No. 25-

IN THE

Supreme Court of the United States

SHAWN MATTHEW KEARNS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Supreme Court of Virginia and the Virginia Court of Appeals erred by affirming the verdict of the Trial Court and the Trial Court's rulings and conclusions and also erred by adopting or applying reasoning that supported those rulings or conclusions including additional reasoning supplied by the Appellate Courts. The evidence was insufficient to show that Shawn Kearns knowingly and intentionally possessed child pornography and Appellant's conviction and affirmance of that conviction on appeal violated his 6th and 14th Amendment rights under the United States Constitution. The Courts from whom the Appellant appeals did not properly exercise their role as gatekeeper with respect to scientific evidence provided, and erred by refusing to recognize technological certainties in their role as gatekeeper thereby allowing data contained in allocated and unallocated space; which was without contradiction not readily accessible to a user, to be used as the basis for appellant's convictions for possession of child pornography.

LIST OF PARTIES

Shawn Matthew Kearns – Petitioner

Commonwealth of Virginia – Respondent

RELATED PROCEEDINGS

Shawn Matthew Kearns v. Commonwealth of Virginia, No. 250402, Supreme Court of Virginia. Denial of Appeal filed January 7, 2026.

Shawn Matthew Kearns v. Commonwealth of Virginia, No. 1823-23-3, Court of Appeals of Virginia. Memorandum Opinion filed April 8, 2025.

Shawn Matthew Kearns v. Commonwealth of Virginia, No. CR17000317-00 -CR17000317-92, Circuit Court of the City of Lynchburg, Virginia. Sentencing Hearing October 18, 2023.

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PETITION FOR CERTIORARI FOR PETITIONER

Shawn Matthew Kearns by and through Joseph A. Sanzone, Esq., his privately retained counsel, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Supreme Court of Virginia.

OPINIONS BELOW

The Supreme Court of Virginia's Order which denied the Petition for Appeal on January 7, 2026, without elaboration is unpublished (App. 1a). The Court of Appeals Opinion by Judge Richard Y. Atlee, Jr., is unpublished but available at 24 Vap UNP 1823233 (2025) styled as Shawn Matthew Kearns v. Commonwealth of Virginia (App. 3a-18a). The Trial Court's action upon a jury verdict with no written Trial Court opinion and trial transcripts is unpublished (App. 19a-39a).

JURISDICTION

Mr. Kearns's Petition for hearing to the Virginia Supreme Court was denied on January 7, 2026. Mr. Kearns invokes this Court's jurisdiction under 28 U.S.C. § 1257 in that the Supreme Court of Virginia and all inferior Courts having ruled in such a way that the Petitioner, Shawn Matthew Kearns's 6th and 14th Amendment rights under the United States Constitution were denied to him. The Appellant timely filed this Petition for a Writ of Certiorari within ninety days of the Virginia Supreme Court's judgment.

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part, that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the state and district wherein 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. This amendment is broadly interpreted as granting a right to present a complete defense in criminal cases.

The Fourteenth Amendment to the United States Constitution, Section 1. provides, in pertinent part, that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

A. Statement of Facts

The Appellant Shawn Kearns lived with his wife in a town home community at 3600 Old Forest Road Unit 54, in the City of Lynchburg, VA. He had a daughter from a

prior relationship who had been kicked out of her mother's house in South Carolina (R. at 617, L. 15 – R. 618, L. 2) over her relationship with Gregory Hlavac, who is described as the boyfriend in this case, and the Appellant gave her a place to stay to finish High School. The Appellant had a basement apartment in his town home where his mother had resided until her death (R. at 618, L. 5-12). He let his daughter and her boyfriend move into the apartment. The relationship was rocky, and the boyfriend came and went. A child was born, and the daughter moved to South Carolina. She and her boyfriend retained keys to the Kearns house (R. at 588, L. 24 – R. at 589, L. 4, R. at 621, L. 20-21) which had a separate basement entrance to the apartment only, and comings and goings could not be heard by persons on the first and second floors (R. at 621, L. 22 – R. at 622, L. 3 R. at 623, L. 24 – R. at 624, L. 2, R. at 588, L. 24 – R. at 589, L. 10).

The daughter had been given a computer by Jennifer Kearns' mother (R. at 582, L. 4-18). The computer hard drive had been erased and all prior data deleted when it was received by the daughter. At some point while the boyfriend was in the basement apartment, the daughter returned to find him viewing pornography on the computer (R. at 583, L. 21 – R. at 584, L. 8). An argument ensued.

On August 17, 2016, police were alerted to a person accessing child pornography from an IP address identified to Jennifer Kearns internet at 3600 Old Forest Road Unit 54, Lynchburg, Virginia. The police came to the house with a search warrant and seized a number of items. A web cam which had been present, and which would have shown the room during the night of the claimed pornographic download was missing after the police search according

to Jennifer and Shawn Kearns who produced the power cord which was left behind at trial (R. at 608, L. 21 – R. at 609, L. 10). Claims were made about the range of the Wi-Fi from Jennifer Kearns's account, but no range measurements were ever admitted into evidence. Shawn Kearns denied accessing pornography at any time or using the computer where the pornography was found (R. at 620, L. 2-4). No evidence linked to Shawn Kearns was found on the computer. According to the uncontradicted testimony of an investigating officer the alleged child pornography was in unallocated space or in allocated space which was not readily accessible. Shawn and Jennifer Kearns testified that they were together in their portion of the town house and not downstairs during the night of the alleged child pornography download (R. at 620, L. 13-24), and that neither of them accessed pornography.

There was no direct evidence regarding the exact location of the computer in question between 9:00 PM on August 16, 2016 until 4:45 AM on August 17, 2016. It was in the basement apartment when the police arrived but the USB camera which had been present, and which was formerly used to monitor the Appellant's mother while she was alive was gone (R. at 608, L. 5 – R. at 609, L. 7). Its disappearance was never explained by the authorities. On the search warrant Jennifer Kearns was listed as the person to whom the internet account was registered (R. at 533, L. 18-23). Pornographic images of child pornography were found on the computer in unallocated space and allocated space which was not readily accessible to the user. (R. at 473, L. 3 – R. at 474, L. 4).

B. Statement of Material Proceedings

All references herein to the record in this case are made to the June 26, 2023, October 18, 2023, and November 15, 2025, trial transcripts filed as part of the digital record created by the Court of Appeals of Virginia. References to the record and transcripts of proceedings are designated as (R. at __, L. __), respectively.

On June 26, 2023, the Appellant was tried by a jury in Lynchburg Circuit Court. The Honorable J. Fredrick Watson presided, after the Appellant has been indicted for one count of possession of child pornography and 92 counts of possession of child pornography second offense. After a trial by jury the defendant was convicted on all counts. A pre-sentence report was requested. A motion to set aside the verdict as being contrary to the law and the evidence was made and overruled. The Appellant was sentenced to 93 years in prison with 82 years suspended and fines and cost. The Appellant requested that his Court costs be run concurrently reducing them from $36,800.00, to $1,900.00, which would lower them to a single set of costs, but this Motion was overruled as the Court felt that it did not have clear authority in this matter and took no action.

The Circuit Court ruling was timely appealed to the Court of Appeals who affirmed the Circuit Court opinion by an unpublished opinion styled Shawn Matthew Kearns v. Commonwealth of Virginia Record Number 1823-23-3.

The decision of the Court of Appeals of Virginia was timely appealed to the Supreme Court of Virginia, who refused the Petition for Appeal on January 7, 2026.

STANDARD OF REVIEW

A Circuit Court's decision to admit or exclude evidence is reviewed under an abuse of discretion or legal error standard and, on appeal, will not be disturbed absent a finding of abuse of that discretion or legal error. Herndon v. Commonwealth, 280 Va. 138, 694 S.E. 2d 618 (2010). A Trial Court abuses its discretion when it makes an error of law. Coffman v. Commonwealth, 67 Va. App. 163, 166, 795 S.E. 2d 178, 179 (2017). A Circuit Court has no discretion to admit clearly inadmissible evidence. Holiday Motor Corp. v. Walters, 272 Va. 461, 790 S.E.2d 447 (2016).

Where a Defendant contests the sufficiency of the evidence the Appellate Court must view this evidence in the light most favorable to the Commonwealth. Norman v. Commonwealth, 2 Va. App. 518, 520, 346 S.E. 2d 44 (1986). The judgment should be affirmed unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it. Patler v. Commonwealth, 211 Va. 448, 457, 177 S.E.2d 618, (1970).

ARGUMENT

The role of gatekeeper with respect to scientific evidence has been thoroughly explored as it relates to the admission of evidence into a trial. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993). The gatekeeper should also have a role when it comes to preventing factual conclusions which are contrary to technological certainty from being used to create or support the requisite sufficiency of the evidence necessary to defeat a motion to strike the prosecutor's case or occasion a reversal of a conviction. "… A determination regarding

the scientific validity of a particular theory requires not only an examination of the trustworthiness of the tested principles on which the expert rests, but also an analysis of the reliability of an expert's application of the tested principles to the particular set of facts at issue." Roche v. Lincoln Prop. Co., 278 F. Supp. 2d 744 (E.D. Va. 2003). The statement from Roche referenced Daubert but its application extends to the role of the gatekeeper to exclude the evidence which contradicts technological certainty or the inferences or deductions which flow from such contradictions. This evidentiary circumstance usually involves an attempt to exclude evidence not, as here, an assertion that the Commonwealth's affirmative evidence and adoptive admission prevents contrary conclusions that lead to a conviction. The uncontradicted evidence of technological certainty in this case is that the manner in which images are stored upon computers prevents data or images such as exist in this case from being readily accessible. The Courts should be prevented by their gatekeeping function from making any contrary finding as further explained herein.

The essential problem in this case rests with the issue of allocated and unallocated space on the computer. A witness for the Commonwealth of Virginia testified that he examined the hard drive of the computer in this case and found images of child pornography in an unallocated portion of the hard drive and in an allocated portion of the hard drive that was not readily accessible (R. at 473, L. 3 – R. at 474, L. 4). This evidence supported the Appellant's claim of innocence. Such an acknowledgement was not contested by the Appellant. The Commonwealth under Virginia Law may not rise above its own evidence. Massie v. Firmstone, 134 Va. 450, 114 S.E. 652 (1922).

The Commonwealth under Virginia Law must establish that the images were readily available to the user. U.S. v. Flyer, 633 F.3d 911 (9th Cir. 2011). There was no contrary evidence offered on this point at the trial or at any other time during the proceeding. This statement regarding a technological certainty must only be accepted as presented and may not be the subject of divergent assumption or speculation which would allow a fact Finder to conclude the data and images were readily accessible. The Court cannot allow the Commonwealth's case to be made stronger by impeaching its own witness or by urging a different view of the evidence it presented. Harris v. Howerton, 169 Va. 647, 194 S.E. 692 (1938).

Normally, it is the prosecution that seeks to bind a Defendant to a particular statement contained in the prosecutor's evidence. In this case, the Appellant, who was the criminal Defendant, seeks to bind the prosecution to a clear statement contained in their own evidence and presented to the Court as a response to a prosecutor's question. The statement sets forth a technological certainty that establishes that the unlawful data and images in this case were not readily accessible and therefore no conviction could follow. This statement regarding ready accessibility is additionally an adoptive admission by the Commonwealth as the content of the statement was clear, the Commonwealth unambiguously consented to the statement since their witness introduced it into evidence, and the circumstances of the statement and the testimony are tied to the prosecution in a meaningful way. U.S. Equal Employment Opportunity Commission v. Rent-A-Center East Inc., 303 F. Supp. 3d 739 (S.D. Ill. 2018).

A Court has no discretion to rule in conflict with fundamental technological certainties. The images in this

case were found on a computer which was found in the basement apartment of a townhome belonging to Shawn and Jennifer Kearns. The apartment had a separate entrance and had been the home of the Kearns daughter and her boyfriend (R. at 588, L. 24 – R. at 589, L. 4, R. at 621, L. 20-21), after the Appellant's mother lived there until her death. The computer where the images were found had been given to the daughter by her maternal grandmother (R. at 582, L. 4-18) according to all testimony in the case and the granddaughter had used the computer for college. An image of child pornography had been accessed by the computer at 4:44 in the morning on August 17, 2016, and Shawn Kearns and Jennifer Kearns had been together in the upstairs of the townhome that evening (R. at 620, L. 13-24). Shawn Kearns said he had been up during the night, and he and his wife said they were together during the time he was awake. They both denied that either of them had used the computer. Shawn Kearns had said that he knew his daughter's computer was in the basement apartment, but no testimony was offered to show that the Appellant knew about the contents of the computer. There was no DNA or fingerprint evidence linking Shawn Kearns to the computer, nor did the computer have any data on it relating to purchases, profiles, or sign in data associated with software downloads or installation that was linked to the Appellant.

In most cases where the data on a computer is sought to be linked to a person there is a showing of a username or a password that relates to, and is known by, that person. No such information existed in this case. No purchases were made from any site by the Appellant, nor did the Appellant register any software using this computer. There were no temporary files which could be associated

with the Appellant, nor were there favorite sites or other items of browsing history which contained references to the Appellant. There were no shared files which associated the Appellant with the illegal images. The images were similarly not in a cache, giving a person with access to the cache access to the files and control over them. In such circumstances as were present in this case, the images are not readily accessible and there is no actual or constructive possession. U.S. v. Flyer, 633 F.3d 911 (9th Cir. 2011). The images are therefore several times removed from a person seeking the retrieval of images from the computer. First the computer password must be known and there must be access to the cache where the data is located. Secondly since the data is not even cached and is "lost", in unallocated space, or in allocated space and not readily accessible it could not be readily accessed. There was no evidence that the Appellant accessed or tried to access the cache files or even knew of their existence. The Commonwealth conceded that the files were in unallocated space or in allocated space which was not readily accessible (R. at 473, L. 11 – R. at 474, L. 4) and Officer Poindexter clearly testified that any child pornography in such space was not readily accessible to a person who was using the computer (R. at 539, L. 1-4).

There was no testimony concerning the dates of the accessing of the pornographic images which were claimed to have been accessed on dates other than August 17, 2016, and which constitute second or subsequent offenses and therefore no evidence concerning the location of the computer at any of these times. Officer Poindexter claimed that Shawn Kearns said that he often sleeps in the basement (R. at 540, L. 1-2). Appellant denied that claim (R. at 629, L. 15-24) and this admission did not appear as part of the taped interview of the conversation

(R. at 637, L. 13 – R. at 638, L.25). There was no assertion that the Appellant slept in the basement on August 17, 2016, or that he claimed to sleep there that night. In fact, Kearns denied sleeping in the basement that night (R. at 620, L. 22-24, L. R. at 622, L. 4-14), or any night and his wife testified that he did not sleep in the basement and was in their bedroom with her, and any such claim was clearly refuted. Jennifer Kearns said that Shawn did not sleep in the basement but with her upstairs (R. at 233, L. 3 – R. at 234, L. 4) No testimony establishes the location of the computer when images were supposedly accessed, and no testimony places the Appellant with the computer at those times. The location data of the computer at the time of the alleged viewing of images was never offered by the Commonwealth.

Because this is a circumstantial evidence case with no direct evidence or confession, a thorough and accurate recitation of the facts is essential. There were deficiencies in the facts as recited by the Commonwealth on Appeal. In a circumstantial evidence case where all the evidence must be considered, not just a few pieces of evidence that can be woven into a theory of guilt, which does not overstate the evidence in favor of the party who has the burden of proof, the foundation of a proper verdict is accuracy. Two areas concerning the Court of Appeals verdict require special attention: 1.) The whereabouts of Kearns and the computer; and 2.) the nature of the files themselves. The issue of the Court as gatekeeper to disallow the improper use of testimony that establishes a technological certainty is even more imperative.

The issues regarding allocated and unallocated space are extremely complex and were not included in a reasoned

explanation addressing these complexities by the Trial Court. The Court of Appeals discussed the data, but no portion of their decision addressed the fact that child pornography must be readily accessible to the Appellant on the date charged in the indictment to be capable of supporting a conviction. U.S. v. Flyer, 633 F.3d 911 (9th Cir. 2011) and Kobman v. Commonwealth, 65 Va. App. 304, 308, 777 S.E. 2d 565 (2015). The Supreme Court of Virginia denial of Certiorari was silent on the issue.

The Court of Appeals rationale, supporting arguments that were only minimally made by the Commonwealth, is that there were special indica that the Appellant had knowledge of, and therefore he had dominion and control over, the "files" on August 17, 2016. These rationales are:

(1) That the disk cleaner had been run 31 times without reference to who ran these 31 events and what date they occurred. Nor was there a determination of where the computer was located when they were run as no device location information was offered by the Commonwealth; and

(2) That a reasonable inference could be drawn that the Appellant was the sole person who used the computer to access child pornography and/or delete and move files when there were two people in the home and the Wi-Fi was not in the Appellant's name, with at least a third person having access to the basement; and

(3) That the Appellant purposefully searched for and downloaded the images, therefore

knowing their character and location even though he was never shown to have known the password to the password protected files, the computer contained no evidence of browsing, purchasing, or downloading apps or other software such as windows, Word, or social media apps, with any identifying data that could be linked to him, and no explanation was offered regarding the missing USB camera that would have recorded the person using the computer when the Appellant could not have removed the camera during the police search; and

(4) That the finder of fact could conclude that the images were in the Appellant's dominion and control from download to moving to trash when this finding is dependent on establishing the location of the computer and the location of the Appellant who must be in the same place as the computer, where no evidence reveals the date of the downloads or the Appellant on those unknown dates and where a question regarding the computer's location and the Appellant's location on these dates is central to this theory and a venue determination; and

(5) The reported references to the Appellant being nervous when the police showed up early in the morning to confront him while he was in his underwear when the Commonwealth has argued in a

> similar circumstantial evidence case that the Defendant not being nervous and remaining calm was circumstantial evident of his guilt.

Three published Virginia cases have established the legal framework for evidence which is sufficient to form the basis of convictions upon constructive possession and possession of child pornography Kobman v. Commonwealth, 65 Va. App. 304 (2015), Terlecki v. Commonwealth, 65 Va. App. 13 (2015), and Kromer v. Commonwealth, 11 Va. App. 812 (2005). In each of these cases statements were made by the defendants which ranged from a statement that the police would find what they were looking for in Kobman, to admissions of viewing images of children between the ages of 8 and 17 in Terlicki, and finally testimony regarding a systems registry on a computer in the name of the Appellant indicating that he owned the computer which he used and from which items were downloaded which was found at the Appellant's residence. None of these circumstances are present in the record of the case. Shawn Kearns denied knowledge of the accessing of the images, was not a registered user of the computer, was never shown to have known the password to the computer or be referenced in a computer registry and was not shown to have been in the basement apartment or to have used the computer on the night in question. There was no physical evidence to prove that Shawn Kearns possessed or even touched the computer as there was no DNA, fingerprint, or similar evidence.

In Yerling v. Commonwealth which is the most recent Virginia Appellate decision addressing Drew v. Commonwealth the same definition of constructive

possession is announced that has been used since Drew v. Commonwealth, 230 Va. 471 (1986): Constructive possession may be established when there are acts, statements, or conduct of the accused or other facts and circumstance which tend to show the [accused] was aware of both the presence and the character of the substance and that it was subject to his dominion and control. Drew at, 473, Powers v. Commonwealth, 227 Va. 474, 476 (1984), Yerling v Commonwealth, 71 Va. App. 527, 533 (2020).

While ownership or occupancy of a premises is a circumstance probative of possession, Kobman v. Commonwealth, 65 Va. App, 304, 308, 777 S.E. 2d 565 (2015), in addressing ownership of a residence, traditional property right issues have been relied upon in the various criminal actions which concern themselves with ownership as a condition to possession or as a consideration of whether a person's presence is permissive or not, Kramer v. Commonwealth, 45 Va. App. 812, 613 S.E. 2d 871 (2005). In fact, the permissive use of the basement, in this case which was freely and voluntarily allowed by the Kearns and their daughter, who had lived in the apartment with the boyfriend who had a key (R. at 585 L. 9- 18, R. at 588, L. 24 – R. at 589, L. 4, R. at 621, L. 20-21) is enough to defeat a claim of burglary where a person carried a key to the house and that person comes and goes at "will". This freedom of entry is a recognized possessory interest. Davis v. Commonwealth, 132 Va. 521 (1922). This possessory interest is a circumstance to be considered in this circumstantial evidence case. Proximity to an unlawful item alone is not sufficient to establish constructive or actual possession. Wright v. Commonwealth, 217 Va. 669 (1977). The search warrant in this case for the home which was acquired upon notice

to the police of suspected child pornography listed the wife as the suspect.

The Commonwealth relies upon what are called other acts, statements, conduct, or facts, from Drew to sustain their argument regarding constructive possession. This position echoes the Commonwealth's position in another constructive possession case where the Supreme Court stated that the "other" evidence presented in support of constructive possession was in fact an absence of evidence. Powers v. Commonwealth, 227 Va. 474, 476 (1984). The absence of other identifying evidence of other persons in the house, the lack of surprise when the defendant was charged, and the value and obvious illegality of the contraband were not sufficient to foreclose the possibility that the illegal item was possessed by another. Powers p. 476. The Court of Appeals of Virginia cited a similar argument to support affirming Kearn's conviction, and this argument should have likewise failed.

All necessary circumstances proved must be consistent with guilt and inconsistent with innocence, Garland v. Commonwealth, 225 Va. 182, 184 (1983) and there must be an unbroken chain of circumstances proving the guilt of the accused to the exclusion of any other rational hypothesis Gordon v. Commonwealth, 212 Va. 298, 300 (1971).

There are more crucial circumstances that support an acquittal and are consistent, not inconsistent, with innocence than there are circumstances which are consistent with guilt. These circumstances include but are not limited to:

(1) There were no personal belongings in the basement apartment including clothes, shoes, mail, books, or anything in writing that relates to the Appellant; and

(2) There were no other devices nearby showing name, passwords, or log in instructions, indicating the presence of the Appellant near the computer; and

(3) There was no forensic evidence including fingerprints or DNA on the computer, bed, or other furniture which identified the Appellant; and

(4) There was no evidence to show registration, software updates, purchases, downloads, or passwords which related to the Appellant; and

(5) The Appellant did not know the password to the computer whereas the daughter's boyfriend who was seen viewing pornography on the computer knew the password and had logged in to the computer and used it to view pornography; and

(6) The USB camera was missing from the computer including a memory card, indicating the presence of a person who was not identified; and

(7) The daughter's boyfriend did not honor a subpoena to Court; and

(8) Jennifer Kearns, the Appellant's wife, is an unimpeached alibi witness and she stated that they were both together the whole night and no pornography was accessed.

While possession of the computer upon which the illegal images are found is an important issue, it is not the only issue. In Kromer the images had been downloaded and were readily accessible. In Kobman only the images that were in allocated space resulted in a conviction after Kobman admitted viewing images of girls as young as 8. While the Commonwealth in the present case referenced search terms in allocated space, they acknowledged that these files were not readily accessible, or that the illegal images were in unallocated space and that no dates of retrieval were shown (R. at 553, L. 9 – R. at 554, L. 20). Kromer placed great importance on the fact that the images were readily accessible. That is not the case here. The retrieval of images from unallocated space requires forensic tools, such as were used in the police investigative search, and there is no evidence that the defendant had access to such tools. The items in allocated space required a system restore to a known date not shown to have been recorded anywhere or within Shawn Kearn's knowledge or understanding. The evidence was further that all the images were either in unallocated space or allocated space in a system volume unit which is not a normal place where people could access files and were therefore not readily accessible (R. at 538, L. 13 – R. at 539, L. 4). The Commonwealth's expert testified that this area was not readily accessible (R. at 538, L. 13 – R. at 539, L. 4). There was no evidence that the Appellant possessed a password to this computer or was seen viewing images on the

computer. (R. at 520 L. 12-15). The daughter's boyfriend admitted viewing pornography in the apartment where the computer was found (R. at 583, L. 21 – R. at 585, L. 5) and was seen by the daughter viewing pornography on the computer in the basement apartment where the police later found the computer. He therefore had viewed pornography on this computer and possessed a password to unlock and operate the computer, not accessing pornography on Direct TV as offered by the Court of Appeals (R. at 582, L. 9 – R. at 585, L. 5). Therefore on the issue of knowledge and control, not only does the evidence fail to show anything that indicates that the Appellant knew of the images or possessed the images, the evidence of possession of child pornography is substantial against the boyfriend who possessed the computer and obviously used the password to access the daughter's computer, admitted downloading pornography in the basement apartment and was seen viewing pornography during the relevant time period on the computer that is the subject of this trial. The evidence against the boyfriend is as powerful as the evidence against the Defendants in Kobman, Terlecki, or Kromer, and properly viewed prevents all of the evidence against the Appellant in this circumstantial case from being consistent with guilt and inconsistent with innocence.

Viewing the evidence against Kearns, the Commonwealth could show no more than Kearns' presence in the upstairs of the house with his wife, both of whom denied his use of the computer and his knowledge that the computer was in the basement. They could not show a technological certainty that supported their view that the Appellant has committed a crime. In fact a technological certainty established that the Appellant was not guilty of

the crimes for which he was charged. The computer was clearly owned by the daughter. Given the inaccessible nature of the files and the lack of proof of use by the Appellant there is no fact which carries this case beyond mere proximity which is insufficient as a matter of law for a conviction.

Even in a civil case, supporting evidence of the allegation is required, and the lack of supporting evidence such as the lack of any evidence regarding the circumstances surrounding the images not claimed to have been viewed on August 17, 2016, causes the evidence to be vague, uncertain, and unsatisfactory, Flanagan v. J.M. Parsons, et al., 167 Va. 6, 10, 187 S.E. 473 (1936). Even the unexplained occurrence of an automobile accident cannot result in a criminal conviction, Powers v. Commonwealth, 211 Va. 386, 177 S.E. 2d 628 (1970).

The Appellant's case concerns the issue of technological certainties. A Court should be without discretion to allow findings which conflict with technological certainties to be sufficient to convict the Defendant. There is a similarity between the reasoning that is offered in this case by the Appellant and the reasoning that was offered by the Appellant Daubert in the matter of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). If Daubert did not originate the concept of a trial judge as a gatekeeper, it certainly formalized the concept with respect to scientific evidence. The Court in Daubert said that Rule 702 of the Federal Rules of Evidence assigns to the trial judge the task of ensuring that an expert's testimony rests upon a reliable foundation and is relevant. It goes on to state that pertinent evidence based on scientifically valid principles will satisfy those demands.

Virginia State Court evidentiary rules rest on a similar foundation (Virginia Supreme Court Rules of Evidence 2:703).

An expert's opinion must account for contrary scientific literature and is unreliable if it does not Tyree v. Boston Sci. Corp., 54 F. Supp. 3d 501 (S.D. W. Va. 2014). There must be sufficient reliability so that the expert testimony can be predicated upon scientific knowledge and be derived from and validated by the scientific method. United States v. Lester, 254 F. Supp. 2d 602 (E.D. Va. 2003). The rules imposed by the Supreme Court of the United States, must clearly contemplate the court exercising some authority to ensure that there is a regulation of the substance of the testimony of an expert when it relies upon scientific testimony. In the present case the expert testimony about unallocated and allocated space provided a reasonable doubt and the Commonwealth was allowed to argue against this technological certainty.

The right to a meaningful defense has routinely been founded upon constitutional protection found in the Amendments to the U.S. Constitution, such as the protections of the 6th and 14th Amendments which should be afforded in the present case Gideon v. Wainwright, 372 U.S. 335, 340-341 (1963), Wolfe v. McDonnell, 418 U.S. 539 (1974), Coleman v. Alabama, 399 U.S. 1, 12 (1970). The right to a fair trial is defined through the several provisions of the 6th Amendment. Strickland v. Washington, 466 U.S. 668, 685 (1984). The Constitutional guarantee of a meaningful opportunity to present a complete defense must include the Court acting as a gatekeeper to prevent the improper sidestepping of technological certainties.

CONCLUSION

A Court must give deference to technological certainty and exercise its role as a gatekeeper to prevent its improper use and a related finding that the evidence was sufficient to convict. The Appellant was denied the right to present a complete defense to a jury trial as guaranteed by the 6th and 14th Amendments to the United States Constitution because a crucial finding that the illegal files in this case were readily accessible was allowed to be made contrary to technological certainty. The Appellant, Shawn Matthew Kearns, prays that this Court grant his Petition for Writ of Certiorari and grant an Appeal in this matter.

Respectfully submitted,

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APPENDIX

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APPENDIX A — ORDER OF THE VIRGINIA SUPREME COURT, DATED JANUARY 7, 2026

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday, the 7th day of January, 2026.

Record No. 250402
Court of Appeals No. 1823-23-3

SHAWN MATTHEW KEARNS,

Appellant,

against

COMMONWEALTH OF VIRGINIA,

Appellee.

Dated January 7, 2026

FROM THE COURT OF APPEALS OF VIRGINIA

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

Appendix A

The rule to show cause previously entered herein is discharged.

A Copy,

Teste:

Muriel-Theresa Pitney, Clerk

By: /s/ Ervina Pajalic

Deputy Clerk

APPENDIX B — MEMORANDUM OPINION OF THE COURT OF APPEALS OF VIRGINIA, FILED APRIL 8, 2025

COURT OF APPEALS OF VIRGINIA

Record No. 1823-23-3

SHAWN MATTHEW KEARNS

v.

COMMONWEALTH OF VIRGINIA

Filed April 8, 2025

MEMORANDUM OPINION*

UNPUBLISHED

Present: Judges AtLee, Chaney and Lorish
Argued at Lexington, Virginia

FROM THE CIRCUIT COURT
OF THE CITY OF LYNCHBURG
J. Frederick Watson, Judge

A jury convicted Shawn Matthew Kearns of 1 count of possessing child pornography and 92 counts of possessing child pornography, second or subsequent offense. The trial court sentenced Kearns to 93 years with all but 11 years

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* This opinion is not designated for publication. *See* Code § 17.1-413(A).

suspended. On appeal, Kearns argues that the evidence was insufficient to prove that he knowingly possessed child pornography and that the trial court erred in admitting a sample of the images and videos of child pornography into evidence. For the following reasons, we affirm his convictions.

I. BACKGROUND

"On appeal, we review the evidence in the 'light most favorable' to the Commonwealth." *Clanton v. Commonwealth*, 53 Va. App. 561, 564 (2009) (en banc) (quoting *Commonwealth v. Hudson*, 265 Va. 505, 514 (2003)). That principle requires us to "discard the evidence of the accused in conflict with that of the Commonwealth, and regard as true all the credible evidence favorable to the Commonwealth and all fair inferences that may be drawn therefrom." *Kelly v. Commonwealth*, 41 Va. App. 250, 254 (2003) (en banc) (quoting *Watkins v. Commonwealth*, 26 Va. App. 335, 348 (1998)).

In 2016, Rodney Brisintine of the Bedford County Sheriff's Office was a member of the Southern Virginia Internet Crimes Against Children Task Force. In that role, Brisintine investigated online sharing of sexually explicit materials involving children. Brisintine used programs called Shareaza LE and ICAT Cops to monitor and identify users on the internet involved in sharing or downloading child pornography.

In July 2016, Brisintine used Shareaza LE to view a file that was shared by a specific computer user

through peer-to-peer ("P2P") computer software. The file contained several videos that depicted sexual acts involving children. Brisintine identified the user's internet protocol ("IP") address and subpoenaed documents from the internet service provider. Brisintine forwarded his findings to the Lynchburg Police Department, who traced the IP address to Kearns's home in Lynchburg.

On August 17, 2016, at 6:22 a.m., Detective Kevin Poindexter of the Lynchburg Police Department, along with several other officers, executed a search warrant of Kearns's home. Kearns answered the door and told officers that his wife, Jennifer Kearns, was sleeping upstairs and that no one else lived in the home. Kearns's voice was shaky, and he was visibly shaking when the officers explained the search warrant. He told officers he had been awake until around 4:00 a.m. and had recently fallen asleep. Kearns mentioned that he and Jennifer slept in separate rooms and that he often slept in the basement. Kearns denied knowledge of any child pornography and stated that he shared his internet with friends and neighbors. Kearns advised the officers that he had a laptop at work, two cellphones, and a desktop computer located upstairs in his home. The officers seized 18 items in total, including an Acer laptop from the basement of the home that Kearns failed to disclose. When confronted with the Acer laptop, Kearns stated he "had completely forgotten that there was a computer downstairs" but acknowledged it was his. Kearns indicated that he used the Ares and Shareaza P2P programs for his "deejay business" but that he had not accessed the programs in about five years. Kearns also disclosed that he had a fake Facebook profile and additional email addresses.

Appendix B

The officers determined that the Kearns's internet signal did not reach across the parking lot from their home to allow access from outside the home as Kearns claimed. They also checked the wireless network at Kearns's residence, and the only devices using the network were those located inside Kearns's home.

Before Kearns's jury trial, he stipulated that 93 images and videos found on the computer were child pornography and were "highly relevant," but he asked that they not be shown to the jury because of their disturbing nature. The trial court allowed the Commonwealth to show a sample of representative images and videos rather than all of them.

Detective Poindexter was qualified as an expert in digital forensics. He testified that he conducted a forensic examination of the Acer laptop and found images, videos, and keyword searches related to child pornography. The laptop contained a user account named "Backup" and required a password. Poindexter generated several records from that "Backup" account. He determined that the final login to the laptop was on August 16, 2016, at 9:36 p.m. and the final logout was on August 17, 2016, at 4:44 a.m. Poindexter testified that login was "interactive," meaning that the user physically entered the password into the laptop. There were no remote or foreign logins on the laptop.

The laptop had the Ares and Shareaza P2P software installed. Poindexter testified that P2P software facilitates file sharing between users of that specific software. He

identified the most recent software update for each program and confirmed they were the current versions. The Ares software was updated on January 24, 2015, and the Shareaza software was updated on July 2, 2016.

Poindexter generated a list of 55 downloaded files from the Ares software that depicted child pornography. The titles included terms like "PTHC" and "OPVA." Poindexter testified that "PTHC" is an acronym for "Preteen Hardcore" and "OPVA" is the "Onion Pedo Video Archive." The records indicated that the earliest download on the Ares software was December 17, 2014, and the latest was May 29, 2016. Poindexter also generated a list of 11 attempted downloads from the Ares software. The search terms included "Hussyfan" and "Molly Fuck," which Poindexter explained are terms consistent with child pornography. The Shareaza software showed a search on August 10, 2016, at 1:21 a.m. for "PTHC."

Poindexter testified that there were also link ("LNK") files on the computer related to child pornography. He explained that LNK files are a "shortcut" function on a computer and serve as a link to the actual file location on the computer. The record indicated that the earliest LNK file was created on January 24, 2015, and the latest on August 17, 2016, at 4:22 a.m. and was titled "PTHC 14 Year Old Masha Blow Job, Anal, Come in Mouth." Poindexter located two other LNK video files created on August 16, 2016, at 11:01 p.m. and August 17, 2016, at 3:56 a.m.

Poindexter testified that a disk clean-up program had been run on the laptop 31 times and determined the

most recent was run on August 17, 2016, at 4:40 a.m. He explained that a disk clean-up allows a user to delete all their downloads.

In total, Poindexter collected 93 images and videos of child pornography from the laptop. The Commonwealth showed seven videos and one image to the jury. Poindexter testified that the images and videos were in both allocated and unallocated space on the laptop. He explained that allocated space is where the files and folders are organized in a computer, and unallocated space is free space on the disk. Poindexter elaborated that when files are deleted, they move from allocated space into unallocated space, and are no longer searchable or accessible without other technical skills or forensic software. He also testified that a person using the same Wi-Fi or wireless access network would not be able to put the files onto the laptop and that because there was no remote access, the user needed to have physical access to the computer to download the child pornography onto it.

At the close of the Commonwealth's case, Kearns moved to strike the evidence. He argued that the evidence was insufficient to show actual or constructive possession of child pornography and insufficient to show he possessed the items in the unallocated space of the laptop because they were not readily accessible to the user and required special forensic software to recover them. The trial court denied his motion.

Kearns presented evidence in his defense. His daughter, Peyton Hensley, testified that she moved from

South Carolina in 2015 to live with Kearns and Jennifer. Her then boyfriend, Gregory Hlavac, moved with Hensley, and they lived in the Kearns's basement. Both Hensley and Hlavac had keys to the Kearns's home and used a separate entrance in the basement to come and go. Kearns's mother-in-law, Judy Seigla, gave Hensley the Acer laptop in 2015 to use for school. Seigla testified that she reset the computer to its factory settings before she gave it to Hensley. In January or February of 2016, Hensley and Hlavac moved back to South Carolina. Hensley left the laptop at the Kearns's home when they moved out. She and Hlavac kept their keys to the home.

Hensley testified that on one occasion, she caught Hlavac watching pornography on the laptop at the Kearns's house and was furious. Hensley also stated that when she received a call from Kearns about his arrest, she did not know of Hlavac's whereabouts. Poindexter testified that he spoke with Hlavac and determined Hlavac had not been at the Kearns's home since May 2016.

Jennifer testified that Kearns slept in the bed with her on the night of August 16, 2016, and never left the bedroom. She also stated they would not be able to hear sounds coming from the basement in their bedroom. Jennifer testified that Hlavac was a "strange individual" and that she was not comfortable around him. Jennifer confirmed that Hlavac had not returned their house key and stated she told the police to investigate him and other prior houseguests.

Kearns denied using the laptop to view and download child pornography. He testified that he "did not get a lot of sleep" on the night of August 16, 2016, but that he went to bed around 12:00 a.m. and denied telling the officers he went to bed around 4:00 a.m. Kearns stated he "hardly ever went down to [the] basement" and had not gone down there since May 2016. Kearns denied telling Poindexter that he slept in the basement, and he stated he always slept with Jennifer. He stated that he advised officers of other people who had stayed in the home, including Hlavac.

At the conclusion of all the evidence, Kearns renewed his motion to strike. He argued there was no evidence to prove actual or constructive possession of the child pornography and that he could not have possessed the items found in the unallocated space that were inaccessible without a forensic tool to retrieve them. Kearns suggested that Hlavac was responsible for downloading the child pornography found on the laptop. The trial court denied the motion. The jury found Kearns guilty of 1 count of possessing child pornography and 92 counts of possessing child pornography, second or subsequent offense. Kearns filed a motion to set aside the verdict, and the trial court denied it at sentencing. This appeal followed.

II. Analysis

A. Possession of child pornography

Kearns argues the evidence was insufficient to prove that he possessed child pornography because there was no evidence connecting him as a user of the laptop. Kearns

also argues that the evidence was insufficient to prove he possessed the images and videos in the unallocated space of the laptop because they were only accessible using special forensic software.

1. Standard of review

"When reviewing the sufficiency of the evidence, '[t]he judgment of the trial court is presumed correct and will not be disturbed unless it is plainly wrong or without evidence to support it.'" *McGowan v. Commonwealth*, 72 Va. App. 513, 521 (2020) (alteration in original) (quoting *Smith v. Commonwealth*, 296 Va. 450, 460 (2018)). "[T]he relevant question is whether '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Vasquez v. Commonwealth*, 291 Va. 232, 248 (2016) (quoting *Williams v. Commonwealth*, 278 Va. 190, 193 (2009)).

2. The evidence was sufficient to prove that Kearns knowingly possessed child pornography.

"Any person who knowingly possesses child pornography is guilty of a Class 6 felony" and "[a]ny person who commits a second or subsequent violation of subsection A is guilty of a Class 5 felony." Code § 18.2-374.1:1(A), (B).

"In order to convict a person of illegal possession of contraband, 'proof of actual possession is not required; proof of constructive possession will suffice.'" *Kromer v.*

Commonwealth, 45 Va. App. 812, 819 (2005) (quoting *Maye v. Commonwealth*, 44 Va. App. 463, 483 (2004)).

> To support a conviction based upon constructive possession, "the Commonwealth must point to evidence of acts, statements, or conduct of the accused or other facts or circumstances which tend to show that the defendant was aware of both the presence and character of the [contraband] and that it was subject to his dominion and control."

Id. (alteration in original) (quoting *Drew v. Commonwealth*, 230 Va. 471, 473 (1986)). "Ownership or occupancy of the premises on which the contraband was found is a circumstance probative of possession." *Id.*

"It is firmly established that '[c]ircumstantial evidence is competent and is entitled to as much weight as direct evidence provided that the circumstantial evidence is sufficiently convincing to exclude every reasonable hypothesis except that of guilt.'" *Kelley v. Commonwealth*, 69 Va. App. 617, 629 (2019) (alteration in original) (quoting *Pijor v. Commonwealth*, 294 Va. 502, 512 (2017)). "'The Commonwealth is not required to prove that there is no possibility that someone else may have planted, discarded, abandoned or placed the [contraband]' where the contraband is discovered." *Kromer*, 45 Va. App. at 819 (alteration in original) (quoting *Brown v. Commonwealth*, 15 Va. App. 1, 10 (1992) (en banc)). "To resolve the issue, the Court must consider the totality of the circumstances established by the evidence." *Id.* (quoting *Williams v. Commonwealth*, 42 Va. App. 723, 735 (2004)).

Appendix B

The Acer laptop was in the basement of Kearns's home where he lived alone with his wife. When the police arrived with the search warrant on the morning of August 17, 2016, Kearns told the officers that he was up until around 4:00 a.m. and that he often slept in the basement where the laptop was found. The laptop was in use from August 16, 2016, at 9:36 p.m., until August 17, 2016, at 4:44 a.m., when Kearns was present in the home and around the time he went to bed. Child pornography was viewed and downloaded onto the laptop just hours before the officers executed the search warrant. The officers found the pornography stored within the P2P sharing software that Kearns stated he used and, even though he claimed to have not accessed them in five years, they were both updated in 2015 and 2016.

Further, Kearns's behavior was telling. He was visibly shaking when speaking with the officers. He falsely claimed that other neighbors and friends had access to his internet. Further, when asked about his electronic devices, Kearns failed to mention the Acer laptop in the basement, stating he had "completely forgotten" about it. Conveniently, the Acer laptop was the only device in the house containing child pornography.

Kearns claims there was a reasonable hypothesis of innocence that Hlavac was responsible for downloading child pornography on the laptop. But "[t]he Commonwealth need exclude only reasonable hypotheses of innocence that 'flow from the evidence itself, and not from the imagination' of the defendant." *Kelley*, 69 Va. App. at 629 (quoting *Pijor*, 294 Va. at 512). "Merely because defendant's theory of the

case differs from that taken by the Commonwealth does not mean that every reasonable hypothesis consistent with his innocence has not been excluded." *Haskins v. Commonwealth*, 44 Va. App. 1, 9 (2004) (quoting *Miles v. Commonwealth*, 205 Va. 462, 467 (1964)). "Whether an alternate hypothesis of innocence is reasonable is a question of fact and, therefore, is binding on appeal unless plainly wrong." *Emerson v. Commonwealth*, 43 Va. App. 263, 277 (2004) (quoting *Archer v. Commonwealth*, 26 Va. App. 1, 12-13 (1997)). To the extent that Kearns's testimony differed from the Commonwealth's, "[t]he factfinder need not believe an accused's explanation and, if that explanation is not believed, may infer that the accused is lying to conceal his guilt." *Abdo v. Commonwealth*, 64 Va. App. 468, 479 n.5 (2015) (quoting *Phan v. Commonwealth*, 258 Va. 506, 511 (1999)).

The record indicated that while Hlavac had been observed watching pornography on the laptop, there was no indication that it was not legal adult pornography. The evidence also showed that Hlavac had moved back to South Carolina with Hensley in January or February of 2016, and last visited in May of 2016. Hensley left the laptop at Kearns's house when they moved and there was no remote access into the laptop at any point. The jury was permitted to reject Kearns's hypothesis of innocence where it was inconsistent with other evidence at trial. Moreover, the totality of the evidence was sufficient to prove that Kearns was aware of and in control of the child pornography found on the laptop.

3. The evidence was sufficient to prove that Kearns knowingly possessed the images and videos in the unallocated space of the laptop.

Kearns argues that the evidence of possession was insufficient because "without other indicia of knowledge, dominion or control, the mere presence of [illegal] contraband in the unallocated space of the computer cannot be shown to be in the accused's possession because the material in the unallocated space cannot be accessed or seen without the forensic software." *Kobman v. Commonwealth*, 65 Va. App. 304, 307 (2015). Kearns therefore argues that the evidence was insufficient to prove he possessed the images in the unallocated space of the laptop because he lacked the forensic software to access them. We disagree. A rational trier of fact could have found that although Kearns lacked the special software to access the images and videos in the unallocated space of the laptop, there was sufficient "other indicia" that he had knowledge of and dominion and control over the files on August 17, 2016.

Poindexter testified that the disk cleaner was run 31 times on the laptop, and the most recent was on August 17 at 4:40 a.m., just hours before the police executed the search warrant. He explained that the disk cleaner allows the user to delete their downloaded files, thereby moving them from allocated space into the unallocated space of the computer. The files were found in the P2P software that Kearns installed and used. The records showed numerous child pornography search terms that a user typed into the

P2P software. There was no remote access to the laptop. And several videos and images were accessed and deleted within hours of the execution of the search warrant, when Kearns and Jennifer were alone in the home.

A reasonable inference may be drawn from this evidence that Kearns was the sole person who had used the computer during the times child pornography was viewed and downloaded on it and that he was the person who was deleting the files and therefore moving files from allocated to unallocated space. A rational trier of fact could have concluded that Kearns purposefully searched for and downloaded the images and videos, and thus knew of their character and presence on the laptop. In addition, the finder of fact could conclude that the images were subject to Kearns's dominion and control from their downloaded dates until he acted to delete them, thereby moving them into the unallocated space of the computer. Thus, the evidence was sufficient to prove that Kearns knowingly possessed the images in the unallocated space.

B. Admission of child pornographic images and videos into evidence

Kearns argues that the trial court erred in allowing photographs and videos into evidence when Kearns had stipulated that such material was child pornography. He contends that the probative value of the images was outweighed by their unduly prejudicial effect. The Commonwealth argues that Kearns waived his argument because he did not object to the admission of the material at trial, just to showing the images and videos to the jury. Assuming without deciding that Kearns preserved

his argument for appellate review, we find that the trial court did not err by admitting the images and videos into evidence and allowing the Commonwealth to show the jury a representative sample of such material.

1. Standard of review

Determining the "'admissibility of evidence is within the discretion of the trial court,' and an appellate court will not reject such decision absent an 'abuse of discretion.'" *Williams v. Commonwealth*, 71 Va. App. 462, 487 (2020) (quoting *Tirado v. Commonwealth*, 296 Va. 15, 26 (2018)). "[T]he abuse of discretion standard requires a reviewing court to show enough deference to a primary decisionmaker's judgment that the [reviewing] court does not reverse merely because it would have come to a different result in the first instance." *Commonwealth v. Thomas*, 73 Va. App. 121, 127 (2021) (alterations in original) (quoting *Lawlor v. Commonwealth*, 285 Va. 187, 212 (2013)).

2. The trial court did not abuse its discretion in admitting the images.

"Relevant evidence may be excluded if: (a) the probative value of the evidence is substantially outweighed by (i) the danger of unfair prejudice, or (ii) its likelihood of confusing or misleading the trier of fact; or (b) the evidence is needlessly cumulative." Va. R. Evid. 2:403.

Kearns stipulated and agreed that the 93 images and videos depicted child pornography and were highly

relevant to the case. But "[t]he Commonwealth . . . is entitled to prove its case by evidence that is relevant, competent and material." *Boone v. Commonwealth*, 285 Va. 597, 600 (2013) (alterations in original) (quoting *Pittman v. Commonwealth*, 17 Va. App. 33, 35 (1993)). "[A]n accused cannot . . . require the Commonwealth to pick and choose among its proofs, to elect which to present and which to forego." *Id.* (alterations in original) (quoting *Pittman*, 17 Va. App. at 35). Even though it was not required to limit its proof of the charged offenses, the Commonwealth showed the jury only a representative sample of 8 videos and images of the 93. Thus, any risk of unfair prejudice to Kearns was limited by the representative sample, and the court did not abuse its discretion.

III. CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment.

Affirmed.

APPENDIX C — TRANSCRIPT OF PROCEEDINGS IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG, VIRGINIA, DATED JUNE 26, 2023

IN THE CIRCUIT COURT FOR THE
CITY OF LYNCHBURG, VIRGINIA

COMMONWEALTH OF VIRGINIA,

Plaintiff,

vs.

SHAWN KEARNS,

Defendant.

June 26, 2023
Lynchburg, Virginia

TRANSCRIPT OF PROCEEDINGS

THE HONORABLE J. FREDERICK WATSON,
PRESIDING

[179] (The jurors exited the courtroom.)

THE COURT: The jurors are in the jury room. Anything to take up before we take a break?

MR. SANZONE: Yes, Judge. We move to strike.

THE COURT: All right. I'll go ahead and hear your motion. You can have a seat.

MR. SANZONE: Judge, essentially the motion is that he did not possess the images that we're talking about here. And I think the law is very clear now that possession of child pornographic image or any pornographic images is governed by the same rules of actual constructive possession that apply in all other cases.

Now, there is absolutely no evidence of actual construction in this case. This is a constructive possession case throughout. And with that, we go back to what we had said about the *Kobman* case. And the *Kobman* case, I think, states it very clearly. Going back again now to page 308. I think it's the cite just before that. They cite *Kromer* and *Drew*. And they say that, "To support a conviction based upon [180] constructive possession, the Commonwealth must point to evidence of acts, statements, or conduct of the accused, or other facts or circumstances which tend to show that the defendant was aware of both presence and character of the contraband and that it was subject to his dominion and control."

Every Commonwealth witness who has testified here today has said my client said he didn't know anything about it. Didn't know anything about it. Every Commonwealth witness that's testified here today has said that there were other people in that home. They said they don't have any idea about the traffic to and from the home prior to their arrival to execute the search warrant.

So you can't base what happened at some point earlier in the day in a different part of the house on the fact that only Mr. and Mrs. Kearns responded to the door when the police arrived. That's really the proper statement.

THE COURT: Isn't the evidence also that they told the police that no one else had been at the house that night? I mean, don't we have [181] more than just the fact that they're the ones who were there? Didn't they represent that they were the only ones who had been there that night?

MR. SANZONE: Judge, what they said was that they were the only ones that were there. I asked him for the specific statement concerning what they said, but he didn't have any. He didn't even know whether somebody else had a key for the house.

So the fact that another person is permitted entry, I mean, is perhaps significant that a person—only two people are in the house, if you can show that the house was secure, or that they were even in the place where some of this activity happened, but you've got to stretch quite a bit. And, you know, the circumstantial evidence rules are very clear, they say all evidence, not just some evidence or a little bit of the evidence, all the evidence has to be consistent with guilt and inconsistent with innocence.

And there is no evidence at all concerning who was at the house. I asked over and over of these witnesses, can you tell me something [182] about the traffic at the house that night. And they said they didn't know. They just didn't know. And they didn't ask a question that could be construed to really deal with what we have here.

Because, you know, they didn't even ask, hey, you know, 6:00 in the morning 4:00 in the morning there was

some illegal activity, do you know who was here at the house then. They didn't ask a question like that. They didn't ask do you know who could have been here at the house then. They didn't ask that.

At some point they asked the son-in-law about receiving pornography there at the house. He admits it. The officer tries to say, well, you know, he said that he didn't do anything except get legal pornography. But they didn't follow up. No investigation. I mean, they're on notice of a lot of other circumstances that could have very well led to this case being solved with my client not being the defendant.

And, Your Honor, the mere fact that two people believe they're alone in their house doesn't necessarily establish that, even for purposes of this motion. But let's just assume [183] that they were alone in the house. There is no evidence at all that he knew of the items, where they were, what they were. Because you have to show, according to what they say in this case, there is no evidence that shows other indicia of knowledge, dominion or control.

That's what's needed in this case. It's not who was at the house, necessarily. I mean, it is a little bit that, but the evidence is did they have knowledge, dominion or control. And there is zero evidence of that in this case.

