

1 Revised December 1, 2000

2
3 UNITED STATES COURT OF APPEALS
4 For the Fifth Circuit
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6
7 No. 99-60819
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11 UNITED STATES OF AMERICA,

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13 Plaintiff-Appellee,

14 VERSUS

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16 BART HENRIQUES,

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18 Defendant-Appellant.
19

20 Appeal from the United States District Court
21 for the Southern District of Mississippi
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23
24 November 27, 2000

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26 Before DAVIS, EMILIO M. GARZA, Circuit Judges, and POGUE*

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28 **DONALD C. POGUE, JUDGE:**
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30 Defendant-appellant Bart Henriques ("Henriques") appeals his
31 conviction on one count of possession of child pornography in
32 violation of 18 U.S.C. § 2252A(a)(5)(B). The district court
33 sentenced Henriques to 42 months imprisonment, followed by three
34 years of supervised release. Henriques appeals on several
35 grounds.¹ The outcome of the case turns on one issue: whether the

* Judge for the United States Court of International Trade, sitting by designation.

¹ Henriques claims that the district court improperly denied his motion to suppress evidence, that the court abused its discretion in finding that remarks by the prosecutor in the grand jury proceeding at most constituted harmless error, that the prosecutor withheld evidence favorable to Henriques in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), that the statutory schemes are void for vagueness, and that the evidence was insufficient to

1 evidence is sufficient to support a finding that the images were
2 transported in interstate commerce. We agree with Henriques that
3 the evidence does not support such a finding. We, therefore,
4 reverse the conviction.

5 **FACTS AND PRIOR PROCEEDINGS**

6
7 Henriques was indicted and convicted by a jury of one count of
8 possession of child pornography in violation of 18 U.S.C. §
9 2252A(a)(5)(B).² It is from this verdict that Henriques filed a
10 timely appeal.

11 The facts relevant for this appeal are as follows: In
12 February 1998, Warren County's Sheriff's Department was contacted

support a verdict of guilty beyond a reasonable doubt.

² 18 U.S.C. § 2252A is entitled "Certain activities relating to material constituting or containing child pornography," and section 2252A(a)(5)(B) reads as follows:

(a) Any person who-
(5) either-

(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains 3 or more images of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, shall be punished as provided in subsection (b)

Subsection (b) discusses fines and imprisonment. 18 U.S.C. § 2252A (a)(5)(B) (1997).

The statute requires a minimum of three images to convict. See *Id.* Henriques was convicted under this minimum. His conviction was based on three images, G-11, G-20, and G-21.

The statute was amended on October 30, 1998. The amended version substitutes "an image" for "3 or more images." 18 U.S.C. §§ 2252A(a)(5)(B). This version of the statute gives the defendant an affirmative defense upon a showing that the defendant possessed fewer than three images. See *Id.* at (c). Although the district court refers to the amended version of the statute, we find that it is not applicable in this case, because the indictment charges Henriques with violating 18 U.S.C. § 2252A(a)(5)(b) on or about February 23, 1998, before the statute was amended.

1 about a runaway teenage girl named Gabrielle Phillips. The
2 Sheriff's Department discovered Phillips at Henriques' apartment.
3 In the process of searching for Phillips, the Sheriff's Department
4 learned of several other children who visited Henriques' apartment
5 and that Henriques often used his computer to view both child and
6 adult pornography in the youths' presence. After Phillips' removal
7 from Henriques' apartment, Henriques was called into the Office of
8 Internal Affairs at the Vicksburg Police Department. There, at the
9 Department's request, he voluntarily consented to a search of his
10 apartment, putting his consent in writing. The police then
11 searched Henriques' apartment during which time Henriques' computer
12 was seized and taken into custody.

13 In March 1998, FBI Special Agent Jeffrey Artis took the
14 computer into FBI custody and transported it for examination by a
15 bureau computer expert. At this time, without turning on the
16 computer, a "mirror" copy of the computer's hard drive was made.
17 Upon review of this copy, several files containing pornography, all
18 organized into subdirectories, were found on the computer.

19 At trial approximately seventeen images found on Henriques'
20 computer were put into evidence. The jury concluded that three
21 images, Exhibits G-11, G-20, and G-21, fell within the behavior
22 prohibited by 18 U.S.C. § 2252A.³ As a result of the jury's
23 finding, Henriques was convicted.

