No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2019

LEVI JERMAINE GRIFFIN
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE ISSUE(S)

I. WHETHER THE EVIDENCE WAS INSUFFICIENT TO SATISFY THE GOVERNMENT'S BURDEN TO PROVE THE ELEMENT OF KNOWLEDGE AS TO THE POSSESSION OF CHILD PORNOGRAPHY COUNT IN THE INDICTMENT BEYOND A REASONABLE DOUBT.

LIST OF PARTIES

All parties appear in the caption of the case on the title page.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, **Levi Jermaine Green,** respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above entitled proceeding on August 2, 2019

OPINION BELOW

The Opinion of the Court of Appeals for the Eleventh Circuit (App., *infra*, 1a-10 a) is unpublished.

JURISDICTION

The Petitioner, **Levi Jermaine Green** was prosecuted by an Indictment alleging violation of Federal Criminal Laws in the United States District Court for the Northern of Florida, convicted and sentenced to 120 months. He appealed his sentence to the Eleventh Circuit Court of Appeals invoking the Court's jurisdiction under 28 U.S.C. § 1291. (Doc. 149) His sentence was affirmed by an Order entered August 2, 2019. (Doc. 117)

The jurisdiction of this Court to review the Judgment of the Eleventh Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No person shall be held to answer for a capital, or infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. Fifth Amendment to the United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. Sixth Amendment to the United States Constitution.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Eighth Amendment to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

On October 25, 2016, the Federal Grand Jury for the Northern District of Florida, Gainesville Division, returned a One-Count Indictment against Levi Jermaine Williams. (Doc. 1)

Count 1 charged that on or about June 24, 2016, and, on or about August 12, 2016, the Defendant did commit the offense of Possession of Child Pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B), and 18 U.S.C. § 2252A(b)(2). (Doc. 1)

The Indictment also included a criminal forfeiture provision, pursuant to 18 U.S.C. § 2253 which requires the Defendant to forfeit to the United States any and all interest in A) any visual depiction, book, magazine, periodical, film, video tape, or other matter of child pornography that was produced, transported, mailed, shipped, or received, in violation of Chapter 110 of 18 U.S.C.; B) any property, real or personal, constituting or traceable to gross profit or other proceeds obtained from such offense; and C) any property, real or personal, used or intended to be used to commit or promote the commission of such offense. (Doc. 1) If any of the property described above as being subject to forfeiture, as a result of acts or omissions of the defendant, it is the intent of the United States pursuant to 21 U.S.C. §853(p), as incorporated by 28 U.S.C. §2461 (c), to seek forfeiture of any other property of said defendant up tot the value of the forfeitable property. Id.

On November 4, 2016, the Defendant appeared before U.S. Magistrate Judge Gary R. Jones for an initial appearance. (Doc. 7) Mr. Griffin pled not guilty and trial was scheduled for January 3, 2017, before United States District Court Judge Mark. E. Walker. (Doc. 10) Mr. Griffin was detained pending trial. (Doc. 11)

On January 27, 2017, after a Motion by the Defendant, Mr. Griffin appeared again before U. S. Magistrate Judge Gary R. Jones for a Detention Hearing (Doc. 20) Judge Jones ordered that Mr. Griffin remain in custody pending further proceedings and trial was scheduled for April 25, 2017, before U. S. District Court Judge Mark E, Walker. (Doc. 21)

After several Motions were granted for continuance of trial, on January 29, 2018, a jury trial commenced in front of U. S. District Court Judge Mark R. Walker. (Doc. 66), (Doc. 69) On January 30, 2018, Mr. Griffin was found guilty on Count 1. (Doc. 74) Sentencing was held on April 23, 2018, when Mr. Griffin was sentenced, inter alia, to 120 months minimum mandatory imprisonment. (Doc. 79) Mr. Griffin is currently in the custody of the Bureau of Prisons and housed at a Federal Prison. (Doc. 109)

The Offense Conduct

On September 16, 2013, Mr. Griffin was sentenced by the United States District Court in Gainesville, Florida, to twenty-one (21) months imprisonment

followed by five (5) years supervised release for committing the offense of failure to register as a Sex Offender. (Doc. 77, 3, ¶ 8)

While on supervised release, on August 12, 2016, Mr. Griffin's girlfriend, Cathryn Ball, contacted Mr. Griffin's Federal Probation Officer and explained that she had discovered child pornography on Mr. Griffin's tablet computer. (Doc. 77, 4, ¶ 9) Cathryn Ball stated she discovered the child pornography after she reviewed the tablet contents without Mr. Griffin's permission. Id. Ms. Ball reported that she guessed the password to the tablet and reviewed the contents, locating numerous images and videos of child pornography. Id. Cathryn Ball provided the tablet to deputies with the Levy County Sheriff's Office. Id.

