

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. NICHOLAS KEITGES, Defendant.	4:23-CR-40131-KES FINAL INSTRUCTIONS TO THE JURY
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VERDICT FORM

FINAL INSTRUCTION NO. 1 – INTRODUCTION

Members of the jury, the written instructions I gave you at the beginning of the trial and the oral instructions I gave you during the trial remain in effect. I now give you some additional instructions.

The instructions I am about to give you, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room. *All* instructions, whenever given and whether in writing or not, must be followed. This is true even though some of the instructions I gave you at the beginning of the trial are not repeated here.

FINAL JURY INSTRUCTION NO. 2 – DISPOSITION OF COUNT 4

At the beginning of the trial, I told you that Keitges was accused of one count of attempted production of child pornography; three counts of transportation of child pornography, and one count of possession of child pornography. Since the trial started, however, Count 4: Transportation of Child Pornography has been disposed of. That charge is no longer before you, and the only crimes that Keitges is charged with now are Count 1: Attempted Production of Child Pornography; Count 2: Transportation of Child Pornography; Count 3: Transportation of Child Pornography; and Count 5: Possession of Child Pornography. You should not guess about or concern yourselves with the reason for this disposition. You are not to consider this fact when deciding if the government has proved, beyond a reasonable doubt, the counts that remain.

FINAL INSTRUCTION NO. 3 – ATTEMPTED PRODUCTION OF CHILD
PORNOGRAPHY

For you to find Nicholas Keitges guilty of the offense of Attempted Production of Child Pornography, as charged in Count 1 of the Indictment, the prosecution must prove the following four essential elements beyond a reasonable doubt:

One, that on or about between April 20, 2022, and April 22, 2022, in the District of South Dakota and elsewhere, Keitges believed that A.R. was under the age of eighteen;

The government is not required to prove that Keitges knew that A.R. was under the age of eighteen. Instead, the government must prove that Keitges believed A.R. to be under the age of eighteen.

Two, that Keitges attempted to employ, use, persuade, induce, entice, or coerce A.R. to engage in sexually explicit conduct;

A person is “used” if they are photographed or videotaped.

“Sexually explicit conduct” means actual or simulated sexual intercourse, including genital-genital, oral-genital, anal-genital, oral-anal, whether between persons of the same or opposite sex; bestiality, masturbation, sadistic or masochistic abuse, or lascivious exhibition of the genitals or pubic area of any person.

Whether a visual depiction of the genitals or pubic area constitutes a lascivious exhibition requires consideration of the overall content of the material. You may consider such factors as:

- (1) whether the focal point of the picture is on the minor’s genitals or pubic area;
- (2) whether the setting of the picture is sexually suggestive—that is, in a place or pose generally associated with sexual activity;
- (3) whether the minor is depicted in an unnatural pose or in inappropriate attire, considering the age of the minor;
- (4) whether the minor is fully or partially clothed, or nude,
- (5) whether the picture suggests sexual coyness or a willingness to engage in sexual activity;
- (6) whether the picture is intended or designed to elicit a sexual response in the viewer;

- (7) whether the picture portrays the minor as a sexual object;
and
- (8) any captions on the visual depictions.

You decide what weight, if any, to give to each of these factors. A picture need not involve all of these factors to constitute a lascivious exhibition of the genitals or pubic area.

Keitges may be found guilty of an attempt if he intended to employ, use, persuade, induce, entice, or coerce A.R. to engage in sexually explicit conduct and voluntarily and intentionally carried out some act which was a substantial step toward that offense.

A “substantial step,” as used in this instruction, must be something more than mere preparation, yet may be less than the last act necessary before the actual commission of the substantive crime. In order for behavior to be punishable as an attempt, it need not be incompatible with innocence, yet it must be necessary to the consummation of the crime and be of such a nature that a reasonable observer, viewing it in context, could conclude beyond a reasonable doubt that it was undertaken in accordance with a design to violate the statute.

Three, that Keitges voluntarily and intentionally engaged in this behavior for the purpose of producing a visual depiction of such conduct;

An item is “produced” if it is produced, directed, manufactured, issued, published, advertised, created, made, or is in any other way brought into being by the involvement of an individual participating in the recording of a visual depiction of sexually explicit conduct.

