No. 09-11978

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

JOHN PILATI,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

BRIEF FOR THE UNITED STATES AS APPELLEE

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United States v. *Pilati*, 09-11978

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

I hereby certify that the following persons may have an interest in the outcome of this case:

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9) The Honorable Virginia Emerson Hopkins, Judge, United States District Court for the Northern District of Alabama

10) Martin, Alice H., Former United States Attorney for the Northern District of Alabama, Birmingham, Alabama.

11) The Honorable John E. Ott, United States Magistrate Judge for the Northern District of Alabama.

12) Pilati, John, Defendant.

13) Vance, Joyce White, United States Attorney for the Northern District of Alabama, Birmingham, Alabama.

s/ Conor B. Dugan
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STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose Pilati's request for oral argument.

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STATEMENT OF JURISDICTION

The magistrate court had jurisdiction under 18 U.S.C. 3401. After the jury returned a guilty verdict, the magistrate judge sentenced John Pilati on March 6, 2008, and entered final judgment against Pilati on March 7, 2008. ER 75.[1] Pilati filed a notice of appeal on March 10, 2008. ER 76. The District Court's

[1] This brief uses the following abbreviations: "ER __ at __" refers to Pilati's excerpts of record and lists the document number on the district court docket sheet, followed by a page number of the document, if applicable. "SER __ at __" refers to the government's supplement excerpts of record. Br. ____ refers to appellant Pilati's brief to this Court.

jurisdiction arose under 18 U.S.C. 3402, Federal Rule of Criminal Procedure 58(g) and United States District Court for the Northern District of Alabama Local Rule 73.1(c). The District Court affirmed the magistrate court's judgment against Pilati on April 7, 2009. Pilati filed a notice of appeal on April 20, 2009. This Court's jurisdiction arises under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

Pilati raises a number of issues on appeal to this Court that he did not raise on appeal to the district court. The government will argue below that Pilati waived all issues on appeal except for the one issue he raised on appeal to the district court. In the alternative, if this Court finds that Pilati has properly raised these new issues, the government will argue that these claims fail.

1. Whether Pilati waived argument in this Court on every issue except that raised on appeal to the district court.

2. Whether the magistrate court's order that Pilati register as a sex offender under the Sex Offender Registration and Notification Act (SORNA) was permissible.

3. Whether the sufficiency of the evidence supported Pilati's convictions.

4. Whether the magistrate court committed evidentiary errors.

5. Whether Pilati was denied his counsel of choice.

6. Whether the magistrate court erred in calculating Pilati's sentence.

STATEMENT OF THE CASE

1. Course Of Proceedings

On May 3, 2007, a five-count superseding indictment was filed against Pilati, alleging various civil rights violations. At the time of the offenses, Pilati was the District Attorney of Franklin County, Alabama.

Count 1 charged that in or about March 2001 through June 2001, Pilati, while acting under color of law, fondled the scrotum and penis of Shane Trowbridge, willfully depriving Trowbridge of his right to be free from unreasonable search in violation of 18 U.S.C. 242. ER 21 at 1. Count 2 charged that in or about May 2001, Pilati, while acting under color of law, fondled the testicles, penis, and buttocks of Justin Hall, willfully depriving Hall of his right to be free from unreasonable search, in violation of 18 U.S.C. 242. ER 21 at 2. Count 3 charged that in or about April 2002, Pilati, while acting under color of law, forced Alan Malone to disrobe and fondled Malone's scrotum and buttocks, willfully depriving Malone of his right to be free from unreasonable search in violation of 18 U.S.C. 242. ER 21 at 2. Count 4 charged that on or about December 16, 2002, Pilati, while acting under color of law, stroked the testicles of Adam Yarbrough, willfully depriving Yarbrough of his right to be free from

unreasonable search in violation of 18 U.S.C. 242. ER 21 at 3. Count 5 charged that on or about February 2004, Pilati, while acting under color of law, forced Daniel Maxwell to disrobe until he was completely naked and then touched Maxwell's genitals, willfully depriving Maxwell of his right to be free from unreasonable search in violation of 18 U.S.C. 242. ER 21 at 3.

On November 1, 2007, the jury returned a guilty verdict on all counts. SER 88 at 603 (Trial Tr. Vol. 3); ER 75 at 1. On March 6, 2008, the magistrate court sentenced Pilati to 42 months imprisonment. ER 90 at 36-37 (Sent. Tr.); ER 75 at 2-3. As a special condition of supervised release, the magistrate required that Pilati register as a sex offender under the notification provisions (SORNA) of the Adam Walsh Child Protection Act of 2006, 42 U.S.C. 16901 *et seq*. ER 90 at 37; ER 75 at 5.

Pilati filed a notice of appeal to the district court on March 10, 2008. ER 76. Pilati only raised one issue on appeal, that the magistrate court erred by imposing SORNA registration. ER 92 at 5-6. The District Court rejected his argument and affirmed the magistrate court on April 7, 2009. ER 101.

2. Statement Of The Facts

a. Background

John Pilati served as District Attorney of Franklin County, Alabama, from January 1999 through April 2004. ER 87 at 199, SER 87 at 198 (Trial Tr. Vol. 2). In 2000, Pilati established a misdemeanor drug testing program under which defendants agreed to submit to urinalysis. ER 87 at 171, SER 87 at 201-203, 205-206, 423; ER 86 at 93, SER 86 at 77 (Trial Tr. Vol. 1). Pilati maintained the list of the individuals in the program, decided when someone was called in for a test, and performed most of the tests. SER 87 at 206-207, 209.

The evidence at trial established that, on a number of occasions, Pilati used the drug tests as a pretense to touch and fondle the genitals of young men. See pp. 6-17, *infra*. The jury heard evidence that Pilati fondled the genitalia of six young men (Trowbridge, Hall, Malone, Maxwell, Greg Presley, and Yarbrough) approximately 14-16 times. ER 86 at 94, 102, 110-111, SER 86 at 77-80, 95-96, 101, 105 (Malone); ER 87 at 174-175, SER 87 at 162-163, 166-170 (Trowbridge); ER 87 at 246-247 (Presley); SER 87 at 394-396 (Hall); ER 87 at 428-429, SER 87 at 423, 427 (Maxwell); ER 87 at 323, SER 87 at 322 (Yarbrough). Numerous witnesses testified that these drug tests were unlike those they administered or took. See pp. 14-15, *infra*.

b. Count 1

Trowbridge was arrested for possession of marijuana and drug paraphernalia. SER 87 at 163. He was taken to the police station at Pilati's request, and Pilati searched Trowbridge and his friends, who were also arrested. SER 87 at 163, 165. Pilati told Trowbridge to remove his clothes. SER 87 at 166. After he removed his clothes, Trowbridge testified, Pilati "[l]ifted up my testicles" for about "five to ten seconds." SER 87 at 168.

Trowbridge was sentenced to one year of probation and a six-month suspended sentence. SER 87 at 169. During 2001, Trowbridge was required to take four drug tests, all of which Pilati conducted. ER 87 at 170. Pilati would call and order Trowbridge to take a drug test. ER 87 at 171. Pilati would take Trowbridge to the hall bathroom at the courthouse. SER 87 at 172. After entering the bathroom, Pilati would tell Trowbridge to remove his underwear. SER 87 at 173. Trowbridge testified that Pilati would then come over and "grab[] me by my testicles and lift[] up on them." ER 87 at 174-175.

Trowbridge testified that he was afraid whenever Pilati would grab his testicles: "I mean, I was 150 pounds maybe. I had this 300-pound man * * * fondling me. It just didn't seem right. But, you know, that's the D.A. I mean, what was I supposed to do, you know?" ER 87 at 176. Trowbridge then would take the urine test. ER 87 at 176.

Trowbridge testified that he was drug tested three other times, for a football scholarship program and employment. ER 87 at 178. In none of those tests did anyone touch his genitals or require him to remove his clothing. ER 87 at 178.

c. Count 2

Hall was convicted for trafficking LSD and required to serve two years at the Franklin County Jail, and submit to drug testing. ER 87 at 385-386, SER 87 at 384. The jailers would call him "into the office, * * * pat [him] down and * * * hand [him] a cup." ER 87 at 386. Hall "would go into the restroom" then "give [his] sample" and return. ER 87 at 386-387. The jailers never asked him to remove his clothing. ER 87 at 387.

Because of Hall's good behavior and grades in school, he requested early release in May 2001. ER 87 at 390. Around that time, Pilati came to visit him late at night and informed him he was there to give him a drug test. ER 87 at 390-392. Hall had never seen Pilati at the jail at that time of night. ER 87 at 391. No one else was around. SER 87 at 393. Pilati took him to the bathroom, closed the door, and told Hall he was going to search him. SER 87 at 393-394. Pilati told him to remove his pants and underwear. SER 87 at 394. Hall testified that Pilati began to pat him down and then Pilati's hands went up and down Hall's legs and into his buttocks. SER 87 at 395. Hall said Pilati also touched his penis and genitals, and touched Hall's testicles slowly. SER 87 at 395-396. Hall said he felt very uncomfortable. ER 87 at 396. Pilati gave Hall a cup and asked

Hall to provide a sample. SER 87 at 396. Hall testified that although Pilati had room to move farther away, he stood inches away from Hall and watched him urinate into the cup. SER 87 at 397.

