03-1394-cr

To be Argued By:
PETER S. JONGBLOED

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-1394-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

PHILIP A. GIORDANO
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Alan H. Nevas, J.) had subject matter jurisdiction over this federal criminal case under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), and this Court has appellate jurisdiction over the defendant's challenge to his conviction and sentence pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court correctly conclude that the defendant's use of telephones constituted use of a "facility or means of interstate commerce" within the meaning of 18 U.S.C. § 2425?

2. Did the district court abuse its discretion in denying the defendant's motion to suppress the wiretap evidence?

3. Was there sufficient evidence that the defendant acted under color of law in abusing the minor girls, and did the district court correctly conclude that the girls had a constitutional right to be free of aggravated sexual abuse?

4. Did the district court abuse its discretion in its evidentiary rulings, particularly in finding that the defendant had opened the door to cross-examination on a number of topics?

5. Did the district court abuse its discretion in denying the defendant's motion to suppress oral statements made between July 23 and 26, 2001, where the defendant has not challenged the district court's findings that he was not under arrest and made the statements voluntarily?

6. Did the district court properly decline to require that the Government interview the child witnesses pre-trial in the presence of defense counsel and a court-appointed monitor, and properly allow the child victims to testify by closed circuit television?

7. Did the district court abuse its discretion in precluding the defendant from cross-examining the child victims about their prior sexual behavior?

8. Did the district court abuse its discretion in computing the defendant's offense level under the Sentencing Guidelines, and is the court's discretionary decision not to further depart downwardly unreviewable on appeal?

9. Did the district court abuse its discretion in declining to recuse itself from the case?

United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket No. 03-1394-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

PHILIP A. GIORDANO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Philip A. Giordano, a three-term Mayor of Waterbury, was convicted by a jury of numerous federal crimes arising from his repeated sexual abuse of two young girls, ages eight and ten. This case arose out of a public corruption investigation, in which the Government obtained court authorization to wiretap the defendant's phones. During the course of the wiretap, federal agents intercepted calls in which the defendant arranged for a Waterbury prostitute and drug addict, Guitana Jones, to bring her niece and daughter to various locations, including the Mayor's Office, so that the defendant could sexually abuse them.

The defendant raises a host of challenges to his convictions for violating the girls' civil rights (18 U.S.C. § 242) and for using and conspiring to use telephones in connection with sexual crimes (18 U.S.C. § 2425 and § 371). Among other things, he argues (1) that his § 2425 convictions are statutorily and constitutionally invalid because the telephone calls at issue were intrastate; (2) that the district court abused its discretion in refusing to suppress the wiretap evidence; (3) that there was insufficient evidence that he acted "under color of law" in abusing the children, and that the girls did not have a federally protected right to be free of sexual abuse; (4) that the district court abused its discretion in its evidentiary rulings, particularly in finding that the defendant had opened the door to cross-examination on a number of topics; (5) that the district court abused its discretion in denying his motion to suppress certain oral statements made to law enforcement agents during a brief period of cooperation after his crimes were uncovered; (6) that the district court erred in refusing to require that the Government interview the child witnesses in the presence of defense counsel and a court-appointed monitor pre-trial, and in permitting the children to testify by closed-circuit television; (7) that the district court abused its discretion in precluding the defendant from cross-examining the children about their prior sexual behavior; (8) that the district court abused its discretion in calculating the Sentencing Guidelines and in declining to downwardly depart further than it did; and (9) that the district judge abused his discretion in failing to recuse himself from the case. For the reasons that follow, this Court should affirm the conviction and sentence in all respects.

STATEMENT OF THE CASE

On July 26, 2001, the Government arrested the defendant without a warrant for violations of 18 U.S.C. §§ 2425 and 371. The defendant was presented before the United States District Court for the District of Connecticut (Hon. Alan H. Nevas, J.). JA 34.[1] The defendant was initially ordered detained, and a criminal complaint setting forth the basis for these charges was filed later that day. After holding a bail hearing, Judge Nevas issued a written detention order dated August 10, 2001. JA 39.

On September 12, 2001, a federal grand jury in Connecticut returned an indictment charging the defendant with two counts of civil rights violations (18 U.S.C. § 242), one count of conspiracy to violate 18 U.S.C. § 2425 (18 U.S.C. § 371), and eleven counts of unlawful

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[1] References are as follows:
JA: Defendant's Joint Appendix
SA: Defendant's Sealed Appendix
SPA: Defendant's Special Appendix
GA: Government's Appendix
GSA: Government's Sealed Appendix
T: Trial transcript (not reproduced in appendices)
The Government's Appendix includes items such as the notice of appeal and certain rulings from which the defendant appeals, which should have been included in the defendant's appendix, *see* Fed. R. App. P. 9(a)(1) and 30(a)(1), as well as transcripts of relevant hearings below and the testimony of the two minor victims, the principal cooperating witness (Guitana Jones), and the defendant.

use of interstate facilities to transmit information about a minor (18 U.S.C. § 2425). A co-defendant, Guitana Jones, was also charged with the conspiracy and § 2425 offenses. The defendant pleaded not guilty to these charges on September 20, 2001. JA 41.

On November 8, 2001, following the defendant's motion for release pending trial, the district court conducted a second bail hearing. The district court reaffirmed its order of pretrial detention, and set forth its reasons in a written ruling on November 14, 2001. JA 44. The defendant appealed the detention order, which this Court affirmed by summary order on August 16, 2002. 41 Fed. Appx. 522.

On July 29, 2002, the district court denied the defendant's motion to dismiss the indictment. JA 49; SPA 1, 260 F. Supp.2d 477.

On September 10, 2002, co-defendant Jones pleaded guilty to Counts 3, 4, 6 and 8 of the indictment, and entered into a written cooperation agreement with the Government. JA 49.

On September 12, 2002, the district judge denied the defendant's motion to disqualify him from ruling on the motion to suppress the wiretap evidence because he had signed the electronic surveillance order. JA 49.

On November 14, 2002, the judge denied the defendant's second, broader motion for disqualification. JA 50; SPA 28, 2002 WL 32086481.

On December 18, 2002, the defendant filed a petition for writ of mandamus in this Court seeking to overturn the district court's two decisions denying his motions for recusal. By summary order dated January 3, 2002, this court denied the petition. GA 35, No. 02-3095.

On January 16, 2003, the grand jury returned an 18-count superseding indictment which, like the original 14-count indictment, charged the defendant with the same federal offenses and added four additional charges under 18 U.S.C. § 2425 concerning other intercepted telephone calls. JA 1-23 (superseding indictment), 51. The defendant renewed his plea of not guilty on February 6, 2003. JA 52.

On February 14, 2003, the district court denied the defendant's motion to suppress wiretap evidence and his oral statements. JA 54; SPA 8, 259 F. Supp.2d 146.

On March 4, 2003, a jury was selected. JA 55. The Government began presenting evidence on March 12, 2003. JA 57. The Government called 48 witnesses, concluding its case-in-chief on March 19. The defendant orally made a Rule 29 motion at the close of the Government's case, which the court denied. GA 23. The defendant presented 5 witnesses and also testified on his own behalf.

On March 24, 2003, the defendant renewed his Rule 29 motion, which the court denied. JA 58, GA 27. The parties then made their closing arguments and the court instructed the jury. GA 70-132 (jury charge). At the end of the day on March 25, the jury returned with its verdict,

unanimously finding the defendant guilty of the two civil rights offenses (Counts 1 and 2), conspiring to use an interstate facility to transmit information about a minor (Count 3), and using an interstate facility to transmit information about a minor (Counts 4-9 and 11-18). JA 59. The jury specifically found that he committed aggravated sexual abuse in connection with Counts 1 and 3. GA 30. The jury could not reach a unanimous verdict on Count 10, which involved Jones leaving a voice mail on the defendant's cellular telephone. GA 31. Count 10 was later dismissed on the Government's motion. JA 62.

On May 1, 2003, the defendant filed a motion for judgment of acquittal, which was denied on June 12, 2003. JA 59, SPA 19.

On June 13, 2003, after a sentencing hearing, the court sentenced the defendant primarily to an aggregate 444 months (37 years) of imprisonment, to be followed by five years of supervised release, plus a $1,700 special assessment. JA 62, GA 33.

On June 19, 2003, the defendant filed a timely notice of appeal. GA 36. He is presently serving his sentence.

STATEMENT OF FACTS

A. The Investigation

This prosecution unexpectedly arose from a political corruption investigation by the Federal Bureau of Investigation ("FBI") and the Internal Revenue Service ("IRS"), involving Mayor Philip Giordano and others in the city of Waterbury, Connecticut. Initially, the investigation focused on reports that Giordano had received cash from a reputed member of the Genovese La Cosa Nostra family, whose construction firm was awarded various city contracts during Giordano's mayoralty. As a part of the investigation, the Government conducted court-authorized electronic surveillance from February through August 2001, intercepting more than 15,000 conversations. Some of these conversations were between the defendant and various women to whom he dispensed amounts of cash inconsistent with his modest salary as a public servant. Among these women was Guitana Jones, a Waterbury prostitute with whom the defendant had a longstanding sex-for-money relationship. Jones is the mother of one young girl, born July 9, 1992 ("Victim 1"), and aunt of another young girl, born September 21, 1990 ("Victim 2"). GA 67, 70; GSA 51-52.

During the course of the public corruption wiretap, the Government intercepted a number of calls in which the defendant had Jones arrange for him to have sexual liaisons with other females 16 years or older. But on July 12, 2001, agents reviewed a series of brief calls that had been intercepted three days earlier, on July 9, which raised

the horrifying possibility that the defendant was also engaging in sexual conduct with young children. In a series of calls on July 9, Jones told the defendant that "I have one of the girls with me today," and made arrangements to bring her to the defendant that evening, after his son's T-ball game was over. When asked by the defendant, "Now who you got?" Jones responded, "Umm, [Victim 1]. Today's her birthday you know." The defendant said, "It is?" Jones said, "Yeah she turned nine years old today." The defendant responded, "Wow. That's cool." He told Jones "Make sure you're there." Jones said, "I will." JA 303. Calls placed the following two days, July 10 and 11, showed that Jones had not in fact brought the girl to the defendant on July 9. JA 308, 313.

The Government promptly placed the defendant under physical surveillance, to ensure that he did not come into contact with the girls. T 1006, GA 229-30. The Government then arranged for an undercover police officer to make a pretextual call to the defendant's cell phone in the late afternoon of July 12. T 1005-06. In a voice mail message, the officer advised the defendant, "I got your number . . . . You better leave them f_kin' kids alone. . . . I know what's up. . . . I'm gonna follow your ass, I'm gonna watch your ass. You f_k around with them young kids like you been doin', that's it, I'm goin' straight to the motherf_kin' media." JA 316. The defendant retrieved the message a few minutes later, while at the park in Waterbury where he was attending another of his son's T-ball games. *Id.*

On July 13, the Government submitted a written report to the district judge who was supervising the wiretap,

entitled "Filing Regarding Possible Sex Offenses." SA 758. Later that day, agents intercepted calls from the defendant to Jones, discussing the anonymous voice mail:

> Giordano: Is, is [Victim 2's] dad alive?
>
> Jones: No, [Victim 2] don't say nothin'...
>
> Giordano: Huh?
>
> Jones: . . . they, them kids haven't said anything. They do not say nothing.
>
> Giordano: Well someone said something to someone because this dude knew.
>
> . . . .
>
> Giordano: . . . it was about the girls man.
>
> Jones: Nobody knows about them. Nobody knows about them. Nobody. Nobody knows about them at all 'cause they don't even say nothing 'cause I got them to the point where they're scared, if they say somethin' they're gonna get in trouble. They don't say anything.

JA 318-21. On July 18, the Government disclosed this and additional calls in writing to Judge Nevas, who was supervising the wiretap. SA 763. On July 20, the Government filed a criminal complaint against Jones premised on violations of 18 U.S.C. §§ 2425 and 371, and obtained a warrant for her arrest. In the early morning

hours of July 21, based on the Government's court-authorized disclosure of limited information to the Chief State's Attorney's Office, the Connecticut Department of Children and Families removed both child victims from their homes in Waterbury. T 1010-12, SPA 783-84.

Mid-day on July 21, 2001, prior to her arrest, Jones told the defendant that the caller was one of the drivers who had taken her and the children to visit the defendant, and that he was demanding hush money. GA 139-43. Jones was then arrested after she collected $200 from the defendant's mailbox, and she agreed to cooperate. GA 139-40. She then made calls seeking more hush money for the driver whom she had just brought to the defendant's house. GA 141-43, JA 343-52. The defendant agreed to meet Jones and her supposed associate at a commuter parking lot in Cheshire, Connecticut, on July 23, where he delivered $500 in cash. GA 473-78, T 1249-56.

After the defendant handed over the cash, two federal agents immediately approached him and identified themselves as law enforcement officers. They asked to speak with him, and he agreed. When in the car, they told him that the Government had evidence of his sexual misconduct and his corrupt activities as Mayor of Waterbury. The agents did not display their weapons, repeatedly told the defendant that he was not under arrest, and invited him to cooperate in the ongoing probe. The defendant agreed to do so, and over the course of the next seventy-two hours engaged in cooperation efforts against other targets of the Government's corruption investigation, including an organized crime figure. T 1254-58, 1983-95, SPA 11-12.

On July 26, after three days of such cooperation, FBI agents placed the defendant under arrest. T 1257. The Government executed 34 search warrants that same day, including those relating to public corruption, searches of the defendant's law office and city-provided police cruiser, a search of the defendant and the seizure of DNA samples from the defendant. T 1997, 1261-63, 1267-71, 1292-93, 1340, 1355. Later search warrants were executed at the Mayor's Office and another police cruiser that the defendant had used previously. T 1264, 1352, 1365. According to a forensic expert who testified at trial, a carpet sample taken from the law office was "glowing like a galaxy" when subjected to a fluorescent light indicating the possible presence of semen. T 1460. The expert testified that there were, in fact, numerous semen stains on the carpet, and that the semen on at least two of these stains contained DNA that matched the defendant's. Jones's DNA was also found on the carpet. No DNA profiles matching those of the child victims were found on the carpets seized from the law office or the Mayor's office. T 1460-72.

B. Indictment and Trial

The defendant was eventually charged in a superseding indictment with a number of offenses. Counts 1 and 2 charged him, acting under color of law, with willfully depriving the two young girls of their right to be free from aggravated sexual abuse, in violation of 18 U.S.C. § 242. JA 1-5. Count 3 charged that Giordano and Jones conspired to initiate the transmission of the names of the two victims by using facilities of interstate commerce (cellular and other telephones), with the intent to entice,

encourage, offer, and solicit the child victims to engage in sexual activity, in violation of 18 U.S.C. § 371. The overt acts set forth in this conspiracy charge involved telephone calls between the defendant and Jones, followed by Jones's transport of the children to the defendant in order for him to engage in sexual acts with them. JA 6-7. Counts 4 through 18 charged each of those phone calls individually as a substantive violation of 18 U.S.C. § 2425, which prohibits the use of interstate facilities to transmit information about minors for the purpose of inducing or promoting unlawful sexual activity. JA 8-23.

Before trial, the defendant moved to suppress the wiretap evidence, to dismiss the indictment, and to disqualify the district judge. Each of these motions was denied, as discussed in the relevant sections that follow. At trial, the Government presented evidence over six days, and called 48 witnesses. Among these was Guitana Jones, who had pleaded guilty to committing and conspiring to commit § 2425 offenses, and who was testifying pursuant to a cooperation agreement. GA 40-41. Jones essentially testified that she had a long-standing sexual relationship with the defendant, that he regularly paid her for oral sex, and that she routinely arranged for the defendant to have sexual liaisons with other women (including other prostitutes). GA 46-63. Jones said that after the first time with Victim 1, the defendant would always tell the girls that Jones would get arrested and they would get into trouble if they said anything. GA 89-91, 127-28, 215. Jones further testified that she frequently arranged to bring the two child victims to the defendant so that he could engage in sexual acts with them. GA 64-115, 127, 135, 141.

The two child victims testified by closed-circuit television. Like Jones, both girls testified that the defendant inserted his penis into the girls' mouths and made them perform oral sex. GSA 54-55, 66-67, 70-71, 85-86, 88, 142-43, 147-48. The defendant would push them away prior to ejaculating. GSA 55, 85, 90. The girls also testified that the defendant touched their breasts, and inserted his finger into their vaginas. GSA 61-62, 85-86, 90-91, 144-45. The defendant asked Victim 2 whether she was "growing hair down there." GSA 62, 91. Victim 1 described how the sexual acts hurt her eyes and made them itchy. GSA 150-51. Victim 2 testified that the Mayor hurt her throat during the sexual acts. GSA 57, 87. Both girls were utterly terrified by the experience. GSA 55-56, 86, 148-49.

The defendant instructed Victim 2 not to disclose what he made them do. GSA 79, 86, 88-89. Victim 1 could not recall if the defendant said not to tell anyone about the sex abuse, but she did not tell anyone because she was afraid of him. GSA 149. Both girls knew that the defendant was Mayor of Waterbury and that he ran the city. GSA 51, 106, 125-26. Victim 2 said the Mayor "rule[s] everybody," and "he's the boss of everyone." GSA 51. She did not tell anyone about the sexual assaults because she was afraid the Mayor would hurt her and her family, and put her jail. GSA 56, 78-79, 86-87, 92-93. Victim 1 stated that the Mayor "protects the city" and "watches over us like God." GSA 125. She stated that she was afraid of him and thought she "would get put in jail" (GSA 149-50), because she "thought he had power." GSA 172.

The Government offered substantial evidence that corroborated these accounts. The jury listened to a selection of conversations intercepted over the city-provided cellular telephones that the defendant used. Many of these were conversations between himself and Jones, to arrange for her to bring the girls to one of his offices. *See, e.g.,* GX38-T, JA 149, 158, 163, 165, 167, 169-70, 178, 183-84, 194, 201-02, 214, 223, 252, 254, 256-57, 269, 278-79, 301, 303, 314-15**.** The Government also presented testimony from five drivers, who explained how they drove Jones and one or more of the children and waited 5 to 20 minutes while Jones and the children went inside various locations in Waterbury: the defendant's law office at 1169 West Main Street, the defendant's house, the Chase Building (which houses the Mayor's office), and a condominium that belonged to a friend of the defendant, at 827 Oronoke Road. T 662-78, 686-700, 706-25, 763-771, 776-814, 1164-70.

The defendant testified on his own behalf, and claimed that Jones offered to bring the young girls to the law office when Jones performed oral sex. GA 363-64. He claimed that this was her idea, not his. The door to the office was left open so he could look out of the room and see the girls in the waiting area as they colored, read, or ate candy he gave them. GA 362-64, 428-29. The defendant said he did not like it: "It's not something I'm proud of." GA 362, 429.

According to the defendant, the girls could not see him receive oral sex from Jones because they were four rooms away and he was standing up with his back to the radiator while he peered at them. GA 429, 454-56. The

receptionist desk purportedly obstructed the children's view of what Jones was doing. On cross-examination, he admitted that the sight of the young girls while he received oral sex was stimulating to him. GA 427-29, 450, 472-73. He also admitted that his intercepted conversations with Jones, which were played for the jury, were for the purpose of having Jones bring the young girls, but claimed this did not happen between February 2001 and July 2001. GA 374, 474, 478, 481, 528.

The defendant also claimed that he did not know that the children had watched or at least could have watched him getting oral sex. GA 428. He said from February 2001 to July 2001, he never got together with Jones and the girls. GA 528. He said he never got together with them during his very active Senate campaign that ended in November 2000. GA 356, 640. He claimed that he had had called Jones only five or six times during the period from November 1, 2000, through February 18, 2001. GA 419. He testified that Victim 1 was in his law office twice and Victim 2 once, and they were nowhere else. GA 457. According to the defendant, these visits occurred between November 2000 and mid-February 2001, ending just about the time the federal wiretap started. GA 528.

After a day of deliberations, the jury found the defendant guilty of all charges except Count 10 (which involved Jones leaving a voice mail message on the defendant's cell hone, and which was later dismissed on the Government's motion). GA 30.

C. Post-Trial Proceedings

On May 1, 2003, the defendant moved for a judgment of acquittal on all counts, renewing his pretrial arguments that the victims lacked a federally protected right to be free of aggravated sexual abuse; that he had not acted under color of law; and that the telephone calls did not involve facilities of interstate commerce because they were placed between two people who were both in Connecticut at the time the calls were made. The district court denied this motion on June 12, 2003. SPA 19.

On June 13, 2003, the court conducted a sentencing hearing. The Government argued that the defendant's reprehensible sexual acts as Mayor warranted a very severe sentence. The Government nevertheless filed a substantial assistance motion under U.S.S.G. § 5K1.1 based on the defendant's cooperation with law enforcement before his arrest on July 26. The defendant sought a downward departure on additional grounds. Based on the defendant's cooperation, the court departed downward from the applicable range of life imprisonment to a total effective term of 444 months (37 years) in prison, to be followed by a five-year term of supervised release, plus a $1,700 special assessment. GA 33.

Judgment entered on June 19, 2003. JA 62. The defendant filed a timely notice of appeal on June 19, 2003, GA 36, and is presently serving his sentence.

SUMMARY OF ARGUMENT

1. The district court correctly concluded that placing or receiving an intrastate telephone call constitutes use of a "facility or means of interstate or foreign commerce" within the meaning of 18 U.S.C. § 2425. Telephones are integrated into a nationwide switching network, making them instrumentalities of interstate communication. Congress is empowered by the Commerce Clause to regulate use of such instrumentalities without regard to whether the particular use in question has a substantial effect on interstate commerce.

2. The district court did not abuse its discretion in denying the defendant's motion to suppress the wiretap evidence. The Government promptly notified the district court once it realized that these calls were evidence of sex crimes, and the district court properly issued an order authorizing use of these calls in prosecuting crimes other than those set forth in the original wiretap authorization. Moreover, the Government's interception of calls between the defendant and Jones was authorized by the original wiretap order premised on public corruption offenses, because the defendant's payments of cash to prostitutes demonstrated his access to cash from sources beyond his modest mayoral salary. The Government properly minimized its monitoring, and in fact all of the calls between Jones and the defendant were less than two minutes long and therefore fall within the safe harbor established by *United States v. Capra*, 501 F.2d 267, 275-76 (2d Cir. 1974). Finally, the district court properly declined to hold a *Franks* hearing because the defendant failed to make a substantial preliminary showing that

material impeachment information about a cooperating witness had been omitted from the wiretap affidavit, that any hypothetical omission had been made recklessly or deliberately, or that any such omission would have altered the probable cause determination.

