THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2017-0280

The State Of New Hampshire

v.

Robert Norman

APPEAL PURSUANT TO MANDATORY APPEAL (RULE 7) FROM A JUDGMENT OF THE HILLSBOROUGH/NORTH SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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ISSUES PRESENTED

I. Whether the affidavit for the warrant established probable cause where the affidavit described the defendant's prior criminal history, the circumstances surrounding his underlying arrest, a description of the photos discovered on the defendant's computer at the time of his arrest, and the affiant's training and experience as a law enforcement officer, specifically in the area of child pornography.

II. Whether the seized photographs which depicted prepubescent, naked females in a variety of poses and backgrounds, constituted child sexual abuse images.

STATEMENT OF THE CASE

On February 19, 2016, the State obtained a search warrant for the defendant's (Robert Norman) Sony laptop, Motorola cell phone, and Seagate external hard drive. DBA: 40–54.[1] On June 15, 2016, a Hillsborough County grand jury indicted the defendant on eight counts of possession of child sexual abuse images ("CSAI") in violation of RSA 649-A:3, I(a) (2016). DBA: 15–22. The defendant filed a motion to suppress the evidence obtained during the search warrant, DBA: 23–37, which the State opposed, DBA: 55–66, and which the trial court denied on January 6, 2017, DBA:1–13.

Following a stipulated-facts bench trial, the defendant was found guilty of six counts of CSAI, T: 26, and sentenced to a stand committed term of four to eight years with one year of the minimum sentence suspended if the defendant were to complete a sex offender program, DBA: 79–86, and a suspended sentence of five to ten years to run consecutive to the stand-committed sentence, DBA: 87–92. This appeal followed.

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[1] "DB:__" refers to the defendant's brief and page number.
"DBA:__" refers to the appendix to the defendant's brief and page number.
"M:__" refers to the transcript of the motion to suppress and page number.
"T:___" refers to the transcript of the stipulated-facts trial and page number.

STATEMENT OF FACTS

A. Factual Background

On February 16, 2016, police officers from the Hillsborough Police Department ("HPD"), responded to the Walmart parking lot in Amherst for an incident unrelated to the defendant. T: 11. While they were there, they observed a pickup truck with wires running from underneath the hood into the cab of the vehicle and the defendant, who appeared to be slumped over the steering wheel, *Id.*

Upon approaching the vehicle, they found the defendant with his pants around his feet, his penis exposed, and a vacuum hose propped up on his leg, *Id.* The police also saw a laptop computer open on the front passenger seat with an image of a partially nude female on the screen, T: 11–12. There was also a cell phone and a hard drive on the front passenger's seat.

The officers asked the defendant to step out of the truck and pull his pants up, which he did. T:12. They also asked for consent to search his laptop, which he gave. T: 12. The police found multiple images on the laptop of a sexual nature, including several of children, estimated to be between the ages of 6 and 15. There were young children in dresses and teenagers in cheerleading outfits. *Id.* When asked about those images, the defendant said they were not pictures of family

members and that he liked photos of younger females if they were wearing pantyhose. *Id.* The defendant subsequently admitted to using those images to "stimulate" himself, and that he had "not yet" begun masturbating in the Walmart parking lot when the police discovered him. T: 13. The defendant also admitted that his laptop contained approximately 500 pornographic images and that he used public access Wi-Fi to download such images so that they would not be traced back to him. *Id.*

The defendant was specifically asked about the images of the children and he said that those images would sometimes appear when he searched for his fetishes. *Id.*

The defendant was placed under arrest for indecent exposure, M:17 and the police obtained a search warrant to search for child sexual abuse images on the defendant's phone, hard drive, and laptop. During execution of the warrant,the police discovered eight images of nude, prepubescent females on the defendant's laptop. T: 14.

B. Motion Hearing

The trial court held a hearing on the defendant's Motion to Suppress on December 21, 2016.

The State presented evidence that the defendant consented to a search of his computer where images of young girls were discovered, and that he admitted to using those images for sexual gratification and that those images were described in the affidavit. M:57.

The State went on to describe a prior incident where the defendant was arrested for indecent exposure wherein the facts almost exactly mirrored the underlying facts of the defendant's present case. *Id.*

The State pointed out that the search warrant affidavit included all of this information, as well as the affiant's training and experience with regards to law enforcement and specifically to experience with computers and child pornography. *Id.*

The defense argued that the description of the images discovered on the defendant's computer and contained in the affidavit were not sufficient, and in lieu of a more precise description, the affiant should have included copies of the images in the warrant application for the magistrate to review. M:61.

