CSE Case Law Update

January 2009

U.S. v. Hicks, 2009 U.S. App. LEXIS 952 (4th Cir. January 20, 2009)

Defendant challenged his convictions for production, receipt and possession of child pornography under 18 U.S.C. § 2251(b), 18 U.S.C. § 2252(a)(2), and 18 U.S.C. **§** 2252 (a)(4)(B) (2006) respectively. The court rejected the defendant's claims of: insufficient evidence; exclusion of the defense of others placing the child pornography on his computer; admission of other bad acts evidence; error for failure to suppress the search of his computer; limitation of cross examination; and, ineffective assistance of counsel. In limiting the defendant's defense of other placing the evidence on the computer the court determined that the defendant failed to satisfy the two part test balancing the evidence versus the confusion to the jury and the direct connection test(defendant was unable to demonstrate a nexus between the evidence and the person defendant claimed put it on the computer).

North Carolina v. Martin, 2009 N.C. App. LEXIS 55(N.C. Ct of Appeals, January 20, 2009)

Defendant's conviction for indecent liberties with a child and using a minor in obscenity upheld. Court determined that photo depicting unclothed defendant with his unclothed six year old daughter on his lap was sexually suggestive and thus indecent under the state statute.

U.S. v. Esparza, 2009 U.S. App. LEXIS 904, (9th Cir. January 20, 2009)

Defendant challenged sentence requiring him to take all prescribed medicine and condition that probation officer could send him to inpatient counseling. The Appeals Court ruled that the District Court could order defendant to take prescription medical if the court made required findings on the record. The Appeals Court agreed with the defendant and held that it was an impermissible deligation of sentencing to allow the probation department to determine whether defendant undergo inpatient treatment. The Court remanded the case for the district Court to make the proper findings of fact for the prescription medicine and remove the inpatient treatment phrase from the lifetime supervision conditions.

U.S. v. Graziano, 2009 U.S. App. LEXIS 835, (2nd Cir. January 16, 2009)

Defendant appealed his sentence upon his plea of guilty to possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). Defendant claimed post-plea that no evidence had been presented demonstrating the child pornography had been in interstate commerce and that his sentence was impermissibly enhanced based on facts that were not included in the record. The court rejected both the defendant's claim indicating where in the plea agreement the defendant admitted to the interstate nature of the child pornography from the internet. The Court also rejected his second argument because the defendant agreed to waive his

appeal rights if the Court sentenced him to 108 months or less (the District Court sentenced defendant to 87 months).

U.S. v. Ross, 307 Fed.Appx. 727, 2009 U.S.App LEXIS 861(4th Cir. January 16, 2009)

The Appeals Court rejected defendant's argument that he was entitled to a downward departure from the sentencing guidelines because Congress unreasonably enhanced the recommendation of the United States Sentencing Guideline Commission. The Appeals Court agreed with the District Court in determining that all of the bases for the downward departure the defendant requested were considered in other aspects of the sentencing. There is no requirement for the district court to mechanically review each of the factors it considers in formulating a sentence.

U.S. v. Gavegnano, 305 Fed. Appx. 954, 2009 U.S.App LEXIS 844 (4th Cir. January 16, 2009)

The defendant appealed his conviction of two counts of receipt of child pornography in violation of 18 U.S.C. § 2252(a)(2), 3261(a)(2006); one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4), 3261(a)(2006); and one count of importation or transportation of obscene matters, in violation of 18 U.S.C. § 1462, 3261(a)(2006). Defendant claimed the District Court erred in failing to suppress evidence from a government issued laptop under both a *Fourth* and *Fifth* Amendment violation. The Court rejected the Fourth Amendment violation claim because the defendant had no reasonable expectation of privacy in the computer. The defendant's claim of a violation of his Fifth Amendment was based on his being asked for the password to his computer after he had asked for an attorney. The Court rejected the defendant's Fifth Amendment claim because the government had already proved that the defendant was the sole person with access to the computer and thus any self-incriminating testimony from divulging the password was a "foregone conclusion". The Court also rejected the defendant's argument that the government did not provide the proper chain of custody to support the admission of the computer forensic report.

