Schneider filed a Notice of Issues of Foreign Law. *See* Fed. R. Crim. P. 26.1 ("A party intending to raise an issue of foreign law must provide the court and all parties with reasonable written notice."). In his Notice, Schneider proffered a translation of Article 133, an expert analysis of this provision, and an explication of the rules of Russian criminal procedure, to the extent such rules were applicable to this case. Thereafter, this Court held a hearing at which defense witness Professor William Butler, Ph. D., a law professor who has authored a Russian/English legal dictionary and has translated the Russian Criminal Code into English, testified as to the meaning of the terms in Article 133. In forming his opinion on the meaning of Article 133, Butler consulted between eight and ten commentaries on the Russian Criminal Code. Butler prefaced his opinion by stating the meaning of Russian law is difficult to ascertain because there is no official English translation of the Criminal Code, the Russian Criminal Code does not provide definitions for terms used in its criminal offenses, and there is no case law interpreting the Russian Criminal Code because there is no concept of precedent under Russian law.

Butler first provided his translation of Article 133 as, "[t]he compelling of a person to perform sexual intercourse, sodomy, lesbian act, or other actions

of a sexual character by means of blackmail, threat of destruction, damaging, or seizure of property or by taking advantage of the material or other dependence of the victim." Butler translation, *supra.* Based on his translation of the RCC and his consultation of RCC commentaries, Butler analyzed the terms "compelling," "material dependence," and "other dependence" because the Indictment charged Schneider with transporting Zavarov with the intent that Zavarov, "under compulsion based on [his] dependence on Schneider, engage in anal intercourse" with Schneider. Indictment Count II ¶ 2. Butler stated the term "compelling" under Russian law is distinct from the use of force or threat of force. Instead, compelling is an objective, real pressure affecting the will of the victim and is weightier than allurements or promises of future benefit. He also stated "material dependence" in Russia means financial dependence, and indicated a person is financially dependent under Russian law if that person would effectively be left out in the cold without any means of sustenance if such dependence was interrupted. Next, he explained the term "other dependence" under Russian law is a catch-all phrase which he believes was included in Article 133 to allow for consideration of other kinds of dependence, but he found no examples of what such other dependence may be.

The Government agreed with Butler's translation of the language in Article 133, but argued this Court should simply read the translated provision to the jury, without providing specific guidance as to the

meaning of the terms used therein. Schneider objected, arguing this Court should instruct the jury on the meaning of the terms "compelling" and "material dependence" under Russian law, based on Butler's analysis. Agreeing with Schneider's position, this Court fashioned its jury instruction on Article 133 based on a transcription of Butler's testimony, including his testimony regarding the term "other dependence." With regard to "other dependence," this Court charged the jury as follows: "Russian law also allows you to find a person was otherwise dependent. The Russian Criminal Code does not give an example of what other dependence is, so you, as the jury, may at your discretion decide whether a person was otherwise dependent." Schneider argues this instruction was too vague to be constitutional and impermissibly permitted the jury to imbue "otherwise dependent" with any meaning it chose.[16]

A statute is void for vagueness if it "does not allow a person of ordinary intelligence to determine what conduct it prohibits, or if it authorizes arbitrary enforcement." *J.S. v. Blue Mtn. Sch. Dist.*, No. 08-4138, 2011 U.S. App. LEXIS 11947, at *49 (3d Cir. June 13, 2011) (citing *Hill v. Colorado*, 530 U.S. 703,

[16] Schneider also argues the jury instruction regarding the terms "compelling" and "material dependence" were too vague. Because this Court found the evidence was insufficient to prove Zavarov was "materially dependent" on Schneider, this Court need not address whether these terms are too vague to withstand constitutional scrutiny.

732 (2000)). A statute "so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case" does not provide fair notice of the conduct it purports to prohibit, and therefore fails to meet the requirements of the due process. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403 (1966) (finding unconstitutionally vague a Pennsylvania statute requiring an acquitted criminal defendant to pay the costs of his prosecution if the jury determined he was guilty of "some misconduct" less than that necessary for a conviction for the offense charged).

In the instant case, the reference to Russian law in the Indictment placed this Court in the difficult position of both ascertaining the meaning of a provision of the Russian Criminal Code and charging the jury in accordance with the provision in a manner that was both legally correct and consistent with due process. Upon review, this Court finds, although the jury charge on the meaning of Article 133 was consistent with Butler's expert testimony, and was a correct statement of Russian law, this law does not comply with the requirements of the due process clause because it is too vague. As Butler testified, the statute allows for a conviction under Article 133 based on a finding the person compelled to engage in sexual intercourse was not materially dependent on the defendant, but was "otherwise dependent."