The defense conceded that the affiant did not misrepresent the images, but argued that his representation was conclusory and therefore should not go to the weight of probable cause. M:62.

The defense also argued that the facts surrounding the defendant's arrest (caught in a parking lot with his genitals exposed) and his prior arrest for the same offense did not rise to the level of probable cause. M: 64–65.

The trial court took the matter under advisement and issued a written opinion wherein the court used a "totality-of-the-circumstances" analysis. The court considered the facts surrounding the defendant's arrest, the images found on the defendant's laptop at the scene of his arrest, and the training and experience of the affiant, Officer Smith to conclude that the warrant and affidavit established probable cause. DBA: 10–14.

SUMMARY OF THE ARGUMENT

I. The trial court committed no error in concluding that the search warrant affidavit established probable cause to search the defendant's laptop, hard drive, and cell phone for evidence of child pornography. The images of child erotica viewed on the defendant's open laptop at the time of his arrest, the circumstances surrounding his arrest, his criminal history, and the defendant's own statements to the police, are all part of the totality-of-the-circumstances. Those circumstances demonstrated probable cause that the defendant's laptop, hard drive, and cell phone would contain CSAI.

II. This Court must affirm the defendant's convictions stemming from the indictments supported by seven of the images because those images are CSAI.

ARGUMENT

I. THE SEARCH WARRANT WAS PROPERLY BASED ON PROBABLE CAUSE DEMONSTRATED BY THE AFFIDAVIT.

The defendant first argues that the affidavit underlying the search warrant failed to establish probable cause that the defendant possessed CSAI. DB: 9–27. On appeal, this Court reviews "the trial court's order *de novo* except with respect to any controlling factual findings." *State v. Ward*, 163 N.H. 156, 160 (2012) (citing *State v. Dalling*, 159 N.H. 183, 185 (2009)). Nevertheless, this Court "afford[s] much deference to a magistrate's determination of probable cause and will not invalidate warrants by reading the supporting affidavit in a hypertechnical sense." *Ward*, 163 N.H. at 159. Rather, this Court "review[s] the affidavit in a common-sense manner, and determine[s] close cases by the preference to be accorded to warrants." *Id.* (quoting *Dalling*, 159 N.H. at 185).

Under part I, article 19 of the New Hampshire Constitution, search warrants may be issued only upon a finding of probable cause. *State v. Zwicker*, 151 N.H. 179, 185 (2004). Probable cause exists "if a person of ordinary caution would justifiably believe that what is sought will be found through the search and will aid in a particular apprehension or conviction." *Ward*, 163 N.H. at 15 (citing *State v. Orde*, 161 N.H. 260, 269 (2010)); *accord United States v. Ribeiro*, 397 F.3d 43, 49 (1st Cir. 2005) ("[T]he application must give someone of 'reasonable caution'

reason to believe that evidence of a crime will be found at the place to be searched." (*Quoting Texas v. Brown,* 460 U.S. 730, 742 (1983) (plurality opinion).)).

"To establish probable cause, the affiant need only present the magistrate with sufficient facts and circumstances to demonstrate a substantial likelihood that the evidence or contraband sought will be found in the place to be searched." *Ward,* 163 N.H. at 159. The affidavit in support of the warrant need not "establish with certainty, or even beyond a reasonable doubt, that the search will lead to the desired result." *State v. Fish,* 142 N.H. 524, 528 (1997) (quotation omitted).

This Court reviews the trial court's ruling under a totality-of-the-circumstances test to review the sufficiency of an affidavit submitted in an application for a search warrant. *Id.* This Court has posed the question to be answered in the following manner:

> Given all the circumstances set forth in the affidavit before the magistrate, including the veracity and basis of knowledge of persons supplying hearsay information, was there a fair probability that contraband or evidence of a crime would be found in the particular place described in the warrant?

State v. Silvestri, 136 N.H. 522, 525 (1992) (quotations omitted). An affidavit may establish probable cause without the observance of contraband at the location to be searched. *Id.* at 527. However the affidavit "must establish a sufficient nexus

between the illicit objects and the place to be searched." *Ward*, 163 N.H at 160 (citing *Dalling,* 159 N.H. at 186).

