In the United States Court of Appeals for the Third Circuit

Nos. 12–1145 & 13–1491

UNITED STATES OF AMERICA

v.

KENNETH SCHNEIDER,
Defendant/Appellant.

On Appeals from a Judgment of Conviction and Sentence and from the denial of a Motion for New Trial of the U.S. District Court for the Eastern District of Pennsylvania in No. 2:10–CR–29 (Sánchez, J.)

BRIEF FOR APPELLANT AND VOLUME ONE
OF THE APPENDIX
(Pages 1a–72a)

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I. STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The district court exercised subject matter jurisdiction pursuant to 18 U.S.C. §3231. This Court has jurisdiction pursuant to 18 U.S.C. §3742(a) and 28 U.S.C. §1291. Defendant/appellant Kenneth Schneider was sentenced on December 1, 2011. App.96a (DDE 211). Judgment was entered on December 13, 2011. App.3a-6a. An amended judgment was entered January 17, 2012. App.10a-15a. Pursuant to an extension of time, App.2301a, Schneider filed his timely notice of appeal on January 17, 2012. App.1a.

On August 20, 2012, within three years of verdict, App.89a (DDE 135), Schneider filed a sealed motion under Fed. R. Crim. P. 33(b)(1) for a new trial based on newly discovered evidence. App.2302a-54a. The new trial motion was denied on February 15, 2013. App.16a. On February 21, 2013, Schneider filed a timely notice of appeal from that order. App.2a. This Court has consolidated these two appeals for all purposes.

II. STATEMENT OF THE ISSUES ON APPEAL

1. Did the district court err in failing to set aside defendant Schneider's conviction on count one, charging a violation of 18 U.S.C. §2423(b) (2001 version), for "travel with intent to engage in a sexual act with a juvenile" because his travel in question was the return leg of an "innocent round trip," *see Mortensen* v. *United States*, 322 U.S. 369, 375 (1944), which the district court itself recognized in setting aside pursuant to *Mortensen* Schneider's conviction on count two, charging a violation of the Mann Act, 18 U.S.C. §2421?

Where preserved: *See* Defendant's motion for judgment of acquittal. App.2031a-34a.

2. Should the conviction be reversed and count one dismissed, because Schneider was indicted more than five years after the alleged commission of the offense, rendering the indictment untimely under the statute of limitations?

Where preserved: *See* Defendant's motion to dismiss indictment. App.110a-21a.

3. Whether the district court, in this closely contested credibility battle, unlawfully deprived Schneider of his constitutional right to a fair trial by

precluding him from establishing that he could not obtain any treatment for his supposed Peyronie's disease since May 2010 because he has been continuously incarcerated on these charges, thus establishing that when Schneider learned that the shape of his penis would be at issue in this case he had no ability to change his penis's shape from that incorrectly depicted in the alleged victim's drawing to the normally shaped penis observed by the physician who performed medical testing on Schneider in prison?

Where preserved: Schneider preserved this issue by means of an offer of proof during trial and his timely objection to the district court's refusal to allow Schneider to introduce the evidence in question. App.1314a-17a, 1319a-20a.

4. Was it prejudicial error to admit as evidence at trial lurid excerpts from the 1980 movie *Nijinsky* and related evidence, which the trial court agreed were "unduly prejudicial and not particularly probative"?

Where preserved: Schneider made timely contemporaneous objections to the prosecution's use of clips from the *Nijinsky* movie during trial, and Schneider renewed those objections in his post-conviction motion for acquittal. App.477a-84a, 1971a, 1985a-91a.

5. Did the district court abuse its discretion in failing to grant an evidentiary hearing on Schneider's motion for new trial, based on newly-discovered evidence that the sole accuser had confessed to committing perjury at trial and claimed to have been paid cash for his testimony?

Where preserved: Schneider raised these grounds in his request for an evidentiary hearing in support of his new trial motion. App.2304a-18a.

6. Did the district court commit significant procedural error by using course-of-conduct evidence to select the applicable Sentencing Guideline on the basis of a cross-reference, where the nature of the offense categorically excludes this case from that aspect of the "relevant conduct" rule?

Where preserved: Schneider preserved his objections to Sentencing Guideline calculations in his objections filed in the district court prior to sentencing and during the sentencing proceeding itself. App.2104a-06a.

III. STATEMENT OF RELATED CASES AND PROCEEDINGS

This case is related to two completed proceedings in this Court. No. 11-3932 was the government's appeal from the post-verdict judgment of acquittal the district court entered on count two of the indictment. On

January 17, 2012, this Court granted the government's motion to voluntarily dismiss that appeal. No. 13-1202 was Schneider's mandamus petition mandamus to compel the district court to rule on whether to allow a hearing on his post-sentence motion for a new trial based on newly discovered evidence. This Court dismissed that matter as moot on March 19, 2013.

These appeals are also related to an action pending at No. 08-CV-3805 (E.D. Pa.), *sub nom. Doe* v. *Schneider*.

V. STATEMENT OF THE CASE

Defendant/appellant Kenneth Schneider, an international lawyer, business consultant, and arts patron who grew up in the Philadelphia area but resided and was employed for many years in Russia by international law firms and investment banking groups, was convicted after a jury trial in the Eastern District of Pennsylvania of traveling from Philadelphia to Moscow on August 22, 2001, on the return leg of his annual summer visit with his aging parents who live in suburban Philadelphia, for the purpose of engaging in sexual activity in Moscow with someone considered a minor

under United States law. Schneider was sentenced to serve 15 years' imprisonment.

A. Relevant Procedural History

This case began with the filing of a sealed criminal complaint in the Eastern District of Pennsylvania on December 4, 2009. App.76a (DDE 1). On January 14, 2010, defendant/appellant Kenneth Schneider was charged in a two-count indictment filed under seal. App.106a-08a. Count one alleged a violation of 18 U.S.C. §2423(b) (traveling in foreign commerce for the purpose of engaging in sex with a minor), and count two charged a violation of 18 U.S.C. §2421 (a "Mann Act" charge of transporting a person with intent to engage in sexual activity in violation of foreign criminal law). Both offenses are alleged to have occurred on the same, single occasion — that is, on August 22, 2001 — when Schneider returned to his home in Moscow from his annual summer visit to his parents, who reside in suburban Philadelphia, on the same flights that the alleged victim used to return to his own family's home in Frazino, a town located near Moscow.

Schneider was taken into custody in Cyprus on March 27, 2010 and was released on bail March 29. App.1314a. On March 30, 2010, the indictment

was unsealed. App.76a (DDE 13). Schneider was returned to custody on May 17, 2010, upon his voluntary surrender to the court in Cyprus, after consenting to extradition in connection with this case. App.1314a-15a.

Schneider was brought to the Federal Detention Center in Philadelphia on May 28, 2010. App.77a (DDE 18-23). Schneider has remained continuously in custody throughout the pretrial, trial, and post-trial periods, and has since served more than four years of his 15-year sentence while pursuing this appeal.

The district court denied a pretrial motion to dismiss the charges on statute of limitations grounds. App.51a. The court granted, in part, the defendant's pretrial motion to limit the scope of the government's proof at trial under Fed. R. Evid. 403 and 404(b). App.168a-75a.

Trial commenced on September 21, 2010 before Judge Sánchez and a jury. App.203a. The government rested its case on September 27. On October 14, 2010, after the close of all the evidence, argument of counsel, and the jury charge, the jury returned verdicts of guilty on both counts. App.89a (DDE 135). On post-trial motions, by order filed September 21, 2011, the district court granted a judgment of acquittal on count two pursuant to *Mortensen* v. *United States*, 322 U.S. 369, 375 (1944). App.17a.

However, the district court upheld Schneider's conviction on count one based on a view that *Mortensen* did not require an acquittal on that charge. App.17a. Although the trial court recognized in hindsight that allowing the prosecution to show the jury clips from the commercial movie *Nijinsky* had been erroneous under Fed. R. Evid. 403, and certain other evidence admitted on that basis had been "bizarre," it declared the error harmless and therefore refused to grant a new trial. App.46a-50a.

The Probation Office prepared a Pre-Sentence Investigation Report. The defendant initially filed objections, focusing on the PSI's selection of the applicable Offense Guideline and other issues. The government submitted no objections to the PSI. The defense and government filed sentencing memoranda, supported by exhibits.

A sentencing hearing commenced on the afternoon of November 30, 2011 and concluded on December 1, 2011. App.2117a-291a The district court adopted the PSI with certain changes. App.2294a-300a. Although the defense had argued that the Sentencing Guidelines, properly applied, produced a range of 33-41 months, the district court calculated the applicable Guidelines range as 168-210 months (capped by the statutory maximum at 180 months). App.2157a-58a. On December 1, 2011, the

district court imposed sentence, comprising, *inter alia*, a 180-month term of imprisonment and $35,000 in restitution. App.2285a-88a.

An amended judgment was filed January 17, 2012. App.10a-16a. Pursuant to an extension of time (App.2301a), Schneider filed his timely notice of appeal from the conviction and sentence on January 17, 2012. App.1a.

On August 20, 2012, Schneider filed in the district court a timely motion under Fed. R. Crim. P. 33(b)(1) for a new trial based on newly discovered evidence. App.2302a-54a. That evidence had come to light in the civil case commenced against Schneider and his family by Roman Zavarov and his wife, arising out of the same allegations that underlie the indictment. The evidence revealed that Zavarov had subsequently admitted perjuring himself at Schneider's trial, that he had testified falsely under pressure from his wife and mother-in-law, who hoped to recover a substantial sum of money from Schneider and/or his parents, and that he had been paid cash by the government in excess of the legally allowed witness fee and expenses for his trial testimony in this case. *Id.* After a conference, Judge Sanchez denied this motion without an evidentiary hearing by memorandum and order filed February 15, 2013. App.16a. A timely appeal

was taken from that order, App.2a, which has been consolidated with Schneider's direct criminal appeal.

B. Relevant Factual History[1]

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

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

[1] The case went to trial with the defendant asserting, and testifying to under oath to, his complete innocence. This recitation of the facts is based on the district court's description of facts in its opinion denying post–trial motions, 817 F. Supp. 2d 586, 590–93 (E.D. Pa. 2011), with emendations to conform the statement more closely to the testimony at trial and to sharpen the focus on facts pertinent to this appeal. This recitation does not constitute an admission by the defendant–appellant that any of the "facts" set forth here are true.