3. There was more than sufficient evidence that the defendant acted under color of law in sexually abusing the two girls. The jury heard Jones and both of the girls testify that the defendant regularly paid Jones to have the girls perform oral sex on the defendant, at times in the Mayor's Office or in his city-provided police cruiser. The defendant repeatedly threatened Jones and the girls not to tell anyone about the abuse, or else Jones would go to jail and they would get in trouble. Through this sexual abuse, the defendant deprived the girls of their constitutional right to bodily integrity. Contrary to the defendant's claims, such a constitutional right is not limited by statute to the special and maritime jurisdiction of the United States or other circumstances set forth in federal sex abuse statutes.

4. The district court did not abuse its discretion in its evidentiary rulings. The defendant testified at trial and voluntarily offered testimony about his extramarital sexual activities, whether he had ever threatened anyone, about his access to cash, and about his cooperation in the municipal corruption probe. Consequently, the defendant opened the door to cross-examination on each of these subjects, each of which was relevant to the defendant's credibility and/or the underlying charges.

5. The district court did not abuse its discretion in refusing to suppress oral statements regarding the sexual abuse and corruption that the defendant made from July 23 to 26, 2001, during his brief period of cooperation with law enforcement authorities. The defendant claims that agents unreasonably delayed in presenting him before a judge, but he offers no legal or factual argument to challenge the district court's detailed predicate findings that the defendant was not arrested until July 26, and that in any event his statements had been made voluntarily.

6. The district court properly declined to require that the Government interview the child witnesses in the presence of defense counsel and a court-appointed monitor, and cites no statutes or case law in support of his claim. Moreover, the district court scrupulously followed the procedures set forth in 18 U.S.C. § 3509 before determining that each of the girls could testify by two-way closed circuit television. The district court properly relied on expert testimony that there was a substantial likelihood that one victim "would suffer emotional trauma from testifying" in open court, and properly relied on lay testimony that both girls would be "unable to testify [in open court] because of fear." These conclusions were fully consonant with the principles announced in *Maryland v. Craig*, 497 U.S. 836 (1990).

7. The district court did not abuse its discretion in precluding the defendant from cross-examining the child victims about prior sexual behavior. The defendant's pretrial proffer failed the specificity and relevance standards of Fed. R. Evid. 412, because it simply alleged that the victims might have witnessed and/or participated

in sexual conduct at home. At most, the defendant claimed that this evidence could show that the girls had learned about sexual terms and anatomy at home, rather from experiences with the defendant. Neither the Government nor the defense pursued any such lines of questioning at trial, and so the defendant could not have suffered any prejudice from the exclusion.

8. The district court did not abuse its discretion in computing the defendant's offense level. None of his multiple challenges are supported by any citations of case law or argument, and should therefore be deemed waived on appeal. On the merits, the district court erred only in imposing a two-level enhancement for serious bodily injury under U.S.S.G. § 2A3.1(b)(4)(B), but this error did not ultimately affect the defendant's final offense level and was therefore harmless. The district court granted the Government's motion under § 5K1.1 and departed downward from life in prison to 444 months. It declined to exercise its discretion to depart downward on further grounds advanced by the defendant, and its decision in this regard is unreviewable on appeal.

9. The defendant waived any challenge on appeal to the district judge's failure to recuse himself, by failing to offer any argument and instead purporting to incorporate by reference earlier pleadings before this Court in an unsuccessful mandamus action. On the merits, the district judge did not abuse his discretion in declining to recuse himself from ruling on the motion to suppress the wiretap evidence simply because he had issued the authorization orders. Likewise, the judge did not abuse his discretion by declining to recuse himself from the entire

case after ruling at a bail hearing that the defendant was a "sexual predator" and should be detained to avoid danger to the community. Facts learned in the course of judicial proceedings do not constitute a basis for recusal on grounds of bias, and the defendant made no showing that the judge displayed deep-seated antagonism that would make fair judgment impossible.

ARGUMENT

I. The District Court Correctly Concluded That the Defendant's Use of a Telephone Constituted Use of a Facility of Interstate Commerce for Purposes of 18 U.S.C. § 2425.

A. Relevant Facts

Counts 4 through 18 of the superseding indictment charged the defendant with using a facility of interstate commerce to transmit information regarding a minor, in violation of 18 U.S.C. § 2425. Count 3 charged the defendant with conspiring to violate § 2425. JA 1-23.

Before trial, the defendant moved to dismiss these charges. As a statutory matter, he argued that § 2425 applies only where a defendant has made actual interstate communications. Because the calls listed in the indictment were made to and from people in Connecticut, he claimed that they fell outside the purview of § 2425. The defendant further argued that if the district court were to conclude that intrastate telephone calls were sufficient

under § 2425, then the statute itself exceeded Congress's powers under the Commerce Clause. In a written decision dated July 29, 2002, the district court rejected both of these arguments. SPA 4-6.

At trial, the evidence showed that Counts 3 through 18 involved telephone calls between the defendant and Jones to arrange for sexual encounters with the minor victims. These conversations involved two cell phones used by the defendant. The first cell phone, which the defendant used from February to April 2001, was provided service by Nextel Communications (Counts 4 through 10). The second cell phone, which the defendant used from the end of March to July 2001, was provided service by Cingular Wireless (Counts 11 through 18). Jones made and received calls with the defendant from various land line telephones. It is undisputed that both the defendant and Jones were in Connecticut at the times that the phone calls were made.

The Government introduced testimony from Richard Iozzo and Donald Richardson, engineers employed by Nextel and Cingular Wireless, respectively, regarding the nature and extent of the telecommunications infrastructure used to make the telephone calls identified in Counts 4 through 18. T 817-68 (Iozzo); 869-88 (Richardson). Iozzo and Richardson both described a global telecommunications network known as the Public Switching Telephone Network ("PSTN"). The PSTN is composed of all of the telecommunications service providers throughout the world, which are interconnected through cables and circuits. When a user turns on a cell phone, the cell phone is integrated into the service

provider's own infrastructure, which, in turn, is part of the PSTN. T 821-23, 871. During the period of time at issue in this case (November 2000 through July 2001), both Nextel and Cingular maintained extensive infrastructures, some of the components of which were in Connecticut. These infrastructures, which included cell site towers and switches, handled both interstate and intrastate telephone calls and were integrated into the PSTN. T 824-31, 871-79.

Iozzo testified that every call to or from a Nextel cell phone in Connecticut during this time would necessarily have been routed through a Nextel switching center in White Plains, New York, even if the call were to or from another person in Connecticut.[2] T 828-30. With respect to the calls identified in Counts 4 through 9, which involved a Nextel cell phone and a land line telephone in Connecticut, electronic communications would be routed by radio signal to a Nextel cell site tower, and then by cable to the White Plains switching center. From the switching center in White Plains, the calls would be transmitted by cable to the local telephone service provider (in this case, SNET), and finally, through the SNET network, to a land line telephone in Connecticut. T 828-30. Iozzo testified that although this route would be established in a fraction of a second, it would last the duration of the telephone call, during which voice and data signals would be transmitted through the PSTN.

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[2] Iozzo also testified that a very small area of the state of Connecticut is served by a Nextel switching center in Mansfield, Massachusetts. T 864.

Richardson testified that cell phones operate by using certain frequencies that are assigned to cellular service providers by the Federal Communications Commission ("FCC"). Richardson also testified that the FCC not only licenses and assigns frequencies to service providers, but also promulgates rules and regulations for service providers relating to the operation and use of assigned frequencies. T 879-81.

On March 19, 2003, at the close of the Government's case-in-chief, the district court orally denied the defendant's motion for a judgment of acquittal on Counts 3 through 18, based on his Commerce Clause arguments. GA 23-26.

Following the close of evidence, the defendant requested that the district court instruct the jury that in order to convict, they must find, as an essential element of the offense, that the defendant made or received an interstate telephone call in committing the charged offenses. The district court rejected this proposed charge and, on March 23, 2003, instructed the jury that a facility of interstate commerce, for purposes of § 2425, is an instrumentality that has the capacity to make interstate phone calls, and that the element requiring use of a facility of interstate commerce is satisfied even if the actual phone calls identified in the indictment were intrastate phone calls. JA 117. The defendant objected to this instruction.

On March 31, 2003, following his conviction, the defendant renewed his motion for a judgment of acquittal, including his Commerce Clause challenge. In a written decision dated June 12, 2003, the district court denied the

defendant's motion, and adopted its earlier ruling on the defendant's motion to dismiss. SPA 19.

B. Governing Law and Standard of Review

Section 2425 of Title 18 of the United States Code prohibits use of an interstate facility to transmit certain information about a minor with the intent to solicit any person to engage in illegal sexual activity. The statute provides, in pertinent part, as follows:

> Whoever, using the mail or any facility or means of interstate or foreign commerce . . . knowingly initiates the transmission of the name, address, telephone number, social security number, or electronic mail address of another individual, knowing that such other individual has not attained the age of 16 years, with the intent to entice, encourage, offer, or solicit any person to engage in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be [guilty of a crime].

The Commerce Clause "provides that 'Congress shall have Power . . . [t]o regulate Commerce with foreign Nations and among the several States . . . .'" *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 216 (2d Cir. 2004) (quoting U.S. Const. Art. I, § 8, cl. 3). This Court has suggested that "[a]mong the eighteen Congressional powers enumerated in Article I of the Constitution, the

Commerce Power is, perhaps, the most sweeping." *United States v. King*, 276 F.3d 109, 111 (2d Cir. 2002).

In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court categorized the activities that Congress may permissibly regulate under the Commerce Clause:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.

Id. at 558-59 (internal citations omitted). The *Lopez* Court struck down a law which prohibited simple possession of a firearm in school zones, reasoning that the law fell within neither of the first two categories (because guns are neither channels nor instrumentalities of commerce), and that simple gun possession in a school zone did not "substantially affect interstate commerce." *Id.* at 559-60; *see also United States v. Morrison*, 529 U.S. 598, 608-09 (2000) (striking down provision of Violence Against Women Act, which provided civil remedy for violence motivated by gender; finding statute deficient under third *Lopez* category). "A showing that a regulated activity substantially affects interstate commerce (as required for

the third category) is not needed when Congress regulates activity in the first two categories." *United States v. Gil*, 297 F.3d 93, 100 (2d Cir. 2002).

This Court conducts *de novo* review of a constitutional challenge to the validity of a federal statute. *See United States v. Pettus*, 303 F.3d 480, 483 (2d Cir. 2002); *King*, 276 F.3d at 111.

"'The propriety of a jury instruction is a question of law that we review *de novo*.'" *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004) (quoting *United States v. George*, 266 F.3d 52, 58 (2d Cir. 2001)). "'A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law.'" *United States v. Pimentel*, 346 F.3d 285, 301 (2d Cir. 2003) (quoting *United States v. Walsh*, 194 F.3d 37, 52 (2d Cir. 1999)).

To the extent a defendant challenges the district court's denial of his motion for acquittal on grounds of evidentiary insufficiency, this Court engages in *de novo* review, applying the same standard that governs a general challenge to the sufficiency of evidence. *See United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003); *United States v. Thorn*, 317 F.3d 107, 132 (2d Cir.), *cert. denied*, 123 S. Ct. 2232 (2003).

It is settled that a defendant challenging a conviction on sufficiency grounds "bears a heavy burden." *United States v. Masotto*, 73 F.3d 1233, 1241 (2d Cir. 1996). The Court considers the evidence presented at trial in the light most favorable to the government, crediting

every inference that the jury might have drawn in favor of the government. The evidence must be viewed in conjunction, not in isolation, and its weight and the credibility of the witnesses is a matter for argument to the jury, not a ground for reversal on appeal. The task of choosing among competing, permissible inferences is for the fact-finder, not the reviewing court. *See, e.g., Jackson*, 335 F.3d at 180; *United States v. Johns*, 324 F.3d 94, 96-97 (2d Cir. 2003); *United States v. LaSpina*, 299 F.3d 165, 180 (2d Cir. 2002); *United States v. Downing*, 297 F.3d 52, 56 (2d Cir. 2002). These principles apply to both direct and circumstantial evidence. *See, e.g., United States v. Griffith*, 284 F.3d 338, 348 (2d Cir. 2000) (citing *United States v. Morrison*, 153 F.3d 34, 49 (2d Cir. 1998)). A witness's direct testimony to a particular fact provides sufficient evidence of that fact for purposes of sufficiency of the evidence review. *See United States v. Jespersen*, 65 F.3d 993, 998 (2d Cir. 1995)."The ultimate question is not whether *we believe* the evidence adduced at trial established defendant's guilt beyond a reasonable doubt, but whether *any rational trier of fact could so find*." *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998) (emphasis in original) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

C. Discussion

The district court properly held that intrastate telephone calls can give rise to criminal liability under § 2425, consistent with the Supreme Court's decision in *Lopez*. The evidence in the instant case clearly established that the facilities in question -- telephones -- were instrumentalities of interstate commerce, regardless of

whether they were used to make interstate calls. Congress' regulation of these facilities is therefore permissible under the second *Lopez* category, without regard to whether the particular phone calls in the present case -- intended to arrange for sexual encounters with the minor victims -- individually had a substantial effect on interstate commerce.

As a matter of statutory construction, there can be no question that telephones are "facilities or means" of interstate commerce within the plain meaning of § 2425.[3] At trial, the Government offered uncontroverted evidence that the Public Switching Telephone Network, over which the calls in this case were transmitted, is a global telecommunications system encompassing both cell phones and land line telephones. Thus, the PSTN itself, which incorporates cell phones, land line telephones, and telecommunications infrastructure, is also an instrumentality of interstate commerce. *See United States v. Gilbert*, 181 F.3d 152, 158 (1st Cir. 1999) ("Both intrastate and interstate telephone communications are part of an aggregate telephonic system as a whole.") (citation omitted); *Kerbs v. Fall River Indus., Inc.*, 502 F.2d 731, 738 (10th Cir. 1974), *cited with approval by United States v. Gil*, 297 F.3d 93 (2d Cir. 2002). It is well established that Congress may and does regulate wire and radio communications, interstate communication providers, and

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[3] There is no meaningful distinction between the statutory term "facility" and "instrumentality." *See United States v. Marek*, 238 F.3d 310, 317 & n.26 (5th Cir. 2001).

satellite systems. *See generally* Title 17, United States Code.[4]

Courts have uniformly held that telephones are facilities of interstate commerce in the context of other federal statutes, though research discloses no cases where that precise question has yet arisen in the context of § 2425. This has been true regardless of whether the parties to the phone call are in the same state. For example, courts have reached such a conclusion in the context of civil securities fraud cases. *See, e.g., Loveridge v. Dreagoux*, 678 F.2d 870, 873-874 (10th Cir. 1982); *Alley v. Miramon*, 614 F.2d 1372, 1379 (5th Cir. 1980); *Dupuy v. Dupuy*, 511 F.2d 641, 643-644 (5th Cir. 1975); *Aquionics Acceptance Corp. v. Kollar*, 503 F.2d 1225, 1228 (6th Cir. 1974); *Kerbs*, 502 F.2d at 738.[5]

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[4] The defendant concedes that Congress can regulate particular intrastate transactions (such as ATM withdrawals) involving "activities that are traditionally subject to federal regulation" such as banking (Def. Br. 36), but for some reason does not apply the same logic to cellular telephone service, which is likewise subject to pervasive federal regulation.

[5] The defendant's invocation of the rule of lenity (Def. Br. 39) is unavailing because telephones are unambiguously "facilities of interstate commerce." Where, as here, "congressional intent is clear, the rule of construction of criminal statutes in favor of lenity is inapplicable." *United States v. Riccardelli*, 794 F.2d 829, 833 (2d Cir. 1986) (recognizing that use of the mails is

(continued...)

As a constitutional matter, Congress's regulation of the use of telephones falls squarely within *Lopez*'s second category of permissible legislation -- that is, laws that "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce." 514 U.S. at 558. Unlike the statutes at issue in *Lopez* and *Morrison*, which regulated gun possession and violence against women, § 2425 regulates use of telephones -- a prototypical instrumentality of interstate commerce. And in the wake of *Lopez* and *Morrison*, courts have repeatedly rejected Commerce Clause challenges to criminal convictions where jurisdiction was predicated on the use of a telephone, even where the call at issue was purely intrastate. *See, e.g., United States v. R.J.S., Jr.*, 366 F.3d 960, 960 (8th Cir. 2004) (upholding bomb-threat conviction under 18 U.S.C. § 844(e); "the commerce power reaches wholly intrastate telephone calls, so long as the calls are made with telephones connected to an interstate telephone system); *United States v. Corum*, 362 F.3d 489, 493 (8th Cir. 2004) (same; "It is well-established that telephones, even when used intrastate, are instrumentalities of interstate commerce."); *United States v. Clayton*, 108 F.3d 1114, 1117 (9th Cir 1997) (upholding convictions under 18 U.S.C. § 1029(a) for cloning cell phones; "Telephones are instrumentalities of interstate commerce"). *See also United States v. Weathers*, 169 F.3d 336, 341 (6th Cir. 1999) (dicta) (noting that well-

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[5] (...continued)
inherently a "federal instrumentality" and therefore an intrastate mailing confers jurisdiction under the Travel Act, 18 U.S.C. § 1952).

established precedent makes it "fairly simple" to conclude "that telephones, even when used intrastate, constitute instrumentalities *of* interstate commerce").

Because congressional regulation of instrumentalities of interstate commerce, such as telephones, implicates category two of *Lopez*, there is no need to engage in the further analysis required in *Lopez* category three, which asks whether activities "substantially affect interstate commerce." 514 U.S. at 559. "[W]hen Congress elects to regulate under the second prong of *Lopez*, federal jurisdiction is supplied by the nature of the instrumentality or facility used, not by separate proof of interstate movement." *United States v. Richeson,* 338 F.3d 653, 660-661 (7th Cir. 2003) (internal quotation marks and citation omitted) (holding that intrastate use of telephone lines in murder-for-hire scheme satisfies jurisdictional element of 18 U.S.C. § 1958(a)); *see also Clayton*, 108 F.3d at 1117 (because telephones are instrumentalities of interstate commerce, they "fall under category two of *Lopez*, and no further inquiry is necessary to determine that their regulation under 18 U.S.C. § 1029(a) is within the Commerce Clause authority"); *Gilbert*, 181 F.3d at 158 (affirming conviction for making bomb threat through intrastate telephone call, in violation of 18 U.S.C. § 844(e), which prohibits threats "through the use of the mail, telephone, telegraph, or other instrument of interstate or foreign commerce").

This Court recently reached an analogous conclusion regarding the sufficiency of intrastate mailings under the Commerce Clause. In *United States v. Gil*, 297 F.3d 93 (2d Cir. 2002), this Court rejected the defendant's

Commerce Clause challenge to his mail fraud conviction under 18 U.S.C. § 1341. The Court explained that "[a] showing that a regulated activity substantially affects interstate commerce (as required for the third category) is *not* needed when Congress regulates activity in the first two categories." *Id*. at 100 (emphasis added). The Court "conclude[d] that private and commercial interstate carriers, which carry mailings between and among states and countries, are instrumentalities of interstate commerce, notwithstanding the fact that they also deliver mailings intrastate." *Id. Accord United States v. Photogrammetric Data Services, Inc.*, 259 F.3d 229, 249-53 (4th Cir. 2001) (rejecting similar Commerce Clause challenge to mail fraud conviction premised on intrastate delivery); *United States v. Riccardelli*, 794 F.2d 829, 831 (2d Cir. 1986) (pre-*Lopez* case interpreting the Travel Act, 18 U.S.C. § 1952, and holding that intrastate mailing is sufficient to invoke federal jurisdiction); *United States v. Heacock*, 31 F.3d 249, 255 (5th Cir. 1994) (same). *Cf. United States v. Cope*, 312 F.3d 757, 771 (6th Cir. 2003) (in murder-for-hire case, proof of intrastate mailing held sufficient to satisfy jurisdictional element of § 1958(a)).

This Court's analysis in *Gil* tracks the consistent reasoning of other appellate courts considering Commerce Clause challenges to criminal convictions. While there is considerable variety among the instrumentalities of interstate commerce used to effectuate federal criminal offenses, the rule remains the same: Congress may properly regulate instrumentalities of interstate commerce, regardless of whether the instrumentality in question is actually used in an interstate transaction or activity. *See United States v. Marek*, 238 F.3d 310, 318-319 (5th Cir.

2001) (upholding constitutionality of murder-for-hire conviction under § 1958(a), because defendant's intrastate use of Western Union to transfer funds within Texas fell within *Lopez* category two); *United States v. Baker*, 82 F.3d 273 (8th Cir. 1995) (rejecting Commerce Clause challenge to extortion conviction under 18 U.S.C. § 1952, where defendant forced victim to withdraw cash from ATM machine, even though the ATM owner bank and drawee bank were both in Missouri; use of interstate network of ATMs brought act within *Lopez* category two).

The only cases in which this Court has required proof of interstate communication involve statutes with language that is materially different from § 2425 -- namely, statutes under which *the criminal act itself must be committed in or affecting interstate commerce*. For example, this Court has held that the wire fraud statute, which punishes anyone who "transmits [certain communications] . . . in interstate or foreign commerce," requires proof of an actual interstate transmission. *See United States v. Blackmon*, 839 F.2d 900 (2d Cir. 1988). The same holds true for the credit card fraud statute, 18 U.S.C. § 1644, which punishes whoever engages in specified fraudulent "transaction[s] affecting interstate or foreign commerce" -- language that fits squarely into *Lopez* category three. *United States v. De Biasi*, 712 F.2d 785, 790 (2d Cir. 1983).[6]

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[6] To the extent that certain courts have reached the same conclusion with respect to the murder-for-hire statute, 18 U.S.C. § 1958, they have relied on language in (continued...)

