

U.S. DISTRICT COURT
DISTRICT OF VERMONT
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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

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UNITED STATES OF AMERICA

v.

BENJAMIN H. WEISINGER

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Case No. 5:12-cr-78

JURY CHARGE

Members of the Jury:

Now that you have heard the evidence and the arguments, it is my duty to instruct you on the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them.

This case is a criminal prosecution brought by the United States against the defendant Benjamin Weisinger. The indictment charges BENJAMIN WEISINGER in four counts.

COUNT ONE

In or about October 2011, in the District of Vermont, the defendant, BENJAMIN H. WEISINGER, knowingly employed, used, persuaded, induced, enticed and coerced a minor female to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, specifically, a video with the

computer file name Capture_20111002.wmv, where the visual depiction was produced and transmitted using materials that have been mailed, shipped, and transported in and affecting interstate and foreign commerce by any means, including by computer, and where the visual depiction was actually transported and transmitted using a means or facility in and affecting interstate and foreign commerce.

COUNT TWO

In or about October 2011, in the District of Vermont, the defendant, BENJAMIN H. WEISINGER, knowingly received a visual depiction, specifically, a video with the computer file name Capture_20111002.wmv, that had been shipped and transported in or affecting interstate or foreign commerce, by any means including by computer, and the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct and the visual depiction was of such conduct.

COUNT THREE

In or about late 2010 or early 2011, in the District of Vermont, the defendant, BENJAMIN H. WEISINGER, knowingly received a visual depiction that had been shipped and transported in or affecting interstate or foreign commerce, and the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct and the visual depiction was of such conduct.

COUNT FOUR

In or about October and November 2011, in the District of Vermont, the defendant, BENJAMIN H. WEISINGER, knowingly possessed at least one matter which contained a visual depiction that was produced using materials which had been mailed and shipped and transported using any means and facility of interstate and foreign commerce, including by computer, the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct, and such visual depiction was of such conduct.

ROLE OF INDICTMENT

At this time, I would like to remind you of the function of an indictment. An indictment is merely a formal way to accuse a defendant of a crime preliminary to trial. An indictment is not evidence. The indictment does not create any presumption of guilt or permit an inference of guilt. It should not influence your verdict in any way other than to inform you of the charges against the defendant. The defendant has pleaded not guilty to the counts in the indictment. You have been chosen and sworn as jurors in this case to determine the issues of fact that have been raised by the allegations of the indictment and the denial made by the not guilty plea of the defendant. You are to perform this duty without bias or prejudice against the defendant, or the prosecution.

REASONABLE DOUBT AND PRESUMPTION OF INNOCENCE

The government must prove the defendant guilty beyond a reasonable doubt. The question is what is a reasonable doubt? The words almost define themselves. It is a doubt based upon reason and common sense. It is a doubt that a reasonable person has

after carefully weighing all of the evidence. It is a doubt that would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs. A reasonable doubt is not a whim, speculation, or suspicion. However, a reasonable doubt may arise from a lack of evidence. It is not an excuse to avoid the performance of an unpleasant duty. And it is not sympathy.

In a criminal case, the burden is at all times upon the government to prove guilt beyond a reasonable doubt. The law does not require the government to prove guilt beyond all possible doubt; proof beyond a reasonable doubt is sufficient to convict. This burden never shifts to a defendant, which means that it is always the government's burden to prove each of the elements of the crimes charged beyond a reasonable doubt. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. A defendant is not even obligated to produce any evidence by cross-examining the witnesses for the government.

If, after fair and impartial consideration of all the evidence against a defendant, you have a reasonable doubt, it is your duty to find that defendant not guilty. On the other hand, if, after fair and impartial consideration of all the evidence, you are satisfied of the defendant's guilt beyond a reasonable doubt, you should vote to convict.

The law presumes that a defendant is innocent of the charges against him or her. The presumption of innocence lasts throughout the trial and during your deliberations. The presumption of innocence ends only if you, the jury, find beyond a reasonable doubt

that a defendant is guilty. Should the government fail to prove the guilt of a defendant beyond a reasonable doubt, you must find that defendant not guilty.

