

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF SOUTH DAKOTA**  
**WESTERN DIVISION**

UNITED STATES OF AMERICA,  <div style="text-align:right">Plaintiff,</div> <div style="text-align:center">vs.</div>  KYLE GARRETT SOTO,  <div style="text-align:right">Defendant.</div>	5:18-CR-50050-01-KES  <div style="text-align:center"><b>FINAL INSTRUCTIONS TO THE JURY</b></div>
---	--

**TABLE OF CONTENTS**

FINAL INSTRUCTIONS

NO. 1 – INTRODUCTION .....	1
NO. 2 – DESCRIPTION OF CHARGES.....	2
NO. 3 – SEXUAL EXPLOITATION OF A MINOR .....	3
NO. 4 – ATTEMPTED SEXUAL EXPLOITATION OF A MINOR .....	6
NO. 5 – ENTICEMENT OF A MINOR USING THE INTERNET .....	8
NO. 6 – ATTEMPTED ENTICEMENT OF A MINOR USING THE INTERNET .....	10
NO. 7 – RECEIPT OF CHILD PORNOGRAPHY .....	12
NO. 8 – POSSESSION OF CHILD PORNOGRAPHY .....	14
NO. 9 – IMPEACHMENT .....	16
NO. 10 – LIMITING INSTRUCTION.....	17
NO. 11 – PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF .....	18
NO. 12 – REASONABLE DOUBT.....	19
NO. 13 – DUTY TO DELIBERATE .....	20
NO. 14 – DUTY DURING DELIBERATIONS .....	21

VERDICT FORM

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.

## NO. 2 – DESCRIPTION OF CHARGES

The Indictment in this case charges Kyle Garrett Soto with 15 crimes:

Counts 1, 5, 7, and 11 of the Indictment charge Kyle Garrett Soto with sexual exploitation of a minor.

Counts 2 and 9 charge Kyle Garrett Soto with attempted sexual exploitation of a minor.

Counts 3, 6, 8, 10, and 12 charge Kyle Garrett Soto with enticement of a minor using the internet.

Count 4 charges Kyle Garrett Soto with attempted enticement of a minor using the internet.

Counts 13 and 14 charge Kyle Garrett Soto with receipt of child pornography.

Count 15 charges Kyle Garrett Soto with possession of child pornography.

Soto has pleaded not guilty to each of these charges.

Keep in mind that each count charges a separate crime. You must consider each count separately, and return a separate verdict for each count.

NO. 3 – SEXUAL EXPLOITATION OF A MINOR

For you to find Kyle Garrett Soto guilty of the offenses charged in counts 1, 5, 7, or 11 of the Indictment, the prosecution must prove the following four essential elements for each count beyond a reasonable doubt:

**One, that on or about the dates listed in the chart below, the individual was under the age of eighteen years;**

The government is not required to prove that the defendant knew that the minor was under the age of eighteen.

**Two, that Soto knowingly employed, used, persuaded, induced, enticed, or coerced the minor 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, or oral-anal, whether between persons of the same or opposite sex, masturbation, 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 a 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) the caption(s) on the pictures.

It is for you to decide the weight or lack of weight to be given to any of these factors. A picture need not involve all of these factors to constitute a lascivious exhibition of the genitals or pubic area.

Intent or knowledge may be proved like anything else. You may consider any statements made and acts done by the defendant—except whether or not he testified in court—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.

A person acts knowingly if he acts intentionally and voluntarily, and not because of ignorance, mistake, accident, or carelessness.

***Three, that Soto acted with 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 any other way brought into being by the involvement of an individual participating in the recording of child pornography.

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. It includes undeveloped film and videotape, and data stored on computer disk by electronic means which is capable of conversion into a visual image.

***And four, that Soto knew or had reason to know that such visual depiction would be transported or transmitted using any means or facility of interstate commerce in or affecting interstate commerce.***

Each count of sexual exploitation of a minor constitutes a separate offense. The actions charged are set forth as follows:

Count	Individual(s)	Dates
1	W.S.	November 15, 2017
5	K.A.	Between February 18, 2018 and February 21, 2018
7	N.W. and A.C.	Between February 21, 2018 and March 2, 2018
11	"Star Pants	March 27, 2018

For you to find the defendant guilty of any of the crimes charged in Counts 1, 5, 7, or 11 of the Indictment, the government must prove all of these essential elements beyond a reasonable doubt; otherwise, you must find the defendant not guilty of the crimes charged. If the government has proved all four of these elements beyond a reasonable doubt for a count, then you must find Soto guilty of that count as charged in the Indictment. If the government has not proved all four of these elements beyond a reasonable doubt, then you must find Soto not guilty of that count as charged in the Indictment.

