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.)

REPLY BRIEF FOR APPELLANT

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I. INTRODUCTION

For a case in which the defendant's only remaining criminal conviction arises under 18 U.S.C. §2423(b) (2001 version), prohibiting "travel with intent to engage in a sexual act with a juvenile," the government's brief for appellee devotes precious little if any attention to the question of whether the defendant's travel back to Russia beginning on August 21, 2001 was "for the purpose of engaging in any sexual act * * * with a person under 18 years of age." *Id.*

Rather, nearly the entirety of the government's discussion and argument supposedly aimed at upholding defendant Kenneth Schneider's conviction under §2423(b) for prohibited travel focuses on Schneider's alleged sexual relationship with a 15-year-old Roman Zavarov in Russia in 2001. What the government's brief fails to acknowledge, however, is that it was not until April 30, 2003 — long after the events at issue in this case — that 18 U.S.C. §2423(c) became law prohibiting "Engaging in Illicit Sexual Conduct in Foreign Places." The jury in this case was not asked to find whether Schneider engaged in "any illicit sexual conduct with another person" in Russia, nor did the jury so find. As this Court has recognized, Schneider's offense of conviction under §2423(b), prohibiting "travel with intent to

engage in a sexual act with a juvenile," *id.*, was "complete as soon as one begins to travel with the intent to engage in a sex act with a minor." *United States* v. *Pendleton*, 658 F.3d 299, 304 (3d Cir. 2011). Thus, the government's attempts to maintain Schneider's conviction under §2423(b) based on disputed evidence concerning whether Schneider and Zavarov had a sexual relationship in Russia in 2001 constitute nothing more than improper efforts to misdirect this Court's attention from the conviction that the government actually obtained to focus instead on alleged conduct that did not constitute a federal offense in 2001.

With regard to Schneider's first argument on appeal — that his conviction on count one must be set aside under *Mortensen* v. *United States*, 322 U.S. 369, 375 (1944), because his travel to Russia on August 21, 2001 represented the return leg of an innocent round-trip — the government's brief fails to defend the basis on which the district court rejected Schneider's argument. And the ground that the government offers this Court for rejecting the argument — that the trip's purpose was to groom Zavarov to willingly continue to be the supposed victim of unlawful sexual contact — was rejected by the district court in its opinion on Schneider's post-trial motions and finds no support whatsoever in the evidence before

the jury because the district court ruled pretrial that "grooming" was not relevant to this case. *See United States* v. *Schneider*, 2010 WL 3734055, at *7 & n.6 (E.D. Pa. Sept. 22, 2010). Moreover, the "grooming" theory that the government offers to uphold Schneider's conviction is equally applicable to the facts of *Mortensen* itself, yet the U.S. Supreme Court nevertheless overturned the conviction at issue there.

Turning to the second issue on appeal, involving expiration of the five-year statute of limitations applicable to this offense, the government does not dispute that to obtain a conviction under 18 U.S.C. §2423(b) for "travel with intent to engage in a sexual act with a juvenile," the government need not establish that the juvenile actually exists or, if the juvenile actually exists, that the defendant succeeded in engaging in a sexual act with him or her. And, as this Court recognized in *Pendleton*, 658 F.3d at 304, the offense proscribed in §2423(b) is *complete* when the defendant begins traveling. Accordingly, this Court should categorically hold that 18 U.S.C. §3283, which extends the statute of limitations "for an offense involving the sexual or physical abuse of a child under the age of 18 years" until the child reaches the age of 25 years, does not apply to an alleged violation of

§2423(b), because that offense does not "involv[e] the sexual * * * abuse of a child under the age of 18 years."

No federal appellate court decision, reported or unreported, supports the government's argument that §3283 applies to extend the statute of limitations applicable to §2423(b). Moreover, the sex offender registration rulings under SORNA on which the government relies in response to Schneider's statute of limitations argument are inapplicable, because they do not involve the duration of the statute of limitations applicable to SORNA violations.

Even if the facts of Schneider's specific case could determine whether §3283 applies to extend the applicable limitations period, here Schneider does not stand convicted of committing sexual abuse under either United States or Russian law. For these reasons, no jury finding survives that would permit this Court to hold that Schneider's travel-related conviction under §2423(b) "involv[ed] the sexual * * * abuse of a child under the age of 18 years."