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

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

Schneider had recently begun assisting the Academy, arranging for his firm to donate furniture to it, sponsoring needed footwear for the students, and providing grants to the instructors. App.694a. Dokukina told Schneider about Zavarov's expulsion and asked if Schneider would be willing to help Zavarov as well. App.694a-95. Schneider indicated he might be willing to help but told Dokukina that Zavarov's potential had to be assessed and that Dokukin — a leading instructor at the Academy — would be the best judge of Zavarov's potential. App.1397a

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

Zavarov's parents were interested in having Schneider help their son and agreed to additional meetings with Schneider. During one of these meetings, Zavarov's father asked Schneider for a loan so that he could repay the debt he owed to the Academy for Zavarov's delinquent dorm fees. App.278a-79a. Schneider agreed, loaning Zavarov's father 4,300 rubles, approximately $470 (U.S.) at the time. App.279a. The Zavarovs promised to repay the loan over four months, although with Schneider's indulgence they did not fully repay the loan until two years later. App.282a-84a, 354a-55a.

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

Academy, even though that was another option that would have allowed Zavarov to reside at home. *Id.*

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

When the new Academy term started, Zavarov began staying with Schneider on school nights, to avoid the commute from his parents' home, returning to his family's home for all weekends, holidays, illnesses, and vacations. App.464a-65a. Zavarov's father claimed in his testimony that Schneider discouraged him from visiting during the week, telling him that Zavarov had everything he needed, App.286a, but it was uncontested that Schneider never interfered with Zavarov's choice of when to call or go home, which Zavarov did on a regular basis. App.331a.

While staying at Schneider's first apartment, Zavarov was primarily taken care of by Schneider's housekeeper who lived across the hall, Ludmila Kozyreva. App.487a, 1022a. Kozyreva woke Zavarov up, prepared his breakfast, helped him get ready for school, watched him after school, and prepared his dinner. App.1028a-29a. Because the Zavarovs did

not know Schneider well, Zavarov's father advised his son to tell Kozyreva immediately if he was ever mistreated by Schneider. App.257a. Kozyreva had her own keys to the apartment and was in and out all the time. App.1068a. During the periods when Zavarov stayed with Schneider, Schneider paid for his food and some of his clothing and purchased other items for Zavarov, including a PlayStation game console. App.463a. Schneider also arranged for Dokukin to provide private training sessions to Zavarov, *id.*, and provided Zavarov with a cellular phone, which Zavarov often used to call or receive calls from his parents or anyone else at any time. App.421. The Dokukins never saw anything improper between Schneider and Zavarov. App.750a. Neither did Kozyreva, the housekeeper. App.1059a.[2]

In 2001, when Zavarov was 15 years old, he applied to summer training programs in the United States and elsewhere, and Schneider agreed to accompany Zavarov to Philadelphia when he was accepted on a full scholarship (including round-trip airfare) to study there at the Rock School for a short summer training program. App.497a, 581a-82a. Zavarov

[2] Zavarov never told Kozyreva that Schneider was mistreating him in any way, though he did seek her help on one occasion when Schneider became angry with Zavarov's father. App.555a-56a, 1042a.

testified that, in the year before he and Schneider traveled to Philadelphia on their round-trip journey, Schneider had been engaging in sexual conduct with him approximately three to four times a week. App.466a-67a. (Schneider, testifying in his own defense, denied ever engaging in sexual conduct with Zavarov. App.1516a.) Zavarov testified that Schneider told him to keep these encounters secret, because people would not understand their relationship and Schneider would go to jail. App.468a. Zavarov also testified that Schneider told him that, if Schneider was gone, Zavarov "[wouldn't] be able to fulfill [his] dreams as a ballet dancer and [would] stay in Russia." *Id.*

Zavarov further testified that Schneider had told him years earlier that their relationship was similar to the relationship of the legendary Russian ballet dancer, Vaslav Nijinsky, and his impresario, Sergei Diaghilev. App.484a. Zavarov claimed that, when he was 13, Schneider had shown him *Nijinsky*, a sensationalized Hollywood movie that depicts Diaghilev and Nijinsky as homosexual lovers and suggests that Nijinsky was emotionally destroyed after he ended his relationship with Diaghilev to pursue a heterosexual marriage. App.470a. After displaying the film, Zavarov said Schneider told him that Nijinsky had made a mistake by

leaving Diaghilev and warned him not to make the same mistake. App.485a. Zavarov also testified to the jury that Schneider had told him relationships with girls were disgusting and he should avoid girls because they would take advantage of him. App.494a.

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

After Zavarov's acceptance to the Rock School's summer program in 2001, Zavarov and his parents went to the U.S. Embassy in Moscow to apply for a travel visa to the United States, which was effective only for the duration, and for the sole purpose, of attendance at the Rock School summer program. App.321a-23a. In the application, Zavarov's parents authorized Schneider to take Zavarov to the United States, specifically and only, from July 4, 2001 until August 31, 2001. App.323a. No visa was actually issued until July 11 (App.898a), delaying the departure and shortening the stay in Philadelphia to only 23 days. App.1763a, 1775a-76a.

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

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

return to the Academy and continued to occur two to three times per week, less frequently than before the visit to Philadelphia. App.502a.

Despite spending a considerable amount of time with them from 1998 to 2002, and speaking with them frequently, Zavarov never told his parents that he had been mistreated in any way or subjected to any sexual contact whatsoever by Schneider. App.289a, 394a. Zavarov's parents testified to the jury, however, that Zavarov's personality changed after he began associating with Schneider.[3] App.294a, 392a-93a. Zavarov eventually moved to the United States to graduate from an elite New England prep school, App.611a-12a, 1493a-94a, and then to perform with several of this country's most prestigious ballet companies in New York, Boston, and Phoenix. App.508a, 614a, 616a, 1495a-96a. In 2008, Zavarov told his wife, Gina D'Amico — whom he had married in 2007 when he was 20 and she was 18, only six months after they had met, to assure his continued ability to reside in the United States — that Schneider had sexually abused him while he stayed with Schneider in Russia. App.523a, 1146a.

[3] The personality changes described by Zavarov's parents were consistent with normal and typical teenage development.

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

V. SUMMARY OF THE ARGUMENT

Under *Mortensen* v. *United States*, 322 U.S. 369 (1944), a conviction may not be obtained for transporting a minor in violation of 18 U.S.C. §2421 or for traveling "for the purpose of engaging in any sexual act * * * with a person under 18 years of age" in violation of 18 U.S.C. §2423(b) where the travel in question consists merely of the return leg of an innocent round trip.

The district court agreed that *Mortensen* compelled the dismissal of Schneider's conviction on count two for violation of §2421 (the Mann Act transporting count), because Schneider's transportation of Zavarov back to

Russia represented the return leg of an innocent round trip. Yet the district court ruled, for reasons that cannot withstand appellate scrutiny, that Schneider's own travel back to his work and home in Russia on return leg of the same round trip did not entitle Schneider to an acquittal under *Mortensen* on count one, charging a violation of §2423(b).

The district court's attempt to draw a distinction between Schneider's entitlement to an acquittal under *Mortensen* on charges brought pursuant to §2421 (transporting a minor) and §2423(b) (transporting oneself allegedly to have prohibited relations with that minor) was contrary to relevant legal authority and common sense. If *Mortensen* entitled Schneider to an acquittal on count two, charging a violation of §2421 — as the district court has already decided — then *Mortensen* likewise compels Schneider's acquittal on count one, charging a violation of §2423(b).

Schneider's conviction on count one should also be dismissed because the applicable statute of limitations had expired before the indictment issued. Barring a dismissal of count one, Schneider is entitled to, a new trial because he was denied his right to put on a full and complete defense relating to his supposed Peyronie's disease that Zavarov claimed affected the curvature of Schneider's penis, and because of the harmfully

prejudicial spillover effect of evidence admitted at trial relevant at most only to now-dismissed count two. Schneider also should have received an evidentiary hearing on his motion for a new trial based on newly discovered evidence of his accuser's perjury and a *Brady* violation.

In the unlikely event that Schneider's conviction is not reversed or a new trial ordered, at a minimum Schneider's term of imprisonment under the Sentencing Guidelines was erroneously calculated. Schneider has already served a sentence greater than the upper end of the applicable Sentencing Guidelines range when correctly calculated. Accordingly, this Court should, if necessary, order resentencing under a correct Guidelines calculation, resulting in Schneider's immediate release from prison.

VI. ARGUMENT

A. Schneider's Conviction On Count One For Violating 18 U.S.C. §2423(b) Must Be Set Aside Pursuant To The "Innocent Round Trip" Exception Recognized In *Mortensen* v. *United States*, 322 U.S. 369 (1944)

1. Standard of review

This Court exercises *de novo* review to ensure that the jury's verdict is supported by "substantial evidence." *United States* v. *Thayer*, 201 F.3d 214,

218-19 (3d Cir. 1999). Proof is insufficient unless a rational jury, taking the evidence in the light most favorable to the government, could have found each element of the offense, properly construed, to have been established beyond a reasonable doubt. *United States* v. *Jones*, 471 F.3d 478 (3d Cir. 2006).

2. *Mortensen* not only necessitates Schneider's acquittal on the charge in count two of returning Zavarov to Moscow but also compels Schneider's acquittal on count one for his own return to Moscow on that same round trip journey

In count one, Schneider was convicted of having violated 18 U.S.C. §2423(b), which in 2001 provided as follows:

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

18 U.S.C. §2423(b).

Federal appellate courts routinely apply Mann Act precedent to prosecutions under §2423(b). In *United States* v. *Vang*, 128 F.3d 1065, 1069

(7th Cir. 1997), the Seventh Circuit observed: "Though enacted in 1994, the statutory antecedents of §2423(b) date back to the early part of this century. The first restriction of this sort was the Mann Act * * *."