Mr. Griffin arrived home while Law Enforcement was present. (Doc. 77, 4, ¶ 10) Although Mr. Griffin was not arrested, he was advised of his Miranda rights and made a statement. Id. Mr. Griffin admitted ownership of the tablet, but denied knowledge that it contained child pornography. Id. Mr. Griffin then left the residence but called back to speak to Cathryn Ball. Id. During the phone conversation, which was monitored by Law Enforcement, Mr. Griffin instructed Cathryn Ball to destroy the laptop and essentially said he had "fucked up". Id.

Law Enforcement obtained a search warrant for the contents of the tablet. (Doc. 77, 4, ¶ 11) Forensic review of the tablet revealed numerous images and

videos. Id. The images allegedly showed pubescent and prepubescent caucasian females, some as young as 3 to 5 years of age. Id. The specifics as to one image depicts a child between 3-5 years of age performing oral sex on an adult male. Id.

There are numerous other images of pubescent female children engaged in sexual acts with adults, as well as images of such children naked displaying their genitalia. (Doc. 77, 4 ¶ 12) In total, 68 images were identified as child pornography, with numerous other images of nude children and child erotica which may or may not meet the legal definition of child pornography[1]. Id. The browser history also included numerous pornography sites with terms associated with "teen", "young", and females.

The Final PSI further stated:

Protected Information Covered by §1B1.8

NONE.

Victim Impact

Adjustment for Acceptance of Responsibility

The Defendant was convicted by jury trial, on January 30, 2018. To date, pursuant to USSG § 3E1.1, Mr. Griffin has not accepted responsibility for the instant offense conduct, accordingly, he is not entitled to a reduction for acceptance of responsibility

[1] At trial, the prosecutor frequently mentioned 68 images, while the Government's own (sole) Expert Witness testified to 12 images in the "Y" folder and 55 images in the "YEA" folder. (Doc. 103, 64-65)

Offense Level Computation

The November 1, 2016 Guidelines Manual, incorporating all guideline amendments, was used to determine the Defendant's offense level. USSG § 1B1.11.

Base Offense Level: The guideline for a violation of 18 U.S.C. §2252A (a)(5)(B) offenses is found in USSG §2G2.2. That Section provides that if the Defendant is convicted of 18 U.S.C. §2252A(a)(5), the base offense shall be 18. **18**

Specific Offense Characteristics: Section USSG §2G2.2(b)(1) states if subsection (a)(2) applies; and the Defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and the Defendant did not intend to traffic in, or distribute, such material, decrease by 2 levels. There has been no information to suggest the Defendant distributed child pornography, therefore a 2 level decrease is appropriate. **-2**

Specific Offense Characteristics: Section USSG §2G2.2(b)(2) states that if the material involved a prepubescent minor or a minor who had not attained the age of 12 years, a 2 level increase is applied. One image depicts a child between 3-5 years of age performing oral sex on an adult male, therefore a 2 level increase is appropriate. **+2**

Specific Offense Characteristics: Section USSG §2G2.2(b)(4) states that if the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) sexual abuse or exploitation of an infant or toddler. increase by 4 levels. This enhancement was considered, however, according to the Government, at this point, the children within the photos were not able to be considered as infant or toddler. **+0**

Specific Offense Characteristics: Section USSG §2G2.2(b)(6) states that if the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material, a 2 level increase is applied. The Defendant used a tablet to download and view child pornography, therefore a 2 level increase is appropriate. **+2**

Specific Offense Characteristics: Section USSG §2G2.2(b)(7)(A) states that if the offense involved 10 images but less than 150, a 2 level increase is applied. In total, the defendant possessed at least 68 images of child

pornography. A 2 level increase is appropriate. +2

Victim Related Adjustment: NONE. 0

Adjustment for Role in the Offense: NONE 0

Adjustment for Obstruction of Justice: NONE 0

Adjusted Offense Level (Subtotal): 22

Chapter Four Enhancement: NONE 0

Acceptance of Responsibility: As of completion of the presentence investigation, the Defendant has not clearly demonstrated acceptance of responsibility for the offense. USSG §3E1.1 0

Total Offense Level: 22

Offense Behavior Not Part of Relevant Conduct: NONE

(PSI, Doc. 78, ¶¶ 19-33) [**emphasis in original**]

REASON(S) FOR GRANTING THE PETITION

I. THE EVIDENCE WAS INSUFFICIENT TO SATISFY THE GOVERNMENT'S BURDEN TO PROVE THE ELEMENT OF KNOWLEDGE AS TO THE POSSESSION OF CHILD PORNOGRAPHY COUNT IN THE INDICTMENT BEYOND A REASONABLE DOUBT.

