

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

FINAL PRETRIAL
CONFERENCE ORDER

v.

KEVIN G. MEALER,

07-CR-016-C

Defendant.

On August 10, 2007 this court held the final pretrial conference. Defendant Kevin Mealer waived his appearance but was represented by his attorney, David Geier. The government was represented by Assistant United States Attorney Timothy O'Shea.

The government had no proposed changes or objections to the court's draft voir dire. Mealer proposed a series of additional questions. After discussion with both attorneys, I agreed to ask many of the questions in the fashion on which we reached consensus at the hearing. A copy of the new, final voir dire is attached to this order. Counsel should double-check for accurate implementation of the agreed changes.

Both sides proposed changes to the court's jury instruction packet. Mealer, by counsel, did not object to the government's proposed changes, so I have incorporated them. Mealer's only proposed additional instruction at this time is a theory of defense. The government objects to the instruction, as much on factual inapplicability grounds as anything; the parties might

address this issue with Judge Crabb at the final hearing, but also might wait until the close of the evidence to discuss the accuracy and necessity of this instruction. As always, both sides reserve their right to cull and tailor the instruction packet at the close of the evidence.

The government filed three motions in limine. Mealer does not contest the first two regarding the definition of “reasonable doubt” and possible penalties in this case. Mealer hotly contests the government’s motion to exclude Mealer’s alleged research into child pornography (dkt. 14). Mealer, by counsel, will be filing and serving a written response not later than August 14, 2007. This issue is framed for discussion and possible resolution at the final hearing on August 16, 2007, at 3:00 p.m.

Mealer filed no written motions in limine, but orally raised several issues at the hearing. First, Mealer wishes to argue to limit the number of sexually-explicit photos and films the government should be allowed to present to the jury at trial, pursuant to Rule 403. Second, Mealer and the government both are concerned with the mechanics of presenting the images to the jury in open court; they might ask to close the courtroom. Finally, although the parties generally agree on sequestering the witnesses, the government will be seeking permission for its computer expert to be present during Mealer’s expert’s testimony to prepare a rebuttal. The parties had no other substantive issues to bring to the court’s attention at this time.

This case likely will go to trial. The government predicts that it might take only one day; Attorney Geier is aware that he must have any defense witnesses available to testify on Monday afternoon. The parties agreed that one alternate juror will suffice. The parties are aware they

must present evidence on the court's ELMO absent prior permission to do otherwise. The parties had no other housekeeping matters to bring to the court's attention.

Entered this 13th day of August, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER

Magistrate Judge

Voir Dire: United States v. Kevin G. Mealer, 07-CR-16-C

Statement of the case: This is a criminal case, in which the defendant, Kevin G. Mealer, is charged with unlawfully possessing child pornography on his computer and with sending images of child pornography over the Internet. The defendant has entered a plea of not guilty to these charges.

Have any of you heard of this case before today? Would this affect your ability to serve impartially as a juror in this case?

1. Is there anything about the nature of the charges in this case that might affect your ability to be impartial in this case?

2. Scheduling: this case will begin today and will conclude tomorrow. Are any of you actually unable to sit as jurors because of this schedule?

3. The court reads from the Seventh Circuit's Pattern Instructions:

The defendant is presumed to be innocent of the charges. This presumption remains with the defendant throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty.

The government has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the government throughout the case. The defendant is not required to prove his innocence or to produce any evidence.

The indictment in this case is the formal method of accusing the defendant of a crime and placing the defendant on trial. It is not evidence against the defendant and does not create any implication of guilt.

The defendant has an absolute right not to testify. The fact that the defendant does not testify cannot be considered by you in any way in arriving at your verdict.

Would any of you be unable or unwilling to follow these instructions?

4. Ask counsel to introduce themselves, the defendant, and the case agent. Ask whether jurors know them.

5. Invite each juror, in turn, to stand and provide the following information:

Name, age, and city or town of residence.

Marital status.

Current occupation (former if retired).

Current (or former) occupation of your spouse.

Number of children and/or grandchildren, their ages and gender.

Current occupation of any adult children.

Any military service, including branch, rank and approximate date of discharge.

Hobbies and leisure-time activities.

Favorite types of reading material.

Favorite types of television shows.

Memberships in any groups or organizations.

Whether you regularly listen to talk radio and if so, to which programs.

Level of education, and major areas of study, if any, including a description of any specialized training in or knowledge of computers or software.

Your comfort level and familiarity using computers and using the Internet

How often you use a computer at home and at work.