The defendant's argument regarding the warrant is three-fold: that the affidavit did not establish the probability that the defendant was sexually attracted to children; that even if the defendant was sexually attracted to children, the affidavit failed to establish that it was probable he possessed CSAI; and finally, that even if the first two parts are true, the affidavit would still fail to make out probable cause. Each of these will be treated in turn below.

A. Sexual Gratification is Not a Requirement of Probable Cause

The defendant argues that the application relied on the inference that the defendant's possession of CSAI was predicated on a probability of sexual attraction to children in order to establish probable cause. DB: 9. There is simply no case law or statute that requires a warrant affidavit to articulate a probability that a person is sexually attracted to children in order to establish probable cause that said person possesses CSAI, nor is it the purpose of a search warrant to establish the mental state for committing a crime. To the contrary, a warrant is a judge's "written order authorizing a law enforcement officer to conduct a search of a specified place and to seize evidence." *In re Medical Records of C.T.,* 160 N.H. 214, 219 (2010) (citing *Black's Law Dictionary* 1470 (9th ed. 2009)).

Furthermore, nowhere in RSA chapter 649-A is there a required element of sexual attraction or sexual gratification.

The defendant argues, "Because that inference was a prerequisite to the chain of reasoning supporting the warrant, the search warrant was not supported by probable cause." DB: 14. This argument is not supported by the affidavit itself. The paragraph in the affidavit that the defendant is referring to does mention sexual gratification, but the passage is brief and uses the qualifier "may." DBA: 45. It can hardly be categorized as a prerequisite for the warrant.

The defendant cites to *United States v. Brunette*, 256 F.3d 14 (1st Cir. 2001), in support of his position that sexual attraction to children must be shown in order to support a warrant. However, the portion that he cites only references the *Brunette* court's holding that any questionable images should be appended to search warrant applications for CSAI for the magistrate to review. DB: 11–12.

Brunette does not require that probable cause be found for a given image (DBA: 64). The facts of *Brunette* do not mirror the facts of the case at hand and are similar only in that they involve charges of possession of child pornography. Here, the State makes no claim that the images on the defendant's laptop at the time of his arrest actually constituted CSAI under RSA 649-A: 2 (2016). Indeed, the nature of those images are not contested as the affidavit itself described them

as "child erotica." DBA: 45. However the distinction between the underlying case and *Brunette* is that in *Brunette*, the only basis for the warrant was images from an Internet account associated with that defendant. There was no additional information—no totality-of-the-circumstances, because the only circumstances were the images. *Id.*

This issue of attaching or describing the suspect images in detail is discussed at length in *State v. Dowman*, 151 N.H. 162 (2004). The defendant cited *Dowman* in his motion to suppress, DBA: 31, as did both the trial court order and the State in response to that motion, DBA: 9, 64. *Dowman* involved a defendant who admitted to owning child pornography, but disputed the search warrant because the affidavit did not detail specific images. However, the *Dowman* court held that a magistrate is not required to view the images and that probable cause for a search warrant involving an investigation into CSAI should be evaluated under the same standard of probable cause used to review warrants generally. *See Dowman*, 151 N.H. at 164.

The court in *United States v. Dennington*, No. 1:07-cr-43-SJM-1, 2009 U.S. Dist. LEXIS 74372, at *1 (W.D. Pa. Aug. 21, 2009), a case which broke with *Brunette,* found that "this Court's job, on review, is not to determine probable

cause anew, but simply to ensure that the magistrate had a 'substantial basis for ... concluding' that probable cause existed." *Id.* at 72.

B. Erotica and Totality-of-the-Circumstances

The defendant cites to a battery of cases that discuss the difference between erotica and child pornography, and how erotica does not constitute CSAI. DB: 13. While there is indeed a distinction between erotica and CSAI, images of child erotica, when taken in a totality-of-the-circumstances context, have been found to weigh in the favor of probable cause for finding CSAI.

In a case cited by the defendant, *Leachman v. State*, No. 01-98-01255-CR, 2006 Tex. App. LEXIS 7345 (Aug. 17, 2006), the court agreed with the affiant, Officer Chapman, who testified that, "child erotica was something that might "seem innocent" or appear "perfectly normal" to some people, but not to others. While taking or possessing the pictures was not criminal, in this case, it was part of the arousal pattern satisfying the defendant's foot fetish. Officer Chapman explained that playing "truth or dare," offering children money to do things, offering to let a child play on your computer, chatting on the Internet with children, and tickling children's feet are not themselves illegal, but combined with the complainant's statement and Officer Chapman's experience with pedophiles,

these things were considered to be "signature" items and actions of a child predator." *Id.* at 17–18.