It is unclear whether such "other dependence" must be objective or subjective, whether it must be reasonable for the person to feel such dependence, or whether an unreasonable dependence upon another may suffice. There is no indication whether "other dependence" must be fostered by the defendant or if it could arise through no effort on the defendant's part. The statute also does not specify the extent of such dependence or the import such dependence must have on the victim's livelihood and well-being. A law is void for vagueness "if it leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio*, 382 U.S. at 403. This is the precise problem with the disputed instruction in this case. Based on Butler's testimony, this Court instructed the jurors they could use their discretion to decide whether a person was otherwise dependent, because the Russian Criminal Code did not define the term. This is similar to the Pennsylvania law found unconstitutional in *Giaccio*, which "contain[ed] no standards at all." 382 U.S. at 402. Here, the Russian statute provided no guidance by which the jury could evaluate "other dependence." As translated, this statute does not "give adequate warning of the boundary between the permissible and the impermissible applications of the law." *City of Chi. v. Morales*, 527 U.S. 41, 59 (1998) (holding a Chicago ordinance prohibiting "loitering" by two or more people, one of whom was a gang member, which defined loitering as "to remain in any one place with no apparent purpose," was too vague to be constitutional because an average citizen

would have no way of determining whether she had an "apparent purpose" and the ordinance provided too much enforcement discretion to the police). Accordingly, this law is too vague to satisfy American standards of due process and Schneider's conviction on Count II is reversed on this alternative basis as well.[17]

Schneider next argues § 2421 is unconstitutional as applied because it is based on a violation of a foreign country's law "that was not and would not be prosecuted in [America] and is based on a stretched interpretation or application of the foreign statute." Def.'s Mem. 11. Schneider contends the language of § 2421 does not suggest that, by penalizing transporting a person "with intent that such person engage in prostitution, or in any sexual offense for which any person can be charged with a criminal offense . . . ," Congress intended to include criminal offenses which arise under foreign laws.[18] Schneider further argues

---

[17] That Schneider was charged with transporting Zavarov with intent to violate Article 133, rather than an actual violation of Article 133, does not affect the vagueness analysis. The same concerns of fair notice apply to a charge of intent to violate the law, and it similarly offends notions of justice to sustain a conviction for intending to commit an act prohibited in a statute containing language too broad and vague to enable a person of ordinary intelligence to conform his behavior to the law.

[18] Schneider argues the absence of specific intent is clear when this statute is compared to the Lacey Act, 16 U.S.C. § 3372, in which Congress explicitly prohibited conduct that would constitute a violation of "any State, or any foreign law" related to the importation of fish, wildlife, or plants. *See United*

(Continued on following page)

such an interpretation of Congressional intent would be absurd, and potentially unconstitutional, insofar as many other countries outlaw sexual conduct which is legal in the United States, including non-marital sexual activity and sexual activity between two people of the same sex.

The Government asserts, in enacting § 2421, Congress intended to include a violation of the law in a foreign jurisdiction, noting the language of the statute does not limit prosecution to those crimes where a person transports another with the intent to engage in an act which would be a crime in the United States. The Government further asserts it is inconsistent with Congressional intent to construe the statute to mean a defendant who takes a victim to another country to sexually abuse him could only be prosecuted for a violation of the other country's laws if there was an identical American state or federal law criminalizing the same conduct.

While the Third Circuit has held "no due process violation occurs when Congress criminalizes conduct abroad that is 'condemned universally by law-abiding nations,'" *Pendleton*, 2011 U.S. App. LEXIS 18565, at *3, n.2 (summarizing the holding in *United States v.*

States v. McNab, 331 F.3d 1228 (11th Cir. 2003) (upholding conviction for importing lobster parts in violation of Honduran fishing regulations); *see also* 18 U.S.C. § 846 (prohibiting smuggling in foreign nations in violation of that nation's laws, provided the nation reciprocally enforces American smuggling laws within its borders).

Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993)), the Supreme Court recently held an American's prior felony conviction in Japan could not serve as the predicate offense for a prosecution under the felon-in-possession statute, even though the statute forbids possession of a gun by any person "who has been convicted in any court," because inclusion of a defendant's foreign conviction record "may include a conviction for conduct that domestic laws would permit." *Small v. United States*, 544 U.S. 385, 389 (2005). *But see McNab*, 331 F.3d at 1239 (upholding Lacey Act conviction of a defendant who transported lobster parts packaged in violation of Honduran fishing regulations, holding regulations promulgated by foreign governments to protect wildlife are encompassed by the phrase "any foreign law" in the Lacey Act); *United States v. Lee*, 937 F.2d 1388, 1393 (9th Cir. 1991) (upholding Lacey Act conviction for violation of Taiwanese fishing regulations and stating "the Act does not impermissibly delegate any legislative power to foreign governments" nor does it "'call for the assimilation of foreign law into federal law'" (citation omitted)). This Court, however, need not determine whether § 2421 is unconstitutional to the extent it incorporates the law of a foreign country which criminalizes actions that are not prohibited here because this Court will reverse Schneider's § 2421 conviction under *Mortenson*, pursuant to his as-applied constitutional challenge, and for insufficiency of the evidence.

Finally, Schneider seeks a new trial, arguing he was unduly prejudiced in violation of Federal Rule of Evidence 403 by the introduction of prior bad acts evidence, including the Government's introduction of evidence regarding Schneider's possession of ceramic faun figurines and airing of excerpts of the film *Nijinsky*. When the faun figurines were introduced at trial, this Court asked Schneider's counsel whether he had any objection to their introduction and counsel did not. Therefore, by failing to object, Schneider waived his objection to the introduction of the figurines. *See Am. Home Ins. Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321, 324 (3d Cir. 1985) (explaining Federal Rule of Evidence 103(a) requires a timely objection to be made in order to preserve an evidentiary issue for appeal). Moreover, even if Schneider had objected, introduction of the figurines into evidence does not require a new trial because the figurines were not unduly prejudicial. Evidence is unfairly prejudicial if it "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise may cause a jury to base its decision on something other than the established propositions in the case." *United States v. Guerrero*, 803 F.2d 783, 785 (3d Cir. 1986) (internal quotation marks and citation omitted). To determine whether evidence is unduly prejudicial, this Court must consider:

> [1] the tendency of the alleged conduct to lead to a decision on an improper basis; [2] the nature or style of the witness's testimony; [3] the probability that the testimony

> is true; [4] the sufficiency of the other evidence submitted to reasonably tie the defendant to the crime alleged[;] and [5] whether the evidence inflames the jury.

United States v. Crawford, 379 F. App'x 185, 189 (3d Cir. Apr. 15, 2010) (citing *Guerrero*, 803 F.2d at 786). The Government argued the figurines were connected to Schneider's attempt to psychologically manipulate Zavarov by comparing their relationship to the relationship of Nijinsky and Diaghilev. One of Nijinsky's famous dance roles was as a faun in the ballet The Afternoon of a Faun (or *L'apres-midi d'un faune*), and the Government introduced the figurines in support of its argument Schneider collected the ceramic figures as part of a continuing scheme to suggest to Zavarov his ballet future was inseparable from his romantic relationship with Schneider. Although this theory was bizarre, introduction of the figurines did not tend to lead the jury to a decision on an improper basis and was significantly undercut by defense testimony that the fauns were valuable collectible items which Schneider purchased for his mother so she could sell them in her antique shop. Moreover, although this evidence was odd and potentially confusing to the jury, it did not inflame the jury by appealing to its sympathies or sense of horror. Finally, as discussed below, the remaining evidence was sufficient to show Schneider sexually abused Zavarov so as to make admission of the faun figurines harmless.

Schneider's challenge to evidence regarding the *Nijinsky* film is two-fold. He first argues any evidence he showed the film to Zavarov was improper prior bad acts evidence introduced in violation of Federal Rule of Evidence 404(b). Rule 404(b) provides evidence of "other crimes, wrongs, or acts" is not admissible "to prove the character of a person in order to show action in conformity therewith." Such evidence, however, may be admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." *Id.* Schneider argues evidence he showed *Nijinsky* to Zavarov could constitute the crime of corrupting the morals of a minor[19] and suggest to the jury that Schneider has the propensity to commit crimes involving children. *See United States v. Sampson*, 980 F.2d 883, 887 (3d Cir. 1992) (stating the government "must clearly articulate how [other bad acts] evidence fits into a chain of logical inferences, no link of which can be the inference that because the defendant committed [similar] offenses before, he therefore is more likely to have committed this one"). The Government contends the film was "intrinsic to the charged offenses" insofar as the film shows Schneider's "psychosexual entanglement with the child victim," and his intent when he traveled with Zavarov in 2001. Gov't's Resp.