The defendant cites this Court's decision in *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973), in support of his position that federal jurisdiction may only be established by interstate phone calls. Def. Br. 20-21. While it is true that the *Archer* Court reversed the defendants' convictions under the Travel Act, 18 U.S.C. § 1952, because they did not make any interstate telephone calls in furtherance of their illegal scheme, the Court's focus was on *who* had made the calls, not on whether those calls were intrastate or interstate. In *Archer*, the calls in question had been placed by undercover agents who sought to induce the defendants to make such calls. The Court was understandably offended by the government's

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[6] (...continued)
that statute that prohibits use of "any facility *in* interstate or foreign commerce" -- and interpreted the phrase "in interstate or foreign commerce" to refer to the use, not the facility. *See, e.g., United States v. Paredes*, 950 F. Supp. 584 (S.D.N.Y. 1996). *But see Richeson,* 338 F.3d 653, 660-661 (7th Cir. 2003) ("[T]here is one and only one way to read the plain language of the murder-for-hire statute, and that is to require that the facility, and not its use, be in interstate or foreign commerce."); *Marek*, 238 F.3d at 317 (same). Some of the confusion over § 1958 stems from an apparent drafting error: The subsection outlining the prohibited conduct speaks of "any facility *in* interstate or foreign commerce," whereas the subsection immediately following defines a "facility *of* interstate commerce." (Both emphases added.) But whatever the case may be with § 1958, § 2425 employs language that more clearly indicates that the *facility*, not its *use*, must be linked to interstate commerce.

jurisdictional entrapment and much of the opinion concerned the government's questionable efforts to create an opportunity for the defendants to commit a crime and to do so in a way that would permit federal prosecution. In deciding the case, however, the Court "in fact went no further than to hold that when the federal element in a prosecution under the Travel Act is furnished solely by undercover agents, a stricter standard is applicable than when the interstate or foreign activities are those of the defendants themselves . . . ." *Id.* at 685-686. Moreover, even if *Archer* were read to require proof of interstate calls, the fact that it involved the Travel Act (which posits use of a facility *in* interstate commerce) distinguishes it from the present case, which involves § 2425 (which requires use of a facility *of* interstate commerce). As discussed *supra* n.6, the language of the former, unlike that of the latter, has sometimes been construed to require proof that the transaction in question actually was an interstate occurrence.

The defendant fares no better in his reliance on *Jones v. United States*, 529 U.S. 848 (2000), for the proposition that only interstate phone calls provide a sufficient nexus for federal jurisdiction. Def. Br. 25. While it is true that the Court in *Jones* invoked the doctrine of constitutional avoidance to interpret a criminal statute to avoid a potential conflict with the Commerce Clause, the Court did so in order to give the most natural meaning to the word "use." Specifically, in *Jones*, the Court held that for an owner-occupied dwelling to constitute property "*used* in interstate or foreign commerce," the property had to be *actively used*; passive uses, such as offering the home as collateral or simply

insuring it, did not qualify. *Id.* at 855. In reaching this conclusion, the Court found ambiguity in the term "used," not in the term "in interstate or foreign commerce." *Id.* at 857-58. In the present case, however, there is no ambiguity as to whether the defendant made and received calls on his cell phones: The wiretap evidence conclusively proved that. And there can be no serious contention that such activity does not constitute "use." Because the canon of constitutional avoidance "has no application in the absence of statutory ambiguity," *Rucker*, 535 U.S. at 134, *Jones* does not support the defendant's effort to limit the scope of § 2425 to interstate phone calls.

To the extent the defendant contends that punishment of sex crimes should remain the province of the states absent a call from one state to another, his argument is more properly directed to Congress than this Court. Indeed, this Court has previously considered and rejected similar policy arguments. *See Riccardelli,* 794 F.2d at 833 ("federalism arguments are misplaced since once the federal jurisdictional nexus of the use of the mails is present, 'the statute [18 U.S.C. § 1952] reflects a clear and deliberate intent on the part of Congress to alter the federal-state balance in order to reinforce state law enforcement.'") (quoting *Perrin v. United States*, 444 U.S. 37, 50 (1979)); *United States v. Kelner*, 534 F.2d 1020, 1024 (2d Cir. 1976) ("However much we might agree as a matter of principle that the congressional reach should not be overextended or that prosecutorial discretion might be exercised more frequently to permit essentially local crimes to be prosecuted locally . . . we do not feel that Congress is powerless to regulate matters in commerce when the interstate features of the activity represent a

relatively small, or in a sense unimportant, portion of the overall criminal scheme."); *United States v. Kammersell*, 196 F.3d 1137, 1139 (10th Cir. 1999) (in light of plain language of 18 U.S.C. § 875(c), rejecting claim that prosecuting for threats transmitted by e-mail would federalize most crimes because most e-mails go through out-of-state routers).

The defendant further argues that Congress's enactment of § 2425 was largely motivated by a desire to deter and punish crimes against children over the Internet,[7] and that the absence of any reference in the legislative history to telephones defeats its application to intrastate calls. This argument fails for several reasons. First, the defendant's argument is a logical *non sequitur;* if he were correct that § 2425 applies only to the Internet, then both interstate *and* intrastate phone calls would fall outside its scope -- and even he has not made such a far-fetched claim. Second, the statutory text does not mention the Internet, but rather speaks expansively of "*any* facility or means of interstate or foreign commerce." *See, e.g., Department of Housing and Urban Development v. Rucker,* 535 U.S. 125, 131 (2002) ("the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind'") (internal quotation marks omitted). "[R]eference to legislative history is inappropriate when the text of the statute is unambiguous." *Id.* at 132. Third,

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[7] "[The Act] prohibits contacting a minor over the Internet for the purposes of engaging in illegal sexual activity and punishes those who knowingly send obscenity to children." H.R. Rep. No. 105-557, at 12 (1998).

the Internet itself is a global telecommunications network that relies on telephone lines belonging to the PSTN -- the very network which the defendant claims is outside the scope of § 2425. It is hard to imagine that Congress meant to punish people for using keyboards and modems to entice children over phone lines, but not for doing so by speaking over those same lines. *See* H.R. Rep. No. 105-557, at 24 (1998) (in passing § 2425, Congress intended "to bring the most effective resources to bear in seeking to protect children from sexual predators"); *cf. Dupuy*, 511 F.2d 641, 643 (5th Cir. 1975) (relying on Congress's broad anti-fraud objective to interpret 15 U.S.C. § 78j as prohibiting both intrastate and interstate calls as "the use of any means or instrumentality of interstate commerce").

Finally, even if the Court were to require proof that a call crossed state lines to sustain a § 2425 conviction, the fact that all the Nextel calls passed through a New York switching center would be sufficient to uphold Counts 4 through 9. *See United States v. Weathers*, 169 F.3d 336, 341 (6th Cir. 1999) (holding, in § 1958 murder-for-hire case, that cell phone's use of interstate electronic signal to effectuate intrastate telephone call suffices to prove phone was actually used in interstate commerce). The defendant's complaint that such an interstate nexus is "serendipitous" or based on "technological facts" misses the point; even as to statutes that require proof of an actual interstate transaction, this Court has not required proof that the defendant intended or even knew of the interstate nature of that transaction. *See, e.g., Blackmon*, 839 F.2d

at 908 (wire fraud); *DeBiasi*, 712 F.2d at 789 (credit card fraud).[8]

In sum, the court correctly instructed the jury that the first element of § 2425 could be satisfied without evidence of interstate phone calls, and this construction of § 2425 is permitted by the Commerce Clause.

II. The District Court Did Not Abuse Its Discretion in Denying the Defendant's Motion To Suppress the Wiretap Evidence

A. Relevant Facts

1. The Wiretap and Discovery of the Sex Offenses

On February 18, 2001, the Government obtained court authorization to conduct electronic surveillance for the purpose of obtaining evidence of certain crimes involving racketeering and public corruption. SA 3. One of the original goals of the investigation was to obtain evidence that the defendant was receiving money and other items in exchange for steering City contracts to certain contractors and vendors. For example, Special

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[8] The defendant also argues (Def. Br. 22-23) that the mere fact that a cell phone service provider is located in a different state is insufficient to form a basis for federal jurisdiction in this case. The Government has not made such an argument, and so the Court need not consider it.

Agent Reiner's affidavit of February 18, 2001, submitted in support of the Government's first wiretap application, describes an incident in which the defendant was seen to have a large amount of cash immediately after meeting the owner of Worth Construction Company. SA 30-31. Accordingly, agents conducting the wiretap were instructed to monitor calls indicating that the defendant was spending money beyond his lawfully gained means -- including conversations with Jones and other women whom he appeared to being paying for sex and drugs. SA 1081-82. In wiretap progress reports regularly filed with the district court, the Government advised that it was monitoring such conversations, although it did not list every such conversation. SA 1082-85.

It was not until the late afternoon of July 13, 2001, that the FBI had probable cause to believe that the defendant was engaging in sexual contact with a child. Before July 9, 2001, the FBI had considered Jones to be merely one of several women with whom the defendant had a sexual relationship and to whom the defendant gave money in exchange for sex. SA 1085. Specifically, the FBI was aware of allegations that the defendant had an ongoing sexual relationship with a Waterbury prostitute, whose name was believed to be Guitana Graham, with whom he had fathered a child around 1993. SA 1080. In making telephone arrangements for sexual liaisons with the minor children, the defendant and Jones never openly discussed what they were doing. Rather, in relatively brief conversations, they would make arrangements to meet at a particular time and place. The defendant and Jones would make brief and vague references to other persons,

two of whom, as the FBI later discovered, were the young victims in this case. SA 1086.

These sex crimes first came to the Government's attention as the result of a brief intercepted call on July 9, 2001, in which Jones told the defendant that she was bringing "[Victim 1]" with her to meet the defendant and that it was Victim 1's ninth birthday. JA 303-04. Based on their knowledge of the defendant's sexual relationship with Jones and the context of the intercepted conversation, FBI agents thought that the defendant might be arranging a sexual liaison with Jones and/or a minor. In order to investigate, and thwart if necessary, this possible sexual liaison, the Government arranged for a pretext call by an undercover law enforcement officer on July 12, 2001, which had the effect of deterring the defendant from continued sexual contact with the minor victims. JA 316-17. The pretext call to the defendant caused him to make incriminating statements to Jones on the following day, which were also intercepted. JA 318-21.

On July 13, 2001, the Government submitted to the district court a report entitled "Filing Regarding Possible Sex Offenses." SA 758. The Government advised that it had reason to believe that the defendant had made arrangements to engage in sexual relations with a minor, and described the relevant intercepted calls. SA 759. The Government also described how it had arranged for the pretext call to the defendant on July 12, 2001. SA 760-61. At the time the Government filed this report, at about noon on July 13, the Government did not yet have probable cause to believe that the defendant had violated or was

about to violate any state or federal law concerning sexual contact with minors. SA 1086.

In a subsequent report, dated July 18, 2001, the Government advised the district court of further intercepted calls, including a conversation at approximately 3:15 p.m. on July 13, 2001, between the defendant and Jones. SA 763. Based on these conversations, there was now probable cause to believe that the defendant had engaged in sexual relations with at least one minor child. SA 1085. The Government then advised the Court of the actions it would take to insure the safety and well-being of the children and to continue its investigation of the defendant for sex-related offenses, as well as for the offenses described in the wiretap orders. SA 769-70.

On July 20, 2001, upon concluding that the defendant was using his cell phones to engage in offenses beyond those outlined in the wiretap applications, the Government filed an application permitting use of that evidence pursuant to 18 U.S.C. § 2517(5). SA 771-76. The Government requested authorization to use the intercepted communications relating to the defendant's sexual contacts with minors in a prosecution for violations of 18 U.S.C. §§ 2425 and 371 and various state offenses. A supporting affidavit reaffirmed that the wiretap orders had been sought in a good faith effort to investigate the racketeering and related violations listed in the applications, and that the Government had not sought the orders as a pretext for gathering evidence of other wrongdoing. SA 777-80.

On July 20, 2001, the district court granted the § 2517(5) application. SA 781. The court found that the communications relating to the possible sex offenses "were intercepted pursuant to Orders entered by the Court and in good faith. The apparent relevance of these communications to other offenses not previously specified became apparent to the Government on or about July 13, 2001, at which time the Government informed the Court." SA 783, ¶5.

On September 5, 2001, the Government filed a second application pursuant to § 2517(5), seeking the court's authorization to disclose the intercepted calls in relation to possible violations of 18 U.S.C. § 242. GSA 1-6. The district court granted that application on September 6, 2001. GSA 7-11.

Following the defendant's arrest, federal agents reviewed numerous telephone calls between the defendant and Jones that had been intercepted earlier. Prosecutors identified 15 intercepted conversations that would form the basis for the § 2425 violations charged in Counts 4 through 18 of the Superseding Indictment, as well as other incriminating conversations.

The defendant moved to suppress the intercepted calls between himself and Jones and all evidence derived therefrom, alleging numerous statutory violations. The defendant's central claim was that the FBI was not authorized to intercept *any* communications between himself and Jones because they were irrelevant to the federal offenses for which the wiretap had been authorized. The defendant also claimed that the

Government had acted in bad faith by failing to comply with § 2517(5).

By order dated February 13, 2003, the district court denied the defendant's motion. In its written decision, the district court found that

> conversations, such as those between Giordano and individuals such as Jones were directly relevant to the government's corruption investigation. The investigation sought evidence substantiating the government's belief that Giordano was receiving money from sources other than his modest income as Mayor of Waterbury. Consequently, any evidence revealing that Giordano was receiving bribes and then disbursing the money to a network of prostitutes, such as Jones, would tend to show that he was abusing his public office for improper and illegal gain. Therefore, the court had probable cause to authorize the government's surveillance of telephone conversations between Giordano and Jones.

SPA 13-14. Addressing the defendant's argument that the Government violated § 2517(5), the district court found that the original order authorizing electronic surveillance was lawfully obtained, that it was sought in good faith and not as a subterfuge, and that the conversations in question were intercepted incidentally during the course of the lawfully executed order. SPA 14. The district court found that the Government's actions with respect to the

intercepts relating to the defendant's sexual abuse of the two minor victims

> demonstrate[d] that the government properly kept the court apprised of the unanticipated interception of communications between Giordano and Jones, and refute Giordano's allegation that the government concealed the sexual nature of the these conversations. Therefore, because the government complied with the requirements of § 2517(5) and [*United States v.] Masciarelli*, [558 F.2d 1064, 1069 (2d Cir. 1977),] Giordano's allegation that the government acted in bad faith in conducting the wiretap is baseless.

SPA 14. In addition, the district court held that "the government's interception of the communications between Giordano and Jones was consistent with the plain view doctrine under the Fourth Amendment as applied to Title III electronic surveillance." SPA 14.

2. The *Franks* Claims

By motion dated January 30, 2002, the defendant challenged the 55-page affidavit which FBI Special Agent Reiner had submitted on February 18, 2001, in support of the Government's original wiretap application. SA 17-69 (affidavit). The defendant requested a hearing, pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), on the grounds that the affidavit supposedly omitted material facts which, if included, would have undermined the

supervising judge's probable cause determination. These facts allegedly related to the absence of forensic evidence.

In a later submission dated December 9, 2002, the defendant renewed his motion for a *Franks* hearing, but on entirely different grounds. The defendant filed a brief affidavit relating to a confidential source, identified in the February 18 affidavit as "CW-1," who provided information that, he argued, was critical to the finding of probable cause. SA 1061, 1071-72. The defendant identified CW-1 as Tim Longino, the defendant's former chief of staff when he was the Mayor of Waterbury. The defendant alleged that Longino had misappropriated more than $50,000 in campaign funds and was subsequently discharged by the defendant, and that the Government knew or had reason to know of Longino's discharge. *Id.*

At a hearing on January 6, 2003, the defendant did not pursue his original claim regarding forensic evidence, but instead claimed for the first time that he had identified two witnesses who would testify to Longino's supposed misappropriation of campaign funds. 1/6/03 T 2-5. The defendant produced no affidavits from these witnesses; instead, defense counsel told the district court that one of them, James Paolino, would testify that Longino had asked Paolino to cash checks. 1/6/03 T 3-5. Paolino was represented by counsel, who would not permit defense counsel to interview him, 1/6/03 T 21-22, and who indicated that Paolino, if called to testify, would assert his Fifth Amendment right against compelled self-incrimination. Def. Br. 79. Defense counsel did not proffer the testimony of the other witness whom he identified. The district court noted that the defendant's

December 9 submission included no details about checks, nor any evidence that Special Agent Reiner was aware of the alleged misappropriation of campaign funds. 1/6/03 T 10-11, 18-20. In denying the defendant's motion for a *Franks* hearing, the district court stated:

> What those witnesses were going to say or are going to say should have been the subject of affidavits and the subject of submissions so that the Court could review them so that the government could have reviewed them and then there would have been a basis for the Court to make a determination on a preliminary basis . . . . There's no -- There's nothing in this record, other than your representations at this time, as to the details or as to what constituted misconduct or alleged misconduct on the part of the government with respect to the seeking of the wiretap application . . . and it seems to me that it's reckless on your part, Mr. Bowman, to make these kinds of allegations unsupported by affidavit or otherwise, at this late juncture.

1/6/03 T 21.

B. Governing Law and Standard of Review

1. Overview of Title III

Statutory authorization for federal law enforcement officials to intercept wire, oral and electronic

communications is found in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, commonly called "Title III." The strict warrant requirements of Title III provide that before issuing a wiretap order, the district court must find:

> 1. Probable cause to believe that an individual is committing, has committed, or will commit one of a list of specified crimes, 18 U.S.C. § 2518(3)(a);
>
> 2. Probable cause that communications concerning that offense will be obtained through the interception, 18 U.S.C. § 2518(3)(b);
>
> 3. Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed or be too dangerous if tried, 18 U.S.C. § 2518(3)(c); and
>
> 4. Probable cause that the facilities from which, or place where, the communications are to be intercepted are being used in connection with the commission of the offense, 18 U.S.C. § 2518(3)(d).

The warrant must also contain a particular description of the type of communication sought to be intercepted and a statement of the offenses to which the communication relates. 18 U.S.C. § 2518(4)(c). The warrant must not allow the interception to continue longer than is necessary

to achieve the objective of the authorization, and in any event not longer than 30 days, 18 U.S.C. § 2518(5), and the warrant must require the interception be conducted in a way that minimizes the interception of calls not subject to interception by Title III. *Id.*

The elaborate Title III requirements address the probable cause and particularity requirements of the Fourth Amendment. "Surveillance that is properly authorized and carried out under Title III complies with the fourth amendment." *United States v. Bianco*, 998 F.2d 1112, 1121 (2d Cir. 1993); *see also United States v. Donovan*, 429 U.S. 413, 429 (1977) (dictum); *United States v. Tortorello,* 480 F.2d 764, 772-75 (2d Cir. 1973).

2. Persons Whose Communications May Be Intercepted

Section 2518 requires the Government to identify in its application "the person, if known, committing the offense and whose communications are to be intercepted." 18 U.S.C. § 2518(1)(b)(iv). Similarly, the order of authorization must specify "the identity of the person, if known, whose communications are to be intercepted." 18 U.S.C. § 2518(4)(a). These provisions do not require the Government to identify *every* person whose calls may be intercepted. Rather, "Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that the individual is 'committing the offense' for which the wiretap is sought." *United States v. Kahn*, 415 U.S. 155 (1974).

3. Evidence of Other Crimes Not Specified in § 2516 or Warrant

Title III allows the Government to seek authorization to conduct electronic surveillance of specified persons in order to investigate specified crimes, which are set forth at 18 U.S.C. § 2516. Although 18 U.S.C. § 242 (deprivation of civil rights under color of law) and § 2425 (use of an interstate facility to transmit information about a minor in connection with sex crimes) were not among the crimes specified in § 2516 at the time of the present wiretap,[9] Title III clearly contemplates that law enforcement officers may hear conversations relating to other crimes not specified in § 2516 and not authorized in the wiretap warrant. Section 2517(5) expressly allows the Government to use evidence of non-specified, non-authorized offenses, often referred to as "other crimes," when such evidence is obtained during the course of a wiretap investigation of a specified authorized offense. In order to use this evidence, however, § 2517(5) requires the Government to make an application to the district court "as soon as practicable." Before other-crimes evidence may be used, the district court must make a finding that the communications in question "were otherwise intercepted in accordance with the provisions of this chapter." *Id.*

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[9] Section 2516 was amended in 2003 to include § 2425 as an enumerated offense. *See* PROTECT Act, Pub. L. 108-21 § 201, Apr. 30, 2003, 117 Stat. 659.

Construing § 2517(5), this Court has stated that "should the law enforcement officer, in the course of conducting the authorized interception, come across communications relating to offenses other than those specified in the order of authorization or approval, he must obtain the authorization or approval of a court of competent jurisdiction as soon as practicable before the communications might be used in connection with the unspecified offense." *United States v. Masciarelli*, 558 F.2d, 1064, 1066 (2d Cir. 1977). Following a discussion of § 2517(5) in *Masciarelli*, the Court concluded that "Congress intended that judicial approval of the interception of evidence relating to non-authorized offenses might retroactively be granted pursuant to § 2517(5) upon a showing that 'the original order was lawfully obtained, that it [was] sought in good faith and not as a subterfuge search, and that the communication was in fact incidentally intercepted during the course of a lawfully executed order.'" *Id.* at 1068 (quoting S. Rep. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 2112, 2189). *See also United States v. McKinnon*, 721 F.2d 19, 22-23 (1st Cir. 1983) (holding that "incidental" interception of wire communications relating to offenses not authorized need not be unanticipated or inadvertent); *United States v. D'Aquila*, 719 F. Supp. 98, 111-112 (D. Conn. 1989); *United States v. Aloi*, 449 F. Supp. 698, 722 (E.D.N.Y. 1977). In sum, § 2517(5) permits a district court to issue an amended order authorizing the use of communications relating to crimes that could not have been investigated under an original order. *See In re Grand Jury Subpoena Served on John Doe*, 889 F.2d 384, 387 (2d Cir. 1989).

4. Minimization Requirements

Title III requires that electronic surveillance "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter . . . ." 18 U.S.C. § 2518(5). Title III does not forbid electronic surveillance monitors from intercepting "all nonrelevant conversations, but rather instructs the agents to conduct surveillance in such a manner as to 'minimize' the interception of such conversations." *Scott v. United States*, 436 U.S. 128, 140 (1978). The Government bears the initial burden of establishing that minimization requirements were met. *United States v. Cirillo*, 499 F.2d 872, 811 (2d Cir. 1974).

To determine whether monitoring agents have properly minimized calls, courts must objectively assess the reasonableness of their conduct, based on the facts known to the agents at the time. *See Scott*, 436 U.S. at 137. When determining whether monitors acted reasonably, courts should consider the circumstances of the electronic surveillance. *Id.* at 140. Whether minimization should have occurred requires an assessment of the reasonableness of the interceptions in light of the purpose of the wiretap and the totality of the circumstances. *United States v. Napolitano*, 552 F. Supp. 465, 476 (S.D.N.Y. 1982). Minimization may be more difficult, and more surveillance may be permitted, where the investigation focuses on a widespread conspiracy. *Scott*, 436 U.S. at 140; *United States v. Gotti*, 42 F. Supp.2d 252, 268 (S.D.N.Y. 1999). The reasonableness of the Government's minimization efforts is evaluated in light of the circumstances existing at the time of the

interceptions, "not with the benefit of hindsight." *See United States v. Clemente*, 482 F. Supp. 102, 109 (S.D.N.Y. 1979), *aff'd*, 633 F.2d 207 (2d Cir. 1980).