The Seventh Circuit continued:

> Judicial interpretations of the Mann Act necessarily color our reading of §2423(b) for a number of reasons. As described above, §2423(b) and the Mann Act are part of the same general legislative framework. More importantly, the crucial language of §2423(b) employs the same "for the purpose of" phrase used in the original Mann Act and construed by the Supreme Court and a number of lower courts. Our interpretation of the statutory language in §2423(b) would necessarily impact that body of precedent; * * *. We are the first court of appeals to consider the scope of §2423(b), and, for the reasons described above, we find it prudent and helpful to draw upon our Mann Act precedent in this task.

128 F.3d at 1069-70.

In the aftermath of the Seventh Circuit's ruling in *Vang*, other federal appellate courts have agreed that Mann Act precedents apply to §2423(b). *See United States* v. *Garcia-Lopez*, 234 F.3d 217, 220 n.3 (5th Cir. 2000) ("[E]arly cases interpreting the original Mann Act are authoritative in construing §2423(b)."); *United States* v. *Hoschouer*, 224 Fed. Appx. 923, 926 (11th Cir. 2007) (per curiam) ("In interpreting [18 U.S.C. §2423(b)], we find instructive our precedent interpreting the pre-1986 version of the Mann

Act, 18 U.S.C. §2421, which is part of the same legislative framework and contained the same 'for the purpose of' language.").

As the district court recognized in deciding Schneider's post-trial motion for acquittal on both counts one and two, the Mann Act precedent most relevant to Schneider's case is *Mortensen* v. *United States*, 322 U.S. 369 (1944). Indeed, the district court ruled that *Mortensen* compelled the entry of an acquittal on Schneider's Mann Act conviction in count two. But the district court then proceeded to commit legal error in holding that *Mortensen* did not compel Schneider's acquittal on count one, alleging a violation of 18 U.S.C. §2423(b).

Mortensen involved a prosecution under 18 U.S.C. §2421 (the same statute Schneider was charged under in count two) of a married couple who worked together in a family business as pimp and madam. The Mortensens took two of their prostitutes with them for a "vacation" across state lines when the defendants made a two-week visit to the madam's parents' home and nearby national parks. The Supreme Court's opinion makes clear that the Mortensens and their prostitutes went their separate ways for part of the trip, after which they reconnected to continue traveling as a group and then return home together.

The Supreme Court held that where the defendant transports a person on a planned round-trip across state lines, from a place where prohibited sexual activity is already occurring, to another place where no such activity occurs or is planned, and then back to the original place where prohibited sexual activity resumes, the statute's required showing of travel for an illegal purpose is lacking as to the return journey because that purpose is absent for the round-trip, seen as a whole:

> It may be assumed that petitioners anticipated that the two girls would resume their activities as prostitutes upon their return to Grand Island[, Nebraska, from Salt Lake City, Utah]. But we do not think it is fair or permissible under the evidence adduced to infer that this interstate vacation trip, or any part of it, was undertaken by petitioners for the purpose of, or as a means of effecting or facilitating, such activities. The sole purpose of the journey, from beginning to end, was to provide innocent recreation and a holiday for petitioners and the two girls. It was a complete break or interlude in the operation of petitioners' house of ill fame, and was entirely disassociated therefrom. There was no evidence that any immoral acts occurred on the journey, or that petitioners forced the girls against their will to return to Grand Island for immoral purposes.
>
> The fact that the two girls actually resumed their immoral practices after their return to Grand Island does not, standing alone, operate to inject a retroactive illegal purpose into the return trip to Grand Island. Nor does it justify an arbitrary splitting of the round trip into two parts, so as to permit an inference that the purpose of the drive to Salt Lake City was innocent, while the purpose of the homeward journey to Grand Island was criminal. The return journey, under the

> circumstances of this case, cannot be considered apart from its integral relation with the innocent round trip as a whole. There is no evidence of any change in the purpose of the trip during its course. If innocent when it began, it remained so until it ended. Guilt or innocence does not turn merely on the direction of travel during part of a trip not undertaken for immoral ends. * * * Criminal intent and purpose must be grounded on something less ingenious than that which is necessary to sustain a finding of such a purpose in making the return interstate journey.

322 U.S. at 374-76.

The prosecution's theory of the case against Schneider depended entirely on the very argument made by the government and rejected in *Mortensen*: an "arbitrary splitting of the round trip into two parts, so as to permit an inference that [even if] the purpose of the [flight to Philadelphia] was innocent, * * * the purpose of the homeward journey to [Moscow] was criminal." *Id.* 375. On the contrary, as the Supreme Court held in *Mortensen*, "[t]he return journey, under the circumstances of this case, cannot be considered apart from its integral relation with the innocent round trip as a whole." *Id.*

Schneider's case is factually indistinguishable from *Mortensen* and the cases that have followed it, as the district court acknowledged in its opinion overturning Schneider's conviction on Count Two. 817 F. Supp. 2d

at 598-99. As the district court held, discussing count two, "Even if the evidence * * * was sufficient for a jury to infer Schneider transported Zavarov on August 22, 2001, with the intent to engage in criminal sexual activity, such a conclusion can only be drawn if Zavarov's return trip to Moscow is examined in isolation, without consideration of the purpose of [the] round trip journey to Philadelphia. Viewing the evidence in this manner is expressly prohibited by *Mortensen* * * * ." *Id.* 598.

Nevertheless, the district court refused to "extend[] the rationale of *Mortensen* to a §2423(b) violation." *Id.* 599. Because the "for the purpose of" element, which *Mortensen* construed, is identical in the two statutes, and because §2423 is merely a recent extension of the Mann Act (the original §2421), the lower court's unpersuasive attempt to distinguish the two statutes under which Schneider was convicted fails as a matter of law.

Also unsuccessful is the trial court's effort to distinguish factually between Mr. Schneider's "transporting" of Roman Zavarov, which was held to be an innocent round trip, and his own "travel" on those exact same flights, which the trial court held not to be:

> Schneider's journey occurred that day so he could escort Zavarov back to Russia after several weeks apart. As previously discussed, Schneider embarked on such travel to return in

> Zavarov's company to Moscow, where he could more readily resume his sexual abuse and run a reduced risk of detection. Because the Government presented evidence Schneider's travel to Moscow was not part of an innocent round trip, but was a flight made after he had traveled throughout the United States and elsewhere, the rationale of Mortensen does not apply, and it is not improper to focus only on Schneider's intent in making the trip from Philadelphia to Russia.

817 F. Supp. 2d at 599.

The "evidence" to which the court referred consists exclusively of Zavarov's testimony that he and the defendant had sexual relations regularly in Moscow but had no sexual relations during their stay in Berwyn in 2001. The court then speculated that Mr. Schneider feared "detection" if he engaged in sexual activity with Zavarov under his aging parents' roof, whereas exposure was less likely in Moscow.

There is in fact no evidence to support the theory or assumption that there were more people around in Berwyn than in Moscow or that the Moscow apartment provided safety from "detection." App.501a (Zavarov, the only witness to provide any evidence on this question, testified that he did not know why he and Schneider did not engage in sexual activity during summer of 2001 in Berwyn). The only other people in the Berwyn house were the defendant's parents, both of whom worked full-time.

App.1252a, 1256a-57a. There thus would have been no one else home during most weekday hours in the large suburban house, if an occasion for assignation had been desired — and certainly other locations closer than Moscow were readily available, if needed.

By contrast, the Moscow apartment was surrounded by other apartments in the building. Schneider stood out as a foreigner, the housekeeper was present every day, and the landlord also had keys to the apartment, creating a much greater chance of "detection," if that were a concern. App.335a. Moreover, Zavarov had daily access to a multitude of teachers and administrators at the most prestigious Academy in the country while in Moscow, not to mention to his parents — who, according to the evidence, showed up at both the Academy and the apartment unannounced whenever they wished — providing Zavarov with a plethora of friends and authorities to turn to for assistance, if needed.

Consistent with the substantially higher level of homophobia in Russia, several Russian witnesses testified that they were alert to any signs of inappropriate activity, precisely because Schneider was male, in his 30s, and unmarried. App.287a. There was no evidence whatsoever of such suspicious eyes focusing on Schneider in the United States. This, too, made

the risk of "detection," if there were anything to detect, much greater in Moscow than in Berwyn. In any event, the perceived danger in Berwyn was surely not so great that it would have prevented sexual activity at the Schneider home or elsewhere, had any been desired.

The district court's "risk of detection" theory also contradicts the great weight of the testimony from Zavarov and the defendant himself that Schneider spent a few days at most in Berwyn upon his and Zavarov's arrival in July 2001 and then presumably another period of time there before their prescheduled return to Moscow. App.582a-83a, 1478a. Similarly, in *Mortensen*, the two prostitutes did not travel together with their pimp and madam throughout the entirety of their journey. Yet the fact that they separated for some portion of the journey and then returned home together for convenience or other practical reasons did not prevent the Supreme Court from finding that the trip as a whole was an innocent round trip.

The district court's conclusory assertion that the prescheduled return flight to Moscow on August 22, 2001 "was not [part of] an innocent round trip" as to Schneider, alone, simply ignores the only reasonable inferences from the evidence. Schneider had lived and was employed in Moscow for

many years by that time and traveled to the United States for a pre-planned, annual visit of short duration (App.1458a); he was required to be back at his job within a matter of weeks; and there is no evidence to show he was not planning to return to his work or his home in Moscow, as one normally does following a vacation. App.1478a-79a. He traveled on a roundtrip ticket, purchased in advance, as the government certainly knew, because it possessed all of his credit card, airline, travel, immigration, and related records.

Moreover, as the district court recognized, Zavarov came to the United States to attend a program of fixed length at the Rock School in Philadelphia, ending in August — and neither his U.S. visa nor his parental authorization would have allowed Zavarov to remain away from Russia beyond August 2001. App.323a. Zavarov's parents arranged for their son's visa, travel, and the legal requirements attendant thereto; the Rock School paid for his roundtrip airline ticket; and Zavarov's parents approved Schneider in advance as Zavarov's required traveling companion — necessarily in both directions. App.323a.

Because Schneider was Zavarov's approved escort, and because Zavarov was too young to travel without being accompanied by an adult,

Schneider had no option but to accompany Zavarov back to Moscow on the return leg of what was a prearranged and pre-booked round trip for both of them. App.323a. A jury could not conclude beyond a reasonable doubt from this evidence that the defendant returned to Russia from the United States in August 2001 other than as part of his own round trip, directly connected with Zavarov's own "innocent" round trip, and that both round trips on the same flights were "innocent" in the sense that their purpose was not to engage in illicit sexual activities. The verdict must therefore be overturned in accordance with *Mortensen*.

