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9
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 10 UNITED STATES OF AMERICA

11 UNITED STATES DISTRICT COURT

12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

16 ROBERT QUIDO STELLA,

17 Defendant.

No. CR 21-338-GW

GOVERNMENT'S TRIAL MEMORANDUM

Trial Date: 04/18/23
 Hearing Time: 8:00 a.m.
 Location: Courtroom of the
 Hon. George Wu

18
 19 Plaintiff United States of America, by and through its counsel
 20 of record, the United States Attorney for the Central District of
 21 California and Assistant United States Attorneys Catharine Richmond
 22 and Lyndsi Allsop, hereby files its Trial Memorandum.

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1 This filing is based upon the attached memorandum of points and
2 authorities, the files and records in this case, and such further
3 evidence and argument as the Court may permit.

4 Dated: 04/11/23

Respectfully submitted,

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7 MACK E. JENKINS
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9 Chief, Criminal Division

Catharine Richmond

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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATUS OF THE CASE

A jury trial in this case, United States v. Stella, CR 21-338-GW, is set for next Tuesday, April 18, 2023. The government estimates its case-in-chief is approximately one court day. With cross-examination and redirect, the government estimates the trial will take a one and a half to two days. It is unknown whether the defense will present a case and, if so, how long it would last. Estimating two days for jury selection, the presentation of the case is likely to last three to four days with jury deliberations to follow.

The government anticipates calling four witnesses in its case-in-chief:

(1) Homeland Security Investigations ("HSI") Special Agent Victoria Scott ("Agent Scott"), the case agent;

(2) HSI Special Agent David Parker ("Agent Parker"), a digital forensic expert;

(3) Ms. Kelly Galvan, Minor Victim 3's ("MV3") mother; and

(4) Mr. Coleman Kelly, Minor Victim 2's ("MV2") father.

The government reserves the right to call rebuttal witnesses, if necessary.

II. STATEMENT OF CHARGES

Defendant, ROBERT QUIDO STELLA ("defendant"), is charged in a six-count indictment with child exploitation offenses.

Today, April 11, 2023, defendant disclosed he intends to plead guilty, without a plea agreement, to the last three counts of the indictment which charge him with, in Counts Four and Five, Possession of Child Pornography, in violation of 18 U.S.C. §§ 2252A(a)(5)(b),

1 (b) (2), and, in Count Six, with Access With Intent to View Child
2 Pornography, in violation of 18 U.S.C. §§ 2252A(a) (5) (b), (b) (2).
3 The change of plea is set for the final pretrial conference this
4 Thursday, April 13, 2023.

5 If defendant pleads as he has indicated he will, then the trial
6 will be on the remaining three counts, Counts One through Three,
7 which charge defendant with Production of Child Pornography, in
8 violation of 18 U.S.C. § 2252A(a), (e).

9 Count One charges defendant with producing child pornography of
10 Minor Victim 1 ("MV1"), M.S., on March 5, 2018. Count Two charges
11 defendant with producing child pornography of MV2, M.K., on April 5,
12 2018. Count Three charges defendant with producing child pornography
13 of MV3, N.E., on April 5, 2018. All three girls were around 13
14 years-old at the time.

15 **III. ELEMENTS OF THE OFFENSES**

16 For the jury to find defendant guilty of Production of Child
17 Pornography, in violation of 18 U.S.C. § 2251(a), (e), the government
18 must prove the below elements beyond a reasonable doubt:

19 (1) At the time, the victim was under the age of 18 years;

20 (2) Defendant employed, used, persuaded, or coerced the victim
21 to take part in sexually explicit conduct for the purpose of
22 producing a visual depiction of such conduct; and

23 (3) Defendant either (a) knew or had reason to know that the
24 visual depiction would be mailed or transported across state lines or
25 in foreign commerce; of (b) the visual depiction was produced using
26 materials that had been mailed, shipped, or transported across state
27 lines or in foreign commerce; or (c) the visual depiction was mailed
28 or actually transported across state lines or in foreign commerce.