5. *Franks* Hearing

Under *Franks v. Delaware*, 438 U.S. 154 (1978), and its progeny, the fruits of a search may be suppressed if (1) the warrant contains a material false statement or a material omission; (2) the affiant on the warrant made the false statement or omission knowingly and intentionally, or with reckless disregard for the truth; and (3) the content of the affidavit, setting aside the material false statement or material omission, was insufficient to establish probable cause. *See Bianco*, 998 F.2d at 1125. The *Franks* standard is applicable in Title III cases. *Id.* at 1126.

The Supreme Court has recognized that in rare cases, it may be appropriate to conduct a hearing to test the accuracy and completeness of a search warrant affidavit. However, before a defendant can gain such a full-fledged evidentiary hearing, he must make "a *substantial preliminary showing* that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the [officer] in the warrant affidavit." *Franks*, 438 U.S. at 155-56 (emphasis added). This substantial preliminary showing "must be supported by more than a mere desire to cross-examine[,] . . . [but instead] must be accompanied by an offer of proof." *Id.* at 171. *Franks* does not require that all statements in an affidavit be true; it simply requires that the statements be 'believed or appropriately accepted by the affiant as true.'" *United States v. Campino*, 820 F.2d 588, 592 (2d Cir. 1989)

(quoting *Franks*, 438 U.S. at 165). Allegations that amount to "negligence or innocent mistake are insufficient" to satisfy the required showing. *Id.* To demonstrate intentional wrongdoing or recklessness, there must be evidence that the officer "'in fact entertained serious doubts as to the truth of his' allegations . . . and [a] factfinder may infer reckless disregard from circumstances evincing 'obvious reasons to doubt the veracity' of the allegations." *United States v. Williams*, 737 F.2d 594, 602 (7th Cir. 1984) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). Finally, a defendant is entitled to a hearing only if he shows that the alleged false statements or omissions were necessary to the finding of probable cause. *Franks*, 438 U.S. at 156, 171-72.

6. Standard of Review

This Court has generally held that "[w]hen reviewing rulings on motions to suppress, we examine the evidence before the district court in the light most favorable to the government, and will disturb factual findings only when they are clearly erroneous." *United States v. Fields*, 113 F.3d 313, 319 (2d Cir. 1997). The district court's legal conclusions will be reviewed de novo. *See id.*; *United States v. Rodriguez*, 786 F.2d 472, 476 (2d Cir. 1986) (reviewing district court's order to suppress Title III evidence).

More specifically, "[i]n reviewing a ruling on a motion to suppress wiretap evidence, we accord deference to the district court because '[t]he role of an appeals court in reviewing the issuance of a wiretap order . . . is not to make a de novo determination of sufficiency as if it were

a district judge, but to decide if the facts set forth in the application were minimally adequate to support the determination that was made.'" *United States v. Miller*, 116 F.3d 641, 663 (2d Cir. 1997) (quoting *United States v. Torres*, 901 F.2d 205, 231 (2d Cir. 1990) (internal quotation marks omitted)); *see also United States v. Diaz*, 176 F.3d 52, 109 (2d Cir. 1999).

C. Discussion

Although the defendant does not appear to be challenging the district court's probable cause determination for the seven orders of Title III authorization, he does raise a variety of challenges to the district court's decision of February 13, 2003, denying his motion to suppress intercepted telephone conversations between himself and Jones and all derivative evidence. For the reasons that follow, each challenge is meritless.

1. The District Court Properly Ratified the Interception of Calls Relating to Sex Crimes Under § 2517(5)

The defendant's primary argument -- that the district court was not authorized by § 2517(5) to ratify interception of calls relating to sex crimes, because § 2516 did not specifically enumerate § 242 and § 2425 as offenses for which electronic surveillance may be authorized -- has been squarely rejected by this Court. In a case not cited by the defense, *In re Grand Jury Subpoena Served on John Doe*, 889 F.2d 384, 387 (2d Cir. 1989),

this Court held "that 'other' offenses under Section 2517(5) may include offenses, federal as well as state, *not listed in Section 2516* so long as there is no indication of bad faith or subterfuge by federal officials seeking the amended surveillance order." (Emphasis added.) The *Doe* court explained "that Congress intended that amended orders under Section 2517(5) could encompass federal crimes not listed in Section 2516. The Senate Report accompanying Section 2517(5) states that 'other' offenses under that section 'need not be designated offenses,' an apparent exemption from the requirement that the offense be among those designated in the Section 2516 list." *Id.* (citation omitted). *Cf. United States v. Tortorello*, 480 F.2d 764, 781-783 (2d Cir. 1973) (upholding an amended order under § 2517(5) even though offenses regarding which evidence was to be used -- federal securities law violations -- were not among offenses listed in Section 2516).[10]

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[10] The defendant also argues that because the intercepted conversations in question were intrastate communications between himself and Jones, they could not form the basis for violations of § 2425. For the reasons set forth in Part I, *supra*, this argument in unavailing. Regardless of the court's decision on the jurisdictional issue, however, the defendant's conversations would have been disclosable in any event to state authorities pursuant to the district court's order of disclosure. (The first application and order also listed possible state crimes. SA 774-75 ¶7, 783 ¶5.)

The district court correctly made a factual finding that the Government had acted in good faith, because it did not expect to intercept conversations relating to the sex crimes that were ultimately uncovered. As the Court can see from its own examination of the transcripts (JA 141-359), all of the calls between Jones and the defendant were exceedingly brief. At the time, these calls appeared to be about arranging consensual sexual encounters between the defendant and Jones and/or other adult women. Although immoral, this behavior was neither federally criminal nor (for the defendant) unusual. The defendant and Jones never expressly described their illegal activity regarding the sexual abuse of minors. SA 1082-85.

Even the conversation between the defendant and Jones on July 9, 2001, in which Jones identified one of the minor girls by name and age, was, on its face and standing alone -- and in the absence of any mention of proposed sexual activity -- not enough to establish probable cause to believe that the defendant and Jones were engaged in criminal activity. By that point in the investigation, however, the Government had enough knowledge regarding the defendant's sexual deviancy (including his sexual relationship with a 16-year old girl in June 2001, SA 692-95, 1084 ¶6) to suspect that he might actually sexually abuse a nine-year old girl, and so the Government informed the Court of the possibility. It was not until July 13, 2001, however, that the truth was flushed out following the pretext call to the defendant and the defendant's incriminating conversations with Jones. Not until July 21, 2001, when the minor girls were interviewed, was Special Agent Reiner's suspicion

confirmed that the defendant had sexually abused them. SA 1086 ¶20.

The defendant's claim, that the Government unreasonably delayed in notifying the court of the calls between Jones and the defendant, is unusual because it effectively blames the Government for not recognizing at an earlier date the full extent of his depravity. Yet the case agent, Special Agent Reiner explained in the suppression proceedings that the Government had not been aware of the defendant's sex crimes:

> Before July 13, 2001, the investigation of Giordano was focused on political corruption in the City of Waterbury. To the best of my knowledge, no member of the investigative team believed or had any reason to believe that Giordano was engaging in sexual acts with minors. During the investigation following Giordano's arrest, no one I have spoken with, other than Guitana Jones, suspected or had knowledge that Giordano was having sex with minors.

SA 1080 (affidavit of Mar. 4, 2002); *see also* SA 1085 ¶19. The defendant offered no evidence to rebut this affidavit. Accordingly, the defendant has failed to show that Judge Nevas clearly erred in finding that the Government did, in fact, act in good faith. *See United States v. Williams*, 205 F.3d 23, 30 (2d Cir. 2000) (reviewing district court's determination regarding subjective good faith of agents accused of misconduct for

clear error); *Buie v. Sullivan*, 923 F.2d 10, 12-13 (2d Cir. 1990) (same). Given that finding, the defendant's challenge to the § 2517(5) order must fail.

Even if the Court were to find that the Government had violated § 2517(5), "[s]uppression is not the necessary or, even, the usual remedy for such a violation." *United States v. D'Aquila*, 719 F. Supp. 98, 112 (D. Conn. 1989). In *D'Aquila*, the district court expressly found that the Government's § 2517(5) application was lacking in detail and "fail[ed] to provide the approving judge with any real opportunity to pass on the validity of the interception in question, as required by Section 2517(5)." *Id.* Nevertheless, the district court denied the defendants' suppression motion, finding, in light of the full record, "that only the technical requirements of Section 2517(5) and not its purposes were violated by the filing of an deficient application." *Id.* at 113. In the present case, the defendant has not claimed that the Government's § 2517(5) application was somehow deficient or that the Government withheld relevant information from the district court in that application. His argument can only be that the Government somehow acted in bad faith in seeking authorization to use and disclose the evidence of the defendant's sexual abuse of the minor victims. For the reasons set forth above, there is simply no factual basis for this argument.

Finally, the defendant challenges (Def. Br. 76-78) the district court's invocation of the plain-view doctrine, first articulated by the Supreme Court in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). That doctrine permits law enforcement officers lawfully executing a search

warrant to seize evidence that is in plain view, even where the evidence does not relate to the crimes for which the warrant was originally issued. The defendant's claim is misplaced. As this Court has recognized, § 2517(5) is a statutory application of the plain view doctrine. *See United States v. Masciarelli*, 558 F.2d 1064, 1066 (2d Cir. 1977) ("[W]here a law enforcement officer lawfully engaged in a search for evidence of one crime inadvertently comes upon evidence of another crime the public interest militates against his being required to ignore what is in plain view."). *See also United States v. Baranek*, 903 F.2d 1068, 1071 (6th Cir. 1990); *United States v. Ramirez*, 112 F.3d 849, 851 (7th Cir. 1997); *United States v. Couser*, 732 F.2d 1207, 1210 (4th Cir. 1984); *United States v. Cox*, 449 F.2d 679, 686 (10th Cir. 1971). Because the district court properly applied § 2517(5) and *Masciarelli*, it properly permitted the Government to use the evidence of the Giordano-Jones telephone calls.

2. The Wiretap Order Authorized the Government To Intercept Conversations Between the Defendant and Jones, and the Government Properly Minimized Its Interceptions

In conducting its investigation of political corruption in Waterbury, the Government fully complied with the minimization requirements set forth in Title III and included in the district court's orders of authorization. *See* Orders of Authorization, SA 75-76, 172-73, 234-35,

314-15, 425-26, 577-78, 741-42. The defendant's contentions, that agents violated their minimization requirements and exceeded the scope of the wiretap by monitoring calls between Jones and the defendant, is meritless.

The agents properly minimized by limiting their monitoring to relevant calls. *See Scott*, 436 U.S. at 140. As the district court held, conversations between the defendant and Jones "were directly relevant to the government's corruption investigation," because "any evidence revealing that Giordano was receiving bribes and then disbursing the money to a network of prostitutes, such as Jones, would tend to show that he was abusing his public office for improper and illegal gain." SPA 13. Accordingly, there was "probable cause to authorize the government's surveillance of telephone conversations between Giordano and Jones." SPA 13-14. As a result, FBI monitors were not obligated to minimize them until such time as they determined that the calls did not relate in any way to the purposes for which electronic monitoring had been authorized. (In fact, on five occasions, FBI monitors did minimize intercepted communications between the defendant and Jones.) GSA 26-27.

Moreover, in assessing the reasonableness of the minimization, a reviewing court must consider whether "the agents devised a reasonable means of limiting interception, and whether they utilized those safeguards in good faith." *United States v. Hinton*, 543 F.2d 1002, 1012 (2d Cir. 1976). Special Agent Reiner's Affidavit demonstrates that such procedures were in place, and that the monitors were made aware of those procedures and

were directed to follow them. SA 1086-90. The defendant has not rebutted or even questioned these facts.

This Court has held that even where the vast majority of intercepted communications, including many that were not relevant to the investigation, were not minimized, there was no violation of the minimization requirement. In *United States v. Manfredi*, 488 F.2d 588 (2d Cir. 1973), this Court upheld the minimization procedures that resulted in the monitoring and recording of *all* calls in a complex, far-flung narcotics investigation. Noting that the Government had "made a prima facie showing of compliance with the minimization provision," the *Manfredi* Court held that "[w]e do not believe that the statute goes further than to require that the methods used to effect minimization be in good faith and reasonable." *Id.* at 600. In the present case, the Government has made a prima facie showing of compliance with the minimization requirement.

Finally, all of the intercepted calls between the defendant and Jones were less than two minutes in duration, and so these calls were "self-minimizing." SPA 15 (finding that Government "intercepted 151 calls between Giordano and Jones or in which Giordano made reference to Jones. Of those 151 calls, 149 were less than two minutes in duration. Jones was not a party to either of the two calls which lasted longer than two minutes."). This Court has held that two minutes is presumptively "too brief a period for an eavesdropper even with experience to identify the caller and characterize the conversation, especially under the circumstances" of a widespread

conspiracy. *United States v. Capra*, 501 F.2d 267, 275-76 (2d Cir. 1974) (internal quotation and citation omitted).[11]

The defendant makes no attempt to rebut the district court's finding that the defendant's access to ready cash for spending on narcotics and prostitutes was probative of whether he was, in fact, receiving corrupt payments. Instead, he simply claims, in a novel variant of an estoppel argument, that the Government itself did not regard the conversations between the defendant and Jones as relevant to its corruption investigation. As proof of this, he points (1) to the fact that the first intercepted call between the defendant and Jones was labelled by the monitoring agent as "non-pertinent," and (2) to the fact that Jones was never listed in the Government's Title III applications as a named interceptee. Neither fact is relevant.

With respect to the first point: It makes no difference that, two days after the inception of the wiretap, the agent who happened to be monitoring the first intercepted call between the defendant and Jones did not deem it pertinent. As the transcripts reflect, JA 141-359,

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[11] *Accord United States v. Willis*, 890 F.2d 1099, 1102 (8th Cir. 1989); *United States v. Mansoori*, 304 F.3d 635, 646-648 (7th Cir. 2002); *Napolitano*, 552 F. Supp. at 476; *see also United States v. Hinton*, 543 F.2d 1002, 1012 (2d Cir. 1976) ("Many of the calls which seemed at the outset to involve purely personal matters later turned out to be [crime] related . . . . [T]here was no way to frame screening instructions so as to avoid the taping of some innocent conversation.").

the vast majority of telephone calls were exceedingly brief, and their purpose was not always readily evident. The pertinence of the calls that were intercepted must be judged on their own merits, and as the affidavit of Special Agent Reiner explained during the suppression hearings, the investigative team regarded the defendant's cash-for-sex relationship with a prostitute to be probative of the defendant's illicit access to cash. SA 1080.

As to the second point, Title III does not require the Government to identify in its application every person whose communications may be intercepted, but only "the person, if known, *committing the offense* and whose communications are to be intercepted." 18 U.S.C. § 2518(1)(b)(iv) (emphasis added). "Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that the individual is 'committing the offense' for which the wiretap is sought." *United States v. Kahn*, 415 U.S. 155 (1974). *See also United States v. Principie*, 531 F.2d 1132, 1136-37 (2d Cir. 1976) (holding that a person must be named in a wiretap warrant only when there is probable cause to believe that he is involved in the crime under investigation). Because there was no basis for concluding that Jones herself was committing any crime other than simple prostitution, T 1036-37 -- which is not a federal crime -- the Government did not violate § 2518(1)(b)(iv) by failing to identify her as a named interceptee. In any event, the failure to identify in a Title III application every person expected to be engaging in criminal conversations is not a ground for suppression of the evidence obtained through that wiretap. *See United*

States v. Donovan, 429 U.S. 413, 436 & n.25 (1977); *Miller*, 116 F.3d at 664.

The defendant notes (Def. Br. 66) that some of the Government's Title III applications identified as interceptees other women with whom the defendant was carrying on sexual relationships, but did not identify Jones as an interceptee. These other women, however, were identified only after the Government had probable cause to believe that *they* were engaging in federal criminal conduct, such as purchasing cocaine for the defendant. SA 263, 284-86. Notwithstanding the fact that Jones and some of the other women not engaging in federal crimes were not named interceptees, the Government, through its progress reports, notified the district court of at least 17 intercepted conversations between the defendant and various women, including Jones (whose surname the Government then thought to be Graham). SA 1082-85 (affidavit, summarizing those conversations); SA 702 (seventh wiretap affidavit, mentioning Jones as having received money from defendant in June 2001 for sexual liaisons). These conversations related to sex, money, prostitution, and narcotics and were properly found by the district court to be relevant to the Government's corruption investigation because it tended to show his access to bribe money. SPA 13.[12]

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[12] In addition to rebutting the defendant's argument that the Government was not really interested in his conversations with Jones for purposes of the corruption investigation, the disclosure of the Jones intercepts to the (continued...)

3. The District Court Correctly Declined to Hold a *Franks* Hearing

The district court correctly declined to hold an evidentiary hearing under *Franks v. Delaware* in response to the defendant's claim that the Government failed to disclose the adverse bias of a cooperating witness whose statements were included in the wiretap application.

The defendant alleges that Special Agent Reiner's February 18, 2001, affidavit omitted a material fact in that it failed to disclose that Tim Longino, identified in the affidavit as CW-1, had a "motive to hate Giordano" and a "motive to lie about Giordano." Def. Br. 86. According to the defendant, Longino had been active in the defendant's mayoral and senatorial campaigns, "but was discharged by Giordano from his duties when it was discovered that he had misappropriated more than $50,000 in campaign funds." Def. Br. 79. The defendant claims that had Longino's alleged impropriety been disclosed in Special Agent Reiner's February 18, 2001, affidavit, the district court would have discounted any information provided by

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[12] (...continued)
district court reveals the Government's good faith effort to comply with the requirements of Title III. The level of judicial supervision is a factor to be considered on a minimization claim. *See United States v. Santoro*, 647 F. Supp. 153, 161 (E.D.N.Y. 1986), *aff'd*, 880 F.2d 1319 (2d Cir. 1989); *United States v. Cale*, 508 F. Supp. 1038, 1041 (S.D.N.Y. 1981) (judicial review of progress reports).

CW-1 and would not have found probable cause to issue the Title III order.

This claim fails for several reasons. First, the defendant offered no support for the accusation that Longino had "misappropriated" funds (Def. Br. 82), aside from vague statements in a brief affidavit that simply referred to an article from the Waterbury *Republican-American*, which in turn makes no mention of misappropriated funds. SA 1060-69, 1074-75. This is hardly the "substantial preliminary showing" required by *Franks* to obtain an evidentiary hearing. "Unsupported conclusory allegations of falsehood or material omission cannot support a *Franks* challenge; to mandate a hearing, the [defendant] must make specific allegations accompanied by an offer of proof." *Velardi v. Walsh*, 40 F.3d 569, 573 (2d Cir. 1994).

Second, the defendant offered no evidence whatsoever that Special Agent Reiner was aware of any wrongdoing by Longino – much less that he recklessly or deliberately failed to disclose such wrongdoing to the district court. To the contrary, Special Agent Reiner explained by affidavit how he took great care to ensure that there was no material information implicating Longino's credibility that should be included in the wiretap application. GSA 21-25.

Third, Longino's statements were unnecessary to the finding of probable cause, and hence any hypothetical omission would not have warranted suppression. *See Franks*, 438 U.S. at 156, 171-72. The original wiretap affidavit itself reflects substantial factual information

provided by three other cooperating witnesses who corroborated Longino. SA 33-58, GSA 25-26.

Finally, it is worth noting that in a statement to FBI agents made on July 23, 2001, the defendant himself substantially corroborated the information that Longino had provided to Special Agent Reiner and that was included in the wiretap application. GSA 25-26. In light of this, it is disingenuous for the defendant to claim on appeal that the information obtained from Longino was unreliable.

III. The Defendant Was Properly Convicted of Violating the Minor Girls' Rights Under 18 U.S.C. § 242

A. Relevant Facts

Count 1 of the superseding indictment charged that, between November 2000 and July 2001,

> the defendant, while acting under color of the laws of the State of Connecticut, did willfully deprive Victim 1 of the rights and privileges secured and protected by the Constitution and laws of the United States, that is the right not to be deprived of liberty without due process of law, which includes the right to be free from aggravated sexual abuse and sexual abuse, by coercing and forcing Victim 1, who had not attained the age of 12 years, to engage in fellatio and

> genital contact with GIORDANO and by touching Victim 1's genitals and breasts, resulting in bodily injury to Victim 1.

JA 4. Count 2 contained identical charges with respect to Victim 2. JA 5.

At trial, Jones testified that she arranged to bring the child victims to the defendant, at his request, to engage in sexual conduct with him. Jones explained that the defendant would pay her for these encounters, and that she used the money to buy drugs. On two or three occasions, Jones brought the girls to the Mayor's Office for these encounters, including once on a holiday when City Hall was closed to the public. GA 82-84, 89-94 (testimony of Jones), GSA 62-65 (testimony of Victim 1)]. On two or three other occasions, Jones brought one of the children to perform oral sex on the defendant while he drove his city-provided police cruiser. GA 104-06.

After each of the sexual encounters between the defendant and the children, the defendant warned Jones in a nice, calm voice "to make sure the kids don't tell anyone" or else Jones would go to jail. GA 89-90, 109, 177-78. Jones would give the girls a look that said she was going to beat them if they said anything. When asked why she did this, Jones responded:

> A. Because I'll get in trouble if they told.
> Q. Trouble by whom?
> A. By him [the defendant], probably.
> Q. And how were you going to get in trouble by him?

A. I'll go to jail.
Q. He told you you were going to go to jail?
A. Yeah, he told me I'll go to jail. I'm there now.

GA 90-91. The defendant told Jones, in front of one of the children, "You keep quiet or you'll go to jail." GA 113. The defendant also warned the children that *they* would get in trouble if they told anyone. Even after the state took custody of the two children, the defendant warned Jones that "if his name was to be mentioned, [she] might as well take a knife and slice [her] throat." GA 137.

The defendant also conveyed to Jones his control over the Waterbury police. Jones testified that defendant "had a lot to do with the police, that he worked with the police, too. You know, he was their boss. I took it like that. He had control of what the police does, so he would be there with them at the crime scene." GA 131. The defendant was so involved in police work, on a day-to-day basis, that once when he wanted an excuse to steal away from his home to a sexual episode with one of the children, he had Jones phone his residence and pretend to be the police calling with an emergency. GA 127, T 980. The defendant had so impressed Jones with his control over the police that when she was ultimately arrested by FBI agents, she asked, "Did Phil send you," because she assumed that the defendant must have sent them to get her. GA 139, 231.