NO. 4 – ATTEMPTED SEXUAL EXPLOITATION OF A MINOR

For you to find Kyle Garrett Soto guilty of the offenses charged in Counts 2 or 9 of the Indictment, the prosecution must prove the following four essential elements beyond a reasonable doubt:

**One, that on or about the date listed in the chart below, Soto believed the person as alleged in the respective count of the indictment was under the age of 18;**

It is not necessary that the government prove that Soto interacted with an actual individual who was less than 18 years of age, but the government must prove that Soto believed the individual to be under that age.

The government is not required to prove that the defendant knew that the minor was under the age of eighteen.

**Two, that Soto knowingly attempted to employ, use, persuade, induce, entice, or coerce the person to engage in sexually explicit conduct;**

The term “use” is described for you in Final Instruction No. 3.

The term “sexually explicit conduct” is described for you in Final Instruction No. 3.

A description of some factors you may consider in evaluating whether conduct is a “lascivious exhibition” is provided in Final Instruction No. 3.

A person may be found guilty of an attempt if he intended to commit sexual exploitation of a minor and voluntarily and intentionally carried out some act which was a substantial step toward that.

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 violation the statute.

A description of what it means to act with intent or knowledge is included in Final Instruction No. 3.

**Three, that Soto acted with the purpose of producing a visual depiction of such conduct;**

The term “produced” is described for you in Final Instruction No. 3.

The term “visual depiction” is described for you in Final Instruction No. 3.

**And four, that Soto knew or had reason to know that such visual depiction would be transported or transmitted using any means or facility of interstate commerce in or affecting interstate commerce.**

Each count of attempted sexual exploitation of a minor constitutes a separate offense. The actions charged are set forth as follows:

Count	Individual	Dates
2	Undercover law enforcement officer posing as W.S.	February 20, 2018
9	A.R.	Between September 17, 2017 and February 8, 2018

For you to find the defendant guilty of any of the crimes charged in Counts 2 or 9 of the Indictment, the government must prove all of these essential elements beyond a reasonable doubt; otherwise, you must find the defendant not guilty of the crimes charged. If the government has proved all four of these elements beyond a reasonable doubt for a count, then you must find Soto guilty of that count as charged in the Indictment. If the government has not proved all four of these elements beyond a reasonable doubt, then you must find Soto not guilty of that count as charged in the Indictment.



NO. 5 – ENTICEMENT OF A MINOR USING THE INTERNET

For you to find Kyle Garrett Soto guilty of the offenses charged in counts 3, 6, 8, 10, or 12 of the Indictment, the prosecution must prove the following four essential elements for each count beyond a reasonable doubt:

**One, that on or about the dates listed in the chart below, Soto knowingly used a cellular phone or computer attached to the internet to persuade, induce, entice, or coerce an individual under the age of 18 to engage in sexual activity;**

A description of what it means to act with intent or knowledge is included in Final Instruction No. 3.

**Two, that Soto believed that such individual was less than 18 years of age;**

The defendant need not know the age of the intended victim, so long as he believed that the victim was under the age of 18.

**Three, that if the sexual activity that occurred, Soto could have been charged with a criminal offense under the laws of the United States, or under the laws of the State of South Dakota.**

As to counts 3, 6, 8, and 12, the elements that the government is required to prove for the offense of sexual exploitation of a minor are provided for you in Final Instruction No. 3.

As to Count 10, the elements that the government is required to prove for the offense of possession, manufacture, or distribution of child pornography under South Dakota law are as follows:

*One*, that the defendant created, caused or knowingly permitted the creation, knowingly possessed, knowingly distributed or otherwise disseminated any visual depiction;

*Two*, that the visual depiction showed a minor; and

*Three*, that the minor was engaging in a prohibited sexual act or in the simulation of such an act.

A visual depiction shows a prohibited sexual act if it shows the actual or simulated exhibition of the bare feminine breasts in a lewd or lascivious manner.

