

Nos. 08-6465/08-6503

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**UNITED STATES OF AMERICA,
Plaintiff/Appellee/Cross-Appellant,**

v.

**TIMOTHY RYAN RICHARDS,
Defendant/Appellant/Cross-Appellee.**

**Appeal From the United States District Court,
Middle District of Tennessee, Nashville Division
Case No.: 3:05-00185**

**FIRST BRIEF ON BEHALF OF
APPELLANT/CROSS-APPELLEE, TIMOTHY RYAN RICHARDS**

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Appellant/Cross-Appellee**

Oral Argument Requested

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

UNITED STATES OF AMERICA,)	
)	
Plaintiff-Appellee,)	
Cross-Appellant ,)	
)	
v.)	Nos. 08-6465/08-6503
)	
TIMOTHY RYAN RICHARDS,)	
)	
Defendant-Appellant,)	
Cross-Appellee.)	

**DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST**

Pursuant to 6th Cir. R. 26.1, Timothy Ryan Richards makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? No.
2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No.

s/ Kimberly S. Hodde _____
Kimberly S. Hodde

October 13, 2009
Date

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STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant/Cross-Appellee Richards believes that, although the issues presented in this appeal have been fully briefed, they are of sufficient magnitude to warrant Oral Argument.

JURISDICTIONAL STATEMENT

The United States District Court for the Middle District of Tennessee had subject matter jurisdiction over the criminal prosecution of Defendant-Appellant/Cross-Appellee Richards pursuant to 18 U.S.C. §3231.

The United States Court of Appeals for the Sixth Circuit has jurisdiction over this controversy pursuant to 28 U.S.C. §1291.

On October 26, 2006, Richards was convicted of eleven (11) of twenty-six (26) counts after a jury trial. He was sentenced by the district court on November 7, 2008. The Judgment and Commitment Order was entered on November 20, 2008 and amended on December 1, 2008. Richards timely filed a Notice of Appeal to this Court on November 26, 2008, challenging his conviction. On December 10, 2008, the government filed a Notice of Appeal, challenging the sentence.

This appeal is from the final judgment of the district court.

STATEMENT OF THE ISSUES

- I. THE SEARCH OF THE BLACKSUN COMPUTER SERVER EXCEEDED THE SCOPE OF PROBABLE CAUSE SET FORTH IN THE WARRANT AND WAS EXECUTED AS A GENERAL WARRANT.
- II. THE GOVERNMENT'S IDENTIFICATION OF 20,000 IMAGES TO BE USED IN ITS CASE-IN-CHIEF WAS AN OBFUSCATION OF ITS REQUIREMENT UNDER RULE 16.
- III. THE ADMISSION OF VIDEO AND PHOTOGRAPHIC EXHIBITS LABELED WITH THE PURPORTED AGE OF THE VICTIM AFTER THE VICTIM WAS IMPEACHED AS TO THOSE LABELED AGES IMPROPERLY MINIMIZED THE IMPACT OF CROSS-EXAMINATION AND INVADED THE JURY DELIBERATIONS.
- IV. THE DISTRICT COURT ERRED BY DENYING RICHARDS' RIGHT TO CONFRONT AND IMPEACH A PROSECUTION WITNESS (JEREMY MOEDER).
- V. THE DISTRICT COURT ERRED BY FAILING TO DISMISS MULTIPLICITOUS COUNTS.
- VI. THE ACCUMULATION OF ERRORS RENDERED DEFENDANT RICHARDS' TRIAL FUNDAMENTALLY UNFAIR AND DENIED HIS DUE PROCESS RIGHTS.

STATEMENT OF THE CASE

On September 22, 2005, Defendant-Appellant/Cross-Appellee Timothy Ryan Richards (hereinafter “Richards”) was charged by Criminal Complaint. (R.3). On October 19, 2005, the government returned a single count Indictment charging the distribution of child pornography in violation of 18 U.S.C. §2252A(1)(a). (R.20). On November 16, 2005, the government returned a 3 count Superseding Indictment charging Richards with advertising and distributing child pornography in violation of 18 U.S.C. §§ 2251(d)(1)(A) & 2252A(1)(a). (R.26). On September 13, 2006, the government filed a 26 count Second Superseding Indictment charging Richards with various child pornography offenses: 7 counts of advertising (Counts 2, 3, 10, 13, 14, 15 & 19; 18 U.S.C. §2251(d)(1)(A)), 4 counts of distribution (Counts 1, 9, 16 & 21; 18 U.S.C. §2252A(a)(1)), 4 counts of production (Counts 4, 6, 23 & 25; 18 U.S.C. §2251(a)), 4 counts of possession (Counts 5, 7, 24 & 26; 18 U.S.C. §2252A(a)(5)(B)), 4 counts of records keeping violations (Counts 8, 11, 17 & 22; 18 U.S.C. §2257(f)(4)), 2 counts of conspiracy to advertise (Counts 12 & 18; 18 U.S.C. §2251(d)(1)(A)), a single count of conspiracy to distribute (Count 20; 18 U.S.C. §2252A(a)(1)) and a criminal forfeiture allegation. (R.115). On September 29,

2006, the government filed a Third Superseding Indictment adding a count of transferring obscenity to a minor (Count 27; 18 U.S.C.§1470). (R.157).¹

On May 19, 2006, Richards filed a Motion to Suppress the Fruits of Seizures and Subsequent Searches of Computer Servers with a supporting Memorandum of Law (R.80 & 81) and a Motion for Identification of Images to Be Used in the Government's Case-in-Chief. (R.77). Following an evidentiary hearing on July 24, 2006, the district court entered an Order denying the Motion to Suppress but granting the Motion for Identification of Images. (R.101).

On August 30, 2006, Richards filed a Motion to Compel the Government to Comply with the court's Order granting his Motion for Identification of Images. (R.105). The court conducted a hearing on the Motion on September 7, 2006 and ultimately denied the Motion. (R.114).

On September 21, 2006, Richards filed a Motion to Dismiss Multiplicitous Counts in the Second Superseding Indictment with supporting Memorandum of Law. (R.131, 132). On October 2, 2006, the district court entered an Order denying the Motion. (R.160).

The trial began before the Honorable Aleta Trauger on October 10, 2006 and concluded with a mixed verdict of "guilty" and "not guilty" findings on October 26,

¹ Count 27 was severed and later dismissed. (R.165, 230)

2006. (R.203). The jury found Richards guilty of Counts 1, 2, 3, 11, 16, 19, 20, 21, 22, 23 and 24, and acquitted him of Counts 4, 5, 6, 7, 9, 12, 15, 18, 25 and 26.² (Id).

On October 22, 2008, Richards filed a Motion to Vacate his Convictions for Production and Advertising (each carrying 15 year mandatory minimums). (R.363, 364). The district court entered an Order denying the Motion. (R. 383).

On November 7, 2008, the district court sentenced Richards to 16 years incarceration, 8 years of supervised release, and a special assessment of \$1,100.00. (R.386). The Judgment and Commitment Order was entered on November 20, 2008 and amended on December 1, 2008.³ (R.386, 387, 392, 393). On November 26, 2008, Richards timely filed a Notice of Appeal, challenging his conviction. (R.390). On December 10, 2008, the government filed a Notice of Appeal, challenging the sentence. (R.397).

² At various stages of the trial and upon motion either by the government or the defendant, the district court dismissed Counts 8, 10, 13, 14, and 17. (R.176, 189 & 196).

³ The only change in the Amended Judgment and Commitment Order related to forfeiture, which is not an issue raised on appeal.

STATEMENT OF THE FACTS

There is nothing typical about this child pornography case. The charges originated from a sensational account of events by immunized, teen porn star and child pornographer, Justin Berry,⁴ and culminated in a trial dominated by proof of the consensual and jointly filmed sexual relationship between 2, openly gay lovers and business partners in the adult pornography business who were 4 years apart in age - Tim Richards (stage name “Casey”) and Pat Lombardi (stage name “Kyle”). Richards (and Lombardi after turning 18) operated a series of adult websites: CaseyandKylesCondo.com (later renamed CaseysCondo.com), PenisClub.com, and JustinsFriends.net (formerly Justin Berry’s site, JustinsFriends.com).

Simply put, the main issues at trial were: (1) whether Lombardi was a minor in the still images and videos depicting him; (2) whether Richards knew that “Taylor” was a minor in a single video produced by and starring Justin Berry; and, (3) whether Chris Billings (aka “Tory”) was a minor in 2 versions of the same pornographic video. Implicit in the jury’s verdict was a finding that Lombardi was a minor in some content but an adult in most of the content, that Richards knew “Taylor” was a minor and that

⁴ Berry’s wild account spawned a New York Times article, an appearance on the Oprah Winfrey Show and Congressional testimony - all before the government got wise to his deception.

Billings was an adult in the “Tory” content. (R.365, Synopsis of Trial Proof, pp.53-54).

A. Search Warrant for the BlackSun Computer Web Server:

On September 12, 2005, the government executed a search warrant on the server containing the JustinsFriends website which was being housed in Los Angeles at BlackSun Technologies.⁵ (R.81, Motion to Suppress, Exhibit A). Agents seized the 2 hard drives in the server. One of the drives was imaged on-site, and the other was imaged at the lab and returned to BlackSun the following day. At trial, the contents of these 2 drives were referred to as either the “LA server” or the “BlackSun server.” (Bernard Riedel, TTR Vol. II, pp.74-80, 85).

The probable cause for the search pertains exclusively to the JustinsFriends website. The Affidavit speaks historically of Justin Berry’s developing interest in the internet and his generating income from his own pornographic websites (specifically justinsfriends.com and mexicofriends.com) while he was still a minor. Berry was assisted by Gregory Mitchel, who had a sexual relationship with Berry while Berry was a minor. The Affidavit reports that Mitchel produced child pornography videos

⁵ Simultaneously, the government executed a search warrant on the server containing a payment processing website known as “Neova.net” which was housed at the Hurricane Electric facility in Fremont, California. The single hard drive server was imaged on-site. This server was referred to throughout the proof as the Hurricane Electric server, the Fremont server or the Neova server. (TTR Vol. II, pp.88-93, 102). The Affidavits are virtually identical.

in his own home featuring Berry (after turning 18) and a boy identified with stagename “Taylor” (who was 14 at the time). The Affidavit states that those videos were later “uploaded” onto the JustinsFriends.com website and could be previewed from the site. Berry identified the “Taylor video” and an undercover FBI agent independently viewed the video on the JustinsFriends website. According to Berry, he abandoned the child pornography industry (including his association with justinsfriends.com) “in or about June or July 2005,” which apparently infuriated Mitchel. The Affidavit declares that Mitchel “control[ed] the content of the justinsfriends website as well as receive[d] the profits from the site.” The Affiant traced the JustinsFriends website to the BlackSun server and the payment processor for the JustinsFriends site to the Neova sever. (R.81, Motion to Suppress, Exhibit A, pp. 12-20).

