

## SELECTED LITIGATION & ADJUDICATION ISSUES

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### SEMINAR OUTLINE:

- I. **Charging** – Discuss considerations regarding charging decisions.
- II. **Pre-Trial** – Review selected aspects of CP cases.
- III. **Trial** – Explain relevant evidentiary standards for admission of CP images.
- IV. **Post-Trial** – Describe sentencing and restitution issues.

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### I. CHARGING



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**QUESTION:**

Can you a defendant be charged with both possession and receipt of child pornography images???

Would the statutes help this decision?

- § 2252(a)(2)(B)
  - “Any person who . . . knowingly receives or distributes [child pornography]”
- § 2252(a)(5)(B)
  - Any person who “knowingly possesses, or knowingly accesses with intent to view [child pornography]”

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**DOUBLE JEOPARDY**

Generally, no. A defendant cannot be charged with both receiving and possessing the same CP images because it violates the double jeopardy clause.

- Multiplicity = the offense of knowingly receiving child pornography includes all of the elements of the lesser-included offense of possessing the same CP, and Congress did not explicitly require multiple punishments. *United States v. Ehle*, 640 F.3d 689 (6th Cir. 2011)

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**DOUBLE JEOPARDY**

HOWEVER, If the defendant is charged with distinct offenses then that does not violate double jeopardy.

Gov. must show:

- (1) images stored in separate materials and
- (2) images obtained through different transactions

“Given the overwhelming number of images and movies stored on the computers and diskettes in [defendant’s] house, it would exceed credulity to conclude that [he] . . . could have acquired all the images and movies at the very same time.” *Planck*, 493 F.3d 501, 506 (5th Cir. 2007) (Wiener, J., concurring)

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## QUESTION

Does possession of CP items on a peer-to-peer network meet the elements required for distribution?

- Remember what P2P Networks are?
  - Networks in which computers use common file-sharing programs, connecting users directly to each other's computer hard drive to search for and exchange files of all kinds.

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## “DISTRIBUTION”

Yes, saving files in a P2P shared folder counts as distribution.

- P2P networks function by freely allowing other users on the P2P network to access to images or files stored in a user's shared P2P folder. Although a defendant does not “actively push” child pornography, this provided access constitutes “distribution.” *United States v. Shaffer*, 472 F.3d 1219 (10th Cir. 2007)

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## QUESTION

Can a person be prosecuted solely based on evidence found in the cache files? Does this meet the “knowing receipt” standard?

- Cache files = files kept by a web browser to avoid having to download the same material repeatedly; allows images to be redisplayed quickly. *United States v. Romm*, 455 F.3d 990, 993 n.1 (9th Cir. 2006)

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### “KNOWING” CIRCUIT SPLIT

- ◎ Some find that absent direct proof that a defendant viewed the image, the presence of a file in the cache is not enough to meet the “knowing receipt” standard.
- ◎ Other courts disagree, holding that a pattern of seeking out images satisfies the knowledge requirement.

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### “KNOWING” UNDER STATE LAW

- **Insufficient** = *People v. Kent*, 19 N.Y.3d 290 (N.Y. Ct. App. 2012) – No evidence that defendant downloaded, saved, printed, or otherwise manipulated or controlled the image while it was on the screen.
- **Sufficient** = *Ward v. State*, 994 So. 2d 293 (Ala. Crim. App. 2007) – Evidence that defendant exercised dominion and control over the 288 images of child pornography that were contained in Internet web sites downloaded by defendant

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### QUESTION

Does “interstate commerce” require the government to prove that the images themselves traveled across state lines?

Remember: *Gonzalez v. Raich*, 125 S. Ct. 2195 (2005)

- Commerce clause gives Congress authority to prohibit local cultivation and use of marijuana, reaffirming the power to regulate purely local activities that are part of a “class of activities” that have a substantial effect on interstate commerce

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## JURISDICTION

No, intrastate CP activities can be regulated under federal CP statutes as “substantially affecting interstate commerce.” *Gonzalez v. Raich*

- Because Congress possessed a rational basis for concluding that the local production and possession of child pornography substantially affect interstate commerce, “the de minimis character of individual instances arising under the statute is of no consequence.” *United States v. Forrest*, 429 F.3d 73, 79 (4th Cir. 2005)
- *Raich* led the 11th Circuit Court to conclude that it is within Congress’s authority to regulate all intrastate possession of child pornography. *United States v. Maxwell*, 446 F.3d 1210, 1218 (11th Cir. 2006)

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## JURISDICTION

HOWEVER, if it is relevant to the charge, then proof may be necessary; when elements of interstate commerce are included in the statute for some offenses still requires the gov. to prove, on those charges, that the images themselves traveled across state lines

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## II. PRE-TRIAL



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## QUESTION

How is bail determined for cases that constitute an offense against a minor (i.e. sex trafficking; aggravated sexual abuse; possession or distribution of CP images; production of CP images, etc.)?

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## BAIL DECISION

### Should bail be granted?

- Judge is to order the pretrial release on personal recognizance or upon execution of a specified bond amount . . . unless the government demonstrates that such release will not reasonably assure the appearance of the person . . . or will endanger the safety of any other person or the community.

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## BAIL CONDITIONS

### What, if any, conditions should be imposed?

- Mandatory Pretrial Release Provision of the Adam Walsh Act ( § 216) mandated certain pretrial release conditions when a person is charged with certain federal crimes.
- The mandatory provisions of curfew and electronic monitoring have been held unconstitutional as-applied by a few district courts.
  - Conditions imposed based solely on specific charges not similarly mandated for other offenses, is unconstitutional as applied. *United States v. Karper*, 847 F. Supp. 2d 350, 362 (N.D.N.Y. 2011) (curfew and electronic monitoring provisions)

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## QUESTION

Is the prosecution required to make the digital evidence reasonably available to the defense (including the images containing CP)?

- Yes, under § 3509(m), any material constituting CP under federal law shall remain in custody, care and control of either the Government or the court (part of Adam Walsh Act 2006)
- Note: Pre 3509(M) – courts split on orders restricting CP to gov. facilities

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## § 3509(M) IS FACIALLY VALID

- Facial challenges on Due Process grounds have universally failed (to date) because “ample opportunity for inspection” is seen as co-extensive with Due Process requirements.
  - See, e.g., Wright, 625 F.3d 583 (9th Cir. 2010)
- But in rare circumstances, some courts have found that “ample opportunity” was not provided to the defendant.
  - See, e.g., Knellinger, 471 F. Supp. 2d 640 (E.D. Va. 2007)

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## DISCOVERY IN STATE COURTS

18 U.S.C. § 3509(m) binds Federal courts only.

- Does not preclude state court from ordering discovery.
- EX: *State v. Allen*, 2009 WL 348555 (Tenn. Ct. Crim. App. 2009) – § 3509(m) “does not apply to proceedings in Tenn. state courts” AND trial court’s protective order requiring disclosure was reasonable and appropriate
  - Noting, even if § 3509(m) did apply, the statute allows disclosure where a defendant shows cost limitations or other good reason

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## QUESTION

Does the court have a duty to advise the defendant of restrictions, such as sex offender registration, before accepting a guilty plea?

- Under Fed. R. Crim. Pro. 11, the court is required to ensure that the accused understands the consequences of his guilty plea.

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## PLEAS

Because sex offender registration does not alter the punishment it is a non-punitive collateral consequence. Therefore, the court is not obligated to inform a defendant about it before accepting the defendant's guilty plea

However, a trial court may be required to notify defendant of both general sex offender registration requirements and child predator registration provisions under state statute or state court rules.

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## III. TRIAL



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## ADMISSION OF IMAGES

### Hurdles:

- (1) Relevance
- (2) Authentication
- (3) Hearsay
- (4) Original Writing Rule

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## RELEVANCY

“Relevant Evidence” = evidence having *any tendency* to make the existence of any fact of consequence to the litigation more probable or less probable than it would be without the evidence. – 401

- ⦿ Not a static concept
- ⦿ *Admissibility* distinguished from *weight* or *sufficiency* of the evidence

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## RELEVANCY CASE LAW

*State v. Salisbury*, 2012 WL 3676162 (Ariz. Ct. App. 2012)

- ⦿ Admission of non-indicted CP images was relevant to show defendant’s knowledge that the phone contained CP. And proof of knowledge is a proper purpose for introducing other-acts evidence. Ariz. R. Evid. 404(b).

*In re Palmer*, 265 P.3d 565, 567 (Kan. Ct. App. 2011)

- ⦿ Admission of several CP images from multitude of images found was relevant and material to proving the defendant’s status as a sexually violent predator.

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## EXCLUSION DESPITE RELEVANCE

- Evidence may be unduly prejudicial when:
  - It contains offensive or highly derogatory language
  - A substantial danger the jury might mistake a computer animation for actual events
  - The court is concerned about the reliability or accuracy of the information

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## AUTHENTICATION METHODS

- Testimony of witness with knowledge
- Comparison
- Distinctive characteristics
  - In conjunction with circumstances
  - Direct or circumstantial evidence, or both
    - EX: E-mail addresses, hash values, "reply" doctrine, metadata
- Process or system – reliability and accuracy

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## VERIFICATION

- Use of data verification procedures during the imaging and analysis process can strengthen legal arguments related to authentication
- Most examiners use verification methods to show that the duplicate matches the original
  - EX: use of MD5, SHA1, and other "hash" values to authenticate evidence files

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## EXAMINER AUTHENTICATION

*Bone v. State*, 771 N.E.2d 710 (Ind. App. 2002)

- Evidence properly authenticated where forensic examiner testified about his investigation process and that he exported images that were true and accurate depictions of originals on the drive.

*Creech v. State*, 2011 WL 1663040 (Tex. App. 2011)

- After considering the evidence, the trial court acted within its discretion in determining the technicians did not tamper or change the contents of appellant's work hard drive in such a manner that the State failed to properly authenticate the images as coming from appellant's computer. See Tex.R. Evid. 901(a) ("[T]he matter . . . is what its proponent claims").