U.S. v. Stabile, 2009 U.S. Dist. LEXIS 4263, (U.S. Dist. Court N.J, January 21, 2009)

Defendant's arguments for Motion to Suppress Evidence rejected. Defendant claimed consent that wife gave to search his computers was involuntary and in the alternative he revoked it and that the subsequent searches of his hard drives were not authorized by a search warrant. This case involved agents visiting defendant's home when he was not present. Defendant was suspected in financial crimes enterprise. Wife gave written consent to search and pointed out various computers in home. Those were collected and removed from premises by agents. After hard drives are taken defendant arrives home and revokes consent to search home. Defendant does not ask for hard drives back from police until after his arrest (about a year later). Multiple search warrants are secured based on affidavits, both state and federal. There are issues with all the search warrants, including scope and inadvertently describing the wrong hard drive to be searched. During the execution of the first search warrant, examiner finds file believed will contain possible contraband from financial case. Detective opens file and sees additional file names he believes based on training and experience to be associated with child pornography. In excess of authority of warrant, detective opens those files and confirms child pornography.

Second warrant sought to further look for child pornography. Unfortunately, this warrant mis-identifies the hard drive to be searched. However, Court rejects defendant's claims against the warrants indicating that based on the file names discovered in the first search the detective would have inevitably discovered the child pornography on that hard drive which would have provided probable cause for the issuance of search warrants on additional hard drives. Court gives good language about any computer file that is opened or manipulated is a search under the *Fourth* Amendment.

U.S. v. Wellman, 2009 U.S. Dist. LEXIS 3631, (U.S. Dist Ct. S. Dist of W.V., January 20, 2009)

Defendant raised multiple issues in his Motion to Sever Counts and Motion in Limine to Preclude Prior Conviction. Defendant house was searched pursuant to a warrant. During the search police find child pornography and guns. Defendant was charged with both in single indictment. Defendant moved to sever gun count and child pornography count and preclude the government from introducing a conviction from 22 years previously for Sex Abuse in First Degree. The Court agreed with the defendant that use of the prior conviction could not be used against the defendant in two of the counts because Rule 414 did not specifically include the two statutes the defendant was charged under. However, defendant's joy was short lived as the Court ruled that it could be used to under Rule 404(b) to show lack of mistake and knowledge. Additionally, the court rejected the defendant's argument that because he had not been charged during the 22 year passage of time from his prior conviction he would be unfairly prejudiced by the admission of the conviction. In fantastic language, the court stated, "whether indulging in child pornography or raping a child, an individual who does either or both is obviously motivated by a sexual interest in children. In addition, though possession of child pornography is different from sexual abuse of a child, each involves the exploitation of a child." Id.

U.S. v. Haney, 2009 U.S. Dist. LEXIS 4076, (U.S. Dist Ct. W. Dist of TN, January 20, 2009)

Defendant's motion to suppress evidence granted. Defendant moved to suppress results of search warrant based on lack of probable cause in search warrant. Defendant raised three separate arguments. The court considered and accepted only one; the warrant lacked any specificity as to the time frame of the alleged abuse that was photographed. The Court concluded that absent even a temporal reference in the warrant as to when the abuse occurred or when the photos of the abuse were taken no way to determine if staleness was an issue. According to the Court even the Leon good faith exception could not save warrant.

Morris v. U.S., 2009 U.S. Dist. LEXIS 4319, (U.S. Dist Ct. North Dist Texas, January 14, 2009)(sentencing)

Defendant challenged entry of sentence of lifetime of supervised release. Defendant's plea agreement, and his admonishments at time of entry of plea related that his supervision following prison sentence would be capped at three years. At the time of the entry of the sentence defendant was informed of the lifetime supervision provision and neither defendant nor his attorney objected. Court rejected defendant's argument based on defendant being made aware of lifetime provision in the documents provided at the time of the sentencing and insinuated that the defendant kept quiet at the time to enjoy the benefit of the lower prison sentence.