With regard to the district court's legally erroneous exclusion from evidence of Schneider's pretrial incarceration to establish that he was unable to obtain any medical treatment to remedy the supposed curvature

of his penis during the critical four- to five-month period before trial, the government can only offer two clearly distinguishable rulings from other courts excluding evidence whose only purpose was to garner sympathy for the defendant from the jury. Here, that was not even an arguable purpose of the evidence that the district court improperly excluded. The excluded evidence was critical to Schneider's defense, and the district court's improper exclusion of that evidence necessitates a new trial.

The government's attempt to avoid a new trial based on its highly inflammatory use of clips from the *Nijinsky* movie during trial and related evidence fails to persuade. The government's brief all but ignores that the district court, after trial, concluded that it should never have authorized the admission of this lurid evidence, which at best was tangentially relevant to now-vacated count two, requiring the government to establish 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. The government now asserts that this evidence was also relevant to count one because it established grooming. But, as summarized above, the district court rejected the relevance of grooming to this case, and the jury did not hear any expert

testimony or argument from counsel on that issue. The erroneous admission of this evidence, and its spill-over effect on count one, thus necessitate a new trial here.

Next, on the question of Schneider's motion for a new trial based on newly discovered evidence, the government's response only confirms the urgent need for a hearing at which the disputed facts can be adequately explored. Although the government's explanation of Zavarov's perjury admission is one possible explanation, in the absence of the necessary evidentiary record it is no more or less persuasive than the explanation that Schneider offers. And the same is true regarding the cash payments to Zavarov. The district court, at a minimum, should have held a hearing to find the relevant facts before deciding whether to grant or deny the new trial motion.

Lastly, on the issue of sentencing, the district court erred in relying on Schneider's alleged sexual abuse of Zavarov in Russia as "relevant conduct" to increase Schneider's base offense level because that conduct did not violate United States law when it allegedly occurred. *See United States* v. *Dickler*, 64 F.3d 818, 830-31 & n.16 (3d Cir. 1995) ("relevant conduct" must be unlawful to be used for sentence enhancement

purposes). Moreover, the district court did not specifically find that the alleged conduct violated Russian law. Yet even if the district court had so found, any finding that Schneider had committed sexual abuse against Zavarov in Russia in violation of Russian law could not lawfully have been used to increase Schneider's base offense level, because the Sentencing Guidelines do not allow a defendant's base offense level to be increased due to crimes committed outside the United States punishable only under foreign law. As a result, the district court's calculation of Schneider's advisory Guidelines sentence was incorrect, necessitating resentencing and Schneider's immediate release from prison.

II. ARGUMENT IN REPLY

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*

Both the district court and the government are incorrect in maintaining that the U.S. Supreme Court's ruling in *Mortensen* v. *United States*, 322 U.S. 369 (1944), recognizing an "innocent round-trip" exception to sex-related travel offenses, does not require Schneider's acquittal on count one for

having violated 18 U.S.C. §2423(b), even though *Mortensen* did require Schneider's acquittal on count two for having violated 18 U.S.C. §2421.[1]

In count one, Schneider was convicted of having violated §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).

In count two, as to which the district court later entered a judgment of acquittal under *Mortensen*, the jury found Schneider guilty for having violated §2421, which provides:

> Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall

[1] The government can complain all it wants about the district court's entry of an acquittal in Schneider's favor on count two under *Mortensen*, *see* Govt's Br. at 27 n.7, but that issue is not before this Court because the government voluntarily dismissed its appeal from that acquittal.

> be fined under this title or imprisoned not more than 10 years, or both.

18 U.S.C. §2421.

And the text of the Mann Act involved in *Mortensen* stated:

> Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice.

18 U.S.C. §398 (1944) (quoted in *Mortensen*, 322 U.S. at 373-74).

Comparing the text of the Mann Act at issue in *Mortensen* with both §§2421 and 2423(b) reveals that only §2423(b) employs the identical "purpose" language that was critical to the outcome in *Mortensen*. Thus, in addition to the cases cited in Schneider's opening brief establishing that federal appellate courts routinely apply Mann Act precedent to prosecutions under §2423(b), the plain language of §2423(b) itself establishes *Mortensen*'s applicability.

In *Mortensen*, 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. *See* 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. *See United States* v. *Schneider*, 817 F. Supp. 2d 586, 598-99 (E.D. Pa. 2011). As the district court held in 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.