This totality-of-the-circumstances argument in relation to child erotica is further supported by *United States v. Lancina*, No. 201600242, 2017 CCA LEXIS 436 (NM Ct. Crim. App. June 30, 2017), a case that criticized *United States v. Edwards,* 813 F.3d 953 (10th Cir. 2015), which was heavily relied upon by the defendant. The *Lancina* court held that, "The Eighth Circuit Court of Appeals explained that while the presence of child erotica may not in and of itself provide sufficient probable cause to suspect the presence of child pornography, such facts

> combined with the other facts included in the affidavit," may support a probable cause determination under the totality-of-the-circumstances. *United States v. Hansel*, 524 F.3d 841, 844–46 (8th Cir. 2008) (concluding that photographs of nude girls and other girls in swimsuits described by the investigating officer as "child erotica, not child pornography" could be considered along with allegations of sexual assault and camera and computer equipment in finding probable cause to search for child pornography).

Lancina, 2017 CCA LEXIS at 22–23.

The court concluded that, "the presence of child erotica can be, at minimum, a factor in finding a substantial basis for probable cause to suspect the appellant committed a child pornography offense under the totality-of-the-circumstances. Even wholly innocent behavior frequently will provide the basis for a showing of probable cause." *Id.* at 23.

In addition to *Edwards,* the defendant seems to rest this portion of his argument on the shoulders of *State v. Lantagne*, 165 N.H. 774 (2013). Indeed, the defendant argues that *"Lantagne* alone is sufficient to resolve the issue here ...." DB: 16. However, *Lantagne* reversed a conviction for possession of CSAI because the underlying arrest was for disorderly conduct, which was not ultimately charged at trial, and which was not supported by the officer's observations:

> Photographing properly-attired children in an open and public portion of a park, regardless of whether the photographs were of the children's backsides, were taken surreptitiously, or would be uploaded to a computer, would not have warranted a reasonable belief that the photographer posed a threat of imminent harm to any patrons, including the children. Accordingly, an officer lacked probable cause to arrest defendant for disorderly conduct.

Id. at 775.

The defendant's contention that *Lantagne* supports his argument is misplaced. The conviction for possession of CSAI in *Lantagne* was reversed because the evidence used against the defendant on that charge was obtained as a result of the arrest for disorderly conduct, and therefore was a fruit of the poisonous tree. The defendant assumes that this Court must have considered the crime of possession of CSAI before ruling that it was aware of no other chargeable crime. DB: 16. The defendant then concludes that the decision in *Lantagne* establishes a bright-line rule that possession of "properly-attired children" can

never be considered supportive of probable cause for CSAI charges. *Id. Lantagne* does not support that conclusion.

The defendant also argues a "transposition fallacy" to suggest that the defendant's possession of child erotica created an erroneous conditional probability that the defendant would possess CSAI. DB: 24. This argument would have more merit if the only element in Officer Smith's affidavit was a mention of the images of minor age children viewed on the defendant's laptop at the time of his arrest. However, Officer Smith's affidavit contains many more points, which, when viewed as a whole, created the probable cause for the search warrant:

(1) The circumstances surrounding the defendant's arrest, namely, that he was found with an open laptop containing photos of naked women, and with his pants down around his ankles;

(2) That his previous arrests were for similar behavior in similar situations;

(3) That there were photos on the defendant's laptop that appeared to be of minor age children along with a description of those images;

(4) Statements made by the defendant at the time of his arrest where he admitted to possessing pornography for the purposes of pleasuring himself, that he enjoyed 'cheesecake' photos, and that he used public access WiFi so downloads would not be traced back to him;

(5) A description of Officer Smith's police background and experience and specialized trainings that he has received in connection to CSAI and computers.

DBA: 43–45.

United States v. Syphers, 426 F.3d 461, 465–66 (1st Cir. 2005), speaks to this totality approach:

> Probable cause only requires a probability or substantial chance of criminal activity, not an actual showing of such activity." *United States v. Garcia*, 197 F.3d 1223, 1227 (8th Cir. 1999) (internal quotations and citation omitted). Appellant cites, and the Court finds, no precedent that would require a more substantial showing for a search warrant in a child pornography case post-*Free Speech Coalition*. Thus, an affiant must establish probable cause, based on the totality of the circumstances, that evidence of child pornography depicting minors will be discovered at a particular location to secure a warrant to search at that location.