Hall said that while on probationary release, he was subject to drug testing. ER 87 at 398. When administering drug tests, his probation officer never had him disrobe, nor touched his genitals. ER 87 at 398-399.

d. Count 3

Malone was prosecuted for juvenile possession of a controlled substance. SER 86 at 74. Shortly after Malone's arrest, Pilati picked him up from school. SER 86 at 76-77. Pilati brought him into the bathroom and locked the bathroom and the stall doors. SER 86 at 78. Pilati asked Malone to remove his "[s]hirt, pants, underwear, socks, and shoes." SER 86 at 79. Malone asked Pilati why he had to remove all his clothing, and Pilati responded that Malone "shut the hell up and do as * * * told." SER 86 at 80. Malone testified that Pilati handed Malone a cup, put on rubber gloves, and then "fondled my genitals, lifting up my scrotum and lifting up my penis," "touch[ing] my penis and * * * rear" as well. SER 86 at 80-81. Malone said Pilati touched his genitals for 15-20 seconds, two or three times, then had Malone urinate into a cup and watched. SER 86 at 80, 88, 90.

When Malone asked why Pilati was touching his genitals, Pilati told him "to shut the hell up." SER 86 at 89. Malone felt "degraded," as if his "manhood" had been taken away. SER 86 at 89.

Malone failed the drug test and marijuana charges were filed against him. SER 86 at 91. Malone received probation and was required to check in with a probation officer each month. SER 86 at 92. His probation included random drug testing, and Kevin Strickland administered some of the tests. ER 86 at 93, SER 86 at 92. Malone said, Strickland never touched Malone's genitals nor required him to disrobe. ER 86 at 93-94.

Pilati also conducted two to four drug tests on Malone as well. ER 86 at 94. During these tests, which occurred in the courthouse bathroom, Malone testified that Pilati would tell Malone to remove his clothes and then would "[f]ondle [his] genitals" for 15-20 seconds and then give him the drug test. ER 86 at 94, SER 86 at 95-96. Malone said, Pilati would "reach underneath between [my] legs and grab and lift up and play with [my genitalia]." SER 86 at 96. Pilati "would just sit there and play with" Malone's genitals. SER 86 at 96. When Malone asked why, Pilati would tell him, "Shut the hell up. Do as you are told." SER 86 at 96. After fondling Malone, Malone was required to urinate into a cup. SER 86 at 97. Malone said these incidents made him feel degraded and "[l]ess than a man," and that he was afraid to be around Pilati. SER 86 at 97.

In 2002, Pilati called Malone's house twice for Malone to take a drug test at Pilati's house. SER 86 at 52, 101. The first time Pilati brought him into a bathroom and told him to take off all his clothing and provide a urine sample. SER 86 at 104. Malone testified that Pilati "put on rubber gloves, put the urinalysis cup on the counter by the sink, lifted up my scrotum * * * and told me to bend down and cough, and searched me again as I stood up." SER 86 at 105. Pilati touched him two or three times, and held Malone's genitals in his hands for 10 or 15 seconds. SER 86 at 105. Malone then urinated into a cup while Pilati watched. SER 86 at 106. Malone said the fondling made him feel like a "pervert," "degraded, less human." SER 86 at 106.

The second time in spring 2002, Pilati called Malone's house and asked that Malone come alone to his house. ER 86 at 107, SER 86 at 39, 53, 108. Malone was extremely "distraught" when he learned of this request. SER 86 at 53-54, 108; SER 87 at 256. Malone's mother testified that she had never seen him this upset before. SER 86 at 54. She stated that others had administered drug tests to Malone and that he had never been upset in those circumstances. SER 86 at 55. She called family friend Ronnie Ray to come help calm Malone down, SER 86 at 54, and Ray also testified that he had also never seen Malone that upset before, SER 86 at 42.

Ray took Malone to Pilati's house. SER 86 at 42. When they arrived, Pilati told Ray to stay outside. SER 86 at 43, 109. Inside, Pilati told Malone to go to the bathroom

and to remove all his clothing. ER 86 at 110, SER 86 at 109. When Malone asked why, Pilati responded, "Shut the hell up and pull off your pants." ER 86 at 111. Pilati "fondled" him and became "more sexually kind of graphic * * * this time." ER 86 at 110. Malone stated, Pilati "played with my genitals more" and Malone had an orgasm. ER 86 at 110. Malone said Pilati played with his genitalia for 35 seconds. ER 86 at 111. Afterwards, Pilati took Malone to his living room couch and "started massaging" Malone's back and talking to him because Malone was crying for about ten minutes. ER 86 at 112.

When Malone returned outside after about 20 minutes, Ray testified that Malone was very quiet and said nothing after he came outside. SER 86 at 44. Malone's mother testified that when he arrived home he was quiet, but seem relieved to be home. SER 86 at 55, 64.

Malone testified that he had taken urinalysis tests in the Army and for the Veterans Administration, and that nobody ever touched his genitals or asked him to disrobe. ER 86 at 113, SER 86 at 114.

e. Count 4

Count 4 involves the abuse of a minor. When Yarbrough was 16 years old, he was arrested for armed robbery. SER 87 at 315-316, 330. Yarbrough pled guilty and was sent to prison for 20 months. SER 87 at 316. Yarbrough entered his plea in

December 2002 and was to report for his sentence on January 1, 2003. SER 87 at 317, 332.

On December 16, 2002, Yarbrough was in a car with friends when Pilati pulled up with the police lights operating on his car. SER 87 at 318. Pilati told Yarbrough to get out of the car, police arrived, arrested and handcuffed Yarbrough, and took him to the police station. ER 87 at 319, SER 87 at 318. There, Pilati told Yarbrough to take a drug test. ER 87 at 319. Yarbrough refused, but Pilati told him that if he refused, Pilati would write him up, which would go on Yarbrough's Department of Corrections record. ER 87 at 319, SER 87 at 321. Pilati then took Yarbrough, still handcuffed, to the restroom (ER 87 at 324-325, SER 87 at 321) where the two were alone. SER 87 at 322. Yarbrough testified that Pilati patted Yarbrough down, unbuttoned his pants, unzipped his zipper, put his "hand down my pants and started moving it around in my crotch area," and also "slowly stroked my testicles." ER 87 at 322-323. Pilati then told Yarbrough to urinate into a cup and held Yarbrough's penis for about 15 seconds. ER 87 at 324.

f. Count 5

Maxwell was placed on probation for misdemeanor possession of marijuana at the age of 18 in June 2003, and was required to submit to drug testing. SER 87 at 420-423. Pilati tested him four times. SER 87 at 423. Pilati would call him to come and take his

test, and then tell Maxwell to disrobe. SER 87 at 424, 427. During the first two tests, Pilati placed gloves on and lifted up Maxwell's scrotum; during the other two other tests, which occurred after July, Pilati made Maxwell disrobe, but had Maxwell lift his own genitals. ER 87 at 428-429, SER 438-439. After the fondling, Pilati would have Maxwell urinate into a cup. SER 87 at 430. Maxwell was extremely uncomfortable and embarrassed. SER 87 at 430.

g. Non-Charged Incidents Of Fondling

Presley was charged with misdemeanor possession of marijuana in 2002 in Franklin County and placed on probation. ER 87 at 232, 237, SER 87 at 231. Presley was drug tested at random, and testified to taking about six tests. ER 87 at 238. Pilati would call Presley at home to come in for his drug tests. ER 87 at 238. Pilati would usually stand in the doorway of the bathroom stall while Presley urinated. ER 87 at 240. Once Pilati fondled him and strip searched him. ER 87 at 246-247, 250-252. At the courthouse, Pilati told Presley that he had to be strip searched. ER 87 at 246. Presley removed all of his clothing. ER 87 at 246. Pilati required Presley to bend over and grab his knees; Pilati then "took his hand and rubbed * * * [his] genitals and rubbed all the way back up [his] buttocks." ER 87 at 246. Pilati touched Presley's penis and scrotum. ER 87 at 247. Pilati told him that he was just "making sure" that Presley did not have

anything "to pass a drug test with." ER 87 at 247. Presley then did the urinalysis test. ER 87 at 249. Anthony Davis corroborated Presley's testimony. SER 87 at 292.

Pilati told Presley that he had failed the test and called the Sheriff's Department. ER 87 at 248. Pilati told the dispatcher that he would have to strip search Presley again. ER 87 at 250-251. Though Presley had not been out of Pilati's presence since previously stripping, Pilati required him to remove all his clothing again, and to bend over and pull his genitals up. ER 87 at 250-252. Pilati administered another test and then told Presley that he was clean. ER 87 at 253.

Presley testified that the probation officers who drug tested him did not require him to remove his clothes or undergo a physical search, nor would they touch his genitals. ER 87 at 242.

h. Testimony Concerning The Administration Of Drug Tests

Numerous witnesses testified that Pilati's manner of drug testing was unusual. A former assistant district attorney in Pilati's office, Joseph Rushing, testified that Pilati taught him to "stand close enough" to those being tested "to make sure that they were urinating and * * * so we could hear that the test was actually a legitimate test and they weren't just pouring water in a cup or something." SER 87 at 210. Pilati never told Rushing to physically search someone before a test, but simply to stand close enough to make sure that he could hear if the person was untaping anything and cheating. SER 87

at 210. Rushing testified that he did not ask people to remove their clothes during drug tests, and that standing close to the individual was sufficient to discover cheating. SER 87 at 220.

James Woodall, the jail administrator for the Franklin County Sheriff's Office, testified that he ran the jail drug testing program. SER 87 at 363. He testified that male inmates would enter the bathroom and urinate, and an officer would stand near the door. SER 87 at 364. He stated that officers occasionally did a "pat search," including of an inmate's genitalia, before an inmate took his test, but that they never searched his genital area directly and the inmate did not disrobe. SER 87 at 365. He testified that officers could see if an inmate was cheating. SER 87 at 365.