Mr. Griffin's conviction for possession of child pornography required proof

that he knowingly possessed child pornography. [emphasis supplied] Because the Government had no direct evidence of knowledge, it sought to establish knowledge based upon circumstantial evidence. However, "[w]hen the Government relies on circumstantial evidence, reasonable inferences, not mere speculation, must support the conviction." United States v. Capers , 708 F.3d 1286, 1297 (11th Cir. 2013) (quoting United States v. Mendez, 528 F.3d 811, 814 (11th Cir. 2008)). "If there is a lack of substantial evidence, viewed in the Government's favor, from which a reasonable fact finder could find guilt beyond a reasonable doubt, the conviction must be reversed." United States v. Mieres-Borges, 919 F.2d 652, 656 (11th Cir. 1990).

In this case, the evidence was insufficient for a reasonable fact finder to conclude beyond a reasonable doubt that Mr. Griffin had the requisite knowledge to support this conviction. There was no testimony or evidence, at trial, that Mr. Griffin was the individual on the tablet during the times child pornography was viewed or uploaded. In fact, none of the witnesses testified that there was any specific evidence that Mr. Griffin was at the tablet at the time that downloads occurred. Mr. Griffin's case is much like the Defendant's case in United States v. Moreland, 665 F.3d 137 (5th Cir. 2011). In Moreland, the Fifth Circuit Court found that the evidence was insufficient to support the Defendant's constructive possession of digital images found in two computers where the residence was jointly occupied and there was no

additional evidence of the Defendant's knowing dominion or control of the contraband. Id. Similarly, Moreland's non-reaction on the telephone, when told of the offensive images, were of no moment on the Appellate Court. Id. at 151-152.

The Government provided no evidence that Mr. Griffin's fingerprints or DNA were found on the tablet computer's hard drive, or, any hard drive seized in the case. There was also no evidence of Mr. Griffin's fingerprints or DNA on the tablet computer that was seized. The Government introduced no surveillance records, photographs, videos, or, audio, connecting Mr. Griffin to the tablet in question or even to the general physical location of that item at the time downloads occurred. In addition, no evidence was introduced tracking any of Mr. Griffin's devices or phone to show where he was at the time the downloads occurred or were viewed.

Accordingly, the Government failed to meet its burden as to the knowledge element for the possession of child pornography charge.

In United States v. Lowe, the Sixth Circuit held that there was insufficient evidence to sustain the defendant's conviction for possession of child pornography. 795 F.3d 519, 523-24 (6th Cir. 2015). In Lowe, the court held that "no rational juror could find [the defendant] guilty beyond a reasonable doubt based on the evidence presented at trial" even though the sole username on the computer where the images

were found was a variant of the defendant's name because the defendant "shared his home with two other people, both of whom could access the [user account] and Shareaza file-sharing program without entering passwords" and "[i]mportantly, the government presented no evidence from which a juror could infer that [the defendant's wife] did not use the laptop over the five-month period" when images were downloaded to it. Id. The government presented evidence that the defendant's wife used the laptop with her name as the username, but, the court held, that the jury "could not draw the additional inference that [the defendant's wife] did not use the . . . laptop [with the defendant's username profile]." Id. (emphasis in original). The court also found that no reasonable juror could conclude it was the defendant and not his wife who saved documents and accessed websites on the computer when child-pornography files were downloaded. Id. This was especially so because the government "presented no evidence of what [the defendant and his wife] did for a living, whether they worked inside or outside of the home, their interests and hobbies, or where they banked." Id. Further, "while a juror might infer from visits to appliance-repair and banking websites than an adult primarily used the computer, she could only speculate about whether the adult was [the defendant] or [his wife]." Id. at 523-24 (emphasis in original).

The *Lowe* court then distinguished cases where other panels have found

sufficient evidence, including where images were found in only one user account of a computer with three user profiles and the defendant admitted that he had viewed child pornography and it aroused him; and where images were stored in password protected files and folders associated with the defendant, his fingerprints were the only ones on compact discs containing child pornography, and he made inculpatory statements to the arresting officers. Id. at 524.