The term “visual depiction” includes any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means.

Intent or knowledge may be proved like anything else. You may consider any statements made and acts done by the defendant, and all the facts and circumstances in evidence which may aid in a determination of the defendant's knowledge or intent. You may, but are not required to, infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

And four, that the materials used to attempt to produce the visual depiction were mailed, shipped, or transported, including by computer, in interstate and foreign commerce.

The term “interstate commerce” means commerce between any combination of states, territories, and possessions of the United States, including the District of Columbia.

The phrase “foreign commerce,” as used above, means commerce or travel between any state, territory or possession of the United States and a foreign country.

The term “commerce” includes, among other things, travel, trade, transportation, and communication. The Internet is an instrumentality and channel of interstate commerce.

For you to find Keitges guilty of the offense charged in Count 1 of the Indictment, the prosecution must prove all four of the essential elements beyond a reasonable doubt. If you find that the prosecution has not proved each of the essential elements beyond a reasonable doubt, then you must find Keitges not guilty of Count 1 of the Indictment.

FINAL INSTRUCTION NO. 4 – TRANSPORTATION OF CHILD PORNOGRAPHY

For you to find Nicholas Keitges guilty of the offense of Transportation of Child Pornography, as charged in Count 2 of the Indictment, the prosecution must prove the following three essential elements beyond a reasonable doubt:

One, that on or about between October 6, 2020, and February 27, 2023, in the District of South Dakota and elsewhere, Keitges knowingly transported material that contained visual depictions of child pornography, by uploading such material into an internet website named Dropbox and into an account associated with “[Name Redacted]@gmail.com”;

“Knowledge,” and “visual depiction” are further defined above in Final Instruction No. 3.

The term “child pornography” means any visual depiction of a minor engaging in sexually explicit conduct, where the minor was engaged in the sexually explicit conduct during production of the depiction.

You have heard evidence of more than one visual depiction involved in the offense. You must agree unanimously which visual depiction(s), if any, that the defendant transported.

Two, that Keitges knew the visual depictions were of a minor engaging in sexually explicit conduct;

The term “minor” means a person under the age of eighteen years.

“Visual depiction,” and “sexually explicit conduct” are further defined above in Final Instruction No. 3.

And three, that the material containing the visual depictions had been mailed, shipped or transported using any means or facility of interstate or foreign commerce, or in or affecting interstate or foreign commerce, including by computer.

“Interstate commerce,” “foreign commerce,” and “commerce” are further defined above in Final Instruction No. 3.

For you to find Keitges guilty of the offense charged in Count 2 of the Indictment, the prosecution must prove all three of the essential elements beyond a reasonable doubt. If you find that the prosecution has not proved each of the essential elements beyond a reasonable doubt, then you must find Keitges not guilty of Count 2 as charged in the Indictment.

FINAL INSTRUCTION NO. 5 – TRANSPORTATION OF CHILD PORNOGRAPHY

For you to find Nicholas Keitges guilty of the offense of Transportation of Child Pornography, as charged in Count 3 of the Indictment, the prosecution must prove the following three essential elements beyond a reasonable doubt:

One, that on or about between October 16, 2022, and July 3, 2023, in the District of South Dakota and elsewhere, Keitges knowingly transported material that contained visual depictions of child pornography, by uploading such material into an internet website named Google and into an account associated with “[Name Redacted]@gmail.com”;

“Knowledge” is further defined above in Final Instruction No. 3 and “child pornography” is further defined above in Final Instruction No. 4.

You have heard evidence of more than one visual depiction involved in the offense. You must agree unanimously which visual depiction(s), if any, that the defendant transported.

Two, that Keitges knew the visual depictions were of a minor engaging in sexually explicit conduct;

“Minor” is further defined above in Final Instruction No. 4.

“Visual depiction,” and “sexually explicit conduct” are further defined above in Final Instruction No. 3.

And three, that the material containing the visual depictions had been mailed, shipped or transported using any means or facility of interstate or foreign commerce, or in or affecting interstate or foreign commerce, including by computer.

“Interstate commerce,” “foreign commerce,” and “commerce” are further defined above in Final Instruction No. 3.