Your estimates of how often you use the Internet, how often you download information, and how often you make purchases over the Internet.

6. Do any of you in the jury box know each other from before today?
7. The evidence that will be presented in this case includes visual depictions of what the government contends are boys under the age of 18 engaging in sexually explicit conduct. Is there anything about the nature of such evidence that would prevent you from serving impartially in this case?
8. Do any of you believe that it is more likely that a homosexual man would receive and distribute child pornography than a heterosexual man?
9. The defendant in this case is homosexual. Is there anything about his sexual orientation that would prevent you from serving impartially in this case?
10. Have any of you ever received any objectionable material on your computer via the Internet without your solicitation? [*If too many affirmatives, narrow question to "objectionable images; in either event, follow up at side bar with nature of material, attempts to remove it, etc."*]
11. Do any of you have strong opinions or feelings about adult pornography, which is legal, or about the dissemination of adult pornography on the Internet, which also is legal, that might affect your ability to be fair to both sides in a prosecution involving child pornography on the Internet? [*Sidebar for follow-up*].
12. Have any of you, your relatives, or close friends ever been accused of, or convicted of any criminal offense? [*Sidebar for follow-up*]. Would this affect your ability to be impartial in this case?
13. Have any of you, your relatives, or close friends ever been incarcerated? Please describe the circumstances briefly. [*Sidebar for follow-up*]. Would this affect your ability to be impartial in this case?
14. Have any of you, or to your knowledge any of your relatives or close friends, ever been sexually abused as children or as adults? [*Sidebar for follow-up*]. Would this affect your ability to be impartial in this case?
15. Do any of you, by virtue of past dealings with the United States government or federal agencies such as the Postal Service or the FBI, or for any reason, have any bias for or against the government in a criminal case?
16. Have any of you, your relatives, or close friends ever worked for the local, county, state, or federal government? Would this affect your ability to be impartial in this case?

17. Have any of you, your relatives, or close friends ever worked for, or had other professional contact with any law enforcement agency, such as the FBI or Postal Inspection Service, or any investigative or security company or agency, or any prison? Would this affect your ability to be impartial in this case?

18. Other than what you have already told us, have any of you, your family or close friends ever worked within the criminal justice system?

19. Have any of you ever belonged to any organization or group that excluded people because of their race, gender, or religion?

20. Would any of you judge the credibility of a witness who was a law enforcement officer or government employee differently from other witnesses solely because of his or her official position?

21. If the defendant were to choose to testify, would any of you judge his credibility differently from other witnesses solely because it was the defendant who was testifying?

22. Have any of you, your relatives, or close friends ever been the victim of any crime? Would this affect your ability to be impartial in this case?

23. Have any of you, your relatives, or close friends ever been a witness in a trial? Is there anything about this experience that might affect your ability to be impartial in this case?

24. Have any of you, your relatives, or close friends ever had any negative experience with any lawyer, any court, or any legal proceeding that would affect your ability to be impartial in this case?

25. How many of you have served previously as a juror in another case? Please tell us in which court you served, approximately when, the type of cases you heard, whether you were foreperson, and the verdicts.

26. If at the conclusion of the trial you were to be convinced of the defendant's guilt beyond a reasonable doubt, is there any one of you who would not, or could not, return a verdict of guilty?

27. If at the conclusion of the trial you were not to be convinced of the defendant's guilt beyond a reasonable doubt, is there any one of you who would not, or could not, return a verdict of not guilty?

28. The court will instruct you on the law to be applied in this case. You are required to accept and follow the court's instructions in that regard, even though you may disagree with the law. Is there any one of you who cannot accept this requirement?

29. Do you know of any reason whatever, either suggested by these questions or otherwise, why you could not sit as a trial juror with absolute impartiality to all the parties in this case?

JUROR BACKGROUND INFORMATION

When asked to do so by the court, please stand and provide the following information about yourself:

Name, age, and city or town of residence.

Marital status.

Current occupation (former if retired).

Current (or former) occupation of your spouse.

Number of children and/or grandchildren, their ages and gender.

Current occupation of any adult children.

Any military service, including branch, rank and date of discharge.

Hobbies and leisure-time activities.

Favorite types of reading material.

Favorite types of television shows.

Memberships in any groups or organizations.

Whether you listen to talk radio and to which programs.

Level of education, and major areas of study, if any, including a description of any specialized training in or knowledge of computers or software.

Your comfort level and familiarity using computers and using the Internet

How often you use a computer at home and at work.

Your estimates of how often you use the Internet, how often you download information, and how often you make purchases over the Internet.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

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v.