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## HEARSAY

**If it is a statement under 801(a):**

- Was it by a "declarant"? 801(b)
- Is it offered to prove the truth of its contents? 801(c)
- Is it excluded from the definition of hearsay? 801(d)

**If it is hearsay, is it admissible under an exception?**

- Availability of declarant immaterial – Rule 803
  - Present sense impression; then-existing state of mind; business records; etc
- Declarant unavailable – Rule 804
- Residual, "catch-all" exception – Rule 807

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## CP IMAGES ≠ HEARSAY

- "[A] photograph is not an assertion, oral, written, or nonverbal, as required by Rule 801(a)" and is "admissible as substantive as well as illustrative evidence."

*United States v. May*, 622 F.2d 1000, 1007 (9th Cir. 1980)

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## ORIGINAL WRITING RULE

Traditionally the “best evidence rule”

- *Original is* required unless “secondary evidence” admissible – 1002
- Computer printouts or readable displays, shown to be accurate, are “originals” – 1001
- *Duplicates* are admissible as “originals” unless a genuine issue as to authenticity of the original, or it would be unfair. –1003

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## ORIGINAL WRITING CASE LAW

- *Broderick v. State*, 35 S.W.3d 67 (Tex. Ct. App. 2000) – hard drive duplicate is admissible to same extent as original
- *State v. Morris*, 2005 WL 356801 (Ohio App. Feb. 16, 2005) - destruction of data on original seized drive not fatal where duplicate admissible under best evidence rule.
- *United States v. Alexander*, 214 Fed. App'x 880 (11th Cir. 2006) – Chain of custody of hard drive goes to weight to be given the evidence, not its admissibility.

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## JUDICIAL CONSIDERATIONS

Will you consider closing the courtroom during parts or all of CP trials?

How many images will the government be allowed to offer into evidence?

Will the format or size of images matter?

How will you allow the jury to handle the images during deliberations

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## IV. POST-TRIAL



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## QUESTION

Does the number of crimes equal the number of images, the number of physical devices, or simply one offense?

- Under the Double Jeopardy Clause of the Fifth Amendment, defendants cannot be punished twice for the same act, but how do we define the “act” that is prohibited by CP laws?

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## SENTENCING

*Possessing multiple images on multiple devices constitutes one crime*

Chiardo, 2012 WL 2821892 (1st Cir. 2012) - unlawful possession of images on two inter-linked computers in same dwelling gave rise to only single count of unlawful possession

*Possessing images on multiple devices constitutes as many crimes as devices*

Hinkeldey, 626 F.3d 1010 (8th Cir. 2010) – Investigators found over 1,500 images of CP on 6 different storage devices. The Eighth Circuit affirmed the defendant's convictions on six counts, one for each physical storage device

*Possession of each individual image constitutes its own separate crime*

McPherson, 269 P.3d 1181 (Ct. App. Ariz. 2012) –defendant was sentenced to a 10 years for 7 counts for possessing a single DVD with 7 images

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**RECENT CASE ILLUSTRATION**

- BALLARD v. STATE (N.M. Ct. App Mar. 8, 2012)
- Ballard took computer to coworker’s home to install a software upgrade. Coworker found CP and contacted the police.
  - Found guilty of 25 counts of sexual exploitation of children for 25 separate images.
    - State’s Exhibit 1 contained 8 video clips downloaded on 4 different dates.
    - State’s Exhibit 2 contained 17 still images downloaded at approximately the same time.
  - Sentenced to 9 years imprisonment.

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**BALLARD ON APPEAL**

Issue: Whether, based on double jeopardy grounds, the 25 counts should have merged into 1count consisting of a unitary course of conduct.

Holding: The statute did not include legislative intent, so the court interpreted the intent and concluded the chargeable unlawful possession consisted of 5 separate and distinct downloads, thus the defendant was erroneously charged with and convicted on 25 counts

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**SENTENCING ENHANCEMENTS**

In *United States v. Kuchinski*, 469 F.3d 853 (9th Cir. 2006), the appellate court noted that images located in the cache files without any further corroborative evidence cannot be used for purposes of enhancements under the Sentencing Guidelines.

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## RESTITUTION

- About a 1/3 of the states require it – to cover med expenses, lost wages, counseling, lost/damages property, other out-of-pocket expenses, and sometimes future damages
- Federal Restitution – 18 U.S.C. § 2259 Mandatory Restitution for Sex Crimes, Violence Against Women Act (1994) – being used by some victims, especially those identified in a series → mixed results so far

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## RESTITUTION ISSUES: Proximate Cause

Restitution statutes require a finding that an offender's act was the proximate cause of a victim's damages



-- The U.S. Supreme Court has denied certiorari in at least two cases

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## RESTITUTION ISSUES: Dividing the Pain

- Restitution under VAWA requires full compensation for victims' losses regardless of the defendant's ability to pay.
- It provides for joint and several liability among defendants, but what about defendants in multiple cases, in numbers nobody can predict?

Pricing Amy, ABA JOURNAL

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**RESTITUTION ISSUES:**

**Actual Payment**

- ⦿ Just because an order is entered does not mean one is going to get payment

*Pricing Amy, ABA JOURNAL*

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**QUESTIONS?**

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