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UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, vs. THOMAS M. SCHNEPPER, Defendant.	CR. NO. 02-00062 ACK GOVERNMENT'S MEMORANDUM OPPOSING JUDGMENT OF ACQUITTAL ON CHILD PORNOGRAPHY CHARGE; CERTIFICATE OF SERVICE Trial: May 28, 2003 before U.S. District Judge Alan C. Kay

GOVERNMENT'S MEMORANDUM OPPOSING JUDGMENT
OF ACQUITTAL ON CHILD PORNOGRAPHY CHARGE

Count 8 charges defendant with the transportation, and attempted transportation, of child pornography. The charge grows out of defendant's transmission of an image to Special Agent Waters on December 13, 2001. The image in question (Ex. 8) depicts a girl having sex with an older man. The government's evidence will show that defendant believed the girl was a minor, and thought the image constituted child pornography.

Defendant now seeks to have count 8 dismissed, on the grounds that the girl is allegedly an adult who only appears to be a minor. Since it was brought during trial, and is based on the evidence, the government construes the motion as a motion for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure.

The motion should be denied. It is true that, under Ashcroft v. Free Speech Coalition, 122 S.Ct. 1389 (2002), the government has to show the girl was an actual minor to prove a substantive violation of 18 U.S.C. § 2252(a). But there is no such requirement to prove an "attempted" violation of that statute under 18 U.S.C. § 2252(b)(1).

There are numerous cases upholding convictions for attempted crimes where defendants have the requisite criminal intent. In United States v. Quijada, 588 F.2d 1253 (9th Cir. 1978), for example, Quijada tried to distribute a substance which he believed was cocaine. The substance actually was soap powder, a non controlled substance. Quijada was convicted of attempted distribution. On appeal, he argued that the conviction was infirm because it was impossible for him to have committed a narcotic offense. The Ninth Circuit disagreed, and affirmed the conviction. It noted as follows:

> We can only say that generally a defendant should be treated in accordance with the facts as he supposed them to be. The fact that the pocket was empty should not insulate the pickpocket from prosecution for an attempt to steal.

Id. at 1255. See also, United States v. Bagnariol, 665 F.2d 877, 895-97 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982)(factual impossibility not defense to conviction for attempted Hobbs Act violation where defendant's intent to violate the law was established).

In United States v. Bilderbeck, 163 F.3d 971 (6th Cir.), cert. denied, 528 U.S. 844 (1999), the Sixth Circuit similarly affirmed a conviction for attempted possession of cocaine with intent to distribute, even though the transaction involved sham drugs. The court noted that "'attempt' is to be construed in a broad and all inclusive manner.'" Id. at 975, quoting United States v. Reeves, 794 F.2d 1101, 1103 (6th Cir.), cert. denied, 479 U.S. 963 (1986). The Sixth Circuit then noted that, "to be convicted of an attempt crime, the government must demonstrate a defendant's intent to commit the proscribed criminal conduct together with the commission of an overt act that constitutes a substantial step towards commission of the proscribed criminal activity." Id.

In United States v. Crow, 164 F.3d 229 (5th Cir.), cert. denied, 526 U.S. 1160 (1999), the Fifth Circuit applied the same reasoning in a case involving the attempted sexual

exploitation of a minor. William Crow contacted an undercover officer pretending to be a 13-year-old girl over the Internet. Thinking that the officer was a 13-year-old girl, Crow tried to get her to pose for sexually explicit videos. Among other things, Crow was charged with attempted sexual exploitation of a minor, a violation of 18 U.S.C. §§ 2251(a) and (d). Subsection (a) prohibits a person from inducing or enticing a minor to engage in "sexually explicit conduct for the purpose of producing any visual depiction of such conduct," and subsection (d) criminalizes any attempt to violate such section. Crow was convicted of the charge at trial.

On appeal, Crow challenged the jury instructions on the attempt charge. The Fifth Circuit affirmed. It noted that, for an attempt conviction, the defendant had to act "with the kind of culpability otherwise required for the commission of the crime which he is charged with attempting," and then take a substantial step toward the commission of the crime. Id. at 235. In addressing the adequacy of the charge, the Fifth Circuit rejected the availability of an impossibility defense based on the fact that the proposed actor in the video was an adult rather than a minor. The Fifth Circuit noted: "[F]actual impossibility is not a defense if the crime could have committed had the attendant circumstances been as the actor believed them to be." Id. at 235, quoting United States v. Contreras, 950 F.2d 232, 237 (5th

Cir. 1991), cert. denied, 504 U.S. 941 (1992).

In short, the Crow court construed 18 U.S.C. § 2251, which uses the same terms used in 18 U.S.C. § 2252, the statute charged in Count 8 in this case. Both statutes address the same subject matter - acts concerning visual depictions of minors engaged in sexually explicit conduct. 18 U.S.C. § 2251 addresses acts of enticing minors to make such depictions, whereas 18 U.S.C. § 2252 addresses the possession or transportation of the depictions. The statutes share the same operative definitions. See 18 U.S.C. § 2256. If the defendant in Crow could be convicted of attempting to get someone he believed to be a minor to make a sexually explicit video, then the defendant in this case can also be convicted of attempting to transport a sexually explicit picture of someone whom he believed to be a minor.

As noted above, the conduct surrounding defendant's transmission of the image corroborates his intent to distribute child pornography. Indeed, defendant admitted to agents that he believed the image was of a minor girl engaged in sex. Defendant's motion for a judgment of acquittal thus should be denied.

Dated: Honolulu, Hawaii, May 30, 2003.

LAWRENCE L. TONG
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was duly served by hand delivery, upon the following:

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DATED: Honolulu, Hawaii, May 30, 2003.