

## **Summary of SC91821, *State of Missouri v. David Delaine Liberty***

Appeal from the Platte County circuit court, Judge Owens Lee Hull Jr.

Argued and submitted Dec. 1, 2011; opinion issued May 29, 2012

**Attorneys:** Liberty was represented by Frederick J. Ernst of the public defender's office in Kansas City, (816) 889-7699; the state was represented by Daniel N. McPherson of the attorney general's office in Jefferson City, (573) 751-3321.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** A man was convicted of one count of promoting child pornography and eight counts of possession of child pornography. He appeals, arguing the evidence was insufficient to convict him of the charge for promoting child pornography and six of the possession charges because that evidence did not describe or depict "sexual conduct" as required by the relevant statutes and, even if it did, entry of eight separate sentences for the simultaneous possession of multiple images of child pornography violated his right to be free from double jeopardy. In a 4-3 opinion written by Judge Laura Denvir Stith, the Supreme Court of Missouri affirms the man's convictions for promoting child pornography and one count of possession of child pornography but reverses the other seven possession convictions and remands (sends back) the case. The evidence used to support each of the convictions described or depicted sexual conduct but, because the applicable possession statute was not clear as to the permissible unit of prosecution, the Court must interpret the statute to permit only a single conviction on the evidence adduced below. This does not preclude the state from retrying the man, as reversal has been necessitated by trial error.

Judge Mary R. Russell wrote an opinion, joined by two judges, concurring in part and dissenting in part. She agrees with the portions of the majority opinion that affirm the man's sentence for promoting child pornography, that determine the evidence was sufficient to show "sexual conduct" as necessary to support the man's conviction for promoting child pornography and that the evidence was sufficient to support the man's conviction for possessing child pornography. She disagrees, however, that double jeopardy bars his multiple convictions for child pornography. She would affirm the entire judgment.

**Facts:** In 2007, a volunteer for an anti-pedophile activist group began monitoring a website frequented by men sexually attracted to young boys. After observing repeated posts by an individual with the username "DDLIBNKC," the volunteer began saving screen shots of posts containing identifying information about the user and information about his apparent sexual contact with children. The volunteer ultimately provided those screen shots to law enforcement officers, who commenced their own investigation, which resulted in the acquisition of several more screen shots of Internet posts made to a pedophile website by "DDLIBNKC." Authorities subsequently linked the posts to David Delaine Liberty and obtained search warrants for his vehicle and the house in which he lived. During these searches, police seized several incriminating items, including a laptop containing apparently pornographic images of children. Based on the contents of a posting Liberty made to the pedophile website, the state charged him with one count of promoting child pornography. The state also charged Liberty with nine counts

of possession of child pornography based on the images that were discovered on his laptop. After trial, the court found Liberty guilty of all charges except one count of possession of child pornography. Liberty appeals.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

**Court en banc holds:** (1) The evidence was sufficient to support Liberty’s conviction for promoting child pornography. The text of the Internet post on which the charge was based and the inferences derived from the post clearly demonstrate that the posting included descriptions of “sexual conduct” as required by the statute setting forth the crime. The statute defines “sexual conduct” to include “physical contact with a person’s clothed or unclothed genitals, pubic area, [or] buttocks ... in an act of apparent sexual stimulation or gratification.” Liberty’s post fell within this definition as it included descriptions of a 5-year-old boy’s physical contact with Liberty’s genitals and of Liberty’s physical contact with the genitals of one 7-year old boy and with the genitals and buttocks of another. That the described exploits meet the further statutory requirement of being “act[s] of apparent sexual stimulation or gratification” is evident or reasonably can be inferred from the sexual connotations associated with the terms used in the post, from the title of the post and from the fact that it was placed on a website providing a discussion forum for men sexually attracted to young boys.

(2) The evidence was sufficient to support Liberty’s convictions for possession of child pornography because the images on which those convictions were based contained an activity statutorily defined as “sexual conduct.” (See Paragraph 1.) The statute also defines “sexual conduct” as “actual or simulated, normal or perverted acts of human masturbation; ... or any sadomasochistic abuse ... in an act of apparent sexual stimulation or gratification.” The images forming the basis of Liberty’s contested convictions fell within the statutory definition of “sexual conduct” as they depicted unclothed boys in sexually suggestive poses or contact with other naked male adolescents. That the images met the further definition of being “act[s] of apparent sexual stimulation or gratification” is evident or reasonably could be inferred from the nature of the depicted positions, the fact that the positions were the primary objects of the images, and the circumstances under which the photographs were taken.