³ See *supra* note 2.

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Sufficiency of Evidence

The issue of sufficiency of evidence is a question of law which we review de novo. See *Aguillard v. McGowan*, 207 F.3d 226, 228 (5th Cir. 2000). Evidence need not “exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt.” *United States v. Richards*, 204 F.3d 177, 206 (5th Cir. 2000)(citing *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. 1982)). We must also view the evidence in the light most favorable to the verdict, in this case in favor of the government. See *United States v. Williams*, 132 F.3d 1055, 1059 (5th Cir. 1998).

The statute mandates that at least three of the images in the defendant’s possession traveled in interstate commerce. This includes any image “that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer.” 18 U.S.C. § 2252A(a)(5)(B)(1997). Transport of the goods through interstate commerce is an element of the crime which the government must prove to obtain a conviction. Cf. *The National Stolen Property Act*, 18 U.S.C. § 2314 (2000); See *United States v. Vontsteen*, 872 F.2d 626 (5th Cir. 1989)(“[T]he government directly proved that [the] pipe . . . was shipped from Texas to Louisiana, thereby satisfying . . . an element of section 2314.”).

1 Henriques contends that the government failed to prove this
2 element.

3 The requirement in 18 U.S.C. § 2252A that child pornography be
4 transported in interstate commerce raises two issues. First, to
5 what extent must the government prove that the image came from the
6 Internet.⁴ Second, does proof that a picture was downloaded from
7 the Internet satisfy the jurisdictional nexus of "interstate
8 commerce."

9 Although this court has not previously addressed the extent of
10 the government's burden in connecting the specific images to the
11 Internet, the Tenth Circuit has already developed a test to ensure
12 that the government satisfies its burden. The Tenth Circuit
13 requires the government to independently link all the images upon
14 which a conviction is based to the Internet. See *United States v.*
15 *Wilson*, 182 F.3d 737, 744 (10th Cir. 1999)(holding evidence linking
16 one diskette to interstate commerce was not sufficient to allow an
17 inference that the other two diskettes were similarly linked).
18 This standard limits the government's ability to build a case on
19 inferences, e.g., by analogizing that since one image was

⁴ Use of the Internet has drastically increased over the past decade. As of November 1999, the U.S. online population was estimated at 101 million and continuing to grow. See David Lake, *Spotlight: How Big is the U.S. Net Population*, available at <<http://www.TheStandard.com>>. Not only has the individual online population grown, but the Internet is now estimated to connect more than 159 countries. See *ACLU v. Johnson*, 194 F.3d 1149, 1153 (10th Cir. 1999) The Internet is "wholly insensitive to geographic distinctions[,]" making it difficult to use the present legal framework to analyze this modern situation. *American Library Assn., et.al. v. Pataki*, 969 F. Supp. 160, 164 (S.D.N.Y. 1997).

1 downloaded from the Internet, the rest of the images must also be
2 connected to the Internet.

3 The transport of images through interstate commerce, as an
4 element of the crime, must be proved beyond a reasonable doubt.
5 Requiring the government to independently link each image to
6 interstate commerce is therefore necessary and appropriate in order
7 that the government satisfies its burden. If we did not require the
8 government to independently link each image to interstate commerce,
9 we would allow the government to obtain a conviction without
10 proving beyond a reasonable doubt each element of the crime.
11 Therefore, we adopt the Tenth Circuit's position.

12 In this case, the government presented little evidence
13 connecting all the images to the Internet independently. Indeed,
14 as to one of the images, the government presented no evidence
15 connecting it to the Internet. It is not disputed that the
16 evidence supports a finding that Henriques accessed the Internet.
17 Nor is it disputed that Henriques' computer contained pornographic
18 material. The required jurisdictional nexus between the images and
19 interstate commerce, however, was not established.

20 The government established that Henriques owned a computer and
21 subscribed to an Internet Service Provider ("ISP"). Through this
22 service, Henriques was able to access and view images on the
23 Internet. His computer also contained pornographic images, which
24 were located on his hard drive. These images were stored in

1 separate folders on his computer. The evidence clearly supports a
2 finding that these folders were consciously created. Also, since
3 Henriques owned the computer, the computer was found in his
4 apartment, and he was the only adult living in the apartment, the
5 jury could reasonably conclude that the evidence establishes that
6 Henriques was the individual responsible for the images found on
7 the hard drive.