EVIDENCE

You have seen and heard the evidence produced in this trial and it is the sole province of the jury to determine the facts of this case. The evidence consists of the sworn testimony of the witnesses, any exhibits that have been admitted into evidence, and all the facts which may have been admitted or stipulated. I would now like to call to your attention certain guidelines by which you are to evaluate the evidence.

There are two types of evidence which you may properly use in reaching your verdict. One type of evidence is direct evidence. Direct evidence is when a witness testifies about something she or he knows by virtue of her or his own senses—something she or he has seen, felt, touched, or heard. Direct evidence may also be in the form of an exhibit.

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. You infer on the basis of reason, experience, and common sense from one established fact, the existence or non-existence of some other fact. For example, if you were to see cow tracks in a pasture, that would be circumstantial evidence that there are or were cows in the pasture.

Circumstantial evidence is of no less value than direct evidence. Circumstantial evidence alone may be sufficient evidence of guilt.

You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the defendant's guilt beyond a reasonable doubt, you must find him not guilty.

EVIDENCE IN THE CASE - STIPULATIONS

The evidence in this case consists of the sworn testimony of the witnesses, the exhibits admitted into evidence, and any stipulated facts, regardless of which party presented the evidence. When the attorneys on both sides stipulate or agree to the existence of a fact, you must, unless otherwise instructed, accept the stipulation and regard that fact as proved. You may give the stipulated fact, like any other evidence, the weight that you think it deserves.

STRICKEN TESTIMONY/ATTORNEYS' STATEMENTS/COURT'S RULINGS

I caution you that you should entirely disregard any testimony or exhibit that has been excluded or stricken from the record. Likewise, the arguments of the attorneys and the questions asked by the attorneys are not evidence in the case. By the rulings the court made in the course of the trial, I did not intend to indicate to you any of my own preferences, or to influence you in any manner regarding how you should decide the case. The attorneys have a duty to object to evidence they believe is not admissible. You must not hold it against either side if an attorney made an objection.

JURORS' EXPERIENCE/SPECIALIZED KNOWLEDGE

Anything you have seen or heard outside the courtroom is not evidence, and must be entirely disregarded. It would be a violation of your oath as jurors to consider anything outside the courtroom in your deliberations. But in your consideration of the

evidence, you do not leave behind your common sense and life experiences. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in light of the evidence. However, if any juror has specialized knowledge, expertise, or information with regard to the facts and circumstances of this case, he or she may not rely upon it in deliberations or communicate it to other jurors.

ADMISSIONS BY A DEFENDANT

There has been evidence that the defendant made certain statements in which the government claims he admitted certain facts.

In deciding what weight to give the defendant's statements, you should first examine with great care whether each statement was made and whether, in fact, it was voluntarily and understandingly made. I instruct you that you are to give the statements such weight as you feel they deserve in light of all the evidence.

CREDIBILITY OF WITNESSES

You, as jurors, are the sole judges of the credibility of the witnesses and the weight of their testimony. You do not have to accept all the evidence presented in this case as true or accurate. Instead, it is your job to determine the credibility or believability of each witness. You do not have to give the same weight to the testimony of each witness, because you may accept or reject the testimony of any witness, in whole or in part. In weighing the testimony of the witnesses you have heard, you should consider their interest, if any, in the outcome of the case; their manner of testifying; their candor;

their bias, if any; their resentment or anger, if any, toward the defendant; the extent to which other evidence in the case supports or contradicts their testimony; and the reasonableness of their testimony. You may believe as much or as little of the testimony of each witness as you think proper. You may accept all of it, some of it, or reject it altogether.

As a general matter, in evaluating the credibility of each witness, you should take into account any evidence that the witness who testified may benefit in some way from the outcome of this case. Such an interest in the outcome creates a motive to testify falsely and may sway the witness to testify in a way that advances his or her own interests. Therefore, if you find that any witness whose testimony you are considering may have an interest in the outcome of this trial, then you should bear that factor in mind when evaluating the credibility of his or her testimony and accept it with great care.