Kevin Strickland, a defense witness and a juvenile probation officer in Franklin County, Alabama, testified the various ways people cheat on drug tests. SER 88 at 500. Strickland testified, however, that he never had to strip search anyone nor did he think it necessary, and that he "felt" it was never necessary physically to search someone's genitals. SER 88 at 504. Anthony Davis and Daniel Maxwell, who were routinely drug tested, testified that no one testing them touched their genitals or required them to disrobe. ER 87 at 434, SER 87 at 288.

3. Standard Of Review

1. This Court reviews claims that Pilati failed to raise in front of the magistrate court for plain error. *United States* v. *Zinn*, 321 F.3d 1084, 1088 (11th Cir.); *United States* v. *Nash*, 438 F.3d 1302, 1304 (11th Cir. 2006).

Under plain error review, an appellant must "establish (1) that there was error (2) that was plain; (3) that affected his substantial rights; and (4) that seriously affected the fairness, integrity, or public reputation of the judicial proceeding." *United States* v. *Straub*, 508 F.3d 1003, 1008 (11th Cir. 2007), cert. denied, 129 S. Ct. 40 (2008). Error is plain only if it is "clear or obvious." *Ibid*. (internal citations and quotations omitted).

This Court reviews a sufficiency claim to see whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States* v. *Holmes*, 595 F.3d 1255, 1257 (11th Cir. 2010). The Court views "the evidence in the light most favorable to the Government and ... draw[s] all reasonable inferences ... in the Government's favor." *Ibid*. The Court will only "upset a conviction * * * if the jury 'could not have found the defendant guilty under any reasonable construction of the evidence.'" *Ibid*. (quoting *United States* v. *Chastain*, 198 F.3d 1338, 1351 (11th Cir. 1999)).

A trial court's "evidentiary rulings are reviewed for abuse of discretion." *United States* v. *Edouard*, 485 F.3d 1324, 1343 (11th Cir. 2007). "Evidentiary errors 'do not

constitute grounds for reversal unless there is a reasonable likelihood that they affected the defendant's substantial rights; where an error had no substantial influence on the outcome, and sufficient evidence uninfected by error supports the verdict, reversal is not warranted.'" *United States* v. *Drury*, 396 F.3d 1303, 1315 (11th Cir. 2005) (quoting *United States* v. *Hawkins*, 905 F.2d 1489, 1493 (11th Cir. 1990)), cert. denied, 129 S. Ct. 159 (2008).

This Court applies "a two-pronged standard to review claims that the district court erroneously applied sentencing guidelines adjustments." *United States* v. *Williams*, 527 F.3d 1235, 1247-1248 (11th Cir. 2008). It first reviews the "factual findings underlying the district court's sentencing determination for clear error." *Ibid*. The "application of those facts to the guidelines" is reviewed "de novo." *Id*. at 1247-1248. The final sentence imposed "is reviewed for reasonableness in light of the factors outlined in 18 U.S.C. § 3553(a)." *Id*. at 1248. This Court will not find "clear error unless" it is "left with a definite and firm conviction that a mistake has been committed." *United States* v. *Crawford*, 407 F.3d 1174, 1177 (11th Cir. 2005) (internal quotation marks and citation omitted).

SUMMARY OF ARGUMENT

This Court should affirm Pilati's conviction, sentence, and requirement that he register as a sex offender under SORNA.

1. Pilati waived argument on every issue except the one he raised on appeal before the district court. This Court's case law makes clear that a party must raise issues in its *initial* brief on appeal in order to preserve them. It is inefficient and wastes judicial resources to allow a party tried in front of the magistrate court to raise new issues on his appeal to this Court that he did not raise on appeal to the district court. This Court should hold that the issues Pilati raises for the first time here are waived. In the alternative, if this Court finds that these issues are not raised, each of these arguments fails on its merits.

2. On the one SORNA issue not waived, registration was proper. Pilati was convicted of a qualifying offense. SORNA is a civil remedy, therefore, the jury was not required to find that Yarbrough was a minor at the time of the sexual offense in order to impose the registration requirement. With respect to the two SORNA issues raised for the first time on appeal, if this court finds that Pilati has not waived them, SORNA registration does not violate the *Ex Post Facto* Clause as this Court recently held in *United States* v. *Ambert*, 561 F.3d 1202, 1207 (11th Cir. 2009), and, as Pilati admits and this Court has held, SORNA's registration requirement does not violate the Commerce Clause.

3. The government maintains that this and all the following issues have been waived. It addresses them in the alternative. The evidence is more than

sufficient to support the jury's verdict to convict Pilati of all five counts in the indictment. Each victim testified that Pilati fondled him. Pilati had "fair warning" that his fondling of the victims was not a reasonable search under the Fourth Amendment. Nor did the evidence and jury instructions constructively amend the indictment. The indictment uses typical and unproblematic language to charge the incidents "on or about" different dates. Nor could the jury have confused uncharged conduct with charged conduct. The jury instructions, which followed this Court's pattern jury instructions and the guidance of numerous cases, properly instructed the jury on the elements of a violation of 18 U.S.C. 242.

4. The magistrate court committed no evidentiary errors. It properly excluded the details of the prior criminal histories of some of Pilati's victims, and the jury was fully aware of each witness's potential biases and motives.

The magistrate court properly admitted evidence of Pilati's other sexual misconduct under Federal Rule of Evidence 413. This evidence was not unduly prejudicial under Federal Rule of Evidence 403, and was highly relevant and probative. Nor did the magistrate court err in admitting evidence of Alan Malone's and Greg Presley's prior consistent statements. Pilati did not challenge these statements with any specificity at trial and, clearly, the admission of these statements, even if error, had no effect whatsoever on the outcome of the trial. The

magistrate court also properly allowed witnesses to testify how they conducted drug tests, and the victims to testify how people other than Pilati administered drug tests. This testimony was clearly relevant.

5. Pilati was not denied his counsel of choice. As the evidence clearly demonstrates, his counsel, Jeffrey Bowling, served in an advisory role, and withdrew voluntarily when a potential conflict was brought to his attention. During the trial Bowling continued to consult with Bruce Gardner, Pilati's counsel, and Pilati.

6. The magistrate court did not err in calculating Pilati's base offense level. The sentencing guidelines require that the judge examine the offense level "from the offense guideline applicable to any underlying offense," U.S.S.G. §2H1.1(a)(1), and Pilati's conduct constituted criminal sexual abuse as defined under 18 U.S.C. 2244 and 2246.[2]

[2] Pilati raises the argument that his trial counsel was ineffective. This argument is misplaced. This Court does not "consider ineffective counsel claims on direct appeal from a conviction." *United States* v. *Millwood*, 961 F.2d 194, 195 (11th Cir. 1992) (citing *United States* v. *Griffin*, 699 F.2d 1102, 1107-1109 (11th Cir. 1983) (per curiam)). Even if this issue were properly before this Court, it would fail. Pilati does not make a showing that but for this alleged ineffective assistance "that there is a reasonable probability that * * * the result of the proceeding would have been different." *Williams* v. *Allen*, 598 F.3d 778, 779 (11th Cir. 2010) (quoting *Strickland* v. *Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984)).

ARGUMENT

I

PILATI HAS WAIVED APPEAL ON EVERY ISSUE EXCEPT ONE

Pilati has waived every issue raised in his brief except for his argument, raised on appeal to the district court, that the magistrate court erred when it required Pilati to register as a sex offender under SORNA. Br. 47-51. He is precluded from raising any new issues before this Court.

The district court's review in this case was as an appellate court under 18 U.S.C. 3402, Federal Rule of Criminal Procedure 58(g) and United States District Court for the Northern District of Alabama Local Rule 73.1(c); see also *United States* v. *Bursey*, 416 F.3d 301, 305-306 (4th Cir. 2005), cert. denied, 546 U.S. 1139, 126 S. Ct. 1154 (2006). To lodge his appeal, he filed a "notice of appeal." ER 76. In his appellate brief to the district court, Pilati only argued that it was error for the district court to order him to register under SORNA. ER 92 at 5-6. Now on appeal to this Court, Pilati raises numerous new issues, all of which could have been raised in his initial appeal to the district court. Because the district court's review of the magistrate's decision was an appeal, by analogy this Court's case law, logic, and questions of judicial efficiency all support holding that Pilati has waived any issue not raised with the district court.

"[A]n issue not raised in a party's *initial* appellate brief is considered waived, and the party is prohibited from raising the issue later in the appeal." *United States* v. *Silvestri*, 409 F.3d 1311, 1338 n.18 (11th Cir. 2005) (emphasis added); *United States* v. *Yates*, 438 F.3d 1307, 1311 n.3 (11th Cir. 2006); see also *United States* v. *Ardley*, 242 F.3d 989, 990 (11th Cir. 2001) (per curiam). This Court applies a similar rule to petitions for rehearing en banc, stating that to

> allow a new issue to be raised in a petition for rehearing circumvents Federal Rule of Appellate Procedure 28(a)(5), which requires that an appellant's initial brief must contain "a statement of the issues presented for review." Further, the rule requiring that issues be raised in opening briefs "serves valuable purposes, as do all of the procedural default rules, which is why we regularly apply them."

United States v. *Levy*, 416 F.3d 1273, 1276 (11th Cir. 2005) (footnote omitted). Among these "valuable purposes are judicial economy and finality." *Ibid*.

