COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss

WORCESTER SUPERIOR COURT
INDICTMENT NO. 03-0546

COMMONWEALTH

COMMONWEALTH'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

v.

KELLY HOOSE, Defendant

The Defendant, Kelly Hoose is charged by way of Indictment with Possession of Child Pornography in violation of M.G.L. c. 272, section 29C.

FACTS

The Sturbridge Police executed a Search Warrant at the home of the Defendant on January 17, 2003 after they (the police) were contacted by the National Center for Missing and Exploited Children out of Alexandria, Virginia. Based upon the defendant's assertions that he was looking at Child Pornography, the "Center" notified police and provided information, including defendant's name, address, date of birth, mother's maiden name. The defendant contacted the "Center" as second time that date to make sure they had all of he information he had provided. The computer was seized from the Defendant's home, sent to the Massachusetts State Police Forensics Unit several images of women and/or children were downloaded from the seized computer. Based on the Detective Donais and The State Police Officers from the Forensics Unit training and experience, the concluded that several of the images were of children engaged in pornographic images. Detective Donais met with Christine Barron, M.D. the then Director of the Child Protection Program and had him review **all** of the images seized from the computer. Dr. Barron selected 38 images that she could and would testify, using her training, experience and the accepted Tanner Staging Method, to identify the images from Mr. Hooses' computer as children

defined in Massachusetts General Laws, Chapter 272 section 29C. (A Motion to Suppress Dr. Barron's testimony on Tanner Method was denied by Fecteau, J.) Defendant now presents this same argument suggesting that the Commonwealth must prove that "real" children were used in the images found on the Defendant's Computer and relies on *Ashcroft v. Free Speech Coalition*, 535 *U.S. 234 (2002) and U.S. v. Hilton*, 386 f.3d (1st Cir. 2004). Both arguments fail in this matter.

ARGUMENT

Massachusetts General Law, chapter 272 section 29C prohibits the knowing possession of a **visual reproduction**, or depiction by computer of a **child whom the defendant knew or reasonably should have known to be under the age of 18...**and such child is depicted or portrayed in a **pose,** posture, or setting involving a lewd exhibition of the unclothed genitals, pubic area, or buttocks or...a fully or partially developed breast of a female child, with knowledge of the nature or content thereof..

The elements to this crime include:

1. knowing possession by the defendant
2. of visual images
3. of a child who is under 18 years of age
4. involving the lewd exhibition mentioned above;

There is no requirement that the Commonwealth must have the child/children in question present and that the children must be identifiable. In the instant case, the Commonwealth will utilize the following to prove the elements above. The tapes of the defendant that he was looking at what he defined to be "child pornography". This relates to the issue of intent and knowing possession. Sgt. Jude Buckley, of the Massachusetts State Police Forensics Unit would testify that the images obtained from the hard drive via Search Warrant appeared to be children based on his training and experience in the Child Pornography Unit. Sgt. Buckley would testify that in his training and experience, "morphed" images will appear to have been changes for example, an adult head on a

child's body; Commonwealth would expect that the would be no evidence of "morphing" that he observed from the images obtained from Mr. Hoose's computer. Similarly, the Commonwealth will call Detective Christopher Donais of the Sturbridge Police who was the investigating officer to testify as to the authenticity of the signature of Mr. Hoose obtained after the search warrant was executed at this home. Detective Donais would also testify as to the images he saw and how the appeared to be children based on his training and experience. Lastly, the Commonwealth would rely on the expert testimony of Dr. Christine Barron, now of Hasbro Hospital in Providence, Rhode Island and formerly the Director of the UMASS/Memorial Child Protection Center in Worcester, MA. Dr. Barron would testify as she did before the Honorable Francis R. Fecteau, that based on her education, training and experience as a clinician and utilizing the Tanner Method, that the 38 images **she** selected after meeting with Detective Donais were children.

37 of 38 images were from *Alscan*, a web site that the Defendant was viewing. Defendant argues that the Commonwealth must prove that the children are actual children in addition to their age. Commonwealth's position is that it can do so circumstantially based upon the corroborative and expert evidence it intends to present to the jury. Further, a jury can rely on it's collective commonsense and life experiences to determine if the children are children or "doctored" visual images.

Commonwealth has no obligation to have representatives from *Alscan* and in fact, record keeping requirements, codified at 18 U.S.C. section 2257, require that producers of sexually explicit material "maintain records proving that performers in those depictions are not minors." There is no affirmative obligation by the Commonwealth to go to *Alscan*, as has been suggested, to seek out their "models'" ages. The Commonwealth asserts that the documentation provided by *Alscan* is self-serving, allows that the models use false names, (see model contracts provided), the photocopies provided to *Alscan* certainly have not been authenticated to be original, accurate or belonging to the pictures associated with them.

Defense relies heavily on the *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) and U.S. *v. Hilton,* No. 03-7141 (1st Cir. 2004) and its holding that the "government may not criminalize the possession of sexually explicit images that appear to, but do not in fact, depict actual children." In Free Speech Coalition, the Supreme Court stated that an amendment to the Federal Child Pornography Protection Act that attempted to criminalize virtual child pornography (computer generated pornography). The Supreme Court determined that the government must prove the actual child as an element of the case.

