IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. DALE YARRINGTON, Defendant.	No. 08-CR-62-LRR **FINAL JURY INSTRUCTIONS**

Ladies and Gentlemen of the Jury:

The instructions I gave you at the beginning of the trial and during the trial remain in effect. I will now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of and during trial are not repeated here.

The instructions I am about to give you now are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my earlier instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

INSTRUCTION NO. 1

In considering these instructions, attach no importance or significance whatsoever to the order in which they are given.

INSTRUCTION NO. 2

Neither in these instructions nor in any ruling, action or remark that I have made during this trial have I intended to give any opinion or suggestion as to what the facts are or what your verdict should be.

INSTRUCTION NO. 3

It is your duty to find from the evidence what the facts are. You will then apply the law, as I give it to you, to those facts. You must follow my instructions on the law, even if you thought the law was different or should be different.

Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense and the law as I give it to you.

INSTRUCTION NO. 4

I have mentioned the word "evidence." The "evidence" in this case consists of the following: the testimony of the witnesses, including the defendant, the documents and other things received as exhibits and the facts that have been stipulated—that is, formally agreed to by the parties.

You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence in the case.

Certain things are not evidence. I shall list those things again for you now:

1. Statements, arguments, questions and comments by the lawyers are not evidence.

2. Anything that might have been said by jurors, the attorneys, or the judge during the jury selection process is not evidence.

3. Objections are not evidence. The parties have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustained an objection to a question, you must ignore the question and must not try to guess what the answer might have been.

4. Testimony that I struck from the record, or told you to disregard, is not evidence and must not be considered.

5. Anything you saw or heard about this case outside the courtroom is not evidence.

During the trial, documents were referred to but they were not admitted into evidence and, therefore, they will not be available to you in the jury room during deliberations.

Finally, if you were instructed that some evidence was received for a limited purpose only, you must follow that instruction.

INSTRUCTION NO. 5

There are two types of evidence from which a jury may properly find the truth as to the facts of a case: direct evidence and circumstantial evidence. Direct evidence is the evidence of the witness to a fact or facts of which they have knowledge by means of their senses. The other is circumstantial evidence—the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

INSTRUCTION NO. 6

The jurors are the sole judges of the weight and credibility of the testimony and the value to be given to each witness, including the defendant, who has testified in this case. In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it or none of it.

In deciding what testimony to believe, consider the witness's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider, therefore, whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

INSTRUCTION NO. 7

In a previous instruction, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be "impeached" and how you are to consider the testimony of certain witnesses.

A witness may be discredited or impeached by contradictory evidence; by showing that the witness testified falsely concerning a material matter; by showing the witness has a motive to be untruthful; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness's present testimony.

You should judge the testimony of the defendant in the same manner as you judge the testimony of other witnesses.

You have heard evidence that certain witnesses were once convicted of crimes. You may use this evidence only to help you to decide whether to believe these witnesses and how much weight to give their testimony.

You have heard evidence that Jordan McConnell hopes to receive a reduced sentence on criminal charges pending against him in return for his cooperation with the government in this case. Jordan McConnell is subject to a mandatory minimum sentence, that is, a sentence that the law provides must be of a certain minimum length. Jordan McConnell entered into an agreement with the government which provides that in return for his assistance, the government may recommend a less severe sentence which could be less than the mandatory minimum sentence for the crimes with which he is charged. If the prosecutor handling this witness's case believes he provided substantial assistance, the prosecutor can file in the court in which the charges are pending against this witness a motion to reduce his sentence below the statutory minimum.

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INSTRUCTION NO. 7 (Cont'd)

The judge has no power to reduce a sentence for substantial assistance unless the government, acting through the United States Attorney, files such a motion. If such a motion for reduction of sentence for substantial assistance is filed by the government, then it is up to the judge to decide whether to reduce the sentence at all, and if so, how much to reduce it.

You may give the testimony of this witness such weight as you think it deserves. Whether or not testimony of a witness may have been influenced by his hope of receiving a reduced sentence is for you to decide.

INSTRUCTION NO. 8

You have heard evidence that the defendant was previously convicted of a crime. You may use that evidence only to help you to decide whether to believe his testimony and how much weight to give it. That evidence does not mean that he committed the crime charged here, and you must not use that evidence as any proof of the crime charged in this case.