This Court also prohibits parties from introducing issues that they failed to raise on a prior appeal. *Nationalist Movement* v. *City of Cumming, Ga.*, 92 F.3d 1135, 1138-1139 (11th Cir. 1996) (finding that plaintiff had "waived [certain] claims by failing to raise them in the prior appeal."); see also *Caban-Wheeler* v. *Elsea*, 71 F.3d 837, 842 (11th Cir. 1996). In one criminal case, this Court held that there was "no reason why" the defendant "should get 'two bites at the appellate apple,'" where he had failed to raise an issue in his initial appeal prior to remand

for resentencing. *United States* v. *Fiallo-Jacome*, 874 F.2d 1479, 1482-1483 (11th Cir. 1989).

Similarly, Pilati should not get two bites at the appellate apple. His *initial* appellate brief raised one issue. To allow him now to raise new issues runs counter to this Court's clear holdings prohibiting raising new issues on subsequent appeals. If an appellant can simply raise new issues not previously briefed to the first appellate court – in this case the district court – it raises the question of why the first appeal even should be required. Indeed, in the only case the government has discovered addressing this precise issue, the Fourth Circuit, albeit in an unpublished opinion, held that an appellant had "forfeited review of his remaining claims because he did not raise them on appeal to the district court." *United States* v. *Frazier*, 178 F.3d 1287 (4th Cir. 1999) (per curiam) (unpublished) (citing *United States* v. *Bell*, 988 F.2d 247, 250 (1st Cir. 1993) ("[A] legal decision made at one stage of a * * * criminal case, unchallenged in a subsequent appeal despite the existence of ample opportunity to do so, becomes the law of the case for future stages of the same litigation, and the aggrieved party is deemed to have forfeited any right to challenge that particular decision at a subsequent date.")).

In addition, requiring issues to be raised on the first appeal serves the "valuable purposes" of "judicial economy and finality." *Levy*, 416 F.3d at 1276.

Allowing Pilati to raise new issues that were not previously briefed is a serious waste of judicial resources and undermines the finality of appellate decisions – even those rendered by the district court. Presumably, some of the issues raised now could have been determined definitively by the district court sitting as the appellate court. This Court should hold that Pilati has waived all the issues raised in the current brief except for his argument that the magistrate court erred in requiring him to register under SORNA. See II.A.1., *infra*.

II

THERE WERE NO ERRORS RELATED TO SORNA

Pilati argues that the magistrate court erred in requiring him to register under SORNA because he was not convicted of a qualifying offense and that the jury was required to make a specific finding as to Yarbrough's age at the time of the offense. Br. 47-51. This argument is properly before this Court, but is without merit. Pilati also argues that his registration under SORNA "violates the Ex Post Facto Clause * * * because it punished him for acts committed prior to the passage of the Act," (Br. 51), and that, more generally, SORNA violates the Commerce Clause, (Br. 58). These arguments are waived, but even if not waived they fail. All these asserted errors related to SORNA are reviewed for plain error as Pilati did not raise them at trial.

A. SORNA Registration Was Proper

1. Pilati Was Convicted Of A Qualifying Offense

Pilati argues that because he was convicted under 18 U.S.C. 242, which is not enumerated in 42 U.S.C. 16911(5)(A)(iii), the magistrate court erred by requiring SORNA registration. Br. 48.

SORNA defines a minor as any "individual who has not attained the age of 18 years." 42 U.S.C. 16911(14). Yarbrough was under 18 at the time of incident. SORNA requires initial registration "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement," 42 U.S.C. 16913(b)(1), and defines a "sex offender" as "an individual who was convicted of a sex offense," 42 U.S.C. 16911(1). Sex offense is defined as, among other things, "a criminal offense that has an element involving a sexual act or sexual contact with another" or "a criminal offense that is a specified offense against a minor." 42 U.S.C. 16911(5)(A)(i) & (ii). A specified offense against a minor includes "[a]ny conduct that by its nature is a sex offense against a minor." 42 U.S.C. 16911(7)(I).

When analyzing whether a criminal offense constitutes a sex offense under SORNA, this Court looks beyond the charged conduct – in this case 18 U.S.C. 242 – and examines the underlying conduct. In *United States* v. *Dodge*, 597 F.3d 1347

(11th Cir. 2010), the en banc reversal of *United States* v. *Dodge*, 554 F.3d 1357 (11th Cir. 2009), upon which Pilati relies, this Court rejected the very arguments Pilati advances. This Court stated:

> Dodge's reading of the definition of sex offense in SORNA is unduly narrow. Taken as a whole, the statute does not suggest an intent to exclude certain offenses but rather to expand the scope of offenses that meet the statutory criteria. Nothing in the plain language of the statute suggests that the 'other criminal offense' provision of 42 U.S.C. § 16911(6) cannot encompass federal offenses not specifically enumerated in § 16911(5)(A)(iii).

Dodge, 597 F.3d. at 1352 (footnote omitted). This Court further held:

> Nothing in the plain language of 42 U.S.C. § 16911(5)(A)(iii), when read together with the rest of the statute, prohibits an unenumerated federal offense such as 18 U.S.C. § 1470 from qualifying as a "specified offense against a minor." Therefore, Dodge's invocation of the canon of e*xpressio unius est exclusio alterius* fails to sway us.

Id. at 1353 (footnote omitted).

Likewise, Pilati's invocation of that canon, and his claim that, because 18 U.S.C. 242 is not an enumerated offense under Section 16911(5)(A)(iii), he cannot be guilty of a sex offense, must fail.

Moreover, in *Dodge* this Court stated that in determining whether "a criminal offense * * * is a specified offense against a minor," courts are to employ

a "noncategorical approach to examine the underlying facts of a defendant's offense, to determine whether a defendant has committed a 'specified offense against a minor' and is thus a 'sex offender' subject to SORNA's registration requirement." *Dodge*, 597 F.3d at 1356. This means that courts are to examine "the defendant's underlying conduct – and not just the elements of the conviction statute – in determining what constitutes a 'specified offense against a minor.'" *Id*. at 1354. Here, the magistrate court was required to "look beyond [Pilati's] conviction statute to the underlying facts of his offense to determine whether his offense qualifie[d] as a 'sex offense against a minor.'" *Id*. at 1355; see also *United States* v. *Byun*, 539 F.3d 982, 990-991 (9th Cir.), cert. denied, 129 S. Ct. 771 (2008).

The underlying facts here show undeniably that Pilati's offense against Yarbrough was "by its nature" a sex offense against a minor. Yarbrough was a minor on December 16, 2002, and there is no dispute that Pilati's actions directed at Yarbrough were sexual in nature. As a matter of law, the magistrate court was required to impose registration under SORNA as a special condition of supervised release; 18 U.S.C. 3583(d) states that the court "shall order, as an explicit condition of supervised release for a person required to register under [SORNA] that the person comply with the requirements of that Act." There was no error.

2. The Jury Did Not Need To Make A Specific Finding As To Adam Yarbrough's Age

Pilati argues that the jury was required to make a specific factual finding as to Yarbrough's age. Br. 50-51. It was not.

United States v. *Booker*, 543 U.S. 220, 244, 125 S. Ct. 738, 756 (2005), held that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." This requirement does not apply when a court imposes a civil requirement or civil remedy on a criminal defendant, however. See, *e.g.*, *United States* v. *Swanson*, 483 F.3d 509, 516 (7th Cir.) (because "restitution is a civil remedy, rather than a criminal punishment, it may be determined by a judge using a preponderance of the evidence standard and remains unaffected by *Booker*"), cert. denied, 552 U.S. 981, 128 S. Ct. 455 (2007).

SORNA's registration requirement is not a criminal sentence. SORNA requires jurisdictions to maintain sex offender registries, 42 U.S.C. 16912, establishes a national registry, 42 U.S.C. 16919 and 16920, and mandates that a sex offender register and keep such registration current in each jurisdiction where he lives, 42 U.S.C. 16913. While there is a related criminal statute that punishes

those who fail to register, 18 U.S.C. 2250, that action is punishment for failure to comply with the civil registration requirements.

Numerous courts have held that SORNA's registration requirements are a civil remedy or requirement. See *United States* v. *Young*, 585 F.3d 199, 204 (5th Cir. 2009) ("SORNA is a civil regulation and, thus, does not run afoul of the Constitution's ex post facto prohibitions.") (footnote omitted); *United States* v. *Hinckley*, 550 F.3d 926, 938 (10th Cir. 2008), cert. denied, 129 S. Ct. 2383 (2009); *United States* v. *Lawrance*, 548 F.3d 1329, 1333 (10th Cir. 2008); *United States* v. *May*, 535 F.3d 912, 919-920 (8th Cir. 2008); *Byun*, 539 F.3d at 993 n.14. That SORNA is a civil measure is further evidenced by the fact that it is codified at 42 U.S.C. 16901 *et seq*., rather than in a criminal title of the United States Code. *United States* v. *Torres*, 573 F. Supp. 2d 925, 946 (W.D. Tex. 2008); see also II.B., *infra*. This Court, by rejecting a defendant's claim that SORNA enhanced the punishment for his 1974 sexual conviction by requiring registration and thereby violated the *Ex Post Facto* Clause, has held by implication that SORNA is a civil remedy. *United States* v. *Ambert*, 561 F.3d 1202, 1207 (11th Cir. 2009). If it were not a civil remedy, SORNA could not be used in this manner to require registration.