In that way, the case is not any different than the case involving *Kobman*. Because Kobman said he had a number of roommates living there and things of that nature. But the court said in the *Kobman* case, he still had to have knowledge of image and dominion and control over the

photos and in this case videos. And there is no evidence of that here.

Additionally, Judge, there is evidence that even the photos that were in the allocated space were in a place that they could not be found except being found inadvertently by [184] someone who didn't place them there. And in that way, it's very similar for the reason that all the cases say you should not find the person in possession of an item in unallocated space as being guilty of possession of that item.

THE COURT: But that's not a blanket rule of law, is it?

MR. SANZONE: I think it's pretty much a blanket rule of law. If I don't have some evidence that they deleted it—

THE COURT: I'm sorry, say that again.

MR. SANZONE: If you don't have some evidence that they deleted or took some action with respect to it, I think it is pretty much a blanket rule of law. And it was even conceded in the *Kobman* case.

THE COURT: Well, you just provided an exception to the rule, so I guess by definition it's not a blanket rule.

MR. SANZONE: Well, I don't think.

Mr. Whitehead had a wonderful case, *Miller v. Commonwealth* where it said that you can't have any

matter that can't be controverted from, they all have to be controverted.

[185] But in this case, Judge, on a motion to strike even, unless they can show that he had some knowledge of the items that were in unallocated space or an allocated space in a place where you couldn't find them without some specific knowledge of their location, and he lacked that specific knowledge. He couldn't just go to Word and they come up. He couldn't just go to Outlook and they come up. Google and they come up. He couldn't do any of that.

You have to actually set your computer to be restored to a date and time. And then after you hit a button, the computer takes an action that causes it to bring up. He brought up it. It can't even be brought up without that computer action. So in that way, it's an impossibility absent some direct evidence in a case such as this or admission, something along those lines, concerning your knowledge of the nature of the photographs.

And there is nothing in this evidence that shows he knew anything like that during the time it's alleged in the indictments. So for all of those reasons, and I think there are several related but different reasons, they [186] can't identify him as being a person in constructive possession. Because that's what they have to prove under *Drew*. And *Drew* is the case that dealt with items found in a home. These are items found in a home just like *Drew*. Except unlike *Drew,* in the *Drew* case, you could actually see the item if you just went to the right place.

In this case, you can't see the item unless you do a forensic dive or unless you hit a button in the right way to make the computer do an operation that retrieves the items because they were all gone. So for all those reasons, Judge, we'd move to strike.

THE COURT: All right. Thank you.

Mr. Freier.

MR. FREIER: Your Honor, first, I would just like to point out nothing can be brought up on a computer without the computer doing an action. That's everything is input, output. The entire way a computer functions is entry of commands, response given by the computer.

And so, Your Honor, when it comes to the restore point, any user can go to settings, restore, restore. That's all that is required

* * *

[194] defendant just went to bed at 4 something around there, and the last log off is at 4:40, and he does sleep in the basement and he knew that the laptop was down there, that gives enough to survive a motion to strike.

THE COURT: All right. Mr. Sanzone.

MR. SANZONE: Judge, when they rely on circumstantial evidence, they need more evidence, not less. You know, because now they're trying to say, well, if

you go here and then you go up here, then go down here and connect over here and then come back and go over, somehow that will give you a conviction.

First of all, it won't. Secondly, when you go through all those gymnastics, there is so much evidence out there that is inconsistent with guilt and consistent with innocence, exactly the flip of what you have to have on circumstantial evidence in order to prove your case.

Now, they've made a big deal out of this restore thing and said every computer has, you know, when you hit a button, you're actually doing something to bring up your document you want to look at. Well, yes. But that's a [195] commonly accepted retrieval. And there is no commonly accepted retrieval possible in this case. And I think that's a distinction that needs to be made.

Restore is even worse than having it in unallocated space, because you can't bring it back, unless you tell the computer to perform a function that causes the computer to go back to search and recreate something that is not presently existing on the computer.

And as they said in this case, and this isn't the only case that says this, you have to have evidence that they possessed it on the dates as charged in the indictments. And if you've got to recreate it and it's gone, when did it leave.

THE COURT: I mean, I recall Detective Poindexter saying that it was there. I think he said in the system live

file. You just had to access it to bring it back. He never said it was gone. He said it was there.

MR. SANZONE: He said it was not there for ordinary retrieval. He said the only way you could get it was to hit—

THE COURT: Well, there is a difference [196] between it being gone and not being available for ordinary retrieval.

MR. SANZONE: Well, no, it's not gone when it's in the unallocated space.

THE COURT: Right.

MR. SANZONE: Because you can retrieve it.

THE COURT: Right.

MR. SANZONE: But you have to use forensic tools to do it.

THE COURT: Right.

MR. SANZONE: And there is not much difference in using some other around the porn kind of way that your computer can retrieve things that you're not specifically looking for. Because it wouldn't just restore those files, it would restore maybe your calendar, maybe other things that existed on that date.

But the fact of the matter is, it's not in a commonly accessible place. So when it's in an uncommonly accessible

place, that's what these cases talked about, the case I cited to you are Federal cases, the case we've talked about here, all these cases, even the case the Commonwealth just cited, there has to be some other indicia. Well, I agree with that.

[197] But the indicia can't be that the other person that was using the computer was also looking at search terms on this day, was also looking at pornography that day, because that relates just as easily to somebody else as it does to my client under all the evidence in this case. He was there at the house for sure when the police came. But the police didn't come when the download was taking place. So no one knows who was there at that particular time.

No one knows who was in the basement. The police can't say that the basement was secure. They say there was a key. We couldn't proceed on a burglary charge if we said somebody had the key to get in. Because, I mean, I guess there is breaking that occurred at night and things of that nature. But in a general sense, keys are evidence of permission. And in this case, the officer couldn't discredit that at all.

But my point again is that these items were in an inaccessible area, all the unallocated arguments lie to the allocated pieces in this case. And we would say that [198] even at this point, Judge, that the evidence can't go forward if you apply the rules from *Drew.* Because he has to specifically know about their existence and what they are. And he has to be in possession of it at the time. They have to exist at the time of the indictment. Not at some

time later when somebody pulls them up over at police headquarters. That's what the forensic was all about. It may be present, you just can't see it.

And when they recreated it to the restore point, when they forensically retrieve those items, a person going to that computer could not retrieve them. And that being the case, it as a hard and fast rule from a circumstantial perspective means that he can't be convicted and can't be found guilty of these offenses.

THE COURT: All right. As counsel knows, at this point in the proceedings, I have to view the evidence in the light most favorable to the Commonwealth, which I'm doing. And your motion to strike is denied. Your objections and exceptions to my ruling are noted.

Do you intend to present evidence?

* * *

[284] THE COURT: Do we have an agreed set of instructions?

MR. SANZONE: Well, I would like to make a motion to strike.

THE COURT: Well go ahead and make your motion. Please be seated.

MR. SANZONE: Judge, now the Commonwealth no longer has any presumption in its favor, and, again, this is

not a direct evidence case, this is a circumstantial evidence case, they have far less indicia of operation, ownership, dominion and control at this point than they did before.

And there is case law that says positive evidence outweighs any number of instances of absence of evidence and that's Virginia case law. And in this case, we have positive evidence of someone using this computer in that house for pornographic purposes. That's the testimony of the daughter. This is the same person who at the motion to strike had just been—received pornographic movies. Everyone else in this case denies knowledge of any pornography on this computer, only that person.

And the daughter says he had a key to the [285] house. They were with the parents or he had a key to the house from before. Showed acquisition of the computer on up through and he was known to come and go late at night. All of those matters, this is a circumstantial case. And that reasonable hypothesis of innocence cannot be excluded, as well as back to—

THE COURT: I want to make sure I understand what the reasonable hypothesis of innocence is that this person came into the their house undetected, spent the night looking at pornography, attempted to delete it and then left undetected?

MR. SANZONE: He was there for an hour or two. That's all this—that's all this evidence indicates.

THE COURT: Whatever the span of time the document shows, but that's it, I forget his name, Greg, is that his name?

MR. SANZONE: That's one.

THE COURT: That's one. All right. So Greg comes to the house undetected. Uses that computer to look at pornography, child pornography and then leaves.

[286] MR. SANZONE: As he has done in the past. We don't know the child pornography part, but we know the pornography part.

THE COURT: Okay.

MR. SANZONE: And he had a key. He had access the whole time. And we heard from multiple witnesses you couldn't hear someone come in the basement at the time. The police say they have no idea what was going on prior.

My client denies knowledge. There is absolutely nothing to link him to it. They tried to say that he made some statements. We heard now, the latest thing that we heard was the statement that it was his computer when actually he says it was not my computer. That's what the evidence was here in this case.

You simply can't piece together a circumstantial evidence case the way they're trying to do taking a little bit here and a little bit there. And you've got to draw a line around the corner to get to a conviction. That's not how that works.

Appendix C

You have to have a solid straight line of circumstantial evidence that leads to a conviction. And all that evidence has to be [287] consistent with guilt and inconsistent with innocence, all of it. Those are the circumstantial evidence rules.

And in this case, they have no evidence that points to my client other than it's in his house. *Drew* says, all these cases that talk about child pornography cite circumstantial evidence was used to prove constructive possession. And in the *Drew* case, there is nothing different about that and drugs than this pornography.

Other people had access, Judge, and it's not just the reasonable hypothesis we've proved it was him. It's the same kind of reasoning that if you find drugs in a car with four people, that doesn't belong to a particular person because they're there. So for all of those reasons and the business about the allocated and unallocated no one would know, and now we're at the stage where they don't have an inference in their favor, because no one knew how to get this information back without a forensic tool or the ability to know that you could go and do a system reset, and if you did all those things, you still would not [288] be possessing the child pornography within the range dates on the indictments, and that's required as well.

So for all those reasons, Judge, we'd ask you to strike the evidence.

THE COURT: All right.

MR. FREIER: Your Honor, first as to the date range, the *Christie* case as well as the *Edmunds* case very clearly delineates that time is not a factor in this charge and the case shall be dismissed because time is not proven is not an element the Commonwealth is required to establish. So the Commonwealth would like the Court to disregard that argument. It's so the law. Case law is very clear that's not an element the Commonwealth is required to prove.

Your Honor, as to the additional stuff, the third-party guilt doctrine as the case law that I handed the Court says in the decision that is strictly and purely a factual determination, which means it's the province of the jury. The jury needs to be the one to decide it, because the jury is the one who decides the credibility of the evidence, the credibility of the witnesses, the weight of the

* * *

[290] you to deny the motion and give this case to the jury.

THE COURT: All right. Anything else, Mr. Sanzone?

MR. SANZONE: Very briefly. Judge, you can't make the argument that they're making up concerning the factual side of this on circumstantial evidence rules, unless the jury does not have the ability to accept some evidence and arbitrarily discard others.

There has to be some evidence. They talk about third-party guilt and all of this business, they still have to prove that there is some evidence that my client knew the nature

of these items and what they were at some point. That's what Christie was saying. That's why time is not of the essence. It doesn't matter if he knew in December of '16 and we called it January of '18. It doesn't matter because he knew then. But if he didn't know at all, they can't make that argument and we ask it be stricken.

THE COURT: All right. Thank you. Well, I'm going to deny the motion to strike. I do think that the issues raised are questions for [291] a jury to decide. Your objection and exception is noted.

All right. Anything else before we get to jury instructions?

MS. WEBSTER: I don't believe so, Your Honor.

MR. SANZONE: No, sir.

THE COURT: Do you have an agreed set?

MR. SANZONE: I believe so.

MS. WEBSTER: Yes. I have this one. I believe this is the agreed set, Your Honor.

THE COURT: All right. And are there any that you disagree on?

MS. WEBSTER: No, Your Honor.

MR. SANZONE: I believe we talked before court. We actually disagreed and then agreed.

THE COURT: All right. Well, thank you. And have you given these to me in an order that you want to—

MS. WEBSTER: I think that's the appropriate order, Your Honor, unless Mr. Sanzone—

MR. SANZONE: It's a good order.

THE COURT: All right. Then I'll go ahead and number these.

* * *

[340] THE CLERK: Members of the jury, you're excused for the term.

THE COURT: All right. Please make sure if you have any personal belongings in the jury room, make sure you don't forget those. The bailiff will assist you in leaving the building. And if you need any notes for work or for school, please let the bailiff know and we can get those for you. All right. You are now free to leave.

(Thereupon, the jurors were excused.)

THE COURT: All right. The jurors are gone. Counsel, are there any motions?

MS. WEBSTER: Yes, Your Honor.

MR. SANZONE: Judge, we would move to set aside the verdict. It's contrary to the law and evidence. I'd like to be able to provide a brief once a transcript is prepared.

THE COURT: All right. Ms. Webster.

MS. WEBSTER: Your Honor, we obviously would object to a motion to set aside the verdict. Additionally, the Commonwealth would have a motion to revoke the defendant's bond at this time.

MR. SANZONE: Your Honor, he has no [341] record. He has been on bond for this for years. There are some obvious issues that have to be addressed later on or could well be addressed later on by this court.

THE COURT: All right. Why don't you all have a seat. Let me—with regard to the motion to set aside the verdict, you say you want to submit authorities on that?

MR. SANZONE: Yes, sir. I would like to be able to. Now we have a transcript.

THE COURT: All right.

