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Recent Developments: Moore v. State: A Person Who Downloads Child Pornography Using a Computer, Absent Any Involvement in Its Creation or Distribution, Does Not Commit a Felony in Violation of Section 11-207(A)(3) of the Criminal Law Article

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RECENT DEVELOPMENT

MOORE v. STATE: A PERSON WHO DOWNLOADS CHILD PORNOGRAPHY USING A COMPUTER, ABSENT ANY INVOLVEMENT IN ITS CREATION OR DISTRIBUTION, DOES NOT COMMIT A FELONY IN VIOLATION OF SECTION 11-207(A)(3) OF THE CRIMINAL LAW ARTICLE

By: Kate E. Stewart

Upon its own initiative, the Court of Appeals granted certiorari to review *de novo* a ruling of the circuit court, holding that a person who uses a computer to download visual representations of a minor engaged in obscene acts or sexual conduct commits a misdemeanor, rather than a felony. *Moore v. State*, 388 Md. 446, 879 A.2d 1111 (2005). In so holding, the Court clarified an existing felony statute criminalizing child pornography by finding that the legislature did not intend the statutory phrase "use [of] a computer to depict or describe" to encompass the use of a computer to download and possess. *Id.*

On October 7, 2003, police served a search warrant upon Jonathan G. Moore ("Moore") for his residence. The police read Moore his *Miranda* rights, and he voluntarily waived them. In the search, detectives found a computer which Moore acknowledged as being his. Moore assisted the detectives in examining the computer by showing them a file on the computer containing photographic images and videos of female children under sixteen years of age engaged in sexual acts. The police also found computer print-outs and a floppy disk with pornographic images. Moore voluntarily stated that he downloaded the material from a website beginning in August 2003 for his personal use, but added that he had not created or distributed any of the images.

Moore was indicted for violating sections 11-207(a)(3) and 11-208(a) of the Maryland Criminal Law Article. Count I of the indictment charged Moore under the felony statute, §11-207(a)(3), with using a computer "to depict and describe" a minor engaged in sexual acts. Count II charged Moore under the misdemeanor statute, §11-208(a), with knowingly possessing various visual representations of a minor engaged in sexual conduct. Moore pled not guilty to both counts.

On June 21, 2004, the Circuit Court for St. Mary's County convicted him of both counts of the indictment. Moore appealed to the Court of Special Appeals of Maryland solely as to his felony conviction under Count I. However, before the Court considered the case, the Court of Appeals of Maryland, upon its own initiative, granted certiorari to resolve the correct interpretation of the language of Md. Crim. Law § 11-207(a)(3).

The Court of Appeals began its analysis by reviewing the plain language of the felony statute. Section 11-207(a)(3) states that a person may not "use a computer to depict or describe" a minor involved in obscene, sadomasochistic, or sexual conduct. *Id.* at 452, 879 A.2d at 1114. Moore argued on appeal that the statute was ambiguous and his conduct did not violate the § 11-207(a)(3) because the statute proscribes the creation of obscene materials using a computer, as evidenced by legislative history. *Id.* at 456, 879 A.2d at 1116. In addition, Moore contended that the misdemeanor child pornography statute already criminalized the use of a computer to possess obscene materials. *Id.* at 456, 879 A.2d at 1116.

In order to resolve any ambiguities and determine the meaning of the statute, the Court engaged in interpretation of the phrase "use [of] a computer to depict or describe" by examining the legislative intent. *Id.* at 452-53, 879 A.2d at 1114. In its examination, the Court considered legislative history, case law, and statutory purpose. *Id.* at 452-53, 879 A.2d at 1114.

The Court began by discussing the plain language of the statute, observing that Webster's Dictionary defines "depict" and "describe" as representing by drawing, writing, or otherwise; whereas "download" denotes the transferring or copying of data. *Id.* at 457, 879 A.2d at 1116-7. The Court stated that the ordinary usage of "depict" and "describe" is inconsistent with the action of downloading. *Id.* at 457, 879 A.2d at 1116-7. Thus, the Court of Appeals accepted Moore's understanding of the words "depict" and "describe." *Id.* at 457, 879 A.2d at 1116-7.

In addition, the Court stated that the legislature's choice to employ the active verb forms of the words "depict" and "describe" indicates legislative intent to criminalize actions involved in creating pornographic materials. *Id.* at 458, 879 A.2d 1117. When used in their passive form, as "depiction" or "description," the words imply a previously created image, as is consistent with the word choice in the misdemeanor statute, § 11-208(a). *Id.* at 458, 879 A.2d 1117. Section 11-208(a) prohibits possession of an image "depicting" child

pornography, thus prohibiting possession of an image that has already been depicted. *Id.* at 458-59, 879 A.2d at 1117-8. The misdemeanor statute, the Court decided, encompasses downloading because an image has already been depicted when a person downloads it. *Id.* at 459, 879 A.2d at 1118.

In addition, the Court of Appeals found the Illinois Legislature's interpretation of its own statutes instructive. *Id.* at 459-60, 879 A.2d 1118. In its distinction between the verb "depict" and the passive tense forms - "depiction" and "depicting" – the Illinois Legislature defined the phrase "depict by computer" to mean "to generate or create..." *Id.* at 459-60, 879 A.2d 1118. The Court of Appeals of Maryland thus concluded that the plain language of the statutory phrase "to depict or describe" was unambiguous, and that the legislature intended the felony statute to proscribe the use of a computer to *create* pornographic images. *Id.* at 460, 879 A.2d at 1118-9 (emphasis added).

The Court also examined Maryland legislative history to support its finding. A letter from an assistant attorney general indicated that the statute targets child pornography producers and distributors. *Id.* at 460, 879 A.2d at 1119. The Court noted that the Maryland General Assembly first criminalized child pornography in 1978, but mere possession of child pornography was not criminalized until 1992 with the passage of a misdemeanor statute, further evidencing legislative intent to target the pornography industry with the felony statute. *Id.* at 462, 879 A.2d at 1120. The Court recognized that the legislature first addressed the use of computers in child pornography in 1996 when it amended what is now § 11-207(a)(3) to include, among the verbs "photographs" and "films," the phrase "depicts or describes," further implying that the statute proscribes authorship, not downloading or possession, of pornographic material. *Id.* at 446, 879 A.2d at 1122.

By holding that a person who downloads child pornography for personal possession does not commit a felony, the Court of Appeals has effectively separated the felony and misdemeanor child pornography statutes by identifying the intended targets of each statute according to the level of involvement in child pornography. Those who simply possess child pornography will only be charged with a misdemeanor, as long as there is no evidence of distribution or creation of child pornography. The felony statute was intended to target the child pornography industry and encompasses more than mere possession. The Court recognized an important distinction between a user who only possesses child pornography and an

individual who promotes the child pornography industry by creating or distributing pornographic material.