This is not to suggest that any witness who has an interest in the outcome of a case will testify falsely. It is for you to decide to what extent, if at all, the witness's interest has affected or colored his or her testimony.

The weight of the evidence is not determined by the number of witnesses testifying. You may find the testimony of a small number of witnesses or a single witness about a fact more credible than the different testimony of a larger number of witnesses. The fact that one party called more witnesses and introduced more evidence than the other does not mean that you should necessarily find the facts in favor of the side offering the most witnesses or the most evidence. Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not

cause you to discredit such testimony. Two or more persons may hear or see things differently, or may have a different point of view regarding various occurrences. It is for you to weigh the effect of any discrepancies in testimony, considering whether they pertain to matters of importance, or unimportant details, and whether a discrepancy results from innocent error or intentional falsehood. You should attempt to resolve inconsistencies if you can, but you also are free to believe or disbelieve any part of the testimony of any witness as you see fit.

In this case you have heard testimony from a number of witnesses. I am now going to give you some guidelines for your determinations regarding the testimony of the various types of witnesses presented in this case.

EXPERT WITNESSES

You have heard evidence from witnesses who are known as expert witnesses. An expert witness is a person who has special knowledge, experience, training, or education in his or her profession or area of study. Because of this expertise, an expert witness may offer an opinion about one or more of the issues in the case. In evaluating their testimony, you should evaluate their credibility and statements just as you would with any other witness. You should also evaluate whether the expert witness's opinion is supported by the facts that have been proved, and whether the opinion is supported by the witness's knowledge, experience, training, or education. You are not required to give the testimony of an expert witness any greater weight than you believe it deserves just because the witness has been referred to as an expert.

LAW ENFORCEMENT WITNESSES

You have heard the testimony of law enforcement officials in this case. The fact that a witness may be employed by the federal, state, or local government as a law enforcement official does not mean that his or her testimony is deserving of more or less consideration or greater or lesser weight than that of a civilian witness.

At the same time, it is proper for defense counsel to try to attack the credibility of a law enforcement witness on the grounds that his or her testimony may be colored by a personal or professional interest in the outcome of the case.

It is your decision, after reviewing all the evidence, whether to accept the testimony of the law enforcement witness and to give to that testimony whatever weight, if any, you find it deserves.

PRIOR INCONSISTENT STATEMENTS OF A NON-PARTY WITNESS

You may find that a witness has made statements outside of this trial that are inconsistent with the statements that the witness gave here. You may consider the out-of-court statements not made under oath only to determine the credibility of the witness and not as evidence of any facts contained in the statements. As to out-of-court statements that were made under oath, such as statements made in prior testimony, you may consider them for all purposes, including for the truth of the facts contained therein.

DEFENDANT'S EXCULPATORY STATEMENTS

You have heard testimony that the defendant made certain statements outside the courtroom to law enforcement authorities in which the defendant claimed that his conduct

was consistent with innocence and not with guilt. The government claims that these statements in which he exonerated or exculpated himself are false.

If you find that the defendant gave a false statement in order to divert suspicion from himself, you may, but are not required, to infer that the defendant believed that he was guilty. You may not, however, infer on this basis alone, that the defendant is, in fact, guilty of the crime for which he is charged.

Whether or not the evidence as to a defendant's statements shows that the defendant believed that he was guilty, and the significance, if any, to be attached to any such evidence, are matters for you, the jury, to decide.

CONCEALMENT OR DESTRUCTION OF EVIDENCE

You have heard testimony that during and after the crime was committed, the defendant may have deleted or destroyed certain information.

If you believe that the defendant engaged in this conduct, then you may consider this conduct, along with all the other evidence, in deciding whether the government has proved beyond a reasonable doubt that the defendant committed the crime charged. This conduct may indicate that he thought he was guilty of the crime charged and was trying to avoid punishment. On the other hand, an innocent person may engage in such conduct for some other reason. Whether or not this evidence causes you to find that the defendant was conscious of his guilt of the crime charged, and whether that indicates that he committed the crime charged, is entirely up to you as the sole judges of the facts.