The district court cited no difference between the offense charged in count one (18 U.S.C. §2423(b)) and that charged in count two (§2421) in this regard, and there is none. Section 2423(b) prohibits the defendant from "traveling" in foreign commerce for a prohibited purpose, while §2421 prohibits the defendant from "transporting" another person (here, Zavarov) across an international border with the identically worded improper purpose. The trip charged in each count was the exact same pre-booked trip: the return leg of a single round trip planned and scheduled prior to departure on the outbound leg whose purpose was thus necessarily the same from either perspective (assuming there could even be

more than one relevant perspective) — the escorting, pursuant to legal requirement and written authorization, of Zavarov on his innocent round-trip for a few weeks at the Rock School and return to the Bolshoi Academy before the start of the academic year on September 1st, which three-week period coincided with Schneider's annual visit to his family in Berwyn.

The district court adopted an irreconcilable view of the evidence supporting each of the two counts of conviction. On count two, the district court ruled that Schneider's intent in transporting Zavarov back to Moscow was the completion of an innocent round trip. But then, on count one, the district court somehow found that Schneider's own purpose in returning to Moscow — on the exact same return trip home — was not part of an innocent round trip but rather was to resume sexual relations with Zavarov. It simply makes no sense for the district court to say that Schneider's purpose in "transporting" Zavarov back to Moscow was innocent while Schneider's purpose in "traveling" back to Moscow was a federal crime punishable by 15 years in prison. Under *Mortensen*, if Schneider's conviction on count two could not be upheld — as the district court has already ruled — then neither can Schneider's conviction on count one.

Mortensen shares yet another important similarity with this case. As the Supreme Court explained in *Mortensen*, at the outset of the round trip the prostitutes in that case were under no obligation to resume their unlawful activities — working for the pimp and madam — after they returned home. Similarly, in this case, Zavarov returned directly to his own family's home to spend a week living with his parents and siblings upon landing back in Moscow. App.323a-24a, 1479a. Following his return home to his parents, Zavarov was under no obligation whatsoever to ever see Schneider again, let alone to ever stay — for his own convenience — at Schneider's home near the Academy. Zavarov was now nearly 16 years old by this time. He was old enough to drive with his father or to commute on his own for the 45 minutes needed to travel on public transportation to the Academy, or he or his parents could have decided that he should no longer stay with Schneider and make other arrangement for living or study.

The district court's opinion in this case confirms that Zavarov's round-trip from Moscow to Philadelphia and back to Moscow, whose return leg gave rise to the criminal charges against Schneider, did nothing to make Zavarov's continued residence from time to time with Schneider in Moscow more likely in the fall of 2001. Schneider had traveled by himself

to the Philadelphia area in preceding summers (App.1454a), while Zavarov spent those summers with his own family (App.1453a-54a), and each fall Zavarov returned to again stay with Schneider and his housekeeper closer to the Academy on school nights. Whether Schneider spent this entire trip with Zavarov in Berwyn or not, there is simply no evidence to support the district court's inexplicable and irrational view that Schneider's return trip to Moscow on August 22, 2001 was anything other than the return leg of an innocent round trip that Schneider had obligated himself to take with Zavarov by agreeing to accompany Zavarov to and from Philadelphia.

In *United States* v. *McGuire*, 627 F.3d 622 (7th Cir. 2010), Judge Posner recognized that the relevant test for criminal culpability under §2423(b) depended on "whether, had a sex motive not been present, the trip would not have taken place or would have differed substantially." *Id.* at 625. Here, for all of the reasons discussed above, Schneider's return on the round trip leg of the journey, from Philadelphia to Moscow, was going to occur in precisely the same manner regardless of whether Schneider intended to have sexual contact prohibited under United States law with Zavarov at some point following Schneider's return to Moscow. Accordingly, under *McGuire*, *Mortensen*, and all other relevant authorities, Schneider is entitled

to the entry of a judgment of acquittal on the lone remaining count of conviction.

For the reasons explained above, the purpose of a round trip as a whole is what must be shown to be criminal under *Mortensen*, not simply the artificially severed return leg. As a result, Schneider's conviction on Count One should be reversed and the indictment dismissed.

B. Schneider's Conviction Should Be Reversed Because He Was Indicted More Than Five Years After Commission Of The Alleged Offense, In Violation Of The Applicable Statute Of Limitations

1. Standard of review

This Court reviews *de novo* a district court's denial of a motion to dismiss an indictment on the basis of the statute of limitations. *See United States* v. *Hoffecker*, 530 F.3d 137 (3d Cir. 2008).

2. Expiration of the applicable statute of limitations bars Schneider's conviction on count one

The statute of limitations for a non-capital offense is five years "except as otherwise expressly provided by law." 18 U.S.C. §3282(a). Count one, a non-capital offense, charged that, in violation of 18 U.S.C. §2423(b), on

August 22, 2001, Schneider traveled in foreign commerce (from Philadelphia to Moscow) for the purpose of engaging in a sexual act with Zavarov (who was then 15½, and thus between the ages of 12 and 16). Schneider was not indicted until January 14, 2010, more than eight years after the alleged offense took place. There is no other law that expressly provides that the five-year limitation period does not apply to the offense of conviction. As a matter of law, the indictment was untimely and should have been dismissed.

Pre-trial, Schneider moved to dismiss the indictment as barred by the statute of limitations. App.110a. The district court denied the motion, holding that the indictment was timely under 18 U.S.C. §3283, a special provision suspending the statute of limitations for offenses involving the "sexual abuse" of a child. App.51a-61a. The version of 18 U.S.C. §3283 in effect at the time of the alleged crime provided that:

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

18 U.S.C. §3283.

Purported extensions or suspensions of criminal statutes of limitations are construed narrowly. Statutes of limitations are to be "liberally interpreted in favor of repose." *Toussie* v *United States*, 397 U.S. 112, 115 (1970); *see also United States* v. *Atiyeh*, 402 F.3d 354, 365 (3d Cir. 2005). Thus, unless there is a statute that expressly extends the five-year statute of limitations for Schneider's offense of conviction, the five-year limitations period governs.

Section 3283, by its terms and under established principles of statutory construction, does not expressly apply to Schneider's offense of conviction. Schneider was not prosecuted for or convicted of an offense "involving the sexual abuse" of a minor. He was convicted of traveling in foreign commerce with an allegedly improper purpose. The government did not have to prove that Schneider, upon return to Moscow, sexually abused Zavarov. It did not even have to prove that Zavarov was an actual person. As this Court has said, "by its unambiguous terms, §2423(b) criminalizes interstate travel for an illicit purpose." *United States* v. *Tykarsky*, 446 F.3d 458, 469 (3d Cir. 2006). Thus, it matters not whether an actual minor is involved or whether any sexual act ever occurs. The crime "turns simply

on the purpose for which [the defendant] traveled." *Id.* (quoting *United States* v. *Root*, 296 F.3d 1222, 1231 (11th Cir. 2002)).

Put simply, the "sexual abuse of a child" is not an "essential ingredient" of the offense of conviction. In *Bridges* v. *United States*, 346 U.S. 209 (1953), the Supreme Court addressed a statute suspending the statute of limitations for offenses "involving the defrauding of the United States." The petitioner in that case was charged with making a false statement in his petition for naturalization. His prosecution would have been barred by the then-governing statute of limitations but for the Wartime Suspension of Limitations Act, which applied to offenses "involving the defrauding of the United States." Recognizing that this suspension of the ordinary limitations constituted an exception to the "longstanding" policy of repose that is "fundamental to our society and our criminal law," *id.* at 216, the Court held the suspension statute was inapplicable to petitioner's offense because defrauding the United States was not an "essential ingredient of the offense charged." *Id.* at 221. Though making a false statement is a crime "comparable" to perjury, "fraud is not an essential ingredient." *Id.* at 222.

Similarly, the sexual abuse of a child is not an "essential ingredient" of the crime with which Schneider was charged in count one. The sole

element of the crime is travel, coupled with a particular subjective intent. Although the sexual abuse of a minor may "accompany" the offense, as this Court has held, it is not a necessary element of the offense, which is complete solely upon travel with the prohibited intent. *Tykarsky*, 446 F.3d at 469. Under *Bridges*, the suspension statute therefore does not apply.

The district court refused to apply *Bridges*, ruling that its "essential ingredient" test was limited to the particular suspension statute at issue in that case, where Congress intended to target a narrow category of crimes, and did not apply to the statute of limitations for sexual abuse of children, where Congress evidenced an intent to lengthen the statute of limitations. App.57a. *Bridges* did not turn on Congress's intention, however, but on the language of the statute. 346 U.S. at 223. Indeed, in a companion case, *United States* v. *Grainger*, 346 U.S. 235, 241-43 (1953), the Court held that the suspension statute did apply to an indictment charging false claims under the False Claims Act because, unlike the false statements at issue in *Bridges*, an "essential ingredient" of the offense of making a false claim is fraud. In any event, when, as here, the language of the statute is clear, the statute is presumed to mean what it says, *United States* v. *Nestor*, 574 F.3d 159, 161 (3d Cir. 2009), and it is inappropriate to avoid application of its plain

language by reliance on legislative history as the district court did here in attempting to discern the purpose underlying §2423(b). *See United States* v. *Bowers*, 432 F.3d 518, 523 (3d Cir. 2005).

The district court also relied on *United States* v. *Sensi*, 2010 WL 2351484 (D. Conn. 2010). There, a district court held that §3283 applied to two counts involving production of child pornography and one count involving 18 U.S.C. §2423(c) — not §2423(b), the offense of conviction here. That offense, unlike Schneider's, requires that the defendant actually "engage in * * * illicit sexual conduct." Thus, unlike a charge under §2423(b), "an essential ingredient" of the crime specified in §2423(c) involves the sexual abuse of a child, not just travel with an allegedly improper purpose.