1 These elements come from the governing Ninth Circuit model jury
2 instruction, Model Instruction Number 20.18.

3 **IV. SUMMARY OF FACTS**

4 **A. HSI Receives a Tip Someone at Defendant's Residence Paid**
5 **to Access to a Darkweb Site Selling Access to Child**
6 **Pornography**

7 On May 10, 2021, Homeland Security Investigations ("HSI")
8 Ventura received a lead from their headquarters that the German
9 police had captured payment information to a website, "356 CP," which
10 sold access to child pornography. (In the Matter of the Search of
11 The Premises Located at 17808 Maplehurst Place, Canyon Country,
12 California 91387, MJ 2:21-03211-MAA, attached to United States v.
13 Stella, CR 21-338-GW ("Dkt.") 75, Exhibit ("Ex.") B.)

14 365 CP was a website accessible only through "The Onion
15 Browser," commonly referred to by its acronym, "Tor." Tor anonymizes
16 online activity by concealing the true Internet Protocol ("IP")
17 address of both the website provider and the site visitor. To access
18 a site on Tor, a user must first download and install Tor. Once
19 installed, Tor does not function like a typical browser with a search
20 engine. That is, a user cannot simply type in search terms which the
21 browser will use to populate a page with clickable hyperlinks to
22 related content. Instead, the user must have a site's URL address,
23 which, on the dark web, is often an unintuitive alphanumeric string.
24 Even if a user has such an address, dark web sites usually have
25 additional login or verification requirements. (Id. at p. 13,
26 Section V.)

27 The homepage of 365 CP contained 12 video stills depicting
28 children engaged in sex acts with hyperlinks. There was no other
content on the page. Those images and their captions were

1 unambiguous. For example, one image titled, "Mother decided to talk
2 with her son about sex and accidentally fucks," depicted a nude pre-
3 adolescent male, approximately 8-10 years-old, and a nude adult
4 female engaged in penetrative sex. Another image, titled, "Young
5 girl diligently sucks two cocks," depicted a pre-adolescent female
6 orally copulating two adult males' penises.

7 At the bottom of 365 CP's page, there were two options to access
8 the site: register or log in. To register for access, the site
9 instructed that a user must pay with cryptocurrency. (Def. Ex. B, p.
10 14 at ¶ 9(d).) Agents later found a screen recording defendant made
11 of himself logging into the site.

12 The payment information to 365 CP from the German tip indicated
13 a purchaser (identified by a unique number) used Coinbase - an online
14 company operating a cryptocurrency exchange platform - to transfer a
15 cryptocurrency payment to 365 CP. Agent Scott queried Coinbase which
16 in turn reported that that on July 13, 2020, the purchaser used a
17 Bitcoin wallet (identified by a unique number) to pay the equivalent
18 of approximately \$18.00 to 365 CP from a particular IP address. In
19 addition, the Coinbase user had registered as follows: Name, Robert
20 Stella; email address, rob.stella1@gmail.com; country, United States
21 of America; address, 17808 Maplehurst Place, Canyon Country, 91387;
22 and phone number, 619.672.9249.¹ (Def. Ex. B, pp. 14-15 at Section
23 VI(A).)

24
25

26 ¹ Typically, the government would not provide a defendant's
27 personally identifying information - such as a home address - in a
28 public filing. However, given that defendant publicly filed the
warrant as an exhibit which contained his personally identifying
information, the government will use the now-public full information
as well.

1 Charter Communications confirmed the IP address used to make
2 the cryptocurrency payment was registered to defendant at the
3 Maplehurst address. Verizon Wireless confirmed the 619.672.9249
4 phone number was registered to defendant at the Maplehurst address.
5 (Id. at pp. 15-16 at Section VI(B).)

6 **B. Agents Search Defendant's Residence, Seize Evidence, and**
7 **Search the Evidence Which Reveals Defendant Produced Child**
8 **Pornography of His Daughter and Her Teenage Friends and**
9 **Possessed Child Pornography of Other Children**

10 On July 15, 2021, HSI agents executed the search warrant at
11 defendant's residence. In all, they seized approximately 17 items
12 and, after returning two, retained only 15 and digitally searched 12.
13 (Id. at pp. 3-6; Def. Ex. C at p. 5.)