The *Lowe* court explained that while these cases did "not establish a minimum threshold for proving knowing possession of child pornography with circumstantial evidence . . . [t]hey do, however, identify the types of evidence on which a jury reasonably may rely to convict an individual of possessing child pornography found on a shared device." Id. The Lowe court reversed the defendant's conviction because the "jury heard no such evidence in [the defendant's] case, despite the fact that the non-password-protected laptop containing pornographic images was found in a common area of a home shared by three individuals." Id.

Further, the *Lowe* court concluded that "the evidence did not permit a juror to conclude that [the defendant] knew the . . . laptop contained child-pornography files" where "[m]ost of the images and videos depicting child pornography were stored in

Shareaza libraries. Without more information about [the defendant's] computer use, no juror reasonably could infer that he opened Shareaza during the five-month period in question." Id. And, the court further concluded that the evidence did not suggest that an "innocent" user would have known about the images if he or she did not open Shareaza, notwithstanding that images were also found in the computer's "downloads" file and the recycle bin, reasoning that while a "juror might be able to infer that a defendant knows about pornography stored in her personal files, especially if the files contain recently opened or created documents, he could not draw the same conclusion about pornography that automatically appears in the `downloads' folder or that a user moved to the recycle bin." Id. at 524-25. Based on those facts, the court held that "without improperly stacking inferences, no juror could infer from such limited evidence of ownership and use that [the defendant] knowingly downloaded, possessed, and distributed the child pornography found on the laptop." Id. at 523.

The evidence that the court found insufficient to sustain the jury's verdict in *Lowe* is, if anything, stronger than the evidence the Government presented in Griffin's case. In Lowe, the username of the sole profile on the computer was a variant of the defendant's name. Id. at 523-24. In Griffin's case, the Government implicitly admitted that there was no profile username, just the generic "Asus user".

Count one charged that Defendant Levi Jermaine Griffin possessed child

pornography. The Court explained the law governing the crime:

> It is a Federal crime to possess child pornography. The defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:
>
> (1) The Defendant knowingly possessed an item of child pornography;
>
> (2) The item of child pornography:
>
> (a) was shipped or transported using any means or facility of interstate or foreign commerce, including by computer, or,
>
> (b) had been produced using materials that had been mailed, shipped, or transported in interstate or foreign commerce.
>
> (3) When the Defendant possessed the material, the Defendant believed the item contained child pornography.
>
> (Doc. 71, 5-6) [emphasis added]

The Court further explained:

> The law recognizes several kinds of possession. A person may have actual possession, constructive possession, sole possession, or joint possession.
>
> "Actual possession" of a thing occurs if a person knowingly has direct physical control of it.
>
> "Constructive possession" of a thing occurs if a person does not have actual possession of it, but, has both the power and the intention to take control over it later.
>
> "Sole possession" of a thing occurs if a person is the only one to possess it.
>
> "Joint possession" of a thing occurs if two or more people share

possession of it.

The term "possession" includes actual, constructive, sole, and joint possession.

(Doc. 71, 9) [emphasis added]

Mr. Griffin was convicted of knowingly possessing child pornography. Specifically, the Government presented some "67 or 68" images which it claimed depicted minors engaged in sexually explicit activity. See Doc. 103,64-65. Thus, the jury necessarily found Mr. Griffin guilty based on a finding that any one of the images constituted child pornography[2]. Assuming for the sake of argument that the government's proof showed that Mr. Griffin downloaded the images, the proof fails to show that he did so knowingly and therefore that he intended to possess them.

In United States v. Kuchinski, 469 F.3d 853 (9th Cir. 2006), the Ninth Circuit explored the difference between viewing an image accessed by a web browser on a computer screen and possessing it for the purposes of a conviction pursuant to 18 U.S.C. 2252A. Kuchinski's computer contained more than 15,000 images of what was admittedly child pornography Kuchinski had viewed on the Internet. Kuchinski, however, argued he lacked knowledge that his internet-browser was downloading the images to his computer when he viewed them on the internet[3].