Clearly, the search warrant for the BlackSun computer server (a virtual, shared, web hosting server) targeted the content of the JustinsFriends website which the government believed would contain child pornography. (Id). The content of the JustinsFriends website was located in a single directory on 1 of the 2 hard drives, although it shared the same IP address with the 6 other websites housed on the same hard drive. (R.162, Suppression Hearing 7/24/06, pp.167, 177-178, 193-197). That same hard drive contained a total of 7 file directories labeled: “CandKCondo.com,”

“condodollars.com,” “gayreallife.com,” “JustinsFriends.net,” “MangoMetro.us,” “PenisClub.com,” and “Premium.ckcondo.com.” (R.162, Suppression Hearing 7/24/06, pp.167, 193-197). Each website had its own operator who controlled content on the individual website and had access only to that content. (Id). However, the server administrator had control over and access to everything on the server. (Id). The government did not know who the administrator was at the time of application for the search warrant or 10 months later at the Suppression Hearing. (R.162, Suppression Hearing 7/24/06, pp.196-199).

To simplify matters by way of analogy, the government’s own forensic expert, James Fottrell, testified that the BlackSun facility was like an apartment complex. Each web server located within the facility was like an individual apartment, and each website on the web server was like a locked room within the apartment - although he admitted that each website operator would not necessarily know the other sites or operators on the server (as if each room had a separate, locking entrance). Each website operator had control over the website and the file directories associated with it, but could not alter content on other sites or in other directories unless that operator was also the administrator of the server. (R.162, Suppression Hearing 7/24/06, pp.202-204, 216-227). At the time of the search and at the time of the Suppression Hearing, the government had no evidence that the operator(s) of the JustinsFriends

website were also administrators of the servers or that they had operational control over the other websites on the server. (Id). Nonetheless, the government imaged both hard drives associated with the BlackSun server and searched every space (including all websites on the server) on both hard drives for child pornography. (Id). This is how the government stumbled onto Richards' adult pornographic websites (CaseyandKylesCondo (later renamed CaseysCondo) and PenisClub) and his financial site (CondoDollars).

Fruits of the search of the BlackSun server were essential components of Richards' prosecution. Richards challenged these search warrants on grounds of overbreadth and lack of particularity (R.80 & 81), but following an evidentiary hearing on July 24, 2006, the district court denied his Motion. (R.162, Suppression Hearing 7/24/06, pp.169-256; R.101, Order).

B. Pretrial Identification of Images:

The government made many inaccurate representations to the district court about the nature and extent of Richards' activities and the evidence it would use in its case-in-chief. On January 13, 2006, the district court noted instructed the government to identify evidence to be used in its case-in-chief. (R.71, Detention Appeal Hearing Transcript, p.141).

Because the government did not comply, on May 19, 2006, the defense was filed a formal Motion for Identification of Images pursuant to Rule 16. (R.77). At the July 24, 2006 evidentiary hearing on multiple issues, the following exchange occurred between counsel and the district court:

MR. STRIANSE: . . . [A]ll I want is them to get on their feet and tell the court what image or images that they intend to offer in the case. . . . They have bristled -- over the last ten months, every time I have gotten on my feet and told the court we are aware of one alleged image involving one underage performer, the government flops around on the floor every time I say that, and they have never once, whether it's the original indictment, the superseding indictment, pointed to any other image....I don't know why the government can't tell the court, we have a photo, we have a video, this is what we're going to offer at the trial. I just don't understand it.

MS. BAKSHI: ...[T]here's not a question of whether or not there is more than one video. There are thousands and thousands and thousands of images of pornography.

THE COURT: If you already know that, just pick your best and go with it.

(R.162, Suppression Hearing 7/24/06, pp.256-258). Judge Trauger granted the Motion and ordered the government to identify evidence for use in its case-in-chief by August 25, 2006. (R.101). On August 25, 2006 and August 28, 2006, the government "identified" 20,429 computer files (mainly images and graphics) for use in its case-in-chief.

On August 30, 2006, Richards filed a Motion to Compel the Government to Comply with the Court's Order granting Identification of Images. (R.105). The government filed a Response to the Motion to Compel which was loaded with histrionic exaggerations in an attempt to justify its massive identification:

Defendant is an egregious child pornography offender. For the several years preceding his apprehension, he apparently did nothing other than utilize his computer talent and energy to create pornography for personal consumption and commercial distribution. He and his co-conspirators created a nefarious empire of child pornography that occupied multiple servers and dozens of personal computers, including the nine seized from defendant's home. The fact that there is a long list of identified files reflects the fact that [the] defendant committed numerous crimes.

.....

The government is entitled to show the jury and this Court the gross nature and massive scope of defendant's crimes.

(R.108, pp.5-6, 9-10).

Then, at the September 7, 2006 hearing on the Motion to Compel, the following exchange occurred:

THE COURT: ...In terms of the exact images, the Government asserts that it is going to be using in some way everything they've given you, even though it's 20,000 images and even though it's flowers and other things. They have asserted that things of that nature are relevant because they help establish what was posted where and the duplication of what was sorted, what was published,

multiple versions. And they claim that has evidentiary value. Is that correct?

BAKSHI: ...Other than [a few erroneous inclusions], we do expect to introduce all of this stuff.

.....

THE COURT: So I don't know what more I can – I mean they assert that basically what they have given you is going to be used in some way.... If they assert they're going to use all 20,000, then you all just have to do the best you can. I don't know what else I can do.

(R.241, Pretrial Hearing 9/7/06, pp.14-16). Because the government assured the Court it would use all of the files and images, the district court's hands were tied and the Motion to Compel Identification was denied. (R.114). This meant that the defense had to prepare to defend against the introduction of over 20,000 identified files.

Throughout the course of the trial, defense counsel objected to the introduction of materials beyond the scope of the 20,000 images, and reminded the district court of the government's gross pretrial misrepresentation that it would use all 20,000 images, when it, in fact, used less than 100 (many of those being duplicates of the same image). (R.213; TTR IV, pp.583-584). The district court took no action against the government.

C. Overview of Trial Proof:

On October 10, 2006, the trial of this complicated matter began. Consistent with its pretrial representations, the government continued to overreach throughout the trial - pushing evidentiary and constitutional boundaries. The government conducted a trial by proxy - carefully avoiding advancing testimony from 2 of 3 “victim” witnesses (“Tory” and “Taylor”) and all of the alleged coconspirators (immunized cooperator Justin Berry, cooperator Greg Mitchel, and cooperator Aaron Brown). Rather, the government sanitized its case by presenting mainly law enforcement witnesses and forensic computer experts and Lombardi (the disgruntled ex-boyfriend, and ex-business partner).

1. Age Labeling on the Exhibits:

The great majority of SA Donahue’s testimony on the first day of trial proof⁶ consisted of identifying the websites⁷ and a series of sexually explicit exhibits (each

⁶ SA Donahue testified several times during the course of the trial.

⁷ The government tried to leave the jury with the impression that Richards’ websites (CaseysCondo.com, CaseyandKylesCondo.com, PenisClub.com and JustinsFriends.net) were all “commercial child pornography websites” because the sites were marked with certain distinguishing features. (R.211, TTR Vol. II, pp.147-159, 160-162, 225). On cross-examination, however, SA Donahue clarified that each of his child pornography website generalizations were not actual trademarks of child pornography sites; rather, they are features of most websites, including adult pornographic sites and non-pornographic sites. (R.211, TTR Vol. II, pp.228-234). The proof demonstrated that Richards’ sites lacked the indicia of commercial child pornography sites. (R.211, TTR Vol. II,

(continued...)

on a separate disc) that the government claimed it would later connect-up and make relevant through the testimony of Pat Lombardi. (R.211, TTR Vol. II, pp.120-147, 163-173, 183-191). Each of disc was marked with a number which corresponded to the age Lombardi claimed to be in the depiction when interviewed prior to trial. (R.211, TTR Vol. II, pp.120-122, 132-147). The district court agreed with the defense objection that the age labeling on the discs was improper, holding that, even with testimony about Lombardi's age, the age label would not come into evidence. (Id). After the exhibits were provisionally admitted, over defense counsel's objection to playing the video without proper authentication and during Donahue's testimony rather than Lombardi's testimony, the government played pornographic videos and displayed pornographic images repeatedly rehashing the same testimony about the

⁷(...continued)
pp.234-239).

exhibits (their origin, who they depicted, etc.) *ad nauseam*.⁸ (R.211,TTR Vol. II, pp.120-122, 132-147, 180-183, 199-228).

Then. Lombardi testified in an effort to link-up the previously admitted and displayed video and photographic evidence. Lombardi was born in July of 1985, and therefore, turned 18 in July of 2003. He was 21 at the time of his testimony. (R.212,TTR Vol. III, pp.279, 329).

Lombardi met Tim Richards in May of 2000 when he was living at home with his family in Barnstable, Massachusetts. (R.212,TTR Vol. III, pp.279-283). Lombardi ran away from home to be with Richards, but returned home shortly thereafter. (R.212,TTR Vol. III, pp.281-288). Lombardi was 14, and Richards had just turned 18 at the time. (R.212,TTR Vol. III, p.288).

After Lombardi turned 15, Richards and Lombardi began a relationship on the weekends with the approval of both sets of parents. (R.212,TTR Vol. III, pp.291-

⁸ On several occasions, the district court made observations that the proof was unnecessarily long and repetitive. (R.211,TTR Vol. II, p.207). The defense objected to the repetitive testimony and display as being “like groundhog day.” (R.211,TTR Vol. II, p.216). Judge Trauger grew frustrated with the government’s disorganization and tactics:

I’m getting tired of the repetitive nature of this proof, folks. This is very difficult proof for the jury to watch. We don’t need to see anything twice, so please get yourselves organized.

(R.211,TTR Vol. II, p.219).