KEVIN G. MEALER,

Defendant.

JURY INSTRUCTIONS

07-CR-16-C

Members of the jury, you have seen and heard all the evidence and the arguments of the attorneys. Now I will instruct you on the law.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in the case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow my instructions on the law, even if you disagree with them. Each of the instructions is important. You must follow all of them.

Perform these duties fairly and impartially. Do not allow sympathy, prejudice, fear or public opinion to influence you. Do not allow any person's race, color, religion, national ancestry or sex to influence you.

Nothing I say now and nothing I said or did during the trial is meant to indicate any opinion on my part about what the facts are or about what your verdict should be.

The evidence consists of the testimony of the witnesses, the exhibits admitted in evidence and stipulations.

A stipulation is an agreement between both sides that certain facts are true.

I have taken judicial notice of certain facts that may be regarded as matters of common knowledge. You may accept those facts as proved, but you are not required to do so.

You are to decide whether the testimony of each of the witnesses is truthful and accurate, in part, in whole, or not at all, as well as what weight, if any, you give to the testimony of each witness. In evaluating the testimony of any witness, you may consider among other things: the witness's age; the witness's intelligence; the ability and opportunity the witness had to see, hear, or know the things the witness testified about; the witness's memory; any interest, bias, or prejudice the witness may have; the manner of the witness while testifying; and the reasonableness of the witness's testimony in light of all the evidence in the case.

You should judge the defendant's testimony in the same way as you judge the testimony of any other witness.

You should use common sense in weighing the evidence. Consider the evidence in light of your own observations in life. You are allowed to draw reasonable inferences from facts. In other words, you may look at one fact and conclude from it that another fact exists. Any inferences you make must be reasonable and must be based on the evidence in the case.

Some of you have heard the phrases “circumstantial evidence” and “direct evidence.” Direct evidence is the testimony of someone who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a series of facts that tend to show whether a defendant is guilty or not guilty. The

law makes no distinction between the weight to be given either direct or circumstantial evidence. You should decide how much weight to give to any evidence. You should consider all the evidence in the case, including the circumstantial evidence, in reaching your verdict.

Certain things are not evidence. I will list them for you:

First, testimony and exhibits that I struck from the record or that I told you to disregard are not evidence and must not be considered.

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded. This includes any press, radio, or television reports you may have seen or heard. Such reports are not evidence and must not influence your verdict.

Third, questions and objections by the lawyers are not evidence. Lawyers have a duty to object when they believe a question is improper. You should not be influenced by any objection or by my ruling on it.

Fourth, the lawyers' statements to you are not evidence. The purpose of these statements is to discuss the issues and the evidence. If the evidence as you remember it differs from what the lawyers said, your collective memory is what counts.

It is proper for a lawyer to interview any witness in preparation for trial.

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a larger number. You need not accept the testimony of the larger number of witnesses.

You have received evidence of a statement said to be made by the defendant to _____ . You must decide whether the defendant did make the statement. If

you find that the defendant did make the statement, then you must decide what weight, if any, you believe the statement deserves. In making this decision, you should consider all matters in evidence having to do with the statement, including those concerning the defendant himself and the circumstances under which the statement was made.

The defendant has an absolute right not to testify. In arriving at your verdict, you must not consider the fact that the defendant did not testify.

A statement made by the defendant before trial that is inconsistent with the defendant's testimony here in court may be used by you as evidence of the truth of the matters contained in it, and also in deciding the truthfulness and accuracy of the defendant's testimony in this trial.

You have heard [reputation/opinion] evidence about the character trait of _____ for truthfulness [or untruthfulness]. You should consider this evidence in deciding the weight that you will give to _____'s testimony.

You have heard [reputation and/or opinion] evidence about the defendant's character trait for [truthfulness, peacefulness, etc]. You should consider character evidence together with all the other evidence in the case and in the same way.

You have heard evidence of acts of the defendant other than those charged in the indictment, specifically _____. You may consider this evidence only on the question of _____. You should consider this evidence only for this limited purpose.

You have heard evidence that before the trial, witnesses made statements that may be inconsistent with their testimony here in court. If you find that it is inconsistent, you may consider the earlier statement only in deciding the truthfulness and accuracy of that witness's testimony in this trial. You may not use it as evidence of the truth of the matters contained in that prior statement. If that statement was made under oath, you may also consider it as evidence of the truth of the matters contained in that prior statement.

_____ has admitted lying under oath. You may give his testimony such weight as you believe it deserves, keeping in mind that it must be considered with caution and great care.