The children testified about their sexual abuse at the hands of the defendant, describing in detail the acts they were made to perform. Each testified that, at Jones'

direction, they frequently had to perform oral sex on the defendant in view of Jones and the other child, until he ejaculated on the carpet. GSA 54-55 (Victim 2); 141-45(Victim 1). The defendant would put his hand inside the victims' clothes, touching their chests and vaginas. GSA 60-62, 144-46. Sometimes the girls were forced to perform sexual acts simultaneously on the defendant. GSA 66-67, 147-48. Victim 2 testified that these acts hurt her throat. GSA 57, 87. Victim 2's eyes hurt. GSA 150-51.

The girls testified, as had Jones, that they were brought at times to City Hall, where they were forced to engage in sexual activity with the defendant in his office. GSA 58, 62-65, 133-34, 146. Both victims testified that when they went to the Mayor's Office, there was no one else around. GSA 65, 133-36. They also testified that they were sexually abused by the Mayor at various other locations. GSA 68-73, 89, 126-31, 135-36, 146.

The girls testified that they lived in fear of the defendant, based on his being the Mayor of Waterbury. One of the girls, who was ten years old when the abuse began, "thought that he could rule everybody" in Waterbury as the Mayor: "I mean like he's the boss of everyone." GSA 51, 92-93. She was too frightened to tell anyone of these sexual encounters, because she was afraid of the defendant and Jones: "She would tell me she would punch me in the mouth, and he would say not to tell or something would happen." GSA 56, 78-79. The girl was afraid that the defendant might hurt her or her family, including the other victim. GSA 86-87, 92-93.

The younger victim, who was eight years old at the time the abuse began, testified that the defendant, as Mayor, "[w]atches over us, like God," and can see everything, like God. GSA 125. She was afraid of the defendant, and thought that he would put her in jail if she told anybody about her encounters with him. GSA 149-50.

At the close of evidence, the defendant moved for a judgment of acquittal on the civil rights counts, arguing that there was insufficient evidence that the defendant acted under color of law. The court denied the motion, noting the defendant's use of government facilities in connection with the abuse, and his threats and intimidation of both Jones and the children. GSA 23-24. The court re-affirmed its ruling after trial in writing. SPA 21-22.

B. Governing Law and Standard of Review

Section 242 of Title 18 of the United States Code provides criminal sanctions for "[w]hoever, under color of any law . . . willfully subjects any person in any State . . . to the deprivation of any rights . . . secured or protected by the Constitution or laws of the United States . . . ." The statute "mak[es] it criminal to act (1) 'willfully' and (2) under color of law (3) to deprive a person of rights protected by the Constitution or laws of the United States." *United States v. Lanier*, 520 U.S. 259, 264 (1997).

The Supreme Court has "broadly interpreted the color of law requirement, concluding that '[m]isuse of power, possessed by virtue of state law and made possible because the wrongdoer is clothed with the authority of state law is action taken under color of state law.'" *United*

States v. *Walsh*, 194 F.3d 37, 50 (2d Cir. 1999) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)); *see also West v. Atkins*, 487 U.S. 42, 49 (1988). A defendant acts under color of law even when he exceeds his lawful authority under law -- that is, when he acts simply under "pretense" of law. *See Screws v. United States*, 325 U.S. 91, 111 (1945) (plurality opinion) ("Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it."); *Walsh*, 194 F.3d at 52. To act under color of state law "means the same thing in § 242 that it does in the civil counterpart of § 242, 42 U.S.C. § " -- that is, the same as "state action" under the Fourteenth Amendment. *United States v. Price*, 383 U.S. 787, 794 n.7 (1966).

With respect to its third prong, § 242 "incorporate[s] constitutional law by reference." *Lanier*, 520 U.S. at 265. The Fourteenth Amendment to the United States Constitution provides that a State may not "deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend XIV, § 1. An individual's right to bodily integrity is a central component of the "liberty" protected by the Fourteenth Amendment. *See Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977); *Rochin v. California*, 342 U.S. 165, 172 (1952); *see also Blouin ex rel. Estate of Pouliot v. Spitzer*, 356 F.3d 348, 359, 363 (2d Cir. 2004) (discussing immunity claims in relation to "federal liberty interest[] of bodily integrity").

The standard of review for evidentiary sufficiency claims is set forth in Part I.B above.

"Questions of constitutional interpretation are reviewed de novo." *United States v. Quinones*, 313 F.3d 49, 60 (2d Cir. 2002); *United States v. Cruz-Flores*, 56 F.3d 461, 463 (2d Cir.1995) ("We review the district court's application of constitutional due process standards de novo.").

C. Discussion

1. There Was Sufficient Evidence That the Defendant Acted "Under Color of Law" When He Sexually Abused the Two Minor Girls

There was ample evidence for the jury to conclude that the defendant's abuse of his minor victims was "made possible only because [defendant was] clothed with the authority of state law." *Classic*, 313 U.S. at 326. The evidence shows that the two minor girls engaged in sexual acts with the defendant at his request. Both girls testified that they knew that the defendant was the Mayor of Waterbury, that he had authority over them and the citizens of the city, and that they were afraid that he would harm them and put them in jail, and that their family and mother/aunt (Jones) would be harmed if they told anyone about the sexual acts. The evidence shows that the sexual assaults occurred at the Mayor's office at City Hall. The evidence also shows that the defendant abused the girls at his private law office, his home, and at an apartment. Both victims testified that they were afraid of the defendant and wanted the abuse to stop. Jones testified that the

defendant would get angry if she could not bring the girls to him for sex.

Furthermore, the defendant utilized his mayoral privileges to facilitate his abuse of the minor girls. As Mayor of Waterbury, the defendant had access to his government office at City Hall where the sexual abuse took place during hours when no one else was at the office. The defendant had access to a police badge and cruiser (in which he abused one of the victims), and called Jones from a murder scene where he was supervising police activity and impressed upon Jones his control over the City police. The defendant used a city-provided cell phone to arrange the times and places at which he abused the two girls. The defendant even had Jones call him, claiming to be the police, in order to afford him an excuse to slip away from other engagements and abuse the girls without arousing his family's suspicions. Being the Mayor facilitated the defendant's sexual abuse of the two girls,[13] and helped him keep his pattern of abuse from being detected and stopped. Thus, taking the "totality of circumstances . . . and drawing all inferences in favor of the government," defendant's assault of the two minor girls fully meets the "'under color of law' requirement." *Walsh*, 194 F.3d at 51.

Indeed, the defendant's misuse of authority under color of law is the kind of conduct prohibited by the

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[13] The defendant concedes there was sufficient evidence that he engaged in oral sex with the victims. Def. Br. 83.

statute, and is consistent with the other kinds of cases in which courts have found abuse of authority under color of law. *See Walsh*, 194 F.3d at 50-51; *Monsky* v. *Moraghan*, 127 F.3d 243, 246 (2d Cir. 1997) (state judge who allowed his dogs to harass plaintiff while she sought access to courthouse records at the courthouse could be liable under § 1983); *see also United States* v. *Tarpley*, 945 F.2d 806 (5th Cir. 1991) (deputy sheriff convicted under §242 for assaulting a man and claiming "special authority" to do so "because he was a cop"). Moreover, courts of appeal have found liability under 42 U.S.C. § 1983 against state actors who utilized their authority to "create the opportunity to facilitate a rape or sexual assault." *Griffin v. City of Opa-Locka*, 261 F.3d 1295, 1306 (11th Cir. 2001); *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476, 479-80 (9th Cir.1991); *Rogers v. City of Little Rock*, 152 F.3d 790 (8th Cir.1998). The ample evidence of the defendant's sexual abuse of the two girls and his threats against them if they told anyone of the abuse fully supports the "under color of law" element of §242 convictions.

The defendant contends (Def. Br. 87) that his actions were motivated by personal reasons, and are not actionable under § 242. This contention lacks merit. Regardless of the defendant's motive for assaulting the two girls, the facts show that he acted under color of law. Courts routinely have upheld § 242 convictions where, for example, state officers abused prisoners, even though the beatings were personally motivated. *See, e.g.*, *United States v. Christian*, 342 F.3d 744, 750-51 (7th Cir. 2003) (on-duty police officer beat prisoner in jail because of racial epithet); *United States v. Colbert*, 172 F.3d 594, 596-97 (8th Cir. 1999) (off-duty police officer who had

personal motivation for beating prisoner at jail and threatening to arrest him every time he saw him in the future acted under color of law). In the instant case, the fact that the defendant asserts he was motivated by his own desires to abuse his minor victims does not remove his conduct from the ambit of § 242, especially given his threats to jail and harm the girls and their family if they told anyone about the abuse.

The defendant, relying (Def. Br. 86-87) on *Pitchell* v. *Callahan*, 13 F.3d 545 (2d Cir. 1994), argues that the testimony by the girls as to their perceptions of his authority as Mayor is irrelevant to whether he acted under color of law. The defendant's reliance is misplaced. In *Pitchell*, this Court rejected a § 1983 plaintiff's argument that "center[ed]" on the victim's subjective reaction to the fact that his assailant was a police officer (then off-duty), and relied on this as the sole support for the contention that the assailant was acting under color of law. 13 F.3d at 548-49. *Pitchell* stands only for the simple proposition that when a defendant has not in fact taken advantage of his official authority in violating a person's rights, a victim's subjective perception to the contrary cannot supply the requisite state action.

In the present case, the jury was entitled to conclude that the victims' perceptions of the defendant's power had been significantly influenced by his own actions. The defendant's conduct must be analyzed in the context in which it occurred. The defendant knew that he was making threatening statements to two girls, to both of whom he had exhibited the trappings of mayoral power (including the impressive mayoral office where he abused

them), and to a drug-addicted prostitute to whom he had demonstrated his control over the Waterbury police. *Cf. Monsky*, 127 F.3d at 246 (holding that judge acted under color of law when he "*implicitly* invoked the power and prestige of his office") (emphasis added). The two girls' testimony that they were abused, intimidated, and believed the defendant to be "like God," overseeing and controlling everything that happened in Waterbury, was highly relevant to the question of whether he was acting under color of law. *See Dan Vang*, 944 F.2d at 479 (holding, in case where expert testifies that rape victims, who were Hmong refugees from Laos, had been entirely reliant on government aid and "in awe of government officials," that state employee "used his government position to exert influence and physical control over these plaintiffs in order to sexually assault them"); *see also Rogers*, 152 F.3d at 798.

2. The District Court Properly Concluded that the Child Victims Had a Constitutional Right To Be Free from Sexual Abuse

The defendant's argument (Def. Br. 93-96) that there is no federal right to be free from sexual abuse is frivolous. In cases arising under 42 U.S.C. § 1983, courts have recognized that forcible intercourse or fellatio falls squarely within the proscriptions of the Fourteenth Amendment.[14] *See, e.g., Rogers*, 152 F.3d 790 (holding

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[14] Because "[t]he protections of the Constitution do (continued...)

that police officer violated victim's due process right to bodily integrity by committing rape); *Wudtke v. Davel*, 128 F.3d 1057, 1063 (7th Cir.1997) (holding that facts showing school superintendent forced teacher to perform fellatio supported substantive due process violation); *Jones v. Wellham*, 104 F.3d 620, 628 (4th Cir.1997) (recognizing that officer's forcible rape violated victim's substantive due process rights); *Bennett v. Pippin*, 74 F.3d 578, 589 (5th Cir. 1996) (holding that sheriff's rape of murder suspect violated her right to bodily integrity).

Where, as here, a state actor subjects a child to such sexual abuse, there is likewise no question that the child victim's right to bodily integrity has been grievously violated. *See, e.g.*, *Doe v. Claiborne County, Tenn.*, 103 F.3d 495, 506 (6th Cir.1996) ("a schoolchild's right to personal security and to bodily integrity manifestly embraces the right to be free from sexual abuse at the hands of a public school employee"); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 451-52 (5th Cir. 1994) (en banc) (holding that 15-year-old student was deprived of substantive due process when sexually molested by teacher), *id.* ("It is incontrovertible that bodily integrity is necessarily violated when a state actor sexually abuses a

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[14] (...continued)
not change according to the procedural context in which they are enforced," court decisions interpreting constitutional rights in civil § 1983 cases are equally applicable to criminal § 242 cases. *United States v. Reese*, 2 F.3d 870, 884 (9th Cir.1993); *United States v. Bigham*, 812 F.2d 943, 948 (5th Cir.1987).

schoolchild."); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 727 (3d Cir.1989) (allegations that teacher coerced student into performing sex acts were sufficient to constitute an intrusion into the child's bodily integrity).[15]

Citing no authority, the defendant nevertheless claims that the "'right to be free from 'aggravated sexual abuse and sexual abuse' exists only with respect to offenses defined in Chapter 109A of Title 18 of the United States Code." Def. Br. 94. This argument simply ignores the language of § 242, which punishes violations of rights "protected by the *Constitution* or laws of the United

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[15] The defendant does not claim that he lacked "fair warning" that his conduct violated the constitutional rights of his two minor victims. In fact, the defendant himself agreed on cross-examination that "forcing children to provide oral sex is a violation of their civil rights." GA 632. In any event, such a claim would lack merit. See, *e.g.*, *Lanier*, 520 U.S. at 266-67 (describing "fair warning" standard for § 242). Sexual abuse of children is such a patent invasion of the right to bodily integrity that one court has found it "ludicrous" to even suggest that such a right might not be "clearly established" for purposes of qualified immunity analysis. *See Stoneking*, 882 F.2d at 727; *see also Taylor Indep. Sch. Dist.*, 15 F.3d at 455; *Claiborne County, Tenn.*, 103 F.3d at 506-07. The Supreme Court has made clear that when a constitutional right is "clearly established" for purposes of § 1983 qualified immunity analysis, there has also been "fair warning" that violation of such a right will give rise to criminal liability under § 242. *Lanier*, 520 U.S. at 270.

States," and the language of the superseding indictment,[16] which charged the defendant with violating the victims' *constitutional* right to be free from sexual abuse. As explained above, courts have uniformly recognized that individuals have a federal constitutional liberty interest in being free of such abuse. The defendant was not charged with violating the criminal laws in 18 U.S.C. §§ 2241-2244, and hence there was no need to establish any of the jurisdictional elements peculiar to those statutes.

IV. The District Court Did Not Abuse Its Discretion in Its Evidentiary Rulings

A. Relevant Facts

Extramarital sexual activities. Because wiretapped calls captured the defendant's conversations with Jones after he received the anonymous call about his sexual abuse of the girls, a key component of his testimony was an effort to explain away his nervousness in those calls. On direct, he denied ever having touched the children, much less having made them perform oral sex. GA 364-65. He claimed that he was nervous only because he feared unfavorable news coverage of his "unfaithful[ness]" to his wife by having a long-term extramarital relationship with Jones. GA 366. He also expressed concern that such news might jeopardize his efforts at obtaining a position with the U.S. Department of Education. *Id.* The defendant repeatedly testified that his

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[16] The defendant's brief mistakenly quotes the original indictment. Def. Br. 93.

only concern was the possible media coverage about Jones giving him oral sex, and the resultant fallout with his wife and job. GA 366, 371, 547, 549, 570, 579.

On cross-examination, the Government challenged the defendant's claim that he was simply concerned about a sex scandal reaching the press. The defendant admitted that he had handled an earlier press inquiry about his being found in a car with a woman in a parking lot, and that his wife had sent a letter to a newspaper as a result of that story. GA 469-70. Likewise, he conceded that a media story had appeared some time ago about his having supposedly fathered a child by Jones. GA 470-71. The defendant further admitted during cross-examination that he had had sexual relations with a number of women besides Jones. GA 483-87. Moreover, the defendant admitted that, despite his professed worry that his extramarital activities might be publicly disclosed, he would sometimes allow women who were complete strangers to watch Jones perform oral sex on him. GA 486, 498.

Threats by the Defendant. On direct, when the defendant was asked whether he had ever threatened Jones or the children with arrest, he responded broadly, "I would have no reason to threaten a woman with anything." GA 361. On cross-examination, the government probed this denial, confronting him with the intercepted call in which he told Jones, after he received the anonymous call about the sexual abuse: "If my name gets mentioned, you might as well put a f_ing knife to your throat, I'm telling you right now." JA 340. After denying that he intended this statement as a threat to Jones, he then offered, "I have

never threatened *anyone* . . . . *Anyone's life*, no. No, I did not." GA 560-61 (emphasis added). Challenging this broad assertion, the government then posed a series of questions that revealed that the defendant threatened to kill a woman named Amy Cameron over a debt with a person named Faith. GA 563. In response to another series of questions, the defendant denied having threatened a person named Mike O'Connor, or telling him, "You don't know how much you f_d me on this. You f_k my family, I'll f_k your family." GA 565. The defendant also denied having threatened a fellow city official, Pat Mangini, who did not want to comply with the defendant's wishes, that "I can do what I want, I'm the Mayor." GA 566.

Availability of Cash. On cross-examination, the defendant said that all of the previous witnesses were wrong when they testified about the frequency of his meetings with Jones and the girls, and volunteered that "[i]f it happened five times a week, it's 50 a clip, it's $250 a week that I'd been paying someone. *That's a thousand dollars a month. I couldn't do it."* GA 499. He later repeated that he could not possibly have afforded having Jones and the children come to him on a regular basis. GA 602. To challenge that testimony, the Government then questioned the defendant with statements he had made to federal agents about his receiving 15 to 20 cash payments ranging from $1,000 to $2,500 from a city contractor named Joe. GA 602-04.

Municipal Corruption and the Defendant's Cooperation. During his direct testimony, the defendant testified that he had been with federal agents before his arrest on July 26, 2001, and that "we talked about

municipal corruption," and "for three days we talked about my house . . . my trips . . . my acquaintances, my families, people associated with the city." GA 377. When, as noted above, the Government began asking the defendant about his receipt of gifts from "Joe," the district court permitted the Government to inquire about Joe's role as a contractor for the City of Waterbury. GA 606-25. The court viewed the defendant's credibility as central to the case, and noted that it was relevant for the jury to consider whether the defendant's acceptance of gifts from city contractors violated the City Charter, which the defendant had earlier testified that he had sworn to uphold. GA 609. The court noted that to the extent that cross-examination touched on municipal corruption, that issue had first been raised by the defendant rather than the Government. GA 610. When the defendant objected to any mention of corruption at closing arguments, the court reiterated its earlier evidentiary finding:

> [the defendant] volunteered, [the prosecutor] didn't, he volunteered while you were conducting your direct examination that the only thing they talked to him about was public corruption, and then he volunteered that he was doing certain things for them in connection with that investigation in terms of recorded telephone conversations . . . . All of that came out on direct examination for the first time. . . . But once your client took the stand and volunteered this information, he was fair game for cross-examination, because it raised, as [the prosecutor] indicated, it bears

> on his credibility. So he opened the door to this kind of cross-examination . . . .

JA 69. The Government invited an instruction to the jury that the challenged testimony only went to his credibility and was not evidence of other crimes. The defendant declined a limiting instruction, asserting that a curative instruction would not work on the issue of other women and the area of political corruption. JA 68.

B. Governing Law and Standard of Review

Where a defendant takes the stand at trial and "offers an innocent explanation [of events] he 'opens the door' to questioning into the truth of his testimony, and the government is entitled to attack his credibility on cross-examination." *United States v. Payton*, 159 F.3d 49, 58 (2d Cir. 1998); *United States v. Garcia*, 936 F.2d 648, 653 (2d Cir. 1991). "Once a defendant has put certain activity in issue by offering innocent explanations for or denying wrongdoing, the government is entitled to rebut by showing that the defendant has lied." *United States v. Beverly*, 5 F.3d 633, 639 (2d Cir. 1993) (citing *United States v. Mills*, 895 F.2d 897, 907 (2d Cir. 1990)). "The rationale behind this rule is not difficult to perceive, for even if the issue injected is irrelevant or collateral, a defendant should not be allowed to profit by a gratuitously offered misstatement." *United States v. Beno*, 324 F.2d 582, 588 (2d Cir. 1963); *cf. Walder v. United States*, 347 U.S. 62, 65 (1954) ("there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility").

On cross-examination, the government may also challenge the defendant's credibility by offering specific instances of conduct "if probative of truthfulness or untruthfulness." Fed. R. Evid. 608(b). The admission of evidence pursuant to Rule 608(b) is subject to the ordinary constraints of Rules 403 and 611. *See United States v. Crowley*, 318 F.3d 401, 416-17 (2d Cir. 2003). Thus, a judge may exclude relevant evidence only if its probative value is *substantially* outweighed by the danger of *unfair prejudice*. Fed. R. Evid. 403. "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997). A court should consider whether the danger of unfair prejudice may be cured short of exclusion by the issuance of an appropriate limiting instruction to the jury. *See, e.g., United States v. Rosenwasser*, 550 F.2d 806, 808-09 (2d Cir. 1977).

Pursuant to Rule 608(b), it is proper to cross-examine a witness about specific instances of conduct that are probative of his truthfulness. The most obvious examples involve making false or misleading statements. *See, e.g., United States v. Jones*, 900 F.2d 512, 520-21 (2d Cir. 1990) (proper to impeach regarding false statements on applications for employment, apartment, driver's license, and loan, as well as on tax returns); *United States v. Sperling*, 726 F.2d 69, 75 (2d Cir. 1984) (proper to impeach regarding false credit card applications); *Lewis v. Baker*, 526 F.2d 470, 475-76 (2d Cir. 1975) (proper to impeach regarding false statements on employment

application); *United States v. Reid*, 634 F.2d 469 (9th Cir. 1980) (defendant properly cross-examined on a letter written to a government agency in which he falsified name, occupation, name of business and purpose in seeking information); *United States v. Girdner*, 773 F.2d 257 (10th Cir. 1985) (defendant properly asked about particulars of a ballot fraud scheme). Such misconduct need *not* be criminal. *Cf. Sperling*, 726 F.2d at 75.

A prior act can be probative of a witness's truthfulness even if the act does not strictly involve falsehoods or deception. *See, e.g., United States v. Cusumano*, 729 F.2d 380, 383 (6th Cir. 1984) (proper to impeach regarding transfer of funds from business prior to bankruptcy proceedings); *Varhol v. National RR Pass. Corp.,* 909 F.2d 1557, 1566 (7th Cir.1990) (en banc) (*per curiam*) (proper to impeach in regard to purchase of stolen railroad tickets because "people generally regard stealing (and receiving and using stolen property) as acts that reflect adversely on a [person's] honesty and integrity"); *United States v. Lambinus*, 747 F.2d 592 (10th Cir. 1984) (defendant properly asked about possessing stolen tools).

