

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA,

HON. BRUCE W. KAUFFMAN

Plaintiffs,

CRIMINAL NO. 07-641

v.

BRIEF IN SUPPORT OF
MOTION IN LIMINE TO
BAR THE GOVERNMENT FROM
USING THE TERMS “VAGINA”
OR “GENITALIA”

PATRICK BUNTY,

Defendant.

**DEFENDANT’S MOTION NO. 9 - TO BAR THE GOVERNMENT FROM USING
THE TERMS “VAGINA” OR “GENITALIA”**

NOW COMES the Defendant, by and through counsel Lorandos & Associates, who respectfully makes the following arguments in support of this motion:

A. THE PHOTOGRAPHS AT ISSUE DO NOT SHOW “VAGINA” OR “GENITALIA” OF THE FEMALES DEPICTED THEREIN.

Defendant is charged with knowingly possessing and transporting in foreign commerce six visual depictions of minors engaged in sexually explicit conduct in violation of Title 18, United States Code, Sections 2251(a)(1) and 2252(a)(4)(B). Defendant has challenged the indictment on the grounds that the photographs do not depict minors engaged in sexually explicit conduct and therefore do not violate Title 18, United States Code, Sections 2251(a)(1) and 2252(a)(4)(B).¹

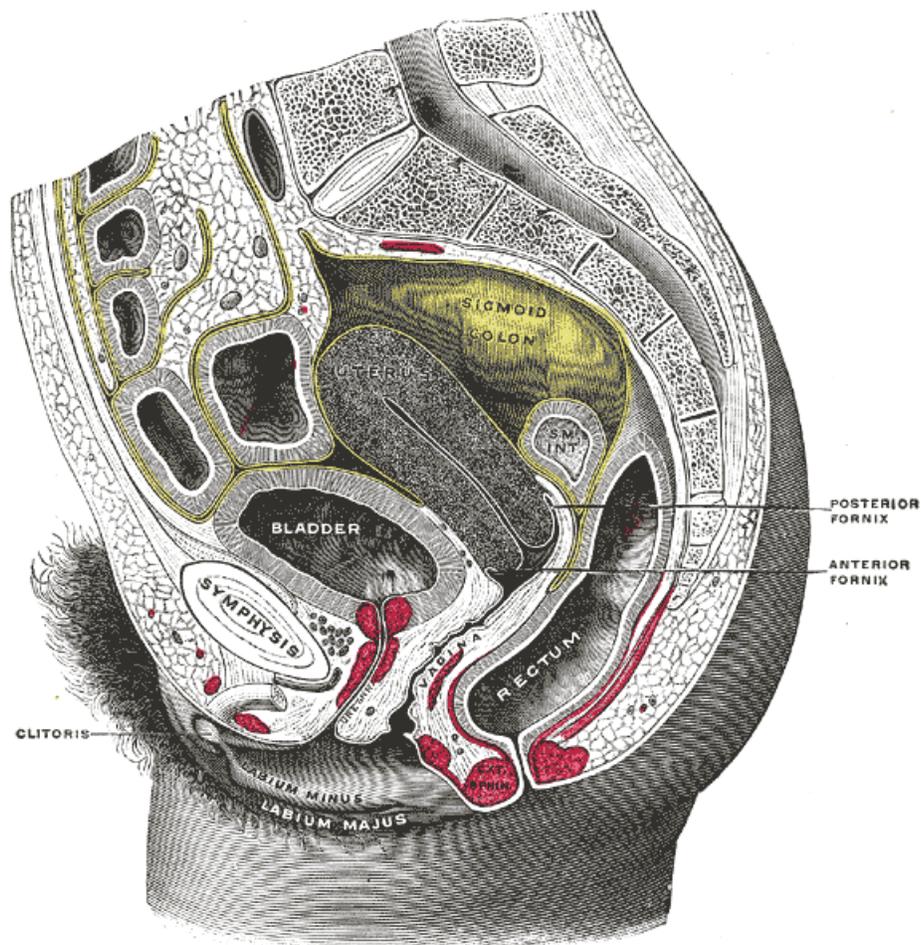
Defendant now challenges the use of term “vagina” or “genitalia” by the Government in this matter. During the oral arguments at motion hearings in this matter,

¹ See Defendant’s Motion No. 3 – to Quash the Indictment.

the AUSA has repeatedly stated on record that the photographs at issue depict minors' "vagina" or "genitalia." This is incorrect. The use of the term "vagina" or "genitalia" is improper and incorrect in view of the photographs at issue. If the AUSA were allowed to use these terms at trial, it would prejudice the jury, inflame their passions and violate the Defendant's right to a trial by an impartial jury. U.S. Const. amend. VI.

The term "vagina" as defined by Gray's Anatomy is:

"The vagina extends from the vestibule to the uterus, and is situated behind the bladder and in front of the rectum; it is directed upward and backward, its axis forming with that of the uterus an angle of over 90°, opening forward....."



Gray's Anatomy, 3d.