B. SORNA's Registration Requirements Do Not Violate The Ex Post Facto *Clause*[3]

Recently, in *United States* v. *Ambert*, this Circuit rejected a defendant's argument that "SORNA violates the *ex post facto* clause because it imposed on him a retroactive duty to register and enhanced the punishment for his 1974 conviction." 561 F.3d 1202, 1207 (11th Cir. 2009) (citation omitted). While this Court did not engage in extensive discussion in dismissing the defendant's claim, this holding forecloses Pilati's argument. Other circuits have held that SORNA's registration requirement does not violate the *Ex Post Facto* Clause. In *United States* v. *Young*, 585 F.3d 199, 204 (5th Cir. 2009), the court rejected a defendant's claim that "SORNA and its attendant registration burdens–isolated from the fact of his incarceration under SORNA–increase[d] his punishment" for his sex crime. Following *Smith* v. *Doe*, 538 U.S. 84, 123 S. Ct. 1140 (2003), which Pilati argues requires a finding of an *Ex Post Facto* violation here, the Fifth Circuit held, along with all of the other circuits "to have considered the issue" that "SORNA is a civil regulation and, thus, does not run afoul of" the *Ex Post Facto* Clause. *Young*, 585 F.3d at 204. The exceptions articulated in *Smith* did not change its analysis. *Id*. at 204-206. See also *United States* v. *Zuniga*, 579 F.3d 845, 849-850 (8th Cir. 2009)

[3] The government maintains that Pilati has waived this and all remaining issues addressed in this brief but addresses them out of an abundance of caution.

(petition for cert. pending (filed Nov. 30, 2008)); *United States* v. *Hinckley*, 550 F.3d 926 (10th Cir. 2008), cert. denied, 129 S. Ct. 2383 (2009); *United States* v. *Lawrance*, 548 F.3d 1329 (10th Cir. 2008).[4]

III

THE EVIDENCE AND TRIAL PROCEDURES EASILY SUPPORT PILATI'S CONVICTIONS

Pilati argues that the evidence was insufficient on all counts of conviction. He further argues that evidence adduced at trial coupled with the magistrate court's instructions constructively amended the indictment, and that the district court failed to instruct the jury on the essential elements of a 18 U.S.C. 242 violation. His arguments fail.

A. The Evidence Was Sufficient To Convict Pilati On All Counts

1. Pilati Had Fair Warning That Touching Genitalia Was An Improper Search

Pilati first argues that he did not have "fair warning" that his touching of his victims' genitalia was prohibited. Br. 7. The evidence clearly demonstrated that no reasonable official would have believed Pilati's conduct was legal.

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[4] As Pilati rightly notes (Br. 58), this Court has held that SORNA's registration requirement does not violate the Commerce Clause. *United States* v. *Ambert*, 561 F.3d 1202, 1211-1212 (11th Cir. 2009).

A defendant may not be convicted under 18 U.S.C. 242 without "fair warning" that his or her conduct violated the Constitution. The standard for determining whether a criminal defendant had "fair warning" that his conduct was unconstitutional is no more burdensome than the standard used for determining whether a civil defendant has a right to qualified immunity in a Section 1983 action. See *United States* v. *Lanier*, 520 U.S. 259, 270-271, 117 S. Ct. 1219, 1227 (1997). A violation of 18 U.S.C. 242 occurs "for deprivation of a constitutional right if, but only if, in the light of pre-existing law the unlawfulness [under the Constitution] is apparent." *Id*. at 271, 1228 (internal brackets, and citation omitted).

The Supreme Court has stated that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope* v. *Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 2516 (2002). To put it "[s]omewhat more concretely, whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action." *Anderson* v. *Creighton*, 483 U.S. 635, 638-639, 107 S. Ct. 3034, 3038 (1987). As the Court recognized in *Lanier*, its decisions have not "demanded precedents that applied the right at issue to a factual situation that is 'fundamentally similar'" to that at issue in a particular case.

Lanier, 520 U.S. at 269, 117 S. Ct. at 1227. "To the contrary," the Supreme Court has "upheld convictions under § 241 or § 242 despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave *reasonable warning* that the conduct then at issue violated constitutional rights." *Ibid*. (emphasis added).

All of the incidents for which Pilati was convicted occurred in the context of a search before a drug test. Therefore, the right implicated is the Fourth Amendment right to be free from unreasonable searches. See *Padgett* v. *Donald*, 401 F.3d 1273 (11th Cir. 2005). The Fourth Amendment prohibits unreasonable searches. "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, * * * conducted." *Bell* v. *Wolfish*, 441 U.S. 520, 559, 99 S. Ct. 1861, 1884 (1979).

While it may have been reasonable for Pilati to conduct some level of search prior to administering drug tests, in order to prevent cheating on the drug tests, the evidence clearly established that the manner in which Pilati fondled the victims was hardly a "reasonable search." With several of the victims, Pilati ordered the victim to completely remove his pants and underwear. After conducting a visual

search, where Pilati could see that the victim was not hiding anything, Pilati nonetheless proceeded to touch and fondle the victims' genitals, for which there was *no* legitimate law enforcement reason. Forcing the victims to strip completely naked was unreasonable and unnecessary to ensure the integrity of the test.

The unreasonableness of the searches is further evidenced by the fact that Pilati fondled only young men. The circumstances surrounding the tests were often suspect. For example, Pilati asked Malone to come to his house at night to do the tests. Similarly, the defendant went to the jail at night to perform a drug test on Hall, despite the fact that the jail performed its own routine drug tests.

The testimony of several law enforcement officials as to how they conducted urinalysis tests, coupled with the testimony of other witnesses who underwent urinalysis, further demonstrated the unreasonableness of Pilati's searches for the jury. Every law enforcement official testified that he never touched an individual's genitals when administering drug tests. See pp. 14-15, *surpa*. Each victim testified that he never was touched or searched in this manner during other drug tests. To suggest, given these facts, that Pilati did not have "fair warning" that groping the genitalia of young men while performing drug tests was illegal strains credulity.

2. There Was Sufficient Evidence As To Count 1

Pilati seems to argue that, because Trowbridge described Pilati's touching of his genitalia as non-sexual, this means the evidence was insufficient to show that Trowbridge was fondled. Br. 11.

This argument fails for two reasons. First, fondling is defined as follows: "To handle, stroke, or caress lovingly." Webster's Second New Riverside University Dictionary 494 (1984). The facts clearly demonstrated that Pilati *handled* Trowbridge's genitalia. Second, Pilati avoids the fact that Trowbridge himself described what Pilati did to him as "fondling." ER 87 at 176. A jury could certainly have found that Pilati did "fondle" Trowbridge's genitals.

Pilati also argues that the "evidence is likewise insufficient to show that Pilati's actions were so unreasonable that no reasonable official would have conducted the brief 'skin search' of Trowbridge." Br. 11. As explained the argument that a reasonable official would not have fair warning of the illicitness of fondling a probationer's scrotum is simply not tenable.

Pilati's counsel also argues that Pilati's actions were reasonable given the rampant cheating that occurs on drug tests. Br. 12-13. Ample testimony demonstrated that drug tests could weed out cheating without fondling and touching the individual's genitals.

3. There Was Sufficient Evidence As To Count 2

Pilati argues that the evidence as to the fondling of Hall was insufficient. For the same reasons stated in II.A.2., *supra*, this argument fails. While Pilati attempts to argue that Hall's inmate status somehow justified the slow touching of Hall's testicles (Br. 16), there is nothing in Hall's situation to make such fondling any more reasonable.

4. There Was Sufficient Evidence As To Count 3

Pilati argues that his search of Malone in spring 2002 was reasonable. He further argues that Malone's characterization of the fondling as sexual in nature should not govern. Br. 18. Pilati's argument fails. Malone testified that Pilati fondled and stroked his penis for 35 seconds, causing him to ejaculate. See p. 11, *supra*. There was nothing reasonable about this purported search, and the jury's verdict was clearly supported.

5. There Was Sufficient Evidence As To Count 4

The indictment charged Pilati with violating Yarbrough's right to be free from an unreasonable search by "strok[ing]" his "testicles." ER 21 at 3. Yarbrough's testimony clearly supported this count.

Pilati makes two irrelevant points arguing that this was insufficient evidence: first, Yarbrough did not "specify what he meant by 'slowly;'" second,

Yarbrough did not "allege that Pilati made any sexually suggestive remarks or tried to masturbate him." Br. 21. Neither of these points changes the fact the jury's conclusion that Pilati's actions passed well beyond the line of reasonableness was well supported.

6. There Was Sufficient Evidence As To Count 5

Pilati argues that there was insufficient evidence to convict Pilati of violating Maxwell's right to be free from an unreasonable search. Pilati's argument primarily revolves around the claim that the indictment alleged that the Pilati's unreasonable search occurred on or about February 2004, but that the testimony showed that two unreasonable searches occurred in summer 2003. Br. 22-23. Pilati is arguing that the proof adduced at trial and the indictment varied, and therefore he "had no way of knowing which" of the four incidents involving Maxwell "he was called upon to defend." Br. 24. This argument fails.

This Court has stated that a variance "occurs when the evidence at trial establishes facts *materially* different from those alleged in the indictment." *United States* v. *Caporale*, 806 F.2d 1487, 1498-1499 (11th Cir. 1986) (emphasis added). This Court reviews for such a variance by first asking "whether a material variance did occur, and second, whether the defendant suffered substantial prejudice as a result." *United States* v. *Dennis*, 237 F.3d 1295, 1300 (11th Cir. 2001) (quoting

Chastain, 198 F.3d at 1349). "The rationale behind the rule prohibiting material variances between indictments and proof at trial is twofold. Most importantly, the rule insures 'that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial.'" *Thompson* v. *Nagle*, 118 F.3d 1442, 1453 (11th Cir. 1997) (quoting *Berger* v. *United States*, 295 U.S. 78, 82, 55 S. Ct. 629, 630 (1935)). Where the government's proof does not differ to such an extent that "the defendant was [not] unfairly surprised and had an inadequate opportunity to prepare a defense," no variance exists. *United States* v. *Paskett*, 950 F.2d 705, 709 n.4 (11th Cir. 1992). As this Court has stated, "[p]roperly understood, however, a variance exists where the evidence at trial proves facts *different* from those alleged in the indictment, as opposed to facts which, although not specifically mentioned in the indictment, are entirely consistent with its allegations." *United States* v. *Gold*, 743 F.2d 800, 813 (11th Cir. 1984).