A district court has broad discretion to admit or exclude evidence and testimony, and so these rulings are subject to reversal only where manifestly erroneous or wholly arbitrary and irrational. *United States v. Yousef*, 327 F.3d 56, 156 (2d Cir. 2003) (manifestly erroneous), *cert. denied*, 124 S. Ct. 353 (2003); *United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001) (arbitrary and irrational).

C. Discussion

The defendant argues that the district court abused its discretion in permitting certain cross-examination and, therefore, denied him a fair trial. (Def. Br. 96-104). The court properly permitted the defendant's impeachment in the four challenged areas: (1) his threatening other people, after testifying that he never threatened anyone; (2) his additional extramarital relationships, after testifying only about his adulterous relationship with Jones and his supposed fear that it would be publicly disclosed; (3) his receipt of money and items from a city contractor, after volunteering that he could not have afforded to pay for sex with Jones and the children; and (4) his pre-arrest cooperation and corruption, after testifying that he spoke with federal agents for three days before his arrest about municipal corruption.

Threats by the Defendant. The defendant opened the door to cross-examination about his threatening others when he testified on direct that he "would have no reason to threaten a woman with anything." GA 361. Likewise, when on cross-examination he gratuitously offered, "I have never threatened anyone," GA 560-61, the Government was entitled to challenge that testimony -- and thereby to call his credibility into question -- by confronting him with threats he had directed at Amy Cameron, Mike O'Connor, and Pat Mangini. *See Payton*, 159 F.3d at 58; *Beverly*, 5 F.3d at 639. Moreover, the defendant's threats to others were highly relevant to the civil rights charges, which turned in part on his repeated threats to Jones and the girls, *see supra* Part III.A. Finally, the defendant's contention (Def. Br. 100) that his

statement to Pat Mangini ("I'm the Mayor, I can do what I want") (GA 566) was not a threat was a question for the jury, and in any event this statement was independently relevant to show the defendant's view of his unchecked mayoral power -- power that he was charged with abusing, in the course of violating the girls' civil rights.

Extramarital Sexual Activities. The court properly permitted cross-examination of the defendant on his adulterous relationships with women other than Jones. On direct examination, the defendant sought to portray himself as someone who only had one extramarital sexual relationship -- that is, with Jones -- suggesting that he had otherwise been faithful to his wife. The Government properly exposed this as only a partial and incomplete version of the truth by cross-examining him about the existence of his other adulterous relationships. His ultimate and reluctant admission to multiple adulterous relationships with women seriously undermined the aura of honesty he sought to project on direct ("I felt a need to testify here today because I wanted the jury and the court to know the truth." GA 362), and showed him to be a person willing to mislead the jury.[17]

In addition, the existence of the defendant's other adulterous relationships seriously undermined his claim

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[17] In any event, earlier in the trial, the defense had elicited the fact that authorities had intercepted calls showing that the defendant had been having sex with prostitutes and other women, besides Jones. *See* T 1044-46 (cross-examination of Special Agent Reiner).

that, in the intercepted conversations, he was afraid only that the press might report his sexual activities with Jones. Cross-examination regarding the defendant's numerous other relationships revealed that the defendant did *not* claim a similar fear with respect to these other women. His refusal to concede that the same media potential existed for these other sexual relationships spotlighted the absurdity of his explanation for his reaction to the pretext call. The jury could therefore infer that the defendant was actually afraid that his criminal sexual abuse of the children would be detected.

Availability of Cash. The defendant also opened the door on cross-examination concerning his receipt of cash from a city contractor, when he spontaneously said on cross-examination that such payments could not have happened as frequently as everyone testified, because he could not have afforded $1,000 a month for sex. GA 499, 602. This permitted the Government to show that the defendant in fact *could* afford to pay Jones for such regular sexual encounters. Therefore, the Government properly asked the defendant about his receiving between $1,000 and $2,500 in cash from Joe 15 to 20 times and revealed that the $5,250 recovered from his house came from Joe. GA 603-05. *See Payton*, 159 F.3d at 58; *Beverly*, 5 F.3d at 639. Moreover, the defendant's receipt of things of value from a contractor doing work for the city in contravention of the city's charter, as well as his failure to report these items on his tax returns, also constituted specific acts of dishonesty that were independently admissible as Rule 608(b) impeachment material. *See Jones*, 900 F.2d at 75.

Municipal Corruption and the Defendant's Cooperation. The Government offered no evidence in its case-in-chief about the defendant's cooperation, what he voluntarily did, or the voluntary statements he made while cooperating. As the district court noted, it was the defendant who first mentioned (during his direct testimony) the municipal corruption investigation, his cooperation, his speaking with federal agents, and his wearing a wire. GA 377, T 2060. He therefore opened the door to questions relating to the issue of public corruption and his cooperation. *See Payton*, 159 F.3d at 58; *Beverly*, 5 F.3d at 639-40; *see also infra* Part V (explaining admissibility of defendant's statements made during cooperation).

Finally, even if any or all of these questions were erroneously permitted, such error was harmless beyond a reasonable doubt in light of the mass of evidence against the defendant. The two young victims of his abuse gave powerful, mutually corroborating testimony that the defendant had forced them to perform sexual acts upon him on numerous occasions (including at the Mayor's Office), and had threatened them and Jones with jail if they told anyone. Jones was an eyewitness to all of this, and the drivers left no doubt that Jones had repeatedly brought the girls to various locations to meet the defendant. In light of this strong record, this Court can be confident beyond any reasonable doubt that the jury would have returned the same verdict even if the challenged cross-examination had been precluded. *See* Fed. R. Crim. P. 52(a); *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946) (harmless error standard for non-constitutional violations); *Dhinsa*, 243 F.3d at 649; *United States v.*

Smith, 727 F.2d 214, 222 (2d Cir. 1984) (erroneous admission of extrinsic evidence under Fed. R. Evid. 608(b) was harmless).

V. The District Court Did Not Abuse Its Discretion in Refusing to Suppress the Defendant's Oral Statements Made Prior to His Arrest

A. Relevant Facts

Before trial, the defendant moved to suppress oral statements he made to federal agents from July 23 to 26, 2001, and all derivative evidence, on the grounds that those statements had been taken in violation of his constitutional rights, Fed. R. Crim. P. 5 and 18 U.S.C. § 3501. The district court held an evidentiary hearing on this motion on January 6 and 9, 2003, at which the Government introduced the testimony of several federal agents. By written decision dated February 13, 2003, the district court denied the defendant's motion, finding that the defendant "was not under arrest from the time he voluntarily entered the FBI vehicle at the commuter parking lot on July 23, 2001, to the time he was arrested at approximately 7:45 a.m. on July 26, 2001." SPA 17. The court found that the defendant

> was voluntarily cooperating with law enforcement officials during this time period [July 23-26, 2001], and was not being held in police custody involuntarily or against his will. Consequently, all

> statements made by him between July 23-26, 2001, were voluntary. Furthermore, even assuming that Giordano was in custody, the court finds that he voluntarily, knowingly, and intelligently waived his Fifth Amendment rights against self-incrimination.

SPA 15. The court set forth extensive factual findings in support of its ruling at SPA 15-18.

B. Governing Law and Standard of Review

A seizure of a person does not occur unless, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980); *see generally United States v. Lee*, 916 F.2d 814, 819 (2d Cir. 1990) (listing relevant factors).

Rule 5(a) of the Federal Rules of Criminal Procedure requires that persons who have been arrested must be taken "without unnecessary delay" before the nearest available federal magistrate judge or before a state or municipal judicial officer if a federal judge is unavailable. A confession obtained from a suspect during a period of unnecessary delay before presentment must be suppressed upon a defendant's objection to its admission into evidence. *Mallory v. United States*, 354 U.S. 449, 453 (1957); *see also McNabb v. United States*, 318 U.S. 332, 341-342 (1943). Section 3501(c) of Title 18 provides that a confession obtained while a person is detained or under arrest shall not be rendered inadmissible solely because of

a delay in bringing the prisoner before a magistrate, provided that the confession was given within six hours of the detention or arrest. *See United States v. Perez*, 733 F.2d 1026, 1031 (2d Cir. 1984).

The standard of review for evaluating the district court's ruling on a suppression motion, or whether a defendant was in custody for *Miranda* purposes, "is clear error as to the district court's factual findings, viewing the evidence in the light most favorable to the government, and *de novo* as to questions of law." *United States v. Rodriguez,* 356 F.3d 254, 257-58 (2d Cir. 2004) (citations omitted).

C. Discussion

In this appeal, the defendant argues (Def. Br. 104-10) that the district court erred in permitting the government to cross-examine him with statements obtained during the period of his cooperation, between July 23 and July 25, 2001. He argues that the government unreasonably delayed in presenting him to a magistrate judge after his arrest, and thereby took these statements in violation of Fed. R. Crim. P. 5(a) and 18 U.S.C. § 3501(c). His argument fails for several reasons.

First, the defendant has not challenged the district court's predicate holdings (1) that the defendant was *not* arrested until the morning of July 26, and (2) that even if the defendant was in custody, his statements were nevertheless voluntary. By failing to raise such challenges in his appellate brief, the defendant has waived them. *See Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 380 n.6

(2d Cir. 2003) (issue abandoned when not raised in opening appellate brief); *LoSacco v. City of Middletown*, 71 F.3d 88, 92-93 (2d Cir.1995). (And in any event, the court's detailed findings were amply supported by testimony at the hearing, *see* SPA 15-18.) Because the defendant was not arrested until the morning of July 26, the only claims he does articulate -- that the government obtained the statements in question too long "after his arrest" in violation of Rule 5(a) and § 3501(c) -- of necessity must fail.

Second, even if the defendant had been arrested in the highway parking lot at 12:15 p.m. on July 23, 2001, the suppression remedy provided by § 3501(c) and the *McNabb-Mallory* doctrine would not apply. The defendant has not challenged the district court's findings that the statements were made voluntarily, or the record evidence that they were made before 6:15 p.m. on July 23, 2001, and so the six-hour "safe harbor" provided by § 3501(c) insulates the statements from suppression.[18]

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[18] The defendant claims (Def. Br. 109) that his testimony on cross-examination relating to his receipt of $1,000 from Joe, was based on a statement that should have been excluded under Rule 5(a) and § 3501(c). Although this conversation did not take place within six hours of the supposed arrest, this conversation was not a "confession" to law enforcement officers as contemplated by § 3501(c). Rather, the defendant's conversation with Joe was made in the course of his cooperation with the FBI and was intended to elicit an incriminating statement

(continued...)

Third, even if these voluntary statements had been obtained in violation of Rule 5, evidentiary suppression doctrines would only have barred their introduction during the government's case-in-chief. As the defendant acknowledges (Def. Br. 110), the government used these statements only during his cross-examination. Accordingly, there could not have been any trial error. *See generally Michigan v. Harvey*, 494 U.S. 344 (1990) (statements obtained in violation of Sixth Amendment rights admissible to impeach defendant); *United States v. Havens*, 446 U.S. 620 (1980) (prosecution may use illegally seized evidence to rebut defendant's statements on cross-examination); *Oregon v. Hass*, 420 U.S. 714 (1975) (prosecution may use statements obtained in violation of *Miranda* in rebuttal case to impeach defendant's direct testimony); *Harris v. New York*, 401 U.S. 222 (1971) (statements obtained in violation of *Miranda* may be used to cross-examine defendant).[19]

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[18] (...continued)
from *Joe,* not the defendant.

[19] In *Harris v. New York*, the Supreme Court appears to have erased an earlier distinction found in the case law, admitting use of illegally obtained statements that relate to collateral matters, but excluding such statements that relate to the ultimate issue of guilt. 401 U.S. at 225. *Cf. United States v. Curry*, 358 F.2d 904 (2d Cir. 1966) (recognizing, pre-*Harris*, applicability of this two-track rule to statements obtained in violation of Rule 5(a) and the *McNabb-Mallory* doctrine).

VI. The District Court Properly Declined To Require that the Government Interview Child Witnesses in the Presence of Defense Counsel and a Court-appointed Monitor, and Properly Allowed the Child Victims To Testify by Closed Circuit Television

A. Relevant Facts

1. Victim Interviews

Up until approximately one month before trial, the Government refrained from interviewing the minor girls in preparation for their testimony based upon its concern that detailed questioning regarding their sexual abuse at the hands of the defendant would have a traumatic effect on them. When it became clear that the case would not be resolved pre-trial, the Government made arrangements to interview the girls on February 10, 2003, and prepare them for trial. The defendant sought to prevent the Government from preparing its witnesses in the absence of a court monitor and defense counsel, claiming that without this relief, Government agents and attorneys would improperly shape the children's testimony in violation of his Fifth and Sixth Amendment rights.

On February 7, 2003, the district court denied the defendant's motion and articulated its reasons for this decision in an oral ruling on February 12, 2003. The district court found that the Government had provided sufficient safeguards that would prevent the harm claimed

by the defendant. The district court noted that the two child witnesses were interviewed separately; that only one prosecutor would conduct the interview; that the interviews would be attended by the children's respective therapists, who were privately retained by the Connecticut Department of Children and Families and had no affiliation with the United States Attorney's Office; that the interviews were also attended by the children's respective social workers; that the Government needed to conduct the interviews to prepare for trial; and that the presence of the children's therapists and social workers would insure that the prosecutor could not improperly suggest answers to the children. In sum, the district court was satisfied that the interviewing procedure used by the Government did not violate the defendant's constitutional rights, as claimed. SA 1171-1174.

2. Closed Circuit Television

In light of the special concerns that attend the testimony of minor victims of sexual abuse, the Government sought an order allowing the testimony of the two child witnesses to be taken from a room outside the courtroom by two-way closed circuit television, in the manner prescribed by 18 U.S.C. § 3509(b)(1)(D). On February 12, 2004, the district court held an evidentiary hearing at which the Government established, through the testimony of three witnesses, a factual basis for the proposed order.

The Government's first witness, Yoon Im, a licensed clinical social worker and therapist for the older of the two girls, stated that her client would be terrified if

she had to testify in the defendant's presence, and, further, that the girl would suffer severe emotional trauma from testifying in the defendant's presence. SA 1200-05, 1236-37. Im further stated that the girl would be able to testify more effectively if her testimony were taken by closed circuit television outside the presence of the defendant and that testifying in this manner would lessen the risk of fear and emotional trauma. SA 1212-13. Im did not testify as an expert witness.

The Government's second witness, Dr. Robert Dell, a licensed psychologist, testified as an expert in the area of child sexual abuse. Dr. Dell stated that the older girl had a particularized fear of the defendant. SA 1252. Dr. Dell further stated that in his expert opinion, there was a substantial likelihood that she would suffer emotional trauma from testifying in the presence of the defendant and that testifying by closed circuit television would lessen the risk of emotional trauma for her. SA 1256-58.

The Government's final witness was Joy Burchell, a licensed clinical social worker who had been the younger girl's therapist for approximately 18 months. Burchell stated that the younger girl would not be able to testify in the presence of the defendant because of fear and trauma, SA 1289-94, and that testifying by closed circuit television would decrease the risk of fear and trauma for her. SA 1294-95. Burchell did not testify as an expert witness.

At the conclusion of the hearing, the district court found that the older girl would be "unable to testify because of fear, and . . . there is a substantial likelihood, established by expert testimony, that [she] would suffer

emotional trauma from testifying, and that trauma is . . . caused not solely because of . . . being in a courtroom generally, but that that trauma would be caused by the presence of the defendant." SA 1314. The district court further found that the defendant's "presence in the court would exacerbate the trauma and fear already likely to be experienced by Victim Number 2" and that she "would not be able to testify in the courtroom in the presence of the defendant." SA 1314. With respect to the younger girl, the district court found that she "would be unable to testify . . . in the presence of the defendant in the courtroom because of fear of the defendant." SA 1315. Based on these findings, the district court ordered the Government to make arrangements to allow the two child witnesses to testify by means of closed circuit television. SA 1315-16.

At trial, the two child witnesses testified from a separate room in the courthouse by two-way closed circuit television. Present in the room as each witness testified were: an Assistant United States Attorney, defense counsel, support personnel for the children, and a camera operator. GSA 37-40. The jury was able to see each witness as she testified and the witnesses were able to see the defendant. GSA 38-40, 83-84.

B. Governing Law and Standard of Review

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Maryland v. Craig*, 497 U.S. 836 (1990), the Supreme Court

considered whether the Confrontation Clause was violated by allowing a child witness to testify at trial outside the defendant's presence by means of one-way closed circuit television, pursuant to the procedure set forth in a Maryland statute. The Supreme Court identified the elements of the Confrontation Clause as (1) the witness' physical presence in the courtroom; (2) the requirement that the witness give testimony under oath; (3) the requirement that the witness submit to cross-examination; and (4) permitting the trier of fact to observe the demeanor of the witness to assess credibility. *Id.* at 845-846.

The Court held that face-to-face confrontation "is not the *sine qua non* of the confrontation right," *id.* at 847, explaining that "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Id.* at 849. "[O]ur precedents establish that the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial, a preference that must occasionally give way to considerations of public policy and the necessities of the case." *Id.* at 849 (emphasis in original) (citations and internal quotations omitted).

The Court held that "the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant." *Id.* at 855. The Court then described the inquiry that a trial court

must conduct before allowing a child witness to testify via closed circuit television:

> [T]he trial court must hear evidence and determine whether . . . the . . . procedure is necessary to protect the welfare of the particular child who seeks to testify. The trial court must also find the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. . . . Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis, i.e.*, more than mere nervousness or excitement or some reluctance to testify.

Id. at 855-856 (internal citations and quotation marks omitted). Although the Court did not establish a minimum showing of emotional trauma necessary to justify the closed circuit procedure, it held that there should be a finding that "such trauma would impair the child's ability to communicate." *Id.* at 857. In this regard, the Court noted that requiring face-to-face confrontation could actually undermine the Confrontation Clause's truth-seeking goal. *Id.* It was significant to the Court that Maryland's statutory procedure, which it was reviewing, preserved the essence of "effective confrontation" -- testimony by a competent witness, under oath, subject to contemporaneous cross-examination, and observable by the judge, jury, and defendant. *Id.* at 851.

Five months after the decision in *Craig*, Congress enacted 18 U.S.C. § 3509, which implements the Supreme Court's ruling by permitting a district court to order that a child witness testify by closed-circuit television from a room outside the courtroom. The Act provides:

> (B) The court may order that the testimony of the child be taken by closed-circuit television . . . if the court finds that the child is unable to testify in open court in the presence of the defendant, for any of the following reasons:
>
> > (i) The child is unable to testify because of fear.
> >
> > (ii) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying.
> >
> > (iii) The child suffers a mental or other infirmity.
> >
> > (iv) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.

18 U.S.C. § 3509(b)(1)(B). Any one of these four reasons is sufficient to justify the closed circuit television procedure. Congress thereby defined the very few situations in which this remedy would be appropriate and

required the district court to "support [its] ruling on the child's inability to testify with findings on the record." 18 U.S.C. § 3509(b)(1)(C). In essence, § 3509(b)(1)(B) makes concrete the constitutional principles enunciated in *Craig*: "So long as a trial court makes . . . a case-specific finding of necessity, the Confrontation Clause does not prohibit [the use of] a one-way closed circuit television procedure for the receipt of testimony by a child witness in a child abuse case." *Id.* at 860.

The district court's factual findings in support of its decision to allow the child witnesses to testify via closed circuit television are reviewed for clear error. The legal effect of those findings under 18 U.S.C. § 3509(b)(1)(B) and *Craig* is reviewed *de novo*. *See United States v. Weekley*, 130 F.3d 747, 750 (6th Cir. 1997); *United States v. Carrier*, 9 F.3d 867, 870 (10th Cir. 1993).

C. Discussion

1. The District Court Properly Refused To Require the Government To Interview the Child Witnesses in the Presence of a Court Monitor and Defense Counsel

Asserting that his "right to confrontation was completely undermined by the exclusive access given by the district court to the government to interview these child witnesses" (Def. Br. 117), the defendant claims that the district court erred by refusing to interpose a court

monitor and defense counsel into the Government's pre-trial witness interviews, thereby depriving him of his rights under the Due Process Clause of the Fifth Amendment and the Confrontation Clause of the Sixth Amendment. Brief at 110. The only authority offered in support of this argument appears to be *Maryland v. Craig*, *see* Def. Br. 112, which relates only to the *trial* testimony of a child witness, not pre-trial interviews. The Government is not aware of any authority that provides a defendant with the right to monitor the Government's preparation of witnesses *before* trial. Indeed, the defendant is not even entitled to learn what witnesses have said during pretrial interviews until after they testify on direct examination. *See, e.g., United States v. Coppa*, 267 F.3d 132, 146 (2d Cir. 2001); 18 U.S.C. § 3500 (Jencks Act). *A fortiori*, a defendant has no right to attend such interviews. To the extent *Craig* is relevant at all to this issue, the Supreme Court's decision undermines the defendant's argument. Under *Craig*, the elements of the confrontation right other than face-to-face confrontation -- testimony by a competent witness, under oath, subject to contemporaneous cross-examination, and observable by the judge, jury, and defendant -- provide adequate "safeguards of reliability and adversariness," 497 U.S. at 851, and fully satisfy the requirements of the Sixth Amendment.

While it is true that federal law makes special provisions for taking the testimony of child witnesses, *see e.g.*, 18 U.S.C. § 3509, these provisions are for the benefit of the *child*, not the defendant. To the extent that the defendant was concerned about the consistency over time

of what the children said about his sexual abuse of them, he could have, but did not, call as defense witnesses the children's various therapists, who had been treating the children since the summer of 2001. Similarly, if the defendant were concerned about the reliability of the testimony of the child witnesses, he was free to challenge that testimony in the same manner as for any other witness: by means of cross-examination. In fact, the defendant did challenge the testimony of the two child witnesses on cross-examination, as the defendant admits in his own Brief. *See* Def. Br. 120-121 (establishing that: both child witnesses had met with prosecutor several times before trial; Victim 1 was not surprised by any of the questions the prosecutor asked and that she had heard them all before; Victim 1 thought that the prosecutor and social worker wanted to hear certain kinds of answers, was concerned that she would disappoint them, and tried not to disappoint them). The fact that the jury chose to credit the testimony of the child witnesses in spite of their answers on cross-examination (and in spite of the defendant's own testimony), however, can hardly be cited as proof that the defendant was deprived of his right to a fair trial or to confront witnesses against him. In this regard, child witnesses are no different from any other witnesses, whose testimony may be affected by confusion, bias, forgetfulness, or evasion. The Supreme Court has held that "the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985). The

Supreme Court recently reaffirmed the centrality of cross-examination to the Confrontation Clause in *Crawford v. Washington*, 124 S. Ct. 1354 (2004), holding that the prior testimony of an unavailable witness is admissible only if the defendant has had an opportunity to cross-examine the witness. Having been afforded that opportunity at trial, the defendant suffered no Confrontation Clause violation.