(3) The trial court erred in entering eight separate convictions for possession of child pornography against Liberty. The right to be free from double jeopardy protects defendants not only from successive prosecutions for the same offense but also from multiple punishments for the same offense. Double jeopardy analysis regarding multiple punishments requires a court to determine whether the legislature intended cumulative punishment, which requires the court to look to the “unit of prosecution” allowed by the statute under which the defendant was charged. If the relevant statute does not express unambiguously the permissible “unit of prosecution” and if the appropriate rules of statutory construction do not clarify the ambiguity, doubt is resolved in favor of the defendant. In such a circumstance, a single criminal transaction will not result in charges for multiple offenses.

Here, Liberty was charged under a statute proscribing possession of “any obscene material” having a child as a participant or portraying a child observing or participating in sexual conduct. As the United States Supreme Court and numerous other courts have recognized, the word “any”

is ambiguous as to the permissible unit of prosecution. Although some courts that have addressed the issue presented here have used various tools of statutory construction to resolve the ambiguity inherent in the word “any,” this Court’s attempt to apply those tools here demonstrates that those rules of construction are unhelpful here. By using the phrase “any obscene material,” the statute left unclear whether a defendant’s simultaneous possession of eight separate images of child pornography constitutes eight separate crimes of possession or a single crime of possession. Accordingly, the ambiguity must be resolved in Liberty’s favor, and seven of his eight convictions for possession of child pornography must be reversed.

(4) Double jeopardy principles do not preclude, however, Liberty’s retrial on these charges. When a conviction is reversed solely because of trial error rather than insufficiency of the evidence, retrial is constitutionally permissible. Here, the trial court misapplied the possession of child pornography statute. As such, the proper remedy is to remand the seven reversed convictions, at which point the state will determine whether to retry Liberty on those charges.

**Opinion concurring in part and dissenting in part by Judge Russell:** (1) The author concurs in the part of the majority’s opinion affirming Liberty’s sentence for promoting child pornography. She agrees the evidence was sufficient to show “sexual conduct” as necessary to support this conviction. She also agrees the evidence was sufficient to show “sexual conduct” in the images underlying his challenged convictions for possessing child pornography.

(2) The author disagrees that Liberty’s rights under the double jeopardy clause of the Fifth Amendment to the United States Constitution bar his multiple possession convictions. A double jeopardy analysis focused on considering the legislature’s intended unit of prosecution requires the Court to examine the elements of the crime as well as the evidence used to prove those elements. When possible, this Court must ascertain legislative intent by giving statutory language its plain and rational meaning. Even giving due consideration in favor of leniency, when a statute has an expressed or obvious intent to establish substantial punishment for an offense, the court should construe the statute in favor of punishing each act that violates the statute. If a charging statute does not express a limit to the unit of prosecution, the rule of lenity resolves doubts about the intended unit in the defendant’s favor. The rule of lenity only should be applied, however, when the reviewing court can make no more than a guess as to what the legislature intended.

Here, there is no confusion in the legislature’s use of the word “any” in the statute that requires this Court to apply the rule of lenity to give Liberty double jeopardy relief from his multiple convictions for possessing child pornography. The legislature’s obvious purpose in enacting statutes criminalizing possession of child pornography is to protect children from exploitation, and ruling that multiple images give rise to only a single count of possession would not deter a possessor of child pornography to desist from such criminality rather than amassing a larger collection. It defies common sense to declare the legislature’s intent in enacting the statute was to limit the phrase “any obscene material” to a single criminal charge regardless of the volume of material possessed. Each possession count against Liberty was supported by a distinct image that was presented into evidence. Even if the elements for each of the counts were the same, the evidence used to prove those elements was not identical. The prosecutor was required to provide evidence that each individual photograph underlying each count of possessing child pornography fulfilled the crime’s statutory requirements. As such, the fact that Liberty simultaneously

possessed multiple images of child pornography did not prevent his prosecution for each of the images separately under the terms of the statute.

Further, in contrast to the majority, the author finds nothing in the 2008 amendment to the statute that impacts the appropriate unit of prosecution under the previous statute. The changes made to the available penalty did not alter or modify the legislature's use of the word "any." Under both versions of the statute, the prosecutor would need to exercise discretion in bringing the appropriate charges for possessing child pornography to fit the facts and evidence of the case. Nothing in the statute required the prosecutor to bring one joint count reflecting Liberty's simultaneous possession of multiple, distinctive images of child pornography, and each count against him was supported by separate and distinct facts relating to each unique image underlying each count. As such, double jeopardy concerns are not implicated, and the author would affirm all of Liberty's convictions for possessing child pornography.