APPENDIX A

A1 - Decision of the United States Court of Appeals for the Seventh Circuit
Case: 22-3196 Doc: 25 Dated: 1/25/24

A2 - Defendant's Brief in Opposition of Dismissal of Appeal and Exhibits

Appendix A1

United States Court of Appeals
For the Seventh Circuit Decision

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted January 23, 2024
Decided January 25, 2024

Before

MICHAEL Y. SCUDDER, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 22-3196

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THOMAS RICHARDSON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:13-CR-00686(1)

Robert M. Dow,
Judge.

ORDER

Thomas Richardson was convicted by a jury of both receiving and possessing child pornography. *See* 18 U.S.C. § 2252A(a)(2)(A), (a)(5)(B). The district court sentenced him to a within-guidelines term of 180 months' imprisonment. Richardson appeals, but his appointed counsel asserts that the appeal is frivolous and moves to withdraw. *See Anders v. California*, 386 U.S. 738 (1967). Richardson responded to counsel's motion. *See* CIR. R. 51(b). Because counsel carefully explains the nature of the case, addresses the potential issues that the appeal might involve, and appears to analyze the issues

thoroughly, we limit our review to the issues that counsel and Richardson raise. *See United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014).

In July 2013, law enforcement discovered that an IP address belonging to Richardson's computer had made child pornography available on a peer-to-peer file sharing network. Based on this discovery, police executed a search warrant on Richardson's apartment. In the apartment, they found more child pornography on multiple devices.

In September 2013, a grand jury indicted Richardson with receiving child pornography on August 20, 2013, *see* § 2252A(a)(2)(A), and possessing child pornography on August 27, 2013, *see* § 2252A(a)(5)(B).

At trial, the government presented testimony from law enforcement officers, who described their investigation and methods for determining that the devices found at Richardson's apartment belonged to him. The government also showed the jury the images and videos that Richardson downloaded and possessed. Next, the government showed that Richardson's devices had been transported in interstate commerce because they were made internationally, and that the images traveled between states because several victims were from other states. The jury found Richardson guilty of both receiving and possessing child pornography.

The district court calculated Richardson's guidelines range as 180 to 188 months (an initial range of 151 to 188 months, increased to the 180-month statutory minimum for his receipt count, *see* 18 U.S.C. § 2252A(b)(1), based on his prior conviction for possessing child pornography). The court sentenced him to 180 months' imprisonment (180 months on the receipt count to be served concurrently with 120 months on the possession count), the bottom of that range (and the statutory minimum for each count), as well as 10 years' supervised release.

Counsel begins by considering whether Richardson could challenge the denial of four pretrial motions he filed to dismiss the indictment.[1] In his first motion, he had argued that criminalization of private receipt and possession of child pornography

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[1] Counsel states that, in accordance with Richardson's directions, she focuses on only those arguments that could result in his conviction being vacated (as opposed to arguments that could lead to a new trial or sentence). *See United States v. Caviedes-Zuniga*, 948 F.3d 854, 856 (7th Cir. 2020); *United States v. Konczak*, 683 F.3d 348, 349 (7th Cir. 2012); *United States v. Knox*, 287 F.3d 667, 671 (7th Cir. 2002).

violated his First Amendment right to freedom of expression. The district court denied the motion, deeming it precluded by the Supreme Court's decision in *Osborne v. Ohio*, 495 U.S. 103, 111 (1990), which rejected a First Amendment challenge to a state statute prohibiting possession of child pornography. Counsel now considers whether Richardson could argue that the statute is facially invalid because it prohibits a substantial amount of protected speech. But counsel rightly concludes that this challenge would be frivolous. The Supreme Court has held that child pornography is unprotected by the First Amendment, *New York v. Ferber*, 458 U.S. 747, 763–64 (1982), and it has repeatedly rejected First Amendment challenges to statutes criminalizing receipt and possession of child pornography. *See United States v. Frederickson*, 996 F.3d 821, 823–24 (7th Cir. 2021) (citing *Osborne*, 495 U.S. at 111; *United States v. Williams*, 553 U.S. 285, 307 (2008); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250–51 (2002)).