14 Special Agent David Parker ("Agent Parker"), who will be
15 testifying as a digital forensic expert, extracted data from the
16 digital devices pursuant to the warrant. (Def. Ex. C.) Agent Parker
17 created a Report of Investigation ("ROI") detailing which devices he
18 searched, how he searched them, and what he did with the extracted
19 data and evidence items. (Id.) He will testify as much at trial.
20 Specifically, he gave the extracted data to Agent Scott for further
21 review and culling.

22 Agent Scott will testify one of those digital devices was
23 Passport External hard drive, which is an external digital storage
24 device, bearing serial number WXMIE83NVZ10, which agents found in a
25 backpack on the right side of the bed in the primary bedroom. She
26 will also testify the backpack contained defendant's identification
27 cards, work badges, a boarding pass in his name, and his passport.
28 On that device, Agent Scott will testify (and Agent Parker will lay
the forensic foundation) that there were 17 videos and approximately

1 430 stills of MV1, MV2, and MV3 recorded from about waist-height in
2 the "kids' bathroom" of defendant's home. These files were found
3 nested five folders deep in file path titled, "\1-NU\1-Courses\HUB
4 650 Foundations of Behavioral Research\3-Case Study\Week4\." Many of
5 the files depicted the girls undressing or naked. These files are
6 the basis of the Production counts charged in Counts One through
7 Three. She will also introduce a video of defendant setting up the
8 camera in the bathroom and (with Agent Parker) that in the deleted
9 space were videos of defendant's wife and son. Agent Parker will
10 testify that he knows of no way the stills could be created except by
11 a user generating them.

12 In a drawer in the small armoire on defendant's side of the bed,
13 agents found a black USB charging port containing a hidden camera.
14 This camera is one of the cameras the Court is currently deciding
15 whether the government can introduce at trial and, if not, testify as
16 to seeing it during the execution of the search warrant.

17 Agent Scott will also testify (and Agent Parker will lay the
18 forensic foundation) that on defendant's MacBook Pro computer,
19 bearing serial number C02XG27YJG5M, agents found a file path,
20 "Users\robertstella\Desktop\1-Desktop\2-APG\2-Events\2-Clients\4-
21 Federal Contracts\1-Bids\INACTIVE\Midshipmen Program\1-Materials for
22 Experiential Program\Student Guide\Pictures\Working\Vampire," which
23 contained child pornography. One file, m2ex7pvg2uqfgwsgnzmh8.mp4,
24 depicted a nude adolescent male orally copulating a naked
25 prepubescent female. That child pornography is the subject of Count
26 Four.

27 They will also testify agents found a second external hard
28 drive, a Western Digital Passport, bearing serial number

1 WX41E34D3202, containing a file path, "Users\robertstella\Desktop\1-
2 Desktop\4-My Documents\Tax Return\2012\untitled folder," which housed
3 41 videos of child pornography mostly depicting prepubescent children
4 between the ages of 5-8. That child pornography is the subject of
5 Count Five. Those videos included the three videos charged in the
6 indictment namely:

- 7 • 3djru8dpmmetnxappw4kr.mp4 - a video that portrays an unseen
8 videographer directing a nude pre-adolescent female,
9 approximately 5-7 years of age, to display her genitalia
10 and buttocks, and then portrays an adult male hand touching
11 her vagina, and an adult male penis penetrating her vagina,
12 her mouth, and ejaculating on her genitals;
- 13 • 7mb6i6i5rrpdu645w4vpj.mp4 - a video that portrays a nude 5-
14 7 year old male; and
- 15 • 78toe746mvw3x67ot3iqo - a video that portrays a nude adult
16 male from the chest down, using his penis to penetrate the
17 vagina of a nude pre-adolescent female, approximately 6-9
18 years of age.

19 Defendant's payment to access the 365 CP is the subject of Count
20 Six.

21 **V. LEGAL AND EVIDENTIARY ISSUES**

22 **A. Motions *In Limine***

- 23 1. The Charged Child Pornography Can Be Offered and, If
24 Admitted, Published to the Jury

25 On February 23, 2023, this Court granted the government's motion
26 in limine to allow the government to offer child pornography as
27 evidence and, if it is admitted, publish it to the jury. (Dkt. 104.)
28 (The Court also agree to display the child pornography to the jurors

1 only and not to the gallery). The Court is permitting the government
2 to show one video for Counts One and Two plus one still from those
3 videos; Count Three is based on stills alone and the government will
4 admit only one still pursuant to the Court's ruling.