INSTRUCTION NO. 9

You have heard testimony that the defendant made statements to certain witnesses and law enforcement in this case. It is for you to decide:

First, whether the defendant made the statements; and

Second, if so, how much weight you should give to them.

In making these two decisions, you should consider all of the evidence, including the circumstances under which the statements may have been made.

INSTRUCTION NO. 10

You have heard testimony from a person described as an expert. A person who by knowledge, skill, training, education or experience, has become an expert in some field may state his opinions on matters in that field and may also state the reasons for his opinions.

Expert testimony should be considered just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used and all the other evidence in the case.

INSTRUCTION NO. 11

Exhibits have been admitted into evidence and are to be considered along with all of the other evidence to assist you in reaching your verdict. You are not to tamper with the exhibits or their contents, and each exhibit should be returned into open court, along with your verdict, in the same condition as it was received by you.

INSTRUCTION NO. 12

The government and the defendant have stipulated—that is, they have agreed that certain facts are as counsel have stated. You must, therefore, treat those facts as having been proved.

INSTRUCTION NO. 13

The Indictment in this case charges the defendant with one crime.

The Indictment charges that, on or about May 24, 2007, in the Northern District of Iowa, the defendant knowingly possessed visual depictions of minors engaging in sexually explicit conduct, said visual depictions having been produced using materials that had been shipped and transported in interstate and foreign commerce, namely, a Western Digital hard drive that was manufactured outside the State of Iowa.

The defendant has pleaded not guilty to this charge.

As I told you at the beginning of the trial, an indictment is simply an accusation. It is not evidence of anything. To the contrary, the defendant is presumed to be innocent. Thus the defendant, even though charged, begins the trial with no evidence against him. The presumption of innocence alone is sufficient to find the defendant not guilty and can be overcome only if the government proves, beyond a reasonable doubt, each element of the crime charged.

There is no burden upon a defendant to prove that he is innocent.

INSTRUCTION NO. 14

The Indictment charges the defendant with possession of child pornography. The crime of possession of child pornography has three essential elements, which are:

One, on or about May 24, 2007, the defendant knowingly possessed one or more visual depictions of child pornography;

Two, the defendant knew the visual depiction or depictions under consideration were of a minor engaging in sexually explicit conduct; and

Three, the visual depiction or depictions under consideration had been produced using a hard drive that had previously been transported in interstate or foreign commerce.

If all of these elements have been proven beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of the crime charged in Count 1; otherwise you must find the defendant not guilty of this crime.

INSTRUCTION NO. 15

"Child pornography," as used in these instructions, means any visual depiction, including a photograph or picture of sexually explicit conduct, where the production of such visual depiction involves a minor engaging in sexually explicit conduct.

INSTRUCTION NO. 16

As used in these instructions, the term "minor" means any person under the age of eighteen years.

INSTRUCTION NO. 17

As used in these instructions, the term "sexually explicit conduct" means 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 lascivious exhibition of the genitals or pubic area of any person.

INSTRUCTION NO. 18

The term "visual depiction" includes any photograph, film or picture, whether made or produced by electronic, mechanical, or other means. It includes undeveloped film and data stored on a computer disk or by electronic means which is capable of conversion into a visual image.

INSTRUCTION NO. 19

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 deciding whether an exposure of the genitals or pubic area constitutes a lascivious exhibition, you may consider such factors as: (1) whether the focal point of the picture or image is on the minor's genitals or pubic area; (2) whether the setting of the picture or image is sexually suggestive, that is, in a place or pose generally associated with sexual activity; (3) whether the minor is depicted in an unnatural pose or in inappropriate attire, considering the age of the minor; (4) whether the minor is fully or partially clothed, or nude; (5) whether the picture or image suggests sexual coyness or a willingness to engage in sexual activity; and/or (6) whether the picture or image is intended or designed to elicit a sexual response in the viewer.

It is for you to decide the weight or lack of weight to be given to any of these factors. An image need not involve all of these factors to constitute a lascivious exhibition of the genitals or pubic area.

INSTRUCTION NO. 20

To return a verdict of guilty you need not unanimously agree on the number of visual depictions that constituted child pornography. You must, however, unanimously agree on at least one visual depiction. If you cannot agree that the same visual depiction constitutes child pornography as defined in these instructions, you may not return a guilty verdict.