Id. at 466.

There is a recent case which reconciles *Brunette's* holding that copies of images must be appended to the affidavit with a totality-of-the-circumstances approach. In *United States v. Burdulis*, 753 F.3d 255 (1st Cir. 2014), the court found that "[i]n cases in which the warrant request hinges on a judgment by an officer that particular pictures are pornographic, the officer must convey to the magistrate more than his mere opinion that the images constitute pornography. Here, though, the warrant was not based on any officer's opinion that certain pictures were pornographic." *Id.* at 261. Rather, the officer submitted the defendant's own statements and also noted that the defendant had already sent a pornographic image to a minor. *See id.* Those things "created a reasonable

inference that a search of Burdulis's digital devices would turn up evidence that he possessed pornography." *Id.*

C. The Officer's Training and Experience

The defendant goes on to attack as insufficient the "boiler plate" language of the search warrant affidavit wherein Officer Smith lists his law enforcement background and qualifications. DB: 20. The defendant cites to *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979), as support that probable cause must be particularized. However, what *Ybarra* holds is that with respect to the search of an individual person:

> A person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person; where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person, and this requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.

Id. at 87. The facts of *Ybarra* are hardly analogous to the facts here and the defendant's application of *Ybarra* to his own case is misplaced.

The salient holding in *Ybarra* is that vague warrants are prohibited. But here, there was no vague warrant. Instead, the affidavit in support of the warrant stated that Officer Smith has been employed with the Amherst Police Department

since August 2002. DBA: 43. He received specialized training in the laws of arrest, search and seizure, and fundamentals of the investigative process. *Id.* Also he had been trained in the digital forensic software tool Lantern, and he was at the time assigned to the New Hampshire Internet Crimes Against Children Task Force. *Id.*

The defendant also cites heavily to *United States v. Weber*, 923 F.2d 1338 (9th Cir. 1990). The affidavit at issue in *Weber* gave a broad description of the terms pedophile and molester and collector, and the court needed to know how they applied to the particular defendant. To determine whether the warrant was reasonably obtained, the court considered the time pressure under which the affiant-officer was working when he prepared the warrant. Because of the broadness of the affidavit, and a seeming lack of time pressure, the court determined that there was no need for the "hurried judgment" of the officer. *Id.* at 1345. The affidavit in the underlying case is not overly broad. As has been detailed above, there were plenty of supporting facts and descriptions included by Officer Smith to sufficiently demonstrate probable cause.

Officer Smith's training and experience as a law enforcement officer was sufficient to support the conclusions that the trial court cited in its opinion: "Officers are entitled to draw reasonable inferences from the facts available to

them in light of their knowledge and prior experience." DBA:11 (citing *State v. Davis*, 149 N.H. 698, 701–02 (2003)). Further, "the officer(s) used their common experiences and every day observations" DBA:12.

Officer Smith's assertion that people interested in child pornography would keep the images on their computers did not require any special training. Any officer familiar with the ordinary uses of computers would have the experience to know that documents, photographs, and other information that is of importance to the user is frequently stored on them. This would be particularly true of people interested in child pornography. *See e.g. Smith v. State*, 887 A.2d 470, 472 (Del. 2005).

Officer Smith's reference to the computer being an ideal repository for child pornography is a widely accepted proposition. DBA:48. *See, e.g., United States v. Richardson*, 607 F.3d 357, 369 (4th Cir. 2010) (Acknowledging the affidavit's "boilerplate 'profile' information about the general tendencies of child pornography collectors," particularly that people "involved in the possession and transportation of child pornography rarely, if ever, dispose of their sexually explicit materials and tend to store their collected materials in their 'residence or other secure location to ensure convenient and ready access"); *United States v. Lewis*, 605 F.3d 395, 401 (6th Cir. 2010) (referring to the boilerplate in affidavits

for search warrants for child pornography); *United States v. Prideaux-White,* 543 F.3d 954, 960 (9th Cir. 2008) (noting "child pornography collector characteristics"); *Smith v. State,* 887 A.2d 470, 472 (Del. 2005) (upholding the trial court's finding that the information in the warrant was not stale because "it rises to the level of common knowledge that imagery in computers is still in existence and is persistent" (internal quotation marks omitted)); *State v. Bennett,* 949 N.E.2d 1064, 1069 (Ohio Ct. App. 2011) ("We have recognized in previous cases that images of child pornography are likely to be hoarded by persons interested in those materials, to be viewed in the privacy of their own homes.").