"When the government charges that an offense occurred 'on or about' a certain date, the defendant is on notice that the charge is not limited to the specific date or dates set out in the indictment." *United States* v. *Reed*, 887 F.2d 1398, 1403 (11th Cir. 1989). This means that "[o]rdinarily, a variance between the date alleged and the date proved will not trigger reversal as long as the date proved falls

within the statute of limitations and before the return of the indictment." *Ibid*. All that is required is proof of a "date reasonably near the specified date." *Ibid*.

The indictment alleged that the illegal search occurred on or about February 2004. ER 21 at 3. The evidence at trial showed that the two incidents during which Pilati fondled Maxwell occurred between June and August 2003. See pp. 12-13, *supra*. The proof thus varied in time from the indictment between six and eight months. This time was within the statute of limitations, see 18 U.S.C. 3282(a), and before the return of the indictment, ER 21 at 1 (filed May 3, 2007). Furthermore, time is not an essential element of this offense and, thus, the variance is not problematic in that sense. See *Russell* v. *United States*, 429 F.2d 237, 238 (5th Cir. 1970) (rejecting variance argument where "time of the offense [was] not an essential element of the offense charged in the indictment" and where the proof was on a date before the indictment's return and within the period of statute of limitations). Finally, this and other courts have rejected arguments that time variances of similar or longer lengths constituted impermissible variances. *United States* v. *Alexander*, 850 F.2d 1500, 1504-1505 (11th Cir. 1988) (approximately four month variance), reversed and remanded on other grounds, 492 U.S. 915, 109 S. Ct. 3236 (1989); *United States* v. *Carter*, 410 F.3d 1017, 1025 (8th Cir. 2005) (four month variance); *United States* v. *Barsanti*, 943 F.2d 428, 438-439 (4th Cir.

1991) (four month variance permissible); *Russell*, 429 F.2d at 238 (no impermissible variance where typographic error in indictment resulted in charge being a year's variance from proof).

Pilati cannot maintain that the facts adduced at trial were *materially* different from those alleged in the indictment. The indictment alleged that Pilati fondled Maxwell during a drug test, which the facts demonstrated, and the facts proved. Even assuming some variance, Pilati was not substantially prejudiced. Pilati, contrary to his contentions, was on notice of the actions against which he needed to defend himself. He cannot reasonably claim that the fact that two incidents in question occurred several months before the February 2004 date surprised him and denied him an adequate opportunity to prepare his defense.

The same is true of Pilati's argument concerning the substantive proof offered at trial. Pilati again misses the point by arguing that he merely examined Maxwell and there was nothing of a sexual nature to these examinations. The government of course was not required to prove that Pilati had any sexual intent in his fondling of Maxwell, but simply that his fondling of Maxwell was unreasonable. The government adduced ample evidence to show this. The jury, of course, was free to accept Pilati's theory that his searches were reasonable but did

not. Nothing Pilati argues here undermines the sufficiency of the evidence supporting that decision.

B. The Indictment Was Not Constructively Amended

While it is not entirely clear how Pilati believes the indictment was constructively amended, it seems that he is arguing that the admission of the uncharged acts, coupled with the fact that the magistrate court "gave an instruction allowing the jury to convict on a date not charged," resulted in constructive amendment. Br. 41. This Court reviews this argument for plain error because Pilati did not raise it at trial. Br. 42.

First, Pilati's concern about the jury instructions allowing conviction on a date other than that stated in the indictment is misplaced. As this Court has stated, "When the government charges that an offense occurred 'on or about' a certain date, the defendant is on notice that the charge is not limited to the specific date or dates set out in the indictment." *United States* v. *Reed*, 887 F.2d 1398, 1403 (11th Cir. 1989). A constructive amendment occurs where "jury instructions broaden the scope of an indictment by permitting a conviction for an uncharged offense." *United States* v. *Spencer*, 592 F.3d 866, 873 (8th Cir. 2010). However, no such "constructive amendment arises from the admission of acts not charged in the indictment when the court's instructions to the jury preclude the possibility that the

defendant was convicted on those acts." *United States* v. *Apodaca*, 843 F.2d 421, 428 (10th Cir. 1988).

Here, the magistrate court carefully instructed the jury that while it had "heard evidence of acts of the defendant which may be similar to those charged," it was to "keep in mind that these act are not charged offenses in the indictment." ER 88 at 558. The jury was told to consider this evidence only for "two very limited purposes:" as "circumstantial evidence to demonstrate the defendant's propensity to commit acts" such as those charged, and as "circumstantial evidence to demonstrate" Pilati's intent. ER 88 at 558. Finally, the uncharged acts admitted into evidence could not have been grounds for conviction. None of the actions concerning Greg Presley related to any of the counts in the indictment, and the uncharged incident involving Trowbridge occurred in September 2000. Meanwhile, Trowbridge testified to four incidents of fondling in the spring of 2001, which corresponded to the charged conduct in Count 1. ER 21 at 1. The jury could not have confused these with the uncharged incident. The indictment was not constructively amended.

C. The Jury Instructions Were Proper

Pilati, without citing a case, argues that the instructions did not put the essential elements of 18 U.S.C. 242 in front of the jury. The Court reviews this for

plain error as Pilati admits he failed to raise it in front of the magistrate court. Br. 43. The magistrate court's instructions set out the standard elements for a Section 242 violation. See, *e.g.*, *United States* v. *LaVallee*, 439 F.3d 670, 686 (10th Cir. 2006); *United States* v. *Sipe*, 388 F.3d 471, 479-480 & n.20 (5th Cir. 2004). They also comported with this Circuit's Pattern Jury Instructions and those of other circuits. Eleventh Circuit Pattern Jury Instructions – Criminal 8; Fifth Circuit Pattern Jury Instructions 2.18; Seventh Circuit Pattern Jury Instructions – Criminal 18 U.S.C. 242.

Pilati also fails to focus on the portion of the 242 instruction that incorporates the question of fair warning, the element of "willfulness." The magistrate court instructed the jury that Pilati could be found guilty only if he acted willfully. It stated that willfully meant acting "voluntarily and purposely, with the specific intent to do something the law forbids." SER 88 at 556. Pilati "must have intended to violate the victim's right under the Fourth Amendment to the United States Constitution to be free from an unreasonable search." ER 88 at 556. The magistrate court further stated that a "defendant acts willfully if he acts in open defiance of a constitutional requirement." ER 88 at 556. There was no error here.

IV

THE MAGISTRATE COURT COMMITTED NO EVIDENTIARY ERRORS

Pilati argues that the magistrate court erred by (a) improperly excluding the criminal histories of Trowbridge, Malone, and Yarborough,[5] (b) by admitting Pilati's other uncharged sexual misconduct, and (c) by allowing witnesses to testify to prior statements of Malone and Presley that were consistent with their trial testimony. Br. 30-34, 43, 45. Pilati also argues, citing no case law, that the district court erred in allowing numerous lay witnesses to testify how they administered urinalysis tests or had such tests administered to them.

A. The Magistrate Court Properly Excluded The Victims' Criminal Histories

Pilati argues that the victims' criminal histories were relevant because they went to the question of the reasonableness of Pilati's searches and the bias the victims might have harbored against Pilati. Br. 31-32. While Pilati does not describe it as such, his argument seems to be that the exclusion of this evidence violated the Confrontation Clause. This argument, which is reviewed for plain error because Pilati did not raise it below, (Br. 30), is wholly without merit.

This Court has held that "the mere fact that defense counsel sought to explore a prosecution witness's bias does not automatically invalidate 'the court's

[5] Pilati erroneously asserts that the government moved to exclude Presley's juvenile conviction for marijuana. Br. 33 n.10.

ability to limit cross-examination.'" *United States* v. *Orisnord*, 483 F.3d 1169, 1178-1179 (11th Cir.) (quoting *United States* v. *Lyons*, 403 F.3d 1248, 1256 (11th Cir. 2005)), cert. denied, 552 U.S. 1049, 128 S. Ct. 673 (2007). Rather, the test is whether "a reasonable jury would have received a significantly different impression of the witness' credibility had counsel pursued the proposed line of cross-examination." *Id*. at 1179 (internal quotation marks and citation omitted). "As long as sufficient information is elicited from the witness from which the jury can adequately assess possible motive or bias, the Sixth Amendment is satisfied." *Ibid*. (same).

Here, clearly the jury was fully aware of the witnesses' potential biases against Pilati. Each victim was testifying about drug tests to which he had to submit because of criminal convictions which Pilati, as District Attorney, prosecuted. The jury thus was fully aware that the victims might bear grudges against their prosecutor.

B. Evidence Of Pilati's Prior Sexual Misconduct Was Properly Admitted

Pilati argues that evidence of his prior sexual misconduct was not admissible. First, he argues that this evidence did not meet the requirements under Federal Rule of Evidence 413 because he was not charged with the "offense of sexual assault." Br. 35. Second, he argues that, even assuming the prior sexual

conduct was admissible under Rule 413, it should have been precluded under Rule 403 because its probative value was "substantially outweighed" by the dangers of prejudice, confusion of the issues and misleading the jury. Br. 36-37. These arguments, which are reviewed for plain error because Pilati did not object below, fail.