U.S. v. Anderson, 2009 U.S. Dist LEXIS 4331, (U.S. Dist Ct. Est Dist Wisc., January 12, 2009)

In Motion to Suppress Evidence defendant claimed Franks violation based on omission of facts from search warrant affidavit. Court agreed with defendant that omitted facts warranted Franks hearing. In facts of case, defendant was believed to have purchased subscription to website containing child pornography. In discovery provided to defendant's attorney, documents present that inferred that credit card charges for the subscription were declined. Court determined that omissions on first warrant justified granting of a Franks hearing. As to the second warrant, the Court determined that the affiant's failure to disclose the location of the files, which had been deleted and thus effectively inaccessible to defendant would also affect the finding of probable cause.

U.S. v. Silva, 593 F.Supp.2d 316, 2009 U.S.Dist LEXIS 3340, (U.S. Dist Ct. Mass, January 9, 2009)

District Court rejected defendant's Motion to Suppress Evidence of search where defendant claimed no nexus to search of his truck. Defendant's house and vehicles listed in a search warrant. Female present at time of search requested to leave and use defendant's truck. Police seized computer media from truck prior to her leaving. Defendant moved to suppress because of lack of nexus. Court rejected defendant's argument, warrant contained facts to support search of truck, based on defendant claim to victim that most of his things were in a storage locker. Court determined that is was fairly possible that defendant would use truck to transport items to storage locker and that he might leave evidence pertaining to child pornography in truck.

People v. Soria, 2009 Cal.App.Unpub. LEXIS 377(5th Ct Appeal, Cal, January 16, 2009)

Defendant charged and found guilty of sexually molesting several boys. Defendant claimed multiple errors at trial including admission of computer evidence, permitting cross examination and rebuttal evidence of prior uncharged crime, and incorrect jury instructions. In rejecting defendant's contentions Court ruled that computer evidence was relevant, even thought is essentially destroyed defense employed by defendant. Defendant claimed the computer evidence was irrelevant, prejudicially cumulative and intended to make him appear despicable. The Court ruled that the evidence was admissible to show propensity, intent and motive. As to the cross examination and rebuttal evidence the court ruled that defendant's testimony on direct opened the door to these issues and the rebuttal evidence proved up impeachment of defendant's testimony.

State v. Cooper, 2009 Iowa App. LEXIS 5 (Ct. of Appeals, IA, January 22, 2009)

Defendant claimed two errors, first insufficient evidence to prove that he had knowledge that his computer hard drive contained images of child pornography and second, that he was not given his right of allocution prior to sentencing. Defendant's attempt to find shelter under constructive possession argument in drug cases was rejected by the Court. Court did remand case to allow defendant to exercise right of allocution which sentencing court skipped during sentence.

People v. Champlain, 2009 Mich App. LEXIS 120 (Ct. of Appeals MI, January 20, 2009)

Defendant was convicted at jury trial of third degree sexual conduct. The facts arose out of defendant meeting a15 year old on line. Defendant ultimate meets victim at her house when her mother is not home and forces her to have sexual intercourse with him. During the trial the prosecution admitted evidence of child pornography images under MRE 404(b). The Appellate Court which is apparently unaware of the connection between child pornography and those that commit contact offenses determined that it did not go to the defendant's motive to commit the crime. However, the Appellate court ruled that the admission of the child pornography was harmless error.