**And four, that Soto intended to persuade, induce, entice, or coerce an individual who had not yet attained 18 years of age to engage in sexual activity.**

Each count of enticement of a minor using the internet constitutes a separate offense. The actions charged are set forth as follows:

<b>Count</b>	<b>Individual(s)</b>	<b>Crime for which Soto Could have been Charged</b>
3	W.S.	Sexual Exploitation of a Minor
6	K.A.	Sexual Exploitation of a Minor
8	N.W. and A.C.	Sexual Exploitation of a Minor
10	A.R.	Possession, manufacture, or distribution of child pornography
11	"Star Pants"	Sexual exploitation of a minor

For you to find the defendant guilty of any of the crimes charged in Counts 3, 6, 8, 10, or 12 of the Indictment, the government must prove all of these essential elements beyond a reasonable doubt; otherwise, you must find the defendant not guilty of the crimes charged. If the government has proved all four of these elements beyond a reasonable doubt for a count, then you must find Soto guilty of that count as charged in the Indictment. If the government has not proved all four of these elements beyond a reasonable doubt, then you must find Soto not guilty of that count as charged in the Indictment.

NO. 6 – ATTEMPTED ENTICEMENT OF A MINOR USING THE INTERNET

For you to find Kyle Garrett Soto guilty of the offense charged in Count 4 of the Indictment, the prosecution must prove the following four essential elements beyond a reasonable doubt:

**One, that on or about February 20, 2018, Soto knowingly used the internet to attempt to persuade, induce, entice, or coerce a person who was an undercover law enforcement officer posing as W.S., an 11-year-old boy, to engage in sexual activity;**

It is not necessary that the government prove that Soto interacted with an actual individual who was less than 18 years of age, but the government must prove that Soto believed the individual to be under that age.

It is not necessary for the government to prove the individual was actually persuaded, induced, enticed, or coerced, but it is necessary for the government to prove that the defendant intended to engage in sexual exploitation of a minor and knowingly and willfully took a substantial step toward bringing about or engaging in exploitation of a minor.

“Attempt” is described for you in Final Instruction No. 4.

A “substantial step” is described for you in Final Instruction No. 4.

A description of what it means to act with intent or knowledge is included in Final Instruction No. 3.

**Two, that Soto believed that such individual was less than 18 years of age;**

The defendant need not know the age of the intended victim, so long as he believed that the victim was under the age of 18.

It is not necessary that there was an actual minor victim. The “victim” may, in fact, be an undercover police officer.

**Three, that if the sexual activity had occurred, Soto could have been charged with a criminal offense under the laws of the United States, namely, sexual exploitation of a minor;**

The elements that the government is required to prove for the offense of sexual exploitation of a minor are provided for you in Final Instruction No. 3.

***And four, that Soto intended to persuade, induce, entice, or coerce an individual who had not yet attained 18 years of age to engage in sexual activity.***

A description of what it means to act with intent or knowledge is included in Final Instruction No. 3.

For you to find the defendant guilty of the crime charged in Count 4 of the Indictment, the government must prove all of these essential elements beyond a reasonable doubt; otherwise, you must find the defendant not guilty of the crime charged. If the government has proved all four of these elements beyond a reasonable doubt for Count 4, then you must find Soto guilty of that count as charged in the Indictment. If the government has not proved all four of these elements beyond a reasonable doubt, then you must find Soto not guilty of Count 4 as charged in the Indictment.

NO. 7 – RECEIPT OF CHILD PORNOGRAPHY

For you to find Kyle Garrett Soto guilty of the offense of receipt of child pornography as charged in Counts 13 or 14 of the Indictment, the prosecution must prove the following three essential elements for each count beyond a reasonable doubt:

**One, that on or about the dates listed in the chart below, Soto knowingly received materials that contained visual depictions of child pornography;**

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.

The term “visual depiction” is described for you in Final Instruction No. 3.

A description of what it means to act with intent or knowledge is included in Final Instruction No. 3.

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

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

The term “sexually explicit conduct” is described for you in Final Instruction No. 3.

A description of some factors you may consider in evaluating whether conduct is a “lascivious exhibition” is included under Final Instruction No. 3.

**And three, that the materials containing the visual depictions had been mailed, shipped, or transported in or affecting interstate or 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” means commerce 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.

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.

You have heard evidence of more than one visual depiction involved in the offense. You must agree unanimously as to which visual depiction or depictions the defendant received. You are instructed that the government is only required to prove that Soto received a single image.