The same conclusion necessarily follows with regard to Schneider's transportation of himself on the very same round-trip. Indeed, the government in its brief for appellee does not dispute that Schneider was obligated both to Zavarov's parents and to the United States and Russian governments to accompany Zavarov on Zavarov's flights to the United States from Russia and back to Russia from the United States. The district court's opinion adjudicating Schneider's motion for acquittal recognized that "Zavarov's parents applied for a travel visa with the American Embassy and authorized Zavarov to travel to and from the United States escorted by Schneider." 817 F. Supp. 2d at 598. The district court in that very same opinion also recognized that "the Government introduced no evidence that Schneider paid for or scheduled Zavarov's transportation." *Id.* at 596 n.11.

Thus, as the district court's opinion correctly recognized, Schneider had no alternative other than to accompany Zavarov back from Philadelphia to Russia in a journey that began on August 21, 2011, and Schneider was obligated to Zavarov's parents, the American Embassy, and Russian authorities to travel from Philadelphia to Russia on that date. App.321a-23a.

The district court's opinion goes on to state that "[t]he Government points to no evidence, however, justifying the inference Zavarov would have refused to continue engaging in sexual activity with Schneider if he had not traveled to Philadelphia," 817 F. Supp. 2d at 599, thereby refuting the prosecution's assertion that somehow Zavarov's round-trip to Philadelphia constituted "grooming." Before the trial of this case began, the district court rejected the government's "grooming" expert witness and any evidence to prove grooming. The district court recognized that because Zavarov claimed that his sexual relationship with Schneider began within days of them first residing together, evidence concerning how individuals intending to sexually abuse a minor may engage in "grooming" intended to ensure that the victim will ultimately submit to the abuse was irrelevant to the facts of this case. *See United States* v. *Schneider*, 2010 WL 3734055, at *7

& n.6 (concluding that evidence about grooming "would not assist the jury or fit this case").

Moreover, the "grooming" theory that the government offers here to uphold Schneider's conviction is equally applicable to the facts of *Mortensen* itself — surely brothel owners who take their prostitutes on vacation cause the prostitutes to be even more dedicated employees on their return to work. Yet the Supreme Court in *Mortensen* nevertheless set aside the convictions, holding that it is improper to focus on the artificially severed return leg of an otherwise innocent round-trip.

Because the district court recognized that the round-trip viewed as a whole was entirely innocent and did nothing to further Schneider's alleged sexual contact with Zavarov in Russia, and because Zavarov's parents and the American and Russian governments required Schneider to accompany Zavarov back to Russia on August 21, 2001, it simply is not possible under *Mortensen* to conclude that Schneider's return travel violated §2423(b) because it was "for the purpose of engaging in any sexual act * * * with a person under 18 years of age."

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, Schneider's return trip to Moscow with Zavarov was required by Zavarov's parents and American and Russian authorities. Thus, the trip would have taken place even in the absence of any sex motive whatsoever. In other words, his 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.

In this case, not only did the prosecution agree that no sexual activity occurred between Schneider and Zavarov in the United States in the summer of 2001, *see* 817 F. Supp. 2d at 598 ("[t]he Government concedes Schneider and Zavarov did not engage in sexual activity while Zavarov was in Pennsylvania"), but it is also undisputed that no sexual activity occurred for some time after their return to Russia, because Zavarov immediately returned to his own home and his own family to spend the remainder of his summer vacation with them. App.323a-24a, 1479a. When Schneider returned to his residence in Russia on August 22, 2001, he had

no way of knowing whether Zavarov would resume staying at Schneider's home in Moscow on school nights once Zavarov returned to his studies at the Bolshoi Academy or even whether Zavarov would resume attending the Academy — decisions over which Schneider had no control whatsoever.