You have heard witnesses give opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way that you judge the testimony of any other witness. The fact that such a person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness' qualifications, and all of the other evidence in the case.

THE INDICTMENT

The defendant is charged in the indictment as follows:

COUNT 1

On or about August 1, 2004, in the Western District of Wisconsin, the defendant, Kevin G. Mealer, knowingly possessed a Western Digital hard drive and a Hitachi Deskstar hard drive both containing visual depictions that was produced using materials which had been shipped in interstate and foreign commerce, specifically the two hard drives, and the production of such visual depictions involved the use of minors engaging in sexually explicit conduct, and the depictions are of such conduct.

COUNT 2

On or about January 14, 2004, in the Western District of Wisconsin and elsewhere, the defendant, Kevin G. Mealer, knowingly transported and shipped in interstate commerce by computer, a visual depiction, and the producing of this visual depiction involved the use of a minor engaging in sexually explicit conduct, and such depiction was of such conduct.

The defendant has entered a plea of not guilty to these charges.

The indictment in this case is the formal method of accusing the defendant of crimes and placing the defendant on trial. It is not evidence against the defendant and does not create any implication of guilt.

The defendant is not on trial for any act or conduct not charged in the indictment.

The defendant is presumed to be innocent of the charges. This presumption continues during every stage of the trial and your deliberations on the verdict. It is not overcome as to the defendant unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty as charged.

The government has the burden of proving the defendant's guilt beyond a reasonable doubt. This burden of proof stays with the government throughout the case. The defendant is never required to prove his innocence or to produce any evidence at all.

The indictment charges that the offenses were committed "on or about" certain dates. The government must prove that an offense happened reasonably close to the date charged but it is not required to prove that an alleged offense happened on that exact date.

ELEMENTS OF THE CHARGE: COUNT 1

To sustain the charge in Count 1, the government must prove these elements:

- 1) The defendant knowingly possessed at least one of the hard drives identified in Count 1;
- 2) This hard drive contained a visual depiction of a minor engaging in sexually explicit conduct;
- 3) The production of this visual depiction involved the use of a minor engaging in sexually explicit conduct;
- 4) The defendant knew that this hard drive contained a visual depiction of a minor engaging in sexually explicit conduct; and
- 5) This visual depiction had been produced using materials that had been shipped and transported in interstate or foreign commerce as specified in Count 1.

If you find from your consideration of all the evidence that each of these elements has been proved beyond a reasonable doubt, then you should find the defendant guilty of Count 1.

If, on the other hand, you find from your consideration of all the evidence that any one of these elements has not been proved beyond a reasonable doubt, then you should find the defendant not guilty of Count 1.

Count 1 charges that the defendant possessed two hard drives, both meeting the elements of the offense listed above. To meet its burden of proof on Count 1, the government does not have to prove all five elements for both of these hard drives, but it must prove all five elements for at least one of the two hard drives. It is not sufficient for some of you to find that the government has proved some of the elements for one of the hard drives and the rest of you to find that the government has met the remaining elements for the other hard drive.

Similarly, to meet its burden of proof on Count 1, the government does not have to prove that every image on a hard drive depicted a minor engaged in sexually explicit conduct. It is the government's burden to prove that at least one of the images on the hard drive constituted such a depiction. Before you may find that the government has proved this point, you must unanimously agree on at least one specific image on the hard drive depicting a minor engaged in sexually explicit conduct. It is not sufficient for some of you to agree on one image, while the rest of you agree on a different image. All twelve of you must agree on at least one image on the hard drive.

ELEMENTS OF THE CHARGE: COUNT 2

To sustain the charge in Count 2, the government must prove these elements:

- 1) That on or about the date charged the defendant used a computer to transport or ship in interstate commerce a visual depiction of a minor engaged in sexually explicit conduct;
- 2) The production of this visual image involved using a minor engaging in sexually explicit conduct;
- 3) The defendant transported or shipped this image knowing that it depicted a minor engaging in sexually explicit conduct.

If you find from your consideration of all the evidence that each of these elements has been proved beyond a reasonable doubt, then you should find the defendant guilty of Count 2.

If, on the other hand, you find from your consideration of all the evidence that any one of these elements has not been proved beyond a reasonable doubt, then you must find the defendant not guilty of Count 2.

Possession of an object is the ability to control it. Possession may exist even when a person is not in physical contact with the object, but knowingly has the power and intention to exercise direction or control over it, either directly or through others.

For the defendant to know something means that the defendant realized what he was doing and was aware of the nature of his conduct and did not act through ignorance, mistake or accident. Knowledge may be proved by the defendant's conduct and by all the facts and circumstances surrounding the case.