1. The Prior Misconduct Was Admissible Under Rule 413

Federal Rule of Evidence 413(d)(2) defines the "offense of sexual assault" as "contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person." Pilati claims that he was not charged with any such crime nor was his contact without consent. Br. 36. The problem with this argument is that every act charged in the indictment meets Rule 413(d)(2)'s definition. Pilati fondled the genitals of the unwilling victims in Counts 1-5. These actions meet the definition of "offense of sexual assault" as laid out in Rule 403(d)(2).

Pilati also argues that all the victims "consented to drug testing" and, therefore, "there is no question that the contact between Pilati" and the victims was "consensual." Br. 36. Submitting to mandatory drug testing is hardly consenting to fondling. The determination of the legality of Pilati's actions – turned on

whether the victims had a right to be free from *unwanted* touching. The victims' own testimony demonstrated that they were not willing participants.

2. The Magistrate Court Did Not Commit Plain Error By Admitting The Prior Acts

Pilati argues that the magistrate court erred in admitting evidence of Pilati's prior acts because it posed a danger of "unfair prejudice," was confusing, and could mislead the jury. Br. 37.

The evidence clearly was relevant to show that Pilati had a propensity to fondle the genitals of young men while ostensibly administering drug tests. See *United States* v. *Rogers*, 587 F.3d 816, 821 (7th Cir. 2009) ("Congress intended, in passing Rule 413, to provide an exception to Rule 404(b)'s general bar and to permit the trier of fact to draw inferences from propensity evidence."); *United States* v. *Hollow Horn*, 523 F.3d 882, 887 (8th Cir. 2008) (same); *United States* v. *Seymour*, 468 F.3d 378, 386 (6th Cir. 2006) (same); *United States* v. *Guidry*, 456 F.3d 493, 501 (5th Cir. 2006) (same), cert. denied, 549 U.S. 1139, 127 S. Ct. 996 (2007). The evidence was not inherently misleading nor did it have a tendency to confuse the jury. Rather, it showed that Pilati had previously fondled Trowbridge's genitals and, in the case of Presley, showed similar behavior to that of the charged conduct.

"'Unfair prejudice,' within the meaning of Rule 403, 'means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" *United States* v. *Kerr*, 778 F.2d 690, 703 (11th Cir. 1985) (quoting Note, Advisory Committee on Rules of Evidence, Rule 403) In this case, while the evidence was by nature prejudicial, it was not unduly so; it is hard to see how several more incidents of sexual misconduct would emotionally inflame the jury beyond the facts tied to the indictment. Courts also have held that "the inflammatory potential inherent in the sexual nature of prior sexual offenses cannot be considered in evaluating the admissibility of evidence under Rule 413," *United States* v. *Medicine Horn*, 447 F.3d 620, 623 (8th Cir. 2006), and that Federal Rule of Evidence 413 evinces a "legislative judgment that evidence of prior sexual offenses should ordinarily be admissible," *United States* v. *LeCompte*, 131 F.3d 767, 769 (8th Cir. 1997). The magistrate court did not abuse its discretion in admitting the evidence of Pilati's prior sexual misconduct, let alone commit plain error.

C. The Magistrate Court Properly Admitted Prior Consistent Statements

Pilati argues that the magistrate court erred by allowing Justin Foust to testify to a prior statement of Malone that was consistent with Malone's trial testimony, and allowing Anthony Davis to testify to a prior statement of Greg

Presley consistent with Presley's trial testimony. Br. 43, 45. He argues that such prior consistent statements are admissible only under the conditions set out in *Tome* v. *United States*, 513 U.S. 150, 160, 115 S. Ct. 696, 705 (1995), none of which obtains here. Br. 44. His argument fails.

"[W]hether a witness had a motive to fabricate when a prior consistent statement was made is a factual question properly decided by the district court and subject to reversal only for a clear abuse of discretion." *United States* v. *Prieto*, 232 F.3d 816, 822 (11th Cir. 2000). The magistrate court here was never given the opportunity to make the factual findings described in *Prieto*. Rather, Pilati now attempts, for the first time, to claim that both Malone and Presley's consistent statements were made after they had a motive to fabricate. The claim that Malone and Presley made their statements after developing a motive to fabricate was not raised in front of the magistrate court and the magistrate judge was given no opportunity to make the sort of factual findings anticipated by this Court's case law.[6] The admission of this testimony could not have been an abuse of discretion, as the court was not given the opportunity to exercise that discretion, and it certainly was not plain error.

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[6] Pilati's citation to *United States* v. *Acosta*, 769 F.2d 721, 723 (11th Cir. 1985) is inapposite. That case involved the burden upon a party attempting to use a statement from an unavailable witness.

Even assuming an evidentiary error in allowing this testimony in at trial, Pilati cannot show that the admission of these prior consistent statements had any influence, let alone a substantial influence, on the outcome. Malone's testimony was corroborated by his mother and a family friend who testified to how upset he was on being called to Pilati's house. Malone's explanation that he did not tell the first FBI Agent everything about Pilati because he felt uncomfortable telling a woman that Pilati made him strip off his clothing was plausible. SER 86 at 100, 126. Malone's experience was of course bolstered by the very similar testimony of the other victims, including Presley. As for Presley, his testimony was never called into question and even if it were, his molestations by Pilati were not charged.

D. The Magistrate Court Properly Allowed Law Enforcement Witnesses To Testify How They Administered Drug Tests And Victims To Testify How Drug Tests Were Typically Administered To Them

It is indisputable that lay witnesses can only offer "testimony in the form of opinions or inferences" in a limited set of circumstances. Fed. R. Evid. 701. But, contrary to Pilati's arguments, which Pilati did not raise below, these lay witnesses were not testifying as to their opinions. The law enforcement officers testified as to how they conducted drug tests and as to why strip searching and touching an individual's genitals was not necessary; they were not opining whether Pilati's

method of "testing" was proper. The victims' testimony simply was about their experiences with other drug testers. None of this consisted of the sort of "lay opinion" precluded by Federal Rule of Evidence 701.

V

PILATI WAS NOT DENIED HIS COUNSEL OF CHOICE WHEN THAT COUNSEL VOLUNTARILY WITHDREW

Pilati argues that he was erroneously deprived of his counsel of choice, Jeffrey Bowling, and that this deprivation requires automatic reversal. Br. 26. The Court reviews for plain error because Pilati did not object below.

A. The Evidentiary Hearings Concerning Bowling's Withdrawal

At the evidentiary hearings this Court ordered, several facts were established. Bowling's involvement in the case was more as an informal advisor than trial counsel. Christine Dunn, trial counsel for the government, testified that she did not believe she needed "to make a formal" motion for Bowling's recusal, because her "understanding" was that "he was not really involved" in the case as counsel. ER 116 at 5 (Evid. Hearing Oct. 20, 2010). Bowling testified that he served Pilati by giving him "advice" about "which counsel he should use,")ER 118 at 7) (Evid. Hearing Oct. 22, 2010), and said he could not recall appearing in the case prior to the date of trial, ER 118 at 8. He never filed any motions with the court in the case nor did he appear at any hearings for Pilati. SER 118 at 22.

Bruce Gardner testified that he was "[a]bsolutely" the primary attorney in the case and that he "had not envisioned nor did * * * Bowling envision * * * Bowling having any specific role in this trial." ER 118 at 49, SER 118 at 43. Bowling testified that he and Gardner had not mapped out a trial plan (SER 118 at 13-14) and Bowling had no assigned role in the case (SER 118 at 23).

The government "never made any sort of formal motion for recusal," (ER 116 at 6, SER 116 at 24) and Bowling said that no objection was ever raised in any form to the magistrate court. ER 118 at 33. In chambers, the government "flagged" a potential conflict involving Bowling and one of the government witnesses, Malone. ER 116 at 6, SER 116 at 23; see also SER 118 at 67. The government's position was that Bowling's previous representation of Malone on any issue was a conflict. ER 116 at 9; SER 118 at 68.

At the hearing to supplement the record, Bowling testified that he recalled appearing for Malone at a juvenile hearing. SER 118 at 11. Bowling testified that the government alleged that his representation of Malone occurred in the matter about which Malone would testify. ER 118 at 15. Gardner testified similarly, but stated that Bowling responded that he had "represented [Malone] in an unrelated matter." ER 118 at 39.

In chambers before trial, Bowling told the court that "he thought he had a client relationship with Mr. Malone in the past," and then volunteered that "he wasn't planning on being involved in the trial anyway, he was not going to be examining witnesses, so he would just not sit at counsel table; he would sit in the audience or in the first row." ER 116 at 6; see also SER 116 at 22, 24; ER 118 at 69. Because Bowling volunteered this, there was no need for the government to ask the magistrate court to recuse Bowling. SER 116 at 13; ER 118 at 70. The government believed Bowling had proposed "an acceptable solution." SER 116 at 13.

Bowling's testified that he believed that the government said that he had represented Malone in the matter at issue in Pilati's case. ER 118 at 15. He testified, "I said well * * * if the representation is that I've represented Mr. Malone in the underlying charge for which Mr. Pilati has been indicted and everyone feels that's a conflict, then I will withdraw from the case and not participate." ER 118 at 17. He testified that he withdrew because the government said he had a conflict. ER 118 at 19. Bowling further stated that he voluntarily withdrew and that the magistrate judge did not disqualify him. ER 118 at 24.