MR. SANZONE: Now it's not a question of what the evidence could be, would be, should be. Now we have a transcript, and we could use that transcript to prepare a brief that would more effectively deal with those cases as they address the particular evidence in this case.

THE COURT: All right. And how much time would you need to prepare?

MR. SANZONE: Once we get the transcript—

THE COURT: Did you want to submit something in writing or did you want to reschedule a hearing?

MR. SANZONE: Well, I think we'd like to [342] submit something in writing to perhaps be heard on. But I was thinking once we get the transcript, which lately has been running about 40 days, that would 21 days after that.

THE COURT: All right. What I'll do, I'll take that motion under advisement, give you the opportunity to review the transcript, and submit authorities. So I do—I don't want to drag this out, so how much time do you need? Let me know. I just want to give you—

MR. SANZONE: I would like the same amount of time that we would have to answer a complaint.

THE COURT: Three weeks?

MR. SANZONE: Twenty-one days.

THE COURT: From today?

MR. SANZONE: Well, I would like it from the day of the transcript because the whole purpose of this is to be able to point particularly to the transcript. Because I think a lot of the statements that were made in this case and submitted to the jury are not supported by the evidence in this case. Not by the Court. I'm talking about by the Commonwealth.

[343] THE COURT: All right. So we're talking about three weeks after you get the transcript, and I don't know how long that will take.

MR. SANZONE: It takes about 40 days is what it's been.

THE COURT: Forty days to a get transcript?

MR. SANZONE: Or a month.

THE COURT: Any thoughts?

MS. WEBSTER: Your Honor, I know we've had a recent case where it was a jury trial and there was also a motion to set aside the verdict. I believe how we handled that is that we took it up at the sentencing date. That we set a sentencing date and took up the motion to set aside at the same time. The Commonwealth suggests that may be appropriate.

MR. SANZONE: That's fine.

THE COURT: All right. Why don't we do that. What I'm going to do is take—Mr. Kearns, I'm going to take can your sentencing under advisement until I have an opportunity to review a presentence investigation report, which I'm now ordering and also consider any motion to set aside the [344] verdict. So let's go ahead and schedule a date for sentencing.

THE CLERK: October the 18th at 9:00 a.m.

MR. SANZONE: Judge, I have an Appomattox case, but I can move that.

THE COURT: All right. So we'll continue it to that date, October—

THE CLERK: October 18th.

THE COURT: October 18th at 9 a.m. And then with regard to your motion to revoke bond, do you wish to make an argument on that?

MS. WEBSTER: Yes, Your Honor. The Commonwealth's position is that this defendant was originally held no bond. There were multiple continuances in the case that did end up with the defendant being released on bond. At this point, having been convicted and looking at sentencing guidelines that begin at 58 years in this case, Your Honor, the Commonwealth believes that with the convictions from the jury today, that he is a significant flight risk.

MR. SANZONE: Judge, he's not any more of a flight risk today than he was before. He has no record.

APPENDIX D — AMENDED REPLACEMENT PETITION FOR APPEAL, DATED MAY 8, 2025

IN THE COURT OF APPEAL OF VIRGINIA
AT RICHMOND

RECORD NO.: 1823-23-3

SHAWN MATTHEW KEARNS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

Dated May 8, 2025

AMENDED REPLACEMENT PETITION FOR APPEAL

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Appendix D

From: DigitalRecordsSystem@vacourts.gov
To: Amanda Wood
Subject: VACES eFiling submission for Shawn Matthew Kearns v. Commonwealth of Virginia has been transmitted
Date: Thursday, May 8, 2025 6:23:25 PM

Your electronic submission for Shawn Matthew Kearns v. Commonwealth of Virginia has been successfully transmitted via the Virginia Appellate Courts eFiling System (VACES) to the Supreme Court of Virginia (SCV) on Thursday, May 08, 2025, at 06:23:17 PM

Note: Any applicable filings fees will be charged, or are due, following court review and acceptance. Separate email notifications shall be sent to confirm review and acceptance, and any filing fees due or charged.

VACES Submission Details:

Case Style:	Shawn Matthew Kearns v. Commonwealth of Virginia
Record Number:	182323
File Count:	01
Confirmation Number:	324438
Calculated Fees:	$50.00
Fee Exemption Requested:	No

Name of Submitter:	AMANDA N WOOD
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Phone Number:	434-846-4691

Appendix D

Submitter Notes:

The following document(s) were uploaded as part of this submission:

Appeal - Petition 25.05.08 FINAL Petition for Appeal.pdf

This email was sent from a notification-only address that cannot accept incoming email. Please do not reply to this message.

did not conduct any surveillance before they executed their search warrant and had no evidence to offer concerning who might have come or gone from the apartment. A freestanding computer camera which would have shown the area immediately around the computer in question in the hours before the search warrant was executed disappeared after the police search with only its power cord left behind at the home. If the police weren't responsible for the disappearance of the camera as they claimed, then a person with access to the apartment must have taken the camera, perhaps to hide their identity.

Allocated/Unallocated Space

The issues regarding allocated and unallocated space are extremely complex and were not included in a reasoned explanation addressing these complexities by the Trial Court. The Court of Appeals discussed the data, but no portion of their decision addressed the fact that child pornography must be readily accessible to the Appellant on the date charged in the indictment to be capable of supporting a conviction. *U.S v. Flyer* and *Kobman*.

The Court of Appeals rationale, supporting arguments that were only minimally made by the Commonwealth, is that there were special indica that the Appellant had knowledge of, and dominion and control over, the "files" on August 17, 2016. These rationales are:

(1) That the disk cleaner had been run 31 times without reference to who ran these 31 events

and what date they occurred. Nor was there a determination of where the computer was located when they were run as no device location information was offered by the Commonwealth; and

(2) That a reasonable inference could be drawn that the Appellant was the sole person who used the computer to access child pornography and/or delete and move files when there were two people in the home and the Wi-Fi was not in the Appellant's name, with at least a third person having access to the basement; and

(3) That the Appellant purposefully searched for and downloaded the images, therefore knowing their character and location even though he has never shown to have known the password to the password protected files, the computer contained no evidence of browsing, purchasing, or downloading apps or other software such as windows, Word, or social media apps, with any identifying data that could be linked to him, and with no explanation offered regarding the missing USB camera that would have recorded the person using the computer when the Appellant could not have removed the camera during the police search; and

(4) That the finder of fact could conclude that the images were in the Appellant's dominion

and control from download to moving to trash when this finding is dependent on establishing the location of the computer and the location of the Appellant who must be in the same place as the computer, where no evidence reveals the date of the downloads or the Appellant on those unknown dates and where a question regarding the computer's location and the Appellant's location on these dates is central to this theory and a venue determination.

(5) The reported references to the Appellant being nervous when the police showed up early in the morning to confront him while he was in his underwear when the Commonwealth has argued in a similar circumstantial evidence case that the Defendant not being nervous was circumstantial evident of his guilt.

Three published Virginia cases have established the legal framework for constructive possession and possession of child pornography *Kobman v. Commonwealth*, 65 Va. App. 304 (2015), *Terlecki v. Commonwealth*, 65 Va. App. 13 (2015), and *Kromer v. Commonwealth*, 11 Va. App. 812 (2005). In each of these cases statements were made by the defendants which ranged from a statement that the police would find what they were looking for in *Kobman*, to admissions of viewing images of children between the ages of 8 and 17 in *Terlicki*, and finally testimony regarding a systems registry on a computer in the name

of the Appellant indicating that he owned the computer which he used and from which items were downloaded which was found at the Appellant's residence. Shawn Kearns denied knowledge of the accessing of the images, was not a registered user of the computer, was never shown to have known the password to the computer or be referenced in a computer registry and was not shown to have been in the basement apartment or to have used the computer on the night in question. There was no physical evidence to prove that Shawn Kearns possessed or even touched the computer as there was no DNA, fingerprint, or similar evidence.

In *Yerling v. Commonwealth* which is the most recent Virginia appellate decision addressing *Drew v. Commonwealth* the same definition of constructive possession is announced that has been used since *Drew v. Commonwealth*, 230 Va. 471, (1986): Constructive possession may be established when there are acts, statements, or conduct of the accused or other facts and circumstance which tend to show the [accused] was aware of both the presence and the character of the substance and that it was subject to his dominion and control. *Drew* at, 473, *Powers v. Commonwealth*, 227 Va 474, 476 (1984), *Yerling v Commonwealth*, 71 Va. App. 527, 533 (2020).

While ownership or occupancy of a premises is a circumstance probative of possession, *Kobman v. Commonwealth*, 65 Va. App, 304, 308, 777 S.E. 2d 565 (2015), in addressing ownership of a residence traditional property right issues have been relied upon in the various criminal actions which concern themselves with ownership

as a condition to possession or as a consideration of whether a person's presence is permissive or not, *Kramer v. Commonwealth*, 45 Va. App. 812, 613 S.E. 2d 871 (2005). In fact, the permissive use of the basement, in this case which was freely and voluntarily allowed by the Kearns and their daughter, who had lived in the apartment with the boyfriend who had a key (R. at 585 L. 9- 18, R. at 588, L. 24 – R. at 589, L. 4, R. at 621, L. 20-21) is enough to defeat a claim of burglary where a person carried a key to the house and that person comes and goes at "will". This freedom of entry is a recognized possessory interest. *Davis v. Commonwealth*, 132 Va. 521 (1922). This possessory interest is a circumstance to be considered in this circumstantial evidence case. Proximity to an unlawful item alone is not sufficient to establish constructive or actual possession. *Wright v. Commonwealth*, 217 Va. 669 (1977). The search warrant in this case for the home which was acquired upon notice to the police of suspected child pornography listed the wife as the suspect.

The Commonwealth relies upon what are called other acts, statements, conduct, or facts, from Drew to sustain their argument regarding constructive possession. This position echoes the Commonwealth's position in another constructive possession case where the Supreme Court stated that the "other" evidence presented in support of constructive possession was in fact an absence of evidence. *Powers v. Commonwealth*, 227 Va. 474, 476, (1984). The absence of other identifying evidence of other persons in the house, the lack of surprise when the defendant was charged, and the value and obvious illegality of the

contraband were not sufficient to foreclose the possibility that the illegal item was possessed by another. *Powers* p. 476. The Court of Appeals of Virginia cited a similar argument to support affirming Kearn's conviction and this argument should have likewise failed.

All necessary circumstances proved must be consistent with guilt and inconsistent with innocence, *Garland v. Commonwealth*, Va. 182,184, (1983) and there must be an unbroken chain of circumstances proving the guilt of the accused to the exclusion of any other rational hypothesis *Gordon v. Commonwealth*, 212 Va. 298, 300 (1971).

There are more crucial circumstances that support an acquittal and are consistent, not inconsistent with innocence than there are circumstances which are consistent with guilt. These circumstances are included but not limited to:

(1) There were no personal belongings in the basement apartment including clothes, shoes, mail, books, or anything in writing that relates to the Appellant; and

(2) There were no other devices nearby showing name, passwords, or log in instructions, indicating the presence of the Appellant near the computer; and

(3) There was no forensic evidence including fingerprints or DNA on the computer, bed,

or other furniture which identified the Appellant; and

(4) There was no evidence to show registration, software updates, purchases, downloads, or passwords which related to the Appellant; and

(5) The Appellant did not know the password to the computer whereas the daughter's boyfriend who was seen viewing pornography on the computer knew the password; and

(6) The USB camera was missing from the computer including a memory card, indicating the presence of an unaccounted for person; and

(7) That the daughter's boyfriend did not honor a subpoena to Court; and

(8) That Jennifer Kearns, the Appellant's wife, is an unimpeached alibi witness as she stated that they were both together the whole night and no pornography was accessed.

While possession of the computer upon which the illegal images are found is an important issue, it is not the only issue. In *Kromer* the images had been downloaded and were readily accessible. In *Kobman* only the images that were in allocated space which requires more specific

indicia of knowledge, dominion, or control because the images cannot be accessed or seen without forensic software or extremely specific information about their location and the means of retrieval resulted in a conviction. While the Commonwealth referenced search terms in allocated space, they acknowledged that these files were not readily accessible, or that the illegal images were in unallocated space and that no dates of retrieval were shown (R. at 553, L. 9 – R. at 554, L. 20). *Kromer* placed great importance on the fact that the images were readily accessible. That is not the case here. The retrieval of images from unallocated space requires forensic tools, such as were used in the police investigative search, and there is no evidence that the defendant had access to such tools. The items in allocated space required a system restore to a known date not shown to have been recorded anywhere or within Shawn Kearn's knowledge or understanding. The evidence was further that all the images were either in unallocated space or allocated space in a system volume unit which is not a normal place where people could access files and were therefore inaccessible (R. at 538, L. 13 – R. at 539, L. 4). The Commonwealth's expert testified that this area was not readily accessible (R. at 538, L. 13 – R. at 539, L. 4). There was no evidence that the Appellant possessed a password to this computer or was seen viewing images on the computer. (R. at 520 L. 12-15). The daughter's boyfriend admitted viewing pornography in the apartment where the computer was found (R. at 583, L. 21 – R. at 585, L. 5) and was seen by the daughter viewing pornography on the computer in the basement apartment where the police later found the computer. He therefore had viewed pornography

on this computer and possessed a password to unlock and operate the computer, not viewed on Direct TV as offered by the Court of Appeals (R. at 582, L. 9 – R. at 585, L. 5). Therefore on the issue of knowledge and control, not only does the evidence fail to show anything that indicates that the Appellant knew of the images or possessed the images, the evidence of possession of child pornography is substantial against the boyfriend who possessed the computer and obviously used the password to access the daughter's computer, admitted downloading pornography in the basement apartment and was seen viewing pornography during the relevant time period on the computer that is the subject of this trial. The evidence against the boyfriend is as powerful as the evidence against the Defendants in *Kobman*, *Terlecki*, or *Kromer*, and properly viewed prevents *all* of the evidence in this circumstantial case from being consistent with guilt and inconsistent with innocence.