Applying the "essential ingredient" test also makes sense. By extending the statute of limitations, Congress intended to protect actual children who might be incapable of notifying the authorities of the wrongdoing for many years. But the offense at issue here does not require an actual child or even actual abuse. A government agent could pretend to be a ten year old child, and the defendant could travel in interstate or foreign commerce with the proscribed intent, and the statute of limitations, under the 1994 version, would run until that non-existent child turned 25 even though nothing

prevented the government from commencing a prosecution within the specified five-year period. Congress has not evidenced a clear intention to essentially eliminate the statute of limitations in cases where the crime is having a bad intent and does not necessarily involve the sexual abuse of an actual child.

Accordingly, the trial court erred in failing to dismiss Count One on the basis of the statute of limitations. The judgment must be reversed and the case remanded with directions to dismiss.

C. A New Trial Is Necessary Because The District Court Improperly Prohibited Schneider From Presenting A Complete Defense By Excluding Relevant Evidence To Establish That Schneider's Penis Never Resembled Zavarov's Drawing Of Schneider's Penis

1. Standard of review

In *United States* v. *Saada*, 212 F.3d 210, 220 (3d Cir. 2000), this Court explained: "We afford a district court's evidentiary ruling plenary review insofar as it was based on an interpretation of the Federal Rules of Evidence, but review a ruling to admit or exclude evidence, if based on a permissible interpretation of those rules, for an abuse of discretion."

2. Schneider deserves a new trial because the trial court committed harmful error in wrongly excluding relevant evidence that strongly supported Schneider's assertions of innocence

This case presented a credibility contest between a lone accuser and the accused. Zavarov's testimony that Schneider had engaged in improper sexual conduct was the only evidence in support of those allegations. Schneider has consistently denied any such improper sexual conduct, including by taking the stand at trial to testify in his own defense.

Consequently, one of the key pieces of evidence in Schneider's defense was a supposedly anatomically correct drawing that Zavarov had made for the prosecution depicting Schneider's penis as abnormally curved, exhibiting an extreme version of a condition medically described as Peyronie's disease. App.1961a-64a. To rebut these charges, Schneider introduced evidence in his defense from an expert witness urologist who had examined Schneider's penis in August 2010. App.970a.

The urologist testified that a penis with Peyronie's disease contains hardened plaque which can only be cured by surgical removal. App.992a. The expert urologist further testified that he had medically induced an erection in Schneider during his evaluation of the defendant and observed no abnormal curvature, nor any evidence either of existing plaque or that

plaque had ever been surgically removed. App.968a-71a. The urologist thus testified that, in his expert opinion, Schneider's penis could never have had the appearance that Zavarov depicted in his drawing, which drawing was supposedly based on approximately 1,000 episodes of sexual relations over a six-year period if Zavarov's accusations were to be believed. App.965a-72a.

The prosecution did not call its own expert on this issue but rather limited itself to cross-examining the defense expert in an attempt to establish that the symptoms of Peyronie's disease (but not elimination of the penile plaque which causes it) could be lessened through non-surgical treatments of certain types. App.980a-85a. Indeed, in the prosecution's closing argument to the jury, the prosecutor did not suggest that Zavarov's drawing of Schneider's supposedly abnormally curved penis had been incorrect; rather, the prosecutor maintained that Schneider had plenty of opportunities in the time after Zavarov severed his relationship with Schneider to pursue surgical and non-surgical treatments of Peyronie's disease that would have eliminated the abnormal curvature of Schneider's penis as described by Zavarov. App.1638a-39a. In fact, the prosecutor went so far as to state — in direct contradiction of the lone expert witness — that

"He [Schneider] got corrective surgery." App.1639a. This type of prosecutorial misstatement of expert testimony during summation should not be countenanced by this Court. *See United States* v. *Moore*, 375 F.3d 259, 264-65 (3d Cir. 2004).

At the trial of this case, Schneider asked the district court for permission to inform the jury that he had been incarcerated continuously since May 17, 2010 on the charges at issue in the trial, and that therefore — during the critical four- to five-month period before trial — he was unable to seek or obtain any treatment, let alone surgery, for his supposed Peyronie's disease. App.1314a-17a, 1319a-20a.

If Zavarov was correct that Schneider's penis had exhibited a severe case of Peyronie's disease when Schneider was in his mid-30s, a jury would be more than justified in assuming that Schneider did not feel any strong compulsion to seek treatment for that condition to reverse its symptoms. Rather, the time when Schneider might finally feel compelled to do something was after he was facing criminal charges, when he obtained knowledge that prosecutors had asked Zavarov to sketch an anatomically correct drawing of Schneider's penis and were planning to use this as proof of sexual misconduct for the upcoming trial. Thus, if Zavarov's depiction

had ever been accurate — which the defendant consistently denied and sought to disprove — the defense wanted to argue to the jury that Schneider had no ability to eliminate the abnormal appearance that Peyronie's disease had given his penis during the period when he would have felt most compelled to take the dramatic actions necessary, because he was incarcerated on these charges at that time.

Schneider had irrefutable proof that he was unable to seek or obtain any surgical or non-surgical treatment of his supposed Peyronie's disease during the four- or five-month period following disclosure of the drawing preceding trial because he had been incarcerated that entire time on these charges. Yet the district court, at the prosecution's urging, prohibited Schneider from presenting the jury with this critical evidence, purportedly out of fear that the jury would sympathize with Schneider's plight in having to undergo extended pretrial incarceration. App.1319a-20a. In so ruling, however, the district court made it far more likely Schneider would be convicted on these charges by excluding compelling evidence that Zavarov had fabricated his claims of sexual abuse.

Schneider respectfully submits that any general inclination to exclude from evidence the fact of a criminal defendant's pretrial incarceration is to

protect the *defendant*, and not the *prosecution*, from unfair prejudice. Here, by contrast, it was the defendant who sought to use the fact of his pretrial incarceration to establish an especially relevant fact — that he was incapable of obtaining any surgical or non-surgical treatment for his supposed Peyronie's disease in the months before trial. It was thus fundamentally unfair to the defendant for the district court to preclude the defendant from introducing that evidence out of a concern that the prosecution would be prejudiced due to possible juror sympathy for the defendant.

In *Holmes* v. *South Carolina*, 547 U.S. 319, 324 (2006), the Supreme Court recognized that criminal defendants must have "a meaningful opportunity to present a complete defense." This Court has itself recognized the same thing in *United States* v. *Quinn*, 728 F.3d 243, 252 (3d Cir. 2013).

Evidence is relevant when it has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. That Schneider was indisputably prevented from obtaining any treatment for Peyronie's disease following the disclosure of this key evidence — Zavarov's vivid depiction of Schneider's penis — in the

months before trial was unquestionably relevant evidence. And that relevant evidence was not *substantially outweighed* by the danger of unfair prejudice to the prosecution, consisting entirely of hypothetical jury sympathy for the defendant. *See* Fed. R. Evid. 403.

Accordingly, the district court's improper exclusion of this critically important and potentially outcome-determinative evidence constituted harmful error requiring a new trial. Evidence establishing that Zavarov was unable to provide the prosecution with an anatomically correct description of Schneider's erect penis represents compelling evidence that Zavarov had fabricated his allegations of sexual contact and thus strongly supported Schneider's testimony that no improper sexual contact ever took place. The district court's improper exclusion of this evidence from trial therefore necessitates a new trial at which this evidence would be admissible.

D. The Admission Into Evidence Of Lurid And Inflammatory Excerpts From The Film *Nijinsky* Denied Schneider A Fair Trial

1. Standard of review

The district court's assessment of the harmlessness of conceded error is subject to plenary review. *United States* v. *Casoni*, 950 F.2d 893, 902 (3d Cir. 1991). Likewise, the question whether a reversal of one count requires a new trial on another count due to prejudicial spillover is subject to plenary review. *United States* v. *Murphy*, 323 F.3d 102, 118 (3d Cir. 2003). The government has the burden of establishing harmless error. *See United States* v. *Cross*, 308 F.3d 308, 326 (3d Cir. 2002).

2. The district court's acknowledged error in admitting lurid excerpts of the *Nijinsky* movie necessitates a new trial

Schneider was tried on two interrelated counts. On post-trial motions, the district court concluded that it had erred in permitting the government to play for the jury, over objection, selected scenes from a commercial film that Zavarov testified he had been shown by Schneider years before the alleged commission of the offense. App.46a-50a. The district court recognized, in hindsight, that these movie clips "were unduly prejudicial inasmuch as they included sexual content unrelated to the

charges in this case. However, although this evidence was unduly prejudicial and not particularly probative, introduction of this evidence was harmless * * *." 817 F. Supp. 2d at 608. The district court therefore declined to award a new trial. For two related reasons, the district court's harmless error ruling was mistaken. If the case is not dismissed for any of the reasons discussed elsewhere in this brief, a new trial should be granted.

Count two, the dismissed "transport" count, and count one, the "travel" count on which judgment was ultimately entered, were "closely linked." *See United States* v. *Wright*, 665 F.3d 560, 575 (3d Cir. 2012). Both involved the same travel on the same date: Schneider's return trip from Philadelphia to Moscow on August 21, 2001. He was accompanied on that flight by Roman Zavarov, who had spent a few weeks with Schneider's family while participating in a summer training program in Philadelphia and was heading back to his own parents' home outside Moscow for the rest of his vacation before resuming school. There was one crucial difference. To prove count two, on which Schneider was eventually acquitted, the government had to prove that Schneider "transported" Zavarov with the intent to commit a sexual act that would be illegal in Russia. At trial, the prosecution argued for admission of prejudicial

evidence, including sexually explicit excerpts from a 1980 film, *Nijinsky*, as crucial to proving that Schneider took advantage of Zavarov's "dependence" on him — the critical element that made the alleged sexual conduct illegal in Russia. This evidence would not have been admitted were the jury faced only with count one, the "travel" count. Even if admissible to prove count two, this prejudicial evidence tainted the jury's consideration of the "travel" count, requiring that the conviction on count one be vacated and a new trial be granted.