The magistrate judge stated "[u]nequivocally" that he did not make nor was asked to make any ruling. SER 118 at 82. Rather, "counsel came to a resolution

in my presence of what they wanted to do." SER 118 at 82. Had they not come to such a resolution, the magistrate court would have held a more formal hearing in the courtroom. SER 118 at 82. Gardner stated that Bowling was the one who brought up the subject of not sitting at the counsel table as a compromise (ER 118 at 46, SER 118 at 48) and Bowling did not request any hearing on the issue, ER 118 at 28. Bowling admitted that neither he nor Gardner requested that the magistrate court take "any further testimony" or that they be able to "make any further argument" concerning the recusal issue. SER 118 at 35. Gardner testified that Pilati did not ask him to move for a continuance and that he made no objection. ER 118 at 41. Gardner also stated that it "caused [him] uneasiness * * * that Mr. Bowling had represented a government witness in any capacity." ER 118 at 44.

During the trial, Bowling spoke to Gardner and Pilati at nearly "every break," (SER 116 at 26) continued to provide Gardner and Pilati advice during the case, and raise points that Gardner should draw out during the trial, ER 118 at 45, SER 118 at 31.

B. Pilati Was Not Denied His Choice Of Counsel

The Supreme Court has stated the right to counsel of choice is limited. A defendant may not "insist on the counsel of an attorney who has a previous or

ongoing relationship with an opposing party." *Wheat* v. *United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 1697 (1988); see also, *United States* v. *Hallock*, 941 F.2d 36, 44 (1st Cir. 1991).

Pilati relies on *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 126 S. Ct. 2557 (2006), and *Rodriquez* v. *Chandler*, 382 F.3d 670 (7th Cir. 2004). Br. 26-27, 29-30. Both cases are inapposite. In *Gonzalez-Lopez*, the district court had erroneously deprived a criminal defendant his choice of counsel. The district court ordered that defendant's counsel of choice, and his ultimately retained counsel, engage in no contact and placed a United States Marshal between them to effect the order. 548 U.S. at 143, 126 S. Ct. at 2560. The Supreme Court held that such an erroneous deprivation required automatic reversal, and the government did not "dispute the * * * conclusion * * * that the District Court erroneously deprived respondent of his counsel of choice." *Id*. at 144, 2561. In *Chandler*, the trial court, relying on assurances from the prosecutor, determined a conflict existed and "prevented" counsel of choice "from rendering" the defendant "any further assistance." 382 F.3d at 671. The trial court affirmatively disqualified defendant's counsel of choice.

Here the government did not move to disqualify Bowling, the court did not order him disqualified, and the testimony demonstrated Bowling's continued

involvement in the case even after the in chambers discussion. Gardner admitted that Bowling's representation of Malone in any previous capacity raised a potential conflict issue. As the hearing testimony demonstrated, the magistrate court did not disqualify Bowling, did not preclude him from talking with Gardner, did not prohibit his contact with Pilati, nor did it enter any order whatsoever concerning Bowling's participation in the trial. Most importantly, the testimony demonstrated Bowling *voluntarily* withdrew himself from any active role when the question of his potential conflict was raised. Where a defendant claims that "both the district court and government effectively 'forced' his attorney out of the case and thus denied him his sixth amendment right to counsel of his choice," such an argument is foreclosed where a counsel's "voluntary withdrawal * * * prevented his sixth amendment claim from ever materializing in the district court." *United States* v. *Dansker*, 537 F.2d 40, 64 (3d Cir. 1976); see also *Byrne* v. *Nezhat*, 261 F.3d 1075, 1091 (11th Cir. 2001). In short, there is no factual or legal basis for Pilati's argument.

VI

THE MAGISTRATE COURT CORRECTLY CALCULATED PILATI'S SENTENCE

Pilati argues that the magistrate court erred in sentencing when it cross-referenced U.S.S.G. §2A3.4, the criminal sexual abuse guideline, and additionally

erred by then applying the civil rights guideline's specific offense characteristic. Br. 54-58. This Court reviews the factual findings that the magistrate court made concerning the sexual abuse guideline for clear error and its application of those facts de novo because Pilati objected below. This Court reviews the application of the civil rights guideline's specific offense characteristic for plain error because Pilati did not raise it below.

A. The Magistrate Court Did Not Err In Applying The Criminal Sexual Abuse Guideline

1. The Probation Office and the Magistrate Judge began their sentencing calculation with the civil rights guideline, U.S.S.G. §2H1.1, Offenses Involving Individual Rights. This guideline requires the sentencing court to calculate the base offense level by applying the greatest of the following:

> (1) the offense level from the offense guideline applicable to any underlying offense;
>
> (2) 12, if the offense involved two or more participants;
>
> (3) 10, if the offense involved (A) the use or threat of force against a person; or (B) property damage or the threat of property damage; or
>
> (4) 6, otherwise.

U.S.S.G. §2H1.1(a).

Initially, the probation office used Section 2H1.1(a)(4) to determine the base offense level. SER 63 at 2. The government successfully objected, arguing that the probation office should employ Section 2H1.1(a)(1), and cross-reference to the guideline for abusive sexual contact, Section 2A3.4. SER 63 at 2-4. The Application Note to Section 2H1.1(a)(1) states, "'Offense guideline applicable to any underlying offense' means the offense guideline applicable to any conduct established by the offense of conviction that constitutes an offense under federal, state, or local law." U.S.S.G. §2H1.1, comment (n.1). The government argued that Pilati's conduct established the offense of abusive sexual contact as defined in 18 U.S.C. 2244 and 18 U.S.C. 2246. SER 63 at 4. The government further argued that because the sexual abuse was accomplished by placing Pilati's victims in fear, a base offense level of 12 applied under Section 2A3.4(a)(2). SER 63 at 5. The government argued that the specific offense characteristic, under Section 2A3.4(b)(3), that the victims were "in the custody, care, or supervisory control of the defendant" also applied. SER 63 at 5-6. This added two levels to the base offense level. Finally, because Pilati acted under color of law, the government argued that the specific offense characteristic under Section 2H1.1(b)(1) applied, which added 6 levels to the 14 levels already calculated. SER 63 at 6.

At the sentencing hearing, the magistrate court denied Pilati's objection to the cross-referencing, and specifically found that Pilati's conduct constituted sexual abuse. ER 90 at 6. The magistrate court adopted the rest of the Superseding PSR and calculated a combined adjusted offense level of 26. ER 90 at 10.

2. Pilati argues that the application of the criminal sexual abuse guideline Section 2A3.4 was error. He argues that he did not have "'sexual contact' with the intent to 'arouse or gratify the sexual desire of any person,'" as that is defined in 18 U.S.C. 2244 and 2246. Br. 57. Pilati's argument is misplaced.

Abusive sexual contact is defined in 18 U.S.C. 2244. Sexual contact is defined as the "intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. 2246(3). This definition is more expansive than simply touching with the intent to gratify or arouse sexual desire as Pilati would have this Court believe.

The evidence clearly supported the magistrate court's factual finding that Pilati committed abusive sexual contact. First, Pilati undeniably touched the genitalia of all five victims. Second, it was reasonable to infer from the abundant

evidence that Pilati touched the victims' genitalia to humiliate and degrade them, see, *e.g.*, (ER 87 at 176) (describing fear), and to gratify his own sexual desire. Given the total lack of necessity for the fondling of the victims' genitalia, this is the only plausible inference to be made from the facts. This Court, at the very least, cannot be left with the definite and firm conviction that the magistrate court's factual finding was erroneous. Contrary to Pilati's claim (Br. 58), Pilati did not need to be guilty of 18 U.S.C. 2241, 2242, or 2243. Rather, his conduct had to be the equivalent of abusive sexual contact, which it was. The magistrate court correctly applied this cross-reference.

B. The District Court Correctly Applied The Civil Rights Guideline's Specific Offense Characteristic

Pilati also argues that the application of the civil rights guideline's specific offense characteristic was error. Without citing a case, he argues it "is axiomatic, that in cross-referencing, the specific offense characteristics are determined by the cross-reference, not the original guideline." Br. 56. Pilati is half correct. The specific offense characteristics of both can be applied.

The Application Notes to Section 2H1.1 detail how to determine the offense level for an "offense guideline applicable to any underlying offense." U.S.S.G. §2H1.1, comment (n.1). The Notes state that the court should "apply subsection (b)" to whatever it determines the base offense level to be. U.S.S.G. §2H1.1,

comment (n.1). Courts routinely apply both the civil rights cross-reference to another guideline, Section 2H1.1(a)(1), and Section 2H1.1(b). See, *e.g.*, *United States* v. *Byrne*, 435 F.3d 16, 27 (1st Cir. 2006) (rejecting defendant's sentencing arguments where district court applied cross-reference to the aggravated assault guideline Section 2A2.2(a), and also applied an aggravated assault enhancement Section 2A2.2(b)(3)(B) as well as the civil rights enhancement Section 2H1.1(b)); *United States* v. *Volpe*, 224 F.3d 72, 76 (2d Cir. 2000) (rejecting double-counting argument where district court had applied both an enhancement under the sexual abuse guideline, Section 2A3.1(b)(3)(A), and the color of law enhancement, Section 2H1.1(b)(1)(B)). Thus, the magistrate court did not err, let alone commit plain error, in applying Section 2H1.1(b).

CONCLUSION

The Court should affirm Pilati's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief does not exceed the type-volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using Microsoft Word 2007 and contains 13,998 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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April 26, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this the 26th day of April, 2010, I electronically filed the United States' Brief as Appelle with the Clerk of the Court. In addition, the original and six copies of the foregoing was filed the Clerk of the Court via first class mail and one copy of the foregoing was sent first class mail to counsel of record:

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