The present matter differs on many levels. First, this is not a Federal Case and the cases in *Free* Speech and Hilton were concerned with a specific argument on the validity of an amendment to the Federal Child Pornography Protection Act. A reference to Massachusetts General Laws Chapter 272 section 29B (c)(attached) For the purposes of this section, the determination whether the child in any visual material prohibited hereunder is under eighteen years of age may be made by the personal testimony of such child, by the testimony of a person who produced, processed, published, printed or manufactured such visual material that the child therein was known to him to be under eighteen years of age, by testimony of a person who observed the visual material or by expert medical testimony as to the age of the child based upon the child's physical appearance by inspection of the visual material, or by any other method authorized by any general or special law or by any applicable rule of evidence."

The Commonwealth Statue refers to the Massachusetts General Laws governing child pornography and to suggest that the Judge make the determination on an essential element of the crime takes the fact finder mission from the jury. Further, *Commonwealth v. John M. Kelley,* (2001) the defendant was charged by Indictment under M.G.L. c. 272, Section 29B(a) and (b). The evidence before the grand jury was that the defendant disseminated color photographs of children in sexual conduct or in a state of nudity to two undercover police officers. The Defense filed a Motion to Dismiss based on the "argument that computer transmitted images are not "visual

Material" under the statue. The defendant, admitted that he "might" have sent four to five people child pornography images. " Kelley at p. . The Court indicated that the term" visual material" is by itself intentionally broad in Massachusetts..."what matters is whether the visual material represents a child in sexual conduct or in a state of nudity..." *Kelley* p. The color photographs of children transmitted by the defendant in this case fall within the Section 31 definition of "visual material." Grand Jury Exhibit 1 and the officer's testimony show that the defendant distributed photographs of actual children, not some artist's rendering of an image of a child. While paintings and drawings would also qualify as pictures under Section 31, this case involves photographs. The statutory term "picture" included the photographs in this case, but these photographs are also within the more narrow statutory term "any...photograph." M.G.L. c. 272 Section 31. The definition of "visual material" in Section 31 leaves no reasonable doubt that these 4 photographs are "visual material."

In 1997, the Legislature enacted a new offense, M.G.L. c. 272 Section 29C, which prohibits possession of a film, photograph, videotape, " or other similar visual reproduction, or depiction by computer" of a child in specific forms of sexual conduct or lewd exhibition. St. 1997, c. 181. The defendant in the Kelley case argues that the specific reference to computer depictions in Section 29C implies that Section 31 definition of "visual material" does not include computer depictions. This argument ignores the pre-existing broad language of Sections 29B and 31 which includes "visual material", "any...picture", and "any...photograph." The fact that the Legislature in 1997 possession statue chose to specifically refer to computer depictions does not mean that a color photograph of a child that is transmitted by a computer is *not a "photograph", not a "picture", and not "visual material" under Sections 29B and 31." Commonwealth v. John M. Kelley,* Mass. (2001).

In enacting the Section 29C possession statute, the General Court made the following finding among others: "to protect children from sexual exploitation it is necessary to prohibit the

production of material which involves or is derived from such exploitation and to exclude all such material from the channels of trace and commerce..."St. 1997, c. 181, section 1. This hardly suggests that the Legislature was mandating an interpretation of "visual material", "picture", and "photograph" in the earlier dissemination statute that would permit computer distribution of color photographs of children in sexual conduct or in a state of nudity by means of a computer." *Commonwealth v. Chavis*, 415 Mass. 709, 708 (1993). The maxim that penal statutes are to be strictly construed does not mean that an available and sensible interpretation is to be rejected in favor of a fanciful or perverse one. *Commonwealth v. Carrion*, 431 Mass. 44, 46 (2000).

The defendant raises the defense that the photographs are within the realm of virtual child pornography. The Commonwealth will have and does have the burden of proving to a fact finder that the photos depict real children. The Commonwealth has declared that it shall do so via the photos themselves and the expert testimony of Dr. Christine Barron (whose testimony on the Tanner Scale was the subject of another Motion allowed by the Honorable Judge Francis Fecteau). However, to sustain that burden of proof, the Commonwealth need not put forth expert testimony. Thus far, four circuits have considered the issue of what evidence is necessary to satisfy the government's burden in proving that the images are of real children; in each instance the courts have determined that expert evidence is not necessary because "[J]juries re capable of distinguishing between real and virtual images[.]" *United States v. Kimler*, 335 F.3d 1132, 1142 (10th Cir. 2003); United States v. Deaton, 328 F. 3d 454, 455 (8th Cir. 2003) (upheld conviction where only evidence put forth by the government were the images themselves: *United States v. Vig*, 167 F. 3d 443, 44-450 (8th Cir. 1999) (where defendant provided no expert evidence that the images were computer generated government, as part of its case-in-chief, was not required to "negate what is merely unsupported speculation."); *United States v. Hall*, 312 F. 3d 1250, 1260 (11 Cir. 2002); United States v. Slaniana, 2004 WL 136681 (5th Cir. 2004)(finding that Free *Speech Coalition* did not establish that the government musts present evidence that picture depicts

a real child.) Further, the prosecution is not required to rebut defenant's uncorroborated speculation that some undefined technology exists to produce pornographic pictures without the use of real children. *See United States v. Nolan*, 818 F.d 1015, 1020 (1st Cir. 1987).

CONCLUSION

Since the determination of whether photographs depict real or virtual images is within the province of a lay jury, the Defendant's Motion must be denied and proceed to trial.

Respectfully submitted,

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Assistant District Attorney

Date: 10-14-2005