II. THE CHALLENGED IMAGES CONSTITUTED CHILD SEXUAL ABUSE IMAGES.

Next, the defendant contests the sufficiency of the evidence that certain of the images constituted child sexual abuse images. RSA 649-A:3 prohibits the knowing possession or control of "any visual representation of a child engaging in sexually explicit conduct." RSA 649-A:3, I(a) (2016). "Child" means "any person under the age of 18 years," RSA 649-A:2, I (2016), and "sexually explicit conduct" means

> human masturbation, the touching of the actor's or other person's sexual organs in the context of a sexual relationship, sexual intercourse actual or simulated, normal or perverted, whether alone or between members of the same or opposite sex or between humans and animals, or any

lewd exhibitions of the buttocks, genitals, flagellation, bondage, or torture,

RSA 649-A:2, III.

"When considering a challenge to the sufficiency of the evidence, [this Court' objectively review[s] the record to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt considering all the evidence and all reasonable inferences therefrom in the light most favorable to the State." *State v. Saunders,* 164 N.H. 342, 351 (2012) (quotation and ellipsis omitted).

A. File names "ca19379", "lsm-05-01-048" and "thCAE6C16J" depict minor children.

Although the State bears the burden of proving beyond a reasonable doubt that the subject depicted is under the age of eighteen years, that element is a question of fact that the fact-finder can resolve by viewing the images. RSA 649-A:6 (2016); *State v. Houghton*, 168 N.H. 269, 272 (2015). "In determining child pornography, based upon its everyday experiences, a trier of fact can determine from a photograph whether a child is under the age of eighteen." *State v. Cobb,* 143 N.H. 638, 646 (1999) (quotations omitted). "To require identification of the child and conventional proof of age would render statutes designed to protect children inoperable." *Id.*(quotation and ellipsis omitted).

The defendant argues that the three images, "ca19379," "lsm-05-01-048," and "thCAE6C16J" do not portray an individual less than 18 years old.

The file named "ca19379" depicts what appears to be a very young girl sitting with her legs bent at the knees, feet flat on the floor. She is feeding grapes to what appears to be a toy rabbit while sitting on a shag rug. Her hair is in pig tails and her genitalia and nipples are exposed. The viewer can clearly see her genitalia and there is no pubic hair apparent. The girl's chest is flat. While the girl's face is looking down, her entire countenance is viewable. The image is very clear.

The file named "lsm-05-01-048" depicts two females stretched out on a bed and table. The female on the bottom is resting on her stomach, looking at the camera. She appears to be older than the second female who is lying on top of her. The second female is a young girl with braids. She is lying face-up straddling the back of the first female. This girl's face is fully in view, with her breasts exposed. Her hair is in braids. It should be noted that the pose this girl is in is extremely awkward and unnatural. This image is clear.

The file named "thCAE6C16J" depicts a young girl lying on her stomach with her feet (which appear dirty) tucked into her buttocks. Her back is arched and her face is propped in her hands, looking away from the camera, but still visible

enough to the viewer to determine that she appears very young. This image is clear.

The defendant cites *Houghton* to support his contention that when the face is obscured in CSAI, it is insufficient because one cannot determine age. That is not the case here. Regarding the image at issue in *Houghton*, the court noted that the individual appeared to have undergone puberty and the image was too heavily pixilated to determine age. *Houghton*, 168 N.H. at 272. In this case, however, the young girls depicted in these three images have all clearly not undergone puberty, particularly in file "ca19379," where the girl has no pubic hair and no breasts. None of the faces in these images are obscured, nor are the images themselves difficult to view.

The defendant also makes an argument that the State should have called an expert witness to aid in "aging" the girls, or should have attempted to discover the identity of these girls or submitted birth certificates. This argument is unavailing and unsupported. The defendant's footnoted citation here of *United States v. Rodriguez-Pacheco*, 475 F.3d 434, 443 (1st Cir. 2007), does not serve the defendant's cause. What *Rodriguez-Pacheco* in fact held was that there was no requirement for the government to produce expert testimony in addition to the

images themselves. *Id.* at 439. The defendant is unable to cite to any authority that requires the State to introduce any evidence other than the images themselves.

B. The files named "lsm-05-01-048" and "thCA517BFO" do show the buttocks and or genitalia of the young girls depicted in the images.