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[2] The defense stipulated at trial that the "68" images "depicted" child pornography. (Doc. 100, 35) (Doc. 103, 146). (Doc. 103, 204) (Doc. 103, 214)

[3] Mr. Griffin was using versions of Microsoft's Internet Explorer, which, as did Kuchinski's browser automatically downloads files to a temporary internet folder or cache. See (Doc. 103,75) The purpose of these

Internet Explorer, the browser Mr. Griffin was using, as did Kuchinski's browser, automatically makes a copy of any image from a visited website and stores it on the computer hard drive in a "temporary internet file" in the computer's cache. The Government's expert (Concannon) testified about finding a browser on the tablet in question right after mentioning Internet Explorer and Chrome browser but failed to distinguish which browser for the record. (Doc. 103 at 75) What happens when a visitor accesses a website is that the computer accesses or opens the website which can then be viewed on the screen. In addition, the computer makes a copy of the data, including images, on the website and stores it. When a user returns to the website at a later date, the computer will compare the date on the website to the date on the previously stored file. If the page is unchanged, the computer displays the cached file on the screen. However, if the website has changed since the computer last visited the site, the computer displays the new data on the screen and caches the new data in the temporary internet file. http://supportmicrosoft.com/kb/263070.

Significantly, these functions are not visible to the user. Therefore, most users are not even aware that the files are being stored on their computers. Furthermore.

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downloads is to cache them so that if a user accesses the site again, the files are already downloaded to the computer which makes internet browsing go faster. Typically, a website will provide an expiration date which may be of short duration or may be for years. Once the expiration date is reached, Internet Explorer moves the expired information to the slack or free disk space. This information is reflected on the browsing histories of the ASUS Android tablet introduced into evidence by the Government. See Government's Exhibit 8 (without admission)

advanced computer skills are necessary to locate and access files that are located within the cache when the computer is offline. Kuchinski, supra.

Similarly, contrary to what the Government's expert (Concannon) implied that Mr. Griffin may have deliberately deleted the files, temporary internet files can be deleted either through routine maintenance without any intent on the part of the user to delete a specific file,[4] or they may be deleted automatically once the cache file becomes full. Microsoft has directions for clearing the cache to obtain more computer space. http://www.microsoft.com/windows/ie/ie6/using/howto/customizing/clearcache.mspx. (Doc. 103 at139) (Doc. 103 at 200, 17-18) The directions make it clear that cache clearing can occur without the person ever having specific knowledge of a specific file contained within the cache.

Most users, therefore, are unaware that accessing a website leads to image downloads to one's computer. Windows computers discourage users from seeing or accessing the temporary internet files or cache by hiding them and by giving a "system warning" if a user inadvertently tries to access the files. In order to actually see these files, the computer user needs to be knowledgeable about how to override the warning and execute certain system commands to copy the files to another folder. Kuchinski,

[4] For example, in Internet Explorer, it is possible to go to the Tools menu under Internet Options and clear the cache.

supra.

Consequently, the Ninth Circuit Court agreed with Kuchinski that absent proof he was a sophisticated computer user who was aware of the automatic downloads, Kuchinski could not be said to have knowingly intended to download and therefore to exercise dominion or control over the images. This is so because it is easy for innocent persons to unknowingly download child pornography to their hard drive and retain it on their computers without the slightest intension to do so. As the Ninth Circuit Court noted:

> Where a Defendant lacks knowledge about the cache files, and concomitantly lacks access to and control over those files, it is not proper to charge him with possession and control of the child pornography images located in those files, without some other indication of dominion and control over the images. To do so turns abysmal ignorance into knowledge and a less than valetudinarian grasp into dominion and control.

Kuchinski, supra, at 863.

Although it is possible to download child pornography directly from a website on the Internet, it is also possible for a person who believes that he is viewing only adult pornography to inadvertently download child pornography or to be viewing some totally non-pornographic and innocuous site and be redirected to a child pornography site without his/her knowledge. In the case of a redirection, Internet Explorer would automatically download the images to the temporary Internet file on the user's computer

without the user ever being aware that this had happened. See U.S. General Accounting Office, File Sharing Programs: Users Of Peer-To-Peer Networks Can Readily Access Child Pornography 11(2004), available at http://www.gao.gov/new.items/d04757t.pdf [GAO REPORT]. The GAO Report discusses numerous ways teenagers, for example, can inadvertently access child pornography by simply using innocuous terms of interest to children or teens. The various sites on Government's Exhibit 8 is indicative of this possible occurrence. (Doc. 103 at128 -131).

Other Courts which have considered the problem of possible inadvertent downloads have found the evidence to be sufficient to support a conviction for receiving or possessing child pornography, but, only where there is additional evidence to show that the Defendant knew the pornography was being downloaded to his computer and that he actually intended to exercise dominion and control over the images.