An object has traveled or been transported in interstate commerce if it has traveled between one state and any other state, or across a state boundary line. An object has traveled or been transported in foreign commerce if it has traveled from some other nation into the United States, or from the United States to some other nation, by any physical or electronic medium. Knowingly sending computer data by means of the Internet to some other data-receiving Internet address that is located in a different state or a foreign nation constitutes transportation in interstate or foreign commerce, even if the sender does not realize that the receiving address is located in a different state or a foreign country.

The government does not need to prove that the defendant was aware that the hard drives described on Count 1 previously had traveled in interstate or foreign commerce.

“Computer” means an electronic, magnetic, optical, electrochemical or other high speed data processing device performing logical, arithmetic, or storage functions, and includes and data storage facility or communications facility directly related to or operating in conjunction with such device.

“Producing” means producing, directing, manufacturing, issuing, publishing or advertising. Computerized images are produced when computer equipment is used to copy or download the images.

“Minor” means any person under the age of eighteen years.

“Visual depiction” includes data stored by electronic means which is capable of conversion into a visual image.

“Sexually explicit conduct” means actual or simulated—

(1) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; or

(2) bestiality

(3) masturbation

(4) sadistic or masochistic abuse; or

(5) Lascivious exhibition of the genitals or pubic area of any person.

“Lascivious” means arousing sexual interest; indicating sexual interest; expressive of lust or lewdness.

Not every exposure of the genitals or pubic area of a minor, and not every image of a naked child constitutes a lascivious exhibition. It is for you to decide, based on the overall content of a particular picture or image, whether that picture or image constitutes a lascivious exhibition of the genitals or pubic area. While the following factors are not all-inclusive and do

not apply to every situation, they may help you determine whether a particular image or picture contains a lascivious exhibition of the genitals or pubic area:

- 1) whether the focal point of the picture or image is on the person's genitals or pubic area;
- 2) whether the setting of the picture or image is sexually suggestive, that is, in a place or a pose generally associated with sexual activity;
- 3) whether the person is depicted in an unnatural pose or in inappropriate attire;
- 4) whether the person is fully clothed, partially clothed, or nude;
- 5) whether the picture or image suggests sexual coyness or a willingness to engage in sexual activity; and
- 6) whether the picture or image is intended or designed to elicit a sexual response in the viewer.

Visual depictions of adults engaging in sexually explicit conduct are protected by the First Amendment to the United States Constitution. Visual depictions of minors engaged in sexually explicit conduct are not protected by the First Amendment.

Upon retiring to the jury room, select one of your number as your presiding juror. This person will preside over your deliberations and will be your representative here in court. A verdict form has been prepared for you.

[Form of verdict read.]

Take this form to the jury room, and when you have reached unanimous agreement on the verdict, your foreperson will fill in, date and sign it.

Each count of the indictment charges the defendant with having committed a separate offense. You must consider each count and the evidence relating to it separate and apart from the other count. You should return a separate verdict as to each count. Your verdict of guilty or not guilty of an offense charged in one count should not control your decision as to the other count.

The verdict must represent the considered judgment of each juror. Whether your verdict is guilty or not guilty, it must be unanimous. You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views and listen to the opinions of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to re-examine your own views and change your opinion if you come to believe it is wrong. But do not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of your fellow jurors or for the purpose of returning a unanimous verdict.

The twelve of you should give fair and equal consideration to all the evidence and deliberate with the goal of reaching an agreement consistent with the individual judgment of each juror. You are impartial judges of the facts. Your only interest is to determine whether the government has proved its case beyond a reasonable doubt.

If it becomes necessary during your deliberations to communicate with the court, you may send a note by a bailiff, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with the court by any means other than a signed writing, and the court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing, or orally here in open court.

You will note from the oath about to be taken by the bailiffs that they too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person –not even to the court– how the jury stands, numerically or otherwise, on the question before you until after you have reached a unanimous verdict.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

VERDICT

v.

07-CR-16-C

KEVIN G. MEALER,

Defendant.

COUNT 1

We, the Jury in the above-entitled cause, find the defendant, Kevin G. Mealer,

("Guilty" or "Not Guilty")

of the offense charged in Count 1 of the indictment.

COUNT 2

We, the Jury in the above-entitled cause, find the defendant, Kevin G. Mealer,

("Guilty" or "Not Guilty")

of the offense charged in Count 2 of the indictment.

Presiding Juror

Madison, Wisconsin

Date: _____