5 Now that defendant is pleading to Counts Four through Six, the
6 government will file a separate motion seeking to admit a limited
7 amount of evidence, including child pornography, from those counts
8 under a number of different legal theories.

9 2. Defendant Is Precluded from Seeking Jury Nullification
10 by Referring to His Military Service

11 On February 23, 2023, this Court granted the government's motion
12 in limine to preclude defendant from seeking to improperly trigger
13 jury nullification by referring to defendant's military service.
14 Dkt. 104. If defendant calls character witnesses, which he has
15 disclosed he might, the government might seek a side bar requesting
16 an attorney proffer from defense counsel before the character
17 witnesses take the stand indicating they will not seek to elicit
18 testimony about defendant's military service.

19 3. Physical Evidence from the Search Warrant Can Be
20 Offered, But a Ruling on Hidden Cameras Is Pending

21 Defendant filed a motion to suppress the physical evidence
22 seized from defendant pursuant to the search warrant. Dkt. 75. At
23 the hearings on the motions to suppress, the Court indicated it would
24 deny defendant's motion, but held one issue in abeyance subject to
25 further briefing: whether cameras seized during the warrant could be
26 admitted and, if not, whether the agents could testify as to seeing
27 them during the execution of the search warrant. The parties'
28 supplemental briefing is pending with the Court.

1 4. A Ruling on the Admissibility of Defendant's
2 Statements Is Pending, But Defendant Should Be
3 Precluded From Attempting to Relitigate the Manner of
4 the Execution of the Search Warrant

5 Defendant filed a motion to suppress statements he made to
6 agents on the day of the execution of the search warrant. Dkt. 77.
7 Defendant contended the manner of the execution of the search warrant
8 was excessive and therefore caused him to involuntarily confess. Id.

9 The Court has not yet ruled on whether defendant's statements
10 will be suppressed.

11 Regardless how the Court rules, however, defendant should be
12 precluded from relitigating to the jury the manner of the execution
13 of the search warrant. The manner of the execution of the search
14 warrant is irrelevant to defendant's guilt or innocence.

15 Relitigating it, therefore, would serve only to impermissibly call
16 into question the agents' character by implying to the jury they
17 violated defendant's rights or, in the alternate, were excessive in
18 the manner of execution of the search warrant.

19 "In executing a search warrant officers may take reasonable
20 action to secure the premises and to ensure their own safety and the
21 efficacy of the search." Los Angeles Cnty., California v. Rettele,
22 550 U.S. 609, 614 (2007) (citations omitted). At the motion to
23 suppress hearings, this Court indicated agreement with the agents
24 need to protect their safety during the execution of the search
25 warrant.

26 Therefore, defendant should be precluded from relitigating the
27 manner of the execution of the search warrant to the jury as it will
28 not aid the trier of fact in determining the only issue before it -
 defendant's guilt or innocence on Counts One through Three.

1 **B. Hearsay**

2 1. The Government May Introduce Defendants' Statements

3 The government, if allowed, intends to introduce defendant's
4 recorded statements to HSI Special Agents.

5 A defendant's out-of-court statement is admissible if offered
6 against him by the government. See Fed. R. Evid. 801(d) (2) (A);
7 United States v. Fernandez, 839 F.2d 639, 640 (9th Cir. 1988).

8 An out-of-court statement offered against the defendant is also
9 not hearsay if the defendant "manifested an adoption or belief in its
10 truth" Fed. R. Evid. 801(d) (2) (B).

11 2. The Government May Introduce Statements of Persons in
12 Conversation with the Defendant

13 The government also intends to introduce statements of the
14 agents interviewing defendant for context. Such statements not
15 offered for their truth, but to provide context for what the
16 defendant said or did, and thus, are not hearsay. United States v.
17 Smith, 918 F.2d 1551, 1559 (11th Cir. 1990); United States v.
18 McDowell, 918 F.2d 1004, 1007-08 (1st Cir. 1990). This makes sense,
19 as often a defendant's "yes" or "no" answer would be indecipherable
20 to a jury without the question that prompted such a question.