292). At first, either Richards would visit Lombardi in Barnstable, or Lombardi would visit Richards at his newly purchased house in Everett, Massachusetts. (R.212,TTR Vol. III, pp.292-293). Lombardi claimed that, when he was at least 16½ or older (dated by his recollection of being able to drive a car and having a MA drivers license), Richards sold his Everett home and moved in with Lombardi and his family in Barnstable where they lived for several months. (R.212,TTR Vol. III, p.294). Then, Lombardi and Richards moved to Ellicott City, Maryland to live with Richards' parents where Lombardi estimated they lived for almost a year. (R.212,TTR Vol. III, pp.294-296). Finally, Lombardi stated that, when he was still 17, he and Richards moved to Florida. (Id).

The government then shifted focus to a discussion of Lombardi's own experience with websites and pornography, Richards' websites, and the production of alleged child pornography. Lombardi testified that Richards (then 18) was in the adult entertainment business when they met. (R.212,TTR Vol. III, pp.296-298). Richards also operated his own payment processing business, Nimenet.com. (Id). By way of contrast, Lombardi testified that he was not in pornography when they met and claimed he never had a website before meeting Richards. (R.212,TTR Vol. III, pp.296-300). He claimed to start his first website, KylesRoom, when he was 15. (Id) Lombardi said it had no sexual content; although, he did admit there were suggestive

photos. (Id). Lombardi said Richards set up a billing system for his KylesRoom website on Neova.net. (R.212,TTR Vol. III, pp.300-302). Lombardi testified that KylesRoom operated for approximately 2 years, until he turned 18 and he and Richards converted CaseysApartment (Richards' adult site) into a joint adult pornographic site (CaseyandKylesCondo). (Id). Lombardi declared that CaseyandKylesCondo went online 1 week after Lombardi turned 18. (R.212,TTR Vol. III, p.302).

On direct examination, Lombardi insisted that all of the content of him on CaseyandKylesCondo was underage content. (R.212,TTR Vol. III, p.324). He also testified that the underage content was created throughout the course of their relationship. (R.212,TTR Vol. III, pp.304-321). Lombardi admitted that he was in a consensual, parent approved relationship with Richards and that he wanted to make the videos. (R.212,TTR Vol. III, pp.291-292, 304-305). He stated that Richards knew that anything created before he turned 18 was child pornography, and that Richards was careful not to use the images until after Lombardi turned 18. (R.212,TTR Vol. III, pp.303, 305-306). According to Lombardi, Richards told him to say he was 18 if asked. (Id).

Lombardi claimed that Richards recorded underage content of him throughout the United States and in Iceland and Australia. (R.212,TTR Vol. III, p.307).

Lombardi identified a series of discs he previously marked with locations and ages as follows:

- Exhibit 12 = provocative, clothed still images taken at age 14 in Barnstable, MA (R.212,TTR Vol. III, pp.307-308);
- Exhibit 11B = Everett, MA at age 15 (R.212,TTR Vol. III, p.309);
- Exhibit 7B = Sydney, Australia at age 16-17 (R.212,TTR Vol. III, p.310);
- Exhibit 14 = Reykjavik, Iceland at age 16-17 (Id);
- Exhibit 6 = Bethany Beach, DE at age 17 (R.212,TTR Vol. III, pp.311-312);
- Exhibit 10B = Bethany Beach, DE at age 16-17 (Id);
- Exhibit 15 = Ellicott City, MD at age 16-17 (R.212,TTR Vol. III, p.312);
- Exhibit 8 = Ellicott City, MD at age 17 (Id);
- Exhibit 18 = Bethany Beach, DE at age 17 (R.212,TTR Vol. III, p.313);
- Exhibit 31 = Everett, MA at age 15 (R.212,TTR Vol. III, p.328).

Although Lombardi admitted that he and Richards produced pornography of themselves after he turned 18, Lombardi claimed that each of the aforementioned exhibits contained underage content. (R.212,TTR Vol. III, p.315). Lombardi identified the various locations because he recognized bedding, decor or furniture; he dated (or assigned ages to) the images using his dog's age, dates of travel⁹ and his

⁹ Lombardi identified dates of his international travel using his passport. (R.212,TTR Vol. III, pp.316-318). He traveled to Australia from November 19-24, 2002 and to Iceland in February 2003 - making him 17 at the time of both

(continued...)

recollection of being in those locations at certain ages. (R.212,TTR Vol. III, pp.314-316).

Lombardi testified that he and Richards ended their relationship in December (around Christmas) of 2003 - almost 6 months after he turned 18. (R.212,TTR Vol. III, pp.322-323). Lombardi claimed that, after the break-up, Richards had exclusive control over CaseyandKylesCondo. (Id). Lombardi stated that after the breakup he logged using a friend's password and saw that Richards was using underage content of him. (R.212,TTR Vol. III, pp.325-327). Lombardi's direct concluded with a declaration about how he felt used by Richards. (R.212,TTR Vol. III, p.327).

On cross-examination, Lombardi was thoroughly impeached about his slanted recollections and outright lies throughout the direct. With hostility, Lombardi initially denied having much computer knowledge and denied assisting in the design and launch of CaseyandKylesCondo. (R.212,TTR Vol. III, p.330). He did not recall that the website was actually launched months (not 1 week) after he turned 18. (Id). He admitted that he shared in the profits from the site and participated in the filming - many times operating the camera himself. (R.212,TTR Vol. III, pp.332-333).

⁹(...continued)
trips. (Id). Lombardi claimed that Richards paid for everything involved in the trips using money earned from his websites. (R.212,TTR Vol. III, pp.316, 321).

Lombardi admitted that Richards was in high school during the year they met. (R.212,TTR Vol. III, p.334). He and Richards were both virgins at the time. (R.212,TTR Vol. III, p.335). They were the same weight and build. (Id). He and Richards had a consensual, committed relationship for almost 4 years. (R.212,TTR Vol. III, pp.334-335, 359-360, 370-373). Richards never abused him or forced him to do anything. (Id). Lombardi wanted to be in the pornography business and was a willing participant in both the sexual interactions and the production of images. (Id). During their 4 year relationship, both Lombardi's and Richards' parents accepted and approved of the relationship. (Id).

Lombardi hesitantly admitted that, before he met Richards, he had sexual experiences on the internet. (R.212,TTR Vol. III, pp.335-338). In the face of being confronted with his website (Camerads), he admitted he operated a website before meeting Richards. (Id). Lombardi further admitted that, using his Camerads website, he would broadcast live web cam masturbation shows of himself. (Id). Inspired by his father's conduct (filming himself and uploading it onto the web to meet women), Lombardi started emailing and posting footage of himself on the web. (Id). Before he ever met Richards, he was having cybersex with people he met online. (Id).

Also, upon cross-examination, Lombardi admitted that he had a relationship with Alex Richards (an older man living in Bermuda and no relation to Tim Richards)

who actually paid for the international travel that Lombardi falsely attributed to the defendant, Tim Richards. (R.212,TTR Vol. III, pp.344-346). Lombardi eventually disclosed that Alex Richards lavished gifts directly on Lombardi such as trips, a \$8,000 down payment on a car and a \$6,500 watch. (Id).

Lombardi was also impeached with his own journal entries complaining about how Tim Richards would not let him participate in pornography until after he was 18. (R.212,TTR Vol. III, pp.347-354). Lombardi recorded and wrote journals throughout the 2 or more years that he operated his KylesRoom site. (Id). The universal themes of the entries were: (1) that Richards disapproved of Lombardi's creation and use of sexually suggestive content while underage and refused to help with the site; and, (2) that Richards threatened to break-up with him if he posed nude on the site. (Id). Lombardi admitted that Richards did not approve of him taking photos of himself and placing them on KylesRoom. (R.212,TTR Vol. III, pp.349-350).

Lombardi conceded that he was having difficulty remembering the dates when images were created. (R.212,TTR Vol. III, pp.355-356). Despite his prior testimony (that he was 17), he admitted that he was actually 18 when they moved to Florida. (Id). Upon having his recollection refreshed, he recalled that the Florida home was not finished until after he turned 18. (Id). He admitted that he dated some of the exhibits by the dog's age, claiming he was 16 when he acquired the dog. (R.212,TTR

Vol. III, pp.356-357). Lombardi was confronted with vet records showing the dog's age and dating Lombardi as 17 (not 16) when he got the dog.¹⁰ (Id). He also admitted that the same video he incorrectly dated by reference to the dog's age displayed a watermark giving the video's creation date as December of 2003 - after Lombardi turned 18. (R.212,TTR Vol. III, pp.357-358).

Lombardi was impeached about the ages he assigned to other video exhibits as well. He agreed that he told the FBI he was 18 in the "welcome video," and that he did appear with Jeremy Moeder and Richards in that video - despite prior conflicting testimony. (R.212,TTR Vol. III, p.361). Generally, Lombardi's direct left the false impression that he was only present in most locations when he was a minor, and on cross, he admitted that was not true. (R.212,TTR Vol. III, pp.363-365). Once confronted with his own American Express bill showing he was in Ellicott City, Maryland in August of 2003, Lombardi conceded that he and Richards were there together after he turned 18 and while they were still dating. (R.212,TTR Vol. III, pp.363-365). He also admitted that he lived in Maryland with Richards for a year - spanning his 18th birthday. (R.212,TTR Vol. III, p.365).

¹⁰ The dog was a fully grown, adult Jack Russell terrier in several versions of the same video- making Lombardi 18 in the images. (Id).

Lombardi also admitted that he and Richards recorded themselves after he turned 18. (R.212,TTR Vol. III, pp.369-371). Contrary to his direct-examination testimony, Lombardi acknowledged that, even after they ended their relationship, they continued to work together on CaseyandKylesCondo and make recordings together for the site until March of 2004 - 7 months after Lombardi turned 18. (Id). Lombardi also stated that he harbored animosity toward Richards - even writing an October, 2005 journal entry threatening to get revenge on and do harm to Richards. (R.212,TTR Vol. III, pp.374-375).

After Lombardi testified and despite the questionable accuracy of the ages on the disc exhibit labels, the district court reversed its prior ruling, permitting the evidence with Lombardi's age notations to go into evidence and into the jury's deliberations.

THE COURT: Okay. We had discussed before the notations on the disks because when they were offered before they were offered through the agent when this witness is the one who had put the notations on the disks. It seems to me that at this point those notations have been authenticated. They are his notations, and I had previously said we would strike all the ages off of there, but I'm not sure that that seems appropriate to me at this point.