8 Despite this evidence, at trial, no evidence was introduced by
9 the government to establish whether the images came from a website,
10 were downloaded from a floppy disk, or came from some other source,
11 such as another hard drive.⁵ Rather, Agent Artis, in his trial
12 testimony, argued that if images of nude children were on the hard
13 drive, and that computer was connected to the Internet, somebody
14 had to use the Internet to put them there. R. Vol. 4, page 320.⁶

⁵ Agent Artis testified that

What we were looking for was child pornography on the computer there, and that's what we found. Now where it came from, what site or what name is written underneath the picture was irrelevant. The fact what we were looking for was, was that child pornography was on the computer. That's what we found.

R. Vol. 4, page 338-9.

⁶ This argument became clear during Henriques' attorney's questioning of Agent Artis.

Q. And the focus of this investigation is somebody - - you believe, in your investigation, that somebody downloaded off of the Internet images of nude children and they exist on that hard drive. Correct?

A. Yes. There was images of children

Q. All right. And in order to get them on the hard drive, somebody has to utilize what we've previously talked about, an Internet service provider, and hook onto the Internet - - dial a phone number through their computer, hook on, and then search and

1 In order to prove the connection between the images found on
2 Henriques' hard drive and the Internet, the government relied on
3 the testimony of one witness and internal evidence on some of the
4 images. Witness testimony was introduced to prove that Henriques
5 viewed pornographic images on the Internet.⁷ This testimony,
6 however, was only applicable for a few of the images, while the
7 government introduced approximately seventeen images for
8 deliberation by the jury. The attorney for the government also
9 argued that the interstate commerce element of the statute was
10 satisfied because website addresses were embedded on some of the
11 images.⁸

12 The government attorney, however, never discussed how the
13 connection to the Internet can be made for the photographs with no
14 internal evidence or without testimony connecting the images to the
15 Internet. Rather, the government attempted to prove the Internet
16 connection mainly through inferences. This, however, leaves a gap
17 in the evidence.

18 Phillips, the girl found at Henriques' apartment, testified

 find one of these photos and then download it onto the computer.
 Correct?

 A. That's correct.

R. Vol. 4, page 320.

⁷ Phillips identified some of the images as ones she witnessed Henriques view on the Internet. See *infra* note 9 and accompanying text.

⁸ The government attorney argued that "in certain of those photographs there is internal evidence which suggests that they [the images] are indeed generated from the Internet." R. Vol. 4, page 488.

1 that Henriques used the Internet to view pornographic images in her
2 presence. She identified a model in G-11 as one she saw Henriques
3 view on the Internet.⁹ The government relied on Phillips'
4 testimony to prove a connection between the images and the
5 Internet. Although Phillips' testimony connects one image, G-11,
6 to the Internet, her testimony cannot be used to infer that the
7 other two images upon which Henriques' conviction is based, were
8 also obtained from the Internet.

9 Of the other two images, one, G-21, contains a world-wide web
10 address embedded on the image. Although, it is possible for this
11 "internal evidence" to support a connection to the Internet for G-
12 21, the government is still required to independently connect G-20
13 to the Internet. The third image, G-20, does not contain internal
14 evidence. There was also no testimony introduced to connect this
15 specific image to the Internet. Since there is no evidence to
16 connect this last image, G-20, to the Internet, we find that there
17 is not independent evidence connecting all three images to the
18 Internet.¹⁰

⁹ Phillips identified models in three exhibits, G-11, G-13, and G-22. Of these three images, the jury only held G-11 as meeting the statutory requirements, making Phillip's identification of the other models irrelevant for this court's purposes.

¹⁰ The failure of the government to meet its burden for all three images, renders it unnecessary to decide the issue of whether downloading an image from the Internet satisfies "interstate commerce." It should be noted that the issue of interstate commerce and the Internet raises competing considerations, such as, the scope of federal jurisdiction and the global nature of the Internet. See generally *American Library Assn., et. al. v. Pataki*, 969 F. Supp. 170 (S.D.N.Y. 1997); *United States v. Carroll*; 105 F. 3d 740 (1st Cir. 1997); *ACLU v. Johnson*, 194 F. 3d 1149 (10th Cir. 1999);