---

[19] *See* 18 Pa. C. S. § 6301 ("[W]hoever, being of the age of 18 years and upwards, by any act corrupts or tends to corrupt the morals of any minor less than 18 years of age, . . . commits a misdemeanor of the first degree.").

16. Here, testimony about the film *Nijinsky* was introduced for a proper purpose. The Government has shown a chain of logical inferences between this film and Schneider's offense; because Schneider showed Zavarov the film and warned Zavarov not to leave him the way Nijinsky left his older patron lover, Diaghilev, it was more likely Schneider intended to have a sexual relationship with Zavarov, and this evidence revealed his motive and intent, proper exceptions to Rule 404(b).

Schneider next argues, even if testimony regarding *Nijinsky* did not violate Rule 404(b), the Government violated Rule 403 by showing excerpts of the film to the jury, including scenes which depicted two men kissing and showed a young man simulating masturbation. This Court agrees excerpts of the film were unduly prejudicial inasmuch as they included sexual content unrelated to the charges in this case. However, although this evidence was unduly prejudicial and not particularly probative, introduction of this evidence was harmless because it does "not appear the evidence had a substantial impact on the jury's verdict." *United States v. Ali*, 493 F.3d 387, 392-93 n.3 (3d Cir. 2007). The film was introduced pursuant to the Government's theory showing Zavarov the film revealed Schneider's intent to engage in sexual acts with Zavarov. However, if these excerpts from the film had not been played for the jury, it would not have affected the jury's verdict because the evidence Schneider had engaged in sexual acts with

Zavarov – and intended to do so again at the time of his travel on August 22, 2001 – was overwhelming.

Zavarov testified Schneider performed oral sex on him and directed Zavarov to perform oral sex on Schneider, and eventually had anal sex with Zavarov at least three times per week. Although Zavarov's parents did not know about these sexual encounters, his parents testified that after Zavarov began living with Schneider, his demeanor changed and he became sullen and withdrawn. Zavarov explained how Schneider grew close to him and became like a second father, telling Zavarov he hoped they would be together for "trillion thirteen years" and warning Zavarov not to leave him or his ballet career would end. Zavarov's wife, D'Amico, testified that, years later, Zavarov still has issues with intimacy and struggles with depression because of Schneider's prior sexual assaults. Defense witness Christina Bates, who served as Zavarov's therapist, testified when he came to see her he felt angry, hostile, anxious, and depressed, and reported issues related to his childhood. Zavarov also told Bates he became agitated and upset when people approached him or hugged him from behind. Another defense witness, Simon Gronic, a 14-year-old boy from Moldova, testified that although Schneider never had oral or anal sex with him, Schneider also sponsored his arts education, traveled with him to the United States, and touched him in ways that made him feel uncomfortable.

In light of this overwhelming evidence showing Schneider sexually assaulted Zavarov, and traveled

with the intent to continue engaging in such assaults, the Government's introduction at trial of excerpts of *Nijinsky* was harmless error. Accordingly, Schneider's motion for a new trial is denied.

For the foregoing reasons, this Court will enter a judgment of acquittal on Count II of the Indictment, and will otherwise affirm the jury's verdict. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	No. 10-29
v.	:	
	:	
KENNETH SCHNEIDER	:	

ORDER

AND NOW, this 21st day of September, 2011, it is ORDERED Defendant Kenneth Schneider's Post-Trial Motion (Document 158) is GRANTED in part and DENIED in part.

Schneider's motion for judgment of acquittal as to Count II of the Indictment is GRANTED.[1] Schneider's conviction on Count II of the Indictment is VACATED.

The motion is otherwise DENIED.

BY THE COURT:

/s/ Juan R. Sanchez
Juan R. Sanchez, J.

[1] If this judgment of acquittal is later vacated or reversed, this Court will not grant a motion for a new trial for the reasons set forth in the accompanying memorandum of law. *See* Fed. R. Crim. P. 29(d)(1).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	No. 10-29
v.	:	
	:	
KENNETH SCHNEIDER	:	

MEMORANDUM

Juan R. Sanchez, J. **September 15, 2010**

Defendant Kenneth Schneider asks this Court to dismiss both charges against him, arguing the Government failed to bring these charges within the applicable statute of limitations. For the following reasons, this Court will deny Schneider's motion.

