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**Defending child pornography cases.**

Child pornography prosecutions have been rampant for many years, both for possession and distribution of child pornography, and for alleged violations of 18 U.S.C. § 2257 recordkeeping provisions. The United States Supreme Court generally limits child pornography prosecutions to images of actual minors, rather than to adults who look like minors. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). By now, such prosecutions run from images of teenagers to images of the youngest of the young. Following are a few non-exhaustive pointers for defending such cases. Through my criminal defense of such cases, I have seen many sexual images of minors. My stomach has been turned and my emotions severely tested many times, as a result. If that is the reaction of a criminal defense lawyer zealously committed to the effective defense of every criminal defendant, then jurors inevitably will be even less understanding of the circumstances that bring defendants to child pornography, if indeed they are guilty. What leads people to become involved with child pornography, aside from any profit motive? A forensic psychologist with whom I have worked offers a few possibilities. For one thing, an adult who was sexually abused as a minor may have the mentality of a minor in many respects, but still is a sexual being in an adult's body, who may consequently relate sexually with minors. He also says that sex is not a spectator sport, and that sexually explicit visual material can become boring quickly, and lead the viewer to engage in such risky behavior as viewing child pornography. As I blogged on November 16, to view child pornography online -- at least under Pennsylvania law -- is not automatically the same as criminal possession of such material. For child pornography cases involving computers, it is important to seek a court-ordered duplicate of all seized computer harddrives, which is critical so that the defendant's computer forensics expert may run a full evaluation in the expert's own lab or colleagues' lab; the evaluation can take many hours and the tools can be very cumbersome and heavy to drag to a police office (where the police may be watching the computer expert's actions). A good case to review for drafting a motion and proposed order for such material is *U.S. v. Hill*, 322 F. Supp. 2d 1081 (C.D. Cal. 2004), *aff'd*, *U.S. v. Hill*, 2006 U.S. App. LEXIS 20584 (9th Cir. 2006). It is important to avoid computer forensic experts who will not guarantee that they will not call the police if they find any child pornography images on the defendant's harddrive that the police did not already find. Although Virginia law, as a for instance, empowers judges to order hard drive duplications to be provided to defense counsel -- Va. Code Ann. § 19.2-270.1:1 -- federal law does not allow such material to be removed from government property. 18 USCS § 3509(m). 18 USCS § 3509(m) provides as follows: "(1) In any criminal proceeding, any property or material that constitutes child pornography (as defined by section 2256 of this title [18 USCS § 2256]) shall remain in the care, custody, and control of either the Government or the court. (2) (A) Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in any criminal proceeding, any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography (as defined by section 2256 of this title [18 USCS § 2256]), so long as the Government makes the property or material reasonably available to the defendant. (B) For the purposes of subparagraph (A), property or material shall be deemed to be reasonably available to the defendant if the Government provides ample opportunity for inspection, viewing, and examination at a Government facility of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial." Two technology experts testified this month in Virginia federal trial court that the foregoing restriction in 18 USCS § 3509(m) would make it too expensive to transport their equipment to a government facility. Attorney Louis Sirkin -- who is a class act and a fellow member of the First Amendment Lawyers Association -- testified that the new restrictions will make it harder to find an expert witness for the case. This Virginia federal case is *U.S. v. Knellinger*, Crim. No. 3:06-cr-00126 (E.D. Va., Richmond Div.). This issue is discussed further here, starting at page 10. If convicted, the defendant is probably in better shape for judge and jury sentencing when such factors as the following exist: Limited scienter; models as close to 17 as possible; images that are as mild as possible; images that don't incite jurors' prejudices (e.g., about homosexuality and other prejudices). I don't agree with the prejudices, but they are out there. Sometimes at least two or more experts are needed for such a case (a computer expert, a visual media expert, a pediatrician, and expert second opinions). Key defenses to consider for such cases include: - Whether the image is of an actual minor. - See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). - If the images might be of post-pubescent people, there is all the more reason to consider challenging the age of the models, including such arguments as distortion (which can arise when transferring from film medium to digital medium), the need for and quality of pediatric expertise for the prosecution and defense (to opine whether the image is of a minor), and whether the image was obtained from a source claiming to be in compliance with 18 U.S.C. § 2257. - Whether the images got on the computer by someone else's doing (e.g. directly on the subject computer, or by a trojan horse or other Internet invasion). Jon Katz. ip

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