21 3. Defendants May Not Introduce Their Own Recorded
22 Statements

23 A defendant cannot elicit or introduce evidence of his own prior
24 statements, either on direct examination of his own witness, or
25 cross-examination of the government's witness, because those
26 statements are inadmissible hearsay. See e.g., United States v.
27 Ortega, 203 F.3d 675, 682 (9th Cir. 2000); United States v. Lim, 984
28 F.2d 331, 336 (9th Cir. 1993) ("[Defendant's] own statement was

1 admissible as a party-opponent admission under Fed. R. Evid.
2 801(d) (2) (A)).

3 Indeed, even where the government elicits the inculpatory
4 portion of a defendant's statement from a witness, on cross-
5 examination, the defendant is not entitled to elicit any purportedly
6 exculpatory portion of the defendant's own statement. See Ortega at
7 682 ("self-inculpatory statements, when offered by the government,
8 are admissions by a party opponent and are therefore not hearsay,"
9 but when offered by defendant himself, "non-self-inculpatory
10 statements are inadmissible hearsay"). To permit otherwise would
11 place a defendant's statements "before the jury without subjecting
12 himself to cross examination, precisely what the hearsay rule
13 forbids." Ortega, 203 F.3d at 682 (district court properly granted
14 the government's motion in limine to exclude introducing defendant's
15 post-arrest statements through cross examination of INS agent)
16 (quoting United States v. Fernandez, 839 F.2d 639, 640 (9th Cir.
17 1988)); United States v. Cunningham, 194 F.3d 1186, 1199 (11th Cir.
18 1999) (defendant cannot introduce exculpatory statement without
19 subjecting himself to cross examination).

20 4. Rule of Completeness Does Not Permit Defendant to
21 Admit Additional Statements where Government Clips Do
22 Not Create Distortions

22 Defendant may argue that Rule 106 ("Rule of Completeness")
23 allows defendant to admit additional portions of their recorded
24 statements to "complete" the recordings. This is a misstatement of
25 the law.

26 The Ninth Circuit has been clear, Rule 106 only "exists to avert
27 'misunderstanding or distortion' caused by introduction of only part
28 of a document." United States v. Vallejos, 742 F.3d 902, 905 (9th

1 Cir. 2014) (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153
2 (1988)). This does not mean defendant is permitted to add additional
3 recordings from the same conversation simply because the recording
4 also contains non-inculpatory statements or furthers a defendant's
5 narrative. See United States v. Collicott, 92 F.3d 973, 983 (9th
6 Cir. 1996), as amended (Oct. 21, 1996).

7 To determine whether the Rule of Completeness applies, the Court
8 must determine whether the government's proffered statements create a
9 "misunderstanding" or "distortion" about its contents. Vallejos, 742
10 F.3d at 905. To be supplemented using this rule, the statements must
11 have created a "misleading impression" because the edited version
12 "distorted the meaning of the statement." Collicott, 92 F.3d at 983;
13 see also United States v. Dorrell, 758 F.2d 427, 434-35 (9th Cir.
14 1985) (finding no Rule of Completeness violation where the edited
15 version of a confession did not "distort[] the meaning of the
16 statement") (internal quotation marks omitted). Here there is no
17 such distortion.

18 Where the government introduces statements by a party opponent
19 pursuant to 801(d)(2), it is proper to exclude non-self-inculpatory
20 statements offered by defendant under Rule 106. Meraz v. United
21 States, 663 F. App'x 580 (2017); Ortega, 203 F.3d at 682.

22 Here the government's recording clips do not create any
23 distortion of facts. Where the recording excerpt does not create
24 such a distortion, "it is often perfectly proper to admit segments of
25 prior testimony without including everything . . ." Collicott, 92
26 F.3d at 983 (internal quotation marks omitted).