State v. Bates, 2009 Ohio 275, 2009 Ohio App. LEXIS 230 (5th App Dist. Ohio, January 22, 2009)

Court rejected defendant's claims of error for denying motion to suppress evidence and error for admission of expert testimony regarding "real" children depicted in child pornography. Court concluded defendants arguments that affidavit for search warrant contained false and misleading statements and was stale were without merit. Specifically, court sets out nice factual basis for defeating staleness arguments in computer child pornography investigations citing U.S. v. Lacy, 119 F.3d 742, 745(C.A. 9. 1997).

As to the issue of admitting the expert's testimony opining that the children in the images were real the Court engaged in a rather confusing explanation. The Court stated that the prosecution has the burden of proving that the child is real. Then the Court writes that since the defendant did not challenge whether the child was real, it was possibly an error to admit the testimony. Ultimately, the Court concludes that it was at worst a harmless error because the jury had access to the images and could determine for themselves whether they were real victims.

U.S. v. Irving, 554 F.3d 64 (January 28, 2009)2nd Circuit

Defendant claimed errors in sentencing for improperly apply guidelines and claim of double jeopardy for convictions of receipt and possession of the child pornography. Court concluded sentencing was reasonable in reviewing factual findings of sentencing court. Additionally, without ruling on underlying issue of whether receipt and possession charges were barred by double jeopardy, reviewing court concluded that in this case because multiple images were charged the jury could have concluded that separate images related to separate charges and double jeopardy did not apply.

U.S. v. Knighton, 307 Fed. Appx. 673, 2009 U.S. App. LEXIS 1360 (January 23, 2009 3rd Circuit)

Defendant challenged sentencing enhancement for running a computer wiping program when the FBI arrived at his door to conduct search and defendant did not tell them. Court rejected defendant's argument and ruled an obstructing enhancement was appropriate considering the factual circumstances.

U.S. v. Perazza-Mercado, 553 F.3d 65, 2009 U.S. App. LEXIS 1322(January 21, 2009 1st Circuit)

Defendant challenged sentencing conditions of no internet access and no pornography. Court reversed those two conditions of supervised release. For the internet access, the court ruled that based on the factual basis of the case, lack of nexus, and the "ubiquitous presence" of the internet the total ban of his internet access at home would not further the goals of supervised release. The court did leave open the possibility of tailoring a different type of internet monitoring for the defendant upon resentence. Secondly, the reviewing court determined that there was no factual basis for the ban of pornography in the record and that the sentencing court did not include any basis for the broad ban in the record.

U.S. v. Paull, 551 F.3d 516 2009 U.S. App. LEXIS 380 (January 9, 2009, 6th Circuit)

Defendant raised multiple challenges to his conviction and sentence for four counts of possession of child pornography, 18 U.S.C. §2252. The defendant's challenged the search warrant for staleness based on the last information the affidavit contained was from a subscription to a suspected website 13 months previous. The court reviewed the standard for child pornography cases and the characteristics of collectors of child pornography in rejecting defendant's contention. Defendant also claimed the search of garbage bags within his garage exceeded the scope of the warrant. The court rejected this contention as well. Defendant's contentions that his statements should have been suppressed because of a Miranda violation were also denied. The court also rejected defendant's claim that he was denied a fair trial because he could not get an expert to refute the government's expert as to the underlying child pornography. The final argument defendant raised and the court declined to follow was that the Child Pornography Prevention Act was vague. The defendant posited that the Act itself was not vague but rather he would not be able to tell which images were prohibited and those that were permitted under the Act. The Court determined that this was a matter of reasonable doubt at a trial not an issue of vagueness with the underlying statute. Finally, defendant raised several issues with his sentencing, including a violation of Crawford for some of the evidence being admitted. The court again rejected all of the defendant's contentions and affirmed his sentence.