In the absence of any evidence or legal authority to establish the inapplicability of *Mortensen*'s innocent round-trip exception to Schneider's conviction under 18 U.S.C. §2423(b), the government seeks to divert this Court's attention away from the issues that this case actually presents to the very issue that this case most certainly *does not* present: whether Schneider and Zavarov engaged in sexual conduct in Russia. As this Court is aware, Schneider steadfastly denies ever having engaged in any sexual conduct with Zavarov, and aside from Zavarov's own testimony there is no evidence whatsoever that Schneider ever engaged in any sexual conduct with Zavarov or any other minor.[2]

[2] One can be sure that the federal government, using its vast resources, scoured the world to find any other boy or girl who would accuse Schneider of sexual abuse but found no one to substantiate such a charge. The most the government turned up was the testimony of another boy who claimed that Schneider once touched the boy's shoulders and spine in a manner that made the boy feel uncomfortable, which merely meant that

If Schneider had been regularly subjecting Zavarov to anal sex as a preteen, surely the instructors at the Bolshoi Academy's physically rigorous ballet program, and Zavarov's parents, to whose home Zavarov returned every weekend and holiday (App.464a-65a), would have noticed signs of such abuse. But neither Zavarov's housekeeper, who laundered the linens, nor the instructors and staff at the Bolshoi Academy, nor Zavarov's parents, who had unfettered access to their child's physical and emotional state for at least two out of every seven days, observed any signs of sexual abuse. Had anything out of the ordinary been observed, Zavarov's puerile explanation of using a solid hemorrhoid stick (App.490a) would have failed to divert attention away from Schneider.

Yet the government, unable to avoid the reality that *Mortensen*'s innocent round-trip exception compels Schneider's acquittal under 18 U.S.C. §2423(b), attempts to make this case about something that it surely is not — namely, whether Schneider had sexual contact with Zavarov in Russia. To begin with, until 18 U.S.C. §2423(c) became law on April 30,

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Schneider had unintentionally caused the child to feel minor pain or discomfort in positioning the child to perform a stretching exercise. App. 1000a, 1002a-03a. Touching a child's back on one occasion in connection with a stretching exercise is a far cry from sexual abuse, as even the government must surely concede.

2003, it was not a criminal offense under United States law for a U.S. citizen to subject a minor child located in another country to sexual abuse.

Section 2423(c) provides, in full:

> **Engaging in Illicit Sexual Conduct in Foreign Places**.— Any United States citizen or alien admitted for permanent residence who travels in foreign commerce or resides, either temporarily or permanently, in a foreign country, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

18 U.S.C. §2423(c).

In turn, 18 U.S.C. §2423(f)(1) contains the following definition of "illicit sexual conduct":

> **Definition**.— As used in this section, the term "illicit sexual conduct" means
>
> (1) a 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; or

18 U.S.C. §2423(f)(1).

Because Schneider's travel occurred before 18 U.S.C. §2423(c) became law in April 2003, and because any sexual abuse that the government alleges as relevant to this case also occurred before that date, the government did not charge Schneider with having violated §2423(c). As a

result, the jury did not find, nor was it asked to find, whether Schneider engaged in any sexual conduct with Zavarov in Russia.

The legislative history of §2423(c) explains:

> H.R. 4477, the ''Sex Tourism Prohibition Improvement Act of 2002,'' addresses a number of problems related to persons who travel to foreign countries and engage in illicit sexual relations with minors. Current law requires the Government to prove that the defendant traveled ''for the purpose'' of engaging in the illegal activity. Under this bill the Government would only have to prove that the defendant engaged in illicit sexual conduct with a minor while in a foreign country. . . .
>
> * * *
>
> Current law requires the Government to prove that the defendant traveled to a foreign country with the intent to engage in sex with a minor. H.R. 4477 eliminates the intent requirement where the defendant completes the travel and actually engages in the illicit sexual activity with a minor. . . . *This legislation will close significant loopholes in the law that persons who travel to foreign countries seeking sex with children are currently using to their advantage in order to avoid prosecution.*

H.R. Rep. 107-525, at 2-3 (2002) (emphasis added); *see also* H.R. Rep. 108-66, at 51-52 (2003) (similar).

As this Court recognized in *United States* v. *Pendleton*, 658 F.3d at 304, the statute codified at 18 U.S.C. §2423(c) "focus[es] the court's attention on the defendant's actual conduct in the foreign nation." Moreover, because the crime described in §2423(c) "is not complete until a person engages in

illicit sex," "§2423(c) is unlike the crime of '[t]ravel with intent to engage in illicit sexual conduct,' defined in §2423(b), which is complete as soon as one begins to travel with the intent to engage in a sex act with a minor." *Id.*

As both this Court and other federal appellate courts have recognized, when Congress enacted 18 U.S.C. §2423(c) in 2003, Congress intentionally omitted any requirement that the defendant's travel to the location outside of the United States where sexual conduct with a minor took place coincided with any specific prohibited intent or purpose. *See United States* v. *Bianchi*, 386 Fed. Appx. 156, 161 n.10 (3d Cir. 2010) (non-precedential) (§2423(c) "does not require that the defendant travel for the purpose of engaging in [illicit sexual] conduct"); *Phillips* v. *United States*, 734 F.3d 573, 576 (6th Cir. 2013) (§2423(c) "has no intent requirement"); *United States* v. *Clark*, 435 F.3d 1100, 1104-05 (9th Cir. 2006) (same).