Each count of receipt of child pornography constitutes a separate offense. The actions charged are set forth as follows:

<b>Count</b>	<b>Dates</b>	<b>Account</b>
13	Between May 14, 2016 and April 24, 2018	Jessica Smith Dropbox account
14	Between February 14, 2014 and April 24, 2018	Shane118@gmail.com email and Google Drive account

For you to find Soto guilty of the offense charged in Counts 13 or 14 of the Indictment, the prosecution must prove all three of the essential elements beyond a reasonable doubt for each count. Otherwise, you must find Soto not guilty of the offense charged in <sup>Counts 13 + 14</sup> the of the Indictment.

NO. 8 – POSSESSION OF CHILD PORNOGRAPHY

For you to find Kyle Garrett Soto guilty of the offense of possession of child pornography as charged in Count 15 of the Indictment, the prosecution must prove the following three essential elements beyond a reasonable doubt:

**One, that on or about April 24, 2018, Soto knowingly possessed materials that contained visual depictions of child pornography;**

The term “child pornography” was described for you in Final Instruction No. 7.

The term “visual depiction” was described for you in Final Instruction No. 3.

A description of what it means to act with intent or knowledge is included in Final Instruction No. 3.

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 also sole as well as joint possession.

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

The term “minor” was defined for you in Final Instruction No. 7.

The term “sexually explicit conduct” was defined for you in Final Instruction No. 3.

A description of some factors you may consider in evaluating whether conduct is a “lascivious exhibition” is included under Final Instruction No. 3.

***And three, that the materials containing the visual depictions had been shipped or transported in interstate or foreign commerce or were produced using materials that had been mailed, shipped, or transported in interstate or foreign commerce.***

The term "interstate commerce" was defined for you in Final Instruction No. 8.

The term "foreign commerce" was defined for you in Final Instruction No. 8.

The term "commerce" was defined for you in Final Instruction No. 8.

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.

You have heard evidence of more than one visual depiction involved in the offense. You must agree unanimously as to which visual depiction or depictions the defendant possessed. You are instructed that the government is only required to prove that Soto possessed a single image.

You have also heard evidence of possession of child pornography. You must agree unanimously as to whether Soto possessed computer files that contained visual depictions of child pornography.

For you to find Soto guilty of the offense charged in Count 15 of the Indictment, the prosecution must prove all three of the essential elements beyond a reasonable doubt. Otherwise, you must find Soto not guilty of the offense charged in Count 15 of the Indictment.



## NO. 9 – 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.

NO. 10 – LIMITING INSTRUCTION

You have heard and seen evidence in which W.S., K.A., A.R., N.W., and A.C. made statements during the course of their email exchanges with the individual using the shane118@gmail.com account either that they were minors or they stated they were some age below eighteen years old or both. Such statements were not offered as proof of the necessary element in each of these charges that these individuals were below the age of eighteen, rather such statements were offered to illustrate the state of mind of the individual using the shane118@gmail.com account and to provide context for the conversations between that individual and the alleged victims, W.S., K.A., A.R., N.W., and A.C.

## NO. 11 – PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

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

- This presumption means that you must put aside all suspicion that might arise from the defendant's arrest, the charge, or the fact that he is here in court.
- This presumption remains with the defendant throughout the trial.
- This presumption is enough, alone, for you to find the 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 the defendant to prove his innocence.
- This burden means that the defendant does not have to call any witnesses, produce any evidence, cross-examine the prosecution's witnesses, or testify.
- This burden means that, if the 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 you must find the defendant 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.

## 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 the defendant, keeping in mind that the 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 the 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 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.

### 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 the defendant is guilty, say so.
- If you are convinced that the prosecution has proved beyond a reasonable doubt that the 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.

#### NO. 14 – DUTY DURING DELIBERATIONS

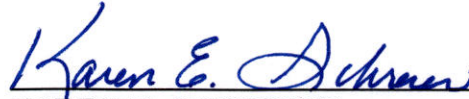
You must follow certain rules while conducting your deliberations and returning your verdict:

- 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 the defendant is guilty or not guilty. If the 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 the defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the 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.

Good luck with your deliberations.

Dated April 16, 2021.

BY THE COURT:

A handwritten signature in blue ink, reading "Karen E. Schreier", is written over a horizontal line.

KAREN E. SCHREIER  
UNITED STATES DISTRICT JUDGE