For example, the Tenth Circuit has considered whether a Defendant can be convicted of possessing child pornography accessed from the Internet and contemporaneously and automatically stored to the Internet cache. United States v. Tucker, 305 F.3d 11936 (10 th Cir. 2002). Tucker had downloaded approximately 5000 images which were found in his cache files. Tucker, however, conceded that he had intentionally sought out and viewed child pornography knowing that the images would be saved on his computer. Id. The Court, therefore, rejected Tucker's sufficiency of the

evidence argument because he continued to view child pornography knowing that the images were being saved, if only temporarily, on his computer, See also, United States v. Romm, 455 F.3d 990, 997-1001 (9th Cir. 2006) [upholding conviction for knowingly receiving pornography stored in cache files that the Defendant knew he could access]; United States v. Calderon, 318 Fed. Appx. 277, 278 (5th Cir. 2009).[5]

In United States v. Bass, 411 F.3d 1198, 1201-02 (10th Cir. 2005), cert. denied, 546 U.S. 1125 (2006), a divided panel of the Tenth Circuit upheld a conviction for possessing child pornography in the Internet cache where the Defendant claimed ignorance of the browser's caching function. Unlike Tucker, who admitted knowledge of the automatic downloads, Bass claimed that a computer virus had caused his browser to save the images without his knowledge. Id. at 1200. Bass however, had used specialized software to deliberately delete the child pornography from his Internet cache files and registry. The Tenth Circuit found the use of specialized software to remove those specific files sufficiently support Bass' knowledge that the files were being downloaded to his computer and that he knowingly possessed them. Id. at 1201-02.

In Mr. Griffin's case, there is no evidence of use of any special software and no

[5] In the unpublished case of Calderon, the Fifth Circuit Court noted that it did not need to decide if it agreed with the statutory interpretation of possession adopted in Calderon because it found the proof to be adequate to support Guideline enhancements at sentencing for the number of images and for possessing an image of a child under 12. In his plea colloquy, Calderon admitted he had a long history of procuring child pornography and also admitted that he sent an Officer an illegal image of a child under 12 in an Internet chat room with the word "preteen." Id. at 278-79.

other evidence indicating that Mr. Griffin, if he was indeed the person who accessed the internet files, knew that these files were being automatically downloaded and saved to his hard drive. Certainly, the internet browsing history in question fails to indicate either a sophisticated or even frequent Internet user accessed the Internet. See Government's Exhibit 8 (without admission). There was no browser history directly related nor associated with the child pornography in question. (Doc. 103 at 127), (Doc. 103 at 129). There was no evidence of an attached storage device relating to the child pornography in question, no file sharing program nor app associated thereto. (Doc. 103 at 121-123).

Not withstanding the admissibility of Concannon's opinion, Concannon is wrong. Windows devotes a finite amount of space to temporary Internet files. The amount depends on the reversion of Internet Explorer on the computer. Once that limit is reached, the computer automatically deletes files from the temporary internet file cache. http://www.msdnmicrosoft.com/en-us/library/aa383928(VS.85).aspxWhen Windows deletes a file, it designates the file as free space so that the computer can write new files in that space http:social.answers.microsoft.com/Forums/en-S/vistaprugrams/thread/13b1eaad-d41c77-91e5-f0bc9590de7d. Concannon's insinuation and ultimately the Government's position that Mr. Griffin deliberately deleted files and, therefore, was aware of the content of the images on the tablet is simply untrue. (Doc. 103 at 75) (Doc. 103 at 200).

There is no evidence that Mr. Griffin was aware of the content of any of the files that

the Government deemed objectionable. If he was aware of the file's content, there is no evidence that he exercised any dominion or control of the images.

The Government's emphasis and over-reliance of Mr. Griffin's off the wall statement to Ms. Ball over the cellular phone, when no one could observe his demeanor, posture, or scenario, is of no moment. After being denied entry into his abode, residence, and principal place of dwelling, Mr. Griffin was asked to take refuge on the street; Mr. Griffin, confused as to the happenings, the apparent detention of his paramour (Ball) and possible Government confiscation of Ball's children, felt compelled to call Ball and accept responsibility for the current dilemma.

Unable to express his true feelings in a proper sentence nor context, Mr. Griffin merely stated that he messed up and advised Ball to rid the house of the condemnable item, if the allegations were actually true. Ball, Sergeant Narayan, and, Child Advocate Amanda Martin all testified they heard "I fucked up" over the cellular speaker phone. (Doc. 100 at77-78), (Doc. 100 at 91); (Doc 100 at 124). On the other hand, Corporal Tom Martin who was also present, testified to hearing the statement, stated, he was one thousand percent certain he heard Mr. Griffin say "I'm fucked" (Doc. 100 at 116) not "I fucked up." Id. No one including Ball, queried Mr. Griffin as to the meaning of his colorable statement; there was no followup clarification nor reasonable understanding offered into evidence as to the statement.

Unlike the Defendant in United States v. Carroll, 886 F.3d 1347 (11th Cir. 2018) the

evidence is unavailing as to the possession count in question. See also, Moreland, supra at 151-152. There was no evidence that child pornography was regularly downloaded to the tablet over the seven months month period at issue (that is, February 2016 to August 2016). See (Doc. 103 at75), (Doc. 103 at 64-65); (Doc. 103 at 114). Mr. Griffin did not have exclusive control of the tablet at all times; the other family members, strangers, and, neighbors, used the tablet at times. (Doc. 100 at 73-74). Indeed, the tablet was not password protected for most of that seven month period. (Doc. 100 at 59). Mr. Griffin did not live alone and his paramour (Ms. Ball) who testified at trial along with Ms. Ball's children had access to the tablet. Id. There is no evidence that the tablet was used to download child pornography on any of the dates that the browser history had captured. There was no evidence nor testimony that the tablet user typed in multiple search terms reflecting the pursuit of child pornography nor that the user visited web sites consistent with such pornography; neither testimony that the tablet activity suggested someone who was "methodically seeking out child pornography". See, e.g . U. S. v. Dobbs, 629 F.3d 1199 (10th Cir. 2011).

All of the internet sites which the Government contended (or at least insinuated) contained (child) pornography were accessible at the time when the tablet computer was used by other individuals at the home and outside. The Government presented no evidence that any sites containing any type of pornography, child or adult, were accessed at any specific time as to Mr. Griffin, despite the fact that Mr. Griffin had owned the tablet computer for a

number of months.

There was no chat room activity on the tablet computer; no evidence of passive, much less active, collection of child pornography and none as it relates to voyeurism in child pornography. See U. S. v. Hiipakka, 2014 U. S. Dist. Lexis 160254 (D. S. D., Nov. 13, 2014).

The Government attempted to show that Mr. Griffin was the one who accessed the offending sites by demonstrating access to those sites in close proximity to access of Mr. Griffin's somehow related other non-pornographic sounding sites and even access to his email account. (Doc. 103 at 200) The Government also insisted that Mr. Griffin took and stored selfie pictures on five (5) sporadic occasions over a four (4) month period is conclusive proof of possession. (Doc. 103 at 114) This is erroneous inference over inference theory. (Doc. 103 at 202) Ball testified, however, that the entire family had access to Mr. Griffin's tablet as did strangers. (Doc. 100 at 73-74) Her testimony was buttressed by her candid admission that her son was caught at school with the tablet and used the tablet at the neighbors. (Doc. 100 at 73)

Interestingly, the prosecution relied on accesses to the alleged child pornography sites by Mr. Griffin on only five (5) dates over a six month period to establish his guilt. The testimony, however, showed that none of the dates listed on the admitted website history, Government's Exhibit 8, matches the dates associated with child pornographic

materials. (Doc. 103 at129). Indeed, there was no artifact nor browser history matching the illegal materials. (Doc. 103 at 127) Additionally, the Government expert's attempts to access the sites listed on the browsing history in Government Exhibit 8 were futile at best. (Doc. 103 at 131)[6]

The Government asked the jury to infer that these files showed that it was Mr. Griffin, and not someone else, who was accessing child pornography. It is not sufficient, however, in order to show constructive possession that Mr. Griffin had access and could have been the person who downloaded the alleged pornographic materials. (e.s.) It is undisputed that other people had access to the tablet and Mr. Griffin's password, apparently (when password protected) and in fact used the tablet and Mr. Griffin's code. In similar circumstances, Courts have held the evidence insufficient to support a conviction. The evidence as to constructive , much less actual, possession was weak at best and nonexistent at worst.

In State v. Myrland, 681 N. W. 2d 415 (Minn. Ct. App. 2004), the child pornography was found on school computers. The defendant admitted he had used the computers to download adult pornography. The password for all the teachers, however, was the same so that any one of them might have downloaded the child pornography. The Court, therefore,

[6] These files were highlighted in yellow to draw jurors' attention to supposed accesses to alleged pornography by the perpetrator and to otherwise innocent lawful but perplexingly related browsing in close proximity to each other.

found that the evidence was insufficient to support the conviction.[7]

In Mr. Griffin's case, there is no evidence that he was aware of any of the offensive files on the computer. In fact, the evidence is that the files could only be accessed by someone who knew they were loosely located in the two non-descript folders (that is, "YEA" and "Y"). That someone used Mr. Griffin's user name on the tablet (once password protected), or, at other times, when unsecured, certainly fails to support an inference that Mr. Griffin accessed those files. The only user name (while password protected) was Mr. Griffin's; therefore, anyone accessing the computer had to use Mr. Griffin's password at all times material, or, simply log in unhindered when not password protected.