As the Eleventh Circuit explained in *United States* v. *Frank*, 599 F.3d 1221 (11th Cir. 2010):

> Congress has also amended its laws to allow for extraterritorial application when it has discovered loopholes in its statutory scheme. For instance, Congress amended 18 U.S.C. §2423 in 2003 to eliminate the requirement that the government had to prove the intent to engage in sexual activity, and instead allowed prosecution where the defendant traveled in foreign commerce and actually engaged in illicit sexual activity with a

> minor. *See* PROTECT Act, §105, 117 Stat. at 654, codified as amended at 18 U.S.C. § 2423(c); H.R.Rep. No. 107-525 (2003) (Congress noted that this "legislation [would] close significant loopholes in the law that persons who travel to foreign countries seeking sex with children are currently using to their advantage in order to avoid prosecution").

Id. at 1232 (some citations omitted).

In this case, the government could not indict or prosecute Schneider under 18 U.S.C. §2423(c) because that statute's enactment post-dated Schneider's alleged conduct. Nonetheless, the government resorted to trying to prove to the jury that Schneider engaged in conduct that would have violated §2423(c) in the hope that the jury would convict Schneider of the seemingly less serious offenses of having traveled himself and transported Zavarov with the intent and purpose of engaging in such conduct. Yet, as the district court correctly concluded, *Mortensen* necessitated Schneider's acquittal on charges of having violated 18 U.S.C. §2421. And, as Schneider has shown herein and in his opening brief, *Mortensen* also necessitates Schneider's acquittal on charges of having violated 18 U.S.C. §2423(b), for if Schneider's transportation of Zavarov back to Russia was merely the return leg of an otherwise innocent round-

trip, then so was Schneider's transportation of himself back to Russia as part of the same otherwise innocent round-trip.

Because the evidence of record and the law applicable to this case compel the conclusion that Schneider's travel from Philadelphia back to Russia on August 21, 2001 was merely the return leg of an innocent round-trip, this Court should order the district court to enter a judgment of acquittal in Schneider's favor on his conviction for having violated 18 U.S.C. §2423(b).

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

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). App.107a-08a. Schneider was not indicted until January 14, 2010, more than eight years after the alleged offense took place. *Id.* 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.

In its appellate brief, the government contends that the indictment was timely under 18 U.S.C. §3283, a provision extending the statute of limitations for offenses involving the "sexual abuse" of a child. 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.

As this Court has recognized, "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). A defendant can be convicted of having violated §2423(b) whether or not an actual minor is involved or 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)). Moreover, as this Court recognized in *Pendleton*, 658

F.3d at 304, the offense proscribed in §2423(b) "is complete as soon as one begins to travel with the intent to engage in a sex act with a minor."

Under *Pendleton*, the offense prohibited in §2423(b) cannot constitute "an offense involving the sexual or physical abuse of a child under the age of 18 years" because the offense is fully complete before any sexual or physical abuse of a child ever occurs. Accordingly, this Court should set aside Schneider's conviction under §2423(b) as time-barred.

This case presents a question of first impression at the federal appellate level, as no court of appeals has ruled that 18 U.S.C. §3283 applies to extend the statute of limitations applicable to an offense charged under 18 U.S.C. 2423(b). The government's reliance on *United States* v. *Borazanian*, 148 Fed. Appx. 352 (6th Cir. 2005) (per curiam) (non-precedential), is misplaced, because that unpublished decision contains no statute of limitations discussion whatsoever.

In its brief for appellee, the government seems to contemplate an approach whereby the statute of limitation applicable to §2423(b) would be five years if the intended victim was make-believe (invented by the authorities to catch a potential child abuser) or the travel failed to result in the abuse of a child, even if the intended victim really existed. But in a case

such as this, where a real person is claiming to have engaged in sexual conduct following the actual offense, the extended time for prosecution conferred in §3283 would apply.