FACTS

On January 14, 2010, Schneider was charged in a two-count indictment with (1) traveling in foreign commerce for the purpose of engaging in sex with a minor, in violation of 18 U.S.C. § 2423(b), and (2) transporting a person in foreign commerce with the intent that such person engage in criminal sexual conduct, in violation of 18 U.S.C. § 2421. The date of Schneider's allegedly criminal travel was August 22, 2001, when he flew from Philadelphia to Moscow, Russia, in the company of R.Z., a 15-year-old Russian

boy. The indictment further alleges Schneider engaged in a sexual relationship with R.Z. both before and after the date of travel.

DISCUSSION

Schneider argues both counts of the Indictment should be dismissed pursuant to Federal Rule of Criminal Procedure 12(b)(3)(A) because the Government failed to secure an indictment within the applicable statute of limitations for the charged offenses. To prevail on a motion to dismiss an untimely indictment, a defendant must establish the indictment charges conduct which occurred outside the applicable statute of limitations period. *See, e.g.*, *United States v. Atiyeh*, 402 F.3d 354, 362 (3d Cir. 2005) (concluding an indictment which, on its face, charged conduct occurring outside the five-year limitations period of 18 U.S.C. § 3282 was beyond the statute of limitations). "In considering a defense motion to dismiss an indictment, the district court accepts as true the factual allegations set forth in the indictment." *United States v. Besmajian*, 910 F.2d 1153, 1154 (3d Cir. 1990).

The general statute of limitations for non-capital federal offenses is five years. *See* 18 U.S.C. § 3282(a) ("Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found . . . within five years next after such offense shall have been committed."). The Indictment in this case was

returned on January 14, 2010, over five years after the date of the charged offense, August 22, 2001. Schneider asserts the five-year statute of limitations period contained in § 3282 applies and bars his prosecution for the charged offenses. The Government disagrees, arguing 18 U.S.C. § 3283, which establishes a longer statute of limitations period for certain child abuse offenses, applies to the charges filed against Schneider.[1]

Congress established a longer statute of limitations for child sex abuse offenses in 1990, permitting prosecution of such offenses until the victim turned 25 years old. The new statute, originally codified at 28 U.S.C. § 3509(k) (1991), provided, "No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse of a child under the age of 18 years shall preclude such prosecution before the child reaches the age of 25 years." Section 3509(k) was recodified without change in 1994 at 18 U.S.C. § 3283. 18 U.S.C. § 3283, Historical and Statutory Notes; *United States v. Chief*, 438 F.3d 920, 922 (9th Cir. 2006) (explaining

[1] The Government concedes the Adam Walsh Child Protection Act, 18 U.S.C. § 3299, which abolished the statute of limitations for certain federal offenses committed against minors, does not apply to the instant case because the Act was signed into law on July 27, 2006, and does not appear to be retroactive. *See United States v. Richardson*, 512 F.2d 105, 106 (3d Cir. 1975) (explaining a law extending a statute of limitations period is "presumed to operate prospectively in the absence of a clear expression to the contrary").

the progressive lengthening of the statute of limitations for child sexual abuse crimes).[2]

Schneider does not dispute the Indictment was timely filed under § 3283 if this statute applies to his offenses. Rather, he argues § 3283 is inapplicable to the offenses with which he is charged because neither charge is an "offense involving the sexual or physical abuse of a child under the age of 18 years." Def.'s Mot. to Dismiss 6 (citing 18 U.S.C. § 3283).

---

[2] The statute was amended in 2003 to permit prosecution of sexual abuse offenses at any time during the life of the child. 18 U.S.C. § 3283. The Government does not contend the 2003 amendment applies to Schneider's conduct, and the Court need not decide that issue in any event, as the child involved in this case, R.Z., had not yet reached the age of 25 on the date the Indictment was filed. The Court notes, however, that several courts have applied the 2003 amendment retroactively to sexual abuse offenses when the original statute of limitations had not yet expired at the time the amendment took effect *(i.e.*, when the victim was still under the age of 25 in the year 2003). *See, e.g.*, *Chief*, 438 F.3d at 924 (interpreting the limitations period for a defendant charged with aggravated sexual abuse, in violation of 18 U.S.C. §§ 1153 and 2241(a), and stating "when Congress repeals one statute of limitations by enacting another, the second statute of limitations can 'simultaneously replace[ ]' the former statute and apply even to cases in which the actions at issue predate the most recent statute"); *United States v. Jeffries*, 405 F.3d 682, 685 (8th Cir. 2005) (explaining a law enacted before the expiration of a previously applicable limitations period does not violate the ex post facto clause when it is applied to institute a prosecution which is not yet time barred); *United States v. Gool*, No. 09-145, 2009 U.S. Dist. LEXIS 61451, at *8-9 (S.D. Iowa Jun. 17, 2009) (same).