STRIANSE: Your Honor, I do acknowledge that he's identified them. I do acknowledge that he's identified his initials and the dates. I just don't like the imprimatur, if you will, of seeing those ages written on there. It in some ways

invades the province of the jury's recollection of the cross-examination. It's sort of like, well, I'm seeing it here in black and white, it's 16 or 17, so that resolves any conflict in favor of the exhibit. It may attach too much significance to it. That's my only fear.

THE COURT: Okay. I think I'm going to overrule your objection. He has fully testified about that. You have cross-examined him and impeached him on things, and it seems to me the jury is either going to believe these things or not, so -- because they have been -- the notations have been fully authenticated, I'm going to overrule your objection.

(R.212,TTR Vol. III, pp.394-395).

2. *Denial of Cross-Examination of Jeremy Moeder:*

In an attempt to muddy Richards, the government next called Jeremy Moeder (“Jer”). Moeder testified that he had been “living the dream” in London, England working in the computer business since 2005. (R.212,TTR Vol. III, pp.413-415). The government bolstered his credibility as a witness by referencing his handling of recently declassified Army materials for an independent contractor working with the troops in Iraq. (Id). He recounted his relationship with Richards and his own involvement with adult pornographic sites. (R.212,TTR Vol. III, pp.416-419). In August of 2003, after Lombardi turned 18, Moeder and his boyfriend, Matt, planed to move in with Richards and Lombardi in the Florida house and to contribute content for CaseyandKylesCondo. (R.212,TTR Vol. III, p.428). Moeder testified that he

would not be associated with CaseyandKylesCondo if he had known there was child pornography on the site. (R.212,TTR Vol. III, pp.428-429). Moeder stated that he moved out around Thanksgiving of 2003 because he became “uncomfortable with the environment” and decided to “break ties with Tim.” (R.212,TTR Vol. III, pp.431-432). Moeder concluded his testimony with the declaration that he would never have children or child pornography on his websites. (R.212,TTR Vol. III, p.436).

A long jury out hearing ensued. Despite Moeder’s self-portrayal as a law-abiding, pornography-reformed citizen who disapproved of child pornography and Tim Richards, he admitted that he had sex with underage boys in both Las Vegas and Tennessee. He also admitted that he filmed himself performing oral sex on a 15 year old from Silverado High School in Las Vegas, although he claimed he did not post it on the internet. (R.212,TTR Vol. III, pp.437-441). The district court precluded the defense from impeaching Moeder’s character and self-portrayal because, although Moeder admitted to producing child pornography and engaging in sex with minors, he did not publish the child pornography on a website. (R.212,TTR Vol. III, pp.440-441). The defense moved for a mistrial, and the motion was denied. (R.212,TTR Vol. III, p.442).

3. *Forensic Proof on Multiplicity and Improper Interpretation of Verotel Email by Witsman:*

The government advanced 2 computer forensic experts. James Fottrell, a computer forensic analyst and supervisor with the Department of Justice, Child Exploitation and Obscenity Section, provided background information about the operation and storage of information on computers and computer servers. (R.213,TTR Vol. IV, pp.501-505, 534-535). Fottrell testified to the content of each website in issue and commented on the significance of his forensic observations. He began with an examination of CaseysCondo. (R.213,TTR Vol. IV, pp. 540-565). He explained the operation of the site, stating that the forensic examination was made easy by the directory structure of the BlackSun server which stored content in directories named for the websites. (Id.).

Fottrell next testified about the CaseyandKylesCondo site. (R.213,TTR Vol. IV, pp.566-604). Like with CaseysCondo, Fottrell testified about the various pages, made a comparison of content with previously identified exhibits and spoke to features he found to have particular forensic importance. (Id). He identified the images from the welcome video (“welcome.wmv”) seen on the site (Exhibit 56) as being the same video previously admitted into evidence as Exhibit 25.

Fottrell also examined the PenisClub site and again, compared images previously admitted (Exhibit 18, KyleBJ.wmv) with thumbnail still images from the video on the site. (R.213,TTR Vol. IV, pp.605-618). He briefly examined web

access logs and HTML pages for the site. (R.213,TTR Vol. IV, p.608). Fottrell testified that PenisClub advertised the sale of a videotape, titled “Vegas 2002,” which could be purchased through a customer’s PayPal account. (R.213,TTR Vol. IV, pp.610-618). He explained how a PayPal transaction worked and recalled a trend of selling VHS tapes in the 2002 to 2003 range. (Id).

Likewise, Fottrell testified about the JustinsFriends site. (R.213,TTR Vol. IV, pp.618-659). Fottrell stated the JustinsFriends.net site opened on June 19, 2005. (R.213,TTR Vol. IV, p.619). He identified a still image of “Taylor” from the site (Exhibit 63) which was the same image (Taylor.jpg, Exhibit 23) previously admitted. (R.213,TTR Vol. IV, pp.639-641). Fottrell noted that the image of “Taylor” on the JustinsFriends.net site contained an imbedded “JustinsFriends.com” watermark. (Id). He also testified that “fucking.wmv” and “JF_Fucking.wmv” were identical videos. (R.213,TTR Vol. IV, pp. 654-657). The “JF_fucking.wmv” video contained a watermark or logo stamp of the JustinsFriends.com site which Fottrell opined was an advertisement for JustinsFriends. (Id). Again, Fottrell reiterated the simplicity of the BlackSun server’s file directories and confirmed that the content for the JustinsFriends site was stored entirely within the “JustinsFriends” folder. (R.213,TTR Vol. IV, p.657).

By stipulation, the parties agreed that certain website domain names were registered to Defendant Richards during certain times. PenisClub was registered to Richards for 1 month from October to November, 2003. JustinsFriends.net was registered to Richards for 1 year beginning July 16, 2005.¹¹ CaseysCondo was registered to Richards from January 14, 2005 to January 14, 2007. (R.213,TTR Vol. IV, pp.659-660, Exhibit 35).

Fottrell then focused on his investigation of the various websites' 2257 compliance. He stated that the 2257 compliance requirements were a hot topic of discussion in the adult industry. (R.213,TTR Vol. IV, pp.663-677). He stated that the law required the posting of a physical address where performers' age verification records could be located and inspected. (Id).

Fottrell explained some basics about the government's IIS (operating system) exhibits and the concept of virtual web hosting. (R.213,TTR Vol. IV, pp.683-690). By examining the IIS screen prints, Fottrell could see that the CaseysCondo site pulled its content from the CaseyandKylesCondo folder, and the premium side of the

¹¹ The site was only operational until September 12, 2005 when the BlackSun search warrant was executed.

CaseysCondo site pulled its content from the premium CaseyandKylesCondo folder.¹² (R.213,TTR Vol. IV, p.690).

By the time of trial, Fottrell finally determined that the administrators for the BlackSun server were Aaron Brown, Richards (“Casey”) and “Zack.” (R.213,TTR Vol. IV, pp.694-695). He could see that the server gave remote access to the inner workings of the sites to Richards and other administrators. (R.213,TTR Vol. IV, pp.696-697).

Fottrell concluded his direct examination with testimony about the “justinpreview2.wmv” file on the JustinsFriends site. (R.213,TTR Vol. IV, pp.722-726). Fottrell read the motto crafted by Berry (“often imitated but never duplicated”) and another of Berry’s declarations on the site (“new Justin content owned by Justin himself”). (Id). These Berry trademark statements were immediately adjacent to the box where the video clip of “justinspreview2.wmv” would have played on the site. (Id). Fottrell testified that the preview video was an advertisement for the JustinsFriends website. (Id).

On cross-examination, Fottrell conceded that he made some assumptions about where images were recorded by looking at the names in file directories - something

¹² SA Donahue also testified that both CaseysCondo and CaseyandKylesCondo derived their content from the same directory (the CaseysCondo folder) on the BlackSun server. (R.211,TTR Vol. II, p.163).

Fottrell previously warned at the Suppression Hearing was not good forensics. (R.209,TTR Vol. V, pp.732-733). When questioned about the “Vegas 2002” video advertisement, Fottrell discovered that the advertisement was actually located in the WebCamFam directory on the Neova server - to which Richards had no administrative access. (R.209,TTR Vol. V, pp.738-740). Fottrell also clarified that he left the wrong impression about the links on the JustinsFriends site. Upon closer review of the exhibit, he realized that those tabs (which he characterized as links on JustinsFriends) were actually representative of what he had open on his own computer at the time of the screen print. (R.209,TTR Vol. V, pp.740-741).

Fottrell was able to forensically confirm that JustinsFriends.com existed prior to Richards’ involvement. (R.209,TTR Vol. V, pp.744-749). The site was launched on June 18, 2005 from the Neova server,¹³ but it was not until July 16, 2005 that Richards registered the name JustinsFriends.net and uploaded the content to the BlackSun server. (R.209,TTR Vol. V, pp.744-747). There was no forensic evidence that Richards put together the content for the JustinsFriends.com site. (R.209,TTR Vol. V, pp.747-749).

¹³ The Neova server administrators were Aaron Brown, Jeremy Moeder and “Casa.” (R.209,TTR Vol. V, p.746).

For the CaseyandKylesCondo and CaseysCondo sites, Fottrell agreed that both sites pulled content from the same directory on the BlackSun server. (R.209,TTR Vol. V, pp.749-750, 794-796). He further agreed the pages on both sites shared the exact same file paths and used the same HTML code. (Id). Most importantly, Fottrell agreed that CaseysCondo was simply a newer version of the CaseyandKylesCondo site. (Id). CaseyandKylesCondo morphed into CaseysCondo. (Id). The sites never co-existed or overlapped in operation. (R.209,TTR Vol. V, pp.749-755). One was simply a revised and renamed version of the other. (Id).

Despite Ms. Bakshi's incessant attempts to characterize Richards' sites as "child pornography sites," Fottrell agreed with the defense that these were adult sites containing thousands of clearly adult images. (R.209,TTR Vol. V, pp.758-759). When defense counsel estimated the percentage of alleged child pornography content on these sites as less than 1% of the total content, Fottrell agreed, stating that it would be a fraction of 1%. (Id).

Fottrell also conceded that none of his many forensic tools (file properties, web access logs, FTP logs, windows media server logs, HTML code or metadata) available to help date the Lombardi or Billings images in dispute revealed a creation or production date before their respective 18th birthdays. (R.209,TTR Vol. V, pp.734-736, 759-770).