2. The District Court Correctly Applied the Constitutional Requirements of *Craig* and the Statutory Requirements of § 3509(b)(1)(B)

In considering whether to allow the Government's two child witnesses to testify via two-way closed circuit television, the district court conducted a hearing that satisfied both the constitutional and statutory requirements designed to preserve a defendant's Sixth Amendment right to confront witnesses against him, while also safeguarding the welfare of child witnesses who had been victims of sexual abuse. The district court received evidence and made case-specific findings that: (1) each of the two child witnesses would suffer fear and/or trauma specifically caused by testifying in the presence of the defendant, and not just a general fear of the courtroom; (2) the fear or trauma experienced by each of the witnesses in the presence of the defendant would be more than *de minimis* and would impair the child's ability to communicate effectively; (3) the closed circuit television procedure was necessary to protect the welfare of each particular child witness. SA 1314-1315. These findings fully satisfy the

safeguards set forth in *Craig*, *see* 497 U.S. at 855-857, and reflect that the district court clearly understood its constitutional obligations. Thus, the defendant's assertion on appeal that "[t]he district court deliberately disregarded the constitutional standard set down by the Supreme Court in *Craig*," *see* Def. Br. 115, is belied by the record.

The district court's findings also satisfy the requirements of § 3509(b)(1)(B). In this regard, it is important to note that, whereas *Craig* imposes no specific constitutional requirement that any of the district court's findings be based on expert testimony, § 3509(b)(1)(B) imposes on the Government the extra burden of establishing the risk of emotional trauma by expert testimony. *See* 18 U.S.C. § 3509(b)(1)(B)(ii) (district court must find that "[t]here is a substantial likelihood, *established by expert testimony*, that the child would suffer emotional trauma from testifying.") (emphasis added). In this regard, Congress can be said to have been more, not less, protective of a defendant's confrontation rights than was the Supreme Court in *Craig*. Similarly, the closed circuit television procedure used in this case went beyond the protections required by *Craig*. In *Craig*, the Supreme Court held that the Confrontation Clause was satisfied by the use of a *one-way* closed circuit television procedure, allowing the defendant, judge, and jury to see the child witness as he testified. In the present case, the Government arranged for a *two-way* closed circuit television procedure, allowing the child witness to see the defendant as she testified. GSA 38-40, 83-84. *See United States v. Etimani*, 328 F.3d 493, 499 (9th Cir. 2003) ("if *Craig* upheld the constitutionality of one-way television

testimony in an appropriate case, then two-way television testimony, a procedure that even more closely simulates in-court testimony, also passes constitutional muster").

The district court supported its "ruling on [each] child's inability to testify with findings on the record," as required by statute. *See* 18 U.S.C. § 3509(b)(1)(C). As to Victim 2, the district court found that the child would be unable to testify because of fear, and also that there was a substantial likelihood that the defendant would suffer emotional trauma from testifying. This latter finding was supported by expert testimony, as required by Section 3509(b)(1)(B)(ii). Specifically, the district court received and credited the testimony of Yoon Im, a licensed clinical social worker, and Robert Dell, a licensed psychologist. Contrary to the defendant's assertion, Dr. Dell stated that in his expert opinion, there was "a *substantial likelihood* that [Victim 2] would experience emotional distress" from testifying in the presence of the defendant (clarifying his previous testimony that there was "a substantial possibility" of emotional distress). SA 1258. Im, who was not offered as an expert witness, provided lay opinion testimony pursuant to Rule 701 of the Federal Rules of Evidence as to whether the girl would be able to testify in the presence of the defendant. In Im's opinion, Victim 2 could not testify in the presence of the defendant because of fear and likelihood of trauma. SA 1198-1205.

As to Victim 1, the district court's finding was supported by the testimony of Joy Burchell, a licensed clinical social worker who had treated her in more than 60 sessions over the course of approximately 18 months. SA

1282, 1284. The district court was entitled to credit her lay opinion testimony, offered pursuant to Fed. R. Evid. 701, that the girl could not testify in the presence of the defendant because of fear. SA 1290-1292.

3. Expert Testimony Is Not Required for a "Because of Fear" Finding Under 18 U.S.C. § 3509(b)(1)(B)(i)

The defendant's central claim of error concerns the district court's finding that the child witnesses could not testify in the presence of the defendant "because of fear." 18 U.S.C. § 3509(b)(1)(B)(i). Citing *Craig* and *United States v. Moses*, 137 F.3d 894 (6th Cir. 1998), the defendant argues that "lay testimony is constitutionally inadequate to make the requisite finding that would justify permitting a witness to testify outside the presence of the defendant," Def. Br. 118, and that a "because of fear" finding could only be based on expert testimony. Citing the statute itself, the district court rejected this argument, correctly observing that § 3509(b)(1)(B) requires expert testimony only for a finding of trauma. *See* SA 1187-1189. *Compare* 18 U.S.C. § 3509(b)(1)(B)(i) (child unable to testify because of fear) *with* § 3509(b)(1)(B)(ii) (child unable to testify because of substantial likelihood of emotional trauma). Notwithstanding the plain language of the statute, the defendant claims that expert testimony is required for a finding of fear as well as trauma. Congress's inclusion of the expert-testimony language in one subsection of § 3509(b)(1)(B), but not the others, presumptively indicates that the omission was purposeful. *See, e.g., Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438,

452 (2002) ("[I]t is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted). The one appellate court to have considered the issue has ruled accordingly. *See United States v. Rouse*, 111 F.3d 561, 569 (8th Cir. 1997) (holding that "because of fear" finding under § 3509(b)(1)(B)(i) "does not require an expert").

Nor does *Craig*, as a constitutional matter, require expert testimony to support a finding that a child witness cannot testify in the courtroom in the presence of the defendant. Although expert testimony had been received in that case, *see* 497 U.S. at 842, the Maryland statute under consideration, unlike § 3509(b)(1)(B), did not expressly require expert testimony and the Supreme Court did not find such testimony to be constitutionally required.

The defendant's reliance on *Moses* is similarly misplaced. In *Moses*, the Sixth Circuit reversed a conviction for abusive sexual contact because the district court did not comply with the requirements of § 3509(b)(1)(B), as understood in light of *Craig*. Relying on §§ 3509(b)(1)(B)(i) and (ii), the district court had made findings that the victim could not testify in the presence of the defendant because of fear and also that there would be a substantial likelihood that the victim would experience emotional trauma as a result of testifying in the presence of the defendant. The Sixth Circuit found that the district

court's "because of fear" finding was clearly erroneous because the victim herself unequivocally stated that she was *not* afraid of the defendant. *See* 137 F.3d at 898-899. The fact that the Government had not offered expert testimony on the issue of fear was completely irrelevant to the appellate court's reasoning. It is clear that if the victim had stated unequivocally that she *was* afraid of the defendant, that would have been enough to support a "because of fear" finding, even in the absence of expert testimony. By contrast, the Sixth Circuit's discussion of trauma focused entirely on the qualifications of the expert witness who had opined that the victim would be unable to testify because of the likelihood of emotional trauma. "Subsection (b)(1)(B)(ii) of [§ 3509] requires *expert* testimony to establish *trauma*." *Id.* at 899 (emphasis in original). The Sixth Circuit held that the expert witness offered to establish trauma, a social worker, was not properly qualified to render such an opinion. In sum, *Moses* supports the Government's argument in this case that expert testimony is not required to support a district court's "because of fear" finding.

4. The Trial Court Did Not Err in Relying on the Expert Testimony of Dr. Dell To Establish "Emotional Trauma" Under 18 U.S.C. § 3509(b)(1)(B)(ii)

The defendant suggests that the district court erred by relying on the testimony of Dr. Dell in its finding that Victim 2 would suffer emotional trauma from testifying in the defendant's presence. Although the defendant does

not question Dr. Dell's qualification as an expert, he notes that Dr. Dell never interviewed or personally examined Victim 2. *See* Def. Br. 118-19. The defendant cites no authority for the proposition that a district court's "emotional trauma" finding must be based on the testimony of an expert who has interviewed or personally examined the child witness. Neither the statute nor the case law prohibits the district court from receiving and relying on the testimony of an expert who has not personally interviewed or examined the child. In *United States v. Garcia*, 7 F.3d 885 (9th Cir. 1993), in which a defendant challenged the district court's finding of a likelihood of trauma under § 3509(b)(1)(B)(ii), the Ninth Circuit held that it was not error for the district court to consider the expert testimony of a psychiatrist who had never met the child witness in question. (The district court in *Garcia* also based its finding on the testimony of the child's counselor who, although not a doctor or psychologist, was qualified by the district court as an expert. *Id.* at 889-890.)

Dr. Dell, a doctor of psychology, was the clinical supervisor for the two therapists (including Im) who had been treating Victim 2. He had extensive experience in child clinical psychology and over several years had conducted research and training in the area of treating child victims of sexual abuse. SA 1243-1246. He testified that from November 2001 through March 2003, he discussed Victim 2's clinical treatment approximately every other week with the therapists under his supervision. SA 1249-1250. Dr. Dell also observed Victim 2 on February 10, 2003, as she was being interviewed by a

prosecutor in preparation for her testimony. SA 1250-1252. In light of Dr. Dell's extensive training and experience, and his close supervision of Victim 2's clinical treatment, the defendant's argument that he was not sufficiently familiar with Victim 2 to render an expert opinion on emotional trauma is meritless. In any event, Dr. Dell's alleged unfamiliarity with Victim 2 goes only to the weight accorded to his testimony, not its admissibility. *Cf. Garcia*, 7 F.3d at 890 (affirming qualification of children's mental health specialist as expert for purposes of testifying about likelihood of emotional trauma under Section 3509(b)(1)(B)(ii), even though she was not a doctor or psychologist).

VII. The District Court Did Not Abuse Its Discretion in Precluding the Defendant from Cross-Examining the Child Victims About Prior Sexual Behavior

A. Relevant Facts

On February 18, 2003, the defendant filed a notice, pursuant to Rule 412 of the Federal Rules of Evidence, that he intended to offer evidence that the victims in this case had engaged in other sexual behavior. On March 4, 2003, the defendant filed a supplemental proffer, which included portions of a Juvenile Court decision and a Department of Children and Families ("DCF") report of certain aspects of the victims' home life, including alleged sexual activity in the home. SA 1157-1164. According to the defendant, this information was relevant, among other reasons, to show that the victims acquired their knowledge

of sexual terms and intimate parts of the body from their home life and not from the defendant. SA 1163.

On March 10, 2003, the district court conducted a hearing pursuant to Rule 412(c)(2). At the conclusion of that hearing, the court ruled that it would not permit cross-examination of the children regarding their prior sexual behavior, finding *inter alia* that, "based on the representations and the proffer made by the defendant, that the Court cannot find that any constitutional rights of the defendant would be violated by excluding any of this evidence." SA 1362-1363. The court added that the defendant was free to raise the issue if a basis to ask about the children's prior sexual behavior arose during the children's direct examination. SA 1363. No such basis arose, and the defendant did not raise the issue again.

B. Governing Law and Standard of Review

Rule 412 of the Federal Rules of Evidence is a rule of exclusion, which provides that in any proceeding involving alleged sexual misconduct, "[e]vidence offered to prove that any alleged victim engaged in other sexual behavior" is not admissible. Rule 412(b)(1) provides three narrow exceptions to this general rule:

> (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence; (B) evidence of specific instances of sexual behavior by the alleged victim with the

> respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and (C) evidence the exclusion of which would violate the constitutional rights of the defendant.

Rule 412 has "strict procedural requirements, including a timely offer of proof delineating what evidence will be offered and for what purpose." *United States v. Rouse*, 111 F.3d 561, 568 (8th Cir. 1997); *see also* Fed. R. Evid. 412(c)(1)(A). This requirement permits the court to determine whether the proffered evidence is admissible under one of the three enumerated exceptions to Rule 412. Where the requirements of Rule 412 are not met, the court may properly exclude the proffered evidence. *United States v. Ramone*, 218 F.3d 1229, 1235 (10th Cir. 2000) (fact that notice was untimely was sufficient to exclude testimony); *Rouse*, 111 F.3d 561 (exclusion of evidence was proper where defendant's vague notice fell far short of complying with Rule 412 requirements). Thus, where the notice does not specify the nature of the evidence and the purpose for which it will be offered, the evidence should be excluded.

This Court "review[s] a district court's evidentiary rulings under an abuse of discretion standard." *United States v. Tin Yat Chin*, 371 F.3d 31, 40 (2d Cir. 2004). A district court's evidentiary rulings are subject to reversal only where manifestly erroneous or wholly arbitrary and irrational. *See United States v. Yousef*, 327 F.3d 56, 156 (2d. Cir.) (manifestly erroneous), *cert. denied*, 124 S. Ct. 353 (2003); *United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001) (arbitrary and irrational). Any error in excluding evidence

would be reviewable for harmlessness, even if based on a Confrontation Clause violation. *See, e.g., United States v. Martins*, 02-1093, slip op. at 6 (2d Cir. July 28, 2004) (citing cases).

C. Discussion

The defendant's claim that the district court erred in excluding evidence of prior sexual behavior of the victims (Def. Br. 121-23) should be rejected. As an initial matter, his failure to cite any source of law other than the Fifth and Sixth Amendments fails to comply with Fed. R. App. 28(a), and alone warrants rejection of this argument. *See Qiu v. Ashcroft*, 329 F.3d 140, 156 (2d Cir. 2003).

As a procedural matter, the defendant's request was properly denied because his proffer failed the specificity and relevance standards of Rule 412. Although the defendant identified general allegations of sexual behavior, his motion did not "specifically describ[e] the evidence" he intended to offer. *See* Fed. R. Evid. 412(c)(1)(A). The defendant proffered this evidence through excerpts from a sealed judicial decision and a report prepared by DCF. SA 1160-1162. The proffered evidence related to alleged sexual conduct in the victims' home, including sexual conduct they might have witnessed and sexual conduct in which they allegedly participated. The defendant failed to identify any witness through whom the proffered evidence would be introduced, whether he intended to inquire on cross-examination of the victims, whether he intended to offer the judicial ruling referenced in his motion, whether he had other documentary evidence that he would offer, or whether he

intended to proceed under a different method of proof. It was impossible for the district court to determine whether the evidence would be admissible, not only under Rule 412, but also under the other applicable rules of evidence. *See United States v. Nez*, 661 F.2d 1203, 1206 (10th Cir. 1981) (defendant's failure to clearly establish a proper purpose for the evidence of victim's prior sexual behavior justified the district court's limitation on cross-examination); *see also United States v. Eagle*, 137 F.3d 1011, 1014-15 (8th Cir. 1999) (affirming exclusion of Rule 412 evidence for failure to file timely notice); *United States v. Boyles*, 57 F.3d 535, 548 (7th Cir. 1995) (district court did not err in failing to rule where defendant failed to make a "proper offer of proof" or a timely and specific request for a ruling).

There is no merit to the defendant's claim (Def. Br. 121-23) that he was "irreparably prejudiced" by the court's preclusion of cross-examination which, he argues, would have shown "that the children's knowledge of sexual terms and references to intimate parts of the body came from experiences other than experiences allegedly attributed to conduct by the defendant." The children's knowledge in this regard was never an issue at trial, and thus such evidence was irrelevant -- much less so relevant that its exclusion resulted in a deprivation of the defendant's right to due process or to confront adverse witnesses.

The evidentiary centerpiece of the prosecution's case was the *direct evidence* of sexual abuse offered through the testimony of the two children and Guitana Jones, who were victims of and/or eyewitnesses to these crimes, and the defendant's own words intercepted on the wiretap. The

Government offered no *circumstantial evidence* of sexual abuse by showing that the child victims were familiar with sexual terms and intimate body parts, nor did the Government suggest, in closing argument or anywhere else, that the children's supposed knowledge of sexual terms and intimate body parts must have come from their sexual abuse at the hands of the defendant. The only portion of the record cited by the defendant to the contrary is a brief passage from the government's summation:

> They came to this courthouse with their images projected to you. They were under oath, and they had to talk about something, just think of how nervous a child would be if they had to come get under oath and testify about something that they were comfortable about, such as a project, or something that they witnessed, and it was a positive thing. Think about how nervous and uncomfortable it would be. Now take that same feeling and overlay it with the fact that they were sexually abused, and they now have to tell you about it. Total strangers. They had to say how the Mayor forced them to put his penis and private in their mouth, how he inserted his fingers in their vagina, how he touched their breasts. Intimate details. These young children have to talk about that. All the while they see his image projected on the screen. Now, if it never happened, why go through all the agony and pain and the embarrassment of doing it. Why do it?

JA 471-472. Read in context, it is clear that the prosecutor was commenting on the credibility of the children, not on the basis for their knowledge of sexual terms. Given that the children's knowledge in this respect was not at issue in the case, the district court did not err in precluding cross-examination of the children regarding such knowledge. *See Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (noting that Constitution affords judges "wide latitude" in excluding evidence that poses undue risk of "confusion of the issues" or evidence that is "only marginally relevant"); *United States v. Blum*, 62 F.3d 63, 67 (2d Cir. 1995) (same).

Finally, the defendant waived any claim regarding exclusion of such evidence in contexts other than his cross-examination of the children. He did not try to elicit testimony regarding whether the girls had other sources of knowledge regarding sexual terms or anatomy from adults who knew the girls at home: Guitana Jones or Bernard Frederick, both of whom appeared as Government witnesses, or Vicki Mullen, who testified as a defense witness. Having failed to offer any other evidence in this regard, he has waived this claim on appeal. *See Yousef*, 327 F.3d at 129 (failure to offer reports into evidence waives claim of improper exclusion of evidence).

VIII. The District Court Did Not Abuse Its Discretion in Computing the Defendant's Offense Level Under the Sentencing Guidelines, and Its Decision Not To Further Depart Downward Is Unreviewable on Appeal

A. Relevant Facts

Following the defendant's conviction, the Probation Office prepared a 63-page Presentence Report ("PSR"). GSA 177-267. The PSR included a multiple count computation, which calculated adjusted offense levels for five separate categories of offenses: the civil rights offense involving Victim 1; the civil rights offense involving Victim 2; the conspiracy offense; the § 2425 counts involving Victim 1; and the § 2425 counts involving Victim 2. GSA 221-29. The PSR arrived at a final offense level of 48, resulting in application of level 43, which is the highest offense level in the sentencing table, and a Criminal History Category of I. GSA 229. The resultant sentencing range was life imprisonment. GSA 237. *See* U.S.S.G. § 5A (sentencing table) (Nov. 1, 2002 Guidelines Manual).

At the sentencing hearing on June 13, 2003, the district court adopted the findings and conclusions of the PSR. JA 482. The district court specifically found that the final offense level was 43, and that such a result would be appropriate even under alternative calculations. JA 483. The court expressly found that the defendant had obstructed justice by filing a false affidavit, threatening to kill Jones if she revealed his criminal conduct to anyone, and falsely

testifying at trial. JA 490-493. The defendant's testimony at trial was, in the district court's view, "totally unbelievable and not credible, and his attempt to exculpate himself and exonerate himself by testifying falsely as he did in the court's view clearly warrants the adjustment for obstruction of justice pursuant to 3C1.1 of the Sentencing Guidelines." JA 493.

The Government filed a motion for downward departure, pursuant to U.S.S.G. § 5K1.1, based on the defendant's substantial assistance to the Government on July 23-25, 2001, after he was initially contacted by federal agents. The district court granted the Government's motion and departed downward to a range of 360 months to life imprisonment. JA 481-482. The defendant also filed a motion for downward departure, based on a variety of other reasons. The district court understood its authority to depart, but declined to exercise it:

> THE COURT: Well, . . . I am not exercising my discretion to depart downward based on [the defendant's] motion, but I am exercising my discretion to depart downward based on the Government's 5K1.1 motion.
>
> MR. JONGBLOED: And with respect to Mr. Bowman, we're all in agreement Your Honor has the authority to --
>
> THE COURT: I have the authority to do it; I elect not to do so.

JA 519-520. The court sentenced the defendant to concurrent sentences of 444 months on each of the first two counts, and 60 months for each of the remaining counts. JA 517-518.

B. Governing Law and Standard of Review

Reliance on PSR. A district court may rely on the Presentence Report and the findings within it. *See, e.g., United States v. Martin*, 157 F.3d 46, 50 (2d Cir. 1998). The sentencing court "satisfies its obligation to make the requisite specific factual findings when it explicitly adopts the factual findings set forth in the presentence report." *United States v. Molina*, 356 F.3d 269, 275 (2d Cir. 2004).

Double counting. "Impermissible double counting occurs when one part of the guidelines is applied to increase a defendant's sentence to reflect the kind of harm that has already been fully accounted for by another part of the guidelines." *United States v. Napoli*, 179 F.3d 1, 12 n.9 (2d Cir. 1999) (internal quotation marks omitted). Multiple adjustments, however, "may properly be imposed when they aim at different harms emanating from the same conduct." *United States v. Volpe*, 224 F3d 72, 76 (2d Cir. 2000); *United States v. Parker*, 136 F.3d 653, 654 (9th Cir. 1998) (*per curiam*). "This court has repeatedly recognized that it is within the Sentencing Commission's and Congress's prerogative to adopt double counting." *United States v. Meskini*, 319 F.3d 88, 91 (2d Cir.) (internal quotation marks omitted), *cert. denied*, 538 U.S. 1068 (2003). Even if the application of multiple enhancements amounts to double counting, they must be applied together if the "language of the Guidelines and the Sentencing Commission's actions

make clear that the . . . Commission intended the provision[s] to apply . . . ." *United States v. Aska*, 314 F.3d 75, 76 (2d Cir. 2002).