RACE, RELIGION, NATIONAL ORIGIN, SEX, OR AGE

You may not consider the race, religion, national origin, sex, or age of the defendant or any of the witnesses in your deliberations over the verdict or in the weight given to any evidence. However, you may consider a person's age in deciding an element of the offense.

BIAS, PREJUDICE, AND EQUALITY BEFORE THE COURT

You are to perform the duty of finding the facts without bias or prejudice toward any party. You are to perform this duty in an attitude of complete fairness and impartiality.

This case is important to the parties and the court. You must give it the fair and serious consideration which it deserves.

The fact that the prosecution is brought in the name of the United States of America entitles the government to no greater consideration than that accorded to any other party to a case. By the same token, it is entitled to no less consideration. All parties, whether government or individuals, stand as equals before the court.

OTHER ACTS BY DEFENDANT

During the trial you have heard evidence that Defendant Benjamin Weisinger allegedly engaged in abuse of the alleged victim at some time before the date of the alleged offenses. The law is strict about how you may use this evidence. You may consider it as relevant to the issue of intent, plan and absence of mistake and to evaluate the credibility of the witness. However, you may not consider this evidence for any other purpose. Specifically, you may not consider this as evidence that Defendant is of bad

character or has a propensity to commit crime. The only crimes for which Defendant is on trial are the crimes which are alleged in the indictment.

DEFENDANT NOT TESTIFYING

You may have observed that the defendant did not testify in this case. A defendant has a constitutional right not to do so. He does not have to testify, and the government may not call him as a witness. A defendant's decision not to testify raises no presumption of guilt and does not permit you to draw any unfavorable inference. Therefore, in determining whether a defendant is guilty or not guilty of the crime charged, you are not to consider, in any manner, the fact that the defendant did not testify. Do not even discuss it in your deliberations.

INSTRUCTIONS ON THE SUBSTANTIVE LAW OF THE CASE

Having explained the general guidelines by which you will evaluate the evidence in this case, I will now instruct you with regard to the law that is applicable to your determinations in this case.

It is your duty as jurors to follow the law as stated to you in these instructions and to apply the rules of law to the facts that you find from the evidence. You will not be faithful to your oath as jurors if you find a verdict that is contrary to the law that I give to you.

However, it is the sole province of the jury to determine the facts in this case. I do not, by any instructions given to you, intend to persuade you in any way as to any question of fact.

The parties in this case have a right to expect that you will carefully and impartially consider all the evidence in the case, that you will follow the law as I state it to you, and that you will reach a just verdict.

THE ESSENTIAL ELEMENTS OF THE OFFENSES

“ON OR ABOUT” -- EXPLAINED

The indictment charges that the offenses were committed “on or about” certain dates.

Although it is necessary for the government to prove beyond a reasonable doubt that the offenses were committed on dates reasonably near the dates alleged in the indictment, it is not necessary for the government to prove that the offenses were committed precisely on the dates charged.

USE OF CONJUNCTIVE

The indictment charges certain acts in the conjunctive. For example, in Count One, the defendant is alleged to have “used, persuaded, induced, enticed and coerced a minor”. In order to prove the defendant guilty of a particular offense, the United States does not need to prove that the defendant used, persuaded, induced, enticed and coerced a minor, but rather the United States is only required to prove one of these factors, that is that the defendant used, persuaded, induced, enticed, or coerced a minor.

There are also other examples of charging in the conjunctive in the indictment. Where the indictment uses this language, the United States is required to prove only one of the factors alleged.

COUNT 1
COUNT I: PRODUCTION OF CHILD PORNOGRAPHY

Defendant Benjamin Weisinger is charged in Count 1 of the indictment with production of child pornography.

In order to prove the defendant guilty of the production of child pornography, the government must establish beyond a reasonable doubt each one of the following three elements:

FIRST: That the alleged victim was under the age of eighteen (18);

SECOND: That the defendant used, employed, persuaded, induced, enticed, or coerced the alleged victim to take part in sexually explicit conduct for the purpose of producing or transmitting a visual depiction of such conduct; and

THIRD: That either:

1. That the visual depiction was produced or transmitted using materials that had been mailed or transported in or affecting interstate or foreign commerce.