1 **C. Cross-Examination of Defendant**

2 A defendant who testifies at trial waives his right against
3 self-incrimination and subjects himself to cross-examination
4 concerning all matters reasonably related to the subject matter of
5 his testimony. See, e.g., Ohler v. United States, 529 U.S. 753, 759
6 (2000) (citing McGautha v. California, 402 U.S. 183, 215 (1971),
7 vacated in part on other grounds, Crampton v. Ohio, 408 U.S. 941
8 (1972) (“It has long been held that a defendant who takes the stand
9 in his own behalf cannot then claim the privilege against cross-
10 examination on matters reasonably related to the subject matter of
11 his direct examination”). A defendant has no right to avoid cross-
12 examination on matters that call into question her claim of
13 innocence. United States v. Miranda-Uriarte, 649 F.2d 1345, 1353-54
14 (9th Cir. 1981). The scope of a defendant’s waiver is coextensive
15 with the scope of relevant cross-examination. United States v.
16 Cuozzo, 962 F.2d 945, 948 (9th Cir. 1992); United States v. Black,
17 767 F.2d 1334, 1341 (9th Cir. 1985) (“What the defendant actually
18 discusses on direct does not determine the extent of permissible
19 cross-examination or his waiver. Rather, the inquiry is whether ‘the
20 government’s questions are reasonably related’ to the subjects
21 covered by the defendant’s testimony.”).

22 In addition, a witness’s - including defendnat’s - false
23 statements may “on cross-examination, . . . be inquired into if they
24 are probative of the character for truthfulness or untruthfulness” of
25 the witness. Fed. R. Evid. 608(b); United States v. Oriyomi, 449 F.
26 App’x 681, 682 (9th Cir. 2011) (“Under [Rule 608(b)], prosecutors may
27 cross-examine witnesses about documents so long as they do not enter
28 the documents as extrinsic evidence.”).

1 As set forth above, the government intends to introduce in its
2 case-in-chief evidence of defendant's statements to HSI Special
3 Agents.

4 If defendant take the stand, the government intends to impeach
5 defendant with these statements. Because defendant's attempts at
6 false exculpatory statements are highly probative of his character
7 for truthfulness, they are proper grounds for cross-examination under
8 608(b).

9 **D. Lay Testimony of Law Enforcement Agents**

10 Lay opinion testimony from law enforcement officers is allowable
11 under Federal Rule of Evidence 701. Rule 701 permits a lay witness
12 to give opinion testimony as long as the opinion is "(a) rationally
13 based on the witness's perception; (b) helpful to clearly
14 understanding the witness's testimony or to determining a fact in
15 issue; and (c) not based on scientific, technical, or other
16 specialized knowledge within the scope of Rule 702." Fed. R. Evid.
17 701. As the Ninth Circuit has explained, law enforcement officers'
18 opinion testimony:

19 is a means of conveying to the jury what the witness has
20 seen or heard . . . Because it is sometimes difficult to
21 describe the mental or physical condition of a person, his
22 character or reputation, the emotions manifest by his acts;
23 speed of a moving object or other things that arise in a
day to day observation of lay witnesses; things that are of
common occurrence and observation, such as size, heights,
odors, flavors, color, heat, and so on; witnesses may
relate their opinions or conclusions of what they observed.

24 United States v. Skeet, 665 F.2d 983, 985 (9th Cir. 1982).

25 The government anticipates calling law enforcement witnesses
26 during its case-in-chief who are expected to testify about their
27 observations during the execution of the search warrant, including
28 (but not limited to) which bedroom was defendant's, which side of the

1 bed was defendant's, and, if the Court allows, where cameras were
2 hidden and in which rooms. United States v. Figueroa-Lopez, 125 F.3d
3 1241, 1245-1246 (9th Cir. 1997) (explaining that lay witnesses may
4 testify about the implication of an observation when the
5 "observations are common enough and require such a limited amount of
6 expertise, if any, that they can, indeed, be deemed lay witness
7 opinion"). In addition, their testimony will also include the
8 officers' opinions and impressions based on what they observed,
9 including that the cameras were, in fact, hidden. United States v.
10 Colwell, 7 F. App'x 555, 557 (9th Cir. 2001) (citations omitted) ("A
11 lay witness may testify based on visual observations of conduct and
12 may make reasonable inferences regarding that conduct."). Lay law
13 enforcement witness testimony should be permitted in this case as it
14 will be based on the respective law enforcement officers'
15 perceptions, and helpful to the jury's understanding of the testimony
16 and determination of facts at issue, namely, whether defendant
17 recorded and saved files of the girls naked in the bathroom to
18 produce child pornography. See Fed. R. Evid. 701; see also United
19 States v. Simas, 937 F.2d 459, 464 (9th Cir. 1991) (the opinion of a
20 law enforcement officer, who testified as a lay witness, "that the
21 defendant's activities match 'the usual criminal modus operandi,'" is
22 helpful to the jury and permissible under Rule 701(b)); United States
23 v. Tello-Carrillo, 516 F. App'x 643, 643 (9th Cir. 2013) ("Because
24 [the officer's] testimony was based on his personal experience and
25 was relevant to assessing the plausibility of [the defendant's]
26 defense theory, it was admissible as lay testimony under Federal Rule
27 of Evidence 701.").

