CHILD PORNOGRAPHY LITIGATION & ADJUDICATION ISSUES: CHARGING AND PRE-TRIAL

Presentation Supplement

CHARGING

Double Jeopardy?

No person shall "be subject for the same offence to be twice put in jeopardy of life or limb." ***U.S. CONST. amend. V.*** This protects an accused from facing a second prosecution or multiple punishments for the same offense. *See* ***Jones v. Thomas***, 491 U.S. 376, 380-81 (1989).

Generally, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied determines whether there are two offenses or only one. ***Blockburger v. United States***, 284 U.S. 299, 304 (1932). Basically, whether each provision requires proof of a fact which the other does not." ***Id.*** The focus is on the proof necessary to establish the statutory elements of each offense, not the actual evidence presented at trial. ***Illinois v. Vitale***, 447 U.S. 410, 416 (1980).

Most courts conclude that a defendant cannot be charged with both receiving and possessing child pornography related to the same images because it violates double jeopardy. Courts find that if a person takes "receipt" of a thing, they necessarily must "possess" the thing." Therefore, the "receipt" charge includes all of the elements of the lesser-included offense of "possession." *See, e.g.*, ***United States v. Bobb***, 577 F.3d 1366, 1375 (11th Cir. 2009); ***United States v. Ehle***, 640 F.3d 689 (6th Cir. 2011).

The fact that the terms of the two sentences run concurrently does not alter this conclusion. ***United States v. Davenport***, 519 F.3d 940, 947 (9th Cir. 2008); *see also* ***Ball***, 470 U.S. at 864–65 (discussing potential adverse collateral consequences of sentences violating double jeopardy, even if concurrent, and concluding that "[t]he second conviction, even if it results in no greater sentence, is an impermissible punishment.").

However, if the defendant is charged with distinct offenses then that does not violate double jeopardy. ***Bobb***, 577 F.3d at 1375. To prove distinct offense, the government must show that the images were stored in separate materials and obtained through different transactions. *See, e.g.*, ***Woerner***, 709 F.3d 527 (5th Cir. 2013); ***Hinkeldey***, 626 F.3d 1010, 1014 (8th Cir. 2010).

"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).

Note that possession of child pornography is not the lesser-included offense of distribution of child pornography. *See* ***United States v. Chiaradio***, 684 F.3d 265, 280 (1st Cir. 2012); ***United States v. Faulds***, 612 F.3d 566, 569–71 (7th Cir. 2010); ***United States v. Woerner***, 709 F.3d 527 (5th Cir. 2013).

Meeting the Elements?

"Distribution" on P2P Networks

Peer-to-peer ("P2P") networks use common file-sharing programs and connect users directly to each other's computer hard drive to search for and exchange files of all kinds.

Courts conclude that saving files in P2P shared folder counts as distribution beause by default it makes it available to other P2P network users.

For example, in United States v. Shaffer, although the defendant did not "actively push" child pornography, he provided access and this constituted "distribution." 472 F.3d 1219 (10th Cir. 2007). The Tenth Circuit Court of Appeals compared the P2P shared folder to a self-serve gas station:

> Just because a gas station is self-serve, or in the defendant's parlance, passive, we do not doubt for a moment that the gas station owner is in the business of "distributing" . . . gasoline. So, too, a reasonable jury could find that Mr. Shaffer welcomed people to his computer and was quite happy to let them take child pornography from it.

In ***United States v. Richardson***, the 5th Circuit just recently agreed, ruling that downloading images and videos containing child pornography from a P2P computer network and storing them in a shared folder accessible to other users on the network amounts to distribution under federal law. No. 11-20773 (5th Cir. Apr. 1, 2013); *see also* ***United States v. Carani***, 492 F.3d 867 (7th Cir. 2007) (rejecting defendant's claim that he never "intentionally distributed CP bc he did not understand what his shared folder on Kazaa did).

"Knowing"

Does evidence saved in the cache meet the "knowing receipt" standard? Cache files are 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).

Some courts 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. For instance, in ***United States v. Kuchinski***, the Ninth Circuit Court of Appeals held that the defendant did not *possess* 18,000 images in cache because he had no knowledge of cache files and he lacked access to and control over files in cache. 469 F.3d 853 (9th Cir. 2006); *see also* ***United States v. Stulock***, 308 F.3d 922 (8th Cir. 2002) (holding that the defendant did not possess three images located in cache file because simply viewing the image on a website is not enough); ***People v. Kent***, 19 N.Y.3d 290 (N.Y. Ct. App. 2012) (concluding that because there was no evidence that defendant downloaded, saved, printed, or otherwise manipulated or controlled the image, the cache evidence was insufficient to demonstrate knowing possession).

However, most courts disagree, holding that a pattern of seeking out images satisfies the knowledge requirement.

- ***United States v. Tucker*****,** 305 F.2d 1193 (10th Cir. 2002) - He admitted to *viewing* but argued against possession because he never downloaded images, which were automatically stored in his cache. The court held that he possessed images because he could control them (enlarge, copy, delete) and images were in cache because he purposefully visited CP sites.
- ***United States v. Bass*****,** 411 F.3d 1198 (10th Cir. 2005) - Defendant "knowingly possessed" CP images in cache. Despite his claimed lack of knowledge, he used programs to delete images from

computer, therefore, the court concluded that he must have known they were there!