The government, however, fails to cite in its brief any caselaw or other authority for the proposition that a defendant's conduct occurring after the crime charged was completed (and thus not establishing elements of the crime itself) can operate to alter the statute of limitations applicable to a specific federal criminal offense. Rather, in support of its argument, the government asserts that under a federal law known as the Sex Offender Registration and Notification Act (SORNA), a district court can examine the underlying facts producing a defendant's conviction to see whether the defendant was a sex offender required to register under SORNA. Yet the cases on which the government relies fail to advance its argument, as the issue presented under SORNA has nothing to do with extending the statute of limitations depending on the underlying facts of a crime, let alone based on the defendant's alleged conduct occurring after the crime charged (travel with a proscribed purpose) had been completed.

Even were this Court inclined to accept the government's invitation to adopt a fluctuating statute of limitations applicable to 18 U.S.C. §2423(b)

depending on the defendant's alleged conduct after that crime was completed where an actual victim existed, the government's attempt to extend the otherwise applicable five-year limitations period based on the facts of Schneider's case cannot succeed.

Schneider's prosecution under §2423(b) cannot be said to have been a "prosecution for an offense involving the sexual or physical abuse of a child under the age of 18 years," 18 U.S.C. §3283, because — until 18 U.S.C. §2423(c) became law on April 30, 2003 — there existed no federal criminal prohibition of "the sexual or physical abuse of a child under the age of 18 years" by a U.S. citizen in a foreign country. And the district court's entry of a judgment of acquittal in favor of Schneider on count two, charging a violation of 18 U.S.C. §2421, was based in part on the government's failure to establish that Schneider's alleged sexual contact with Zavarov in 2001 violated Russian law. *See* 817 F. Supp. 2d at 602-05 & n.15 ("[I]n 2001 the age of consent in Russia was 15, so the Government could not have charged Schneider with intending to violate Russian criminal prohibitions on engaging in sexual acts with a minor because Zavarov was 15 in August 2001.").

Because, under even the government's suggested approach, 18 U.S.C. §3283 does not operate to extend the five-year statute of limitations applicable to the lone offense in count one for which Schneider remains convicted, the judgment of conviction should be reversed and this 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

A key piece of evidence in Schneider's defense was a supposedly anatomically correct drawing and accompanying description that Zavarov created at the request of counsel 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.

According to the urologist's testimony, a penis with Peyronie's disease contains hardened plaque that can only be cured by surgical removal. App.992a. The expert urologist further testified that he had medically

induced an erection in Schneider and observed no curvature, nor could he find any evidence either of existing plaque or that plaque had ever been surgically removed. App.968a-71a. The urologist thus testified, in his expert opinion, that Schneider's penis could never have had the appearance that Zavarov depicted in his drawing and description — which were 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.

Misrepresenting the expert urologist's testimony at trial about a small scar located on the underside of Schneider's penis that the urologist unambiguously testified was not a surgical scar evidencing the removal of penile plaques, in her closing argument to the jury, the government's lead attorney argued, "But here's the kicker, he also told you about surgery and the defendant has a scar. He got corrective treatment." App.1639a.

At trial, Schneider sought to inform the jury that he had been incarcerated continuously since May 17, 2010 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 reasonable jury could conclude that the time when Schneider might finally feel compelled to do something about that condition was after he was facing criminal charges, when he learned that Zavarov had sketched a supposedly anatomically correct drawing of Schneider's penis. Thus, if Zavarov's depiction had ever been accurate — which the defendant consistently denied and sought to disprove at trial — the defense wanted to demonstrate to the jury that Schneider had no ability to eliminate the abnormal appearance that Peyronie's disease had given his penis during the time when he would have felt most compelled to take the dramatic actions necessary, because he was then incarcerated.

Schneider's pretrial incarceration in this case constituted irrefutable proof that he was unable to seek or obtain any surgical or non-surgical treatment of his supposed Peyronie's disease during the critical four- or five-month period following disclosure of the drawing preceding trial because he had been incarcerated that entire time. 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 might

sympathize with Schneider for having been subjected to pretrial incarceration. App.1319a-20a. In so ruling, however, the district court erroneously made it far more likely Schneider would be convicted on these charges by excluding critical 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, it was the defendant who sought to use the fact of his pretrial incarceration to establish something of critical relevance to his defense — that he was incapable of obtaining any surgical or non-surgical treatment for his supposed Peyronie's disease in the months before trial. It is pure speculation to hypothesize that a jury might feel sympathy because a defendant accused of sexually abusing a child had been subjected to pretrial incarceration.