The file named "lsm-05-01-048" was described above and does indeed depict a young girl's genitalia. As the girl on top of the other female is stretched out on her back with her legs splayed, completely nude, the girl's *mons pubis* is clearly in view. The spirit of RSA 649-A:3 is to protect young children from exploitation and to quibble over whether the top portion of the vagina constitutes "genitalia" is unseemly and unproductive.

The file named "thCA517BFO" depicts a young girl with flowers in her hair, facing the camera while lying on her left side with one leg extended in the air and the other leg tucked into her thigh as in a bicycle kick. She is wearing high heels and has vines wrapped around one leg. Her full chest and the right side of her buttock are exposed. The defendant is unable to cite to any authority that requires the full buttocks to be viewable and therefore his argument that her buttocks are not exhibited is in error.

C. The file images named "ca19379", "CA7DDVC2", "thCA9TPYU5", "thCA517BFO", "thCAE6C16J" and "thCAQJFBIZ" involve the lewd exhibition of the genitals or buttocks.

The State bears the burden of proving that the images depict "sexually explicit conduct." With respect to a claim that the images contain "lewd exhibitions of the ... genitals," this Court has found instructive the six-factor test adopted in *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986). *State v. Lopez*, 162 N.H. 153, 156 (2011). The six factors are:

(1) Whether the focal point of the visual depiction is on the child's genitals or pubic area;

(2) Whether the setting of the visual depiction is sexually suggestive, *i.e.*, in a place or pose generally associated with sexual activity;

(3) Whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;

(4) Whether the child is fully or partially clothed, or nude;

(5) Whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;

(6) Whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Id. (quotation omitted).

The Massachusetts Appeals Court has recently considered whether a photograph of a naked girl was "lewd" for the purposes of a criminal charge. *See*

Commonwealth v. Sullivan, 972 N.E.2d 476 (Mass. App. Ct. 2012). Applying the *Dost* factors, the court concluded that the image placed the girl's developing breast "in the front and center of the photograph" and that her hands pointed to her exposed pubic area. *Id.* at 485. It concluded that based on this, it was not simply an image of the girl posing nude, *compare Commonwealth v. Rex*, 11 N.E.3d 1060, 1071 (Mass. 2014) ("Based on our *de novo* review of the photocopies, it is plainly apparent that their only notable feature is the nudity of the children."), but was designed to draw the viewer's attention to her breasts and pubic area. *Sullivan,* 972 N.E.2d at 485. The court further concluded that she was "of an age when girls normally are clothed even when in nature or in a stream" and "well past the age of the 'Coppertone girl.'" *Id.* at 486 (quotation omitted). Although the court concluded that setting of the image was not sexually suggestive and the image did not suggest a sexual coyness or willingness to engage in sexual activity, it ultimately concluded that the image was "designed to elicit a sexual response" and held that the image was a lewd exhibition of the girl's genitals and breasts. *Id.* at 486–87.

Turning to the six images challenged by the defendant for a lack of "lewdness," these arguments are unavailing. The images contain much to support the trial court's conclusions.

The defendant argues that all the images depict the girls' full bodies and the camera does not focus specifically on their genitalia, nor do they involve a sexually suggestive setting because three were taken outdoors and three were taken in a photography studio. DB: 28–33. Additionally, the defendant argues that none of the photographs involve an unnatural pose or inappropriate attire or suggest a sexual coyness or willingness to engage in sexual activity. DB:33–34.

In image "ca19379," described above, one can clearly see the girl's genitalia. Because she is sitting facing the camera with her legs bent and knock-kneed, the eye is drawn to the girl's pubic area. Her *labia majora* are clearly visible and more or less at the center of the photo. As for the setting of the photo, it does appear to be taken in a studio. That in and of itself does not negate a "sexually suggestive setting," although the setting is certainly bizarre: there is a spinning wheel in the background and the girl is staged next to a stuffed rabbit on a shag rug, feeding the rabbit grapes.

"thCA9TPYU5" and "thCA517BFO" were also taken in what appear to be studios, and both depict the genitalia of very young girls. "thCA9TPYU5" shows a young girl with flowers in her hair and elbow-length gloves, lying on her side with her left hand on her hip, smiling directly into the camera. The nipples on her flat chest are exposed, as is her hairless *mons pubis*. Her legs are separated as if one is

lifted, and she is lying on a blanket next to a stuffed animal. There is also a robe or cloth draped near the girl's hips, calling attention to her pubic area.