Viewing the evidence against Kearns, the Commonwealth could show no more than Kearns' presence in the upstairs of the house with his wife, both of whom denied his use of the computer and his knowledge that the computer was in the basement. The computer was clearly owned by the daughter. Given the inaccessible nature of the files and the lack of proof of use by the Appellant there is no fact which carries this case beyond mere proximity which is insufficient as a matter of law for a conviction.

Even in a civil case, supporting evidence of the allegation is required, and the lack of supporting evidence such as the lack of any evidence regarding the

circumstances surrounding the images not claimed to have been viewed on August 17, 2016, causes the evidence to be vague, uncertain, and unsatisfactory, *Flanagan v. J.M. Parsons*, et. al. 167 VA 6, 10, 187 S.E. 473 (1936). The indictments that sought to charge criminal acts for activity other than the morning of August 17, 2016 are devoid of any evidentiary support for the manner in which images arrived into unallocated space on the computer and must be dismissed for such a failure There is no evidence about the location of the computer at any time regarding the images on the computer and there is no evidence which places the appellant at the same location of the computer with respect to the illegal images.. Even the unexplained occurrence of an automobile accident cannot result in a criminal conviction, *Powers v. Commonwealth*, 211 VA 386, 177 S.E. 2c 628 (1970).

ASSIGNMENTS OF ERROR II

II. The Trial Court erred by refusing to strike the evidence and dismiss those counts which were charged as possession of child pornography when those files were contained in unallocated space and not accessible in the matter required for conviction. The Court of Appeals erred by affirming the verdict of the Trial Court and the Appellant objects to each of the findings and the conclusions of the Court of Appeals for the reasons stated herein.

(Objection preserved at R. at 310 – R. at 317, R. at 732, L. 21 – R. at 735 L. 22, R. at 751, L. 10 – R. at 755, L. 1).

Appendix D

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA

RECORD NO. 1823-23-3

SHAWN MATTHEW KEARNS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA

Appellee.

MOTION FOR EXTENSION OF TIME TO FILE A NOTICE OF APPEAL

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF VIRGINIA:

COMES NOW the Appellant, SHAWN MATTHEW KEARNS, and states the following pursuant to the provisions of Virginia Supreme Court Rule 5A:3(a) and 5A:3(b), and respectfully moves this Court as herein stated to be allowed an extension of time to file a Notice of Appeal with respect to the decision of the Court of Appeals of Virginia rendered on April 8, 2025, affirming Appellant's conviction.

(1) Appellant's Counsel became ill with appendicitis Saturday, April 26, 2025. At

first Counsel thought he had a bad stomach virus but on the morning of Monday, April 28, 2025, he was diagnosed as having appendicitis and required immediate emergency surgery. On April 28, 2025, Counsel for Appellant followed doctors' directives beginning at 8:00 AM and was admitted to the hospital having surgery at approximately 7:00 PM. Counsel is recovering.

(2) The opinion to which this Notice of Appeal applies was rendered on April 8, 2025, and the Appellant had until May 8, 2025 to file the Notice of Appeal.

(3) Because of the disruptions caused by Appellant's Counsel's hospitalization and sudden illness which was remedied by emergency surgery and subsequent hospitalization and recovery, Counsel's workflow was affected and while the Petition to the Supreme Court appealing the Court of Appeals decision, was filed via VACES with the Supreme Court of Virginia on May 8, 2025, within thirty days of the decision, the Notice of Appeal to the Court of Appeals, Exhibit A, regarding that decision was not transmitted until the following morning.

(4) Counsel for Shawn Matthew Kearns filed a Motion for Extension of Time to

File a Notice of Appeal with the Court of Appeals via VACES on Friday, May 9, 2025 at 11:07:04 AM and received an e-mail confirmation that the Motion was successfully transmitted as well as reviewed and accepted which are attached as Exhibits A & B to this Motion

(5) Counsel for Shawn Matthew Kearns spoke with Sheri H. Kelly, Counsel for the Commonwealth, on May 9, 2025, before filing the Motion for Extension of Time to File a Notice of Appeal in the Court of Appeals and again before filing this Motion and she does not object to the Appellant's request for an Extension to File a Notice of Appeal or a delayed filing of an Appeal.

(6) On Monday, May 12, 2025, Counsel for Appellant received an e-mail from the Court of Appeals of Virginia stating that they no longer had legal authority to act on our requested Motion for Extension of Time to File a Notice of Appeal, Exhibit C, and that our Motion should be filed with the Supreme Court.

WHEREFORE, Shawn Matthew Kearns prays that this Court allow an Extension of Time for Filing the Notice of Appeal, for good cause shown, so that the attached Notice of Appeal will be deemed timely pursuant to Rule 5A:3(a) and Rule 5A:3(b) and that such an extension be

granted, and any further and general relief that this Court finds necessary and proper.

Respectfully submitted,
SHAWN MATTHEW KEARNS

By: /s/ Joseph Sanzone
By Counsel

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Counsel for Appellant

Appendix D

CERTIFICATE OF SERVICE

The undersigned counsel for Shawn Matthew Kearns, hereby certifies that on this 13th day of May 2025, a true and correct copy of the foregoing Petition for Rehearing was sent to, Sheri H. Kelly, Assistant Attorney General, Office of the Attorney General, 202 North 9th Street, Richmond, Virginia 23219 at skelly@oag.state.va.us.

/s/ Joseph A. Sanzone
Joseph A. Sanzone

Appendix D

Exhibit A

From: DigitalRecordsSystem@vacourts.gov
To: Amanda Wood
Subject: VACES eFiling submission for Shawn Matthew Kearns v. Commonwealth of Virginia has been transmitted
Date: Friday, May 9, 2025 11:07:11 AM

Your electronic submission for Shawn Matthew Kearns v. Commonwealth of Virginia has been successfully transmitted via the Virginia Appellate Courts eFiling System (VACES) to the Court of Appeals of Virginia (CAV) on Friday, May 09, 2025, at 11:07:04 AM

Note: Any applicable filings fees will be charged, or are due, following court review and acceptance. Separate email notifications shall be sent to confirm review and acceptance, and any filing fees due or charged.

VACES Submission Details:

Case Style:	Shawn Matthew Kearns v. Commonwealth of Virginia
Record Number:	1823-23
File Count:	01
Confirmation Number:	324494
Calculated Fees:	$0.00
Fee Exemption Requested:	No

Name of Submitter:	AMANDA N WOOD
Email Address:	A.WOOD@SANZONE-BAKER.COM
Phone Number:	434-846-4691

Appendix D

Submitter Notes:

The following document(s) were uploaded as part of this submission:

Motion for Extension of Time to File Notice of Appeal 25.05.09 Mot. for Extension and NOA.pdf

This email was sent from a notification-only address that cannot accept incoming email. Please do not reply to this message.

Appendix D

VIRGINIA:

IN THE COURT OF APPEALS OF VIRGINIA

RECORD NO. 1823-23-3

SHAWN MATTHEW KEARNS

Appellant,

v.

COMMONWEALTH OF VIRGINIA

Appellee.

MOTION FOR EXTENSION OF TIME TO FILE A NOTICE OF APPEAL

TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS OF VIRGINIA:

COMES NOW the Appellant, SHAWN MATTHEW KEARNS, and states the following pursuant to the provisions of Virginia Supreme Court Rule 5A:3(a) and 5A:3(b), and respectfully moves this Court as herein stated to be allowed an extension of time to file a Notice of Appeal with respect to the decision of this Honorable Court rendered on April 8, 2025, affirming Appellant's conviction.

(1) Appellant's Counsel became ill with appendicitis Saturday, April 26, 2025. At

first Counsel thought he had a bad stomach virus but on the morning of Monday, April 28, 2025, he was diagnosed as having appendicitis and required immediate emergency surgery. On the 28th Counsel for Appellant followed doctors' directives beginning at 8:00 AM and was admitted to the hospital having surgery at approximately 7:00 PM. Counsel is recovering.

(2) The opinion to which this Notice of Appeal applies was rendered on April 8, 2025, and the Appellant had until May 8, 2025 to file the Notice of Appeal.

(3) Because of the disruptions caused by Appellant's Counsel's hospitalization and sudden illness which was remedied by emergency surgery and subsequent hospitalization and recovery, Counsel's workflow was disrupted and while the Petition to the Supreme Court appealing the Court of Appeals decision, was filed on May 8, 2025, within thirty days of the decision, the Notice of Appeal to the Court of Appeals regarding that decision was not transmitted on May 8, 2025, or before, and is being transmitted with this Motion.

(4) Counsel for Shawn Matthew Kearns spoke with Sheri H. Kelly, Counsel for the Commonwealth, on May 9, 2025, before

filing this Motion and she does not object to the Court granting an extension of time to file a Notice of Appeal in this matter.

Prayer

WHEREFORE, Shawn Matthew Kearns prays that this Court allow an Extension of Time for Filing the Notice of Appeal, for good cause shown, so that the attached Notice of Appeal will be timely filed pursuant to Rule 5A:3(a) and Rule 5A:3(b) and that such an extension be granted, and any further and general relief that this Court finds necessary and proper.

Respectfully submitted,
SHAWN MATTHEW KEARNS

By: /s/ Joseph Sanzone
By Counsel

Joseph A. Sanzone (VSB # 20577)
Sanzone & Baker, L.L.P.
P.O. Box 1078
1106 Commerce St., Ste. 3A
Lynchburg, VA 24505
Tel (434) 846-4691
Fax (800) 927-1565
valaw@sanzoneandbaker.com
Counsel for Appellant

Appendix D

CERTIFICATE OF SERVICE

The undersigned counsel for Shawn Matthew Kearns, hereby certifies that on this 9th day of May 2025, a true and correct copy of the foregoing Petition for Rehearing was sent to, Sheri H. Kelly, Assistant Attorney General, Office of the Attorney General, 202 North 9th Street, Richmond, Virginia 23219 at skelly@oag.state.va.us.

/s/ Joseph A. Sanzone
Joseph A. Sanzone

Appendix D

VIRGINIA:

IN THE COURT OF APPEALS OF VIRGINIA

NOTICE OF APPEAL
RECORD NO. 1823-23-3

SHAWN MATTHEW KEARNS

Plaintiffs,

v.

COMMONWEALTH OF VIRGINIA

Defendant.

The Plaintiff, SHAWN MATTHEW KEARNS, by his attorney, pursuant to Rule 5:14, hereby appeals to the Supreme Court of Virginia from the final judgment of this Court entered against him on the 8th day of April, 2025.

CERTIFICATE

The undersigned certifies as follows:

(1) The name and address of Plaintiff is:

Shawn Matthew Kearns
83 Fish Trail,
Bracey, VA 23919

(2) The name, address, and telephone number of Counsel for Appellant is: Joseph A. Sanzone, Esq., VSB #20577

Sanzone & Baker, L.L.P.
1106 Commerce Street
P. O. Box 1078
Lynchburg, VA 24505
(434) 846-4691 (telephone)
(800) 927-1565 (facsimile)
valaw@sanzoneandbaker.com

(3) The name of Defendant's is:

Commonwealth of Virginia

(4) The name and address of Counsel for Defendant's is:

Sheri H. Kelly (VSB No. 82219)
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
Telephone: (804) 786-2071
Facsimile: (804) 371-0151
Email: oagcriminallitigation@oag.state.va.us
skelly@oag.state.va.us

(5) The record in this matter, including a transcript of the testimony in the case has previously been filed in the Court of Appeals of Virginia.

(6) Counsel for the Plaintiff has been privately retained.

(7) A copy of this Notice of Appeal has mailed to all opposing counsel and to the Clerk of the Court of Appeals of Virginia via VACES on this 9th day of May 2025.

Shawn Matthew Kearns

By: /s/ Joseph A. Sanzone
Joseph A. Sanzone

Joseph A. Sanzone, VSB # 20577
Sanzone & Baker, L.L.P.
1106 Commerce Street
P.O. Box 1078
Lynchburg, VA 24505
(434) 846-4691 (telephone)
(800) 927-1565 (facsimile)
valaw@sanzoneandbaker.com

Appendix D

Exhibit B

From: DigitalRecordsSystem@vacourts.gov
To: Amanda Wood
Subject: VACES eFiling submission for Shawn Matthew Kearns v. Commonwealth of Virginia has been reviewed and accepted
Date: Friday, May 9, 2025 11:32:46 AM

Your electronic submission for Shawn Matthew Kearns v. Commonwealth of Virginia has been reviewed and accepted via the Virginia Appellate Courts eFiling System (VACES) by the Court of Appeals of Virginia (CAV) on Friday, May 09, 2025, at 11:32:41 AM

Note: A separate email notification shall be sent to confirm any filing fees due or charged.