To prove count one, the "travel" count, the government had to prove that Schneider traveled from Philadelphia to Moscow "for the purpose" of engaging in sexual activity with Zavarov, a minor between the ages of 12 and 16. The government was not required to prove that Schneider compelled Zavarov to engage in sex or exerted any undue influence on him, or that Zavarov was financially or psychological dependent on Schneider. In contrast, to prove count two, the Mann Act "transport" count, the government had to prove that Schneider transported Zavarov from Philadelphia to Moscow with the intention of compelling him to engage in sodomy "by taking advantage of" the latter's "material or other dependence" on Schneider. App.1711a. Though in most other respects the

two counts overlapped, the elements of compulsion and dependency (imported into 18 U.S.C. §2421 from Russian law) became the evidentiary hook that allowed the prosecution, over vigorous objection, to place before the jury extremely prejudicial evidence that would not have been admissible solely on count one.

First, and most objectionably, Zavarov testified that Schneider made him watch a film, *Nijinsky*, about Sergei Diaghilev, the lover and patron of the brilliant danseur, Vaslav Nijinsky. App.474a. Over objection, the prosecutor was permitted to show the jury highly prejudicial excerpts from that film that portrayed the older Diaghilev seducing and then controlling the much younger Nijinsky. App.1960a (*Nijinsky* video clips DVD). One excerpt showed Diaghilev leaning over to kiss Nijinsky in his bed; another showed a scene from Nijinsky's infamous 1912 performance in "Afternoon of a Faun," culminating with Nijinsky simulating masturbation. *Id.* The excerpts then showed Diaghilev severing all ties with Nijinsky when he defied Diaghilev and married, destroying Nijinsky's career and precipitating his descent into madness. *Id.* The excerpts included the movie's opening and final scenes of a psychotic, rambling Nijinsky, imprisoned in a strait jacket, followed by an epilogue relating that Nijinsky

spent his last thirty years in and out of mental institutions. *Id.* Zavarov testified that Schneider warned him that Nijinsky made a mistake to leave Diaghilev and not to make the same mistake. App.484a-85a.

The evidence about the film was admitted solely to establish a unique element of count two — dependence, financial or otherwise, under Russian law. The prosecutor argued that the *Nijinsky* film "shows his [Schneider's] control over the victim and the psychological inference." App.481a. In summation, the prosecutor argued that the *Nijinsky* evidence was crucial to establishing dependence under count two because Schneider used it to convince Zavarov not to make the same mistake as Nijinsky. App.1626a. In ruling on post-trial motions that the *Nijinsky* evidence supported a conviction on count two, the district court opined that:

> Schneider showed Zavarov a film about the ballet dancer Nijinsky and his older male patron and lover Diaghilev, telling Zavarov if he left Schneider the way Nijinsky left Diaghilev, he would suffer Nijinsky's fate of emotional ruin and psychological despair. Based on the close emotional relationship which developed between Zavarov and Schneider, and Schneider's suggestion that Zavarov would be emotionally devastated if he left Schneider, there was sufficient evidence for the jury to conclude Schneider compelled Zavarov to engage in sexual activity with him by taking advantage of Zavarov's "other dependence" on him.

App.38a.

Second, borrowing from Nijinsky's infamous role as the faun, the prosecution was permitted to introduce evidence that Schneider collected Royal Copenhagen porcelain figurines of faun-like creatures, characterized by the prosecutor as a sick "fetish." App.1621a, 1623a. Though the court labeled the government's theory "bizarre" (App.47a), it understood that the figurine evidence was relevant only to the issue of dependence:

> [T]he Government argued the figurines were connected to Schneider's attempt to psychologically manipulate Zavarov by comparing their relationship to the relationship of Nijinsky and Diaghilev * * *. [T]he Government introduced the figurines in support of its argument that Schneider collected the ceramic figures as part of a continuing scheme to suggest to Zavarov that his ballet future was inseparable from his romantic relationship with Schneider.

817 F. Supp. 2d at 607.

Third, Zavarov testified that Schneider gave him a birthday card in 1999 inscribed with the message, "Romanicov, until trillion thirty years, your friend, Ken," and told him that they should be together "until trillion thirteen years." App.470a.

Fourth, Zavarov testified that Schneider paid for his clothing, food, private training, and gifts and toys, including a PlayStation electronic game machine. App.463a. The prosecution argued that this evidence by itself

constituted legally sufficient evidence of material or other dependence. App.1998a, 1626a, 1629a-30a. In closing, the prosecutor told the jury that by furnishing Zavarov with necessities and playthings, Schneider assured that "he gained complete psychological and emotional control over this child." App.1630a.

Fifth, Zavarov's mother, Fanzilia Zavarova, testified that she believed Schneider was trying to undermine her parental authority. As an example of Schneider's purported power over Zavarov, she testified that she gave Zavarov a Virgin Mary icon, which he returned to her allegedly because Schneider had told him not to wear it. App.393a-94a. This, too, was admitted to establish the dependence relevant only to Count Two.

Sixth, the government was permitted to introduce testimony that, in December, 2006, when Zavarov was taken to the hospital after he cut himself, Schneider told him that if Zavarov continued with Gina D'Amico (his new girlfriend and soon-to-be wife), it would ruin his career (presumably, the way Nijinsky ruined his career when he defied Diaghilev, as dramatically portrayed in one of the film excerpts, to marry). App.859a-61a.

All of this highly prejudicial and sensationalized evidence was introduced to prove the element of "dependence." The jury would not have heard this evidence if the prosecution had not vigorously contended that it was essential to prove the special element of dependence under Russian law relevant only to count two. The threshold standard for prejudicial spillover is easily satisfied.

The government cannot meet its burden of establishing harmless error. *See United States* v. *Cross*, 308 F.3d 317 (3d Cir. 2001). This Court applies a two-step analysis to determine whether evidence admitted to support a dismissed count prejudiced trial on the remaining count. First, this Court must decide whether the jury heard evidence on the dismissed count that would not have been admissible at a trial limited to the remaining count. *See United States* v. *Riley*, 621 F.3d 312, 325 (3d Cir. 2010). Second, applying the four-part test derived from *United States* v. *Pelullo*, 14 F.3d 881, 898-99 (3d Cir. 1994), the Court must decide whether the error was "harmless," that is, whether it is "highly probable that the error did not prejudice the jury's verdict on the remaining counts." *Riley*, 621 F.3d at 325.

To evaluate whether the introduction of spillover evidence is prejudicial, the Court considers four factors:

> whether (1) the charges are "intertwined with each other"; (2) the evidence for the remaining counts is "sufficiently distinct to support the verdict" on these counts; (3) the elimination of the invalid count "significantly changed the strategy of the trial;" and (4) the prosecution used language "of the sort to arouse a jury."

Murphy, 323 F.3d at 118 (quoting *Pelullo*, 14 F.3d at 898-88). The Court considers these factors in a light "somewhat favorable to the defendant." *Murphy*, 323 F.3d at 122 (quoting *Pelullo*, 14 F.3d at 898). Ultimately, this Court must decide whether it is "highly probable" that the evidence did not impact the jury's verdict. In its post-trial opinion, the district court did not separately consider whether there was prejudicial spillover onto count one.

Here, the spillover evidence undoubtedly affected the jury in this "he said, he said" credibility contest. The two charges in the indictment were not only intertwined, they were virtually identical. Count two incorporated the factual allegations of count one. Both counts rested on Schneider's traveling from Philadelphia to Moscow on August 22, 2001 with the intent to engage in sex with Zavarov. With the exception of the dependency

element — required to prove a crime under Russian law — the facts underlying each charge and the crucial evidence were identical. The risk of jury confusion from the spillover evidence was enormous, and the jury likely considered all of the evidence in reaching its verdict as to each count.

Nor was the evidence on count one "sufficiently distinct" to mitigate the prejudice. With the exception of the spillover evidence, the evidence introduced with respect to counts one and two was identical. The evidence of how Schneider met Zavarov, of their living arrangements, and of the trip to and from Philadelphia in the summer of 2001 so that Zavarov could attend the Rock School was identical. So was the evidence relating to their alleged sexual relationship. There was no independent evidence of Schneider's state-of-mind when he left Philadelphia to return to Moscow. Indeed, the uncontested evidence demonstrated that Zavarov returned home to his own family in another town for a week or more and that Schneider, once back in Moscow, immediately returned to work.

It is also clear that the defense strategy was adversely affected by the government's spillover evidence. The defense had to counter the government's claim that Schneider dominated Zavarov. To do so, the defense introduced, during cross-examination of Zavarov's father, a

videotape of his son, at age 12, auditioning for the Dokukins with Schneider and the parents present. App.298a-300a The defense obviously expected that this videotape would show that Schneider was introduced to Zavarov by reputable ballet teachers, with his parents' full support, and was interested in sponsoring Zavarov only because he displayed unusual talent from a young age. This strategy backfired because, though Zavarov was wearing traditional Russian ballet audition clothes, the government elicited from Zavarov's mother during her direct examination that her son had appeared before Schneider in his "underwear," implying that this was somehow done at the defendant's behest. App.381a-83a. The government used the videotape to further its portrayal of Schneider as a Diaghilev-like villain.

Schneider's defense also had to try to defuse the prosecution's treatment of the faun figurine evidence as a sick "fetish": part of the prosecution's overall *Nijinsky*-dominance theory. To rebut the government's proposed inference, the defense introduced the testimony of Schneider's mother, a professional antiques dealer and collector, about her many collections of porcelain figurines, including the fauns. App.1259a-61a, 1273a-80a. At the very outset of its summation, the prosecutor

ridiculed Mrs. Schneider's testimony and suggested it was untrue. App.1622a-23a. The defense would never have produced this evidence were it not compelled to counter the "bizarre" inferences the prosecution asked the jury to draw from the porcelain "fauns," again only relevant to count two.

Finally, the evidence, particularly the *Nijinsky* film excerpts and the collection of faun figurines, was particularly incendiary. Diaghilev — a thinly veiled Schneider, according to the prosecutor — is portrayed in the movie as a domineering, manipulative older man who destroys the life of Nijinsky, his exceptionally talented protégé — a thinly veiled Zavarov — when Nijinsky defies him. The final image of the brilliant Nijinsky, locked in madness (App.1960a (clip 7, at 2:29)); also seen during intro montage), had to have inflamed the jury's passions. And in the prior scene, the jury was permitted to hear the Diaghilev character ask Nijinsky's wife, "Do you think I am a monster?," eliciting her reply, "Yes, I do." (*Id.* (Clip 7, at 1:48)) The evidence designed to prove psychological "dependence" was precisely of a "sort to arouse the jury."