The government called a second computer expert, Kristi Witsman, to prove that Richards created and uploaded content from his home computer to the CaseysCondo, CaseyandKylesCondo and PenisClub sites; she did so by comparing exhibits showing that files (graphics, movies, site templates, and specific images) found on the server were also on Richards' home computers.¹⁴ (R.209,TTR Vol. V, pp.832-840, 850-853). Additionally, Witsman explored a number of emails found on Richards' home computers and interpreted the significance of those emails. (R.209,TTR Vol. V, pp.830-832, 836-838, 840-846, 858-871, 876-882).

In Richards' email files, Witsman found an email exchange between Richards (using nb15@hotmail.com) and Verotel (a European payment processor for CaseyandKylesCondo). (R.209,TTR Vol. V, pp.840-846, Exhibit 84). In Richards' email to Verotel on January 14, 2005, he inquired as to why payment was being delayed. (Id). Witsman then read a portion of Verotel's response to Richards dated March 27, 2005:

Dear Casey. The account is in pre-authorized at the moment. This is because some time ago we had to suspend some sites because of "underage content." After we did that, some customers had complained that they weren't able to access the sites although they had paid for it.

¹⁴ Richards never contested that he created CaseyandKylesCondo, CaseysCondo or PenisClub or that he placed them on the server. He insisted that the performers (Lombardi and Billings) were adults in the images.

(Id). The clear implication that the government sought to leave with the jury was that Verotel found “underage content” (or child pornography) on CaseyandKylesCondo or other sites belonging to Richards.¹⁵

On cross-examination, Witsman reluctantly admitted that the government was focusing the jury’s attention on a few (out of thousands) emails on the home computer. (R.209,TTR Vol. V, p.896). She conceded that it “probably appeared” that she placed great emphasis on the words, “underage content,” in the Verotel email. (R.209,TTR Vol. V, pp.897-898). She also admitted that she did not interview anyone at Verotel and did not know what the dispute was really about. (Id).

4. *Richards’ Trial Testimony:*

Richards testified in his own defense. He explained his own background, his interest in computers, his website history (pornographic and otherwise), the history

¹⁵ After trial, the defense discovered how Verotel defines “underage content.” According to Verotel’s “Content Compliance Policy,” the company defines “underage content” as follows:

Verotel DOES NOT process transactions for websites displaying “underage” or related content. Under age content is ANY content with at least one PERSON (male or female) that appears to be under 18 years of age regardless of actual age or IS under 18 years of age - in any situation - fully dressed, semi-dressed or undressed, where it is not important if one of these persons is engaged in sexual conduct.

(R.265, Motion for New Trial, Exhibit C).

of his relationship with Lombardi, and the creation, operation and content of each website. (R.214,TTR Vol. VI, pp.970-1009). Richards testified that CaseysCondo and CaseyandKylesCondo were the same site. (R.214,TTR Vol. VI, pp.1009-1011). On October 17, 2003, Richards and Lombardi launched CaseyandKylesCondo. (Id). In early 2005, Richards changed the name of the site to CaseysCondo and changed a few pages to reflect the new name. (Id). The sites never overlapped in existence or operation. (Id). If a user typed in the domain name for either site, it took the user to the same place. (Id). The sites were interchangeable. (Id).

Richards also offered clarity to Lombardi's defective recollections of ages through the use of many defense exhibits - corroborating that Lombardi was 18 in the locations or films. (R.214,TTR Vol. VI, pp.1012-1050).

Richards addressed his involvement in the JustinsFriends site. The site was created by, operated by, and featured Justin Berry, a competitor of Richards' in webcam-based adult pornography. (R.214,TTR Vol. VI, pp.1050-1052). Berry fancied himself to be a star of the adult industry. (Id). When Richards first interacted with Berry in June of 2005, Berry was 18 (about to turn 19) - although Richards thought he was older. (Id). Richards never met Berry personally, but they previously swapped content and cross-promoted their respective sites. (Id).

Berry first contacted Richards by IM (instant message) on June 17, 2005. (Id). Berry was having problems with his site (JustinsFriends.com), particularly with his HTML code. (R.214,TTR Vol. VI, pp.1052-1054). On June 17, 2005, Richards provided some free assistance, which soon evolved into a business relationship. In June 2005, Richards browsed Berry's site, looking at performer biographies including the one for "Taylor" that claimed he was 18. (Id). Richards had no role in creating any of the content. (R.214,TTR Vol. VI, p.1054, Defense Exhibit 17).

Berry asked Richards to edit a preview video for the site to entice users to join. (R.214,TTR Vol. VI, pp.1055-1057). Berry selected content that he wanted included in the video and forwarded it to Richards for editing. (Id). Richards recognized some of the performers but not others. (Id). When Richards finished the preview, it did not include any of the "Taylor video." Berry rejected the preview, sending it back for a revision with instruction to include the newly shot "Taylor video." (Id). Berry and his then-partner in the site, Mitchel, were responsible for records keeping (collecting ID's) the JustinsFriends performers. (R.214,TTR Vol. VI, pp.1057-1059).

JustinsFriends.com was located on the Neova server. (R.214,TTR Vol. VI, p.1062). However, in mid-July of 2005, Richards received a rare call from Aaron Brown; Brown explained that Berry and Mitchel were fighting about money. (R.214,TTR Vol. VI, pp.1062-1063). Brown (who operated the payment processor

for JustinsFriends.com and administered the Neova sever) reported that several people signed up for 6 month memberships on JustinsFriends.com, and now Mitchel and Berry were both abandoning the site. (Id). Brown asked Richards to take over the site until the memberships expired. (Id). With Brown's assistance, Richards moved the site from the Neova server to the BlackSun server and registered it under a new name, JustinsFriends.net. (Id). In an effort to keep the site going, Richards hired new, verified adult talent to replace Berry. (R.214,TTR Vol. VI, pp.1064-1066, Defense Exhibit 18).

Consistent with his insistence that he lacked knowledge that "Taylor" was underage, Richards voluntarily contacted the FBI on September 12, 2005 when the server was searched. (R.214,TTR Vol. VI, pp.1073-1074). He provided his contact information and offered to answer questions. (Id).

On October 26, 2006, the jury reached a verdict finding Defendant Richards guilty of Counts 1, 2, 3, 11, 16, 19, 20, 21, 22, 23, and 24, and acquitting him of Counts 4, 5, 6, 7, 9, 12, 15, 18, 25, and 26. (R.203).

SUMMARY OF THE ARGUMENT

POINT I: The search warrant authorizing the search of the shared webhosting server lacked particularity, was overbroad and was executed as a general warrant. The probable cause set forth in the supporting affidavit only justified the search of a single website (JustinsFriends.com/net), yet the entire server and all websites in it were searched. The district court erred by denying the Motion to Suppress.

POINT II: The government failed to comply with the district court's Rule 16 based Order to identify the images to be used in its case-in-chief when it identified over 20,000 images for use. Despite the defense's insistence that the "identification" lacked any precision and was tantamount to a paper dump, and purely to avoid sanction, the government vowed to use all 20,000 files in the case-in-chief. The government used less than 1% of the files in evidence at trial, and despite the renewed objection, the trial court erroneously took no action.

POINT III: Prior to trial, Lombardi labeled each exhibit disc containing an alleged child pornographic image of himself with the age he believed he was in the depiction. At trial, he was impeached as to those ages (sometimes conceding that he was not a minor in the video). Nonetheless, over the defense's objection, the district court admitted the age labeled discs into evidence and sent them into the jury room

during deliberations - improperly minimizing the impact of cross-examination and invading the jury deliberations by interfering with their recollection of the proof.

POINTS IV: The district court erred by refusing to allow the defense to cross-examine a witness about a misleading and credibility bolstering impression left in the direct examination. The witness admitted the lie in a jury out hearing, but the district court improperly forbade cross-examination using the probative impeachment evidence.

POINT V: The proof at trial definitively showed that Counts 1 and 16 were multiplicitous. The district court erred by failing to dismiss one of the counts of conviction.

POINT VI: The accumulation of error at trial violated Richards' due process rights, rendering his trial fundamentally unfair.

STANDARDS OF REVIEW

POINT I: Following the denial of a motion to suppress, the district court's findings of fact are reviewed for clear-error and its legal conclusions are reviewed *de novo*. *United States v. Terry*, 522 F.3d 645, 647 (6th Cir.2008).

POINTS II: The district court's Rule 16 decision is reviewed for an abuse of discretion. *United States v. Clark*, 385 F.3d 609, 619 (6th Cir.2004).

POINT III: A district court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *See United States v. Ganier*, 468 F.3d 920, 925 (6th Cir.2006). Findings of fact are reviewed for clear error; legal conclusions are reviewed *de novo*. *See ibid.* The denial of a motion for mistrial is reviewed for abuse of discretion. *United States v. Cope*, 312 F.3d 757, 779 (6th Cir.2002).

POINT IV: Rulings limiting the scope of cross-examination are reviewed for an abuse of discretion. *United States v. Chance*, 306 F.3d 356, 385 (6th Cir.2002).

POINTS V & VI: Constitutional challenges present questions of law that are typically reviewed *de novo*. *United States v. VanHoose*, 437 F.3d 497, 500 (6th Cir.2006); *United States v. Ristovski*, 312 F.3d 206, 210 (6th Cir.2002); *United States v. Stewart*, 306 F.3d 295, 311 (6th Cir.2002).

ARGUMENT

I. THE SEARCH OF THE BLACKSUN COMPUTER SERVER EXCEEDED THE SCOPE OF PROBABLE CAUSE SET FORTH IN THE WARRANT AND WAS EXECUTED AS A GENERAL WARRANT.

On September 12, 2005, the FBI searched the contents of an entire computer server located at the BlackSun Technologies facility. The accompanying search warrant was authorized by Magistrate Judge Michael F. Urbanski of the United States District Court for the Western District of Virginia and was supported by the affidavit of FBI SA Monique Winkis.¹⁶ (R.80, Motion to Suppress, Exhibit A). The affidavit sought to search “BlackSun, 66.54.91.171, Server #4, Cabinet #200.02,”

for the contents of the websites known as **justinfriends.com** [sic] and/or **justinfriends.net** [sic] and stored wire and electronic communications and transactional records. . . .

(R.80, Motion to Suppress, Exhibit A, ¶ 4)(emphasis in original).

A. Assertion of Probable Cause:

The articulated probable cause related exclusively to JustinsFriends.com/net and not to other websites on the BlackSun server. (R.80, Motion to Suppress, Exhibit A, ¶¶ 20-31, 33-45).

¹⁶ In 2008, FBI SA Winkis was terminated from her employment with the FBI because of misconduct tangentially related to this case. (R.346, Exhibit A, Letter of Termination; R.362, Order regarding Termination)

The Internet Service Provider (ISP) who owned the server facility and leased server space to JustinsFriends was identified as BlackSun. A representative of BlackSun reported that the justinsfriends.com and/or justinsfriends.net websites were located on a single computer server and specifically described its location within the 2000 server BlackSun facility (R.80, Motion to Suppress, Exhibit A, ¶¶ 46-47).

B. Overbroad Suggested Search Procedure:

The affidavit stated that James Fottrell, who is reported to have “specialized training in computer hardware and computer forensic analysis,” believed that the computer server’s hard drives should be “imaged” and searched off-site. (R.80, Motion to Suppress, Exhibit A, ¶¶ 53-56). Without explanation or foundation, Fottrell declared that the entire IP address should be searched as well as domain names “neova.net, justinsfriends.com and justinsfriends.net.” (Id).

The affidavit failed to make any distinction between shared web hosting servers (serving multiple websites) and dedicated web hosting servers (serving a single website). Rather, the affidavit incorrectly presumed that the BlackSun server is a dedicated server without evidence to support the assumption. Thus, the Affidavit failed to report: (1) that every business using space on a shared server also shares the same IP address; and, (2) that, unless the operator of the website is also the

administrator of the server, the website content will be compartmentalized within the server.¹⁷ This information is essential to both the search and seizure procedure and the scope of the search of this shared server.

C. Proposed and Actual Scope of the Search:

Attachment B to the Affidavit (titled “Items to be Seized”) detailed the proposed scope of the Warrant:

All content of the **justinsfriends.com** and/or **justinsfriends.net** servers at [BlackSun], including any computer files that were or may have been used as a means to advertise, transport, distribute or possess child pornography, in violation of 18 U.S.C. §§ 2251, 2252, and 2252A as well as any child pornography images.

The aforementioned request to search the “servers” was so vague that it allowed unfettered law enforcement discretion in execution. The Affidavit conveniently failed to consider or address the likely possibility that JustinsFriends was on a shared server housing content for multiple websites - as it was here. Consequently, it neglected to advise the issuing court that, with a shared web server, each website operator has access only to their individual content on the server (essentially creating

¹⁷ The suggestion that the entire IP address be searched is tantamount to suggesting that an entire apartment complex be searched based upon the alleged criminal activity occurring in a single apartment.

a unique key unlocking only a specific leased space) and is *not* provided access to other tenants' secure content on the same server.

The request to search “all content of the justinsfriends.com and/or justinsfriends.net servers” is ambiguous and misleading. One of two potential explanations exist for the ambiguity. On one hand, if the request was meant to limit the search to only the section of the server that hosted the justinsfriends.com and/or justinsfriends.net websites, then the scope of the warrant would square with the probable cause articulated in the affidavit. However, under this scenario, the warrant was unconstitutionally executed as a general warrant because the *entire* server was imaged and rummaged off-site by law enforcement.

On the other hand, if the request to search was intended to extend to the entire server (ensnaring the spaces of all website owners), then the warrant was unconstitutionally overbroad when issued and lacked sufficient probable cause to support the scope.

D. Argument:

The warrant requirement serves to interpose between the police and an individual's personal privacy an orderly procedure involving “a neutral and detached magistrate,” who is responsible for making an “informed and deliberate

determination” on the issue of probable cause. *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 92 L.Ed. 436 (1948); *Aguilar v. Texas*, 378 U.S. 108, 110, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). The warrant process thus avoids allowing the determination of probable cause to rest with the “zealous” judgment of the police who are “engaged in the often competitive enterprise of ferreting out crime.” *Johnson*, 333 U.S. at 14.

A search warrant will be upheld if the affidavit provides a “substantial basis” to believe “there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *United States v. Smith*, 510 F.3d 641, 652 (6th Cir.2007)(quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527(1983)). The sufficiency of the supporting affidavit is reviewed under a “totality of the circumstances” approach. *Id.* In applying this test, this Court has held that “where a known person, named to the magistrate, to whose reliability an officer attests with some detail, states that he has seen a particular crime and particular evidence, in the recent past, a neutral and detached magistrate may believe that evidence of a crime will be found.” *United States v. Allen*, 211 F.3d 970, 976 (6th Cir.2000)(*en banc*).

In the context of computer server searches, Fourth Amendment principles clearly apply. Because individuals generally retain a reasonable expectation of

privacy in the contents of closed containers, they also retain a reasonable expectation of privacy in data held within electronic storage devices. *See United States v. Ross*, 456 U.S. 798, 822-23 (1982); *United States v. Barth*, 26 F.Supp.2d 929, 936-37 (W.D.Tex.1998). “Because computers can hold so much information touching on many different areas of a person’s life, there is greater potential for the ‘intermingling’ of documents and a consequent invasion of privacy when police execute a search for computer evidence.” *United States v. Walser*, 275 F.3d 981, 986 (10th Cir.2001). “There are just too many secrets on people’s computers, most legal, some embarrassing, and some potentially tragic in their implications, for loose liberality in allowing search warrants.” *United States v. Gourde*, 440 F.3d 1065, 1077 (9th Cir.2006)(*en banc*)(Kleinfeld, dissenting).

In *Olmstead v. United States*, Justice Brandeis loosely predicted the evolution of technology and its interplay with the Fourth Amendment:

. . . Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. . . . Can it be that the Constitution affords no protection against such invasions of individual security?

277 U.S. 438, 473-74 (1928)(Brandeis, J., dissenting)(internal citations omitted).

It is well-established that a search and seizure may not exceed the scope of the search warrant or the bounds of probable cause articulated therein. *Maryland v. Garrison*, 480 U.S. 79, 84 (1987); *Walter v. United States*, 447 U.S. 649, 656-57 (1980). The mere fact that an individual uses a computer along with an expert law enforcement opinion that this type of offender uses computers to store or communicate incriminating information does not amount to probable cause. *See United States v. Weber*, 923 F.2d 1338, 1343-45 (9th Cir.1991). A user has an expectation of privacy in the contents of a computer which is why a search warrant simply authorizing the seizure of the computer is not sufficient to justify searching its contents. *See United States v. Carey*, 172 F.3d 1268, 1274 (10th Cir.1999)(consent to seize computer did not permit the officer to open files contained in the computer); *United States v. Kow*, 58 F.3d 423, 427 (9th Cir.1995)(warrant for computers and diskettes with no probable cause limitation on files that could be seized was a general warrant).

The warrant authorizing the search for the contents of justinsfriends.com, and justinsfriends.net did not justify the search of the entire, shared computer server any more than a warrant authorizing a search of a house for a murder weapon would permit the police to cart off the entire contents of the house or to search neighboring homes. *See United States v. Upham*, 168 F.3d 532, 535-36 & n.1 (1st Cir.1999);

Kreman v. United States, 353 U.S. 346 (1957)(“The seizure of the entire contents of the house and its removal some 200 miles away to the FBI offices for the purposes of examination are beyond the sanction of any of our cases.”).

A general warrant is a warrant that authorizes “a general exploratory rummaging in a person’s belongings.” *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S.Ct. 2022, 2038, 29 L.Ed.2d 564 (1971). The Fourth Amendment seeks to prevent general warrants by requiring all warrants to contain a “particular description” of the things to be seized. The particularity requirement “makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.” *Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231 (1927). In condemnation of overbroad warrants, this Court wrote that “[t]he authorization to search for evidence irrelevant to th[e] time frame [substantiated by probable cause] could well be described as ‘rummaging.’” *United States v. Abboud*, 438 F.3d 554 (6th Cir.2006).

As set forth above, the scope of the BlackSun warrant is confusing. At most, the probable cause justified a search of JustinsFriends.com/net. However, in places, the affidavit seemed to suggest a search of the entire server. If the warrant truly authorized the search of the entire BlackSun server, then it was a general warrant -

improperly vesting the executing officers with unbridled discretion to conduct an exploratory rummaging through the server without regard to the scope of the probable cause. Because it was executed as general warrant, the fruits of the search must be suppressed. *Coolidge*, 403 U.S. at 467, 91 S.Ct. at 2038.

In the alternative, the Court must examine the scope of the search and seizure authorized by the warrant against the ambit of probable cause established in the supporting affidavit. *See, Andresen v. Maryland*, 427 U.S. 463, 470-77, 96 S.Ct. 2737, 2743-46, 49 L.Ed.2d 627 (1976). The Fourth Amendment requires warrants to “particularly describ[e] the . . . things to be seized,” but the degree of specificity depends on the crime alleged and the items sought.

. . . The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be *carefully tailored to its justifications*, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.

Maryland v. Garrison, 480 U.S. 79, 84, 107 S.Ct. 1013, 1016 (1987)(emphasis added); *see generally Groh v. Ramirez*, 540 U.S. 551, 558-62 (2004).

The proper remedy for overbreadth is to sever the infirm portion of the warrant from the valid remainder. *United States v. Blakeney*, 942 F.2d 1001, 1026-27 (6th

Cir.1991). On the other hand, “[i]f no portion of the warrant is sufficiently particularized to pass constitutional muster, then total suppression is required.” *Cardwell*, 680 F.2d at 78. The facts of this case require total suppression on grounds of overbreadth.

The BlackSun server contained the websites, data and communications of at least 6 other websites (in addition to justinsfriends.com/justinsfriends.net). Despite the fact that each website was, in fact, neatly compartmentalized into separate file directories with distinctive operational control - making forensic evaluation much easier, the government seized and searched every website on the shared web server without restraint. (Fottrell, R.213, TTR Vol. IV, pp.540-565, 657, 683-690; Fottrell, R.162, Suppression Hearing 7/24/06, pp.202-204, 216-227). The evidence flowing from this unconstitutional search led to the prosecution of Richards, the search of his home computers and all of the evidence introduced at trial relating to CaseysCondo, CaseyandKylesCondo, PenisClub and CondoDollars.

The search warrant lacked particularity and was executed as a general warrant. The district court erred by failing to suppress the fruits of the search of the BlackSun computer server.

II. THE GOVERNMENT'S IDENTIFICATION OF 20,000 FILES AND IMAGES TO BE USED IN ITS CASE-IN-CHIEF WAS AN OBFUSCATION OF ITS REQUIREMENT UNDER RULE 16.

The government's conduct - the initial refusal to identify the alleged child pornographic images embraced by the charges and subsequent identification of over 20,000 with a promise to use them all simply to bypass compliance with the district court's order - was inexcusable and deceitful gamesmanship rendering Rule 16 meaningless and prejudicing the defense.

Criminal discovery is not a game. It is integral to the quest for truth and the fair adjudication of guilt or innocence. Violations of discovery rules thus cannot go uncorrected or undeterred without undermining the truthseeking process.

Taylor v. Illinois, 484 U.S. 400, 419, 108 S.Ct. 646, 658 (U.S.Ill.,1988)(Justice Brennan dissenting).

The facts are simple: (1) from September 2005 through August 25, 2006, the government identified only 1 image of child pornography (Justin Berry, an adult, in a mutual masturbation scene with a 14 year old boy, "Taylor") but promised that tens of thousands more existed; (2) beginning on January 13, 2006, the district court repeatedly instructed the government to identify the promised child pornographic images; (3) in late August of 2006, the government identified over 20,000 images and graphics, claiming that each one would be used at trial; (4) the defense asserted that

the government did not comply with the district court's order, and rather, it engaged in the computer version of a paper dump - with no intention of using the majority of the images; (5) the district court stated that it could take no action against the government because the government promised to introduce all 20,000 images in evidence and make them relevant; (6) the defense's prediction came true at trial when the government introduced less than 1% of those files; and, (7) the defense was prejudiced by being forced to spend hundreds of hours preparing to defend against images the government never intended to introduce - thereby, distracting the defense from focusing on the handful of images actually introduced.

In post-trial hindsight, it is undeniable that the government conducted a paper dump consisting of little relevant information with the vast majority being purely distracting and meaningless. It is equally clear that the government misled the district court and the defense about the relevance and evidentiary value of the over 20,000 identified images when, in order to avoid a pretrial sanction, it declared that it would introduce all 20,000 images. The prejudice to Richards was obvious given the nature of the defense - which was known to the government and the district court well in advance of the trial. The defense was twofold: (1) that Lombardi and Billings were adults (not minors) in the images; and, (2) that Richards did not know that "Taylor" was a minor in the single image depicting him. This type of defense

required careful study and addressing of each image - which is why the identification of 20,000 irrelevant and unused images created an enormous unfairly prejudicial misdirection and undercut Richards' opportunity to prepare a defense.

Pursuant to Federal Rule of Criminal Procedure 16, the government must, upon the defendant's request, allow the defendant to inspect and copy all documents that "the government intends to use ... in its case-in-chief at trial." Fed.R.Crim.P. 16(a)(1)(E)(ii). "A discovery violation under [Rule 16] or a standing discovery order is reversible error only when it violates a defendant's substantial rights." *United States v. Camargo-Vergara*, 57 F.3d 993, 998 (11th Cir.1995). "Substantial prejudice exists when a defendant is unduly surprised and lacks an adequate opportunity to prepare a defense, or if the mistake substantially influences the jury." *Id.* at 998-99. "Inadvertence does not render a discovery violation harmless; rather, the purpose of Rule 16 is to protect a defendant's right to a fair trial rather than to punish the government's non-compliance." *Id.* at 999. "The actual prejudice will often turn on the strength of the Government[']s case." *United States v. Rodriguez*, 799 F.2d 649, 652 (11th Cir.1986).

Here, the discovery violation resulted in substantial prejudice to Richards. Had his trial preparation focused on a handful of images, rather than 20,000, the verdict probably would have reflected that he was "not guilty" on all counts. In this close

case (resulting in a mixed verdict and many dismissed counts), the government's proof was not strong. The government meticulously avoided alleged eyewitnesses like Berry, Brown, Mitchel and Billings. Lombardi's credibility was destroyed on cross-examination. The government consistently overreached in its forensic proof, and the verdict reflected all of those falterings. The government's case was underwhelming; it oversold and under-delivered on its proof and its pretrial promises.

If Rule 16 has any value or serves any meaningful purpose, the government's conduct cannot be tolerated. What the government did (a paper dump followed by a false promise to use it all in evidence) was a complete obfuscation of the letter and intent of Rule 16 and prevented Richards from receiving a fundamentally fair trial.

III. THE ADMISSION OF VIDEO AND PHOTOGRAPHIC EXHIBITS LABELED WITH THE PURPORTED AGE OF THE VICTIM AFTER THE VICTIM WAS IMPEACHED AS TO THOSE LABELED AGES IMPROPERLY MINIMIZED THE IMPACT OF CROSS-EXAMINATION AND INVADED THE JURY DELIBERATIONS.

The government placed each image of alleged child pornography pertaining to Patrick Lombardi on a separate disc. In preparation for trial, SA Donahue interviewed Lombardi as to his age and the location of each image or video on each disc. Those ages and locations were then physically written in marker on the discs. During Donahue's testimony, the government sought to introduce and play each of those discs subject to later relevancy testimony by Lombardi. The defense objected both as to the premature admission and display of the images and as to the writing on the discs. The district court overruled the admissibility objection and provisionally admitted the recordings subject to later connecting up by the government. However, the district court ruled that the labeling was improper and would not come in even with Lombardi's supporting testimony. Following Lombardi's testimony, despite his heavy impeachment as to both his age and the locations of the images and over Richards' objection, the district court reversed itself and allowed the labeled discs to be admitted and to go to the jury during deliberations.

The labeling on the discs was inadmissible hearsay. The government offered no authority supporting the admission. The defense objected that the labeling placed

undue emphasis on Lombardi's direct examination and negated the impact of the cross-examination. Sending the labeled discs to the jury was tantamount to sending a copy of Lombardi's unimpeached direct examination into the jury deliberations.

In the analogous context of re-reading testimony in deliberations, Courts have found that it is improper for the trial court to emphasize part of a witness' testimony. *United States v. Richard*, 504 F.3d 1109, 1114 (9th Cir.2007)(the jury should ordinarily be provided with the witness' *entire* testimony-i.e., direct *and* cross-examination, and should be admonished to weigh all the evidence and not focus on any portion of the trial). The circumstance at hand is very similar to sending the jury (without request) a transcript of only Lombardi's direct examination for use in deliberations. This is reversible error.

This Court has recognized two dangers from reading testimony to a jury during deliberations.

The first is that the jury may accord undue emphasis to the testimony. The second is that the testimony reviewed by the jury may be taken out of context.

United States v. Epley, 52 F.3d 571, 579 (6th Cir.1995)(internal citations omitted).

Both of these dangers existed when the age labeled discs entered jury deliberations.

Because the labels improperly emphasized (in fact, mirrored) Lombardi's recollection

during direct examination, they unfairly minimized the impact of the cross-examination and suggested a tool (the label) by which the jury could settle discrepancies between the direct and cross. Further, the label served as a substitute for their independent recollection of the proof.

The district court committed reversible error by permitting the age labeled exhibits into evidence and into jury deliberations.

IV. THE DISTRICT COURT ERRED BY DENYING RICHARDS' RIGHT TO CONFRONT AND IMPEACH A PROSECUTION WITNESS (JEREMY MOEDER).

Jeremy Moeder (“Jer”) was one of a few eye-witnesses called by the government. The purpose of Moeder’s testimony was to bolster Lombardi’s damaged credibility, to impugn Richards’ credibility and to attempt to date the production of images featuring Lombardi (“Kyle”) and Billings (“Tory”). Moeder was a self-proclaimed reformed adult performer who knew Richards (“Casey”), Lombardi and Billings. He was familiar with CaseyandKylesCondo, and he produced content for the site with Richards for several months in 2003 until they had a falling out.

Upon questioning by the government and in an effort to distinguish himself from Richards and impugn Richards, Moeder testified that he would not have associated himself with CaseyandKylesCondo if he had known there was child pornography on the site. (R.212,TTR Vol. III, pp.428-429). Then, again prompted by the government, Moeder concluded his testimony with the gratuitous declaration that he would never have children or child pornography on his websites. (R.212,TTR Vol. III, p.436).

A long jury out hearing ensued. Despite Moeder’s self-portrayal as a law-abiding, pornography-reformed citizen who disapproved of child pornography and

Tim Richards, he admitted that he had sex with underage boys in both Las Vegas and Tennessee. He also admitted that he filmed himself performing oral sex on a 15 year old from Silverado High School in Las Vegas, although he claimed he did not post it on the internet. The district court precluded the defense from impeaching Moeder's character and self-portrayal in the presence of the jury because, although Moeder admitted to producing child pornography and engaging in sex with minors, he claimed not to have published the child pornography on a website. The district court improperly limited the scope of cross-examination, and denied a renewed motion for mistrial based on the refusal. (R.212,TTR III, pp.437-442; R.209,TTR Vol.V,pp. 955-960).

The "cross-examination of a witness is a matter of right." *Alford v. United States*, 282 U.S. 687, 691, 51 S.Ct. 218, 75 L.Ed. 624 (1931). "Cross-examination is the principal means by which the believability of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.'" *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)(holding that precluding a defendant from cross-examining a key prosecution witness to show bias violated the defendant's constitutional right to confront the witness testifying against him). However, the right to cross-examine is not absolute. *United States v. Atisha*, 804 F.2d 920, 929-30 (6th Cir.1986). The trial court has

latitude to “impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.” *United States v. Beverly*, 369 F.3d 516, 535 -536 (6th Cir.2004)(citations omitted).

Baited by the government's questioning, Moeder left the jury with the impression that he disapproved of Richards' conduct under the government's child pornography theory and that he would personally never involve himself in such conduct. During the jury out hearing, Moeder admitted that he had sex with minors on several occasions and that he filmed child pornography of himself with a 15 year old boy - a direct contradiction of the impression left with the jury moments before. This line of cross-examination was relevant and probative evidence of impeachment and demonstrated that Moeder lacked reliability as a witness. Moeder lied and the district court prohibited exposure of the lie on cross-examination based upon a hyper-technical, erroneous and artificial distinction between producing child pornography and uploading it to a website. Regardless of whether Moeder ever placed his child pornography on a website, the fact that he admitted filming child pornography directly contradicted and impeached the false impression left in his direct examination - that he would never be involved in such a thing, unlike Richards. Forbidding this impeachment was a violation of Richards' confrontation right.