The sexual abuse of a child "includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or to assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation with children, or incest with children." 18 U.S.C. § 3509(a).[3] The determination of whether Schneider's charges fall within § 3283's statute of limitations requires this Court to determine whether 18 U.S.C. §§ 2421 and 2423(b) are "offenses involving the sexual or physical abuse of a child" within the meaning of § 3283.

In the first count of the Indictment, Schneider is charged with traveling in foreign commerce "for the purpose of engaging in any sexual act as defined in Section 2246 with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred" in the United States, in violation of 18 U. S.C. § 2423(b). Indictment 2. In the second count,

---

[3] As noted, the statute of limitations in § 3283 was originally codified at § 3509(k). When § 3509(k) was recodified, Congress did not create a new definition of sexual abuse and did not cross reference a different definition. It is therefore appropriate to rely on the definition set forth in § 3509. Moreover, this definition "is appropriate, not simply because it appears somewhere in the United States Code, but because it is consonant with the generally understood broad meaning of the term 'sexual abuse.'" *Restrepo v. Attorney General*, No. 07-4741, 2010 U.S. App. LEXIS 17091, at *27 (3d Cir. Aug. 16, 2010) (adopting the definition of sexual abuse contained in § 3509(a) in defining abuse of a minor under the Immigration and Nationality Act) (quoting *Mugalli v. Ashcroft*, 258 F.3d 52, 58-59 (2d Cir. 2001)).

Schneider is charged with "transport[ing] a person in foreign commerce with the intent that such person engage in any sexual activity for which any person can be charged with a criminal offense," in violation of 18 U.S.C. § 2421. Indictment 4. The predicate criminal sexual activity charged for this count is compulsory anal intercourse, which is a violation of Article 133 of the Russian Criminal Code. Both of the offenses charged in the Indictment are codified in chapter 117 of title 18 of the United States Code, titled "Transportation for Illegal Sexual Activity and Related Crimes."

To support his argument that sexual abuse of a child is not an essential ingredient of either of the offenses charged, Schneider relies on *Bridges v. United States*, 346 U.S. 209 (1953). In *Bridges*, the Supreme Court clarified the criminal offenses to which the 1942 Wartime Suspension of Limitations Act (WSLA) applied. The WSLA expanded the statute of limitations for fraud in connection with war contracts beyond the three-year limitations period in place at the time for non-capital federal crimes. Congress had authorized a limited expansion of the limitations period to "safeguard the treasury" from war contract fraud "by increasing the time allowed for [the] discovery and prosecution [of war fraud crimes]." *Id.* at 216-17. The Supreme Court insisted the WSLA was not intended to "swallow up the three-year [statute of] limitations" and thus interpreted the statute narrowly, strictly limiting application of the WSLA to only those offenses "in which defrauding or

attempting to defraud the United States is an *essential ingredient of the offense charged.*" *Id.* at 221. The Court held fraud was only an "essential ingredient" if proof of fraud was required to prove the charged offense and further stated "the insertion of surplus words in the indictment does not change the nature of the offense charged." *Id.* at 222.

Schneider contends, under *Bridges's* essential ingredient test, § 3283 does not apply because child sexual abuse is not an essential ingredient of either § 2421 or § 2423(b). He contends both charges have two essential elements – (1) transportation or travel, and (2) intent to engage in a sexual act – neither of which requires proof a child was sexually or physically abused. Indeed, a defendant may be convicted for a violation of § 2423(b) based on evidence of his intent alone, even if he never actually encountered or sexually assaulted a child. *See United States v. Tykarsky*, 446 F.3d 458, 469 (3d Cir. 2006) (explaining a conviction under § 2423(b) "turns simply on the purpose for which [the defendant] traveled" and the actual age of the intended victim is not an element of the offense). Although instances of a defendant's sexual abuse of a child victim may be presented at trial to prove the defendant's intent to engage in a sexual act which would violate chapter 109A, or his intent to engage in criminal sexual activity, evidence of actual abuse is not necessary to secure a conviction under either of theses statutes. *See id.* Schneider therefore urges this Court to find an offense only involves the sexual abuse of a minor if such abuse is necessary to sustain

a conviction for the offense, and argues the Court should not look beyond the elements of the charge to the underlying facts of the offense in making its determination as to whether § 3283 applies.