INSTRUCTION NO. 21

Possession is an element of the offense charged in the Indictment. The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may have sole or joint possession.

A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

Whenever the word "possession" has been used in these instructions, it includes actual as well as constructive possession and also sole as well as joint possession.

INSTRUCTION NO. 22

The Indictment charges certain acts in the conjunctive. For example, in Count 1, the defendant is charged with knowingly possessing at least one image of child pornography having been produced using a hard drive that had been "shipped and transported in interstate and foreign commerce . . . ." In order to prove the defendant guilty, the government does not need to prove that (1) the hard drive had been both shipped and transported and (2) that the hard drive had been shipped or transported in both interstate and foreign commerce. Rather, the government is only required to prove one of these sets of facts, that (1) the hard drive had been either shipped or transported and (2) in either interstate or foreign commerce.

INSTRUCTION NO. 23

The term "interstate commerce" means commerce between any combination of states, territories and possessions of the United States, including the District of Columbia.

The phrase "foreign commerce" means commerce between any state, territory or possession of the United States and a foreign country.

INSTRUCTION NO. 24

The phrase "transported in interstate or foreign commerce," as used in these instructions, means that the item or items described, at any time, traveled or moved between one state and another or one country and another. It is not necessary for the government to prove that the defendant personally transported the material in interstate or foreign commerce. It is sufficient that the government prove that at some point before or during the charged conduct, the hard drive traveled in interstate or foreign commerce.

INSTRUCTION NO. 25

You will note that the Indictment charges that the offense was committed "on or about" a certain date. The government need not prove with certainty the exact date or the exact time period of an offense charged. It is sufficient if the evidence established that an offense occurred within a reasonable time of the date or period of time alleged in the Indictment.

INSTRUCTION NO. 26

The government is not required to prove that the defendant knew that his acts or omissions were unlawful. An act is done "knowingly" if the defendant is aware of the act and does not act through ignorance, mistake or accident. You may consider evidence of the defendant's words, acts or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

INSTRUCTION NO. 27

A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

INSTRUCTION NO. 28

Throughout the trial, you have been permitted to take notes. Your notes should be used only as memory aids, and you should not give your notes precedence over your independent recollection of the evidence.

In any conflict between your notes, a fellow juror's notes and your memory, your memory must prevail. Remember that notes sometimes contain the mental impressions of the note taker and can be used only to help you recollect what the testimony was. At the conclusion of your deliberations, your notes should be left in the jury room for destruction.

INSTRUCTION NO. 29

In conducting your deliberations and returning your verdict, there are certain rules you must follow. I shall list those rules for you now.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach an agreement if you can do so without violence to individual judgment, because a verdict—whether guilty or not guilty—must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right or simply to reach a verdict.

Third, if a defendant is found guilty, the sentence to be imposed is my responsibility. You may not consider punishment in any way in deciding whether the government has proved its case beyond a reasonable doubt.

Fourth, if you need to communicate with me during your deliberations, you may send a note to me through the Court Security Officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone—including me—how your votes stand numerically.

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INSTRUCTION NO. 29 (Cont'd)

Fifth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict, whether guilty or not guilty, must be unanimous. Nothing I have said or done is intended to suggest what your verdict might be—that is entirely for you to decide.

INSTRUCTION NO. 30

Attached to these instructions you will find the Verdict Form and Interrogatory Form. The Verdict Form and Interrogatory Form are simply the written notices of the decisions that you reach in this case. The answers to the Verdict Form and Interrogatory Form must be the unanimous decisions of the jury.

You will take the Verdict Form and Interrogatory Form to the jury room, and when you have completed your deliberations and each of you has agreed to the answers to the Verdict Form and Interrogatory Form, your foreperson will fill out the Verdict Form and Interrogatory Form, sign and date them and advise the Court Security Officer that you are ready to return to the courtroom.

Finally, members of the jury, take this case and give it your most careful consideration, and then without fear or favor, prejudice or bias of any kind, return the Verdict Form and Interrogatory Form in accord with the evidence and these instructions.

May 20, 2009
Date

Linda R. Reade, Chief Judge
United States District Court
Northern District of Iowa