The district court's post-trial assessment that the presentation of these movie scenes was substantially more unfairly prejudicial than legitimately

probative was correct. Its conclusion that the admission of this evidence was harmless, on the other hand, was mistaken.

The sole ground on which the lower court suggested that its error in admitting the Nijinsky video evidence was harmless was that the "evidence Schneider had engaged in sexual acts with Zavarov — and intended to do so again at the time of his travel on August 22, 2001 — was overwhelming." 817 F. Supp. 2d at 608. This assertion, as shown by the district court's own recitation of the evidence that follows it, is far from correct.

This brief demonstrates above that the evidence was plainly insufficient to prove guilt beyond a reasonable doubt on count one. But even if the evidence were somehow deemed to be sufficient, it could not possibly be called overwhelming. The entirety of the support for the district court's assertion in this regard is a reference to Zavarov's own testimony and the subjective impressions of those who knew him: that he "became sullen and withdrawn" as he passed through his teens; that Zavarov expressed his close feelings toward Schneider, who reciprocated in a birthday card; that Zavarov's wife years later reported depression and "issues with intimacy"; that he saw a psychologist for such symptoms; and

that a young musician from Moldova testified that Mr. Schneider sponsored him, never did "anything improper with" him (App.1000a), but once touched his back during a yoga demonstration in a way that made him "a little" uncomfortable (App.1003a). 817 F. Supp. 2d at 608. To call that litany "overwhelming" is to take all meaning from that overused term. In such cases, where the evidence cited in support of guilt could as likely be attributed to any number of other circumstances, this Court does not hesitate to reverse on account of evidentiary error. *See United States* v. *Smith*, 725 F.3d 340, 348 (3d Cir. 2013).

Where, as here, a video is tangential at best to the charged offense, where the foundation on which its relevance depends is exceptionally weak, and where the trial court itself has concluded, after observing the jury and seeing the evidence, that unfair prejudice greatly outweighed probative value, the government has a heavy burden to establish that the error was harmless. The test is a "high probability that the error did not contribute to the judgment," not whether the jury might well has convicted anyway. *See United States* v. *Vosburgh*, 602 F.3d 512, 540 (3d Cir. 2010).

In this case, the prosecution's theory of the case hinged on its pop-psychology analysis of Schneider's supposed identification of himself and

Zavarov with Diaghilev and Nijinsky. The prosecutor's closing argument began there and never wavered from that approach. App.1621a-41a. The inadmissible evidence was compelling and emotional in its content. The government cannot satisfy its burden of proving the error harmless.

E. The District Court Abused Its Discretion In Failing To Grant An Evidentiary Hearing On The Defendant's Motion For A New Trial Based On Newly Discovered Evidence

1. Standard of review

The district court's grant or denial of a hearing on a motion for new trial is review for abuse of discretion. *See Gov't of Virgin Is.* v. *Lima*, 774 F.2d 1245, 1250 (3d Cir. 1985).

2. The district court should have held an evidentiary hearing on defendant's motion for a new trial based on newly discovered evidence

While this appeal was pending, Schneider filed a motion for new trial under Fed. R. Crim. P. 33(b)(1) based on newly discovered evidence. App.2304a-2354a. The motion presented information that Schneider learned as a result of ongoing civil litigation brought against him by Zavarov. The motion explained that this new evidence strongly suggested

perjury by Zavarov at trial and a significant *Brady* violation. After oral argument, the district court denied the defendant's motion without a hearing. The denial of a hearing constituted a reversible abuse of discretion.

The denial of a hearing was erroneous with respect to Zavarov's admissions to his therapist, obtained in discovery after the criminal trial, that he had committed serious perjury in his testimony concerning this criminal case. App.2309a-11a. The district court appears to have had an overly restrictive idea about the standard for allowing an evidentiary hearing:

> Schneider * * * submits evidence that raises a mere suspicion of perjury. Schneider cannot specify what the perjured statement was or if it related to anything material in the criminal case. * * * As such, this Court does not find an evidentiary hearing is necessary. It seems Schneider requests an evidentiary hearing so that he may explore Zavarov's statements made to his therapist in hopes to uncover misstated facts related to the criminal case. Schneider, a criminal defendant seeking a new trial, may not demand an evidentiary hearing to reexamine a witness in hopes it will reveal new evidence entitling him to a new trial. Rather, he has the burden of providing this Court with the newly discovered evidence.

App.71a. Respectfully, notes taken by a professional quoting the lone accuser saying that he committed perjury in relation to the same case, fears

going to prison if found out, and is concerned that the conviction will be overturned do more than raise "a mere suspicion of perjury." A disclosure of perjury is not mere impeachment. In a credibility-based case, it is inappropriate to dismiss a suggestion of perjury by the most crucial witness as unimportant.

The *Brady* issue was based on Zavarov's sworn testimony, given in his deposition in the civil case, that he was paid cash for his testimony by the prosecutor. App.2306a-09a. In the government's response, the prosecutor offered an account (unsupported by affidavit) of Zavarov's receipt of witnesses payments and expense reimbursements. App.2344a-56a. That account contradicts Zavarov's own sworn testimony, yet the district court refused a hearing on this contradiction by purporting to make findings of fact as to what actually occurred. App.64a-66a. This was simple error under this Court's precedent.

The defendant brought to the district court's attention, and requested a hearing to develop, sworn testimony by the government's star witness, who says he was paid cash for his testimony by the lead prosecutor during trial. This raised a *Brady* issue that must be resolved on a proper record. *See United States* v. *Bagley*, 473 U.S. 667 (1985) (undisclosed payments to

cooperating witness constituted *Brady* material); *United States* v. *Fenech*, 943 F. Supp. 480, 486-87 (E.D. Pa. 1996) (Padova, J.) (new trial granted on basis of *Brady* violation for failure to disclose payments to cooperating witness). The government attorney's denial — even had it been sworn — could not resolve the question without a hearing if contradictions remained. Here, the amount paid did not gibe, as between the witness's sworn testimony and the government's exhibit. Nor did the government explain how a witness who testifies for one day is entitled to be paid for eleven days, including six days the week prior to trial and four days during trial, nor why he would be handed a check or cash before completing his attendance at trial. The district court's assumption that Zavarov was referring in his deposition only to the amounts paid under his vouchers, and that those sums were paid according to law, did not overcome the need for a hearing.

The test used for granting a new trial under Fed. R. Crim. P. 33(b) based on newly discovered evidence has five parts:

> (a) the evidence must be in fact newly discovered, i.e., discovered since trial;
>
> (b) facts must be alleged from which the court may infer diligence on the part of the movant;

> (c) the evidence relied on must not be merely cumulative or impeaching;
>
> (d) it must be material to the issues involved; and
>
> (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

Lima, 774 F.2d at 1250.

The district court conceded that Schneider's motion satisfied the first two elements (App.64a), and the discussion above shows that the rest were also likely to be met had a hearing been allowed. But, as the district court failed to mention, this five-part test does not apply to the later discovery of a *Brady* violation. When newly-discovered evidence falls into the category of *Brady* material, including material which is materially impeaching, the defense need not demonstrate that the new evidence "would probably produce an acquittal," *United States* v. *Adams*, 759 F.2d 1099, 1108 (3d Cir. 1985), but only that there is a "reasonable probability" of a different outcome at a new trial. *Bagley*, 473 U.S. at 680-81.

Moreover, the test also is altered when the newly discovered evidence consists of perjury. In that event, it is enough that (a) the testimony of a material witness was false; (b) the jury might have reached a different

conclusion had the witness not committed perjury; and (c) the defendant was surprised by the false testimony and unable to meet it, or did not know of its falsity until after trial. *See United States* v. *McLaughlin*, 89 F. Supp. 2d 617, 625-27 (E.D. Pa. 2000) (Giles, Ch. J., granting new trial) (applying *United States* v. *Meyers*, 484 F.2d 113, 115-17 (3d Cir. 1973)); *cf. Lima*, 774 F.2d at 1251 n.4 (discussing and explaining *Meyers*).

Indeed, it is not necessary that the false testimony be labeled "perjury" in the technical, criminal sense:

> The question of whether [a government witness's] untruthfulness in [the criminal trial] constituted perjury or was caused by a psychiatric condition[, for example,] can make no material difference here. Whichever explanation might be found to be correct in this regard, [the witness's] credibility has been wholly discredited * * * . No other conclusion is possible. The dignity of the United States Government will not permit the conviction of any person on tainted testimony.

Mesarosh v. *United States*, 352 U.S. 1, 9 (1956). The harmless beyond a reasonable doubt standard must apply when false testimony has been disclosed in order to protect the defendant's Sixth Amendment right to trial by jury. Under any or all of the possibly applicable legal standards, a hearing should have been permitted to allow the defendant to develop and establish the basis for a new trial presented in his Rule 33 motion.

F. The District Court Misapplied The "Relevant Conduct" Rule To Trigger A Guidelines Cross-Reference Resulting In A Procedurally Unreasonable Sentence That Was Far Longer Than The Properly Applicable Range

1. Standard of review

This Court reviews *de novo* the district court's interpretation of the Sentencing Guidelines. *See United States* v. *Grier*, 475 F.3d 556, 570 (3d Cir. 2007) (en banc). Having failed to identify and apply the governing legal rule, the district court necessarily abuses its discretion. *See United States* v. *Mitchell*, 690 F.3d 137, 148 (3d Cir. 2012) ("A district court by definition abuses its discretion when it makes an error of law."). A sentence imposed after "improperly calculating" the Guidelines range is procedurally unreasonable. *See Gall* v. *United States*, 552 U.S. 38, 51 (2007).

2. The district court imposed a grossly incorrect sentence

Schneider was convicted of count one only: a violation of 18 U.S.C. §2423(b) for traveling in foreign commerce on August 22, 2001 for the purpose of engaging in sex with a minor between the ages of 12 and 16. The defense argued that USSG §2A3.2 (2000 ed.) was the appropriate Offense Guideline. App.2105a. The Probation Officer and the prosecution

contended that the applicable guideline was §2A3.1, *see* Rev. PSI ¶ 26; App.2093a, which, if applied, would lead to a much longer sentence. The district court sentenced Schneider pursuant to USSG §2A3.1, though, at sentencing, its reason for doing so was murky. App.2149a-51a. The district court elaborated on its reasoning a month later in a written order. App.2294a-300a. The district court's explanation makes clear both the mistaken rationale for and the grave error in its sentencing ruling.