Schneider's arguments are unavailing. First, *Bridges*, the case Schneider relies on to support his argument, is distinguishable. Although *Bridges* also interpreted the word "involve" in the context of a statute of limitations' applicability, the statute in that case, the WSLA, is dissimilar to § 3283 because the WSLA targeted a narrow category of crimes and was intended to be narrowly applied.[4] In contrast, Congress has sought to progressively lengthen the statute of limitations to allow prosecution for child sex offenses by extending the limitations period first to the victim's 25th birthday, then to encompass the life of the victim, and finally to abolish the limitations period entirely for some categories of offenses. *See Chief*, 438 F.3d at 922; and 18 U.S.C. § 3299. Moreover, such legislation is indicative of the general Congressional intent to "cast a wide net to ensnare as many offenses against children as possible." *United*

[4] The Third Circuit has only addressed *Bridges* on three occasions, in decisions which are over 15 years old. *See Dutton v. Wolpoff & Abramson*, 5 F.3d 649 (3d Cir. 1993) (discussing the doctrine of legislative reenactment); *United States v. Levine*, 658 F.2d 113 (3d Cir. 1981) (outlining the history of the general statute of limitations for non-capital federal crimes); *United States v. Vazquez*, 319 F.2d 381 (3d Cir. 1963) (stating the requirements for proving the crime of conspiracy to defraud the United States).

States v. Dodge, 597 F.3d 1347, 1355 (11th Cir. 2010) (interpreting Congressional intent with regard to the Sex Offender Registration and Notification Act (SORNA)).

The Eleventh Circuit's analysis in *Dodge*, while not controlling, is instructive because the court discussed whether a categorical approach is appropriate in determining whether a criminal conviction is a "sex offense" under the SORNA. The SORNA defines the term "sex offense" to include "a criminal offense that is a specified offense against a minor," 42 U. S.C. § 16911(5)(A)(ii), and further defines a "specified offense against a minor" to include an offense against a minor that "involves . . . [c]riminal sexual conduct involving a minor." 42 U.S.C. § 16911(7)(H). Dodge was convicted of three counts of transferring obscene material to a minor after he knowingly transferred nude images of himself to someone he believed to be a thirteen-year-old girl, but who was actually an undercover agent. *Dodge*, 597 F.3d at 1349. In determining whether this constituted a "sex offense" under § 161911(5)(A)(ii), the court concluded it was appropriate to look beyond Dodge's statute of conviction to the underlying facts of his offense because the definition of a "specified offense against minor" at § 16911(7) contains no reference to an "element" of a crime and refers to "offenses" rather than "convictions." *Dodge*, 597 F.3d at 1355-54. Similarly, § 3283's description of an offense involving the sexual abuse of a child makes no reference to the elements of a crime and by its terms applies to

"offenses" rather than "charges." Moreover, § 3283's limitations period applies to offenses "involving" child sexual abuse, not to offenses "constituting" such abuse. The *Dodge* court held that Dodge's transfer of nude photos of himself to a girl he thought was thirteen years old "clearly constitute[d] 'criminal sexual conduct involving a minor' and rejected the argument that the phrase "against a minor" requires contact with or opposition by the minor.[5] *Id.* at 1355.

Second, the categorical analysis suggested by Schneider is untenable here because the Court cannot determine whether the offenses with which Schneider is charged involve sexual abuse of a child by examining the elements of the offenses alone. Rather, each of Schneider's charges cross-references another crime which this Court must also consider. A defendant can only be convicted under § 2423(b) if he traveled with the intent to engage in a sexual act with a child which would violate chapter 109A if committed in the United States. *See* 18 U.S.C. § 2423(b). This cross-reference requires the Court to examine both whether

---

[5] Although *Dodge's* interpretation of a sex offense under the SORNA is not directly on point for this Court's interpretation of § 3283, the court's reasoning is analogous:

> District judges do not need a statute to spell out every instance of conduct that is a sexual offense against a minor. They are capable of examining the underlying conduct of an offense and determining whether a defendant has engaged in conduct that 'by its nature is a sex offense against a minor.'

Dodge, 597 F.3d at 1355.

the defendant intended to engage in a sexual act defined by § 2246 and to examine whether the underlying conduct, if committed, would constitute an offense under chapter 109A. At the time of the offense in 2001, Chapter 109A made it a crime to knowingly engage in a sexual act with a person between the age of 12 and 16 years if the offender was more than four years older than the minor. *See* 18 U.S.C. § 2243(a) (2001).