The cases on which the government relies in arguing that the district court's exclusion of this evidence was proper fail to support the government's argument. In *United States* v. *Pintado-Isiordia*, 448 F.3d 1155, 1158 (9th Cir. 2006), the appellate court explained that "the only apparent

purpose" for which the defendant wished to introduce a photograph of himself in military uniform was to elicit the jury's sympathy. Here, by contrast, eliciting the jury's sympathy was not the only purpose, or even a purpose, why Schneider wished to introduce evidence that he was precluded from seeking treatment of his supposed Peyronie's disease in the critical months before trial.

Similarly, in *United States* v. *Harris*, 491 F.3d 440, 447 (D.C. Cir. 2007), the defendant wished to introduce into evidence that he was a dedicated family man, but the appellate court agreed evidence of that character trait had no relevance to the case. Here, by contrast, the excluded evidence favorable to Schneider's defense was central to the case. His alleged victim was unable to accurately describe the supposed "weapon" through which sexual abuse had been repeatedly inflicted on him.

Finally, the government maintains that Schneider could have simply informed the jury he was unable to obtain any medical treatment for his supposed Peyronie's disease since May 2010, and that the government would not have directly contradicted that testimony. But in a case where Schneider's credibility was under siege, such testimony was no substitute

for evidence conclusively establishing that he was unable to obtain any treatment of his supposed Peyronie's disease while incarcerated.

Zavarov's inability to provide an anatomically correct depiction and description of Schneider's erect penis constitutes compelling evidence that Zavarov 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 therefore necessitates a new trial at which this evidence is admissible.

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

The district court concluded in deciding Schneider's post-trial motions 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 three years before the alleged commission of the offense. *See* 817 F. Supp. 2d at 606-08. 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." *Id.* at 608.

To prove count two, on which Schneider was later 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 would have 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.

Surprisingly, the government maintains in its appellate brief that this evidence was equally admissible as to count one, all but ignoring the district court's conclusion that the evidence was improperly admitted in the first place even as to count two. The government's assertion that the *Nijinsky* clips were properly admissible to prove "grooming" of the victim is no more persuasive here than this same argument was when the

government raised it in opposing Schneider's request for an acquittal under *Mortensen*.

As already explained above, the district court in a pretrial ruling rejected the government's "grooming" expert witness and the government's introduction of any evidence to prove grooming. S*ee United States* v. *Schneider*, 2010 WL 3734055, at *7 & n.6 (concluding that evidence about grooming "would not assist the jury or fit this case").

Consequently, the jury heard no expert testimony or argument from government's counsel on the subject of grooming. The government's assertion that lurid and inflammatory scenes from a movie that Schneider supposedly showed to Zavarov three years earlier was somehow relevant to proving Schneider's purpose in taking a return flight with Zavarov to Russia on August 21, 2001, as required by Zavarov's parents and American and Russian authorities, defies common sense.

This spillover evidence originally admitted solely in connection with the offense charged in count two 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 21, 2001 with the intent to engage in sex with Zavarov. With the exception of the dependency element applicable only to count two, the facts underlying each charge and the relevant evidence were identical. The risk of jury confusion from the spillover evidence was enormous, and the jury undoubtedly considered all of the evidence in reaching its verdict as to each count.

The government cannot satisfy its heavy burden of proving that the district court's conceded error in admitting this evidence was harmless. Accordingly, a new trial is necessary here.

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

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 explained that new evidence learned as a result of ongoing civil litigation brought against him by Zavarov strongly suggested Zavarov committed perjury at the trial of Schneider's criminal case and also identified 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.

On appeal, as in the district court, the government advances its own versions of the facts pertinent to these events to argue that no new trial is necessary. But all that the government's response highlights is the critical need for district court factfinding on these disputed factual issues.