- ***United States v. Romm***, 455 F.3d 990 (9th Cir. 2006) - Defendant knowingly possessed" images of CP in cache because he had ***control*** over images to enlarge, print, email, or save them.
- ***Commonwealth v. Diodoro***, 932 A.2d 132 (Sup. Ct. PA. 2007) – Under PA statute, Defendant knowingly accessed / viewed CP sites, but did not save or download images & did not know they were saved to cache. The court held: Accessing and viewing CP on website constituted control; he reached out for images on sites, opened sites, closed sites; when viewing images, he could download, print, copy, etc.
- ***Ward v. State***, 994 So. 2d 293 (Ala. Crim. App. 2007) - As an issue of first impression, evidence was sufficient to show that defendant exercised dominion and control over the 288 images of child pornography that were contained in Internet web sites downloaded by defendant on computer he used at state university, as required to establish constructive possession.

PRE-TRIAL

Bail

Under the Bail Reform Act, a 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.

The government bears the burden of proving that the defendant is a flight risk or otherwise poses a risk of harm preventing release or, if the defendant is to be released pending trial, that certain conditions should accompany such release. Where public safety, rather than flight, is at issue, the government bears the burden of demonstrating, by clear and convincing evidence, that the specific defendant charged poses a danger.

If bail is granted, then the judge must determine if any conditions are to be imposed. Under the 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 pretrial release conditions provision has been held facially constitutional to date. District courts across the country have found the curfew and electronic monitoring provisions to be appropriate in *particular* child pornography trafficking cases in order to stem the risk of flight and ensure community safety, such cases demonstrated sets of circumstances exist when the mandates of the provision would be constitutionally valid, and provision did not deprive child pornography defendants of a detention hearing or an individualized determination whether detention or release would be appropriate." ***United States v. Stephens***, 594 F.3d 1033 (8th Cir. 2010)

However, the curfew and electronic monitoring provisions have been held

unconstitutional in as-applied challenges. *See, e.g.*, ***United States v. Karper***, 847 F. Supp. 2d 350, 362 (N.D.N.Y. 2011) (ruling that conditions imposed based solely on specific charges not similarly mandated for other offenses, is unconstitutional as applied).

Discovery

Electronic discovery issues frequently surface in pornography prosecutions given the wide use of computers to store and transmit pornographic images.

Under ***Fed. R. Crim. Pro. 16(d)(1)***, generally, a court can order discovery denied, restricted, or deferred, or make other appropriate orders: upon motion and for good cause shown. However, pursuant to ***18 U.S.C. § 3509(m)***, any material constituting child pornography under federal law shall remain in custody, care and control of either the Government or the court (part of Adam Walsh Act 2006).

Specifically in ***§ 3509(m)(2)(A)*** it states that notwithstanding Fed. R. Crim. Pro 16, court shall deny any request for any manner of copy or reproduction of child pornography, as long as Government makes the material "reasonably available" to the defendant.

Material is "reasonably available" if the government provides "*ample opportunity*" for inspection, viewing and examination of the material at a Government facility to or by the defendant, the attorney, and any defense expert.

Facial challenges against § 3509(m) 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).

As a federal statute, § 3509(m) only binds federal courts, and it does not preclude state courts from ordering discovery.

For example, in State v. Allen, the Tennessee Court of Appeals held that § 3509(m) did not apply to proceedings in Tennessee state courts, and it further held that the trial court's protective order requiring disclosure was reasonable and appropriate. 2009 WL 348555 (Tenn. Ct. Crim. App. 2009); see also ***State v. Boyd***, 158 P.3d 54 (Wash. 2007) (concluding that the defendant, who had been charged with 28 child pornography crimes was entitled to "mirror image" of hard drive and the protective measures put in place by trial court in granting codefendants' discovery request were appropriate); ***State v. Bowser***, 772 N.W.2d 666 (Wis. 2009) (upholding the grant of a protective order, which allowed the defense access to the hard drive at a state facility but prohibited the defense from obtaining a copy of the hard drive).

Guilty Pleas

Under ***Fed. R. Crim. Pro. 11***, the court is required to ensure that the accused understands the consequences of his guilty plea. So, what is required to ensure the accused "understands" the consequences?

The court is only required to inform the defendant of punitive and direct consequences of his plea. A defendant need not be advised of all possible collateral consequences of his plea.

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.

For instance, in ***State v. Perry***, the court noted that sex offender registration and reporting requirements do not need to be explained at a plea proceeding since they are remedial and not punitive in nature. 2003-Ohio-6344, 2003 WL 22805880 (Ohio Ct. App. 2003); *see also* ***Magyar v. State***, 18 So. 3d 807 (Miss. 2009) (finding sex offender registration to be a collateral consequence of a guilty plea, thus unnecessary in the plea colloquy).

However, a trial court may be required to notify defendant of both general sex offender registration requirements and child predator registration provisions under state statue or state court rules. *See* ***State v. Davenport***, 15 A.3d 1154 (Conn. App. Ct. 2011).