VACES Submission Details:

Case Style:	Shawn Matthew Kearns v. Commonwealth of Virginia
Record Number:	1823-23
File Count:	01
Confirmation Number:	324494
Calculated Fees:	$0.00
Fee Exemption Requested:	No
Name of Submitter:	AMANDA N WOOD
Email Address:	A.WOOD@SANZONE-BAKER.COM
Phone Number:	434-846-4691

Appendix D

Submitter Notes:

The following document(s) were uploaded as part of this submission:

Motion for Extension of Time to File Notice of Appeal 25.05.09 Mot. for Extension and NOA.pdf

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Appendix D

Exhibit C

From: FrontDesk
To: Amanda Wood
Subject: FW: Shawn Matthew Kearns v. Commonwealth of Virginia; Record No. 1823-23-3
Date: Monday, May 12, 2025 3:40:10 PM

From: Court of Appeals of VA _2 <court_of_appeals_of_va_2@vacourts.gov>
Sent: Monday, May 12, 2025 3:35 PM
To: FrontDesk <FrontDesk@sanzone-baker.com>
Cc: skelly@oag.state.va.us; oagcriminallitigation@oag.state.va.us
Subject: Shawn Matthew Kearns v. Commonwealth of Virginia; Record No. 1823-23-3

COURT OF APPEALS OF VIRGINIA

Dear Mr. Sanzone:

The Court of Appeals of Virginia has received your request for additional time to note an appeal of this Court's decision to the Supreme Court of Virginia. As this Court has completed its review of your case and no longer has the legal authority to act on your request, your request for additional time to note an appeal (and perhaps file a petition for appeal with the Supreme Court), should be directed to that Court. The Supreme

Court is the only Court that has the authority to extend its deadlines.

Sincerely,

Zachary R. Allentuck
Deputy Clerk-Motions Specialist

Counsel must file all correspondence and pleadings electronically through the VACES system. Information about VACES is available on the Virginia Judicial System Website at https://eapps.courts.state.va.us/help/robo/vaces/index.htm. Pro se/self-represented litigants may file through the VACES system. Otherwise, such individuals must submit one paper copy of a filing to the Clerk of the Court.

Appendix D

DO NOT REPLY TO THIS EMAIL.

This Court will take no action on anything received at this email address. Should you wish to contact the Clerk's Office of the Court of Appeals of Virginia, you may do so by telephone at 804-786-5651 or by writing to A. John Vollino, Clerk, Court of Appeals of Virginia, 109 North Eighth Street, Richmond, Virginia, 23219.

Appendix D

From: DigitalRecordsSystem@vacourts.gov
To: Amanda Wood
Subject: VACES eFiling submission for Shawn Matthew Kearns v. Commonwealth of Virginia has been reviewed and accepted
Date: Wednesday, May 14, 2025 8:58:06 AM

Your electronic submission for Shawn Matthew Kearns v. Commonwealth of Virginia has been reviewed and accepted via the Virginia Appellate Courts eFiling System (VACES) by the Supreme Court of Virginia (SCV) on Wednesday, May 14, 2025, at 08:58:01 AM

Note: A separate email notification shall be sent to confirm any filing fees due or charged.

VACES Submission Details:

Case Style:	Shawn Matthew Kearns v. Commonwealth of Virginia
Record Number:	182323
File Count:	01
Confirmation Number:	324753
Calculated Fees:	$0.00
Fee Exemption Requested:	No
Name of Submitter:	AMANDA N WOOD
Email Address:	A.WOOD@SANZONE-BAKER.COM
Phone Number:	434-846-4691

Appendix D

Submitter Notes:

The following document(s) were uploaded as part of this submission:

Extension of Time	25.05.13 Motion for Extension SCV and Exhibits.pdf

This email was sent from a notification-only address that cannot accept incoming email. Please do not reply to this message.

Appendix D

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday, the 27th day of June, 2025.

Record No. 250402
Court of Appeals No. 1823-23-3

SHAWN MATTHEW KEARNS,

Appellant,

against

COMMONWEALTH OF VIRGINIA,

Appellee.

FROM THE COURT OF APPEALS OF VIRGINIA

On May 13, 2025, came the appellant, by counsel, and filed a motion for extension of time to file the notice of appeal in this case.

Upon consideration whereof, the Court grants the motion and the notice of appeal is deemed timely filed.

A Copy,

Teste:

Muriel-Theresa Pitney
Clerk

APPENDIX E — OPENING BRIEF OF APPELLANT IN THE COURT OF APPEAL OF VIRGINIA AT RICHMOND, FILED FEBRUARY 20, 2024

IN THE COURT OF APPEAL OF VIRGINIA
AT RICHMOND

RECORD NO.: 1823-23-3

SHAWN MATTHEW KEARNS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

Filed February 20, 2024

OPENING BRIEF OF APPELLANT

Joseph A. Sanzone, VSB #20577
SANZONE & BAKER, L.L.P.
1106 Commerce Street, P. O. Box 1078
Lynchburg, VA 24505
(434) 846-4691 telephone
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valaw@sanzoneandbaker.com
COUNSEL FOR APPELLANT

* * *

Appendix E

From: DigitalRecordsSystem@vacourts.gov
To: Amanda Wood
Subject: VACES eFiling submission for Shawn Matthew Kearns v. Commonwealth of Virginia has been reviewed and accepted
Date: Tuesday, February 20, 2024 11:11:31 AM

Your electronic submission for Shawn Matthew Kearns v. Commonwealth of Virginia has been reviewed and accepted via the Virginia Appellate Courts eFiling System (VACES) by the Court of Appeals of Virginia (CAV) on Tuesday, February 20, 2024, at 11:11:25 AM

Note: A separate email notification shall be sent to confirm any filing fees due or charged.

VACES Submission Details:

Case Style:	Shawn Matthew Kearns v. Commonwealth of Virginia
Record Number:	1823-23
File Count:	01
Confirmation Number:	297077
Calculated Fees:	$0.00
Fee Exemption Requested:	No
Name of Submitter:	AMANDA N WOOD
Email Address:	A.WOOD@SANZONE-BAKER.COM
Phone Number:	434-846-4691

Appendix E

Submitter Notes:

The following document(s) were uploaded as part of this submission:

Opening Brief of Appellant	24.02.19 Opening Brief of Appellant FINAL.pdf

This email was sent from a notification-only address that cannot accept incoming email. Please do not reply to this message.

* * *

[3] At some point while the boyfriend was in the basement apartment, the daughter returned to find him viewing pornography on the computer (R. at 583, L. 21 – R. at 584, L. 8). An argument ensued.

On August 17, 2016, police were alerted to a person accessing child pornography from an IP address identified to Jennifer Kearns internet at 3600 Old Forest Road Unit 54, Lynchburg, Virginia. The police came to the house with a search warrant and seized a number of items. A web cam which would have shown the room during the night of the claimed pornographic download was missing after the search according to the Jennifer and Shawn Kearns who produced the power cord which was left behind (R. at 608, L. 21 – R. at 609, L. 10).

Shawn Kearns denied accessing pornography at anytime or using the computer (R. at 620, L. 2-4).

No evidence linked to Shawn Kearns was found on the computer. The alleged child pornography was in unallocated space or in allocated space which was not readily accessible. Shawn and Jennifer Kearns testified that they were together in their portion of the town house and not downstairs during the night of the alleged child pornography download (R. at 620, L. 13-24).

ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR I

I. The trial court erred by refusing to strike the evidence and dismiss all charges when the evidence was insufficient to show that Shawn Kearns knowingly and intentionally possessed child pornography.

(Objection preserved at R. at 310 – R. at 317, R. at 543 L. 5-6, 9 – R. at 544, L. 22)

* * *

[10] While possession of the computer upon which the illegal images are found is an important issue, it is not the only issue. In *Kromer* the images had been downloaded and were readily accessible. In *Kobman* only the images that were in unallocated space which requires more specific indicia of knowledge, dominion, or control because the images cannot be accessed or seen without forensic software or extremely specific information about their location and the means of retrieval. While

the Commonwealth referenced search terms in allocated space, they acknowledged that these files were not readily accessible, or the illegal images were in unallocated space and that no dates of retrieval were shown (R. at 553, L. 9 – R. at 554, L. 20). *Kromer* placed great importance on the fact that the images were readily accessible. That is not the case here. The retrieval of images from unallocated space requires forensic tools, such as were used in a police investigative search, and there is no evidence that the defendant had access to such tools. The items in allocated space required a system restore to a known date not shown to have been recorded anywhere or within Shawn Kearn's knowledge or understanding. The evidence was further that all the images were either in unallocated space or allocated space in a system volume unit which is not a normal place where people could access files and were therefore inaccessible (R. at 538, L. 13 – R. at 539, L. 4). The Commonwealth's expert testified that this area was not readily accessible (R. at 538, L. 13 – R. at 539, L. 4). There was no evidence that the Appellant possessed a password to this computer or was seen viewing images on the computer. (R. at 520 L. 12-15). The daughter's boyfriend admitted viewing pornography in the apartment where the computer was found (R. at 583, L. 21 – R. at 585, L. 5) and was seen by the daughter viewing pornography on the computer in the basement apartment where the police later found the computer (R. at 582, L. 9 – R. at 585, L. 5). Therefore on the issue of knowledge and control not only does the evidence fail to show anything that indicates that the [10] Appellant knew of the images or possessed the images, the evidence is very strong against the boyfriend who possessed the computer and obviously

used the password to access the daughter's computer, admitted downloading pornography in the basement apartment and was seen viewing pornography during the relevant time period on the computer that is the subject of this trial. The evidence against the boyfriend is much more powerful than the evidence in *Kobman, Terlecki,* or *Kromer,* and properly viewed prevents all evidence in this circumstantial case from being consistent with guilt and inconsistent with innocence.

Viewing the evidence against Kearns, the Commonwealth could show no more than Kearns' presence in the upstairs of the house with his wife, both of whom denied his use of the computer and his knowledge that the computer was in the basement. The computer was clearly owned by the daughter. Given the inaccessible nature of the files and the lack of proof of use by the Appellant there is no fact which carries this case beyond mere proximity which is insufficient as a matter of law for a conviction.

Even in a civil case, supporting evidence of the allegation is required, and the lack of supporting evidence causes the evidence to be vague, uncertain, and unsatisfactory, *Flanagan v. J.M. Parsons,* et. al. 167 VA 6, 10, 187 S.E. 473 (1936). The indictments that sought to charge criminal acts for activity other than the morning of August 17, 2016 are devoid of any evidentiary support for the manner in which images arrived into unallocated space on the computer and must be dismissed for such a failure There is no evidence about the location of the computer at any time regarding the images on the computer and there is no evidence which places the appellant at the same

location of the computer with respect to the illegal images.. Even the unexplained occurrence of an automobile accident cannot result in a criminal conviction, *Powers v. Commonwealth,* 211 VA 386, 177 S.E. 2c 628 (1970).

[12] **ASSIGNMENT OF ERROR II**

II. The trial court erred by refusing to strike the evidence and dismiss those counts which were charged as possession of child pornography when those files were contained in unallocated space and not accessible in the matter required for conviction.

(Objection preserved at R. at 310 – R. at 317, R. at 732, L. 21 – R. at 735 L. 22, R. at 751, L. 10 – R. at 755, L. 1)

STANDARD OF REVIEW

Matters which are solely a question of law will be reviewed de novo. *Javier v. Arminio,* 272 Va. 353, 634 S.E. 2d 754 (2006). With respect to factual issues that the trial court decides after considering and weighing the evidence, such decisions rest within the sound discretion of the trial court and will not be reversed on appeal unless plainly wrong or unsupported by the evidence. *Wright v. Wright,* 61 Va. App. 432, 440, 737 S. E. 2d 519, 523 (2013).

ARGUMENT II

The Appellant repeats and realleges the argument which was made in Assignment of Error I as if it were fully set forth herein.

Appendix E

The issue of data found on unallocated space has become more well defined in the past ten years. As previously stated in this brief the issue of accessibility is a fundamental consideration for allocated and unallocated space. Initially accessibility to the data on the computer in general must be shown and there is no evidence of this accessibility in this case. [13] There is no evidence of the knowledge of the computer password or its use by the Appellant. He is not given a username and none of the computer activities relate to online purchases delivered to him or any such other computer-related activity.

Even if the Commonwealth could clear the hurdle of accessing the computer in general, the illegal images are not readily accessible (R. at 538, L. 13 – R. at 539, L. 4? because they were relocated by an unknown person and their location was distorted so it could not be readily retrieved. A person would need to know and exact date to execute a system restore in order to have a chance to retrieve the image and there is no evidence that Shawn Kearns ever knew a proper system restore date for this retrieval. This inaccessibility to ready use requires a dismissal. *Kovach v. Commonwealth* Record No. 2013-15-2 (Va. Ct. App. December 6, 2016). There was no evidence of the defendant seeking out child pornography and placing it on the computer, there were no admissions of activity related to images of children, and there was abundant evidence of possession of the computer by others and even use of the computer for accessing pornography by the daughter's boyfriend.

* * *