28

1 **E. Audio and Video Recordings**

2 All duly admitted recorded conversations must be played in open
3 court.² The foundation that must be laid for the introduction into
4 evidence of recorded conversations is a matter largely within the
5 discretion of the trial court. There is no rigid set of foundational
6 requirements. Rather, the Ninth Circuit has held that recordings are
7 sufficiently authenticated under Federal Rule of Evidence 901(a) if
8 sufficient proof has been introduced "so that a reasonable juror
9 could find in favor of authenticity or identification," which can be
10 done by "proving a connection between the evidence and the party
11 against whom the evidence is admitted" and can be done by both direct
12 and circumstantial evidence. United States v. Matta-Ballesteros, 71
13 F.3d 754, 768 (9th Cir. 1995), modified by 98 F.3d 1100 (9th Cir.
14 1996).

15 Witnesses may testify competently as to the identification of a
16 voice on a recording. Here, that witness will be Agent Scott. A
17 witness's opinion testimony in this regard may be based upon his
18 having heard the voice on another occasion under circumstances
19 connecting it with the alleged speaker. Fed. R. Evid. 901(b)(5);
20 United States v. Torres, 908 F.2d 1417, 1425 (9th Cir. 1990)
21 ("Testimony of voice recognition constitutes sufficient
22 authentication.").

23 Recorded conversations are competent evidence even when they are
24 partly inaudible, unless the unintelligible portions are so
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28 ² Pursuant to the Court's previous comments, the government
anticipates the child pornography will be shown only to the jurors,
and not to the gallery, however.

1 unsubstantial as to render the recording as a whole untrustworthy.
2 United States v. Rrapi, 175 F.3d 742, 746 (9th Cir. 1999).

3 **F. Business Records and Public Records**

4 The government will seek to introduce business records in the
5 form of certified copies of business records, which do not require
6 extrinsic evidence of authenticity as a condition precedent to
7 admissibility. Fed. R. Evid. 902(11). Such records are self-
8 authenticating, Fed. R. Evid. 902(11), and not hearsay, Fed. R. Evid.
9 803(6). A duplicate is admissible to the same extent as an original
10 unless (1) a genuine question is raised as to the authenticity of the
11 original, or (2) under the circumstances, it would be unfair to admit
12 the duplicate instead of the original. Fed. R. Evid. 1003; see also
13 United States v. Smith, 893 F.2d 1573, 1579 (9th Cir. 1990).

14 **G. Reciprocal Discovery**

15 The government has complied with its discovery obligations under
16 Rule 16 of the Federal Rules of Criminal Procedure, and continues to
17 do so. The government has likewise requested all reciprocal
18 discovery from defendants on multiple occasions in writing. To date,
19 the government has received no discovery from defendant other than
20 the videos and photos from defendant's home security system on the
21 execution of the day of the search warrant; nor have defendants
22 voiced an objection to the government's requests.

23 Pursuant to Rule 16(b)(1)(A), a defendant should be precluded
24 from introducing any documents that were not produced, in violation
25 of defendant's reciprocal discovery obligations. Fed. R. Crim. P.
26 16(d)(2) ("the court may . . . prohibit the party from introducing
27 evidence not disclosed"); see also Taylor v. Illinois, 484 U.S. 400,
28 415 (1988) (defendant's failure to comply with, or object to,

1 government's discovery request before trial justified exclusion of
2 unproduced evidence).

