

COMMON PLEAS COURT  
WARREN COUNTY OHIO  
FILED

STATE OF OHIO, WARREN COUNTY

COMMON PLEAS COURT

2006 AUG 18 AM 10:31

STATE OF OHIO,  
    plaintiff,

v.

STEVEN CARPENTER,  
    defendant.

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06CR23210

JAMES L. SPAETH  
CLERK OF COURTS

JUDGE FLANNERY

MOTION *in limine* TO PROHIBIT  
EXPERT TESTIMONY ON ISSUE OF  
MANIPULATION OF DIGITAL  
IMAGES

The Prosecuting Attorney submits this Motion *in limine* to Prohibit the Introduction of Expert Testimony on the Manipulation of Digital Images.

As grounds for this Motion, the Prosecuting Attorney states as follows:

1. This is a child pornography case. The Defendant is alleged to have reproduced and possessed on his computer numerous images depicting sexual abuse against children.

2. The State is very familiar with the proposed expert in this case, Dean Boland. He is not an expert. He is an attorney with no specialized training in forensic analyses of computers. His anticipated testimony concerns general information about "digital imaging technology and digital imaging exhibits demonstrating the state of technology."

3. The proposed expert will be *unable to give any opinions about the actual images at issue in this case*. Instead, he will give a general description about the manner in which *some images may be manipulated*. This is not relevant. As shown below, courts have uniformly held that the jury, without the assistance of experts, may determine whether digital images are of real or "virtual" minors.

a. *Ashcroft* does not impose a heightened requirement of expert testimony to determine whether the images in question are, in fact, images of actual minors. *Ashcroft v. Free Speech Coalition* (2002), 535 U.S. 234. In *Ashcroft*, the United States Supreme Court explicitly rejected the implicit claim by the Defendant that a non-expert, such as the jury, could not be expected to distinguish between real and virtual images. In *Ashcroft*, the government claimed that, under current technology, "virtual images [can be created that are] indistinguishable from real ones." 535 U.S. at 254. The Court found this "hypothesis [to be] somewhat implausible." The Court said: "If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would

risk prosecution by abusing real children if fictional, computerized images would suffice.” *Id.* at 254. n 12. This language by the Supreme Court leads to the inescapable conclusion that no expert opinion is necessary for the trier of fact to differentiate between real and virtual depictions of child pornography.

b. The Defendant’s claim that an expert is needed on this issue has been explicitly rejected in *every* federal appeals court where the issue has been raised. For example, in *United States v. Slanina* (5th Cir. 2004), 359 F.3d 356 (per curiam), the government did not present expert testimony but, instead, the trier of fact was permitted to infer that the images were images of real children. The Fifth Circuit held that “the trier of fact was capable of reviewing the evidence to determine whether the Government met its burden to show that the images depicted real children.” *Id.* At 357. Similarly, in *United States v. Kimler*, 335 F.3d 1132, 1142 (10th Cir., 2003), the court held that *Ashcroft* did not establish a new “expert witness” requirement in child pornography cases. The Tenth Circuit said: “Juries are still capable of distinguishing between real and virtual images.” *Id.* All other federal appeals courts to have examined the issue are in agreement. *See also United States v. Farrelly*, 389 F.3d 649, 655 (6th Cir., 2004) (government provided sufficient evidence in the absence of expert testimony that child pornography depicted real children); *United States v. Deaton*, 328 F.3d 454, 455 (8th Cir. 2003) (noting that images, alone, may be sufficient evidence); *United States v. Hall*, 312 F.3d 1250, 1260 (11th Cir. 2002) (upholding conviction where “there was no evidence at trial of any kind indicating or inferring that the pictures contained images of virtual children as opposed to actual children”), cert. denied, 538 U.S. 954 (2002); *United States v. Hilton*, 386 F.3d 13, 18 (1st Cir., 2004) (vacating prior contrary opinion; acknowledging that government must prove that images are images of minors, but not requiring an expert for trier of fact to reach that conclusion); *United States v. Rearden*, 349 F.3d 608, 614 (9th Cir., 2003) (“... it is obvious from the pictures themselves that they are of children. Expert testimony was not, therefore, necessary in this case to assist the court.”).

c. The Twelfth District has held that experts are not necessary to consider whether the images depict real children or “virtual” or “altered” images of children. *State v. Bettis* (June 13, 2005), Butler App. No. CA2004-02-034, 2005-Ohio-2917. The Twelfth District said that “triers of fact are still capable of distinguishing between real and virtual images.”

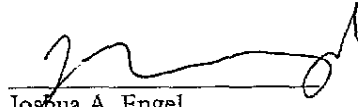
*Wherefore*, the Court should prohibit the introduction of any expert testimony on the manipulation of digital images.

Respectfully Submitted,

  
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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a copy of the foregoing was forwarded by U.S. Mail to the office of Craig Newburger, on August 18, 2006.

  
Joshua A. Engel  
Assistant Prosecuting Attorney