Aggravating role. "The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of § 1B1.3 (Relevant Conduct) . . . and not solely on the basis of elements and acts cited in the count of conviction." U.S.S.G. § 3B1.1 intro. comment. *See United States v. Brinkworth*, 68 F.3d 633, 641 (2d Cir. 1995). "[T]he defendant must have been the organizer, leader, manager, or supervisor of one or more other participants." U.S.S.G. § 3B1.1 app. note 2. The defendant must exercise "some control" over others involved in the commission of the offense or be responsible for organizing others to carry out the crime. *United States v. Leonard*, 37 F.3d 32, 38 (2d Cir. 1994). Arranging for the services of a participant makes one a supervisor. *United States v. Jacobo*, 934 F2d 411, 418 (2d Cir. 1991). A defendant's direct and immediate control over other participants is also an important factor in determining whether the defendant had a managerial or supervisory role. *See United States v. Greenfield*, 44 F.3d 1141, 1146 (2d Cir. 1995).

Obstruction of justice. A court may enhance a defendant's sentence under U.S.S.G. § 3C1.1 if he commits perjury at trial. The district court must determine whether the defendant has given "false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." *United States v. Dunnigan*, 507 U.S. 87, 94 (1993); *see also United States v. Blount*, 291 F.3d 201, 217-18 (2d Cir. 2002). A judge must make factual findings that are

independent of the jury verdict when imposing a perjury enhancement. *See Dunnigan*, 507 U.S. at 95. Likewise, threatening, intimidating, or otherwise unlawfully influencing a witness warrants an enhancement for obstruction of justice. *See* U.S.S.G. § 3C1.1, app. note 4(a); *United States v. Dorn*, 39 F.3d 736, 739-740 (7th Cir. 1994).

Grouping. If two or more counts are determined to involve "substantially the same harm," they are consolidated into a single group of closely related counts. *See* U.S.S.G. § 3D1.2. The offense level is then determined on the basis of the single group, and no additional increase in offense level results simply from the fact that the defendant was convicted on multiple counts. *See* U.S.S.G. § 3D1.3. By contrast, if two or more counts are not grouped, then the Guidelines prescribe a procedure for calculating a *combined* enhanced offense level based on the multiple counts of conviction. This combined offense level is calculated by starting with the offense level for the count (or the group of closely related counts) that has the highest offense level, then adding from one to five more offense levels depending on the number and severity of additional groups of closely related counts. *See* U.S.S.G. § 3D1.4. The combined offense level is then used to determine a final sentencing guideline range. *See* U.S.S.G. § 3D1.5. *See generally United States v. Gordon*, 291 F.3d 181, 192-93 (2d Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003) (discussing operation of § 3D1.2); *United States v. Szur*, 289 F.3d 200, 214-15 (2d Cir. 2002) (describing operation of "grouping" rules).

Downward departures. "Departures from the prescribed Guidelines ranges are allowed only in cases that are unusual." *United States v. Sentamu*, 212 F.3d 127, 134

(2d Cir. 2000). "It is well established in this Circuit that a court's decision not to depart from the Guidelines is normally not appealable." *United States v. Crowley*, 318 F.3d 401, 420 (2d Cir.) (internal quotation marks omitted), *cert. denied*, 124 S. Ct. 239 (2003). "While there is a narrow exception to this rule for those cases in which the sentencing judge mistakenly believes that he or she lacks authority to grant a given departure, we ordinarily presume that a sentencing court understood all the available sentencing options, including whatever departure authority existed in the circumstances of the case." *Crowley*, 318 F.3d at 420 (internal quotation marks omitted). This presumption of non-reviewability is overcome only "where there is clear evidence of a substantial risk that the judge misapprehended the scope of his departure authority." *United States v. Gonzalez*, 281 F.3d 38, 42 (2d Cir. 2002) (internal quotation marks omitted).

Standard of review. "We review a district court's interpretation of the Sentencing Guidelines *de novo*, its findings of fact for clear error, and its application of the Guidelines to the facts for abuse of discretion." *United States v. Lucien*, 347 F.3d 45, 55 (2d Cir. 2003). Here, because the defendant appears to challenge the manner in which the district court applied the guidelines to the particular facts of this case, this Court applies abuse-of-discretion review. *See* 18 U.S.C. § 3742(e) (requiring "due deference to the district court's application of the guidelines to the facts"); *United States v. Hamilton*, 334 F.3d 170, 188 (2d Cir.), *cert. denied*, 124 S. Ct. 502 (2003).

C. Discussion

The defendant raises numerous challenges to the Guidelines calculation in the PSR, but does so without substantive argument, legal citation, or analysis. For this reason alone, this Court should reject these claims on appeal. *See Qiu* 329 F.3d at 156. Out of an abundance of caution, however, the Government explains below why his challenge to the ultimate offense level is meritless.

Serious bodily injury. The government concedes that the district court erred in applying a two-level enhancement for serious bodily injury under U.S.S.G. § 2A3.1(b)(4)(B), GSA 222-28, but this error did not ultimately affect the defendant's final offense level and was therefore harmless beyond a reasonable doubt. The district court erred in imposing this two-level enhancement based on the defendant's sexual abuse of the children, because such abuse was already factored into the base offense level 27 under U.S.S.G. § 2A3.1(a). *See* U.S.S.G. § 2A3.1 app. note 1 ("for purposes of this guideline, 'serious bodily injury' means conduct other than criminal sexual abuse, which already is taken into account in the base offense level under subsection (a)"). Although the children suffered severe psychological injury, the record does not show that they suffered an injury "involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty, or require medical intervention such as surgery, hospitalization, or physical rehabilitation." U.S.S.G. § 1B1.1(i) (defining "serious bodily injury"). Not including the serious bodily injury adjustment results in an adjusted offense level of 41, not 43, for Counts 1 and 2; after

grouping, however, the total offense level remained at 43, as explained below.

Color of law. The defendant objects on sufficiency grounds to the six-level adjustment for being a public official or acting under color of law, pursuant to U.S.S.G. § 2H1.1(b)(1)(A) and (B). As fully shown at trial and reflected in the jury's guilty verdicts on Counts 1 and 2, the defendant abused his position as the Mayor of Waterbury when he sexually abused the victims, and he did so under color of law. *See supra* Part III. *See United States v. Livoti*, 22 F. Supp.2d 235, 246-47 (S.D.N.Y. 1998) (district court imposed § 2H1.1(b)(1) enhancement on police officer for violating arrestee's civil rights), *aff'd* 196 F.3d 322 (2d Cir. 1999). Therefore, the six-level adjustment was warranted.

Aggravating role. The defendant objects to his two-level role enhancement under § 3B1.1. He argues that Jones "was not a subordinate," or even a "participant" within the meaning of the Guidelines, on the grounds that she could not have been convicted of the civil rights offense (presumably because she was not a public official). Def. Br. 124-25. This claim fails for three reasons. First, Jones could in fact have been prosecuted under § 242 as an aider-and-abettor, because she was instrumental in helping the defendant violate the children's civil rights. *See, e.g., United States v. Causey,* 185 F.3d 407, 415 (5th Cir. 1999) (private citizens may be prosecuted under § 242 for aiding in official abuse). Second, a person "need not have been convicted" to qualify as a "participant" under § 3B1.1. U.S.S.G. § 3B1.1, app. note 1; *see United States v. Brinkworth*, 68 F.3d 633, 641-642 (2d Cir. 1995); *United States v. Belletiere*, 971 F.2d 961, 969 (3d

Cir. 1992). Third, there was ample evidence that the defendant, a mayor and lawyer, directed Jones, a prostitute and drug addict, to arrange for *him* to have sex with the children. It was the defendant who told Jones when and where to bring the children so he could sexually abuse them. JA 153, 172, 191, 192, 269.

Abuse of position of trust. The defendant oversimplifies the record in claiming that the court erred by enhancing his sentence for abuse of trust under U.S.S.G. § 3B1.3. While he is correct that this enhancement may not be applied in addition to the six-level enhancement he received for acting under color of law and being a public official in U.S.S.G. § 2H1.1(b)(1) (*see* app. note 5), the PSR did *not* apply the § 3B1.3 enhancement to the counts involving § 2H1.1 (the civil rights counts). GSA 222-24. The PSR applied the abuse-of-trust enhancement only with respect to the conspiracy and § 2425 counts, which were calculated under § 2G1.1. GSA 224-28. Thus, the double-counting of which the defendant complains never occurred.

Obstruction of justice. The district court correctly found that the defendant obstructed justice by committing perjury at trial and threatening a witness (Jones). The defendant testified repeatedly that he did not have any sexual contact with the children, and that he did not speak with Jones during the period charged in the indictment to arrange for sex with the children. The court's determination that the defendant's testimony was false was fully consistent with the jury's guilty verdicts. *See United States v. Godwin*, 272 F.3d 659, 671 (4th Cir. 2001), *cert. denied*, 535 U.S. 1069 (2002). Likewise, the defendant's threat to kill Jones if she told

anyone about his sexual relationship with the children warranted the obstruction adjustment. *See* JA 340 ("if my name get's f__kin' mentioned, okay, you might as well just put a f__kin' knife to your throat and kill yourself"); *United States v. Dorn*, 39 F.3d 736 (7th Cir. 1994) (threat to retaliate against informant warranted obstruction enhancement). Furthermore, the district court's findings on perjury adequately encompassed the factual predicates for a finding of perjury, leaving no doubt of the district court's view that the defendant's false testimony was given intentionally in order to exculpate himself, not out of mistake or confusion. *Dunnigan*, 507 U.S. at 95; *see United States v. Webster*, 54 F.3d 1, 9 (1st Cir. 1995) (finding that defendant's "protestations of 'absolute' innocence . . . were not in any way ambiguous and amounted to perjury").

Grouping. The defendant objects to the PSR's determination, adopted by the court, that none of the counts should be grouped, and claims that there should have been only two groups: one for each victim. Def. Br. 125.

The district court did not abuse its discretion when it declined to form only two groups out of all of the defendant's criminal conduct. There was overwhelming evidence that the defendant sexually abused each of the children on numerous occasions between November 2000 and July 2001. The court, in adopting the PSR, reasonably concluded from the very nature of these sexual abuse offenses as well as the particular facts of this case that these frequent episodes of sexual abuse should not be lumped together as essentially one composite harm to their separate victims, but instead should

be treated as separate groups.[20] The commentary to the Guidelines' grouping provisions make this point quite clearly, explaining that when a "defendant is convicted of two counts of rape for raping the same person on different days[,] [t]he counts *are not* to be grouped together." U.S.S.G. § 3D1.2, comment (n.4) (Example #5); *see United States v. Miller*, 993 F.2d 16, 21 (2d Cir. 1993) (affirming non-grouping of three

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[20] The PSR made clear that "each count would receive one unit" for purposes of grouping analysis, and that there were accordingly far more units than required to enhance the defendant's sentence by the maximum five levels provided by § 3D1.4. GSA 221-22 at ¶118. The PSR's chart, however, mistakenly lists only five groups of offenses instead of the six required for imposition of the five-level enhancement. GSA 229. Because the PSR makes clear that each count would be ungrouped, this error is clearly nothing more than a clerical oversight.

The PSR also seems to mistakenly treat each § 2425 count as interchangeable with a single episode of sexual abuse. GSA 221-22. It is the episodes of abuse, rather than the particular telephone calls, that represent distinct harms and therefore warrant separate grouping. The distinction makes no difference in the present case, however, because there was abundant evidence of far in excess of six such episodes. *See supra* Part III (describing testimony of Jones and the minor girls regarding the defendant's frequent abuse, which occurred in the Mayor's Office, his law office, his home, his police cruiser, and a friend's apartment).

counts of offenses involving sending threatening letters to same victim on different dates within three-year period).[21]

Indeed, the purpose of the grouping rules is "to provide incremental punishment for significant additional criminal conduct" in cases where multiple counts of conviction "represent additional conduct that is not otherwise accounted for by the guidelines." U.S.S.G. Ch. 3, Pt. D, intro. comment. (¶¶ 2, 4); *see also* U.S.S.G. § 3D1.2 comment. (b'grd.) (where decision whether to group same-victim counts is not "clear cut," sentencing court "should look to the underlying policy" of grouping rules). In contrast to the fraud and drug guidelines, which already prescribe enhanced offense levels for additional wrongful transactions, the sexual abuse guideline does not account for repeated acts of abuse. *See* U.S.S.G. § 2A3.1. The district court properly ensured that the defendant's offense level took account of each of his wrongful acts of aggravated sexual abuse.

Grouping was also inappropriate because the same-victim acts were not "connected by a common criminal objective or constitut[ed] part of a common scheme or plan,"

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[21] The Court presently has another case *sub judice* that presents a similar issue, of whether a district court abused its discretion at sentencing when it concluded that a defendant prison guard's sexual abuse of the same female inmate on multiple days did not result in a single, composite harm to the inmate victim and therefore did not warrant "grouping" separate counts of conviction under U.S.S.G. § 3D1.2. *See United States v. Vasquez*, No. 03-1763 (oral argument not yet calendared).

as required by U.S.S.G. § 3D1.2(b). *See United States v. Pitts*, 176 F.3d 239, 245 (4th Cir. 1999) (where "the defendant's criminal conduct constitutes single episodes of criminal behavior, each satisfying an individual -- albeit identical -- goal, then the district court does not group the offenses"). Here, because the defendant's goal of sexual gratification was satisfied with each assault, there was no working to a single goal. In fact, had it not been for the fortuitous discovery of the defendant's criminal conduct by federal agents, the conduct would have undoubtedly continued. *See also United States v. Bradford*, 277 F.3d 1311, 1316 (11th Cir.) (*per curiam*) (prison escapes one month apart not groupable under § 3D1.2(b), because the defendant "has not demonstrated that his two separate escapes were connected by a common criminal objective"), *cert. denied*, 537 U.S. 918 (2002).

Harmless error. Offense Level 43 was the correct final offense level in this case irrespective of whether all of the counts should have been grouped together for each victim; whether the two-level adjustment for serious bodily injury applied in the calculation of the offenses; or whether the abuse of trust enhancement applied to Groups 3, 4, and 5. The offense level total for Group 1 (Count 1 -- Victim 1) and Group 2 (Count 2 -- Victim 2) were each 41 (base offense level of 27; victim under 12 (+4); defendant was public official or acted under color of law (+6); defendant was organizer or leader in criminal activity (+2); and defendant obstructed justice (+ 2)). Under U.S.S.G. § 3D1.4, one unit is added for the highest group and one unit for any equally serious additional group. Group 1 (Level 41) and Group 2 (Level 41) each count for one unit, which results in the

addition of two levels to the highest group. U.S.S.G. § 3D1.4(a). Thus, the final offense level would still be Level 43 -- the highest offense level in the sentencing table. The court expressly allowed for an alternative guideline calculation, which permits this result. JA 483.

Downward departure. The Court should reject the defendant's argument that the court "refused to consider the grounds for a departure other than for substantial assistance" and "really never considered the grounds for departure." Def. Br. 126, 128. The district court clearly stated that it was exercising its discretion to depart based on the defendant's cooperation, and that it was "not exercising my discretion to depart downward based on [the defendant's] motion." JA 519. The court unequivocally acknowledged it had authority to depart based on the grounds advanced by the defendant, but chose not to depart when it said, "I have the authority to do it; I elect not to do so." JA 519-20. *Volpe*, 224 F.3d at 79; *United States v. Brown*, 98 F.3d. 690, 692 (2d Cir. 1996).

IX. The District Court Did Not Abuse Its Discretion in Declining To Recuse Itself Based on Factual Findings Made During Detention Proceedings

A. Relevant Facts

On March 4, 2002, the defendant filed a motion for a limited recusal, asking Judge Nevas to recuse himself from ruling on his motion to suppress the wiretap evidence because the judge had authorized the wiretap applications. On September 12, 2002, the judge denied that motion. JA 49.

On September 10, 2002, the defendant filed a second, broader motion for recusal, contending that Judge Nevas should be recused from hearing the entire case because his characterization of the defendant as a "sexual predator" might lead a reasonable person to question the judge's impartiality. The defendant cited an article in the *Hartford Courant* highlighting the government's argument made before this Court during oral argument of the bond appeal, in which counsel noted the district judge's finding after the detention hearings that "defendant is a sexual predator with deviant proclivities whose victimization is far-reaching." On November 14, 2002, the district court denied this second motion as well. SPA 28. By summary order dated January 3, 2002, this Court summarily denied the defendant's petition for mandamus, seeking to overturn these rulings. GA 35.

B. Governing Law and Standard of Review

Section 144 of Title 28 provides that "[w]henever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein . . . ." Section 455(a) provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Under this section, "recusal is not limited to cases of actual bias; rather, the statute requires that a judge recuse himself whenever an objective, informed observer could reasonably question the judge's impartiality, regardless of whether he is actually partial or biased." *United States v. Bayless,* 201 F.3d 116, 126 (2d Cir. 2000). Put another way, "would an objective,

disinterested observer fully informed of the underlying facts, entertain significant doubt that justice would be done absent recusal?" *United States v. Lovaglia*, 954 F.2d 811, 815 (2d Cir. 1992). "Litigants are entitled to an unbiased judge; not to a judge of their choosing." *SEC v. Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1321 (2d Cir. 1988). The legislative history of § 455(a), as noted in *Bayless*, 201 F.3d at 127, cautions that it is not intended to be "used by judges to avoid sitting on difficult or controversial cases." H.R. Rep. No. 93-1453, at 5, *reprinted in* 1974 U.S.C.C.A.N. at 6355.

The Supreme Court has explained that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994). Furthermore, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of *prior proceedings*, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* (emphasis added); *see also United States v. Bernstein*, 533 F.2d 775, 785 (2d Cir. 1976). "[W]hat a judge learns in his judicial capacity – whether by way of guilty pleas of codefendants or alleged coconspirators, or by way of pretrial proceedings, or both – is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification." *Id.; see also United States v. Colon*, 961 F.2d 41, 44 (2d Cir. 1992) (§ 455 mandates recusal only where judge has personal bias, meaning "prejudice based on 'extrajudicial' matters, and earlier adverse rulings, without more, do not provide a reasonable basis for questioning a

judge's impartiality") (citing *Schiff v. United States*, 919 F.2d 830, 834 (2d Cir. 1990)).

A recusal claim is forfeited if a defendant delays in seeking recusal. *See United States v. Polizzi*, 926 F.2d 1311, 1321 (2d Cir. 1991) (rejecting a recusal argument under 28 U.S.C. § 144 and § 455 because defendant never made such request in district court). "[A] party must raise its claim of a district court's disqualification at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim." *Id.* at 1321 (citations and internal quotation marks omitted). Although 28 U.S.C. § 455, unlike § 144, "does not explicitly contain a timeliness requirement for the filing of a recusal claim, timeliness has been read into this section as well." *Id.; see Bayless*, 201 F.3d at 127-28; *United States v. Daley*, 564 F.2d 645, 651 (2d Cir. 1977).

The district court's denial of a recusal motion is subject to review only for abuse of discretion. *See Chase Manhattan Bank v. Affiliated FM Ins. Co.*, 343 F.3d 120, 126 (2d Cir. 2003); *United States v. Yousef*, 327 F.3d 56, 158 (2d Cir. 2003).

C. Discussion

As an initial matter, the defendant's complete failure to cite any cases or make any legal argument in support of his recusal claim warrants its rejection by this Court. *See* Fed. R. App. P. 28(a)(9); *Qiu*, 329 F.3d at 156; *Dangler v. New York City Off Track Betting Corp.*, 193 F.3d 130, 143 (2d Cir. 1999) (holding that litigant did not comply with Rule 28 by simply cross-referencing other pleadings).

Furthermore, the defendant forfeited his recusal claims by failing to raise them in a timely manner before the district court. The defendant's first recusal motion, based on the judge's familiarity with the Title III intercepts, was not filed until March 4, 2002, even though he had learned on July 26, 2001, that Judge Nevas had signed the wiretap order. The defendant's second recusal motion (based on the judge's "sexual predator" finding) was not filed until September 10, 2002 -- more than nine months after the court made that finding on November 14, 2001. Such lengthy delay renders these claims forfeited. *See Daley*, 564 F.2d at 651.

Alternatively, the district judge did not abuse his discretion in declining to recuse himself. As for the first recusal motion, the present case mirrors the situation in *United States v. Diaz*, 176 F.3d 52, 111 (2d Cir. 1999), where this Court rejected the argument that recusal was appropriate merely because, "in reviewing and authorizing wire intercepts in the case, the court heard and credited inadmissible hearsay evidence of a conspiracy." *See also United States v Foddrell*, 523 F.2d 86, 87 (2d Cir. 1975) (recusal not warranted where court conducted 11-day hearing on wiretap).[22]

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[22] Other courts have concluded that prior involvement with authorizing or reviewing wiretaps does not require recusal in subsequent criminal or civil proceedings. *See Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 490 (1st Cir. 1989); *United States v. Diana*, 605 F.2d 1307, 1316 (4th Cir. 1979); *United States v. de la Fuente*, 548 F.2d 528, 541 (5th Cir. 1977);*United States v.*

(continued...)

With respect to the second recusal motion, the district court's finding that the defendant was a sexual predator was based entirely on evidence offered in the course of detention proceedings, *see United States v. Arena*, 180 F.3d 380, 398 (2d Cir. 1999). This Court has held that "[t]he fact that the judge had previously made rulings adverse to [the defendant] was not a ground for recusal" -- even when the prior rulings involved, as here, a denial of pretrial release. *Arena*, 180 F.3d at 398. The judge's use of strong language ("sexual predator") in his pretrial ruling does not alter this analysis. *See Liteky*, 510 U.S. at 555 (requiring showing of "deep-seated and unequivocal antagonism that would render fair judgment impossible"); *King v. First American Investigations, Inc.*, 287 F.3d 91, 96 (2d Cir. 2002); *United States v. Amen*, 831 F.2d 373, 383 (2d Cir. 1987).

In short, the district judge did not abuse his discretion in declining to recuse himself from the case.

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[22] (...continued)
Nicholson, 955 F. Supp. 582, 583 (E.D. Va. 1997); *United States v. Garramone*, 374 F. Supp. 256, 258 (E.D. Pa. 1974). *But cf. United States v. Zarowitz*, 326 F. Supp. 90, 93-94 (C.D. Cal. 1971) (voluntarily recusal of judge who had pretrial participation in wiretaps).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: August 2, 2004

Respectfully submitted,

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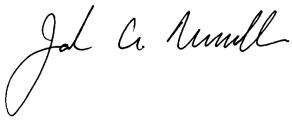

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief is calculated by the word processing program to contain approximately 35,623 words, exclusive of the Table of Contents, Table of Authorities and this Certification. The United States has submitted a motion for permission to file an oversized brief.

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