3 **H. Authentication, Identification, and Chain of Custody**

4 Fed. R. Evid. 901(a) provides that "the requirement of
5 authentication or identification as a condition precedent to
6 admissibility is satisfied by evidence sufficient to support a
7 finding that the matter in question is what its proponent claims."
8 Rule 901(a) only requires the government to make a prima facie
9 showing of authenticity or identification "so that a reasonable juror
10 could find in favor of authenticity or identification." United
11 States v. Chu Kong Yin, 935 F.2d 990, 996 (9th Cir. 1991); United
12 States v. Blackwood, 878 F.2d 1200, 1202 (9th Cir. 1989); United
13 States v. Black, 767 F.2d 1334, 1342 (9th Cir. 1985). Once the
14 government meets this burden, "the credibility or probative orce of
15 the evidence offered is, ultimately, an issue for the jury." Black,
16 767 F.2d at 1342.

17 The government will seek to photos and videos obtained from
18 defendant's digital devices, including a computer and hard drive. In
19 establishing chain of custody as to an item of physical evidence, the
20 government is not required to call all persons who may have come into
21 contact with the piece of evidence. Reyes v. United States, 383 F.2d
22 734 (9th Cir. 1967); Gallego v. United States, 276 F.2d 914, 917 (9th
23 Cir. 1960). Moreover, a presumption of regularity exists in the
24 handling of exhibits by public officials. United States v. Kaiser,
25 660 F.2d 724, 733 (9th Cir. 1981); United States v. De Bright, 730
26 F.2d 1255, 1259 (9th Cir. 1984) (en banc); United States v.
27 Harrington, 923 F.2d 1371, 1374 (9th Cir. 1991). Gaps or defects in
28 chain of custody go to the weight of the evidence rather than its

1 admissibility. United States v. Matta-Ballesteros, 71 F.3d 754, 769-
2 70 (9th Cir. 1995); United States v. Robinson, 967 F.2d 287, 292 (9th
3 Cir. 1992).

4 **I. Character Evidence**

5 The Supreme Court has recognized that character evidence --
6 particularly cumulative character evidence -- has weak probative
7 value and great potential to result in confusion of the issues and
8 prejudice the jury. Michelson v. United States, 335 U.S. 469, 480,
9 486 (1948). The Court has thus given trial courts wide discretion to
10 limit the presentation of character evidence. Id. at 486. Federal
11 Rule of Evidence 403 also "gives the district court broad discretion
12 in excluding cumulative evidence." See Hamling v. United States, 418
13 U.S. 87, 127 (1974).

14 Rule 404(a) of the Federal Rules of Evidence governs the
15 admissibility of character evidence. Rule 404(a) permits a defendant
16 to introduce evidence only of a "pertinent" trait of character. A
17 non-pertinent or misleading character trait is not admissible. For
18 instance, evidence of defendant's family status is similarly
19 irrelevant to whether defendant is believable and law-abiding, and is
20 thus inadmissible. See United States v. Santana-Camacho, 931 F.2d
21 966, 967-68 (1st Cir. 1991) (testimony of defendant's daughter
22 purportedly showing that defendant was a good family man was
23 inadmissible character evidence inasmuch as such character traits
24 were not pertinent to charged crime of illegally bringing aliens into
25 the United States).

26 As a general rule, character witnesses called by defendant may
27 not testify about specific acts demonstrating a particular trait or
28 other information acquired only by personal observation and

1 interaction with the defendant; the witness must summarize the
2 reputation or opinion of the defendant as known in the community.
3 Fed. R. Evid. 405(a); Michelson, 335 U.S. at 477; United States v.
4 Hedgorth, 873 F.2d 1307, 1313 (9th Cir. 1989). On cross-examination
5 of a defendant's character witness, however, the government may
6 inquire into specific instances of defendant's past conduct relevant
7 to the character trait at issue. Fed. R. Evid. 405(a). In
8 particular, a defendant's character witnesses may be cross-examined
9 about their knowledge of the defendant's past crimes, wrongful acts,
10 and arrests. Michelson, 335 U.S. at 479, 481 n.18. The only
11 prerequisites are that: (1) there be a good faith basis that the
12 incidents inquired about occurred; and (2) the incidents are relevant
13 to the character trait at issue. United States v. McCollom, 664 F.2d
14 56, 58 (5th Cir. 1981); United States v. Bright, 588 F.2d 504, 512
15 (5th Cir. 1979).

16 **VI. CONCLUSION**

17 The government respectfully requests leave to file such
18 supplemental memoranda as might become necessary during trial.
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