OR

2. The visual depiction was mailed or actually transported and transmitted in or affecting interstate or foreign commerce;

COUNT 1: FIRST ELEMENT

As I have just instructed you, the first element of the offense charged in Count 1 which the government must prove beyond a reasonable doubt is that the alleged victim was less than eighteen (18) years old at the time of the acts alleged in the indictment. Under Federal Law, a minor means any person under the age of eighteen years. Although the definition of a minor may vary in different states, under federal law, which

you must follow in this matter, a minor is any individual under 18. Thus as to each count of the indictment, a minor means any individual under the age of 18.

Whether or not a minor consented to engaging in sexually explicit conduct or if they agreed to do any of those things for the purpose of producing a visual depiction of such conduct, is irrelevant. The consent or voluntary participation of the minor is not a defense to this charge.

COUNT 1: SECOND ELEMENT

The second element of the offense charged in Count 1 which the government must prove beyond a reasonable doubt is that the defendant knowingly employed, used, persuaded, induced, enticed, or coerced the alleged victim to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct.

An act is done knowingly when it is done voluntarily and intentionally and not because of accident, mistake or some other innocent reason. The government is not required to prove that the defendant knew that his acts or omissions were unlawful.

A “visual depiction” includes any video or picture.

The words “employ, use, persuade, induce, entice and coerce” are defined by their plain and ordinary meanings. The idea conveyed by these words is that one person is “leading” or “causing” another to bring about, produce or cause a desired effect, in this case, the creation of a visual depiction of a minor engaged in sexually explicit conduct. The government is not required to prove that the defendant himself created the visual depiction. If you find that the defendant knowingly employed, used, persuaded, induced,

enticed or coerced the alleged victim to engage in sexually explicit conduct for the purpose of creating the visual depiction of that conduct, then the government has satisfied this part of the second element of Count 1. If you do not find that the government has proven this or any other element of Count 1, you must return a verdict of not guilty as to this charge.

COUNT 1: SECOND ELEMENT, “SEXUALLY EXPLICIT CONDUCT”
DEFINED

The meaning of “sexually explicit conduct” in this context includes actual or simulated sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, masturbation, sadistic or masochistic abuse, **OR** the lascivious exhibition of the genitals or pubic area of any person. The United States does not need to prove that the sexually explicit conduct included both masturbation and “lascivious exhibition.”

The term “lascivious exhibition” means a depiction which displays or brings to view to attract notice to the genitals or pubic area of a minor’s body in order to excite lustfulness or sexual stimulation in the viewer. Not every exposure of the genitals or pubic area constitutes lascivious exhibition. Whether a picture or image of the genitals or pubic area constitutes such a lascivious exhibition requires a consideration of the overall content of the material.

In determining whether an exhibition of the genitals or pubic area of a minor is lascivious, you may consider the following factors:

- Whether the focal point of the visual depiction is on the minor's genitals or pubic area;
- Whether the setting of the visual depiction is sexually suggestive, that is, a place or pose generally associated with sexual activity;
- Whether the minor is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
- Whether the minor is fully or partially clothed, or nude;
- Whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and
- Whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Of course, in order for a visual depiction to be lascivious, all six factors need not be present and the list of factors is not exhaustive. Instead, you must determine whether the visual depiction is lascivious based on its overall content, taking into account the age of the minor. It is for you to decide the weight or lack of weight to be given to any of these factors.

COUNT 1: THIRD ELEMENT

The third element of Count 1 that the government must prove beyond a reasonable doubt is that either:

1. The visual depiction was produced or transmitted using materials that had been mailed, shipped or transported in and affecting interstate or foreign commerce by any means, including by computer; **OR**
2. The visual depiction was actually transported and transmitted in interstate or foreign commerce.

In order to prove the defendant guilty of this offense, the United States does not need to prove both of these factors and it does not need to provide that the defendant himself transported a visual depiction in interstate or foreign commerce. Rather, it must prove **EITHER** (1) that “the visual depiction was produced or transmitted using materials that had been mailed, shipped or transported in or affecting interstate or foreign commerce by any means, including a computer”; **OR** (2) that “the visual depiction was actually transported and transmitted in interstate or foreign commerce.”