"thCA517BFO" shows a young girl completely nude, except for a pair of high heels, lying on the ground with flowers in her hair. There appears to be a jungle theme as the girl has vines suggestively wrapped around one of her legs. The side of her right buttock is exposed as is her chest.

"CA7DDVC2," "thCAE6C16J," and "thCAQJFBIZ" as the defendant suggests, appear to have been taken outdoors—or in a studio staged as the outdoors. "CA7DDVC2" shows a girl in the water with her buttocks facing up and the viewer can see a nipple on a flat chest. The underside of the girl's vagina is also evident between the girl's legs. She is in a very awkward, contorted pose, smiling.

"thCAE6C16J" has been described above, but again, the side of her buttocks are apparent and her back is arched in a sexually suggestive way. The soles of her feet also appear to be dirty and her feet are tucked close to her buttocks.

"thCAQJFBIZ" shows a very young girl lying on her side in a wooded area with flowers in her hair. There is a blanket or cloth draped over her waist but both buttocks are exposed and the heel of her left foot is propped awkwardly near her

vagina. Her nipples are exposed and her chest is flat. She is smiling into the camera and, similar to the images mentioned above, the pose looks uncomfortable and unnatural—she is propping herself up with her left hand.

The defendant has argued that these images have not satisfied factor two in the *Dost* test: "whether the setting of the visual depiction is sexually suggestive, *i.e.*, in a place or pose generally associated with sexual activity." *See Dost,* 636 F. Supp. at 828. It must be pointed out that not all factors must be present to reach a determination that a visual depiction is a lewd exhibition of the genitals. *Id.* (quotations omitted).

Certainly the girls' poses are associated with sexual activity—completely nude with their legs either awkwardly bent showing their pubic areas or buttocks or both, or lying on their sides with full-frontal nudity. The settings themselves were clearly staged to appeal to someone's idea of a sexual setting. The defendant cited *State v. Bergeron*, No. 2016-0088, order at 5 (N.H. June 30, 2017), to support his contention that the photographs at issue were not lewd. However, in an earlier cite of the same case, this Court reiterated that all evidence must be considered in a sufficiency challenge. See *State v. Bergeron*, 2016 LEXIS 213 (N.H.Sept. 16, 2016). The defendant in *Bergeron* had an avowed interest in images of young boys, and this Court thus held that "a fact-finder could

reasonably consider this evidence to support the conclusion that the images on the defendant's computer depict boys under the age of eighteen." *Id.* Applying this to the case at hand, given the self-proclaimed predilection of the defendant for "cheesecake" photos, or photos of girls in tights or pantyhose, a factfinder could conclude that the defendant possessed these images because he associated the depicted poses with sexual activity.

The defendant's last points, that none of the six images depict an unnatural pose or inappropriate attire or suggest sexual coyness, are unavailing. The young girls in these photos are not in natural poses. They are staged with their legs lifted or bent or their torso or arms twisted. They are not sitting in chairs or even standing. They are propped up like so many dolls. They are all completely nude with the exception in some cases of gloves or high heels or heavy, mature jewelry, which is hardly appropriate attire for girls this young.

As to sexual coyness or a willingness to engage in sexual activity, the First Circuit has addressed precisely this element as it applies (or doesn't apply) to children: "Children do not characteristically have countenances inviting sexual activity, and the statute does not presume that they do. By suggesting that the child subject must exhibit sexual coyness in order for an image to be lascivious, the

district court in *Dost* ran the risk of limiting the statute." *United States v. Fabrizio*, 459 F.3d 80, 89 (1st Cir. 2006).

For all of the foregoing reasons, and when viewed in the light most favorable to the State, the images that were the bases for the defendant's convictions are CSAI.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a five-minute argument before a 3JX panel.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

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CERTIFICATE OF SERVICE

I, Katherine Triffon, hereby certify that two copies of the foregoing were mailed this day, postage prepaid to Thomas Barnard, Senior Assistant Appellate Defender, counsel of record, at the following address:

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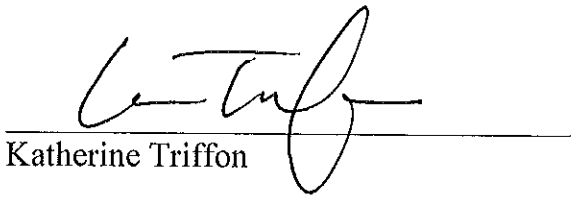
March 12, 2018



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