V. THE DISTRICT COURT ERRED BY FAILING TO DISMISS MULTIPLICITOUS COUNTS.

The Third Superseding Indictment charged alleged child pornography offenses organized by website. Count 1 charged that, between 2000 and September 12, 2005, Richards distributed child pornography via a website, CaseyandKylesCondo.com, in violation of 18 U.S.C. §2252A(a)(1). Count 16 charged that, between 2003 and September 12, 2005, Richards distributed child pornography via a website, CaseysCondo.com, in violation of 18 U.S.C. §2252A(a)(1). Because CaseyandKylesCondo and CaseysCondo were renamed versions of the same website, Richards filed a Motion to Dismiss Multiplicitous Counts. (R.131, 132). The district court denied the Motion. (R.160). The Motion was renewed during the trial, and was again denied. (R.209, TTR Vol. V, pp.948-949; R.217, TTR Vol. IX, p.1399).

The trial proof elicited from government and defense witnesses made it clear that the websites were the same. First, SA Donahue testified that CaseysCondo and CaseyandKylesCondo derived their content from the same directory (the “CaseysCondo” folder) on the BlackSun server. (R.211, TTR Vol. II, p.163). Secondly, the government’s forensic examiner, James Fottrell, testified they were the same site. Fottrell agreed that both sites pulled content from the same directory on the BlackSun server. (R.209, TTR Vol. V, pp.749-750, 794-796). He agreed the

pages on both sites shared the exact same file paths and used the same HTML code and that CaseysCondo was simply a newer version of the CaseyandKylesCondo site. (Id). The sites never co-existed or overlapped in operation. (R.209,TTR Vol. V, pp.749-755). One was simply a revised and renamed version of the other. (Id). Lastly, Richards testified that they were the same website. (R.214,TTR Vol. VI, pp.1009-1011).

The Fifth Amendment right to be free of double jeopardy prohibits both successive prosecutions and “multiple punishments for the same offense.” *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *See also United States v. Robinson*, 651 F.2d 1188, 1194 (6th Cir.), *cert. denied*, 454 U.S. 875 (1981). As part of that Fifth Amendment double jeopardy safeguard, a defendant is protected from having to defend himself against multiplicitous counts in an indictment. *See, United States v. Alsobrook*, 620 F.2d 139, 142 (6th Cir.), *cert. denied*, 449 U.S. 843, 101 S.Ct. 124, 66 L.Ed.2d 51 (1980). Multiplicity is defined as the charging of a single offense in several counts or in several charging instruments. *United States v. Schaffner*, 771 F.2d 149, 152 (6th Cir. 1985). The dangers of a multiplicitous indictment are that the defendant may be given multiple sentences for what Congress considered a single offense, and that prolix recitation may falsely suggest to a jury that a defendant has

committed not one but several crimes. *United States v. Gibbons*, 994 F.2d 299, 301 (6th Cir.1993); *United States v. Gullett*, 713 F.2d 1203, 1211-12 (6th Cir.1983).

The Supreme Court has held:

The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction. Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.

Ball v. United States, 470 U.S. 856, 865, 105 S.Ct. 1668, 1673 (1985).

Clearly, Counts 1 and 16 charged the same conduct (distribution of child pornography) originating from the same physical website that underwent a name change in the Fall of 2003. It is undisputed that both domain names (CaseysCondo.com and CaseyandKylesCondo.com) routed the user to a single directory of files on the BlackSun server. Punishing distribution from both CaseyandKylesCondo and CaseysCondo is tantamount to charging 2 counts of mortgage fraud involving the same house which is distinguished only by a change of

paint color. Because the illicit act of distribution corresponds to disseminating allegedly underage materials from the same directory using a single (although renamed) website, Richards' convictions on Counts 1 and 16 are multiplicitous, and one of them needs to be vacated. *See United States v. Hebeka*, 25 F.3d 287, 291 (6th Cir.1994)(prescribing vacation as proper remedy for multiplicitous counts).

VI. THE ACCUMULATION OF ERRORS RENDERED DEFENDANT RICHARDS' TRIAL FUNDAMENTALLY UNFAIR AND DENIED HIS DUE PROCESS RIGHTS.

Errors which standing alone may be deemed harmless or insufficiently prejudicial to amount to a denial of due process may cumulatively produce a trial setting which is fundamentally unfair. *Campbell v. United States*, 364 F.3d 727, 736 (6th Cir.2004); see *United States v. Pierce*, 62 F.3d 818, 834-835 (6th Cir.1995); *United States v. Parker*, 997 F.2d 219, 221 (6th Cir.1993); *Walker v. Engle*, 703 F.2d 959 (6th Cir.1983); see also *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967)(holding that an error is harmless if it appears “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.”).

Unfortunately for Richards, the trial was riddled with errors - the accumulation of which undermined the fundamental fairness of the trial. Although Richards submits that each of these issues warrant reversal independent of the others, when considered together, the accumulation of error produced a trial setting that was fundamentally unfair.

CONCLUSION

Based on the foregoing, Richards respectfully requests that this Court vacate his conviction on either Count 1 of 16 and reverse his conviction and remand for a new trial with instruction.

Respectfully submitted,

s/ Kimberly S. Hodde

Kimberly S. Hodde, Esq.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via the Court's electronic filing system or, if not registered, by U.S. Mail or sent via PDF file attachment to electronic mail, postage prepaid, to:

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On this 13th day of October 2009.

s/ Kimberly S. Hodde
Kimberly S. Hodde

CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,887 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the Brief has been prepared in a proportionally spaced typeface using Corel WordPerfect 12 in 14 point font, Times New Roman.

s/ Kimberly S. Hodde

Kimberly S. Hodde

Attorney for Timothy Ryan Richards
Defendant-Appellant/Cross-Appellee

Dated: October 13, 2009

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

UNITED STATES OF AMERICA,)	
)	
Plaintiff-Appellee,)	
Cross-Appellant ,)	
)	
v.)	Nos. 08-6465/08-6503
)	
TIMOTHY RYAN RICHARDS,)	
)	
Defendant-Appellant,)	
Cross-Appellee.)	

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to 6 Cir. R. 30, Appellant designates the following items to be “Relevant District Court Documents:”

Description of Item	Date filed with District Court	Record Entry #
Current Docket Sheet	n/a	n/a
Complaint	9/22/2005	R. 3
Indictment	10/19/2005	R. 20
Superseding Indictment	11/16/2005	R. 26
Transcript of Detention Appeal	4/20/2006	R. 71

Motion for Identification of Images to Be Used in the Government's Case-in-Chief	5/19/2006	R. 77
Motion to Suppress the Fruits of Seizures and Subsequent Searches of Computer Servers w/ Exhibit	5/19/2006	R. 80
Memorandum of Law in Support of Motion to Suppress	5/19/2006	R. 81
Affidavit of Charles Foulk in support of Motion to Suppress	7/21/2006	R. 96
Affidavit of Nancy Peritore in support of Motion to Suppress	7/24/2006	R. 98
Order denying the Motion to Suppress but granting the Motion for Identification of Images	7/24/2006	R. 101
Motion to Compel Compliance with Order Granting Identification of Images	8/30/2006	R. 105
Government Response to Motion to Compel	9/4/2006	R. 108
Order denying Motion to Compel	9/7/2006	R. 114
Second Superseding Indictment	9/13/2006	R. 115
Motion to Dismiss Multiplicitous Counts in the Second Superseding Indictment	9/21/2006	R. 131
Memorandum of Law in support of Motion to Dismiss Multiplicitous Counts	9/21/2006	R. 132
Third Superseding Indictment	9/27/2006	R. 157

Order denying Motion to Dismiss Multiplicitous Counts	10/2/2006	R. 160
Transcript of 7/24/06 Hearing on Motion to Suppress and Motion for Identification of Images	10/2/2006	R. 162
Order granting Severance of Counts	10/3/2006	R. 165
Motion to Dismiss Counts 10, 14 & 17	10/10/2006	R. 174
Order Granting Motion to Dismiss Counts 10, 14 & 17	10/10/2006	R. 176
Order Granting Judgment of Acquittal on Count 8	10/19/2006	R. 189
Minute Entry noting dismissal of Count 13	10/23/2006	R. 196
Jury Verdict	10/26/2006	R. 203
Trial Transcript Vol. V (proceedings on 10/17/2006)	1/25/2007	R. 209
Trial Transcript Vol. I (proceedings on 10/10/2006)	2/5/2007	R. 210
Trial Transcript Vol. II (proceedings on 10/11/2006)	2/5/2007	R. 211
Trial Transcript Vol. III (proceedings on 10/12/2006)	2/5/2007	R. 212
Trial Transcript Vol. IV (proceedings on 10/16/2006)	2/5/2007	R. 213
Trial Transcript Vol. VI (proceedings on 10/18/2006)	2/5/2007	R. 214

Trial Transcript Vol. VII (proceedings on 10/19/2006)	2/5/2007	R. 215
Trial Transcript Vol. VIII (proceedings on 10/20/2006)	2/5/2007	R. 216
Trial Transcript Vol. IX (proceedings on 10/23/2006)	2/5/2007	R. 217
Trial Transcript Vol. X (proceedings on 10/24/2006)	2/5/2007	R. 218
Trial Transcript Vol. XI (proceedings on 10/25/2006)	2/5/2007	R. 219
Transcript of Motion Hearing on 10/3/06	2/28/2007	R. 223
Transcript of Motion Hearing on 9/6/06	4/19/2007	R. 226
Order dismissing severed Count 27	5/1/2007	R. 230
Transcript of Motion Hearing on 9/7/06	5/18/2007	R. 241
Motion for New Trial with Exhibits	7/31/2007	R. 265
FBI SA Winkis Letter of Termination	8/8/2008	R. 346
Order regarding FBI SA Winkis' Termination	9/12/2008	R. 363
Motion to Vacate his Convictions for Production and Advertising	10/22/2008	R. 363
Synopsis of Trial Proof with Exhibit	10/23/2008	R. 364

Defendant's Sentencing Position Paper with Exhibits	10/24/2008	R. 366
Character Letter in Support of Defendant	10/30/2008	R. 368
Reply to Government's Sentencing Position	11/3/2008	R. 374
Order denying the Motion to Vacate Convictions	11/14/2008	R. 383
Judgment and Commitment Order	11/20/2008	R. 386
Sealed Statement of Reasons	11/20/2008	R. 387
Appellant's Notice of Appeal	11/26/2008	R. 390
Amended Judgment and Commitment Order	12/1/2008	R. 392
Amended Sealed Statement of Reasons	12/1/2008	R. 393
Cross-Appellant's Notice of Appeal	12/10/2008	R. 397

Respectfully submitted,

s/ Kimberly S. Hodde

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On this 13th day of October 2009.

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Kimberly S. Hodde