For you to find Keitges guilty of the offense charged in Count 3 of the Indictment, the prosecution must prove all three of the essential elements beyond a reasonable doubt. If you find that the prosecution has not proved each of the essential elements beyond a reasonable doubt, then you must find Keitges not guilty of Count 3 as charged in the Indictment.

FINAL INSTRUCTION NO. 6 – POSSESSION OF CHILD PORNOGRAPHY

For you to find Nicholas Keitges guilty of the offense of Possession of Child Pornography, as charged in Count 5 of the Indictment, the prosecution must prove the following three essential elements beyond a reasonable doubt:

One, that on or about between March 11, 2023, and August 30, 2023, Keitges knowingly possessed material that contained a visual depiction of child pornography;

“Knowledge” and “visual depiction” are further defined above in Final Instruction No. 3 and “child pornography” is further defined above in Final Instruction No. 4.

The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may have sole or joint possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it. A person who, although not in actual possession has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint. Whenever the word “possession” has been used in these instructions it includes actual as well as constructive possession and sole as well as joint possession.

You have heard evidence of more than one visual depiction involved in the offense. You must agree unanimously which visual depiction(s), if any, that the defendant possessed.

Two, that Keitges knew the visual depiction was of a minor engaging in sexually explicit conduct;

“Visual depiction,” and “sexually explicit conduct” are further defined above in Final Instruction No. 3.

And three, that the material containing the visual depiction was produced using materials that had been mailed, shipped, or transported, including by computer, in or affecting interstate or foreign commerce.

“Interstate commerce,” “foreign commerce,” and “commerce” are further defined above in Final Instruction No. 3.

Images transmitted or received over the Internet have moved in interstate or foreign commerce. It is for you to determine, however, if the material containing the visual depiction had been transmitted or received over the Internet or was produced using materials that had been transmitted or received over the Internet.

For you to find Keitges guilty of the offense charged in Count 5 of the Indictment, the prosecution must prove all three of the essential elements beyond a reasonable doubt. If you find that the prosecution has not proved each of the essential elements beyond a reasonable doubt, then you must find Keitges not guilty of Count 5 as charged in the Indictment.

FINAL JURY INSTRUCTION NO. 7 – OTHER ACTS

You have heard evidence of a conversation between “berlinink1944” and another user on Snapchat with the username “esm69_tsuyuasui” and evidence of Website Bookmarks. You may consider each piece of this evidence only if you unanimously find that it is more likely true than not true that Keitges committed the acts alleged. This is a lower standard of proof than beyond a reasonable doubt. You decide that by considering all of the evidence relating to the alleged act, then deciding what evidence is more believable.

If you decide that the evidence has not been proved, then you must disregard it. If you decide this evidence has been proved, then you may consider it only for the limited purpose of deciding whether the defendant had intent, state of mind, knowledge, or there was the lack of mistake necessary to commit the crimes charged in the Indictment. You should give it the weight and value you believe it is entitled to receive.

Keitges is on trial only for the crimes listed in the Indictment and you may consider the evidence of other acts only on the issue stated above.

FINAL INSTRUCTION NO. 8 – EXPERT TESTIMONY

You have heard testimony from persons described as experts. Persons who, by knowledge, skill, training, education or experience, have become experts in some field may state their opinions on matters in that field and may also state the reasons for their opinion.

Expert testimony should be considered just like any other testimony. You may accept or reject it, and give it as much weight as you think it deserves, considering the witness' education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all the other evidence in the case.

FINAL INSTRUCTION NO. 9 – CREDIBILITY OF WITNESSES

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In deciding what testimony to believe, consider the witness' intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness' memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

FINAL INSTRUCTION NO. 10 – IMPEACHMENT

In Preliminary Instruction No. 6, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness’s present testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and therefore whether they affect the credibility of that witness.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness’s testimony whatever weight, if any, you think it deserves.

Your decision on the facts of this case should not be determined by the number of witnesses testifying for or against a party. You should consider all the facts and circumstances in evidence to determine which of the witnesses you choose to believe or not believe. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

FINAL INSTRUCTION NO. 11 – PRESUMPTION OF INNOCENCE AND
BURDEN OF PROOF

The presumption of innocence means that a defendant is presumed to be absolutely not guilty.