I draw your attention to the boldfaced, capitalized **OR** in this instruction. Because this count of the indictment charges that the Defendant committed the offense alleged in two different ways, I must give you a special instruction. In order to convict the Defendant on this count, all twelve of you must agree that the Defendant committed this offense in at least one of these two ways. In other words, you must all agree that the Government has proven beyond a reasonable doubt **either** (1) that “the visual depiction was produced or transmitted using materials that had been mailed, shipped or transported in or affecting interstate or foreign commerce by any means, including a computer”; **OR** (2) that “the visual depiction was actually transported and transmitted in interstate or foreign commerce,” or both. If you are not unanimous as to at least one of these two means of committing the crime, you must return a verdict of not guilty.

To transport or transmit means to send or carry something from one place to another. It can be accomplished in any of a variety of ways; either directly because a person personally carries an item or indirectly because a person makes use of a third

party, such as a commercial shipper or through the use of the mails or computer. Transmission of photographs or video by means of the Internet constitutes transportation in interstate commerce. The transportation must, however, involve the movement of the materials in question interstate, that is, across state lines, or in foreign commerce, which entails commerce with a foreign country.

COUNTS 2 AND 3
RECEIVING CHILD PORNOGRAPHY

Defendant Benjamin Weisinger is charged in Counts 2 and 3 of the indictment with receipt of child pornography.

COUNTS 2 AND 3: ELEMENTS OF THE OFFENSE

In order prove the defendant guilty of receiving child pornography, the government must establish beyond a reasonable doubt each one of the following four elements:

- FIRST:** That the defendant knowingly received a visual depiction;
- SECOND:** That the visual depiction was shipped and transported in or affecting interstate or foreign commerce;
- THIRD:** That the production of the visual depiction involved the use of a minor engaging in sexually explicit conduct, and portrays the minor engaging in that conduct; and
- FOURTH:** That the defendant knew that the production of the visual depiction involved the use of a minor engaging in sexually explicit conduct, and portrayed a minor engaging in that conduct.

COUNTS 2 AND 3: FIRST ELEMENT

The first element of Counts 2 and 3 which the government must prove beyond a reasonable doubt is that the defendant “knowingly” received a “visual depiction.” As I have previously instructed you, an act is done knowingly when it is done voluntarily and intentionally and not because of accident, mistake or some other innocent reason. The government is not required to prove that the defendant knew that his acts or omissions were unlawful. As I previously instructed you, a “visual depiction” includes any video or picture.

To receive a visual depiction means to take possession of it. A person “knowingly receives” child pornography when he intentionally views, acquires, or accepts child pornography on a computer or other device from an outside source. This includes the knowing acceptance of a depiction previously requested. Receiving includes the downloading of a photograph or video by means of the Internet.

COUNTS 2 AND 3: SECOND ELEMENT

The second element of Counts 2 and 3 which the government must prove beyond a reasonable doubt is that the visual depiction was mailed or transported in or affecting interstate or foreign commerce. The indictment alleges that the visual depiction was actually transported in or affecting interstate or foreign commerce. This means that the government must prove beyond a reasonable doubt that the visual depiction crossed from one state to another or between the United States and a foreign country. Transmission of photographs or video by means of the Internet constitutes transportation in or affecting interstate or foreign commerce.

COUNTS 2 AND 3: THIRD ELEMENT

The third element of Counts 2 and 3 which the government must prove beyond a reasonable doubt is that the production of the visual depiction involved the use of a minor engaging in sexually explicit conduct and portrays that minor engaged in that conduct.

The visual depiction must be of a real person under the age of eighteen (18) engaging in sexually explicit conduct. You may consider all of the evidence, including your viewing of the depiction, in determining whether the depiction portrayed an actual person under the age of eighteen (18) engaging in sexually explicit conduct.

I have previously instructed you on the term “sexually explicit” and that term has the same meaning here.

COUNTS 2 AND 3: FOURTH ELEMENT

The fourth element of Counts 2 and 3 which the government must prove beyond a reasonable doubt is that the defendant knew both that the production of the visual depiction involved the use of a minor engaging in sexually explicit conduct, and that it portrayed a minor engaging in that conduct.

As I stated before, an act is done knowingly when it is done voluntarily and intentionally and not because of accident, mistake, or some other innocent reason.

In this case, the term “knowingly” refers to an awareness of the sexually explicit nature of the material, and to the knowledge that the visual depiction was in fact of an actual minor engaged in that sexually explicit conduct.

The government must prove beyond a reasonable doubt that the defendant had knowledge of the general nature of the contents of the material. The defendant need not

have specific knowledge as to the identity or actual age of the minor, but the defendant must have knowledge or an awareness that the material contained a visual depiction of a minor engaged in sexually explicit conduct. Such knowledge may be shown by direct or circumstantial evidence, or both. Eyewitness testimony of a defendant's viewing of the material is not necessary to prove his or her awareness of its contents; the circumstances may warrant a reasonable inference that he or she was aware of what the material depicts. Furthermore, the defendant's belief as to the legality or illegality of the material is irrelevant.

COUNT 4
POSSESSION OF CHILD PORNOGRAPHY

Defendant Benjamin Weisinger is charged in Count 4 of the indictment with possession of child pornography.

COUNT 4: ELEMENTS OF THE OFFENSE

In order to prove the defendant guilty of possessing child pornography, the government must prove each of the following elements beyond a reasonable doubt:

- FIRST:** That the defendant knowingly possessed a visual depiction;
- SECOND:** That the visual depiction was produced using materials that had been mailed, shipped, or transported in or affecting interstate or foreign commerce;
- THIRD:** That the production of the visual depiction involved the use of a minor engaged in sexually explicit conduct, and portrays the minor engaged in that conduct; and

FOURTH: That the defendant knew that the production of the visual depiction involved the use of a minor engaging in sexually explicit conduct, and portrayed a minor engaged in that conduct.

COUNT 4: FIRST ELEMENT

As I have just instructed you, the first element of the offense charged in Count 4 which the government must establish beyond a reasonable doubt is that the defendant knowingly possessed a visual depiction. I have previously instructed you on the terms “knowingly” and “visual depiction” and those words have the same meaning here.

To “possess” something means to have it within a person’s control. This does not necessarily mean that the person must hold it physically, that is have actual possession of it. As long as the visual depiction is within the defendant’s control, he possess it. If you find that the defendant either had actual possession of the depiction, or that he had the power and intention to exercise control over it, even though it was not in his physical possession, you may find that the government has proven possession.

COUNT 4: SECOND ELEMENT

The second element of Count 4 requires the government to prove beyond a reasonable doubt that the visual depiction was produced using materials that had been mailed, shipped or transported in and affecting interstate or foreign commerce by any means, including by computer. As I have previously instructed you, to transport means to send or carry something from one place to another. It can be accomplished in any of a variety of ways; either directly because a person personally carries an item or indirectly because a person makes use of a third party, such as a commercial shipper or through the

use of the mails or computer. The transportation must, however, involve the movement of the materials in question interstate, that is, across state lines, or in foreign commerce, which entails commerce with a foreign country.

COUNT 4: THIRD ELEMENT

The third element of Count 4 which the government must prove beyond a reasonable doubt is that the production of the visual depiction involved the use of a minor engaging in sexually explicit conduct and portrays that minor engaged in that conduct.

The visual depiction must be of a real person under the age of eighteen (18) engaging in sexually explicit conduct. You may consider all of the evidence, including your viewing of the depiction, in determining whether the depiction portrayed an actual person under the age of eighteen (18) engaging in sexually explicit conduct.

I have previously instructed you on the term “sexually explicit” and that term has the same meaning here.

COUNT 4: FOURTH ELEMENT

The fourth element of Count 4 which the government must prove beyond a reasonable doubt is that the defendant knew both that the production of the visual depiction involved the use of a minor engaging in sexually explicit conduct, and that it portrayed a minor engaging in that conduct.

As I stated before, an act is done “knowingly” when it is done voluntarily and intentionally and not because of accident, mistake, or some other innocent reason.

In this case, the term “knowingly” refers to an awareness of the sexually explicit nature of the material, and to the knowledge that the visual depictions were in fact of an actual minor engaged in that sexually explicit conduct.

The government must show that the defendant had knowledge of the general nature of the contents of the material. The defendant need not have specific knowledge as to the identity or actual age of the minor, but the defendant must have knowledge or an awareness that the material contained a visual depiction of a minor engaged in sexually explicit conduct. Such knowledge may be shown by direct or circumstantial evidence, or both. Eyewitness testimony of a defendant’s viewing of the material is not necessary to prove his awareness of its contents; the circumstances may warrant an inference that he was aware of what the material depicts. Furthermore, the defendant’s belief as to the legality or illegality of the material is irrelevant.

JUROR NOTE TAKING

During this trial, you have been provided with pencil and paper, and some of you have taken notes. As I explained at the beginning of the trial, all jurors should be given equal attention during the deliberations regardless of whether or not they have taken notes. Any notes you have taken may only be used to refresh your memory during deliberations. You may not use your notes as authority to persuade your fellow jurors as to what a witness did or did not say. In your deliberations you must rely upon your collective memory of the evidence in deciding the facts of the case. If there is any difference between your memory of the evidence and your notes, you may ask that the

record of the proceedings be read back. If a difference still exists, the record must prevail over your notes.

RECOLLECTION OF EVIDENCE

Let me remind you that in deliberating upon your verdict, you are to rely solely and entirely upon your own memory of the testimony.

If, during your deliberations, you are unable to recall with any degree of accuracy, a particular part of the testimony, or a part of these instructions, you may do the following:

- (1) Write out your question, and have the foreperson sign it;
- (2) Knock on the door of the jury room; and
- (3) Deliver your note to the Court Officer, to give to me.

After the attorneys have been consulted, and the record has been reviewed, I shall decide what action to take, and I shall tell you my ruling.

CONCLUSION

I caution you, members of the jury, that you are here to determine whether the defendant before you today is not guilty or guilty solely from the evidence in this case. I remind you that the mere fact that a defendant has been indicted is not evidence against him. Also, a defendant is not on trial for any act or conduct or offense not alleged in the indictment. Nor are you called upon to return a verdict as to the guilt or innocence of any other person or persons not on trial as a defendant in this case.

You should not consider the consequences of a guilty or not guilty determination. The punishment provided by law for the offenses charged in the indictment is a matter

exclusively within the responsibility of the judge, and should never be considered by the jury in any way in arriving at an impartial verdict.

It is your duty as jurors to consult with one another and to deliberate. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. Do not hesitate to re-examine your own views and change your opinion if you think that you were wrong. Do not, however, surrender your honest convictions about the case solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

To return a verdict, it is necessary that every juror agree to the verdict. In other words, your verdict must be unanimous regarding each element of the offense.


Upon retiring to the jury room, your foreperson will preside over your deliberations and will be your spokesperson here in court. If a vote is to be taken, your foreperson will ensure that it is done. A verdict form has been prepared for your conclusions. After you have reached an agreement, the foreperson will record a verdict of guilty or not guilty as to the defendant on each count. Your foreperson will then sign and date the verdict form and you will return to the courtroom. In all other respects, a foreperson is the same as any other juror. His or her votes do not count more than any other member of the jury.

If, during your deliberations you should desire to communicate with the court, please put your message or question in writing signed by the foreperson, and pass the note to the Court Officer who will bring it to my attention. I will then confer with the attorneys and I will respond as promptly as possible, either in writing or by having you

return to the courtroom so that I can speak with you. I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at the time. You should also never communicate the subject matter of your note or your deliberations to any member of the court's staff.

I appoint _____ as your foreperson.

Dated at Rutland, in the District of Vermont this 5th day of April, 2013.



Christina Reiss, Chief Judge
United States District Judge