Counsel also considers whether Richardson could challenge the denial of his second motion to dismiss the indictment—a motion based on the Commerce Clause. In that motion, Richardson had argued that the non-commercial possession of child pornography could not be proscribed by federal legislation under the guise of the Commerce Clause. The district court deemed this argument foreclosed by *United States v. Angle*, 234 F.3d 326, 338 (7th Cir. 2000), which upheld 18 U.S.C. § 2252(a)(4)(B) (a similar statute prohibiting possession of child pornography) as a valid exercise of Congress's Commerce Clause power given the statute's substantial relationship to the closely regulated interstate market of child pornography. Counsel rightly declines to challenge the court's ruling. We recently reaffirmed that the possession of child pornography substantially affects interstate commerce by feeding the market for such material and increasing demand for it. *See United States v. Wehrle*, 985 F.3d 549, 557 (7th Cir. 2021). Further, Richardson possessed child pornography on devices that had moved through interstate commerce (and the pornography itself had moved through interstate commerce because it had been produced in other states)—a sufficient hook for Congress to exercise its Commerce Clause power. *See id.*

Counsel then considers whether Richardson could challenge the denial of his third motion to dismiss the indictment, one based on the Double Jeopardy Clause. In that motion, Richardson argued that the indictment violated the Double Jeopardy Clause because of the Eighth Circuit's decision in *United States v. Harvey*, 829 F.3d 586 (8th Cir. 2016), which held that a defendant cannot be convicted of both receipt and possession of child pornography when both counts are based on the same act or transaction. The district court denied this motion, pointing out that the images and videos at issue in Richardson's two counts were different and, regardless, his argument

was premature because he had not yet been convicted of the offenses. Counsel (and Richardson in his Rule 51(b) response) now consider challenging the court's ruling, again based on *Harvey*. But as counsel correctly explains, *Harvey* is distinguishable because Richardson's two convictions stemmed from different acts or transactions. Richardson's receipt-of-child-pornography charge was based on images downloaded on August 20, and his possession-of-child-pornography charge was based on different images he possessed a week later, when the search warrant was executed. *See also United States v. Halliday*, 672 F.3d 462, 470 (7th Cir. 2012) (no double jeopardy if receipt and possession convictions are based on different images).

Counsel next considers and rightly rejects challenging the denial of a pro se, pretrial motion Richardson had filed to dismiss the indictment. In that motion, Richardson asserted that he wished to make a host of wide-ranging constitutional arguments that his trial counsel refused to raise. But as counsel explains, Richardson's arguments were patently frivolous—not supported by any case law, rules, or statutes.

Counsel represents that Richardson does not wish to challenge his sentence, but in his Rule 51(b) response Richardson states that he wants to challenge the guidelines calculation. He argues that (1) he should have received a two-level reduction under U.S.S.G. § 2G2.2(b)(1)(C) because he did not intend to distribute the child pornography, and (2) that his prior conviction for possessing child pornography should not have counted toward his criminal history score because it already increased the statutory maximum sentence for his receipt count. But counsel rightly explains that any error in the guidelines calculation would be harmless because Richardson received the lowest possible statutory sentence on both counts. *See United States v. Melvin*, 948 F.3d 848, 854 (7th Cir. 2020).

Finally, Richardson complains that he could have raised more constitutional issues in the district court had his counsel allowed him to do so. To the extent he is asserting his trial counsel was ineffective, such claims of ineffective assistance are best reserved for collateral review, where a more complete record can be developed. *See Massaro v. United States*, 538 U.S. 500, 504–05 (2003); *United States v. Cates*, 950 F.3d 453, 456–57 (7th Cir. 2020).

Therefore, we GRANT counsel's motion to withdraw and DISMISS the appeal.

United States Court of Appeals

Rcvd From Bob 3/25/24

For the Seventh Circuit
Chicago, Illinois 60604

February 27, 2024

Before

MICHAEL Y. SCUDDER, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 22-3196

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THOMAS RICHARDSON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:13-cr-00686

Robert M. Dow, Jr.,
Judge.

ORDER

Defendant-appellant filed a petition for rehearing and rehearing *en banc* on February 12, 2024. No judge[1] in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing and rehearing *en banc* is therefore **DENIED**.

[1] Judge Joshua P. Kolar did not participate in the consideration of this matter.