Several of the photographs at issue in this matter show the external *Labia Majora* of a standing female therein. Underneath the *Labia Majora* and not visible in the pictures is the *Labia Minora*. Underneath the *Labia Minora* and certainly not visible in the pictures is the *Vaginal Introitus*. Therefore, for the AUSA to say that the photographs at issue show the “vagina,” is improper and incorrect.

B. USE OF THE TERMS “VAGINA” OR “GENITALIA” BY THE GOVERNMENT AT TRIAL WOULD INFLAME, PREJUDICE AND MISLEAD THE JURY.

Federal Rules of Evidence, Rule 403 states:

“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

This Court’s analysis pursuant to Federal Rule 403 must begin with a determination as to whether the evidence has probative value. *U.S. v. Universal Rehabilitation Services (PA), Inc.*, 205 F.3d 657, 665 (3rd Cir. 2000). Clearly, the terms “vagina” or “genitalia” in the context of the photographs at issue are incorrect and misleading. None of the photos show the vagina or any part of the vagina of the females therein. What is inherently incorrect and misleading obviously cannot have probative value.

Arguendo, even if these terms had probative value, use of these terms still must be prohibited at trial. Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *U.S. v. Universal Rehabilitation Services (PA), Inc.*, 205 F.3d 657, 664 (3rd Cir.

2000). The terms “vagina” and “genitalia” carry an immediate sexual undertone for lay people. Respectfully, Defendant says that every owner of a vagina and any person who has ever visited a vagina knows that the vagina of a human female lies beneath the *Labia Minora* which lies beneath the *Labia Majora*. The “vagina” of a human female is by definition not visible in a standing female. Use of these terms by the AUSA at trial would result in unfair prejudice to the Defendant. As the Third Federal Circuit has stated, unfair prejudice “means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” *United States v. Cross*, 308 F.3d 308, 324 n. 23 (3d Cir.2002). Repeated use of these terms would result in prejudicing and inflaming the jury. *Carter v. Hewitt*, 617 F.2d 961, 972 (3d Cir.1980) (“prejudice” entails a determination on “an improper basis of decision”).

Further, this Court is required to balance the probative value of evidence against its prejudicial effect. As this Court is aware, the Third Circuit instructs that the district court “must appraise the genuine need for the challenged evidence and balance that necessity against the risk of prejudice to the defendant.” *Government of the Virgin Islands v. Archibald*, 987 F.2d 180, 186 (3d Cir.1993) (emphasis added). There is no need (much less “genuine need”) for the Government to use the terms “vagina” or “genitalia” at trial. There is no legitimate purpose for their use. There is “an overwhelming probability” that, if used, these terms would create “a strong likelihood” that their use would be “devastating” to the Defendant. *U.S. v. Bradley*, 173 F.3d 225, 230 (3d Cir. 1999); *United States v. Vaulin*, 132 F.3d 898, 901 (3d Cir.1997). When evidence serves no legitimate purpose and the only effect of such evidence is to inflame the minds of the jurors, it is error to admit such evidence. *U.S. v. Bamberger*, 456 F.2d 1119, 1127 (3rd

Cir. 1972) *citing Suhay v. United States*, 95 F.2d 890, 894 (10th Cir.), cert. denied, 304 U.S. 580, 58 S.Ct. 1060 (1938).

The terms “vagina” and “genitalia” carry with them highly emotional appeal and if allowed to be used during the trial will inflame the jury. In *United States v. Bates*, 46 Fed.Appx. 104 (3d Cir. 2002), the Third Federal Circuit stated:

“At all times, however, the government must refrain from inflammatory and highly emotional appeals which can easily divert the jury from a fair consideration of evidence of guilt and result in a trial that is manifestly unfair. *See, e.g., Tucker v. Zant*, 724 F.2d 882, 890 (11th Cir.1984). A prosecutor may not attempt to sway a jury towards a guilty verdict by inflaming the jury’s passions and prejudices. *See, e.g., United States v. Homer*, 545 F.2d 864, 867 (3d Cir.1976).” *Id.* at 110

Words that are loaded with emotion, that are designed to inflame a jury and are not probative of the issue in question are best kept out at trial. As an analogy, in *United States v. Archer*, 2008 WL 2247144 (3d Cir. 2008), a testifying police officer, who was a witness for the prosecution in an armed bank robbery case, used the word “cop-killer” to identify the type of bullet used in the robbery while he was on the stand. Upon Defense counsel’s objection to the use of this term, the trial court cautioned the Government and sought assurance from the Government that there would be no further use of the term in any subsequent portion of the trial. The defense in this case is filing this motion *in limine* to avoid such a scenario in front of the jury at the time of trial.

CONCLUSION

WHEREFORE the foregoing reasons, Defendant respectfully requests that this Honorable Court grant Defendant’s motion and instruct the Government to not use the

terms “vagina” and/or “genitalia” during trial while describing the photographs at issue or in any context with these photographs.

Dated: October 1, 2008

s/ Ashish S. Joshi
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