A defendant can only be convicted under § 2421 if he transported a person with the intent to engage in criminal sexual activity. This also requires the Court to look beyond the elements of § 2421 to examine which predicate criminal offense underlies the charge. Here, the predicate offense charged is a violation of Section 133 of the Russian Criminal Code criminalizes compelling a person to engage in illicit relations or pederasty[6] "by means of blackmail, threat of destruction, damage, or taking of property, or with the advantage of material or any other dependence of the victim." UGOLOVNYI KODEKS ROSSIISKOI FEDERATSII [UK RF] (Criminal Code) art. 133 (Russ.). Both of these charged offenses cross-reference offenses involving sexual abuse of a minor. As a consequence, application of the statute of limitations provided in 18 U.S.C. § 3283 is appropriate. Third, those courts that have considered this issue have uniformly held the limitations period of § 3283 applies to crimes codified

[6] Pederasty is "[a]nal intercourse between a man and a boy." *Black's Law Dictionary*, 1167 (8th ed. 2004).

in chapters 110 and 117. The District Court of Connecticut recently addressed a similar question in *United States v. Sensi*, No. 08-253, 2010 U.S. Dist. LEXIS 55594 (D. Conn. Jun. 7, 2010). In that case, defendant Edgardo Sensi was charged with illicit sexual conduct in foreign places, in violation of 18 U.S.C. § 2423(c), and various offenses related to production of child pornography, all of which involved two minor victims. *Id.* Like Schneider, Sensi argued the statute of limitations for these offenses was not governed by § 3283, and had thus expired. The court addressed whether § 3283's reference to sexual abuse "applies only to crimes listed in chapter 109A of Title 18, which is titled 'Sexual Abuse,'" or whether it encompasses "all crimes that would logically relate to the common understanding of sexual abuse even when found in chapters 110 and 117," concluding "[o]f the courts that have faced this issue, all have found that *section 3283* applies to the latter category of crimes," those which logically relate to the common understanding of sexual abuse. *Id.* (citing *United States v. Panner*, No. 06-365, 2007 U.S. Dist. LEXIS 11589, at *2 (E.D. Cal. Feb. 20, 2007) (holding the statute of limitations in § 3283 applied to prosecution under 18 U.S.C. §§ 2251 and 2252A, child pornography offenses codified in Chapter 110); *United States v. Borazanian*, 148 Fed. Appx. 352, 353 (6th Cir. 2005) (applying § 3283 to a child pornography offense and to a charge for traveling with intent to engage in illicit sexual conduct, in violation of 18 U.S.C. § 2423(b), which is codified in Chapter 117); and *Chief*

438 F.3d 920 (applying § 3283 to charge under 18 U.S.C. § 2241(a))).

The court went on to hold that § 3283 applied to a charge under § 2423(c), explaining such a charge "constituted sexual abuse' insofar as it allege[d] that defendant traveled to Nicaragua to engage in illicit sexual conduct with a minor." *Sensi*, 2010 U.S. Dist. LEXIS 55494, at *6-7. In the instant case, both of Schneider's charged offenses are codified in chapter 117 and both "logically relate to the common understanding of sexual abuse" in that Schneider is charged with (1) traveling with the intent to engage in sexual activity criminalized by chapter 109A, which governs sexual abuse crimes, and (2) transporting a minor with the intent to engage in compulsory anal intercourse with him. These offenses indisputably relate to the common understanding of sexual abuse and also "involve" sexual abuse as defined in 18 U.S.C. § 3509(a) because sexual abuse of a child "includes the . . . persuasion, inducement, enticement or coercion of a child to engage in . . . sexually explicit conduct." 18 U.S.C. § 3509(a).

Accordingly, this action is timely under § 3283 as both offenses charged involve the sexual abuse of a child. An appropriate order follows.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 12-1145 & 13-1491

UNITED STATES OF AMERICA

v.

KENNETH SCHNEIDER,
Appellant

(D.C. No. 2-10-cr-00029-001)

Present: McKEE, *Chief Judge*, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, Jr., VANASKIE, SHWARTZ and KRAUSE, *Circuit Judges.*

SUR PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellant Kenneth Schneider in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for

rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT:

s/ D. Michael Fisher
Circuit Judge

Dated: October 5, 2015