The district court agreed with the defense that USSG §2A3.2 was the Offense Guideline applicable to the offense of conviction, that is, the starting point for the offense calculation. App.2297a. But it then erroneously invoked a cross-reference found at §2A3.2(c)(1) — directing the court to use §2A3.1 "if the offense involved criminal sexual abuse (as defined in 18 U.S.C. §2241 or §2242) to calculate the final offense level." App.2298a. This cross-reference had not been addressed in the PSI or by either party in their sentencing memoranda or at the sentencing hearing. Thus, Schneider never had an opportunity to object to the district court's reasoning, which, as shown below, was fundamentally flawed. It depended on an application of "relevant conduct" that was simply mistaken under USSG §1B1.3(a), the guideline which defines that important but technical

concept. The result was an increase in Schneider's sentence of more than ten years. Resentencing is thus required.

Section 1B1.1(a)(1) of the Guidelines Manual requires that the court use §1B1.2(a) to select the offense guideline. *See United States* v. *Savani*, 733 F.3d 56, 62 (3d Cir. 2013) (as amended on rehearing). Section 1B1.2(a), in turn, provides that the sentencing court shall:

> Determine the offense guideline section in Chapter Two (Offense Conduct) applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment ... of which the defendant was convicted.) ... Refer to the Statutory Index (Appendix A) to determine the Chapter Two offense guideline, referenced in the Statutory Index for the offense of conviction.

Appendix A's introductory instructions state, "If more than one guideline section is referenced for the particular statute, use the guideline most appropriate for the offense conduct charged in the count of which the defendant was convicted." *See also United States* v. *Wright*, 642 F.3d 148, 153 (3d Cir. 2011) (sentencing court must follow Appendix A's introductory instructions for choosing applicable guideline where more than one section is listed in Appendix). The district court, in its order, properly began with this rule, and properly followed it to arrive at USSG §2A3.2, as the defense had advocated. App.2297a.

Section 2A3.2 was appropriately selected from among the three possible Offense Guideline provisions referenced in Appendix A (the 2000 edition of the Manual) for §2423(b) convictions. Section 2A3.2 applies to charged violations of 18 U.S.C. §2243 (sex act with a person between 12 and 16, who is at least four years younger than the defendant). The district court determined that the "offense conduct" that was "charged in the count" of conviction, that is, count one, and which Schneider allegedly had the purpose to commit when he engaged in international travel in violation of §2423(b), was conduct in violation of §2243.

Thus, as the court below correctly ruled, the Offense Guideline that is "most appropriate" for this "offense conduct" is the guideline that explicitly and exclusively applies to that conduct: USSG §2A3.2, which in the 2000 edition of the Manual, provided, in pertinent part:

> §2A3.2. Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts
>
> (a) Base Offense Level:
>
> (1) 18, if the offense involved a violation of chapter 117 of title 18, United States Code; or
>
> (2) 15, otherwise.
>
> (b) Specific Offense Characteristics

> (1) If the victim was in the custody, care, or supervisory control of the defendant, increase by 2 levels ….
>
> * * * * *
>
> (c) Cross Reference
>
> (1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. §2241 or §2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual abuse). …

The district court, however, instead of using the base level and specific offense characteristics of §2A3.2, determined that the cross-reference applied, and thus turned to §2A3.1. App.2298a. That determination was highly prejudicial error requiring reversal.

The term "offense" (as used in the cross-reference) is defined to mean "the offense of conviction and all relevant conduct under § 1B1.3 (Relevant Conduct) * * * ." USSG §1B1.1, n.(l). Recognizing that "the offense of conviction" by itself — that is, travel with the unlawful purpose charged in Count One — did not "involve" any sexual abuse or attempt to commit sexual abuse as defined in 18 U.S.C. §§2241 and 2242 — the court turned to what it described as "relevant conduct" to justify using the cross-reference. The conduct which the district court identified, however, relying on the PSI's description of what occurred during the earliest years of Schneider's

relationship with Zavarov, App.2151a-52a — evidence which was properly excluded from trial as too remote and unduly prejudicial, App.171a-75a, and which the defense disputed at sentencing — was not "relevant conduct" under USSG §1B1.3.

Insofar as pertinent here, the "relevant conduct" Guideline provides:

> §1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)
>
> (a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, ... (iii) cross references in Chapter Two, ... shall be determined on the basis of the following:
>
> (1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant;
>
> * * *
>
> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;
>
> (2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;
>
> (3) all harm that resulted from the acts and omission specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions….

Though in footnote 3, explaining why it relied on the cross-reference, the district court did not specify which of the provisions of "relevant conduct" was applicable in this case, in footnote 2 of the same order the district court stated that Schneider's sexual contact with Zavarov in the years before the trip from Philadelphia back to Moscow constituted relevant conduct because it "occurred during or in preparation for the offense of conviction and resulted in harm to the victim." App.2296a-99a. That was simply wrong. As this Court has emphasized, "in order to determine the scope of 'relevant conduct' under the guidelines, [a court] must first define [the defendant's] 'offense of conviction.'" *United States* v. *Abrogar*, 459 F.3d 430, 434 (3d Cir. 2006).

Here, the district court did not define the "precise nature" of Schneider's "offense of conviction." Instead, the district court essentially ignored the conviction. With the offense of conviction properly defined — Schneider's traveling to Moscow on August 22, 2001, with an allegedly unlawful purpose — it is clear that none of the relevant conduct provisions applies.

Section 1B1.3(a)(1) is not applicable because conduct that allegedly occurred years earlier in Moscow did not take place "during" the commission of that offense. Nor was such earlier contact in "preparation"

for the return trip to Moscow. According to the district court, Schneider was "able" to commit the offense because he had earlier "cultivated a sexual relationship with Zavarov." App.2296a. Again, that misconstrues the "offense of conviction," which was not sexual abuse of Zavarov after the return to Moscow. The government did not have to prove any sexual abuse occurred after the date of the travel.

Section 1B1.3(a)(2) — the well-known "course of conduct" or "common scheme or plan" aspect of "relevant conduct" — is also inapplicable, and the district court did not even attempt to rely on it.

Finally, the district court concluded that the earlier contact "resulted" in harm to Zavarov, yet another misinterpretation of the Guidelines. App.2297a. For the "harm" to constitute relevant conduct it must be "harm that resulted from the act and omissions" specified in subsections (a)(1) and (2) or that was the "object of such acts or omissions." USSG §3B1.1(a)(3). In other words, the court should consider as relevant conduct the harm that flows from relevant conduct under (a)(1) and (a)(2). Here, since neither (a)(1) nor (a)(2) was applicable, Zavarov suffered no harm from "relevant conduct." The harm to which the district court abstractly

referred did not constitute "relevant conduct" under (a)(1) or (a)(2) of §1B1.3.

Under §2A3.2, the correct Guideline calculation would be:

	levels	justification
Base	18	2A3.2(a)(1) - offense "involved" viol. of Ch. 117 (transportation offenses)
SOC	2	(b)(1) - victim under care/custody/superv. of dft.
total OL	20	

There are no other adjustments. With no prior record, at Level 20, Schneider's correct guidelines range was 33-41 months, as the defense argued below, not the 168-210 months (at Level 35) determined by the district court at sentencing, App.2157a-58a, which the district court was required to reduce to a range of 168-180 months because of the 15-year statutory maximum. See USSG §5G1.1(c)(1). As of the date of this filing, Schneider has already served more than 50 months in prison for the offense of conviction, far in excess of the high end of the applicable Guidelines range. Schneider therefore respectfully requests his immediate release, whether or not he is acquitted of the sole remaining count of conviction.

A sentence based on an incorrect interpretation of the Guidelines is procedurally unreasonable and requires resentencing. *See*, *e.g.*, *United States* v. *Castro*, 704 F.3d 125, 143 (3d Cir. 2013). Judge Sánchez imposed a sentence of 180 months (the statutory maximum), which falls at the top of the authorized range. This enormous error committed in calculating the guidelines range cannot be deemed harmless. 18 U.S.C. §3742(f); *United States* v. *Langford*, 516 F.3d 205, 215-19 (3d Cir. 2008); *United States* v. *Knight*, 266 F.3d 203, 206 (3d Cir. 2001) (prejudice from miscalculation is presumed).

For these reasons, the judgment must be vacated and the case remanded for resentencing, and Schneider should be freed on bail pending any further proceedings.

VII. CONCLUSION

For the reasons explained above, this Court must reverse the conviction and direct entry of a judgment of acquittal on the sole remaining count of conviction. In the alternative, due to expiration of the applicable statute of limitations, the judgment of sentence must be vacated and remanded with directions to dismiss. Barring that relief, the case should be remanded for a new trial. At the very least, a remand for resentencing is required.

Respectfully submitted,

Dated: August 18, 2014

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CERTIFICATION OF COMPLIANCE WITH TYPE–VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type–volume limitations of Fed. R. App. P. 32(a)(7)(B), as amended by this Court's order dated March 28, 2014 allowing an opening brief of not more than 16,100 words, because this brief contains 16,039 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14–point Book Antiqua font.

Dated: August 18, 2014

/s/ Howard J. Bashman
Howard J. Bashman

CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

Dated: August 18, 2014

/s/ Howard J. Bashman
Howard J. Bashman

CERTIFICATION OF ELECTRONIC FILING AND VIRUS CHECK

Counsel hereby certifies that the electronic copy of this Brief for Appellants is identical to the paper copies filed with the Court.

A virus check was performed on the PDF electronic file of this brief using McAfee virus scan software.

Dated: August 18, 2014

/s/ Howard J. Bashman
Howard J. Bashman

CERTIFICATE OF SERVICE

I hereby certify that all counsel listed immediately below on this Certificate of Service are Filing Users of the Third Circuit's CM/ECF system, and this motion is being served electronically on them by the Notice of Docket Activity:

Vineet Gauri

Michelle Morgan

Dated: August 18, 2014

/s/ Howard J. Bashman
Howard J. Bashman