U.S. v. Comstock et. Al, 551 F.3d 274, 2009 U.S.App. LEXIS 185(January 8, 2009 4th Circuit)

The Appellate Court declared the Federal Civil Commitment Act under 18 U.S.C. §4248(2006), unconstitutional. The basis for the Court's ruling was that the Act was outside the express powers delegated to Congress. The Court rejected the government's argument that it was allowable under the Necessary and Proper Clause. The Court held that while that clause grants Congress broad powers, it is limited to areas where Congress has been granted express authority

under the Constitution. The Court reviewed each of the government's arguments including authority under: running of federal prisons; regulation of sex-related crimes; power to prosecute criminal offenses, and rejected and refuted each. Ultimately, the Court concluded that Congress exceeded its constitutional authority in enacting 18 U.S.C. §4248.

U.S. v. Osborne, 551 F.3d 718, 2009 U.S. App. LEXIS 12 (January 5, 2009 7th Circuit)

Appellate Court vacated defendant sentence and remanded for new sentencing based on District Court's improper application of a prior conviction for abusive sexual conduct with a minor or under 18 U.S.C. §2252(b)(1). The Appellate Court ruled that the prior conviction for sexual conduct must meet the definition of "abusive" as defined by other crimes in Title 18. The court ruled that not all prior sex convictions are for abusive conduct. The court stated that if the prior conviction arises from a state charge the sentencing court must review the state charging/plea/sentencing paperwork to determine if the abusive definition is met.

North Carolina v. Martin, 671 S.E.2d 53, 2009 N.C. App. LEXIS 55 (January 20, 2009 N.C. Court of Appeals)

Defendant challenged his convictions for two counts of indecent liberties with a child and one count of using a minor in obscenity. The basis of defendant's claim was that the act of placing a naked child on his naked lap was not arousing or sexually gratifying. The Court rejected defendant's claim holding that placing a naked child on the lap of the naked defendant did provide substantial evidence of sexual gratification under the statute. Similarly, the Court refused defendant's claim of double jeopardy holding that the elements of indecent solicitation and obscenity were different.

U.S. v. Handy, 2009 U.S.Dist LEXIS 6471 (January 21, 2009 Middle Dist of Florida)

Court's sentencing decision disallowing the use of the two point enhancement under § 2G2.2(b)(3)(F) for a defendant distributing child pornography. Court writes a very good description of peer-to-peer software and how evidence of it can be used to show distribution, but then rules the government failed to demonstrate it in that case.

U.S. v. Ruth, 306 Fed. Appx 385, 2009 U.S. App. LEXIS 1313 (January 5, 2009 9th Circuit)

Appellate Court rejected defendant's claim that District Court provided inadequate reasoning for imposition of sentence that fell within the sentencing guidelines.

U.S. v. Goodin, 67 M.J. 158, 2009 CAAF LEXIS 7 (January 21, 2009 C.A.A.F.)

Defendant convicted of possessing visual depictions of a minor engaging in sexually explicit conduct and committing an indecent act upon minor. Defendant based his appeal on defendant's wife being allowed to testify about their sexual acts and statements the defendant made about

what he found sexually arousing. Without ruling that the wife's testimony was in error, the Court applied the four-part test in U.S. v. Kerr, 51 M.J. 401, 405 (C.A.A.F 1999) and determined that the admission was harmless and did not materially prejudice rights of defendant.

U.S. v. Dodge, 554 F.3d 1357, 2009 U.S. App.LEXIS 591(January 14, 2009 11th Circuit)

Defendant who pleaded guilty to transferring obscene material to a minor under 18 U.S.C. §1470 appealed sentencing provision that required him to register as a Tier I sex offender under SORNA at 42 U.S.C. §16911. The Appellate Court reversed the registration requirement finding that a violation under §1470 was not enumerated in the SORNA registration offenses and thus outside the scope of the crimes an offender would have to register under SORNA. The Court rejected the government's argument that defendant should still have to register because his conviction was covered under subsection (6) of §16911 as an "other criminal offense." The Court concluded that since it was a federal offense and not enumerated in §16911 the doctrine of *expression unius est exlusio alterius*, required a finding that the charge the defendant pleaded guilty to was not included in SORNA.