The Government has failed to contradict Ms. Ball's testimony that others frequently used Mr. Griffin's tablet.

Cases involving constructive possession in the context of drug possession are instructive. Although, in cases involving joint occupancy or ownership, this Court has "recognize[d] that in other cases we have indicated that mere dominion over a vehicle in which [contraband] is found can lead to an inference of constructive possession. But, while dominion over the vehicle will certainly help the Government's case, it alone cannot

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[7] The Court was also concerned, as was the Court in Kuchinski, that there were many ways that images could be stored to the hard drive by pop-up advertisements, unsolicited emails and banner advertisements. Even if a user ignored or deleted them, pornographic images could be stored on the computer.

establish constructive possession of [contraband] found in the vehicle, particularly in the face of evidence that strongly suggests that someone else exercised dominion and control over the [contraband]." United States v. Wright, 24 F.3d 732, 735 (5th Cir. 1994).

The Appellate Courts have been "especially reluctant to infer constructive possession of contraband by one occupant when there is evidence in the record explicitly linking the contraband to another occupant." United States v. Mergerson, 4 F.3d 337, 349 (5th Cir. 1993), cert. denied, 510 U. S. 1198, 114 S. Ct. 1310, 127 L. Ed.2d 660 (1994) [pawnshop receipt indicated gun belonged to co-occupant of the bedroom]. See also, United States v. Pigrum, 922 F.2d 249, 255-56 (5th Cir.), cert. denied sub. nom. Allen v. United States, 500 U. S. 936, 111 S. Ct. 2064, 114 L. Ed.2d 468 (1991); United States v. Onick, 889 F.2d 1425, 1429-30 (5th Cir. 1989) [both cases reversing possession convictions when the evidence linked co-occupant, rather than Defendants, to drugs on premises].

What is required in the case of co-occupancy and co-ownership is "something else... besides mere joint occupancy." Mergerson, 4 F.3d 337, 349. Here the Government has no "something else." In fact, "countervailing evidence" links the pornography to other third party users. The unchallenged testimony of the Government's main witness, Cathryn Ball, inculpates third parties. As one Appellate Court has pointed out, even if jurors chose to disbelieve the countervailing testimony, "their disbelief is not tantamount to proof beyond a reasonable doubt" that the Defendant was guilty of constructive possession. United States

v. Crain, 33 F.3d 480, 486-487 (5th Cir. 1994)"

In Crain, the drugs were found under the seat of the car Crain was driving. Id. The Court reversed the conviction because that alone was insufficient, particularly where the evidence pointed to someone else who could just as easily have been guilty. The Court stated:

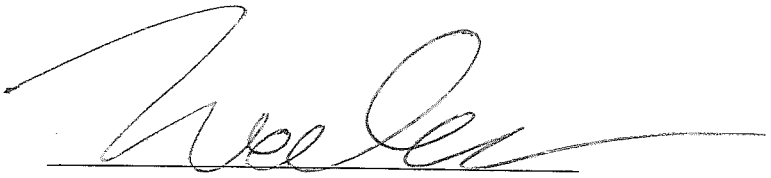
> We suspect that the jury 'must have speculated [Crain] into a conviction," piling "inference upon inference," which it cannot do. Inference must stop at some point. Even under our strict standard of review for insufficiency claims, we conclude that a rational jury could not have found on this record that Crain was guilty of the possession count. As we stated in a recent case, "[a]lthough the strict nature of the standard demonstrates our reluctance to interfere with jury verdicts, this case is an example of why Courts Of Appeal must not completely abdicate responsibility for reviewing jury verdicts." United States v. Ragan, 24 F.3d 657, 659 (5th Cir. 1994). Id. at 887.

Because the jury had to speculate in order to find that it was Mr. Griffin, rather than someone else, who downloaded the alleged pornography, this Court should reverse Mr. Griffin's conviction and direct a verdict of not guilty.

CONCLUSION

The Defendant's conviction and sentence should be reversed and vacated, and, the cause remanded for a new trial to a different District Judge with instructions to apply the guidelines constitutionally and with due regards for the precedent set by the United States Supreme Court and this Circuit

Respectfully submitted



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