The government's key witness at trial, Zavarov, now states — to his own lawyers and to his psychologist — that he committed perjury in his testimony about this matter. App.2309a-11a. The perjury, he told his psychologist (after consultation on the subject with his attorneys) was so serious that he could be facing ten years' imprisonment and was contemplating suicide. App.2310a. Zavarov believed that as a consequence of his now telling the truth Schneider's criminal conviction might be overturned. *Id.*

Zavarov's civil lawyers then filed, in August 2012, an "Errata Sheet" dated in May 2012, attempting to change two of Zavarov's answers given in his civil deposition. Supp.App.50. The matters addressed in the "Errata Sheet" are fairly trivial. They are therefore unlikely to be the same matters that Zavarov referred to as his serious "perjury." Only a hearing in the

district court can determine for certain, however, what it is that Zavarov said under oath that he now admits was "perjury." In a credibility-based case, it is never possible to dismiss a suggestion of perjury by a key witness as unimportant.

Furthermore, the government fails to explain how a witness who testifies for one day is entitled to be paid for 11 days, including six days the week prior to trial and four days during trial, nor why he would be handed a check before completing his attendance at trial, when he was supposedly mailed a check for his attendance after sentencing.

For the reasons set forth above and in Schneider's opening brief, under any or all of the possibly applicable legal standards, the district court should have held a hearing to allow Schneider 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

The government's attempt to justify the district court's reliance on so-called "relevant conduct" suffers from a clear flaw — under Third Circuit

law, in order for "relevant conduct" to be used to increase a defendant's sentence under the Sentencing Guidelines, it "must be criminal conduct." *Dickler*, 64 F.3d at 830-31.

Other federal appellate courts likewise have held that "relevant conduct" must be criminal in nature in order to increase a defendant's sentence. In *United States* v. *Shafer*, 199 F.3d 826, 831 (6th Cir. 1999), the court explained that "unless the conduct at issue amounts to an offense for which a criminal defendant could potentially be incarcerated," the conduct does not constitute "relevant conduct" that a district court can use to increase a Guidelines sentence. *See also United States* v. *Benns*, 740 F.3d 370, 374 (5th Cir. 2014) (same).

Not until 18 U.S.C. §2423(c) became law in April 2003 did the sexual abuse of a minor by a U.S. citizen in a foreign country become a federal crime. Nor did the district court hold that Schneider's supposed sexual contact with Zavarov, used to massively increase Schneider's base offense level, violated Russian law. Indeed, the district court's only discussion of Russian law was to conclude that the government had failed to establish as to count two, alleging a violation of 18 U.S.C. §2421, that Schneider's

supposed sexual contact with Zavarov in Russia violated Russian law. *See* 817 F. Supp. 2d at 602-05.

Because the United States could not convict Schneider for the sexual abuse of a Russian citizen in Russia before 18 U.S.C. §2423(c) became law in April 2003, the question then becomes whether it is proper to include solely foreign crimes in calculating Schneider's base offense level, which is precisely what the district court did here. In *United States* v. *Azeem*, 946 F.2d 13 (2d Cir. 1991), the Second Circuit held that the Sentencing Guidelines do not allow a defendant's base offense level to be increased due to crimes committed outside the United States punishable only under foreign law. *Id.* at 16-18 ("the Cairo transaction should not have been included in the base offense level calculation because it was not a crime against the United States"); *see also United States* v. *Chao Fan Xu*, 706 F.3d 965, 992-93 (9th Cir. 2013) (citing *Azeem*).[3]

[3] This Court's decision in *United States* v. *Harvey*, 2 F.3d 1318, 1325-30 (3d Cir. 1993), is distinguishable. In *Harvey*, unlike here, the defendant's violation of foreign law (creating child pornography overseas) was a necessary precondition to the offense of conviction (possessing that child pornography in the United States).

Accordingly, Schneider's sentence should be vacated, this case should be remanded for resentencing, and Schneider should be freed on bail pending any further proceedings.

III. CONCLUSION

For the reasons explained above and in Schneider's opening brief, this Court should direct the 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 should 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: December 19, 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 November 10, 2014 allowing a reply brief of not more than 8,050 words, because this brief contains 7,956 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: December 19, 2014

/s/ Howard J. Bashman
Howard J. Bashman

CERTIFICATION OF ELECTRONIC FILING AND VIRUS CHECK

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

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Dated: December 19, 2014

/s/ Howard J. Bashman
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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 document is being served electronically on them by the Notice of Docket Activity:

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