- This presumption means that you must put aside all suspicion that might arise from a defendant's arrest, the charges, or the fact that he is here in court.
- This presumption remains with a defendant throughout the trial.
- This presumption is enough, alone, for you to find a defendant not guilty, unless the prosecution proves, beyond a reasonable doubt, all of the elements of an offense charged against him.

The burden is always on the prosecution to prove guilt beyond a reasonable doubt.

- This burden never, ever shifts to a defendant to prove his innocence.
- This burden means that, if a defendant does not testify, you must not consider that fact in any way, or even discuss it, in arriving at your verdict.
- This burden means that a defendant does not have to call any witnesses, produce any evidence, cross-examine the prosecution's witnesses, or testify.

This burden means that you must find Keitges not guilty of an offense charged against him, unless the prosecution proves beyond a reasonable doubt that he has committed each and every element of that offense.

FINAL INSTRUCTION NO. 12 – REASONABLE DOUBT

A reasonable doubt is a doubt based upon reason and common sense.

- A reasonable doubt may arise from evidence produced by the prosecution or a defendant, keeping in mind that a defendant never, ever has the burden or duty to call any witnesses or to produce any evidence.
- A reasonable doubt may arise from the prosecution's lack of evidence.

The prosecution must prove a defendant's guilt beyond a reasonable doubt.

- Proof beyond a reasonable doubt requires careful and impartial consideration of all the evidence in the case before making a decision.
- Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt.
- Proof beyond a reasonable doubt is proof so convincing that you would be willing to rely and act on it in the most important of your own affairs.

The prosecution's burden is heavy, but it does not require proof beyond all possible doubt.

FINAL INSTRUCTION NO. 13 - DUTY TO DELIBERATE

A verdict must represent the careful and impartial judgment of each of you. Before you make that judgment, you must consult with one another and try to reach agreement if you can do so consistent with your individual judgment.

- If you are convinced that the prosecution has not proved beyond a reasonable doubt that a defendant is guilty, say so.
- If you are convinced that the prosecution has proved beyond a reasonable doubt that a defendant is guilty, say so.
- Do not give up your honest beliefs just because others think differently or because you simply want to be finished with the case.
- On the other hand, do not hesitate to re-examine your own views and to change your opinion if you are convinced that it is wrong.
- You can only reach a unanimous verdict if you discuss your views openly and frankly, with proper regard for the opinions of others, and with a willingness to re-examine your own views.
- Remember that you are not advocates, but judges of the facts, so your sole interest is to seek the truth from the evidence.
- The question is never who wins or loses the case, because society always wins, whatever your verdict, when you return a just verdict based solely on the evidence, reason, your common sense, and these Instructions.
- You must consider all of the evidence bearing on each element before you.
- Take all the time that you feel is necessary.
- Remember that this case is important to the parties and to the fair administration of justice, so do not be in a hurry to reach a verdict just to be finished with the case.

FINAL INSTRUCTION NO. 14 – DUTY DURING DELIBERATIONS

You must follow certain rules while conducting your deliberations and returning your verdict:

- Select a foreperson to preside over your discussions and to speak for you here in court.
- Do not consider punishment in any way in deciding whether a defendant is guilty or not guilty. If a defendant is guilty, I will decide what the sentence should be.
- Communicate with me by sending me a note through a Court Security Officer (CSO). The note must be signed by one or more of you. Remember that you should not tell anyone, including me, how your votes stand. I will respond as soon as possible, either in writing or orally in open court.
- Base your verdict solely on the evidence, reason, your common sense, and these Instructions. Again, nothing I have said or done was intended to suggest what your verdict should be—that is entirely for you to decide.
- Reach your verdict without discrimination. In reaching your verdict, you must not consider a defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against a defendant unless you would return the same verdict without regard to his race, color, religious beliefs, national origin, or sex.
- Complete the Verdict Form. The foreperson must bring the signed verdict form to the courtroom when it is time to announce your verdict.
- When you have reached a verdict, the foreperson will advise the CSO that you are ready to return to the courtroom.
- It is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so

without violence to individual judgment, because a verdict—whether guilty or not guilty—must be unanimous.

Good luck with your deliberations.

Dated January 22, 2026.

BY THE COURT:



KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE