

SB

222

**SENATE COMMITTEE REPORT
First Committee of Referral**

DATE: 1/19/10

FURTHER: Finance

Date of 5-Day Notice: 1/25/10
(in accordance with Uniform Rule 23)

DATE TURNED
IN TO OFFICE: 4/7/10

Judiciary Committee considered SENATE BILL NO. 222

SB 222 SEX OFFENSES; OFFENDER REGIS.; SENTENCING

"An Act relating to the crimes of harassment, possession of child pornography, and distribution of indecent material to a minor; relating to suspending imposition of sentence and conditions of probation or parole for certain sex offenses; relating to aggravating factors in sentencing; relating to registration as a sex offender or child kidnapper; amending Rule 16, Alaska Rules of Criminal Procedure; and providing for an effective date."

and recommends:

- be replaced with SCS or CS SB222 (JUD)
- adopt previous SCS or CS — SCS/CS- Forthcoming
- attached amendment(s)
- adopt _____ Letter of Intent
- further referral to _____ Committee

SENATE BILL:	
<input type="checkbox"/>	Same Title
<input type="checkbox"/>	New Title
<hr/>	
HOUSE BILL:	
<input type="checkbox"/>	Same Title
<input type="checkbox"/>	Technical Title Change
<input type="checkbox"/>	New Title w/ SCR # _____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#
COURT	1/24/10			✓	5
DPS/Records	1/22/10	✓			6

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#
ADM/OPA	12/31			✓	1
COR	1/7	✓			2
ADM/PO	12/31			✓	3
LAW	12/30			✓	4

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	PRINTED LAST NAME	DO PASS	DO NOT PASS	NO REC	AMEND
	Coffitt			✓	
	Witekhorowski			✓	
	McQuinn	✓			
CHAIR:	French	✓			

AMENDMENT #1

Senator
French

OFFERED IN THE SENATE

TO: CSSB 222(JUD), Draft Version "E"

1 Page 8, line 11:

2 Delete "associated with the account;"

3 Insert "and physical location associated with the account; and"

4

5 Page 8, lines 12 - 13:

6 Delete all material.

7

8 Renumber the following paragraphs accordingly.

9

10 Page 8, line 15:

11 Delete ";

12 Insert "."

13

14 Page 8, lines 16 - 19:

15 Delete all material.

What E-1 does

1 **Sec. 44.23.080. Subpoena power of attorney general in cases involving use**
 2 **of an Internet service account in the exploitation of children.** (a) In an
 3 investigation of an offense under AS 11.41.452, 11.41.455, or AS 11.61.125 -
 4 11.61.128 and on reasonable cause to believe that an Internet service account has been
 5 used in the exploitation or attempted exploitation of children, the attorney general may
 6 issue in writing and cause to be served a subpoena requiring the production and
 7 testimony described in (b) of this section.

8 (b) A person receiving a subpoena under (a) of this section shall disclose, for
 9 the account that is the subject of the subpoena,

- 10 (1) the name of the person holding the account;
- 11 (2) the address ^{and physical location associated with the account; and} associated with the account;
- 12 ~~(3) local and long distance telephone connection records, including~~
 13 ~~records of session times and durations for the account;~~
- 14 (4) length of service, including service start date, and types of service
 15 used by the account; (C)
- 16 ~~(5) the telephone or instrument number or other subscriber number or~~
 17 ~~identifier, including any temporarily assigned network address for the account; and~~
- 18 ~~(6) the means and source of payment for the service, including a credit~~
 19 ~~card or bank account number associated with the account.~~

20 (c) At any time before the return date specified on the subpoena, the subpoenaed
 21 person may petition a court of competent jurisdiction for the judicial district in which the
 22 person resides or does business for an order modifying or setting aside the subpoena or for
 23 an order sealing the court record.

24 (d) A subpoena under this section must describe the objects required to be
 25 produced and must prescribe a return date with a reasonable period of time within which
 26 the objects must be assembled and produced.

27 (e) If no case or proceeding arises from the production of records or other
 28 documents under this section within a reasonable time after those records or documents
 29 are produced, the attorney general shall either destroy the records and documents or return
 30 them to the person who produced them.

31 (f) A subpoena issued under this section may be served as provided for service of
 32 subpoenas under Rule 45, Alaska Rules of Civil Procedure, or for service of process under

#2

AMENDMENT

French

OFFERED IN THE SENATE

TO: CSSB 222(JUD), Draft Version "E"

1 Page 6, following line 30:

2 Insert a new bill section to read:

3 "* Sec. 16. AS 12.62.130 is amended to read:

4 **Sec. 12.62.130. Reporting of uniform crime information.** A criminal justice
5 agency shall submit to the department, at the time, in the manner, and in the form
6 specified by the department, data regarding crimes committed within that agency's
7 jurisdiction. At a minimum, the department shall require a criminal justice
8 agency to report each felony sex offense committed in the agency's jurisdiction.
9 The department may withhold grant funding to a criminal justice agency that
10 fails to report data as required by this section. The department shall compile, and
11 provide to the governor and the attorney general, an annual report concerning the
12 number and nature of criminal offenses committed, the disposition of the offenses, and
13 any other data the commissioner finds appropriate relating to the method, frequency,
14 cause, and prevention of crime. In this section, "sex offense" has the meaning given
15 in AS 12.63.100."

16

17 Renumber the following bill sections accordingly.

18

19 Page 9, lines 6 - 11:

20 Delete all material.

21

22 Renumber the following bill sections accordingly.

23

- 1 Page 9, line 31:
- 2 Delete "Sections 17 and 19"
- 3 Insert "Sections 18 and 19"

AMENDMENT

#3

French

OFFERED IN THE SENATE

TO: CSSB 222(JUD), Draft Version "E"

1 Page 1, line 2, following "pornography,":

2 Insert "failure to register as a sex offender,"

3

4 Page 2, following line 11:

5 Insert a new bill section to read:

6 **** Sec. 3.** AS 11.56.840 is repealed and reenacted to read:

7 **Sec. 11.56.840. Failure to register as a sex offender or child kidnapper in**
8 **the second degree.** (a) A person commits the crime of failure to register as a sex
9 offender or child kidnapper in the second degree if the person

10 (1) is required to register under AS 12.63.010;

11 (2) knows that the person is required to register under AS 12.63.010;

12 and

13 (3) with criminal negligence fails to

14 (A) register;

15 (B) file written notice of

16 (i) change of residence;

17 (ii) change of mailing address;

18 (iii) establishment of an electronic or messaging address
19 or any change to an electronic or messaging address; or

20 (iv) establishment of an Internet communication
21 identifier or any change to an Internet communication identifier;

22 (C) file the annual or quarterly written verification; or

23 (D) supply accurate and complete information required to be

1 submitted under this paragraph.

2 (b) In a prosecution for failure to register as a sex offender in the second
3 degree under (a) of this section, it is an affirmative defense that

4 (1) unforeseeable circumstances, outside the control of the person,
5 prevented the person from registering under (a)(3)(A) of this section or filing or
6 supplying the written notices, verification, and other information required under
7 (a)(3)(B) - (D) of this section; and

8 (2) the person contacted the Department of Public Safety orally and in
9 writing immediately upon being able to perform the requirements described in this
10 section.

11 (c) Failure to register as a sex offender or child kidnapper in the second degree
12 is a class A misdemeanor."

13

14 Renumber the following bill sections accordingly.

15

16 Page 9, line 29:

17 Delete "Sections 1 - 16"

18 Insert "Sections 1 - 17"

19

20 Page 9, line 31:

21 Delete "Sections 17 and 19"

22 Insert "Sections 18 and 20"

CS FOR SENATE BILL NO. 222(JUD)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-SIXTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL
FOR AN ACT ENTITLED

1 **"An Act relating to the crimes of harassment, distribution and possession of child**
2 **pornography, and distribution of indecent material to a minor; relating to suspending**
3 **imposition of sentence and conditions of probation or parole for human trafficking or**
4 **for certain sex offenses; relating to aggravating factors in sentencing; relating to**
5 **reporting of crimes; relating to administrative subpoenas for certain records involving**
6 **exploitation of children; amending Rule 16, Alaska Rules of Criminal Procedure; and**
7 **providing for an effective date."**

8 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

9 *** Section 1.** AS 11.56.759(a) is amended to read:

10 (a) A person commits the crime of violation by sex offender of condition of
11 probation [OR PAROLE] if the person

12 (1) is on probation [OR PAROLE] for conviction of a sex offense;

13 (2) has served the entire term of incarceration imposed for conviction

1 of the sex offense; and

2 (3) [EITHER

3 (A)] violates a condition of probation imposed under
4 AS 12.55.100(a)(5), (a)(6), or (e), 12.55.101(a)(1), or any other condition
5 imposed by the court that the court finds to be specifically related to the
6 defendant's offense [; OR

7 (B) VIOLATES A CONDITION OF PAROLE IMPOSED
8 UNDER AS 33.16.150(a)(3), (a)(4), (a)(6), (a)(13), (b)(4), (b)(11), OR (f)].

9 * Sec. 2. AS 11.56.759(c) is amended to read:

10 (c) Violation by sex offender of condition of probation [OR PAROLE] is a
11 class A misdemeanor.

12 * Sec. 3. AS 11.61.118(a) is amended to read:

13 (a) A person commits the crime of harassment in the first degree if

14 (1) the person violates AS 11.61.120(a)(5) and the offensive physical
15 contact is contact with human or animal blood, mucus, saliva, semen, urine, vomitus,
16 or feces; or

17 (2) under circumstances not proscribed under AS 11.41.434 -
18 11.41.440, the person violates AS 11.61.120(a)(5) and the offensive physical
19 contact is contact by the person touching through clothing another person's
20 genitals, buttocks, or female breast.

21 * Sec. 4. AS 11.61.125(a) is amended to read:

22 (a) A person commits the crime of distribution of child pornography if the
23 person distributes in this state or advertises, promotes, solicits, or offers to
24 distribute in this state [BRINGS OR CAUSES TO BE BROUGHT INTO THE
25 STATE FOR DISTRIBUTION, OR IN THE STATE DISTRIBUTES, OR IN THE
26 STATE POSSESSES, PREPARES, PUBLISHES, OR PRINTS WITH INTENT TO
27 DISTRIBUTE,] any material that is proscribed under AS 11.61.127 [VISUALLY
28 OR AURALLY DEPICTS CONDUCT DESCRIBED IN AS 11.41.455(a),
29 KNOWING THAT THE PRODUCTION OF THE MATERIAL INVOLVED THE
30 USE OF A CHILD UNDER 18 YEARS OF AGE WHO ENGAGED IN THE
31 CONDUCT].

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

* **Sec. 5.** AS 11.61.127(a) is amended to read:

(a) A person commits the crime of possession of child pornography if the person knowingly possesses or knowingly accesses on a computer with intent to view any material that visually [OR AURALLY] depicts conduct described in AS 11.41.455(a) knowing that the production of the material involved the use of a child under 18 years of age who engaged in the conduct or a depiction of a part of an actual child under 18 years of age who, by manipulation, creation, or modification, appears to be engaged in the conduct.

* **Sec. 6.** AS 11.61.127(c) is amended to read:

(c) Each film, audio, video, electronic, or electromagnetic recording, photograph, negative, slide, book, newspaper, magazine, or other material that visually or aurally depicts conduct described in AS 11.41.455(a) that is possessed or accessed in violation of (a) of this section [BY A PERSON KNOWING THAT THE PRODUCTION OF THE MATERIAL INVOLVED THE USE OF A CHILD UNDER 18 YEARS OF AGE THAT ENGAGED IN THE CONDUCT] is a separate violation of this section.

* **Sec. 7.** AS 11.61.127 is amended by adding new subsections to read:

(e) In a prosecution under (a) of this section, it is an affirmative defense that the person

(1) possessed or accessed fewer than three depictions described in (a) of this section; and

(2) without allowing any person other than a law enforcement agency to view the depictions, either took reasonable steps to destroy the depictions, or reported the matter to a law enforcement agency and allowed the agency access to the depictions.

(f) In this section, "computer" has the meaning given in AS 11.46.990.

(g) In a prosecution under (a) of this section, the prosecution is not required to prove the identity of a minor depicted or that the defendant knew the identity of a minor depicted.

* **Sec. 8.** AS 11.61.128(a) is amended to read:

(a) A person commits the crime of [ELECTRONIC] distribution of indecent

1 material to minors if

2 (1) the person, being 18 years of age or older, knowingly distributes to
3 another person [BY COMPUTER] any material that depicts the following actual or
4 simulated conduct:

5 (A) sexual penetration;

6 (B) the lewd touching of a person's genitals, anus, or female
7 breast;

8 (C) masturbation;

9 (D) bestiality;

10 (E) the lewd exhibition of a person's genitals, anus, or female
11 breast; or

12 (F) sexual masochism or sadism; [AND]

13 (2) the material is harmful to minors; and

14 (3) either

15 (A) the other person is a child under 16 years of age; or

16 (B) the person believes that the other person is a child under 16
17 years of age.

18 * Sec. 9. AS 11.61.128(c) is amended to read:

19 (c) Except as provided in (d) of this section, [ELECTRONIC] distribution of
20 indecent material to minors is a class C felony.

21 * Sec. 10. AS 11.61.128(d) is amended to read:

22 (d) Distribution [ELECTRONIC DISTRIBUTION] of indecent material to
23 minors is a class B felony if the defendant was, at the time of the offense, required to
24 register as a sex offender or child kidnapper under AS 12.63 or a similar law of
25 another jurisdiction.

26 * Sec. 11. AS 11.61.128 is amended by adding a new subsection to read:

27 (e) In this section, "harmful to minors" means

28 (1) the average individual, applying contemporary community
29 standards, would find that the material, taken as a whole, appeals to the prurient
30 interest in sex for persons under 16 years of age;

31 (2) a reasonable person would find that the material, taken as a whole,

1 lacks serious literary, artistic, educational, political, or scientific value for persons
2 under 16 years of age; and

3 (3) the material depicts actual or simulated conduct in a way that is
4 patently offensive to the prevailing standards in the adult community as a whole with
5 respect to what is suitable for persons under 16 years of age.

6 * Sec. 12. AS 12.55.085(f) is amended to read:

7 (f) The court may not suspend the imposition of sentence of a person who

8 (1) is convicted of a violation of AS 11.41.100 - 11.41.220, 11.41.260
9 - 11.41.320, 11.41.360 - 11.41.370, 11.41.410 - 11.41.530, [OR] AS 11.46.400, or
10 AS 11.61.125 - 11.61.128;

11 (2) uses a firearm in the commission of the offense for which the
12 person is convicted; or

13 (3) is convicted of a violation of AS 11.41.230 - 11.41.250 or a felony
14 and the person has one or more prior convictions for a misdemeanor violation of
15 AS 11.41 or for a felony or for a violation of a law in this or another jurisdiction
16 having [SUBSTANTIALLY] similar elements to an offense defined as a misdemeanor
17 in AS 11.41 or as a felony in this state; for the purposes of this paragraph, a person
18 shall be considered to have a prior conviction even if that conviction has been set aside
19 under (e) of this section or under the equivalent provision of the laws of another
20 jurisdiction.

21 * Sec. 13. AS 12.55.100(e) is repealed and reenacted to read:

22 (e) In addition to other conditions imposed on the defendant, while on
23 probation and as a condition of probation

24 (1) for a sex offense, as described in AS 12.63.100, the defendant

25 (A) shall be required to submit to regular periodic polygraph
26 examinations;

27 (B) may be required to provide each electronic mail address,
28 instant messaging address, and other Internet communication identifier that the
29 defendant uses to the defendant's probation officer; the probation officer shall
30 forward those addresses and identifiers to the Alaska state troopers and to the
31 local law enforcement agency;

1 (2) if the defendant was convicted of a violation of AS 11.41.434 -
2 11.41.455, AS 11.61.125 - 11.61.128, or a similar offense in another jurisdiction, the
3 defendant may be required to refrain from

4 (A) using or creating an Internet site;

5 (B) communicating with children under 16 years of age; or

6 (C) possessing or using a computer.

7 * Sec. 14. AS 12.55.155(c)(5) is amended to read:

8 (5) the defendant knew or reasonably should have known that the
9 victim of the offense was particularly vulnerable or incapable of resistance due to
10 advanced age, disability, ill health, homelessness, consumption of alcohol or drugs,
11 or extreme youth or was for any other reason substantially incapable of exercising
12 normal physical or mental powers of resistance;

13 * Sec. 15. AS 12.55.155(c)(18) is amended to read:

14 (18) the offense was a felony

15 (A) specified in AS 11.41 and was committed against a spouse,
16 a former spouse, or a member of the social unit made up of those living
17 together in the same dwelling as the defendant;

18 (B) specified in AS 11.41.410 - 11.41.458 and the defendant
19 has engaged in the same or other conduct prohibited by a provision of
20 AS 11.41.410 - 11.41.460 involving the same or another victim; [OR]

21 (C) specified in AS 11.41 that is a crime involving domestic
22 violence and was committed in the physical presence or hearing of a child
23 under 16 years of age who was, at the time of the offense, living within the
24 residence of the victim, the residence of the perpetrator, or the residence where
25 the crime involving domestic violence occurred;

26 (D) specified in AS 11.41 and was committed against a
27 person with whom the defendant has a dating relationship or with whom
28 the defendant has engaged in a sexual relationship; or

29 (E) specified in AS 11.41.434 - 11.41.458 or AS 11.61.128
30 and the defendant was 10 or more years older than the victim;

31 * Sec. 16. AS 12.63.100(6) is amended to read:

1 (6) "sex offense" means

2 (A) a crime under AS 11.41.100(a)(3), or a similar law of
3 another jurisdiction, in which the person committed or attempted to commit a
4 sexual offense, or a similar offense under the laws of the other jurisdiction; in
5 this subparagraph, "sexual offense" has the meaning given in
6 AS 11.41.100(a)(3);

7 (B) a crime under AS 11.41.110(a)(3), or a similar law of
8 another jurisdiction, in which the person committed or attempted to commit
9 one of the following crimes, or a similar law of another jurisdiction:

10 (i) sexual assault in the first degree;

11 (ii) sexual assault in the second degree;

12 (iii) sexual abuse of a minor in the first degree; or

13 (iv) sexual abuse of a minor in the second degree; or

14 (C) a crime, or an attempt, solicitation, or conspiracy to commit
15 a crime, under the following statutes or a similar law of another jurisdiction:

16 (i) AS 11.41.410 - 11.41.438;

17 (ii) AS 11.41.440(a)(2);

18 (iii) AS 11.41.450 - 11.41.458;

19 (iv) AS 11.41.460 if the indecent exposure is before a
20 person under 16 years of age and the offender has a previous conviction
21 for that offense;

22 (v) AS 11.61.125 - 11.61.128;

23 (vi) AS 11.66.110 or 11.66.130(a)(2) if the person who
24 was induced or caused to engage in prostitution was 16 or 17 years of
25 age at the time of the offense; [OR]

26 (vii) former AS 11.15.120, former 11.15.134, or assault
27 with the intent to commit rape under former AS 11.15.160, former
28 AS 11.40.110, or former 11.40.200; or

29 (viii) AS 11.61.118(a)(2) if the offender has a
30 previous conviction for that offense;

31 * Sec. 17. AS 44.23 is amended by adding a new section to read:

1 **Sec. 44.23.080. Subpoena power of attorney general in cases involving use**
2 **of an Internet service account in the exploitation of children.** (a) In an
3 investigation of an offense under AS 11.41.452, 11.41.455, or AS 11.61.125 -
4 11.61.128 and on reasonable cause to believe that an Internet service account has been
5 used in the exploitation or attempted exploitation of children, the attorney general may
6 issue in writing and cause to be served a subpoena requiring the production and
7 testimony described in (b) of this section.

8 (b) A person receiving a subpoena under (a) of this section shall disclose, for
9 the account that is the subject of the subpoena,

10 (1) the name of the person holding the account;

11 (2) the address associated with the account;

12 (3) local and long distance telephone connection records, including
13 records of session times and durations for the account;

14 (4) length of service, including service start date, and types of service
15 used by the account;

16 (5) the telephone or instrument number or other subscriber number or
17 identifier, including any temporarily assigned network address for the account; and

18 (6) the means and source of payment for the service, including a credit
19 card or bank account number associated with the account.

20 (c) At any time before the return date specified on the subpoena, the subpoenaed
21 person may petition a court of competent jurisdiction for the judicial district in which the
22 person resides or does business for an order modifying or setting aside the subpoena or for
23 an order sealing the court record.

24 (d) A subpoena under this section must describe the objects required to be
25 produced and must prescribe a return date with a reasonable period of time within which
26 the objects must be assembled and produced.

27 (e) If no case or proceeding arises from the production of records or other
28 documents under this section within a reasonable time after those records or documents
29 are produced, the attorney general shall either destroy the records and documents or return
30 them to the person who produced them.

31 (f) A subpoena issued under this section may be served as provided for service of
32 subpoenas under Rule 45, Alaska Rules of Civil Procedure, or for service of process under

1 Rule 4, Alaska Rules of Civil Procedure.

2 (g) Except as provided in this section, any information, records, or data reported
3 or obtained under a subpoena under this section shall remain confidential and may not be
4 disclosed unless the disclosure occurs in connection with a criminal case related to the
5 subpoenaed materials.

6 * Sec. 18. AS 44.41.020(c) is amended to read:

7 (c) The department shall establish, and may require state and local law
8 enforcement agencies to use, standardized methods of collecting and recording law
9 enforcement and crime statistics. At a minimum, the department shall require
10 reporting from law enforcement agencies of each type of felony sexual offense
11 proscribed in the state.

12 * Sec. 19. The uncodified law of the State of Alaska is amended by adding a new section to
13 read:

14 DIRECT COURT RULE AMENDMENT. Rule 16(b), Alaska Rules of
15 Criminal Procedure, is amended by adding a new paragraph to read:

16 (9) Restriction on Availability of Certain Material or Property.
17 Notwithstanding (b)(1)(A)(iv) of this rule, the court shall deny any request by the
18 defendant to copy, photograph, duplicate, or otherwise reproduce any property or
19 material that may be illegal or prohibited under AS 11.41.455(a) or defined as "child
20 pornography" under 18 U.S.C. 2256, provided the prosecution makes the property or
21 material reasonably available to the defendant. Property or material shall be deemed to
22 be made reasonably available to the defendant if the prosecution provides, at a
23 prosecution or law enforcement facility, ample opportunity for inspection, viewing,
24 and examination of the property or material by the defendant, the defendant's attorney,
25 and any individual the defendant may seek to qualify to furnish expert testimony at
26 trial.

27 * Sec. 20. The uncodified law of the State of Alaska is amended by adding a new section to
28 read:

29 APPLICABILITY. (a) Sections 1 - 16 of this Act apply to offenses committed on or
30 after the effective date of this Act.

31 (b) Sections 17 and 19 of this Act apply to offenses committed before, on, or after the
32 effective date of this Act.

1

* **Sec. 21.** This Act takes effect July 1, 2010.

26-GS2859R
Luckhaupt
3/30/10

CS FOR SENATE BILL NO. 222(JUD)

**IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-SIXTH LEGISLATURE - SECOND SESSION**

BY THE SENATE JUDICIARY COMMITTEE

**Offered:
Referred:**

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to the crimes of harassment, distribution and possession of child**
2 **pornography, and distribution of indecent material to a minor; relating to suspending**
3 **imposition of sentence and conditions of probation or parole for human trafficking or**
4 **for certain sex offenses; relating to aggravating factors in sentencing; relating to**
5 **registration as a sex offender or child kidnapper; relating to reporting of crimes;**
6 **relating to administrative subpoenas for certain records involving exploitation of**
7 **children; amending Rule 16, Alaska Rules of Criminal Procedure; and providing for an**
8 **effective date."**

9 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

10 *** Section 1. AS 11.56.759(a) is amended to read:**

11 (a) A person commits the crime of violation by sex offender of condition of
12 probation [OR PAROLE] if the person

1 (1) is on probation [OR PAROLE] for conviction of a sex offense;
2 (2) has served the entire term of incarceration imposed for conviction
3 of the sex offense; and

4 (3) [EITHER

5 (A)] violates a condition of probation imposed under
6 AS 12.55.100(a)(5), (a)(6), or (e), 12.55.101(a)(1), or any other condition
7 imposed by the court that the court finds to be specifically related to the
8 defendant's offense [; OR

9 (B) VIOLATES A CONDITION OF PAROLE IMPOSED
10 UNDER AS 33.16.150(a)(3), (a)(4), (a)(6), (a)(13), (b)(4), (b)(11), OR (f)].

11 * **Sec. 2.** AS 11.56.759(c) is amended to read:

12 (c) Violation by sex offender of condition of probation [OR PAROLE] is a
13 class A misdemeanor.

14 * **Sec. 3.** AS 11.56.840 is repealed and reenacted to read:

15 **Sec. 11.56.840. Failure to register as a sex offender or child kidnapper in**
16 **the second degree.** (a) A person commits the crime of failure to register as a sex
17 offender or child kidnapper in the second degree if the person

18 (1) is required to register under AS 12.63.010;

19 (2) knows that the person is required to register under AS 12.63.010;

20 and

21 (3) fails to

22 (A) register;

23 (B) file written notice of

24 (i) change of residence;

25 (ii) change of mailing address;

26 (iii) establishment of an electronic or messaging address
27 or any change to an electronic or messaging address; or

28 (iv) establishment of an Internet communication
29 identifier or any change to an Internet communication identifier;

30 (C) file the annual or quarterly written verification; or

31 (D) supply accurate and complete information required to be

1 submitted under this paragraph.

2 (b) In a prosecution for failure to register as a sex offender in the second
3 degree under (a) of this section, it is an affirmative defense that

4 (1) unforeseeable circumstances, outside the control of the person,
5 prevented the person from registering under (a)(3)(A) of this section or filing or
6 supplying the written notices, verification, and other information required under
7 (a)(3)(B) - (D) of this section; and

8 (2) the person contacted the Department of Public Safety orally and in
9 writing immediately upon being able to perform the requirements described in this
10 section.

11 (c) Failure to register as a sex offender or child kidnapper in the second degree
12 is a class A misdemeanor.

13 * Sec. 4. AS 11.61.118(a) is amended to read:

14 (a) A person commits the crime of harassment in the first degree if

15 (1) the person violates AS 11.61.120(a)(5) and the offensive physical
16 contact is contact with human or animal blood, mucus, saliva, semen, urine, vomitus,
17 or feces; or

18 (2) under circumstances not proscribed under AS 11.41.434 -
19 11.41.440, the person violates AS 11.61.120(a)(5) and the offensive physical
20 contact is contact by the person touching through clothing another person's
21 genitals, buttocks, or female breast.

22 * Sec. 5. AS 11.61.125(a) is amended to read:

23 (a) A person commits the crime of distribution of child pornography if the
24 person distributes in this state or advertises, promotes, solicits, or offers to
25 distribute in this state [BRINGS OR CAUSES TO BE BROUGHT INTO THE
26 STATE FOR DISTRIBUTION, OR IN THE STATE DISTRIBUTES, OR IN THE
27 STATE POSSESSES, PREPARES, PUBLISHES, OR PRINTS WITH INTENT TO
28 DISTRIBUTE,] any material that is proscribed under AS 11.61.127 [VISUALLY
29 OR AURALLY DEPICTS CONDUCT DESCRIBED IN AS 11.41.455(a),
30 KNOWING THAT THE PRODUCTION OF THE MATERIAL INVOLVED THE
31 USE OF A CHILD UNDER 18 YEARS OF AGE WHO ENGAGED IN THE

1 CONDUCT].

2 * Sec. 6. AS 11.61.127(a) is amended to read:

3 (a) A person commits the crime of possession of child pornography if the
4 person knowingly possesses or knowingly accesses on a computer with intent to
5 view any material that visually [OR AURALLY] depicts conduct described in
6 AS 11.41.455(a) knowing that the production of the material involved the use of a
7 child under 18 years of age who engaged in the conduct or a depiction of a part of an
8 actual child under 18 years of age who, by manipulation, creation, or
9 modification, appears to be engaged in the conduct.

10 * Sec. 7. AS 11.61.127(c) is amended to read:

11 (c) Each film, audio, video, electronic, or electromagnetic recording,
12 photograph, negative, slide, book, newspaper, magazine, or other material that visually
13 or aurally depicts conduct described in AS 11.41.455(a) that is possessed or accessed
14 in violation of (a) of this section [BY A PERSON KNOWING THAT THE
15 PRODUCTION OF THE MATERIAL INVOLVED THE USE OF A CHILD
16 UNDER 18 YEARS OF AGE THAT ENGAGED IN THE CONDUCT] is a separate
17 violation of this section.

18 * Sec. 8. AS 11.61.127 is amended by adding new subsections to read:

19 (e) In a prosecution under (a) of this section, it is an affirmative defense that
20 the person

21 (1) possessed or accessed fewer than three depictions described in (a)
22 of this section; and

23 (2) without allowing any person other than a law enforcement agency
24 to view the depictions, either took reasonable steps to destroy the depictions, or
25 reported the matter to a law enforcement agency and allowed the agency access to the
26 depictions.

27 (f) In this section, "computer" has the meaning given in AS 11.46.990.

28 (g) In a prosecution under (a) of this section, the prosecution is not required to
29 prove the identity of a minor depicted or that the defendant knew the identity of a
30 minor depicted.

31 * Sec. 9. AS 11.61.128(a) is amended to read:

1 (a) A person commits the crime of [ELECTRONIC] distribution of indecent
2 material to minors if

3 (1) the person, being 18 years of age or older, knowingly distributes to
4 another person [BY COMPUTER] any material that depicts the following actual or
5 simulated conduct:

6 (A) sexual penetration;

7 (B) the lewd touching of a person's genitals, anus, or female
8 breast;

9 (C) masturbation;

10 (D) bestiality;

11 (E) the lewd exhibition of a person's genitals, anus, or female
12 breast; or

13 (F) sexual masochism or sadism; [AND]

14 (2) the material is harmful to minors; and

15 (3) either

16 (A) the other person is a child under 16 years of age; or

17 (B) the person believes that the other person is a child under 16
18 years of age.

19 * Sec. 10. AS 11.61.128(c) is amended to read:

20 (c) Except as provided in (d) of this section, [ELECTRONIC] distribution of
21 indecent material to minors is a class C felony.

22 * Sec. 11. AS 11.61.128(d) is amended to read:

23 (d) Distribution [ELECTRONIC DISTRIBUTION] of indecent material to
24 minors is a class B felony if the defendant was, at the time of the offense, required to
25 register as a sex offender or child kidnapper under AS 12.63 or a similar law of
26 another jurisdiction.

27 * Sec. 12. AS 11.61.128 is amended by adding a new subsection to read:

28 (e) In this section, "harmful to minors" means

29 (1) the average individual, applying contemporary community
30 standards, would find that the material, taken as a whole, appeals to the prurient
31 interest in sex for persons under 16 years of age;

1 (2) a reasonable person would find that the material, taken as a whole,
2 lacks serious literary, artistic, educational, political, or scientific value for persons
3 under 16 years of age; and

4 (3) the material depicts actual or simulated conduct in a way that is
5 patently offensive to the prevailing standards in the adult community as a whole with
6 respect to what is suitable for persons under 16 years of age.

7 * Sec. 13. AS 12.55.085(f) is amended to read:

8 (f) The court may not suspend the imposition of sentence of a person who

9 (1) is convicted of a violation of AS 11.41.100 - 11.41.220, 11.41.260
10 - 11.41.320, 11.41.360 - 11.41.370, 11.41.410 - 11.41.530, [OR] AS 11.46.400, or
11 AS 11.61.125 - 11.61.128;

12 (2) uses a firearm in the commission of the offense for which the
13 person is convicted; or

14 (3) is convicted of a violation of AS 11.41.230 - 11.41.250 or a felony
15 and the person has one or more prior convictions for a misdemeanor violation of
16 AS 11.41 or for a felony or for a violation of a law in this or another jurisdiction
17 having [SUBSTANTIALLY] similar elements to an offense defined as a misdemeanor
18 in AS 11.41 or as a felony in this state; for the purposes of this paragraph, a person
19 shall be considered to have a prior conviction even if that conviction has been set aside
20 under (e) of this section or under the equivalent provision of the laws of another
21 jurisdiction.

22 * Sec. 14. AS 12.55.100(e) is repealed and reenacted to read:

23 (e) In addition to other conditions imposed on the defendant, while on
24 probation and as a condition of probation

25 (1) for a sex offense, as described in AS 12.63.100, the defendant

26 (A) shall be required to submit to regular periodic polygraph
27 examinations;

28 (B) may be required to provide each electronic mail address,
29 instant messaging address, and other Internet communication identifier that the
30 defendant uses to the defendant's probation officer; the probation officer shall
31 forward those addresses and identifiers to the Alaska state troopers and to the

1 local law enforcement agency;

2 (2) if the defendant was convicted of a violation of AS 11.41.434 -
3 11.41.455, AS 11.61.125 - 11.61.128, or a similar offense in another jurisdiction, the
4 defendant may be required to refrain from

5 (A) using or creating an Internet site;

6 (B) communicating with children under 16 years of age; or

7 (C) possessing or using a computer.

8 * Sec. 15. AS 12.55.155(c)(5) is amended to read:

9 (5) the defendant knew or reasonably should have known that the
10 victim of the offense was particularly vulnerable or incapable of resistance due to
11 advanced age, disability, ill health, homelessness, consumption of alcohol or drugs,
12 or extreme youth or was for any other reason substantially incapable of exercising
13 normal physical or mental powers of resistance;

14 * Sec. 16. AS 12.55.155(c)(18) is amended to read:

15 (18) the offense was a felony

16 (A) specified in AS 11.41 and was committed against a spouse,
17 a former spouse, or a member of the social unit made up of those living
18 together in the same dwelling as the defendant;

19 (B) specified in AS 11.41.410 - 11.41.458 and the defendant
20 has engaged in the same or other conduct prohibited by a provision of
21 AS 11.41.410 - 11.41.460 involving the same or another victim; [OR]

22 (C) specified in AS 11.41 that is a crime involving domestic
23 violence and was committed in the physical presence or hearing of a child
24 under 16 years of age who was, at the time of the offense, living within the
25 residence of the victim, the residence of the perpetrator, or the residence where
26 the crime involving domestic violence occurred;

27 (D) specified in AS 11.41 and was committed against a
28 person with whom the defendant has a dating relationship or with whom
29 the defendant has engaged in a sexual relationship; or

30 (E) specified in AS 11.41.434 - 11.41.458 or AS 11.61.128
31 and the defendant was 10 or more years older than the victim;

1 * **Sec. 17.** AS 12.63.100(6) is amended to read:

2 (6) "sex offense" means

3 (A) a crime under AS 11.41.100(a)(3), or a similar law of
4 another jurisdiction, in which the person committed or attempted to commit a
5 sexual offense, or a similar offense under the laws of the other jurisdiction; in
6 this subparagraph, "sexual offense" has the meaning given in
7 AS 11.41.100(a)(3);

8 (B) a crime under AS 11.41.110(a)(3), or a similar law of
9 another jurisdiction, in which the person committed or attempted to commit
10 one of the following crimes, or a similar law of another jurisdiction:

11 (i) sexual assault in the first degree;

12 (ii) sexual assault in the second degree;

13 (iii) sexual abuse of a minor in the first degree; or

14 (iv) sexual abuse of a minor in the second degree; **or**

15 (C) a crime, or an attempt, solicitation, or conspiracy to commit
16 a crime, under the following statutes or a similar law of another jurisdiction:

17 (i) AS 11.41.410 - 11.41.438;

18 (ii) AS 11.41.440(a)(2);

19 (iii) AS 11.41.450 - 11.41.458;

20 (iv) AS 11.41.460 if the indecent exposure is before a
21 person under 16 years of age and the offender has a previous conviction
22 for that offense;

23 (v) AS 11.61.125 - 11.61.128;

24 (vi) AS 11.66.110 or 11.66.130(a)(2) if the person who
25 was induced or caused to engage in prostitution was 16 or 17 years of
26 age at the time of the offense; [OR]

27 (vii) former AS 11.15.120, former 11.15.134, or assault
28 with the intent to commit rape under former AS 11.15.160, former
29 AS 11.40.110, or former 11.40.200; **or**

30 **(viii) AS 11.61.118(a)(2) if the offender has a**
31 **previous conviction for that offense;**

1 * **Sec. 18.** AS 44.23 is amended by adding a new section to read:

2 **Sec. 44.23.080. Subpoena power of attorney general in cases involving use**
3 **of an Internet service account in the exploitation of children.** (a) In an
4 investigation of an offense under AS 11.41.452, 11.41.455, or AS 11.61.125 -
5 11.61.128 and on reasonable cause to believe that an Internet service account has been
6 used in the exploitation or attempted exploitation of children, the attorney general may
7 issue in writing and cause to be served a subpoena requiring the production and
8 testimony described in (b) of this section.

9 (b) A person receiving a subpoena under (a) of this section shall disclose, for
10 the account that is the subject of the subpoena,

11 (1) the name of the person holding the account;

12 (2) the address associated with the account;

13 (3) local and long distance telephone connection records, including
14 records of session times and durations for the account;

15 (4) length of service, including service start date, and types of service
16 used by the account;

17 (5) the telephone or instrument number or other subscriber number or
18 identifier, including any temporarily assigned network address for the account; and

19 (6) the means and source of payment for the service, including a credit
20 card or bank account number associated with the account.

21 (c) At any time before the return date specified on the subpoena, the subpoenaed
22 person may petition a court of competent jurisdiction for the judicial district in which the
23 person resides or does business for an order modifying or setting aside the subpoena or for
24 an order sealing the court record.

25 (d) A subpoena under this section must describe the objects required to be
26 produced and must prescribe a return date with a reasonable period of time within which
27 the objects must be assembled and produced.

28 (e) If no case or proceeding arises from the production of records or other
29 documents under this section within a reasonable time after those records or documents
30 are produced, the attorney general shall either destroy the records and documents or return
31 them to the person who produced them.

32 (f) A subpoena issued under this section may be served as provided for service of

1 subpoena under Rule 45, Alaska Rules of Civil Procedure, or for service of process under
2 Rule 4, Alaska Rules of Civil Procedure.

3 (g) Except as provided in this section, any information, records, or data reported
4 or obtained under a subpoena under this section shall remain confidential and may not be
5 disclosed unless the disclosure occurs in connection with a criminal case related to the
6 subpoenaed materials.

7 * **Sec. 19.** AS 44.41.020(c) is amended to read:

8 (c) The department shall establish, and may require state and local law
9 enforcement agencies to use, standardized methods of collecting and recording law
10 enforcement and crime statistics. At a minimum, the department shall require
11 reporting from law enforcement agencies of each type of felony sexual offense
12 proscribed in the state.

13 * **Sec. 20.** The uncodified law of the State of Alaska is amended by adding a new section to
14 read:

15 DIRECT COURT RULE AMENDMENT. Rule 16(b), Alaska Rules of Criminal
16 Procedure, is amended by adding a new paragraph to read:

17 (9) Restriction on Availability of Certain Material or Property.
18 Notwithstanding (b)(1)(A)(iv) of this rule, the court shall deny any request by the
19 defendant to copy, photograph, duplicate, or otherwise reproduce any property or
20 material that may be illegal or prohibited under AS 11.41.455(a) or defined as "child
21 pornography" under 18 U.S.C. 2256, provided the prosecution makes the property or
22 material reasonably available to the defendant. Property or material shall be deemed to
23 be made reasonably available to the defendant if the prosecution provides, at a
24 prosecution or law enforcement facility, ample opportunity for inspection, viewing,
25 and examination of the property or material by the defendant, the defendant's attorney,
26 and any individual the defendant may seek to qualify to furnish expert testimony at
27 trial.

28 * **Sec. 21.** The uncodified law of the State of Alaska is amended by adding a new section to
29 read:

30 LEGISLATIVE STATEMENT CONCERNING CULPABLE MENTAL STATE. In
31 AS 11.56.840(a), as repealed and reenacted by sec. 3 of this Act, the only culpable mental
32 state required to be proven by the prosecution is the "knowing" requirement in paragraph (2)

1 of that subsection. No other culpable mental state needs to be proven for the other elements of
2 that offense.

3 * **Sec. 22.** The uncodified law of the State of Alaska is amended by adding a new section to
4 read:

5 **APPLICABILITY.** (a) Sections 1 - 17 and 21 of this Act apply to offenses committed
6 on or after the effective date of this Act.

7 (b) Sections 18 and 20 of this Act apply to offenses committed before, on, or after the
8 effective date of this Act.

9 * **Sec. 23.** This Act takes effect July 1, 2010.

AMENDMENT

OFFERED IN THE SENATE
TO: SB 222

BY SENATOR FRENCH

1 Page 1, line 5, following "kidnapper;":

2 Insert "relating to reporting of crimes;"

3

4 Page 7, following line 31:

5 Insert a new bill section to read:

6 "* Sec. 16. AS 44.41.020(c) is amended to read:

7 (c) The department shall establish, and may require state and local law
8 enforcement agencies to use, standardized methods of collecting and recording law
9 enforcement and crime statistics. At a minimum, the department shall require
10 reporting from law enforcement agencies of each type of felony sexual offense
11 proscribed in the state.

12

13 Renumber the following bill sections accordingly.

14

15 Page 9, line 5:

16 Delete "Section 16"

17 Insert "Section 17"

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595



Committee Members:
Senator Bill Wielechowski
Senator Dennis Egan
Senator Lesil McGuire
Senator Gene Therriault

Senate Judiciary Committee

MEMORANDUM

Report and Recommendations: Reducing Sexual Assault in Alaska

Introduction:

Alaska has the highest reported rate of sexual assault in the United States. Between 2003 and 2007, Alaska's reported rate of forcible rape was over two and a half times the national average, with Anchorage reports at almost three times the national rate and Fairbanks reports at over five times the national rate. This does not include all sexual assaults in Alaska, since the definition used in the federal reporting system (the Uniform Crime Report) excludes child victims, male victims, and many other forms of sexual assault. Nevertheless, forcible rape is a greater percentage of all violent crimes reported in Alaska than it is nationally, at 12% of all violent crime in Alaska as opposed to 6% of violent crime in the United States on average.

Between 2003 and 2004, the Troopers received 1,184 reports of contact sexual violence cases involving forcible rape, sexual assault, or sexual abuse of a minor. Of those, some 884 were deemed to have occurred and to have an identifiable suspect. The troopers then turned over 449 cases, or about half, to the Department of Law for their screening. Of these, 271 were accepted for prosecution, and some 217 convictions resulted.

During hearings of the Senate Judiciary Committee conducted during 2009, committee members heard testimony as to what Alaska can do to reduce sexual assault and improve rates of prosecution and conviction.

The following issues were discussed:

A. Inadequate and inaccurate data:

1. The current system for tracking reports of sexual assault is inadequate at best. The Uniform Crime Report (UCR) excludes many kinds of sexual assault, making it

unreliable, even for reported crimes. Not all police departments in Alaska provide information to the UCR, though they are statutorily required to do so. According to the Department of Public Safety, 41 local police departments failed to file the data needed for the Uniform Crime Report in 2007.

2. Alaska has never done a victimization study (a survey that includes both reported and unreported cases). Because of this, we do not know if Alaska's rates of sexual assault are higher, or the rate at which reports are made are higher, or both. So, for example, Fairbanks may have a very high rate of sexual violence, or it may be that citizens are simply more likely to report that violence, or it may be that both these things are true. Nationwide, it is estimated that 52% of sexual assaults are not reported to law enforcement. Without a victimization study, there is no way to know if this is also the case in Alaska.
3. Finally, the statistics that are available, largely collected through studies done by the Justice Center of the University of Alaska, show differences in the groups that are most likely to be victimized in various regions. For instance, a review of Alaska State Trooper cases showed that 94% reports are of victims who were 15 years of age or younger, while 73% of reports coming to the Anchorage Police Department are from victims aged 18 and older.

Recommendations:

- *The legislature should fund a victimization survey to determine the actual rate of both reported and unreported sexual assaults in Alaska. This survey should be large enough to look at the state by region, so that programs and policies can be tailored to be most effective.*
- *Legislation should be enacted requiring the Department of Public Safety to collect annual statistics on reported sexual assault in Alaska as defined in state law. This legislation should require local police department participation.*
- *A data system should be developed to track sexual assaults from report to conviction. This will require interagency cooperation and so should be addressed by a group such as MAJIC or the Criminal Justice Working Group.*

B. Certain resources have a disproportionate and positive impact on cases being accepted for prosecution, yet for the most part no consistent state policy has been implemented to ensure that these best practices are followed.

1. UAA Justice Center studies show that certain factors increase the likelihood of prosecution and conviction. These include the presence of a Village Public Safety Officer (VPSO), a Village Police Officer or Tribal Police Officer for crimes in villages. In State Trooper cases where a VPSO was available, rates of serious assault went down by 40% and the likelihood of the case being accepted for prosecution went up by three and a half times.
2. When victims received a medical-forensic exam, it more than doubled the likelihood that their case was accepted for prosecution. Documentation of non-genital injury was particularly important in the eventual decision to prosecute a case. However, of the 15 Sexual Assault Nurse Examiner programs that have been instituted in Alaska, only 4 are currently active.
3. In cases where witnesses were located and interviewed, and where appropriate investigative follow-up and victim support was done, the likelihood of prosecution increased by more than three times.
4. Finally, DNA evidence is becoming increasingly critical to sexual assault prosecutions and testimony indicated that there are significant delays and backlogs in getting this evidence processed in a timely way.

Recommendations:

- *The legislature should continue to increase the number of villages with local law enforcement through the VPSO program.*
- *The legislature should consider grant funding for local hospitals to provide qualified Sexual Assault Nurse Examiners and to support the cost of existing programs. In addition, a pilot project which looks at the use of telemedicine in extending SANE services to rural communities without SANE nurses should be explored.*
- *Law enforcement agencies should prioritize sexual assault investigations so that investigators have the time to contact potential witnesses, work with victims, and collect any other evidence that may be available in these cases.*
- *The legislature and the Department of Public Safety must address the needs of the State Crime lab and look at methods to process DNA evidence in a timely way.*

C. Alcohol use is significantly associated with sexual assault.

1. In a study of Anchorage Police Department cases, over 60% of victims and 70% of suspects had used alcohol just prior to or at the time of the assault. Similar statistics were also found in a study of cases in Alaska's Sexual Assault Nurse Examiner (SANE) program. In Trooper cases, where the victims tended overwhelmingly to be children, the victim use was 27% and suspect use was 42%. In addition, significant numbers of victims report having consumed alcohol to the point of incapacitation (e.g., Anchorage 23%; Fairbanks 31%). This both increases the vulnerability of the victim to an assault and can make cases more difficult to prosecute.

2. The UAA Justice Center reports that rates of serious injury from assault are 36% lower in dry villages and, further, that cases involving alcohol use are less likely to be referred for prosecution and are less likely to be accepted for prosecution when they are referred.

Recommendations:

- *Alaska should continue to support programs and policies that reduce alcohol consumption*
- *Education efforts in sexual assault awareness and prevention should specifically address alcohol use and its potential adverse effects on personal safety.*

D. Ongoing efforts to reduce recidivism by known sex offenders is critically important.

1. In a 1988 study (Abel, et al), of offenders who participated and who admitted to child molestations and rapes, 97% were never arrested for these crimes. The lag time for detection of sex offenders ranges from between 6 years to 16 years according to various national studies.

2. Nationally, almost 45% of prisoners serving time for rape or sexual assault committed their crime while on probation or parole.

Recommendations:

- *Alaska should continue to fund and expand its sex offender management programs, particularly the current Containment Model, which utilizes offender polygraphs but in prison and on probation.*
- *Alaska's Internet Crimes Against Children Task Force, which locates offenders who are looking for victims using the internet, should be expanded. This program has resulted in arrests and convictions of adults who would otherwise have offended against children.*

The Senate Judiciary Committee would like to thank the many experts who provided their time and knowledge to the committee during these hearings. The committee particularly acknowledges the work done by the UAA Justice Center, which has provided vital leadership in its research regarding violence against women in Alaska.

Justice Center, University of Alaska, Anchorage:

Andre Rosay, Phd., Interim Director

Alaska Department of Public Safety:

Commissioner Joe Masters
Deputy Commissioner Audie Holloway
Katie Tepas, Acting Director, Council on Domestic
Violence & Sexual Assault
Sgt. Derek DeGraaf, Computer & Financial Crimes

Anchorage Police Department:

Sgt. Kevin McCoy, Sexual Assault Unit
Sgt. Ron Tidler, Cyber Crimes Unit

Alaska Sexual Assault Nurse Examiners (SANE) Program:

Tara Henry, RN, MSN, SANE-A, SANE-P

Alaska Department of Law:

Rick Svobodny, Deputy Attorney General
Sue McLean, Chief Assistant Attorney General

Aleutian Pribilof Island Association:

Richard Krause, VPSO Program Director

Alaska Department of Corrections:

Dwayne Peeper, Deputy Commissioner
Dr. Anthony Mander, Clinical Consultant
Rose Manafo, Criminal Justice Planner
Bernie Troglia, Probation Officer



April 6, 2010

AMERICAN CIVIL

**LIBERTIES UNION OF
ALASKA**

1057 W. Fireweed, Suite 207
Anchorage, AK 99503
(907) 258-0044
(907) 258-0288 (fax)
WWW.AKCLU.ORG

OFFICERS AND DIRECTORS

SUSAN WINGROVE, Anchorage
PRESIDENT

RICH CURTNER, Anchorage
VICE PRESIDENT

LLOYD EGGAN, Anchorage
TREASURER

TONY STRONG, Juneau
SECRETARY

WILLIE ANDERSON, Juneau
AFFIRMATIVE ACTION OFFICER

KIRSTEN BEY, Nome
PAUL GRANT, Juneau
SCOTT HENDERSON, Anchorage
MICHAEL KING, Anchorage
CONNIE OZER, Anchorage
JOHN NEVILLE, Anchorage
GALEN PAINE, Sitka
STEPHANIE PAWLOWSKI, Anchorage
JUNE PINNELL-STEPHENS, Fairbanks
JIM WHITAKER, Fairbanks
NADINE WINTERS, Fairbanks

ZACH FICK, Anchorage
NOELANI KAMAHELE, Anchorage
STUDENT ADVISORS

The Honorable Hollis French
Chair, Senate Judiciary Committee
Alaska State Senate
State Capitol, Room 417
Juneau, AK 99801-1182

Re: **CS (JUD) for Senate Bill 222**
Constitutional Issues

Chair French:

Thank you for the opportunity to submit written testimony regarding CS (JUD) for Senate Bill 222. These comments reflect analysis in addition to our prior correspondence of February 15, with respect to provisions amended in the CS.

Section Seventeen – Unjustified Invitation to Abuse

Section 17, proposes that the Attorney General may issue administrative subpoenas to obtain an internet user's name, address, telephone records, bank or credit card information, service history, and any telephone number or IP address used in accessing the internet through the service provider.

The general rule in criminal investigations has been that a warrant issues from a judge or other judicial authority. In some contexts, administrative warrants have been issued by various administrative agencies – to assist the IRS, for instance, in recovering owed taxes, or the SEC in identifying violations of securities regulations.

Permitting a criminal enforcement agency to issue its own subpoenas for the purpose of prosecution has been rarely tried and leads to abuse when it has occurred. In the wake of 9/11, the FBI seized on the authority of

“exigent letters” and “national security letters” to demand phone records and other information from businesses. Investigation of this authority found that the letters were issued where no exigent circumstances or national security issue existed, that the secrecy surrounding the procedure allowed agents to misrepresent where the information had come from, and allowed the FBI to obtain phone records of some individuals, including journalists, in ways which raise serious civil liberties concerns.

Testimony to the effect that such sweeping authority should be removed from the hands of a judge – who traditionally affords constitutional protections as a neutral party – has indicated that the judicial process is too cumbersome or takes too much time. However, the submission of a warrant to a judge is the same procedure by which the phones of those accused of drug dealing are tapped, by which the homes of those accused of murder are searched, and by which those accused of rape are arrested. While the “affidavit” portion of a warrant request can be lengthy, much of it is boilerplate. The ACLU can provide the Committee with an exemplar affidavit showing that the original language necessary to complete the affidavit is rather minimal.

Testimony that it would be easier for the head of the state’s law enforcement and litigation agency to read an application for an administrative subpoena than for any of the many state court judges to do so is similarly unpersuasive. Regardless of who will finally sign a warrant or subpoena, the same steps must be completed. The statement of probable cause must be drafted, the statement of what materials are to be seized must be prepared, and the application must be submitted for signature. Whether the application is faxed to a judge’s chambers or carried upstairs does not add significantly to the time needed to complete the application. One could imagine that the Attorney General would have less time to fully review the application than judges around the state. If the intention of the bill is that the Attorney General will designate representatives to sign these warrants in his name, such a practice invites different concerns. Devolving subpoena power to numerous subordinates whose actions would be difficult to track even within the Department of Law, opens even more avenues for abuse.

Some of the material sought by these subpoenas should be considered private and outside the scope of an administrative subpoena. *State v. Miles*, 160 Wash.2d 236, 252 (Wash. 2007) (holding that bank records were private and not subject to administrative subpoena). The context of the subpoena – internet usage – should prompt more scrutiny from the courts, since access to the internet is part of the freedom of speech. Allowing the government to discover who makes negative comments about political figures on websites, to find out whether a state employee is visiting a website about whistleblower law, and who is supporting rival political campaigns threatens the privacy and the free speech rights of citizens. *Doe v. Alaska Superior Court*, 721 P.2d 617, 629 (Alaska 1986) (privacy clause protects “sensitive personal information”). It is no answer to say that the statute is supposedly about child exploitation when the subpoenas are not subject to independent scrutiny. The only entity able to challenge the subpoena would be the internet service provider, which has no particular interest in the freedom of speech or privacy of citizens.

Allowing a law enforcement agency to issue its own subpoenas without review by a neutral party has led in the past and will lead again to serious abuse by government officials.

Sections Five and Six: First Amendment Issues

As noted in Committee colloquy during the Monday, April 5 hearing, Sections 5 and 6 as currently drafted, present First Amendment issues. By inclusion of non-obscene material, these proposed amendments run afoul of the U.S. Supreme Court's ruling in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), (child pornography cannot be banned if it is both (1) not constitutionally obscene and (2) not a depiction of real children).

As currently drafted, one could imagine a work of art, for instance, placing a photo of the head of a minor Britney Spears, on drawing intended as commentary on media depictions of youth and sexuality unconstitutionally qualifying as "criminal material." Absent, for example, language tracking the *Miller* standard (*Miller v. California*, (1973) 413 U.S. 15) these provisions are subject to facial challenge.

Conclusion

As previously noted, the ACLU takes seriously the need to address sexual assault in Alaska. But the sections cited invite constitutional challenge and will likely entangle the state in lengthy and costly litigation, and lead to unnecessary uncertainty in criminal verdicts, should the CS (JUD) for S.B. 222 pass as currently written.

Sincerely,



Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Senator Wielechowski, Vice Chair
Senator Egan
Senator McGuire
Senator Coghill



February 15, 2010

AMERICAN CIVIL
LIBERTIES UNION OF
ALASKA
1057 W. Fireweed, Suite 207
Anchorage, AK 99503
(907) 258-0044
(907) 258-0288 (fax)
WWW.AKCLU.ORG

OFFICERS AND DIRECTORS
SUSAN WINGROVE, Anchorage
PRESIDENT

RICH CURTNER, Anchorage
VICE PRESIDENT

LLOYD EGGAN, Anchorage
TREASURER

TONY STRONG, Juneau
SECRETARY

WILLIE ANDERSON, Juneau
AFFIRMATIVE ACTION OFFICER

KIRSTEN BEY, Nome
PAUL GRANT, Juneau
SCOTT HENDERSON, Anchorage
KATIE HURLEY, Wasilla
MICHAEL KING, Anchorage
CONNIE OZER, Anchorage
JOHN NEVILLE, Anchorage
GALEN PAINE, Sitka
STEPHANIE PAWLOWSKI, Anchorage
JUNE PINNELL-STEPHENS, Fairbanks
JIM WHITAKER, Fairbanks
NADINE WINTERS, Fairbanks

ZACH FICK, Anchorage
NOELANI KAMAHELE, Anchorage
STUDENT ADVISORS

The Honorable Hollis French
Chair, Senate Judiciary Committee
Alaska State Senate
State Capitol, Room 417
Juneau, AK 99801-1182

Re: **Senate Bill 222**
Constitutional Issues

Chair French:

Thank you for the opportunity to submit written testimony regarding Senate Bill 222. As you know, the American Civil Liberties Union of Alaska ("ACLU) represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. From that perspective, we have several concerns with the proposed legislation.

Section 16 Proposed Amendments to
Rule 16 of the Rules of Criminal Procedure

Section Sixteen of the Bill proposes changes to the rules of criminal procedure that violate the state and federal constitutional rights to a fair trial and to effective representation, and would result in lengthy and costly litigation. The Section proposes that relevant evidence should be revealed to defendants, defense attorneys, and defense experts only at a state facility, under the control of a law enforcement agency. While protecting the privacy of the victims of certain crimes is an important interest, the proposed changes to the Rules of Criminal Procedure unnecessarily restrict the rights of the accused.

In some cases, the use of a technological expert is invaluable. Defendants are entitled to establish, for example, that images at issue in a trial are not illegal material, were placed on the drive by another party, or were altered in some way. The computer source files would require review at length by an expert witness. Being forced to conduct the review at a local police department or District Attorney's office would make the work of these experts essentially impossible. Moreover, the analysis of hard drives and other media would likely require unique analysis programs which would necessitate examining the images on the expert's own computers. The proposed Rule Amendment would effectively deprive defendants of the effective use of expert testimony, which would be a key defense resource in these cases.

Even where the use of an expert is unnecessary, the defense attorney may need to review the files at length, to establish the exact nature of images or files, or to determine whether some of them are duplicates. Requiring defense attorneys to do their work at times and places convenient to the state is unnecessarily and unconstitutionally restrictive.

A case from Washington State perfectly illustrates why the proposed rule would result in lengthy and expensive litigation which would ultimately result in the overturning of the statute. In *State v. Boyd*, for example, the prosecution in a child pornography case sought and obtained a protective order from the court which only permitted the defense to view the evidence at a state facility. 158 P.3d 54 (Wash. 2007). The Supreme Court of Washington ruled that the Rules of Evidence, the Fifth Amendment right to a fair trial, and the Sixth Amendment right to effective representation by counsel all required that the protective order be struck down and the defendant be granted a new trial, because the defendant could not be adequately represented nor fairly tried under the order.

The important privacy of needs of victims can be protected without the measures laid out in Section 16. For example, the *Boyd* court upheld an order requiring the defense to keep "mirror image" hard drives of evidence under lock and key, to use firewall software on any computer viewing images that was connected to the internet, making the attorney personally and professionally responsible for any unauthorized release of the images, and allowing state experts to verify the complete eradication of the images after the conclusion of the case.

The power of a court to issue a protective order in a particular case already exists and needs no augmentation by the legislature. An order issued after consideration of the unique facts of an individual case is far more likely to survive appellate review than a blanket rule set down by the legislature.

Section 16 of S.B. 222 violates the state and federal constitutional rights to a fair trial and to effective representation. We recommend the Bill be revised so that the courts would be permitted to manage the disclosure of evidence on a case-by-case basis, rather than by instituting a blanket rule that would invite litigation.

///

Section 15 Requirement for Registration of Sex Offenders from Other Jurisdictions

Section 15 proposes to expand the list of those required to register as sex offenders to include anyone required to register in another jurisdiction. The ACLU of Alaska has numerous objections to this amendment.

The Alaska Supreme Court ruled in *Doe v. State* that those convicted of sex offenses in Alaska before the enactment of the sex offender registry statutes in 1994 could not be required to register, as the statute would otherwise violate the *ex post facto* provision of the State Constitution. 189 P.3d 999 (Alaska 2008). In many other jurisdictions, the state courts have not declared their state sex offender statutes to offend their own *ex post facto* rules. The Alaska *ex post facto* provision may prohibit mandatory registration for those convicted of offenses in another state prior to 1994. A final determination would need to be made by the Alaska Supreme Court, likely after lengthy litigation, and potentially overturning many convictions.

The proposed amendment in Section 15 also usurps the State's own policy making decisions. In Alaska, for instance, the legislature has set the age of consent at sixteen. This amendment would nullify the legislature's judgment and require someone convicted of having sex with a 17-year-old in another state to report to the Department of Public Safety and face incarceration should he fail to report on time. Should he end up incarcerated, the people of the state of Alaska will be paying \$44,000 a year to incarcerate someone as a consequence for committing an underlying act which would not even be a crime in Alaska.

The current state of the law in Alaska is that anyone convicted under appropriate Alaska statutes or similar statutes in another state, such as rape, sexual assault, etc., must register in Alaska. Section 15 would therefore expand the registry not to the most culpable and the most dangerous, but to those convicted of designated sex offenses that lie outside the most dangerous sex offenses: particularly, those convicted of having sex with 16 or 17 year olds; those convicted of prostitution offenses; and those convicted of some other minor offenses, like indecent exposure. These offenders are not particularly more likely to commit the rapes and molestations that the registry is designed to protect Alaskans from.

Generally, registries have been ineffective in preventing crime. A Rutgers University study showed that the New Jersey sex offender registry had "no demonstrable effect in reducing sexual re-offenses." The study also showed the enactment of the law had no effect on the number of victims of sex offenses, no effect on how long those convicted of sex offenses remained arrest-free, and no effect on the type of sex offenses committed. The legislature should look for proven, effective methods of preventing sex offenses. The proposed expansion of the sex offender registry in S.B. 222 is not a means to do this.

///

///

**Section Three – Eliminating the Mental State
Requirement of the Failure to Register Statute**

Subsection (b) of Section Three of the Bill eliminates any mental state requirement, or *mens rea*, for the offense of failure to register, which means that a person who accidentally or in good faith neglects to complete the registration requirement every three months could still be found guilty of the offense. Subsection (c) creates an affirmative defense that registration became impossible because of an unforeseen circumstance and that the individual orally registered with the Department of Public Safety as soon as possible.

Generally, the criminal law requires “not only the doing of some act by the person to be held liable, but also the existence of a guilty mind during the commission of the act.” *Speidel v. State*, 460 P.2d 77, 80 (Alaska 1969). The Alaska courts have held that, for major felonies, a mental state requirement is mandatory, while some minor offenses, such as hunting or public health related offenses, may be strict liability offenses without a mental state requirement. *Speidel*, 460 P.2d 77 (holding that the statute declaring the failure to return a car to be a crime, regardless of mental state, violated due process); *see also State v. Guest*, 583 P.2d 836 (Alaska 1978); *State v. Fremgen*, 914 P.2d 1244 (Alaska 1996).

In some cases, the courts have avoided declaring a statute unconstitutional by creating a mental state requirement where a statute has no provision for mental state but no language stating that no mental state requirement exists. *Kimoktoak v. State*, 584 P.2d 25 (Alaska 1978); *Alex v. State*, 484 P.2d 677 (Alaska 1971). With an explicit statement that no mental state is required in Section Three, the courts will not be able to avoid the constitutional conflict and may rule the statute unconstitutional.

Of note, as well, are the unique conditions here in Alaska. Many registered sex offenders live off the road system and in remote villages in which mail service gets interrupted, travel and telecommunications are irregular, and weather could keep an offender from being able to comply. Placing the burden on the defendant to prove his innocence reverses our legal tradition and the traditional balance of powers between the defense and the prosecution. The elimination of the mental state requirement and the substitution of a restrictive affirmative defense make Section Three subject to attack under the Alaska constitution.

Conclusion

We hope that the Judiciary Committee will note these constitutional infirmities in Sections Three, Fifteen, and Sixteen of Senate Bill 222 and consider amending them or eliminating them from the Bill to avoid these concerns.

///

///

Senate Judiciary Committee
ACLU of Alaska Analysis of S.B. 222
February 15, 2010
Page 5

While the ACLU of Alaska takes very seriously the need to address the epidemic of sexual assault in Alaska, these sections are not well-crafted to vindicate the state's purposes. The sections we have identified present substantial Constitutional problems and will likely entangle the state in litigation, should S.B. 222 pass as currently written.

Thank you again for the opportunity to share our concerns. And please feel free to contact the undersigned should you require any additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Mittman", with a long horizontal flourish extending to the right.

Jeffrey Mittman
Executive Director
ACLU of Alaska

THE MEDIA COALITION INC

275 SEVENTH AVENUE • 15TH FLOOR • NEW YORK, NEW YORK 10001
PHONE: 212-587-4025 • FAX: 212-587-2436 • WWW.MEDIACOALITION.ORG

DAVID HOROWITZ
Executive Director

Memorandum in Opposition to Alaska Senate Bill 222

American Booksellers
Foundation for Free
Expression

Association of American
Publishers, Inc.

Comic Book Legal
Defense Fund

Entertainment Consumers
Association

Entertainment Merchants
Association

Entertainment Software
Association

Freedom to Read
Foundation

Independent Book
Publishers Association

Magazine Publishers of
America, Inc.

Motion Picture
Association of America,
Inc.

National Association of
Recording Merchandisers

Recording Industry
Association of America,
Inc.

The members of Media Coalition believe that both Section 8 of Senate Bill 222 and existing Alaska statute 11.61.128(a) violates the First Amendment rights of producers and retailers and their customers. The trade associations and other organizations who comprise Media Coalition have many members throughout the country including Alaska: book and magazine publishers, booksellers and librarians as well as manufacturers and retailers of recordings, films, videos and video games and their consumers.

AS 11.61.128(a) bars the distribution by a computer of any "indecent material" by an adult to anyone under 16 years old or someone the adult believes is under 16 years old. "Indecent material" is defined to include any depiction of actual or simulated sexual penetration, lewd touching or exhibition of the genitals, anus, or female breast, masturbation, sexual masochism or sadism. S.B. 222 would expand the existing law would broaden it to apply to any type of distribution rather than merely by computer.

Speech is protected unless the Supreme Court tells us otherwise. As the Court said in *Free Speech Coalition v. Ashcroft*, "As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity and pornography produced with children." 535 U.S.234, 241 (2002). Unless speech falls into one of these limited categories or is otherwise tied to an illegal act such as luring or enticing a minor, there is no basis for the government to bar access to make such material illegal.

Chair
Chris Finan
American Booksellers
Foundation for Free
Expression

Immediate Past Chair
Sean Devlin Bersell
Entertainment Merchants
Association

Treasurer
Sally Jefferson
Entertainment Software
Association

General Counsel
Michael A. Bamberger
Sonnenschein Nath &
Rosenthal LLP

The restriction on "indecent materials" in the present law and in this bill, without a connection to an otherwise illegal act such as luring or enticing a minor, is almost certainly unconstitutionally overbroad. While minors do not enjoy the protection of the First Amendment to the same extent as adults, the U.S. Supreme Court has ruled that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected material to them." *Erznoznick v. City of Jacksonville*, 422 U.S. 212-13 (1975). Governments may restrict minors' access to some sexually explicit speech but it is a narrow range of material determined by a specific test. Merely containing sexual content is not enough to make a book, movie, magazine or sound recording illegal. In the case of *Ginsberg v. New York*, 390 U.S. 629 (1968), the U.S. Supreme Court established a three-part test for determining whether material is "harmful to

The Media Coalition is a trade association that defends the First Amendment rights of publishers, booksellers, librarians, recording, motion picture and video games producers, and recording, video, and video game retailers and consumers in the United States.

minors" and may therefore be banned for sale to minors. The material deemed illegal for minors by AS 11.61.128(a) and S.B. 222 does not include any of the three prong test from *Ginsberg* and would criminalize a far broader range of material than is allowed under the First Amendment. A recent law enacted in Illinois barred the sale of video games with sexual content but without the third prong of the *Ginsberg* test. The law was permanently enjoined by the U.S. District Court and the ruling was heartily affirmed by the Seventh Circuit Court of Appeals. *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 642 (7th Cir. 2006) *aff'g* 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

The existing law's application of these restrictions to Internet communication is almost certainly unconstitutional even if it was limited to material that could be restricted as "harmful to minors" under the three-prong test in *Ginsberg*. This treats material on the Internet as if there were no difference between a computer transmission and a book or magazine. But cyberspace is not like a bookstore. There is no way to know whether the person receiving the "harmful" material is a minor or an adult. As a result, the effect of banning the computer dissemination of material "harmful to minors" is to force a provider, whether a publisher or an on-line carrier, to deny access to both minors and adults, depriving adults of their First Amendment rights. The U.S. Supreme Court has already declared unconstitutional two federal laws that restrict the availability of matter inappropriate for minors on the Internet. *Reno v. ACLU*, 117 S.Ct. 2329 (1997); *Ashcroft v. ACLU*, 534 F.2d 181 (3d Cir 2008), cert. den. 129 Sup. Ct. 1032 (2009). Similar state laws banning sexual speech for minors on the Internet have been ruled unconstitutional. See, *PSINet v. Chapman*, 63 F.3d 227 (4th Cir. 2004); *ABFFE v. Dean*, 342 F.3d 96 (2nd Cir 2003); *Cyberspace Communications, Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *Southeast Booksellers v. McMasters* 282 F. Supp 2d 1180 (D.S.C. 2003); *American Libraries Ass'n v. Pataki* 969 F. Supp. 160 (S.D. 1997); *ACLU v. Goddard*, Civ No. 00-0505 TUC AM (D. Ariz. 2002). The only exceptions to these decisions have been laws that were limited to speech illegal for minors that were intended to be communicated to a person the speaker has specific, rather than general, knowledge is a minor. However, such laws might still be unconstitutional as a violation of the Commerce Clause of the U.S. Constitution. In addition to First Amendment deficiencies, the courts have also ruled that these state laws violate the Commerce Clause, which reserves to Congress the regulation of interstate commerce and prevents a state from imposing laws extraterritorially.

Passage of this bill could prove costly. If a court declares it unconstitutional, there is a good possibility that the state will be ordered to pay the plaintiffs' attorneys' fees. In the successful challenge to the Illinois legislation, the state agreed to pay to the plaintiffs more than \$500,000.

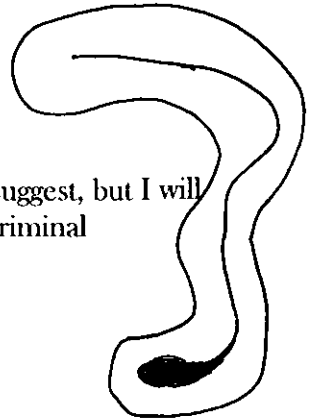
If you would like to discuss further our position on this bill, please contact David Horowitz at 212-587-4025 #11 or at horowitz@mediacoalition.org.

Again, we ask you to please protect the First Amendment rights of all the people of Alaska and reconsider the existing law and S.B. 222.

Cindy Smith

From: Sen. Hollis French
Sent: Tuesday, February 02, 2010 8:44 AM
To: David Cheezem
Subject: RE: Senate Bill 222

David,
Thanks for writing. I'm a big supporter of independent bookstores.
I think you have raised a valid concern with the bill. I can't promise to adopt the language you suggest, but I will work to make sure that the bill does not expose you and other booksellers to the possibility of criminal prosecution.
Best,
Hollis French



—Original Message—

From: David Cheezem [mailto:dcheezem@mtaonline.net]
Sent: Tuesday, February 02, 2010 8:21 AM
To: Sen. Hollis French
Subject: Senate Bill 222

Dear Senator French,

As a member of the community, I understand the need to protect children from child pornography, and I appreciate the impetus behind Senate Bill 222. However, as a bookstore owner, I am deeply concerned about the unintended dampening effects this bill as written will have on the legitimate sharing of information.

At our bookstore, we take pride in knowing our books well – but we can't read or review every book we sell, and we cannot, and should not be expected to verify which books might depict, for example, the lewd groping of a woman's breast. The bill as written makes no allowances for broad community standards. Ultimately, a parent has to decide if his or her 16 year old is ready to read "The Piano" or even George Orwell's "Animal House." „
Farm

I have some of the best, most caring people in the world working for me. They are in the early stages of their careers as artists, writers, managers. I don't want my staff or myself wondering when we are going to be accused of a Class C felony when we sell a book that has serious literary or scientific value, but which offends some – but not all – people in the community.

I would urge you to insert the Miller test into the bill – at the very least, the qualifying language about lacking "serious literary, artistic, political or scientific value."

Section 11.61.128(a) (3) should read (with my insertion delineated by *
...*):

...the person, being 18 years of age or older, knowingly distributes
to
another person [BY COMPUTER] any material *lacking serious literary, artistic, political or scientific value and
*that depicts the following
actual or
simulated conduct:

...

Thank you,

David Cheezem
Fireside Books
720 S. Alaska St.
Palmer, AK 99645

(907) 745-2665

JOHN SUTER

P.O. Box 670144
Chugiak, AK 99567
(907) 688-3103
suter@gci.net

January 18, 2010

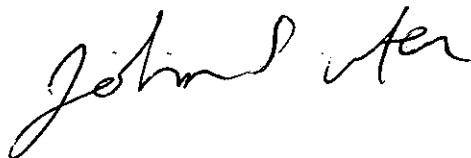
Dear Senator Hollis French

Enclosed is a news article showing that your opponent two weeks before your reelection can have a computer hacker put in a viruses of child porn in your computer and you will be prosecuted for files that you didn't know that you had. It is fast and easy to do. You will lose your reelection immediately and you will be paying your attorney \$250,000 for your defense.

There must be a way that a law can be put in that would hold the information about the charges you are facing until the police finish a complete full scale investigation on the matter. This would give the police time to track down the perpetrator and prosecute the correct person who did this crime. As you can see, the door is wide open here for injustice with the laws that are on the books at this time. You can't un ring the bell once it has been rung. By putting in a law to deal with this matter, you will be giving a chance for one (or you) and all to have a shot at justice.

Thank you for your prompt and courteous attention.

John Suter



SEATTLE SLAYING: Suspect once lived in Bethel, Alaska A-3**HOCKEY:** Aces stumble as road trip ends, Sports B-1

75 cents

Final Edition

Anchorage Daily News

Monday, November 9, 2009

BREAKING NEWS AT ADN.COM

Alaska's Newspaper

Viruses can put child porn on anyone's computer

Innocent people prosecuted for files they didn't know they had

By **JORDAN ROBERTSON**
The Associated Press

Of all the sinister things that Internet viruses do, this might be the worst: They can make you an unsuspecting collector of child pornography.

Heinous pictures and videos can be deposited on computers by viruses — the malicious programs better known for swiping your credit card numbers. In this twist, it's your reputation that's stolen.

Pedophiles can exploit virus-infected PCs to remotely store and view their stash without fear they'll get caught. Pranksters or someone trying to frame you can tap viruses to make it appear that you surf illegal Web sites.

Whatever the motivation, you get child porn on your computer — and

might not realize it until police knock at your door.

An Associated Press investigation found cases in which innocent people have been branded as pedophiles after their co-workers or loved ones stumbled upon child pornography placed on a PC through a virus. It can cost victims hundreds of thousands of dollars to prove their innocence.

Their situations are complicated by the fact that actual pedophiles often blame viruses — a defense rightfully viewed with skepticism by law enforcement.

"It's an example of the old 'dog ate my homework' excuse," said Phil Malone, director of the Cyberlaw Clinic at



MATTHEW HEALEY / Boston Herald archive 2008

Michael and Robin Fiola display a forensics report that cleared Michael. The Fiolas say they have health problems from stress.

See Back Page, **COMPUTERS**

Representative Jay Ramras
Chair, Judiciary
Chair, Economic
Development, Trade &
Tourism
Energy
Military & Veteran Affairs
Joint Armed Service
State Capitol, Room 118
Juneau, Alaska 99801-1182
Phone: (907) 465-3004
Fax: (907) 465-2070
Toll Free: (877) 465-3004

Alaska State Legislature



House of Representatives

Interim:
1292 Sadler Way, Suite 324
Fairbanks, Alaska 99701
Phone: (907) 452-1088
Fax: (907) 456-3346
Toll Free: (877) 465-3004

House District 10

Fax

To: Jerry Luckhaupt
Leg. Legal

Fax #: (907) 465-2029

From: Jane W. Pierson

Date: February 9, 2010

Re: Amendments to HB298

Number of pages including cover:

Jerry,

Today, we passed HB298 out of HJUD. Please make the following amendments and go final.

- Amendment #1 - A.7
- Amendment #2 - A.8
- Amendment #4 - A.15
- Amendment #7 - A.14
- Amendment #19 - A.20

Conceptual Amendment Page 8, Line 24 Change "expert" to "experts"

- Amendment #12 - A.3 as amended P.1, L.12 after prosecution insert "or law enforcement
- Amendment #15 - A.24 as amended P. 2, L.6 after "petition" delete "the district" and insert "any court of competent jurisdiction"

- Amendment #16 - A.26

If you need any more info, please call.

Thank you!

Representative_Jay_Ramras@legis.state.ak.us

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 298

1 Page 1, line 1, following "harassment,":

2 Insert "**distribution and**"

3
4 Page 3, following line 19:

5 Insert a new bill section to read:

6 "*** Sec. 5 AS 11.61.125(a)** is amended to read:

7 (a) A person commits the crime of distribution of child pornography if the
8 person distributes in this state or advertises, promotes, solicits, or offers to
9 distribute in this state [BRINGS OR CAUSES TO BE BROUGHT INTO THE
10 STATE FOR DISTRIBUTION, OR IN THE STATE DISTRIBUTES, OR IN THE
11 STATE POSSESSES, PREPARES, PUBLISHES, OR PRINTS WITH INTENT TO
12 DISTRIBUTE,] any material that is proscribed under AS 11.61.127 [VISUALLY
13 OR AURALLY DEPICTS CONDUCT DESCRIBED IN AS 11.41.455(a),
14 KNOWING THAT THE PRODUCTION OF THE MATERIAL INVOLVED THE
15 USE OF A CHILD UNDER 18 YEARS OF AGE WHO ENGAGED IN THE
16 CONDUCT]."

17
18 Renumber the following bill sections accordingly.

19
20 Page 3, lines 21 - 26:

21 Delete all material and insert:

22 "(a) A person commits the crime of possession of child pornography if the
23 person knowingly possesses or knowingly accesses on a computer with intent to

1 view any material that visually [OR AURALLY] depicts conduct described in
2 AS 11.41.455(a) knowing that the

3 (1) production of the material involved the use of a child under 18
4 years of age who engaged in the conduct or a depiction of a part of an actual child
5 under 18 years of age who, by manipulation, creation, or modification, appears to
6 be engaged in the conduct; or

7 (2) material appears to include a child under 18 years of age
8 engaging in the conduct."
9

10 Page 4, line 4:

11 Delete "a new subsection"

12 Insert "new subsections"

13
14 Page 4, line 5:

15 Delete "for possession of child pornography"

16
17 Page 4, following line 11:

18 Insert new subsections to read:

19 "(f) In this section,

20 (1) "appears to include a child" means that the material appears to
21 include, or conveys the impression that it includes, a person who is under 18 years of
22 age and the material was not created using a depiction of any part of an actual child
23 under 18 years of age, and

24 (A) the average individual, applying contemporary community
25 standards, would find that the depiction, taken as a whole, appeals to the
26 prurient interest; and

27 (B) a reasonable person would find that the depiction, taken as
28 a whole, lacks serious literary, artistic, political, or scientific value;

29 (2) "computer" has the meaning given in AS 11.46.990.

30 (g) In a prosecution under (a) of this section, the prosecution is not required to
31 prove the identity of a minor depicted or that the defendant knew the identity of a

1 minor depicted."

2

3 Page 9, line 3:

4 Delete "Sections 1-15"

5 Insert "Sections 1-16"

6

7 Page 9, line 5:

8 Delete "Section 16"

9 Insert "Section 17"

The CHRISTIAN SCIENCE
MONITOR

Ban upheld on offering child porn

The Supreme Court allows a 2003 law dealing with 'virtual' child porn that some thought was too broad.

By Warren Richey Staff writer of The Christian Science Monitor
posted May 20, 2008 at 12:00 am EDT

Washington —

The US Supreme Court has upheld an effort by Congress to make it illegal to offer or promote child pornography — even when the photographs being offered or promoted don't really exist or involve real children.

In a 7-to-2 decision announced on Monday, the high court said the law was a constitutional effort by Congress to protect innocent children from a thriving form of abuse.

The majority justices upheld the law even though it restricted certain kinds of speech that critics said must be protected by the First Amendment.

Instead, the high court said Congress had struck the correct balance in passing the anti-child-pornography law.

"We hold that offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment," writes Justice Antonin Scalia for the majority.

The PROTECT Act of 2003 is an attempt to shut down a flourishing trade in child pornography over the Internet. It seeks to do it not only by barring the exchange of pictures depicting children in sexually explicit poses, but also by outlawing any attempt to convince another person that offered pictures are of real child pornography involving real children.

In effect, the law makes it illegal to try to dupe other would-be consumers of child pornography into thinking that they are about to receive actual child pornography. The activity is illegal even if the photographs do not involve actual child pornography. In addition, such pandering is illegal even if the photographs don't exist.

The majority justices said the statute was not too broad or too vague to pass constitutional muster.

The law "punishes speech seeking to conclude illegal transactions," Justice Scalia said in a statement from the bench. "Such speech does not get First Amendment protection."

He adds, in the opinion: "Offers to give or receive what it is unlawful to possess have no social value and thus, like obscenity, enjoy no First Amendment protection."

His opinion was joined by Chief Justice John Roberts and Justices John Paul Stevens, Anthony Kennedy, Clarence Thomas, Stephen Breyer, and Samuel Alito.

Justices David Souter and Ruth Bader Ginsburg dissented. Justice Souter writes that prior Supreme Court rulings established that only pornographic photographs of actual children may be prohibited and that virtual child pornography retains First Amendment protections.

Justices Souter and Ginsburg said the 2003 PROTECT Act violates free-speech protections by allowing a new pandering prohibition aimed at suppressing otherwise protected speech. In other words, if virtual child pornography is protected by the First Amendment, how could an attempt to pander virtual child pornography be illegal?

"Just six years ago the court struck down a statute outlawing particular material merely represented to be child pornography, but not necessarily depicting actual children," Souter writes. "The court is going against the grain of pervasive First Amendment doctrine that tolerates speech restriction not on mere general tendencies of expression, or the private understandings of speakers or listeners, but only after a critical assessment of practical consequences."

The decision comes in the case of Michael Williams of Key Largo, Fla. Mr. Williams was arrested in May 2004 after an encounter with an undercover agent in an adult chat room on the Internet.

He logged into the chat room and posted a message that he had "good" photographs of his 2-year-old daughter that he wished to swap for similar photos. An undercover federal agent responded and engaged Williams in a private Web chat. The agent identified himself as a 30-year-old mother with a 10-year-old daughter.

Williams and the undercover agent swapped photos. The children depicted in the photos were clothed and were not engaged in sexually explicit activities.

According to court documents, Williams tried to get the undercover agent to provide a more sexually explicit photograph. When it did not arrive, Williams posted a warning message in the chat room that the undercover agent was a cop. The undercover agent responded in a chat room message accusing Williams of being a cop.

In response to the accusation that he was an undercover cop, Williams posted a hyperlink to seven sexually explicit photographs of children ages 5 to 15.

Four days later, federal agents executed a search warrant for Williams's trailer in Key Largo. They discovered 22 computer images of children engaged in various forms of sexual activity. They also discovered that Williams lived alone and did not have a 2-year-old daughter.

Williams was charged with possession of child pornography. But federal prosecutors also charged him with violating the federal child-pornography pandering law for his Internet encounter with the undercover agent.

Williams agreed to plead guilty to both charges, but he reserved the right to appeal the pandering conviction. His lawyers said he shouldn't be held criminally liable for false claims made in an adult chat room.

The 11th US Circuit Court of Appeals in Atlanta agreed with Williams and reversed the pandering conviction.

In overturning the appeals court, the high court said, "The Eleventh Circuit believed it a constitutional difficulty that no child pornography need exist to trigger the statute. In its view, the fact that the statute could punish a 'braggart, exaggerator, or outright liar' rendered it unconstitutional."

The decision continues: "That seems to us a strange constitutional calculus."

Scalia said the 11 Circuit's reading of the law would forbid the government from punishing fraudulent offers to provide illegal products. "We see no logic in that position; if anything, such statements are doubly excluded from the First Amendment," he writes.

Responding to Souter's dissent, Scalia says the high court's holding does not overrule a 2002 decision in a case called *Ashcroft v. Free Speech Coalition*.

In that case, the court ruled that Congress could not ban virtual child pornography in an attempt to stamp out actual child pornography. "According to the dissent, Congress has made an end-run around the First Amendment's protection of virtual child pornography by prohibiting proposals to transact in such images rather than prohibiting the images themselves," Scalia writes.

He says an offer to provide or a request to receive virtual child pornography is not prohibited by the PROTECT Act and continues to have First Amendment protection. "A crime is committed only when the speaker believes or intends the listener to believe that the subject of the proposed transaction depicts real children," Scalia writes.

Souter and Ginsburg say the statute must be based on more than mere belief by a speaker or the speaker's desire to foster a belief in another.

"First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end," Souter writes, quoting from the court's 2002 Free Speech Coalition decision. "The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."

In contrast, the majority said Congress struck the correct balance in the statute. "Child pornography harms and debases the most defenseless of our citizens," Scalia writes. "Both the state and federal governments have sought to suppress it for many years, only to find it proliferating through the new medium of the Internet."

He adds, "This court held unconstitutional Congress's previous attempt to meet this new threat, and Congress responded with a carefully crafted attempt to eliminate the First Amendment problems we identified. As far as the provision at issue in this case is concerned, that effort was successful."

In other action, the high court upheld a Kentucky program that provided tax exemptions for Kentucky-based municipal bonds.

Voting 7 to 2, the justices ruled that a state may decline to charge taxes on interest earned on its own bonds while taxing residents for interest earned on bonds from other states. Forty-two states offer some form of tax exemption for their bonds, while taxing out-of-state bonds.

In another case, the high court upheld a portion of the conviction of the so-called Millennium Bomber who was allegedly plotting to blow up Los Angeles International Airport. He was arrested attempting to drive into the United States from Canada. Officials found explosives in his car.

The Supreme Court ruled 8 to 1 that Ahmed Ressam was properly charged and convicted under a law prohibiting carrying explosives while committing a felony.

In Mr. Ressam's case, the underlying felony was making false statements on his US Customs form while attempting to enter the US by car in December 1999. At issue was whether the underlying felony must involve committing a crime linked to the explosives not simply possessing the explosives while committing a felony.

A federal appeals court had thrown out a single count of Ressam's nine-count conviction.

On Monday, the Supreme Court reversed that decision. The ruling will make it easier for federal prosecutors to return lengthy prison sentences against suspected terrorists caught in possession of explosives. Oral argument was presented in the case by Attorney General Michael Mukasey, who is now battling 1 000 as an advocate before Supreme Court.

© The Christian Science Monitor. All Rights Reserved. Terms under which this service is provided to you. Privacy Policy

AMENDMENT

OFFERED IN THE HOUSE
TO: HB 298

BY REPRESENTATIVE GRUENBERG

1 Page 2, line 30, through page 3, line 1:

2 Delete all material.

3

4 Reletter the following subsections accordingly.

5

6 Page 8, following line 31:

7 Insert a new bill section to read:

8 **** Sec. 17.** The uncodified law of the State of Alaska is amended by adding a new section to

9 read:

10 **LEGISLATIVE STATEMENT CONCERNING CULPABLE MENTAL STATE.** In

11 AS 11.56.840(a), as repealed and reenacted by sec. 3 of this Act, the only culpable mental

12 state required to be proven by the prosecution is the "knowing" requirement in paragraph (2)

13 of that subsection. No other culpable mental state needs to be proven for the other elements of

14 that offense."

15

16 Renumber the following bill sections accordingly.

17

18 Page 9, line 3:

19 Delete "Sections 1 - 15"

20 Insert "Sections 1 - 15 and 17"

AMENDMENT

By Rep. RAMRAS

OFFERED IN THE HOUSE
TO: HB 298

1 Page 3, lines 14 - 19:

2 Delete all material and insert:

3 "(a) A person commits the crime of harassment in the first degree if

4 (1) the person violates AS 11.61.120(a)(5) and the offensive physical
5 contact is contact with human or animal blood, mucus, saliva, semen, urine, vomitus,
6 or feces; or

7 (2) under circumstances not proscribed under AS 11.41.434 -
8 11.41.440, the person violates AS 11.61.120(a)(5) and the offensive physical
9 contact is contact by the person touching another person's genitals, anus, or
10 female breast, either directly or through clothing."

AMENDMENT

By: Rep. Ritzler

OFFERED IN THE HOUSE
TO: HB 298

1 Page 6, lines 30 - 31:

2 Delete all material and insert:

3 "(E) specified in AS 11.41.434 - 11.41.458 or AS 11.61.128
4 and the defendant was 10 or more years older than the victim;"

AMENDMENT

By: Rep. Rauwa

OFFERED IN THE HOUSE
TO: HB 298

1 Page 6, following line 31:

2 Insert a new bill section to read:

3 **** Sec. 15. AS 12.63.020 is amended by adding a new subsection to read:**

4 (c) A person required to register under AS 12.63.010 for a conviction in
5 another jurisdiction that is not similar to an offense in this state shall register for a
6 period described in

7 (1) (a)(2) of this section if the person has been convicted of only one
8 offense;

9 (2) (a)(1) of this section if the person has been convicted of two or
10 more offenses for which the person is required to register in another jurisdiction."
11

12 Renumber the following bill sections accordingly.

13

14 Page 9, line 3:

15 Delete "Sections 1 - 15"

16 Insert "Sections 1 - 16"

17

18 Page 9, line 5:

19 Delete "Section 16"

20 Insert "Section 17"

AMENDMENT

*Passed
AS ANNOUNCED*

OFFERED IN THE HOUSE
TO: HB 298

BY REPRESENTATIVE HOLMES

1 Page 8, lines 3 - 31:

2 Delete all material and insert:

3 "DIRECT COURT RULE AMENDMENT. Rule 16(b), Alaska Rules of
4 Criminal Procedure, is amended by adding a new paragraph to read:

5 (9) Restriction on Availability of Certain Material or Property.

6 Notwithstanding (b)(1)(A)(iv) of this rule, the court shall deny any request by the
7 defendant to copy, photograph, duplicate, or otherwise reproduce any property or
8 material that may be illegal or prohibited under AS 11.41.455(a) or defined as "child
9 pornography" under 18 U.S.C. 2256, provided the prosecution makes the property or
10 material reasonably available to the defendant. Property or material shall be deemed to
11 be made reasonably available to the defendant if the prosecution provides, at a
* 12 prosecution facility, ample opportunity for inspection, viewing, and examination of the
13 property or material by the defendant, the defendant's attorney, and any individual the
14 defendant may seek to qualify to furnish expert testimony at trial."

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 298

1 Page 1, line 5, following "kidnapper;":

2 Insert "relating to administrative subpoenas for certain records involving
3 exploitation of children;"
4

5 Page 7, following line 31:

6 Insert a new bill section to read:

7 **** Sec. 16.** AS 44.23 is amended by adding a new section to read:

8 **Sec. 44.23.080. Subpoena power of attorney general in cases involving use**
9 **of an Internet service account in the exploitation of children.** (a) In an
10 investigation of an offense under AS 11.41.452, 11.41.455, or AS 11.61.125 -
11 11.61.128 and on reasonable cause to believe that an Internet service account has been
12 used in the exploitation or attempted exploitation of children, the attorney general may
13 issue in writing and cause to be served a subpoena requiring the production and
14 testimony described in (b) of this section.

15 (b) A person receiving a subpoena under (a) of this section shall disclose, for
16 the account that is the subject of the subpoena,

- 17 (1) the name of the person holding the account;
18 (2) the address associated with the account;
19 (3) local and long distance telephone connection records,
20 including records of session times and durations for the account;
21 (4) length of service, including service start date, and types of
22 service used by the account;
23 (5) the telephone or instrument number or other subscriber

1 number or identifier, including any temporarily assigned network address for
2 the account; and

3 (6) the means and source of payment for the service, including
4 a credit card or bank account number associated with the account.

5 (c) At any time before the return date specified on the subpoena, the subpoenaed
6 person may petition ^{ANY COURT OF COMPETENT JURISDICTION} the district court for the judicial district in which the person resides or
7 does business for an order modifying or setting aside the subpoena or for an order sealing
8 the court record.

9 (d) A subpoena under this section must describe the objects required to be
10 produced and must prescribe a return date with a reasonable period of time within which
11 the objects must be assembled and produced.

12 (e) If no case or proceeding arises from the production of records or other
13 documents under this section within a reasonable time after those records or documents
14 are produced, the attorney general shall either destroy the records and documents or return
15 them to the person who produced them.

16 (f) A subpoena issued under this section may be served as provided for service of
17 subpoenas under Rule 45, Alaska Rules of Civil Procedure, or for service of process under
18 Rule 4, Alaska Rules of Civil Procedure.

19 (g) Except as provided in this section, any information, records, or data reported
20 or obtained under a subpoena under this section shall remain confidential and may not be
21 disclosed unless the disclosure occurs in connection with a criminal case related to the
22 subpoenaed materials."
23

24 Renumber the following bill sections accordingly.

25
26 Page 9, line 5:

27 Delete "Section 16 of this Act applies"

28 Insert "Sections 16 and 17 of this Act apply"

AMENDMENT

OFFERED IN THE HOUSE
TO: HB 298

BY REPRESENTATIVE HOLMES

1 Page 4, line 25:

2 Delete "and"

3 Insert "[AND]"

4

5 Page 4, line 26, following "(2)":

6 Insert "the material is harmful to minors; and
7 (3)"

8

9 Page 5, following line 6:

10 Insert a new bill section to read:

11 **** Sec. 11.** AS 11.61.128 is amended by adding a new subsection to read:

12 (e) In this section, "harmful to minors" means

13 (1) the average individual, applying contemporary community
14 standards, would find that the material, taken as a whole, appeals to the prurient
15 interest in sex for persons under 16 years of age;

16 (2) a reasonable person would find that the material, taken as a whole,
17 lacks serious literary, artistic, educational, political, or scientific value for persons
18 under 16 years of age; and

19 (3) the material depicts actual or simulated conduct in a way that is
20 patently offensive to the prevailing standards in the adult community as a whole with
21 respect to what is suitable for persons under 16 years of age."

22

23 Renumber the following bill sections accordingly.

1

2 Page 9, line 3:

3 Delete "Sections 1 - 15"

4 Insert "Sections 1 - 16"

5

6 Page 9, line 5:

7 Delete "Section 16"

8 Insert "Section 17"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

v.

RANDY D. WINSLOW,

Defendant.

3:07-CR-00072-TMB-DMS

**ORDER REGARDING DEFENDANT'S
MOTION FOR ORDER COMPELLING
DISCOVERY OF COMPUTER-
RELATED EVIDENCE SEIZED FROM
RANDY D. WINSLOW
[Doc. 31]**

I. INTRODUCTION

A computer was seized from Defendant Randy D. Winslow during the investigation of this matter. The defendant requests that a copy of the HP Pavillion hard drive seized from 109 East 5th Street, Tilton, Illinois, his home, be provided to defense counsel for review by a computer forensic expert. The Government contends that the hard drive contains images that constitute child pornography. The hard drive also allegedly contains evidence of on-line chats and emails between Winslow and an undercover officer, which are relied upon by the Government to prove a charge of attempted aggravated sexual abuse of a minor.

The defense requests that this discovery material be made available as it was in the past, pursuant to a detailed protective order that specified how the copied hard drive would be handled while in the possession of defense counsel for the purpose of discovery. (See U.S. v. Danny Michael Harvey, 3:07-CR-00103-RRB-DMS, Doc. 73-2, Affidavit of Bruce Johnson, Federal Public Defender Investigator, District of Alaska. The parties in this matter stipulated that the evidentiary record in Harvey on the issue of discovery could be incorporated into the record in

this matter. U.S. v. Winslow, Doc. 88, 90, 91). The precautions contained in the prior protective orders were taken to insure there was no further copying, viewing or distribution of the images, beyond that necessary to prepare the legal defense. The defense relies upon Fed. R. Crim. P. 16 and United States v. Hill, 322 F. Supp. 2d 1081 (C.D. Cal. 2004), in which the Court approved such a protective order.

The Government refuses to deliver the copy, arguing that the 2006 Adam Walsh Child Protection and Safety Act (hereafter the Walsh Act)—specifically 18 U.S.C. § 3509(m)—directs prosecutors and investigators in criminal cases to retain all child pornography in the Government's care, custody and control. The Government argues that it will provide ample opportunity for the defense examination of the hard drive while in Government custody and, as a result, the Walsh Act prohibits the Court from ordering the Government to produce a copy of the hard drive for delivery to the office of defense counsel.

Winslow responds that 18 U.S.C. § 3509(m) is unconstitutional both facially and as applied in this case. He contends that he is entitled to copies of the hard drive under the Fifth Amendment's Due Process clause and the Sixth Amendment's Compulsory Process and Effective Assistance of Counsel clauses.

Other district courts around the country have considered whether this section of the Walsh Act is constitutional when applied to child pornography on a hard drive. No circuit courts have addressed the issue to date. Also, this Court has been unable to locate any precedent which addresses the constitutionality of Section 3509(m) of the Walsh Act when applied to a hard drive that contains not only child pornography but written emails and on-line chats from the defendant, which are relevant to a charge other than possession or distribution of child pornography.

II. STATEMENT OF FACTS

In a superceding indictment August 24, 2007, Winslow was charged with attempted aggravated sexual abuse in violation of 18 U.S.C. § 2241(c) and distribution of child pornography in violation of 18 U.S.C. § 2252(a)(2) and (b)(1). Federal law enforcement agents arrested Winslow on May 4, 2007 in his Illinois home two weeks before he planned to travel to Alaska. Later that day, federal agents seized a computer and HP Pavillion hard drive from Winslow's Illinois home.

Prior to passage of the Walsh Act, in federal child pornography prosecutions in Alaska, the Government often provided the defense team with a copy of any computer hard drive which contained evidence considered to be child pornography, as long as an appropriate protective order was in place (Harvey Tr. 17, 76, Doc. 73-2, Johnson Affidavit). Since the passage of 18 U.S.C. § 3509(m), the Government no longer abides by this practice.

A. Discovery Procedures Prior to Enactment of the Walsh Act

In Alaska prior to the Walsh Act, the Government provided mirrored hard drives to the defense attorney or expert (Harvey Tr. 107). The attorney and analyst signed an agreement in which the defense team agreed not to publish or distribute the material and to return the hard drive to the Government after the proceedings (Harvey Tr. 107). Agent Laws testified there was never a situation in Alaska when a defense attorney or computer analyst lost or distributed child pornography contained on a mirrored hard drive (Harvey Tr. 106). He was unaware of this ever happening nationwide. The single instance he knew of when a computer hard drive containing child pornography was lost, occurred when it was in the custody of the Government (Harvey Tr. 110-111).

The Federal Public Defender's criminal defense investigator, Mr. Bruce Johnson, stated that prior to the Walsh Act, the Government routinely provided copies of computer evidence to the Public Defender's Office, subject to appropriate protective orders and non-disclosure agreements (Harvey Doc. 73-2, Affidavit of Johnson at 2). Mr. Johnson maintained exclusive control of all computer evidence received and he placed such materials in a secure safe. He and the office administrator were the only two people with the key and security code to the safe, and he was the only person to ever access the safe (Harvey Doc. 73-2, Affidavit of Bruce Johnson at 3). Whenever he had to remove computer evidence from the safe, he documented the chain-of-custody and the date and time of its removal. He was the only person in the office who conducted analyses of the computer evidence, which ran in his secured office (Harvey Doc. 73-2, Affidavit of Bruce Johnson at 4). Upon completion of an analysis, he returned all computer evidence to the Government; permanently removed and deleted files and remnants of the hard drive from his office computer; and certified no copies had been made and all copies were returned (Harvey Doc. 73-2, Affidavit of Bruce Johnson at 5).

B. Problems Presented when Defense Forensic Analysis is Required to Take Place at a Government Facility

At the evidentiary hearing, Marcus Kenneth Lawson from Spokane, Washington testified as the defense computer forensics expert.¹ Mr. Lawson is the President of Global CompuSearch, LLC, which provides forensic computer investigations. Earlier in his career, Mr. Lawson worked for U.S. Customs as an agent specializing in child pornography computer forensic investigations

¹As noted supra, the parties stipulated that the evidentiary hearing in U.S. v. Harvey on the issue of discovery of a hard drive in a prosecution for aggravated sexual abuse and possession of child pornography could be incorporated by reference in the record of this case. U.S. v. Winslow, Doc. 91. Lawson, who testified, is the defense forensic computer expert in both cases.

(Harvey Tr. 13). Mr. Lawson testified about the steps required for an effective analysis, including the need for specific equipment; access to the tools in his laboratory; access to his experienced colleagues; access to the Internet and access to defense counsel during the analysis.

The defense also relied upon the affidavits of Government agents filed in support of two search warrants in U.S. v. Harvey. The affidavits established the surroundings and circumstances necessary for an effective computer forensics exam (Harvey Doc. 42-3, Affidavit of Special Agent Skinner, Defendant's Exhibit C at the evidentiary hearing) and (Harvey Doc. 40-3, Affidavit of Special Agent Laws, Defendant's Exhibit B at the evidentiary hearing).

In his search warrant application and affidavit, Special Agent Kevin Laws of Immigration and Customs Enforcement (ICE) stated that reviewing data on a computer hard drive can take weeks or months; that it is impossible to attempt a computer review at the residence or office being searched; that searching computer systems for criminal evidence is very technical and requires a controlled environment. He added that it is difficult to know before a search what types of hardware and software are located on a computer, and therefore it is hard to know what type of experts and equipment are needed to analyze the computer and its data.

Special Agent Skinner of ICE stated in his affidavit that it is impossible to bring all of the technical manuals and specialized equipment necessary to conduct a thorough search to a search site; that a substantial amount of time is necessary to complete an analysis of a computer and a controlled environment is necessary. During the evidentiary hearing, Mr. Lawson agreed with the statements of both Agents Laws and Skinner (Harvey Tr. 19-22). Mr. Lawson stated that an on-site analysis, away from his laboratory, is difficult because running the required programs can take a long time and extend into the night (Harvey Tr. 22-23).

Mr. Lawson and his staff at CompuSearch, LLC have encountered the following problems when conducting computer analyses away from their office, at a Government facility (Harvey Tr. 19-43; Harvey Doc. 46-2, Affidavit of Lawson, incorporated by reference in evidentiary hearing Tr. 57):

1) Limited hours. Many times the Government will only provide limited hours to conduct an analysis. Government buildings have restricted hours—usually 9:00 a.m. to 5:00 p.m.—that prevent his team of experts from running a search or test after hours. Because various diagnostic programs frequently run into the night, if access is cut off at 5 p.m., the analysis can take much longer and may not be as effective.

2) Limited privacy. Frequently the Government will place an agent inside the room with defense experts. In these situations, defense experts are not able to have the requisite privacy and confidentiality needed to talk about the results with other experts and to talk with defense counsel about their findings. Also, the Government agents inside the room are often distracting and noisy, according to Mr. Lawson.

3) Limited contact. Often the Government will not provide phone access to the defense team. The rooms provided are often in the basement where there is no cell service and no telephone land lines (also referred to as fixed phone lines). This deficiency makes it difficult for the experts to consult with their colleagues and the attorneys.

4) No Internet access. Often an expert will need access to the Internet to conduct research to solve problems that occur during an analysis. The Government facilities provided to the defense team usually do not provide Internet access.

5) Inadequate preparation time. Because of the access limitations, both before and during

trial, the defense experts cannot be as prepared for trial as they would like to be and this deficiency is often exploited by the prosecution, who then make the defense experts appear unprepared or less knowledgeable about the evidence than the prosecution's experts, according to Mr. Lawson.

6) Damage to equipment. Transporting the expert's machines and tools often damage them and crucial time is spent fixing equipment instead of conducting the required analyses.

Mr. Lawson also testified that forensic computer analysis is crucial for the defense in any case involving child pornography or attempted aggravated assault on a child. Such analyses can reveal evidence of multiple users (Harvey Tr. 25); verify that any Internet chats reported by the Government are correct and presented in the proper context (Harvey Tr. 26, 28); profile the types of users in any chat rooms that may be at issue in the case (Harvey Tr. 28); determine the age of the people in any images involved in the case and whether or not the people in the images are real or virtual (Harvey Tr. 28, 30). It can also find evidence that reflects on whether or not the defendant intended to possess such child pornography (Harvey Tr. 53).

Mr. Lawson and defense counsel stressed that the biggest concern about 18 U.S.C. § 3905(m) is the effect it has on the defense at trial. Mr. Lawson testified that his team will often run tests and check data during a trial and after the trial has ended for the day (Harvey Tr. 33-38, 39). He said he often has associates stay late after a day of trial testimony to conduct tests and look up data (Harvey Tr. 75). According to Mr. Lawson, restrictive access to the copied hard drives during trial is an extreme handicap for the defense team (Harvey Tr. 36-38).

Mr. Lawson testified that since the passage of the Walsh Act, many forensic computer analysts will not work for a defense team because it is too difficult to conduct analyses in a

Government office, transporting their diagnostic equipment (Harvey Tr. 83-40). Despite the difficulties, Lawson's company still performs defense computer analyses (Tr. 40). His company has conducted forty to forty-five cases on the road since the passage of the Walsh Act (Harvey Tr. 72). According to Mr. Lawson, he believes that he and his staff did not do an adequate job when testifying in court because of the access limitations (Harvey Tr. 77).

Agent Laws testified as the Government's expert witness on computer forensics. He stated that, in his view, it is possible to do an effective defense forensic computer analysis at a Government office, notwithstanding his comments in his search warrant application about the difficulties of conducting a government forensic examination off-site. He testified that once the initial processing of a computer hard drive is complete, an expert then knows what tools and software will be necessary to complete the forensic analysis (Harvey Tr. 89). He said he did not believe it would give his adversaries insight into his work if the experts knew how often and how long he looked at the computer evidence (Harvey Tr. 103-104).

C. Discovery Procedures to Date in Winslow Case

While the Defendant's Motion for Order Compelling Discovery of All Computer-Related Evidence was pending, to expedite matters, the parties entered into a Stipulation Regarding Forensic Review Procedures Involving HP Pavillion Hard Drive Seized from Defendant (Winslow Doc. 85). The Government agreed to make two copies of a "true forensic, bit by bit E01 image of the HP Pavillion hard drive" available to the defense team to examine at the office of the Spokane Federal Bureau of Investigation (FBI). This was because expert Lawson's firm, Global CompuSearch, LLC, is located in Spokane. The stipulation stated:

The Spokane FBI Office will allow the defense team to install a stand-alone

defense forensics review workstation in an interview room monitored by Closed Circuit (CC) TV. The defense team lodges a standing objection to the camera while the forensic review is being conducted. While the non-audio feed will insure the integrity of FBI space and security of its occupants, the Plaintiff represents that the video feed will not be of sufficient detail or at an angle that would reveal defense strategy. The Plaintiff and its agents expressly agree that no attempt will be made to record any audio from the workstation and that no attempt will be made to observe the defense team's work product or computer monitor screen at any time. The defense expert may review the feed to ensure that their strategy is not being compromised at any time while conducting the forensic review.

(Winslow, Doc. 85 at 3).

In addition, the stipulation specifies that:

- The government will make a copy of the seized hard drive "reasonably available to the defendant and provide ample opportunity for the defense team to examine it"
- The defense team can review the evidence from 8 a.m. to 5 p.m. Monday through Friday. "The parties may approach the Court if there is a need for after hours access during the course of litigation in the event trial or motion hearings require additional forensic review."
- The defense team will not make any copies of "alleged child pornography contraband." The defense team is defined as the defense attorneys, defense investigator and defense forensic examiner. The word "contraband" is not defined.
- The defense team will not remove any contraband images from the government facility.

- The defense expert will be allowed to copy any file that is not contraband and compile a report without contraband images/videos on removable media at the discretion of the expert.
- The defense reserved all rights to object to the procedure and maintained a standing objection to the constitutionality of the Walsh Act.

U.S. District Court Judge Timothy M. Burgess entered a protective order, which adopted the stipulation (Doc. 87) on November 15, 2007.

On January 14, 2008, defense expert Lawson filed an affidavit with the Court, describing problems encountered during this discovery process. On January 4, 2008, an employee of Global CompuSearch went to the FBI office in Spokane, obtained the hard drive copies, set up her forensic station and attempted to view the media unsuccessfully. She reported that a forensic image "of what appeared to be a Compaq computer" was encrypted and required a password to open. A second forensic image entitled "other media" was also encrypted, and required a password to open. The examiner then returned the hard drive, broke down her forensic station, returned to Global CompuSearch and contacted the defense attorney. This process took one-half day (Doc. 102-2, Affidavit of Marcus K. Lawson).

Defense attorney McCoy then contacted Agent Laws about the matter. Agent Laws reported:

On or about January 7, 2008, I returned a telephone call to Kevin McCoy. Mr. McCoy inquired about some files on a hard drive sent to his computer expert in Spokane, Washington. Mr. McCoy said he was advised by his computer expert that some of the files on the hard drive were (sic) encrypted. I told Mr. McCoy that some of the files were

encrypted, that the hard drive contained items seized that were not included in the Stipulation and therefore I encrypted the files. I told Mr. McCoy that the hard drive also contained the "image" of several "CD'S" and at least one "media card" and these items were (sic) encrypted. I also told Mr. McCoy that his expert in Spokane was "looking at the files wrong" because the files covered in the court order—those involving the HP Pavillion hard drive—where (sic) in fact not encrypted.

(Winslow Doc. 106-2, Affidavit of Senior Special Agent Kevin J. Laws at 2).

Based upon this conversation, two Global CompuSearch experts again went to the Spokane FBI office on January 7 and repeated the process of obtaining the hard drive copies, setting up their forensic equipment and making screen captures of the encrypted media. This again took most of a morning (Winslow Doc. 102-2, Lawson affidavit at 3).

Further dialogue occurred with Agent Laws that permitted Mr. McCoy to ultimately forward the necessary passwords after receiving them from the Government on January 11. Mr. Lawson also reported that "the Spokane FBI Office has decided that it will no longer accommodate defense forensic examinations under 18 U.S.C. §3509(m) for cases originating outside of the Eastern District of Washington. Such examinations will be permitted only when there is an order by the district court requiring the Spokane FBI to permit the forensic evaluation on its premises." (Winslow Doc. 102-2, Lawson affidavit at 4). Lawson concluded, stating, "... [T]he delay described in this affidavit illustrates and underscores the time consuming difficulties associated with performing a defense forensic examination of computer related media maintained in government controlled facilities."

In its response to expert Lawson's affidavit, the Government did not comment on the

assertion that the Spokane FBI office will no longer accommodate a defense forensic exam pursuant to the Walsh Act in the absence of a court order. It is also unclear from the present record whether the FBI is refusing the Global CompuSearch team access at the present time, or whether the Government views Judge Burgess' order enforcing the stipulation to require the FBI to cooperate.

III. ANALYSIS

A. Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure

The Walsh Act became effective on July 27, 2006. Prior to that date, Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure governed whether or not the prosecution provided the defense team copies of hard drives containing alleged child pornography. Winslow asserts that under Rule 16(a)(1)(E), this Court can order the Government to produce a mirror-image of the hard drives, citing United States v. Hill, 322 F. Supp.2d 1081 (C.D. Cal 2004) for the proposition that it is not an abuse of discretion to order production of contraband such as child pornography with an appropriate protective order in place.² However, the Government asserts that Rule 16(a)(1)(E) is no longer controlling in child pornography cases since the passage of the Walsh Act.

Title 18 U.S.C. § 3509(m) states as follows:

(m) Prohibition on reproduction of child pornography.--

²Hill was decided by Judge Alex Kozinski of the Ninth Circuit, who was sitting as the district court judge by designation pursuant to 28 U.S.C. § 291(b). In that case, Judge Kozinski, rejected the Government's argument that the computer hard drives containing child pornography had to remain in the Government's offices. He ordered the hard drives be turned over to the defense team pursuant to a detailed protective order. Hill was decided prior to enactment of the Walsh Act.

(1) In any criminal proceeding, any property or material that constitutes child pornography (as defined by section 2256 of this title) shall remain in the care, custody, and control of either the Government or the court.

(2) (A) Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in any criminal proceeding, any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography (as defined by section 2256 of this title), so long as the Government makes the property or material reasonably available to the defendant.

(B) For the purposes of subparagraph (A), property or material shall be deemed to be reasonably available to the defendant if the Government provides ample opportunity for inspection, viewing, and examination at a Government facility of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial.

Section 3509(m)(2)(A) clearly nullifies the copying requirements of Rule 16 as applied to child pornography.

B. Constitutionality of 18 U.S.C. § 3509(m)

Winslow challenges 18 U.S.C. § 3509(m) as it applies to computer evidence. He argues that in situations where computer evidence is involved, the statute violates a Defendant's Fifth

Amendment Due Process rights and Sixth Amendment Compulsory Process and Effective Assistance of Counsel rights.

To date, it appears no appellate court has reviewed the constitutionality of § 3509(m). However, district courts around the country have addressed the issue. All have ruled that the statute is constitutional. See United States v. Sturm, No. 06-CR-00342, 2007 WL 1453108 (D. Colo. May 17, 2007) (rejecting defendant's constitutional challenges to the Walsh Act, both facially and as applied, holding that the requirements of Subsections (2)(A) and (2)(B) of § 3509(m) are "consistent, if not coterminous, with the due process guarantee that [defendant] be afforded a 'fair opportunity to defend against the [Government's] accusations,'" and holding that because the defendant made no attempt to reach an accommodation with the United States, his as-applied challenge also fails); United States v. Doane, 501 F. Supp. 2d 897 (E.D. Ky. 2007) (finding that the case law does not support the defendant's position that requiring defense expert to examine a computer hard drive at a Government facility interferes with defendant's constitutional rights to investigate charges and to have assistance of counsel and due process because such access is "ample opportunity" under the statute); United States v. Renshaw, No. 05-CR-00165, 2007 WL 710239 (S.D. Ohio Mar. 6, 2007) (finding that although "Section 3509(m) may inconvenience trial counsel and [d]efendant's experts, it does not preclude defendant from preparing his case for trial" and because the statute provides a safety valve permitting the court to order the production of evidence where the Government does not make it reasonably available, there is no basis for a due process challenge and therefore the statute does not necessarily deny defendant a fair trial); United States v. O'Rourke, 470 F. Supp. 2d 1049, 1054-55 (D. Ariz. 2007) (rejecting defendant's constitutional challenges to the Walsh Act, both facially and as applied,

holding defendant was not deprived of due process by any Government refusal to give defense experts private access to the Internet when performing their analysis of the hard drive taken from defendant's computer); United States v. Knellinger, 471 F. Supp. 2d 640, 650 (E.D. Va. 2007) (noting that such an evaluation to compel duplication of materials should be made on a case-by-case basis, and holding that while the statute was constitutional, the Government had not given ample access to defense experts); United States v. Johnson, 456 F. Supp. 2d 1014, 1019-20 (N.D. Iowa 2006) (finding that the statute did not, as applied, unduly burden defendant's Fifth Amendment rights to due process and fair trial and Sixth Amendment right to effective assistance of counsel, and the statute did not unreasonably restrict defendant's access to services of computer forensic expert); United States v. Spivack, No. 05-CR-98, 2007 WL 4593475 (E.D.N.Y. Nov. 29, 2007) (finding the statute constitutional and holding that defendant provided no evidence that Government failed to provide ample opportunity); United States v. Battaglia, No. 07-CR-0055, 2007 WL 1831108 (N.D. Ohio June 25, 2007) (finding the statute constitutional and finding that Government provided ample opportunity); and United States v. Flinn, No. S-05-314, 2007 WL 3034932 (E.D. Cal. Oct. 16, 2007) (finding the statute constitutional and finding that defense had not presented any case-specific concerns to establish the lack of ample opportunity).

In the O'Rourke case, the court rejected the defendant's as applied and facial challenges to 18 U.S.C. § 3509(m). While the defendant challenged the statute under both the Fifth and Sixth Amendment, the court addressed the statute's constitutionality under the Fifth Amendment's due process framework, finding that the Fifth Amendment's Due Process clause provides broader protections for a fair trial than the Sixth Amendment. O'Rourke, 470 F. Supp. 2d at 1054, fn 2 (citing Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987)). The Court found that the statute does

not provide for an absolute denial of a defense team's possession of alleged child pornography. Instead, the court noted that § 3509(m)(2)(A) denies the defense team possession of the material only if the Government otherwise makes the material "reasonably available" to the defendant. O'Rourke, 470 F. Supp. 2d at 1055. The court noted that subsection 3509(m)(2)(B) provides that the material is "reasonably available" to the defendant if "the Government provides ample opportunity for inspection, viewing, and examination at a Government facility" of the material by the defense team. Id. Therefore, according to the court, if the Government does not provide "ample opportunity" to analyze the material at a Government facility, the court can order the Government to provide a copy to the defendant. Id. The court concluded that "ample opportunity" is coterminous with the requirements of due process because it requires the Government to provide defendants the same access to material that due process mandates, otherwise the court can order the Government to give the defense team a copy of the hard drive. Id. at 1055-56.

In Knellinger, the court applied similar reasoning and found that the term "ample opportunity" could be construed to, at a minimum, protect the constitutional rights of defendants. 471 F. Supp. 2d 640, 644 (E.D. Va. 2007). It therefore held that 18 U.S.C. § 3509(m) was facially constitutional. Id. at 645. The court also held that the statute would not be unconstitutional as applied either because the statute permitted the court to remedy insufficient "ample opportunity" through a court order, thus rendering any as-applied challenge moot. Id. at 646. Applying the facts, the court found that the defense needed digital video experts to establish the defense that the images on his computer were virtual and not real. Id. at 647. The digital video experts who testified in the Knellinger case noted that they do not move the equipment needed to run digital

video analysis and that it would be a great cost and effort to do so. They testified that they would not agree to service the defense team because their ability to do the job would be compromised. Id. at 646-48. The court ultimately found that the Government did not provide the defense team with an ample opportunity to inspect, view, and examine the child pornography because the experts needed to assert a “virtual-child” defense and could not conduct an analysis at a Government facility. Id. at 650. Therefore, the court ordered the Government to turn over a copy of the hard drive to the defense. Id.

In Sturm, the court adopted the reasoning of O’Rourke and Knellinger, and determined that 18 U.S.C. § 3509(m) is not facially unconstitutional. No. 06-CR-00342, 2007 WL 1453108 (D. Colo. May 17, 2007), at *7. It also determined that the defense did not present with precision any actual or anticipated problems because the defense has not yet attempted to examine the images or work out an accommodation with the Government. Id. The court refused to rule for the defense based on hypothetical scenarios that could arise in any case, considering that witnesses suggested solutions to any hypothetical problems presented. Id. at *7-*8.

This Court finds the reasoning applied in O’Rourke, Knellinger, and Sturm persuasive. There is no indication of the purpose of § 3509(m) in the legislative history accompanying the Walsh Act.³ See O’Rourke, 470 F. Supp. 2d at 1056 (citing 152 Cong. Rec. H676 (daily ed. Mar. 8, 2006) (statement of Rep. Conyers) and 152 Cong. Rec. H705-31 (daily ed. July 25, 2006)) (stating that § 3509(m) was added to the Walsh Act without consideration in committee and with virtually no explanation in the legislative history).

³There is a statement of purpose for the statute. However, there is no legislative history related to § 3509(m).

Nevertheless, it is the Court's responsibility to construe a statute to avoid a ruling of unconstitutionality, if possible. See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575 (1988) (citing Grenada County Supervisors v. Brown, 112 U.S. 261, 269 (1884)) (stating that a statute should be given a reasonable construction so that it is not ruled unconstitutional); United States v. Ray, 375 F.3d 980, 988-89 (9th Cir. 2004) (applying doctrine of constitutional avoidance); Abner J. Mikva & Eric Lane, An Introduction to Statutory Interpretation and Legislative Process 6-16, 23-27 (1997). Therefore, the term "ample opportunity" in 18 U.S.C. § 3509(m) must be read to at least include the same opportunity for inspection, viewing, and examination that is required by Fifth and Sixth Amendments of the Constitution. In other words, Winslow's opportunity to view, inspect, and examine the evidence must afford him a fair opportunity to defend against the Government's accusations as required by due process. If the Government is not providing a fair opportunity consistent with the Due Process clause, this Court can order the Government to turn over a copy of the evidence. This Court's ability to order the production of evidence and correct any situation that does not amount to "ample opportunity" renders any as-applied challenge moot. Instead, this Court must examine the facts to determine if the requisite access to the evidence will be provided to Winslow's defense team.

C. Adequacy of Opportunity to Review Computer Hard Drive

In this situation, expert Lawson testified that defense experts examining a hard drive in a Government facility encounter a number of problems that make inspection, viewing, and examination difficult, if not impossible. These problems involve limited hours to access the evidence; limited privacy; limited contact with colleagues and defense attorneys because of a lack

of phone reception; no Internet access to conduct research; inadequate preparation for trial, and possible damage to equipment when traveling. Winslow argues that because of these problems, when computer evidence is at issue, access to the computer at a Government facility is never going to amount to ample opportunity. The existence of these problems cause this Court concern about a defendant's right to a fair trial as encompassed in the Fifth and Sixth Amendments.

Winslow correctly argues that under constitutional jurisprudence he is entitled to access to evidence. See California v. Trombetta, 467 U.S. 479 (1984) (citing United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982))(stating that to safeguard a criminal defendant's right to be afforded a meaningful opportunity to present a complete defense, the Court has developed "what might loosely be called the area of constitutionally guaranteed access to evidence").

Winslow also correctly argues that he has a right to the assistance of experts. See e.g., Ake v. Oklahoma, 470 U.S. 68, 83 (1985) (noting that indigent defendants have a right to receive the assistance of experts necessary for an adequate defense and holding that when sanity is to be an issue in trial, the state must assure the defendant access to a competent psychiatrist to conduct examinations and help prepare for the defense's preparation and presentation of the evidence).⁴

Underlying Winslow's argument as to why he does not have "ample opportunity" to view

⁴This right to expert assistance does not confer a constitutional right to choose a specific expert. Id. In this case, there is no evidence to suggest that Winslow will not be able to obtain an expert. In the Knellinger case, there was testimony from the digital video experts indicating that they would not take the case, leaving the defendant without expert assistance. 471 F. Supp. 2d at 647. In this case, while Lawson testified that many computer forensic experts are no longer taking cases similar to this one because of the restrictions imposed by 18 U.S.C. § 3509(m), he said his company still conducts computer analyses at Government facilities. In Knellinger, the digital video experts testified about the increased costs and impossibility of moving their equipment. 471 F. Supp. 2d at 647. According to the testimony of Lawson, his company has been moving equipment in order to conduct analyses off-site and nothing presented to this Court suggests that the equipment cannot be moved safely.

the hard drive is concern about the lack of privacy and the resulting disclosure of defense strategies and weaknesses. One of the questions presented by this case is whether the defense has a constitutional right to have defense experts view the evidence in private or whether it is acceptable for government agents to maintain video surveillance while discovery is underway. Here, the Government has conditioned access to the evidence upon an agreement that the experts remain under video surveillance. The Government promised that no audio recording would be made during discovery. No representation was made that the video images would not be recorded.

In United States v. Nobles, 422 U.S. 225 (1975), the Court considered the qualified work product privilege in the criminal context (ruling that the privilege protecting a defense investigator's report is waived if the investigator seeks to testify on behalf of the defendant.)

In describing the work product privilege, the Court stated:

'Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. . . .

* * * * *

Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate

safeguards assure the thorough preparation and presentation of each side of the case.

* * * * *

... [T]he doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.

United States v. Nobles, 422 U.S. 225, 238-9 (1975).

At least one district court has ruled that the Constitution requires that a defense expert be given private space to conduct a forensic examination of a hard drive allegedly containing child pornography. "Private space" was defined by the court as space where the expert "can conduct analyses of his choosing without purposeful or otherwise direct surveillance of those activities."

United States v. Flinn, 2007 WL 3034932 at *7 (E.D. Cal. Oct. 16, 2007)

The Government's requirement that the discovery room remain under surveillance by closed circuit television, with the promise that the camera will not be trained on the computer monitor, does not provide "ample opportunity" to conduct discovery as required by the Constitution. Even without access to the final report of the expert, such surveillance can intrude upon the attorney work product privilege in meaningful ways. This is very troubling, particularly in light of the reason given by the Government for the surveillance. The stipulation of the parties states it is necessary "insure the integrity of FBI space and security of its occupants." The Court is confident that the FBI can accomplish this important goal by means that do not impermissibly infringe upon the constitutional rights of the defendant.

The effective examination by defense experts is further hampered in this case because the Government did not make phone lines available in the room and no cell phone reception was possible (Harvey Tr. 32, 73). Also, no internet access was possible (Harvey Tr. 72, 73). This makes communication with defense counsel impossible without leaving the building and stopping the forensic examination, causing significant delay in completion of discovery (Winslow Doc. 102, Affidavit of Marcus K. Laws).

As noted supra, Agent Laws testified that prior to the Walsh Act, mirrored hard drives containing copies of child pornography were delivered to defense attorneys and experts for discovery purposes. With a protective order in place, there had never been an instance in Alaska's history when the contraband was copied or illicitly distributed (Tr. 106). He also testified he was unaware of any instance in the country when that occurred. The single time a hard drive with contraband on it disappeared, it had been in the custody of the Government, he said (Tr. 110-111).

The Walsh Act greatly increases the inconvenience, difficulty, and expense connected with both the prosecution and defense of child pornography offenses. In this matter, the Government perceives the statute to require the monitoring of the discovery room by closed circuit TV while defense experts examine the hard drive and prepare for trial—a process that can require days or weeks. Similarly, defense expert time is spent traveling to the Government facility and returning to his lab as needed for equipment and expert consultations. This drives up the cost for the parties. United States v. Flinn, No. S-05-314, 2007 WL 3034932, at *5 (E.D. Cal. Oct. 16, 2007) (stating that the statute causes extra costs to be incurred). When a defendant is represented at taxpayer expense, the increased costs charged by the defense forensic examiner are ultimately paid by the taxpayer. See 18 U.S.C. § 3006A(e). When considering the new statute, one judge stated:

One could reasonably argue that §3509(m) is legislation by anecdote, and is an overreaction to an infrequent problem, the burdens of which outweigh the possible benefits. However, Congress gets to make its judgments on less than empirically perfect data. Except in the most arbitrary situations, concerns about the wisdom of legislation are to be raised before Congress.

Flinn, 2007 WL 3034932, at *6.

In United States v. Harvey, 3:07-CR-00103-RRB-DMS, to accomplish discovery, the Government offered the defense a private room in a government facility, a basement room at Immigration and Customs Enforcement. The room was made available 24-hours a day both before and during trial, and phone access and internet access were provided. A government agent was posted outside the room but did not enter it. This Court ruled that these discovery conditions addressed all the significant problems set forth by defense expert Lawson, and provided ample opportunity to review the hard drive under circumstances coterminous with the constitutional requirements embodied in the Fifth and Sixth Amendments (Harvey, Doc. 104).

The same conclusion cannot be reached in the instant case. No phone or internet access is provided (Harvey Tr. 32, 72, 73). And, most importantly, privacy is not permitted. These restrictions impermissibly intrude upon both the defendant's Fifth and Sixth Amendment rights and are insufficient to "assure the thorough preparation and presentation of each side of the case" allowing for a "fair and accurate resolution of the question of guilt or innocence." U.S. v. Nobles, Id. As a result, this Court orders the Government to produce a copy of the hard drive to the defense team pursuant to the conditions described infra.

D. Ability to Copy Non-pornographic Files on Hard Drive

The hard drive in question also contains online chats and emails between Winslow and an undercover officer. This evidence is relevant to prove the charge of attempted aggravated sexual abuse. Defense expert Lawson testified that a forensic examination of such materials could reveal multiple users; determine whether the Internet chats reported by the Government were correctly reported and presented in the proper context; and profile the types of users in any chat rooms that may be at issue in the case.

In his motion, Winslow requests a copy of the computer files contained on the hard drive, which are not visual depictions of child pornography. See 18 U.S.C. §3509(m) (incorporating the definition of child pornography found at 18 U.S.C. §2256). The defense makes this request pursuant to Rule 16 of the Federal Rules of Criminal Procedure, United States v. Hill, 322 F. Supp. 2d 1081 (C.D. Cal 2004), and the Fifth and Sixth Amendments to the Constitution.

It is unnecessary to resolve the question in the present case because the Court is directing that a copy of the hard drive be provided to defense counsel. Also, the stipulation of the parties states that the defense team can copy any file that is not contraband. If it is necessary for the expert to download copies of non-pornographic materials to complete his report, and this can be done without compromising the forensic integrity of the hard drive, this is permissible pursuant to Rule 16 and the Fifth and Sixth Amendments to the Constitution. There is nothing in the plain language of § 3509(m) to prohibit it.

In Flinn, the court considered the expert request to remove downloaded materials which were not child pornography from the custody of the Government facility. The Court ruled:

With the exception of materials which would be considered child pornography

under federal law, the expert may take off site that electronic or electronically derived information necessary for his examination or report; the expert will certify in writing that he has taken no materials which would be considered child pornography under federal law; and that he has not caused any such child pornography to be sent off site. . .

Flinn, 2007 WL 3034932, at *6.

IV. CONCLUSION

This Court finds that the conditions for review offered by the Government in this case do not meet the Constitutional requirements of due process and a fair trial. The conditions also intrude on the defendant's Sixth Amendment rights. Thus, ample opportunity for review pursuant to 18 U.S.C. § 3509(m) has been denied. Therefore, Defendant Winslow's Motion for Order Compelling Discovery of All Computer-Related Evidence Seized from Randy D. Winslow is **HEREBY GRANTED**.

In light of the Government's failure to provide ample opportunity to review the hard drive, this Court orders that a copy of the HP Pavillion hard drive seized from the home of the defendant be immediately provided to defense attorney Kevin McCoy under the following terms and conditions:

- 1) The hard drive copy will be delivered to and remain in the exclusive control of defense investigator Bruce Johnson and will be maintained in a secure safe at the Federal Public Defender Agency in Anchorage.
- 2) Whenever the evidence is removed from the safe, the chain-of-custody will be documented and the date and time of its removal. Any analysis of the hard drive will occur in a locked,

secure room. Only the defense attorney, investigator and expert may have access.

- 3) Any individual who handles or views any portion of the hard drive must sign a non-disclosure agreement, agreeing to refrain from copying or publishing any material which would be considered child pornography under federal law.
- 4) With the exception of materials which would be considered child pornography under federal law, the defense investigator and/or expert may download files or portions of files as long as the forensic integrity of the hard drive is not altered. He may take off site that electronic or electronically-derived information necessary for his examination or report; the expert will certify in writing that he has kept no materials which would be considered child pornography under federal law and that he has not caused any child pornography to be sent off site.
- 5) Upon completion of the hard drive examination, the hard drive will be returned to the Government.
- 6) The defense expert and/or investigator will certify that, upon completion of the hard drive examination, all files and remnants of the hard drive are permanently removed and deleted from the defense computer equipment.

DATED this 28th day of January, 2008, at Anchorage, Alaska.

/s/ Deborah M. Smith
DEBORAH M. SMITH
United States Magistrate Judge

Alaska Case Law Service



» Home

» Search

- » [By Word](#)
- » [By Citation](#)
- » [By Decision Date](#)
- » [By Party Name](#)
- » [By Judge and Opinion Type](#)
- » [By Docket Number or Counsel](#)

Worden v. State
 213 P.3d 144
 Alaska App., 2009.
 May 22, 2009

» [Help](#)

Term **D**

» [How to Print](#)

213 P.3d 144

» Other Alaska Law websites

- » [Alaska Statutes](#)
- » [Alaska Administrative Code](#)
- » [Alaska Rules of Court](#)

Court of Appeals of Alaska.
 Christopher J. WORDEN, Appellant,
 v.
 STATE of Alaska, Appellee.

» Related Thomson West Sites

- » [Westlaw®](#)
- » [Westlaw by Credit Card](#)
- » [Online CLE Programs](#)
- » [Shop for Alaska Legal Products](#)

No. A-10005.
 May 22, 2009.

Renee McFarland, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for Appellant.

Blair M. Christensen, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Talis J. Colberg, Attorney General, Juneau, for Appellee.

Before: COATS, Chief Judge, and MANNHEIMER and BOLGER, Judges.

OPINION

COATS, Chief Judge.

After a jury trial, Christopher J. Worden was convicted of three counts of sexual abuse of a minor in the first degree,^{FN1} six counts of sexual abuse of a minor in the second degree,^{FN2} four counts of possession of child pornography,^{FN3} and one count each of indecent exposure in the second degree^{FN4} and unlawful exploitation of a minor.^{FN5} Superior Court Judge Charles T. Huguelet sentenced Worden to a composite sentence of 37 years and 6 months' imprisonment with 21 years and 6 months suspended.

FN1. AS 11.41.434(a)(1).

FN2. AS 11.41.436(a)(2), (4).

FN3. AS 11.61.127.

FN4. AS 11.41.460(a).

FN5. AS 11.41.455(a)(6).

Worden appeals, arguing that Judge Huguelet erred in denying his motion to dismiss the indictment and in refusing to grant Worden's motion for a continuance when the State presented an expert witness without appropriate notice under Alaska Criminal Rule 16. Worden also argues that the evidence presented at trial was insufficient to support his conviction for possession of child pornography. Finally, Worden argues that Judge Huguelet imposed an excessive sentence.

We conclude that Judge Huguelet did not err in refusing to grant Worden's motion to dismiss the indictment and did not err in denying Worden's motion for a continuance. However, we conclude that the State did not present sufficient evidence to convict Worden of possession of child pornography. Because this latter decision affects Worden's sentence, we remand for resentencing and do not decide whether Worden's sentence was excessive.

Factual background

On May 27, 2002, Juanita Thirlwell was visiting her son and daughter-in-law, Gene and Shari Conner, and her grandchildren, including C.C. (age eleven) and S.B. (age nine) at their home in Kenai. Worden, a family friend, was also at the house. At some point, Worden, C.C., and S.B. went into another room to watch a movie. In a reflection in a window, Thirlwell saw Worden rubbing and squeezing S.B.'s buttocks and touching her vaginal area over her clothes. The next weekend, Thirlwell, Shari Conner, S.B., and C.C. reported the assault to the Kenai police.

On June 3, 2002, Kenai police officers interviewed Worden. Worden admitted to having engaged in some inappropriate conduct with C.C. and S.B. and was arrested. Worden's wife, Renee, gave the police permission to seize and search two computers from her home that Worden had used. Police department employee Virgil Gattenby conducted a forensic examination of the computers. He found multiple images of child pornography in the computer's cache files. Worden was indicted on numerous felony charges.

At trial, S.B. testified that Worden had touched her on her breasts, buttocks, and genital area numerous times, including the incident on May 27, 2002. She also stated that Worden digitally penetrated her vagina and anus, and made her masturbate him. C.C. testified that Worden had touched her buttocks and breasts on a few occasions. Worden was convicted and he now appeals.

Worden's motion to dismiss the indictment

Prior to trial, Worden moved to dismiss the indictment. Worden's motion was based on a factual inaccuracy. He argued that it was improper for Shari Conner, S.B.'s mother and C.C.'s stepmother, to sit on the grand jury panel that indicted him. In

its opposition, the State pointed out that, although Conner was a member of the grand jury venire which had been called to hear cases over a three-month period, she did not sit on the panel that indicted Worden. In denying Worden's motion to dismiss the indictment, Judge Huguelet noted that Conner was not on the panel that indicted Worden and that Worden had not presented "particularized circumstances establishing the likelihood of a significant influence on the grand jury as a whole."
FN6

FN6. Judge Huguelet was quoting from Patterson v. State, 747 P.2d 535, 537 (Alaska App.1987).

On appeal, Worden argues that, at the grand jury proceeding, the State "should have conducted a more searching inquiry into the grand jury's ability to impartially and fairly assess [Conner's] testimony." But Worden concedes that he did not raise this issue in the trial court. He must therefore establish plain error. Because Worden never raised this issue in the trial court, there is simply no record to indicate whether the grand jurors might have been prejudiced by their association with Conner. Further, even if Worden had established prejudice and Judge Huguelet had granted the motion to dismiss the indictment, the State could have easily reindicted Worden because the case against him was strong.
FN7 There is simply no basis to find plain error.

FN7. See Gaona v. State, 630 P.2d 534, 536-37 (Alaska App.1981).

Worden's motion for a continuance

Worden argues that the State called an expert witness at trial without giving him the notice required by Alaska Criminal Rule 16. Rule 16(b)(1)(B) requires the prosecutor to inform the defendant, no later than forty-five days before trial, of any expert witnesses the prosecutor is likely to call at trial. Among other things, the prosecutor is to furnish the defendant with "a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion." FN8

FN8. Alaska R.Crim. P. 16(b)(1)(B).

The witness in question was Virgil Gattenby. Gattenby worked at the Kenai Police Department as the communications supervisor. This job entailed running the 911 center, working as the system administrator, and occasionally doing computer forensics work. Gattenby was not a law enforcement officer but had previously been an information management officer in the military. In addition to maintaining computer networks for the Department of Defense, Gattenby's military experience included doing computer forensic analyses and testifying at court martials based on those analyses. Gattenby performed the computer forensic analysis on Worden's computer.

At trial, after the State asked Gattenby if he found child pornography on Worden's computer, Worden objected,

apparently because he believed that the State would be eliciting an expert opinion from Gattenby. After a mostly inaudible bench conference, Judge Huguelet stated: "I won't allow [Gattenby] to give any expert opinions."

Worden did not make any further objections during Gattenby's testimony. But after Gattenby testified, Worden argued that portions of Gattenby's testimony constituted expert testimony and that the State had violated Rule 16 by not giving notice that it was calling Gattenby as an expert witness. Worden asked Judge Huguelet to strike Gattenby's testimony or to grant the defense a continuance. Worden represented that if the State had given notice that Gattenby would be called to testify as an expert, he would have obtained his own expert to analyze the information presented by Gattenby and might have called the expert as a witness at trial.

Judge Huguelet observed that Gattenby had testified before the grand jury. He concluded that Worden had known about the nature of Gattenby's testimony and that he had copies of the exhibits that Gattenby had relied upon for a long time. Worden conceded that he had possessed this information "for years." But Worden's attorney argued that it was not his job to ask "the State to hurry up and get their expert notice in so they can convict my client."

Judge Huguelet denied Worden's motion for a continuance. He concluded that Worden was on notice of the type of testimony that Gattenby was going to give and the issues that would be raised by that testimony. This conclusion is supported by the record. Furthermore, when Worden moved for a continuance, he never gave any indication of how long of a continuance he would need or what he specifically intended to accomplish if the court granted the motion for a continuance. Accordingly, we conclude that Judge Huguelet did not abuse his discretion in denying Worden's motion for a continuance.

In addition, we find that Worden has waived this objection. When Worden initially objected to Gattenby's testimony, Judge Huguelet ruled that he would not allow Gattenby "to give any expert opinions." This ruling alerted Worden that if he believed that Gattenby was testifying as an expert during some portion of his testimony, Worden should object. Judge Huguelet's implication appeared to be that if Worden could show that Gattenby was giving expert testimony, Judge Huguelet would sustain Worden's objection. But Worden never objected on this ground during Gattenby's testimony. And he cross-examined Gattenby on several technical portions of his testimony. By his inaction, Worden has waived this objection.

The State did not present sufficient evidence to convict Worden of possession of child pornography

Gattenby testified that when he examined Worden's computer, he found images of child pornography that Worden had accessed and viewed on the Internet. Gattenby's testimony supported the conclusion that Worden had intentionally accessed the child-pornography sites because his examination showed that: (1) Worden had visited certain websites containing child pornography more than once, and (2) it would have taken Worden's computer several minutes to load the images, and the

images recovered had loaded completely.

But Gattenby testified that even though the images of child pornography were found amongst the cache files on the hard drive of Worden's computer, there was no indication that Worden had any intent to permanently store the images-his intent was simply to view the images on his computer screen for the time he was at a given website. Gattenby explained that when a person uses a computer to access a site on the Internet, the computer automatically stores the images from the web page in the browser cache. This enables the computer to load the web page more quickly when you revisit it, because data is accessed directly from the computer's hard drive rather than loading that data over the Internet. ^{FN9}

FN9. See *United States v. Romm*, 455 F.3d 990, 993 n. 1 (9th Cir.2006) ("Most web browsers keep copies of all the web pages that you view ... so that the same images can be redisplayed quickly when you go back to them." (quoting Douglas Downing et al., *Dictionary of Computer and Internet Terms* 149 (Barron's 8th ed. 2003))); see also Ty E. Howard, *Don't Cache out Your Case: Prosecuting Child Pornography Possession Laws Based on Images Located in Temporary Internet Files*, 19 *Berkeley Tech. L.J.* 1227, 1229-30 (2004) (explaining basic operation and purpose of cache).

Most people do not know that these temporary internet files are being stored on their computer when they access the Internet.^{FN10} A user would need a high level of computer knowledge to locate and access these images.^{FN11} Computer forensic experts like Gattenby often use specialized software to access the cache files.^{FN12}

FN10. See, e.g., *United States v. Kuchinski*, 469 F.3d 853, 862 & n. 24 (9th Cir.2006) (noting government expert's agreement with statement that "most sophisticated-or unsophisticated users don't even know [the cache files are] on their computer").

FN11. See Giannina Marin, *Possession of Child Pornography: Should You be Convicted When the Computer Cache does the Saving for You?*, 60 *Fla. L.Rev.* 1205, 1213-14 (2008) ("A user needs advanced computer skills to directly access files in the cache while the computer is offline.").

FN12. See, e.g., *Barton v. State*, 286 Ga.App. 49, 648 S.E.2d 660, 661 (2007) (where State's expert testified that "no one using the computer can retrieve information stored in the temporary internet file folders without special forensic software").

In the present case, the State did not present any evidence

that Worden had this specialized knowledge-that he was aware that images were stored in his computer's browser cache or that he might have the ability to access those images-at the time of the alleged offense. As Gattenby testified, the evidence supported the inference that Worden had viewed child pornography on certain websites at some point in the past. But there was no evidence that Worden knew that the images from these websites were being stored in his computer's cache or that he intended to save them on his computer.

The State's case, therefore, rested upon proof that Worden intentionally accessed and viewed images of child pornography over the Internet. But we conclude that AS 11.61.127, the Alaska Statute prohibiting the knowing possession of child pornography, does not criminalize merely viewing images of child pornography on a computer. The statute prohibits the "possession" of "material that visually or aurally depicts conduct [constituting child pornography]." ^{FN13} Another section of the statute provides that "[e]ach film, audio, video, electronic, or electromagnetic recording, photograph, negative, slide, book, newspaper, magazine, or other material" depicting child pornography that is knowingly possessed by the defendant constitutes a separate crime. ^{FN14}

FN13. AS 11.61.127(a).

FN14. AS 11.61.127(c).

It is questionable whether the act of possessing material encompasses viewing an image on a computer screen. If Worden had gone to a movie depicting child pornography, it could not be said that he possessed the child pornography depicted in the movie, even though it might be clear that he had intentionally set out to view those images. Interpreting the former version of the federal statute criminalizing the possession of child pornography, ^{FN15} which is similar to AS 11.61.127(c), federal courts have concluded that merely viewing child pornography on a computer, as opposed to saving it on the computer, was not prohibited by the statute. ^{FN16} The Court of Appeals for the Ninth Circuit interpreted the former federal statute to criminalize only the knowing possession of files on a hard drive or other computer storage device. ^{FN17} It follows that where a defendant is not aware of the existence of the cache files, he has not committed a crime.

FN15. Former 18 U.S.C. 2252A(a)(5)(B) (2006) (making it a crime to "knowingly possess[] any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been ... transported in interstate or foreign commerce by any means, including by computer"), *amended by* Enhancing the Effective Prosecution of Child Pornography Act of 2007, Pub.L. No. 110-358, Title II § 203(b), 122 Stat. 4001, 4003-04 (2008) (inserting "or knowingly accesses with intent to view" into the operative language of 18 U.S.C. 2252A(a)(5)(B)).

FN16. See, e.g., *United States v. Stulock*, 308 F.3d 922, 925 (8th Cir.2002) (noting with approval the district court's holding that "one cannot be guilty of possession for simply having viewed an image on a web site, thereby causing the image to be automatically stored in the browser's cache, without having purposely saved or downloaded the image").

FN17. *Kuchinski*, 469 F.3d at 863 ("[W]here a defendant lacks knowledge about the cache files, and concomitantly lacks access to and control over those files, it is not proper to charge him with possession and control of the child pornography images located in those files, without some other indication of dominion and control over the images."); *Romm*, 455 F.3d at 1000 ("[T]o possess the images in the cache, the defendant must, at a minimum, know that the unlawful images are stored on a disk or other tangible material in his possession.").

Some state courts have construed their statutes prohibiting the possession of child pornography to criminalize the use of a computer to access images of child pornography over the Internet.^{FN18} But those states' statutes are much broader than AS 11.61.127.^{FN19}

FN18. See, e.g., *Ward v. State*, 994 So.2d 293, 301-02 (Ala.Crim.App.2007); *Tecklenburg v. Superior Court*, 169 Cal.App.4th 1402, 87 Cal.Rptr.3d 460, 472-73 (2009); *Commonwealth v. Diodoro*, 932 A.2d 172, 174-75 (Pa.Super.2007), cert. granted, 595 Pa. 537, 939 A.2d 290 (2007).

FN19. See, e.g., Cal.Penal Code § 311.11 (West 2008) (criminalizing possession or control of "any matter, representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film or filmstrip," that depicts minors engaging in or simulating sexual conduct).

A basic rule of statutory construction "is that statutes imposing criminal liability should be construed narrowly."^{FN20} Therefore, "[w]hen the scope of a criminal statute is unclear, courts should normally construe the statute against the government—that is, construe it so as to limit the scope of criminal liability."^{FN21} At best, AS 11.61.127 is ambiguous as to whether it criminalizes viewing a digital image of child

pornography over the Internet. Because we must interpret the statute narrowly, we conclude that it does not prohibit viewing child pornography on a computer screen. Since this is the only conduct the State proved Worden knowingly engaged in, insufficient evidence existed to convict Worden of possession of child pornography.

FN20. State v. ABC Towing, 954 P.2d 575, 579 (Alaska App.1998).

FN21. Id.

Conclusion

We AFFIRM all of Worden's convictions except his convictions for possession of child pornography. Worden's convictions for possession of child pornography must be REVERSED and a judgment of acquittal must be issued. We do not decide whether Worden's sentence is excessive because Worden must be resentenced based on the reversal of his convictions for possession of child pornography.

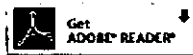
The judgment of the superior court is AFFIRMED in part and REVERSED in part. The superior court shall resentence Worden within 90 days and transmit a copy of the judgment to this court. After the distribution of the amended judgment, Worden shall have 30 days to renew his sentence appeal. We retain jurisdiction.

Alaska App.,2009.
Worden v. State
213 P.3d 144

END OF DOCUMENT

 Term

© 2010 Thomson Reuters/West. No Claim to Orig. U.S. Govt. Works.
Adobe Reader is required to view PDF images.





LEXSEE



Analysis
As of: Mar 30, 2010

STATE OF TENNESSEE v. RE'LICKA DAJUAN ALLEN

No. E2007-01018-CCA-R3-CD

COURT OF CRIMINAL APPEALS OF TENNESSEE, AT KNOXVILLE

2009 Tenn. Crim. App. LEXIS 114

March 26, 2008, Session

February 12, 2009, Filed

SUBSEQUENT HISTORY: Rehearing denied by *State v. Allen*, 2009 *Tenn. Crim. App. LEXIS 359* (*Tenn. Crim. App.*, Mar. 9, 2009)

US Supreme Court certiorari denied by *Allen v. Tenn.*, 2010 U.S. LEXIS 265 (U.S., Jan. 11, 2010)

PRIOR HISTORY: [*1]

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed and Remanded. Direct Appeal from the Criminal Court for Knox County. No. 77455. Mary Beth Leibowitz, Judge.

State v. Butler, 2005 *Tenn. Crim. App. LEXIS 302* (*Tenn. Crim. App.*, Mar. 30, 2005)

DISPOSITION: Judgment of the Criminal Court Reversed and Remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: The State sought review of a judgment of the Criminal Court for Knox County (Tennessee), which suppressed certain evidence it did not provide to defendant after being ordered to do so and which dismissed the indictment against defendant.

OVERVIEW: Defendant was indicted on two counts of aggravated exploitation of a minor and one count of sexual exploitation of a minor. The State refused to comply with requests for discovery by withholding the contents of defendant's computer hard drive and other

computer materials alleged to contain incriminating evidence. The State refused to disclose the requested discovery despite the trial court's issuance of two protective orders, the ruling of the court on interlocutory appeal, and a third protective order by the trial court requiring disclosure. The court held that 18 U.S.C.S. § 3509 was not applicable to state prosecutions and even if it were, the difficulties of discovery only in a law enforcement facility and the compromise to the effectiveness of the defense expert justified the orders of production and the protective orders. In light of the prosecution statements to the trial court and the assurance of the attorney for the State at the appellate oral argument that the prosecution was ready to comply with the discovery orders, the court concluded that exclusion of the computer images in question and dismissal of the prosecution were erroneous under *Tenn. R. Crim. P. 16*.

OUTCOME: The court reversed the trial court's judgment, reinstated the indictment, and remanded the matter for trial.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Tangible Objects > General Overview

[HN1] See 18 U.S.C.S. § 3509(m).

Constitutional Law > Supremacy Clause > Federal Preemption

Governments > State & Territorial Governments > Police Power

[HN2] The police powers of a state are not to be preempted by federal legislation unless that is Congress's clear and manifest purpose. Congress's intent to preempt state laws must either be expressly stated in a federal statute or be implicit in the statute's structure and purpose.

Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Tangible Objects > General Overview

[HN3] Title 18, § 3509(m) of the United States Code does not explicitly refer to state prosecutions. The law references *Fed. R. Crim. P. 16* in superceding that rule's discovery procedures. The statute also refers to the prosecution as the Government, a term typically used in federal statutes to denote the government of the United States not the government of a state. Finally, the statute is part of Part II of Title 18 of the United States Code which is dedicated to Criminal Procedure. Section 3509(m) does not apply to proceedings in Tennessee state courts. Further, the statute does not criminalize any conduct that was not already illegal under 18 U.S.C.S. §§ 2251, 2252 and 2252(a) long before the passage of § 3509.

Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Tangible Objects > General Overview

[HN4] Even if 18 U.S.C.S. § 3509 were applicable to state proceedings, the statute has been interpreted to allow disclosure of offending materials where a defendant has shown that an analysis of the material at a government facility would be cost prohibitive; doubt about the reliability of an expert's equipment would be raised if the expert were forced to move the equipment; or that the expert's ability to analyze the material is so compromised that he is of no effective service to Defendant or Defendant's attorney.

Criminal Law & Procedure > Discovery & Inspection > General Overview

[HN5] *Tenn. R. Crim. P. 16* governs most discovery issues in Tennessee criminal cases.

Criminal Law & Procedure > Discovery & Inspection > Discovery Misconduct > Sanctions > General Overview

Criminal Law & Procedure > Discovery & Inspection > Discovery Misconduct > Sanctions > Dismissal of Charges

Criminal Law & Procedure > Discovery & Inspection > Discovery Misconduct > Sanctions > Exclusion of Evidence

[HN6] Although under certain circumstances exclusion of evidence and dismissal of a criminal prosecution is proper under *Tenn. R. Crim. P. 16* for failure of the State to comply with discovery orders, that power should be used sparingly and only when necessary to avoid irreparable prejudice to Defendant from discovery violations.

COUNSEL: James A. H. Bell, Knoxville, Tennessee, for the appellant, Re'Licka Dajuan Allen.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Kevin J. Allen, Assistant District Attorney General, for the appellee, State of Tennessee.

JUDGES: JERRY L. SMITH, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER, J., joined and J. C. McLin, J., dissenting.

OPINION BY: JERRY L. SMITH

OPINION

Defendant, Re'Licka Dajuan Allen, was indicted on two counts of aggravated exploitation of a minor and one count of sexual exploitation of a minor. The State refused to comply with Defendant's requests for discovery by withholding the contents of Defendant's computer hard drive and other computer materials alleged to contain incriminating evidence. The State refused to disclose the requested discovery despite the trial court's issuance of two protective orders, the ruling of the appellate [*2] court on interlocutory appeal, and a third protective order by the trial court requiring disclosure. After a final hearing, the trial court suppressed the evidence and dismissed the indictment against Defendant. The State argues on appeal that the trial court erred in suppressing the evidence based upon the perceived threat of federal prosecution to defense counsel. Following our review of the parties' briefs, the record, and the applicable law, we reverse the judgment of the trial court, reinstate the indictment and remand for trial.

OPINION

I. BACKGROUND

Defendant was charged in a three-count indictment alleging sexual and aggravated sexual exploitation of a

minor stemming from the possession of child pornography. Defendant's case was consolidated with another case presented by the State on interlocutory appeal. The facts of Defendant's underlying offenses were summarized in the appellate court's opinion as follows:

[The defendant] was charged by the Knox County Grand Jury on June 17, 2003, with one count of sexual exploitation of a minor for possessing materials that included a minor engaged in sexual activity, and with two counts of aggravated sexual exploitation of a minor for possessing, [*3] with the intent to transport and with the intent to distribute, materials that included a minor engaged in sexual activity, in violation of *Tennessee Code Annotated section 39-17-1004*. Both cases involved material located on Defendants' computers. In [the defendant's] case, the material was originally discovered by a computer repair technician at a store where [the defendant] had taken his computer for repair. The technician informed his manager of his discovery, and the manager in turn contacted Knox County law enforcement.

*State v. Richard Allen Butler, No. E2004-00359-CCA-R9-CD, 2005 Tenn. Crim. App. LEXIS 302, 2005 WL 735080, at *1 (Tenn. Crim. App., at Knoxville, Mar. 30, 2005) perm. app. denied 2005 Tenn. LEXIS 687 (Tenn. Aug. 22, 2005), abrogated by State v. Pickett, 211 S.W.3d 696 (Tenn. Jan. 22, 2007).*

After the charges were filed, Defendant filed a motion for discovery, which included a request that the State provide him with copies of the computer hard drive and other computer materials. The State refused Defendant's discovery request but offered instead to make Defendant's computer hard drive available for inspection at the Sheriff's Department. Thereafter, Defendant filed a motion to compel discovery. At a hearing on his motion [*4] to compel, Defendant's computer expert testified that simply being allowed access to Defendant's computer hard drive at the Sheriff's Department would not permit him to conduct a sufficient evaluation. The defense expert's testimony was summarized in this court's opinion as follows:

In [Defendant's] case, a hearing on his motion to compel was held at which the State presented one witness, Carlton Bryant, an attorney employed at the Knox County Sheriff's Department. Bryant tes-

tified that his understanding of the law was that the sheriff's department could not allow counsel to take a copy of the computer hard drive from the department because the sexual exploitation statute did not contain any exemption for defense counsel to be given child pornography. He said they would, however, accommodate counsel and counsel's computer experts by mirror-imaging the hard drive and allowing them to examine the copy while it remained in the "custody and control" of the department. He testified that they contemplated setting aside a conference room for that purpose and would arrange a schedule that was convenient for counsel and his experts.

Herbert Mack, [Defendant's] expert computer witness, described [*5] in detail the various programs and viruses by which material can be both deliberately and inadvertently downloaded into a computer and estimated that it would take him approximately one week of intensive twelve-to fourteen-hour days to complete an examination of [Defendant's] computer hard drive. He testified he would probably require the assistance of support personnel from his office and, in addition, would need to consult regularly with counsel with respect to whether any sexually explicit files he found on the computer qualified as child pornography. He said that, given the large number of images allegedly contained on the computer, he would not be able to remember the specifics of the information without taking the computer hard drive from the sheriff's department.

Mack expressed concern about working from a "mirror image" rather than the hard drive itself, testifying that the computer programs in existence did not create true mirror images:

A. Well, the question-what I heard before was providing me with a mirror image. Okay. If we're talking about me working on the original computer, no, I don't need another computer as long as I can, you know, load my tools and take my tools off. [*6] If what you're going to give me is a mirror image, my concern there is that I'm not getting all of the data that's there.

Q. And why is that? If it's a mirror image wouldn't you just get everything that's in the mirror?

A. No, sir.

Q. Why not?

A. A mirror image is a misnomer, okay. The computer programs that you have right now, okay, are for the purpose of recovering good data. Okay. So if a file has been ordered damaged or erased it's not going to be on the image.

Mack conceded that his examination of the actual hard drive would entail reconnecting the original personal computer equipment, turning the computer on, and loading his software file-searching tools, and he agreed that in the process of booting up the Windows operating system the contents of the hard drive would be changed. However, according to his testimony, booting the computer would not alter either the file creation date or last accessed date of the images in question. Mack testified he was familiar with "En-Case," a forensic examination software utility available exclusively to law enforcement, but he was not aware that it had been approved by several federal district and appellate courts as a "non-invasive forensic examination [*7] tool."

*2005 Tenn. Crim. App. LEXIS 302, [WL] at *2-3.*

In addition to the testimony above, Mack further testified that the risk of transmitting inaccurate information was high if defense counsel was dependent upon Mack to tell defense counsel what he had seen on a computer disk image. Mack stated that there was an increased risk of disclosing non-discoverable information because the State's expert would be able to determine what tools had been run on Defendant's computer hard drive and what information had been recovered before Defendant was obligated to disclose its expert report. Mack also stated that Defendant would have no choice but to involuntarily disclose information that was not subject to discovery and that Defendant did not intend to use at trial.

At the conclusion of the hearing on the motion to compel, the trial court issued a protective order requiring disclosure of a mirror image of the computer hard drive. However, the State refused to comply. Defendant filed a "Renewed Motion to Suppress" as a result of the State's

noncompliance with the court's order. In response, the trial court issued a second protective order requiring disclosure of the discovery materials to Defendant.

After the issuance of the second [*8] protective order by the trial court, the State filed an interlocutory appeal under *Rule 9 of the Tennessee Rules of Appellate Procedure*. The State argued that compliance with the discovery request violated Tennessee sexual exploitation statutes. At the conclusion of the interlocutory appeal, this court found that the trial court did not err in ordering the State to comply with Defendant's discovery request.

[We] conclude that the possession, copying, or distribution of child pornographic materials does not constitute a violation of Tennessee's sexual exploitation of a minor statutes so long as it occurs in the context of the prosecution or defense of a case under the statute. . . . [T]he trial court[] entered protective orders to keep the evidence secure and to confine its dissemination to defense counsel and counsel's agents and employees in the preparation of their defense. We find these orders reasonable and appropriate, especially given [Defendant's] computer expert's testimony with respect to the extensive and exhaustive work entailed in his examination of [Defendant's] computer hard drive. Accordingly, we conclude that the trial courts did not err in granting Defendant[s] motion [*9] to compel the production of the evidence.

*Richard Allen Butler, 2005 Tenn. Crim. App. LEXIS 302, 2005 WL 735080, at *11.* This Court affirmed the trial court's issuance of the two previous protective orders. However, the State continued to deny Defendant's discovery request. Thereafter, Defendant filed a "Second Renewed Motion to Suppress," again requesting suppression of the evidence. The State filed a response to Defendant's motion and argued that enactment of an amendment to federal law, known as the "Adam Walsh Child Protection and Safety Act" ("the Adam Walsh Act"), now prevented the State from granting Defendant's discovery request to provide copied images of the alleged child pornography taken from Defendant's computer. The trial court entered a third protective order, which again instructed the State to provide copies of the discovery material requested by the defense. In its order, the court stated:

In its March 30, 2005 decision, the Court of Criminal Appeals clearly contemplated the State's proposal of mir-

ror-imaging Defendant's hard drive and allowing counsel to examine the copy while it remained in the "custody and control" of the Sheriff's Department. *State v. Butler*, No. E2004-00359-CCA-R9-CD, 2005 Tenn. Crim. App. LEXIS 302, at *6 (Tenn. Crim. App. Mar. 30, 2005). [*10] The Court also considered the State's argument that the sexual exploitation statute provides no exception allowing possession of such material by defense counsel or experts. *Id.* at *26. Despite taking these arguments under advisement, the court held "that the possession, copying, or distribution of child pornographic materials does not constitute a violation of Tennessee's exploitation of a minor statutes so long as it occurs in the context of the prosecution or defense of a case under the statute." *Id.* at *33 (emphasis added). The Court clearly stated that both the *Allen* and *Butler* Trial Courts' Protective Orders were "reasonable and appropriate" under *Tenn. R. Crim. P. 16(a)(1)(C)*. *Id.* In upholding the *Butler* and *Allen* Orders, the Court specifically relied upon computer expert testimony detailing the extensive and exhausting work involved in examining a computer hard drive. *Id.*

The state has continued to refuse to provide [Defendant] with an independent examination of the evidence against him. The State has persisted in allowing [Defendant] access to his hard drive and other evidence only while it is under the "custody and control" of the Sheriff's Department, despite the fact that [*11] the Criminal Court of Appeals found this Court's . . . Order to be reasonable and appropriate. *Butler*, No. E2004-00359-CCA-R9-CD, 2005 Tenn. Crim. App. LEXIS 302, at *33.

In response to the issuance of the trial court's third protective order mandating disclosure of discovery, the State filed a "Motion to Reconsider and/or Motion to Clarify the Court's Protective Order." In this motion, the State argued that the enactment of the Adam Walsh Act "unequivocably bann[ed]" the distribution or dissemination of child pornography to defense counsel during litigation, thereby reversing the appellate court's ruling in *Butler* on the basis that the Adam Walsh Act, under the doctrine of federal preemption, superseded Tennessee

criminal procedural rules governing discovery. Defendant filed a memorandum in response to the State's motion. In Defendant's response memorandum, Defendant detailed cases in other jurisdictions which held that the Adam Walsh Act did not preempt those States' discovery rules.

A hearing was held on the State's motion to reconsider. At the hearing, the State informed the court that it had contacted the U.S. Attorney's office, as it believed it was obligated to do, and disclosed [*12] that a copy of the mirror image of the computer hard drive would be provided to defense counsel and their experts. The State informed the court that defense counsel, any defense expert, as well as court staff and others could be at risk of federal prosecution for possession of child pornography in violation of the Adam Walsh Act if the discovery material was turned over to Defendant. At the hearing, the following exchange occurred between the trial court and the State:

[Prosecutor]: I'm here and ready, Judge. I can't make any promises about what would happen in - I mean there's dual jurisdiction in child pornography cases. They know that.

The Court: What happens if my court reporter takes it? Is she subject to federal prosecution? Is the court clerk and Miss Phillips subject to federal prosecution?

[Prosecutor]: Judge, I have absolute immunity in my prosecutorial functions. This is a prosecutorial function. I don't know about anybody else.

The Court: Well, there's another alternative. And that is because I have ordered this be turned over at least three times and the appellate court has too, I can suppress the evidence and you can appeal that to the appellate court and see if we can't [*13] get the appellate court to tell us how they'd like to approach these cases because the State of Tennessee is going to have to do something.

[Prosecutor]: I'm here and ready to comply with the order, Judge, the initial order where you'd have me turn it over. We appealed that to the Court of Appeals and it came back down.

The Court: Yes, and they told you to turn it over, and I told you to turn it over.

[Prosecutor]: You re-ordered me, and then I filed a Motion to Reconsider based on the Adam Walsh case, and you haven't ruled on the Adam Walsh case yet. Today is the day that you rule on Adam Walsh -

....

The Court: Did you notify the U.S. Attorneys?

[Prosecutor]: Yes, I did.

The Court: Then - then I want the disc lodged with the court reporter to be sealed and filed under seal. I hereby suppress the evidence in this case, and the State is free to appeal the suppression of evidence. I hereby suppress the evidence that's on the disc; let's put it like that. I don't know what other evidence the State wants to offer

....

The Court: Well, I'm suppressing the evidence based upon what Mr. Bell just said, that they cannot - they're totally chilled from being able to evaluate their [*14] own - evaluate the evidence against them.

[Prosecutor]: So you're suppressing it because I notified the U.S. Attorney that they were taking possession -

The Court: No. I'm suppressing it because they can't get it under federal law because - you know, that's up to you whether you notified the U.S. Attorney because I think you - there are certain things you have to do under the law as well. But I don't see how you can proceed with a prosecution with regard to this, turn that over to them, and not - and them not be able to do what they need to do, which was what the whole issue was about.

The disc had to be a mirror image because any manipulation of the computer disc changes the evidence, and that was the whole point. And they need to have their expert evaluate it. So how can they do that? They can't not without violating the law.

And as attorneys, they're standing up and saying to me, as officers of the court,

they don't wish to violate the law, and I respect that.

So I'm going to suppress the evidence as a result of that disc, but I'm locking it up so that we have that disc. And I think you ought to consult with whoever you consult with to deal with the suppression issues -

....

[Prosecutor]: [*15] The contents of that hard drive are - contain all of the counts in the indictment. So if you're suppressing . . . the actual child pornography that's contained thereon, then you're in effect -

The Court: In effect, dismissing -

[Prosecutor]: - dismissing -

The Court: - the case.

....

The Court: If you'd like me to go ahead -

[Prosecutor]: - so that we could -

The Court: - and do an outright dismissal, then I dismiss it.

[Prosecutor]: Yes. So that we could Rule 3 it.

The Court: It's hereby dismissed.

After the trial court suppressed the evidence and dismissed the case against Defendant, the state filed a timely notice of appeal.

II. ANALYSIS

Risk of Federal Prosecution

As noted, the State argued in the trial court that *Section 3509(m) of Title 18 of the United States Code*, part of the Adam Walsh Act, effectively preempts discovery in child pornography cases and that conducting discovery in violation of the act could subject defense counsel to federal prosecution for possession of child pornography. *18 U.S.C. § 3509(m)* provides:

[HN1] (1) In any criminal proceeding, any property or material that constitutes child pornography (as defined by section 2256 of this title) shall remain in the care,

custody, [*16] and control of either the Government or the court.

(2)(A) Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in any criminal proceeding, any request by Defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography (as defined by section 2256 of the title), so long as the Government makes the property or material reasonably available to Defendant.

(B) For the purposes of subparagraph (A), property or material shall be deemed to be reasonably available to Defendant if the Government provides ample opportunity for inspection, viewing and examination at a Government facility of the property or material by Defendant, his or her attorney, and any individual Defendant may seek to qualify to furnish expert testimony at trial.

The question we must initially address is whether this statute preempts our own state rules regarding discovery in state prosecutions for crimes involving child pornography. This is a question of first impression in this state.

[HN2] "The police powers of a state are not to be preempted by federal legislation unless that [is] Congress's clear and manifest purpose." *State v. Scott*, 678 S.W.2d 50, 51 (Tenn. 1984). [*17] Congress's intent to preempt state laws must either be expressly stated in a federal statute or be implicit in the statute's structure and purpose. *Id.*

It can readily be seen that [HN3] *Section 3509(m)* does not explicitly refer to state prosecutions. The law references *Fed. R. Crim. P. 16* in superceding that rule's discovery procedures. The statute also refers to the prosecution as the "Government," a term typically used in federal statutes to denote the government of the United States not the government of a state. Finally, the statute is part of Part II of Title 18 of the United States Code which is dedicated to "Criminal Procedure." In the case of *State ex rel. Tuller v. Crawford*, 211 S.W.3d 676 (Mo. Ct. App. 2000), the Missouri Court of Appeals relied on these factors in concluding that *Section 3509(m)* is a procedural provision applicable only to federal courts. *Id.* at 679. We agree with the reasoning of *Crawford* and hold that *Section 3509(m)* does not apply to proceedings in Tennessee state courts. Further, the statute does not criminalize any conduct that was not already illegal un-

der *Sections 2251, 2252 and 2252(a) of Title 18 of the United States Code* long before the passage of *Section 3509*.

We [*18] have been unable to find a single state or federal criminal prosecution of defense counsel anywhere in the country based on counsel's possession of child pornography as part of a state's discovery procedures. We think the likelihood of federal prosecution of defense counsel in this case for possession of child pornography is remote at best and did not justify the suppression of evidence and dismissal of the prosecution of Defendant.

Moreover, [HN4] even if *Section 3509* were applicable to state proceedings, the statute has been interpreted to allow disclosure of offending materials where a defendant has shown that an analysis of the material at a government facility would be cost prohibitive; doubt about the reliability of an expert's equipment would be raised if the expert were forced to move the equipment; or that the expert's ability to analyze the material is so compromised that he is of no effective service to Defendant or Defendant's attorney. See *United States v. Knellinger*, 471 F.Supp. 2d 640, 647-48 (E.D.Va. 2007). In *Richard Allen Butler* the trial court and this Court found that forcing the defense expert to conduct the "extensive and exhaustive work" entailed in examining Defendant's [*19] computer hard drive in a law enforcement facility would compromise significantly the expert's usefulness to the defense. 2005 Tenn. Crim. App. LEXIS 302, 2005 WL 735080, at *11. Consequently, we held the trial court's orders compelling production of evidence along with protective orders to restrict the dissemination of the offending material solely in the preparation of the defense were reasonable and proper. *Id.* We believe this case is analogous to *Knellinger* and that even if *Section 3509* were applicable to this prosecution the difficulties of discovery only in a law enforcement facility and the compromise to the effectiveness of the defense expert justify the orders of production in this case as well as the protective orders. Therefore, we hold that the trial court erred in dismissing this case out of fear that defense counsel would be subject to a federal prosecution under §3509.

Dismissal for Failure to Comply with Tennessee Rule of Criminal Procedure 16

[HN5] *Tennessee Rule of Criminal Procedure 16* governs most discovery issues in Tennessee criminal cases. The record in this case also reflects that the trial court was to some extent concerned about the prosecution's obstinate refusal to comply with the orders of both [*20] the trial court and this Court regarding discovery in this case. The dismissal of the indictment could be interpreted as punishment for the prosecution's pertinacious-

ness in the failing to follow the discovery orders. [HN6] Although under certain circumstances exclusion of evidence and dismissal of a criminal prosecution is proper under *Tennessee Rule of Criminal Procedure 16* for failure of the State to comply with discovery orders, that power should be used sparingly and only when necessary to avoid irremediable prejudice to Defendant from discovery violations. See *State v. Garland*, 617 S.W.2d 176, 185 (Tenn. Crim. App. 1981). In light of the prosecution statements at the hearing in the trial court on this matter and the assurance of the attorney for the State at the appellate oral argument that the prosecution is now ready to comply with the discovery orders of this Court and trial court, we hold that exclusion of the computer images in question and dismissal of the prosecution were erroneous. If the prosecution is now willing to comply, the potential prejudice to Defendant is not irremediable.

We understand the frustration of the trial court over the persistent refusal of the prosecution [*21] to comply with court orders. However, exclusion of the evidence in question and dismissal of the indictment was not the proper method to punish the prosecution once a willingness even grudgingly expressed was made to at last comply with the discovery orders. Any further refusal to comply with the orders of the trial court should be punished with the court's contempt powers. *Garland*, 617 S.W.2d at 185.

CONCLUSION

In light of the foregoing the judgment of the trial court is reversed, the indictment is reinstated and the case is remanded for trial.

JERRY L. SMITH, JUDGE

DISSENT BY: J.C. MCLIN

DISSENT

J.C. MCLIN, Judge, dissenting.

Because the state, as the appellant, failed to meet its burden of proving that the trial court committed an abuse of discretion by suppressing the evidence, I must respectfully dissent from the majority.

The state's refusal to disclose the discovery material it was obligated to provide was a violation of the rules of discovery. Specifically, the rule states that: "[u]pon a defendant's request, the state shall disclose to the defendant . . . (I) the defendant's relevant written or recorded statements, or copies thereof . . ." *Tenn. R. Crim. P. 16(a)(1)(B)*. "[S]uppression by the prosecution [*22] of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Sample v. State*, 82 S.W.3d 267, 270

(*Tenn. 2002*) (quoting *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)). A defendant may be accorded certain remedies based upon the state's noncompliance. *Rule 16(d)(2)(A)-(D) of the Tennessee Rules of Criminal Procedure* provides as follows:

If a party fails to comply with this rule, the court may: (A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions; (B) grant a continuance; (C) prohibit the party from introducing the undisclosed evidence; or (D) enter such other order as it deems just under the circumstances.

The exchange of discovery matters is regulated by our Tennessee Rules of Criminal Procedure. Specifically, *Rule 16(d)(2)(D)* governs the exchange in criminal matters:

Although *Rule 16 of the Rules of Criminal Procedure* does not explicitly provide as one of the sanctions the dismissal of the indictment after failure to comply with a discovery request or order, the rule [*23] does provide that the court may enter such sanction "as it deems just under the circumstances." *Tenn. R. Crim. P. 16(d)(2)(D)*. This opened-ended language of the Rule authorizes the dismissal of an indictment in certain circumstances when a court would otherwise have "no effective sanction for failure to comply with its order." *State v. Collins*, 35 S.W.3d 582, 585 (Tenn. Crim. App. 2000); see also *State v. Freseman*, 684 S.W.2d 106, 107 (Tenn. Crim. App. 1984) (suggesting that if a trial court has the authority to dismiss a case as a sanction for failure to comply with discovery orders, it is implied authority pursuant to *Tenn. R. Crim. P. 16(d)(2)*). However, the Rule provides the court with many other methods for assuring compliance without resorting to such extreme measures. A trial court has wide discretion in fashioning a remedy for non-compliance with a discovery order, and the sanction should fit the circumstances of the case. See *Collins*, 35 S.W.3d at 585.

State v. Downey, 259 S.W.3d 723, 2008 WL 3540371 at *9 (Tenn. 2008). After providing this analysis, the court held that "[g]iven the discretion afforded the trial court in fashioning the penalty, we [*24] conclude that the trial court's decision to suppress . . . was sufficient penalty for the State's discovery violation." *Id.* Furthermore, "[i]t is well settled that decisions with regard to pre-trial discovery matters rest within the sound discretion of the trial court. The decision of the trial court in discovery matters will not be reversed on appeal unless a clear abuse of discretion is demonstrated." *Benton v. Snyder*, 825 S.W.2d 409, 416 (Tenn. 1992). "The abuse of discretion standard contemplates that before reversal the record must show that a judge 'applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.'" *State v. Coley*, 32 S.W.3d 831, 833 (Tenn. 2000) (citations omitted) *overruled on other grounds* by *State v. Copeland*, 226 S.W.3d 287 (Tenn. 2007).

In the instant case, the hearing on the state's motion to reconsider arose from the trial court's issuance of a third protective order requiring disclosure of the requested discovery materials under *Rule 16 of the Tennessee Rules of Criminal Procedure*. The state's blatant, continued refusal to disclose the requested discovery created the very [*25] problem which forced the trial court to suppress the evidence. The trial court issued a total of three protective orders requiring disclosure, and the state refused to comply each time. The third order came after the appellate court, upon interlocutory appeal, affirmed the trial court's two previous orders. The state had ample time to comply, and its failure to do so is evidence of its intentional bad faith. The period of time ranging from the trial court's issuance of the first protective order to the passage of the Adam Walsh Act was more than two-and-half years. Assuming the state was entitled to excuse its delay in part based upon its reliance on the appellate court's interlocutory ruling, the state still refused to turn over the requested discovery for a period of more than one year and four months before the passage of the Adam Walsh Act. Even more importantly, the state has offered no justification for its failure to comply with the court's orders at any point in time. I would also note that the trial court's decision was further complicated by the state's eleventh-hour willingness to provide the discovery to the defendant only under threat of potential federal prosecution. [*26] Based on the passage of the Adam Walsh Act, it appeared that anyone, including defense counsel, its staff, or experts retained by the defendant, faced possible federal prosecution once they

took possession of the discovery material. Given the precarious position that both the defendant and the court were placed in by the state if they accepted the discovery material, it is my view that the trial court did not err when it found that it had "no other reasonable alternative" but to suppress the evidence. *See State v. Smith*, 926 S.W.2d 267, 270 (Tenn. Crim. App. 1995).

As identified previously, the state, as the appealing party, has a duty to demonstrate that the trial court abused its discretion by suppressing the evidence. *Snyder*, 825 S.W.2d at 416. The state is unable to show how, or in what manner, the trial court committed such abuse. The state argues without citation to legal authority, that there was "no need for the trial court to take the drastic measure of *sua sponte* suppressing the evidence" and further contends that there was "no lawful basis" for suppression. As noted above, the trial court clearly had the discretion to suppress the evidence. *See Downey*, 259 S.W.3d 723, 2008 WL 3540371, at *9. [*27] It is the state who has appealed, and it is the state that has failed to meet its burden of showing that the trial court abused its discretion by suppressing the evidence or abused its inherent powers to dismiss a case for failure to comply with discovery. *Iverson v. Xpert Tune, Inc.*, 553 So. 2d 82, 87 (Ala. 1989).

I agree with the majority that the trial court could have and should have sanctioned the state by holding it in contempt for its willful non-compliance with the court's repeated orders. However, this remedy, in my view, is not one that the trial court was necessarily required to employ. Furthermore, arguing that the trial court erred because it did not exhaust all possible remedies before suppressing the evidence erroneously shifts the burden from the state as the appellant, whose obligation it is to show an abuse of discretion, by the trial court. The majority opinion imposes an affirmative duty upon the trial court to show why it did not hold the state in contempt or institute any other remedies before suppressing the evidence. Because the function of this appellate court is to act as a court of error, it is my opinion that the majority opinion exceeds this court's authority [*28] by requiring that the trial court first exhaust all other remedies before finding that it acted within its discretion under *Rule 16* by suppressing the evidence in this case.

For the reasons stated above, I would affirm the judgment of the trial court.

J.C. McLIN, JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

UNITED STATES OF AMERICA

v.

Criminal No. 3:06cr126

DAVID LEROY KNELLINGER

MEMORANDUM OPINION

This matter is before the Court on the Supplemental Brief in Support of Motion to Dismiss (Docket No. 46) filed by the defendant, David Leroy Knellinger, in which Knellinger asserts that 18 U.S.C. § 3509(m) is both invalid and unconstitutional. For the following reasons, Knellinger's motion is denied. However, Knellinger's request for a mirror image copy of his computer hard drive, which contains the child pornography images listed in the Superseding Indictment (Docket No. 14), is granted subject to the entry of an appropriate protective order and a certification by counsel for Knellinger that he will use that copy for assessment and preparation of a defense.

BACKGROUND

Knellinger stands charged with seven counts of transporting, attempting to transport, receiving, and possessing child pornography (Docket No. 14). The statutory maximum sentence faced by Knellinger is twenty years imprisonment on each count. On July 17, 2006, Knellinger filed a Motion for Independent Analysis of Physical Evidence and Protection Order (Docket No. 21), in which he

requested a copy of the computer hard drive that was seized during a search of his residence and that now is in the possession of law enforcement authorities. That hard drive contains the images of child pornography at issue in this case, and Knellinger's counsel sought a copy of the hard drive so that computer experts could examine it, and the images contained therein, to help counsel ascertain therefrom the basis for a defense to the pending charges. During a telephone conference on July 26, 2006, the United States agreed to provide Knellinger with a mirror image copy of his computer hard drive and, accordingly, the Court denied as moot Knellinger's Motion for Independent Analysis (Docket No. 31).

However, the very next day, on July 27, 2006, the Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, 120 Stat. 587 (2006), was signed into law. A provision of that statute, codified at 18 U.S.C. § 3509(m), requires that child pornography remain in the custody of the United States or the Court, and prohibits a defendant from obtaining copies thereof so long as the United States provides the defendant "ample opportunity for inspection, viewing, and examination" of the child pornography "at a Government facility." Because of this new law, the United States told Knellinger that it could not honor its agreement to turn over a mirror image copy of his computer hard drive, and the United States has been in sole possession of the child pornography images ever since.

At a hearing on August 28, 2006, Knellinger raised a challenge to the constitutionality of 18 U.S.C. § 3509(m). Knellinger claimed that he is constitutionally entitled to copies of the child pornography that will be presented as evidence against him and that 18 U.S.C. § 3509(m) violates the Constitution by preventing him from having those copies. The Court asked the parties to brief the issue, invited *amicus* briefs from the National Association of Criminal Defense Lawyers, the Federal Public Defender, and the University of Richmond Law School, and held an evidentiary hearing on November 6, 2006 to determine whether 18 U.S.C. § 3509(m) violates Knellinger's rights under the United States Constitution.

DISCUSSION

As described above, Knellinger's primary objection to 18 U.S.C. § 3509(m) is that it prevents him from obtaining a copy of the child pornography in this case for independent examination. Section 3509(m) reads as follows:

(M) Prohibition on reproduction of child pornography. --

(1) In any criminal proceeding, any property or material that constitutes child pornography (as defined by section 2256 of this title) shall remain in the care, custody, and control of either the Government or the court.

(2) (A) Notwithstanding Rule 16 of the Federal Rules of Civil Procedure, a court shall deny, in any criminal proceeding, any request by the defendant to copy, photograph, duplicate, or

otherwise reproduce any property or material that constitutes child pornography (as defined by section 2256 of this title), so long as the Government makes the property or material reasonably available to the defendant.

(B) For the purposes of subparagraph (A), property or material shall be deemed to be reasonably available to the defendant if the Government provides ample opportunity for inspection, viewing, and examination at a Government facility of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial.

18 U.S.C. § 3509(m) (emphasis added). As Knellinger correctly points out, the effect of the statute is to prevent the Court from ordering the United States to provide Knellinger with a copy of the child pornography in this case so long as the United States makes that material "reasonably available" to Knellinger in a Government facility. The upshot is that Knellinger's counsel has not been able to conduct the type of examination that he feels is necessary to assess effective defenses to the very serious charges that Knellinger now faces. For that reason, Knellinger challenges the validity of § 3509(m). He first argues that § 3509(m) is an invalid amendment to the Federal Rules of Criminal Procedure. He also asserts that § 3509(m) is unconstitutional, both facially and as applied in this case. Knellinger seeks either dismissal of the indictment or a copy of the child pornography that will be presented as evidence against him.

A. Knellinger's Assertion That § 3509(m) Offends The Rules Enabling Act

Knellinger contends that § 3509(m) is invalid because it promulgates a rule of criminal procedure, thereby amending a current rule, without following the requirements of the Rules Enabling Act, 28 U.S.C. § 2071 et seq. This challenge to the power of Congress lacks merit. Congress at all times retains the authority to enact statutes affecting federal rules of procedure. As the Fifth Circuit summarized in Jackson v. Stinnett:

It has long been settled that Congress has the authority to regulate matters of practice and procedure in the federal courts. ... Congress delegated some of this power in 1934 by passing the Rules Enabling Act, which gave the Supreme Court the power to promulgate rules of practice and procedure for United States courts. ... Although Congress has authorized the Court to exercise some legislative authority to regulate the courts, Congress at all times maintains the power to repeal, amend, or supersede its delegation of authority or the rules of procedure themselves.

102 F.3d 132, 134-35 (5th Cir. 1996) (citations omitted). Indeed, Congress often has enacted statutes that repeal, amend, or supercede existing rules of federal procedure, and courts consistently upheld the power of Congress to do so. See, e.g., Floyd v. United States Postal Service, 105 F.3d 274, 277-78 (6th Cir. 1997) (upholding provisions of the Prison Litigation Reform Act which conflicted with the Federal Rules of Appellate Procedure); United States v. Mitchell, 397 F. Supp. 166, 170

(D.D.C. 1974), aff'd sub nom, United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976) (upholding authority of Congress to extend the life of a federal grand jury beyond the expiration date prescribed by Rule 6 of the Federal Rules of Criminal Procedure). Given the ultimate Congressional authority over the federal rules of procedure, there is no merit to Knellinger's argument that Congress ran afoul of the Rules Enabling Act by passing a subsequent statute that also affects the rules of federal criminal procedure.

B. Knellinger's Constitutional Challenges To § 3509(m)

1. Separation of Powers

In ways that are neither adequately explained nor readily apparent, Knellinger asserts that § 3509(m) offends the constitutionally-imposed separation of powers between the legislative and the judicial branches of government. The argument amounts to an assertion that Congress cannot tell "an Article III court how to rule on a motion before it." (Def's Reply to United States' Resp. in Opp. to Def.'s Supp. Br. in Supp. of Mot. to Dismiss "Def.'s Reply" at 15.) This contention appears to be predicated on the arguments respecting the Rules Enabling Act, and, to that extent, is meritless for the reasons explained above.

In any event, this argument, which was unaccompanied by citation in Knellinger's Supplemental Brief in Support of Motion to Dismiss (Docket No. 46), and was accompanied only by indiscriminate inapposite citation in his Reply (Docket No. 50), was not raised

during or after the evidentiary hearing on November 6, 2006, and, quite frankly, appears to have been abandoned. Hence, it will not be further considered.

2. Knellinger's Constitutional Arguments Respecting The Rights Of Criminal Defendants

Knellinger also argues that § 3509(m) deprives criminal defendants of their right to a fair trial under the United States Constitution.¹ (See Def.'s Supp. Br. in Supp. Of Mot. to Dismiss at 16-17; Def.'s Reply at 6-11.) The constitutional rights which produce a "fair trial" are implicated by the restrictions imposed by § 3509(m) on the custody and reproduction of child pornography that is the subject of a criminal proceeding. However, while those restrictions are serious and significant, they have limited reach. Defendants, including Knellinger, may obtain, by court order, copies of child pornography when the United States cannot provide an "ample opportunity for inspection, viewing, and examination at a Government facility." Consequently, § 3509(m) is not an absolute prohibition on copying child pornography for inspection outside a Government facility. That being the case, Knellinger's facial challenge to the statute can succeed only if he can demonstrate that no application of the statute's safety valve provision ("ample

¹ Knellinger's "fair trial" argument seems to encompass many of the various rights afforded by the Fifth and Sixth Amendments. See Strickland v. Washington, 466 U.S. 668, 684-85 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment").

opportunity for inspection, viewing, and examination at a Government facility") would be sufficient to protect the constitutional rights of any criminal defendant. See United States v. Salerno, 481 U.S. 739, 745 (1987). Knellinger's argument therefore turns on the definition of "ample opportunity."

While the statute does not define "ample opportunity," that term must be read to include at least every opportunity for inspection, viewing, and examination required by the Constitution. If read in that way, any opportunity for inspection that falls short of that mark would enable a court to order a copy given to the defendant for inspection outside a "Government facility." Long-established canons of statutory construction require the Court to read "ample opportunity" in just this way. As the Supreme Court reiterated in Edward J. DeBartolo Corp. V. Florida Gulf Coast Building & Constr. Trades Council:

'[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' This approach ... also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.

485 U.S. 568, 575 (1988) (citing Grenada County Supervisors v. Brown, 112 U.S. 261, 269 (1884)). Because Knellinger does not explain why "ample opportunity" cannot reasonably be read to, at a minimum, protect the constitutional rights of defendants, the Court

need not further address Knellinger's facial constitutional challenge.²

Moreover, "ample opportunity" may, in some circumstances, include greater access than what the Constitution alone would require. In interpreting this same statutory provision, another district court noted that "[t]he word 'ample' means 'generous or more than adequate in size, scope, or capacity.'" United States v. O'Rourke, No. CR 05-1126-PHX-DGC, 2007 WL 104901, *4 (D. Ariz. Jan. 17, 2007) (citing Webster's New Collegiate Dictionary 39 (1981)). As discussed above, the opportunity to inspect, view, and examine contemplated by § 3509(m)(2)(B) requires, at a minimum, whatever opportunity is mandated by the Constitution; therefore, an opportunity that is "generous" or "more than adequate" may, in some circumstances, require more access than what would be mandated by the Constitution alone.³ Under that interpretation of "ample

² To the extent that Knellinger contests this reading of the statute, he does not explain why this reading is unreasonable, nor does he offer an alternative definition for "ample opportunity." (See Def.'s Reply at 6.) Indeed, even after the evidentiary hearing in this matter, which focused largely on the meaning of "ample opportunity," Knellinger has never adequately explained why the Court cannot order production of the child pornography if the Government has failed to provide an ample opportunity for inspection, viewing, and examination at a Government facility. (See Def.'s Post-Hearing Br.; Def's Post-Hearing Reply Br.)

³ The O'Rourke court similarly construes "ample opportunity." While, in rejecting the defendant's constitutional challenges to § 3509(m), the court noted that "ample opportunity" might be "coterminous with the requirements of due process," and that "ample opportunity" requires "due-process-level access" to evidence, the court ultimately held that the defendant was not entitled to a copy

opportunity," the Court need not necessarily resolve Knellinger's as applied constitutional challenge in order to determine whether Knellinger has been afforded an "ample opportunity" to access his hard drive. If the statutorily required ample opportunity to access his hard drive has not been provided, the Court may order production of the hard drive without deciding whether the Constitution would also compel its production.

As the United States correctly argues, whether there is ample opportunity for inspection, viewing, and examination is a factual issue that must be resolved on the record in each case. Thus, the threshold task here is to assess, on the record made in this case, whether Knellinger has been afforded an ample opportunity to inspect, view, and examine the hard drive at a Government facility. If the Court finds that the statutorily required ample opportunity has been provided, Knellinger's constitutional rights will, by definition, have been protected.⁴ If ample opportunity has not

of his computer hard drive because his particular concerns did not "amount to a denial of due process or of an ample opportunity to inspect the hard drive." 2007 WL 104901, *6 (emphasis added). If "ample opportunity" were necessarily "coterminous" with the requirements of due process, there would have been no need for the court to have considered the defendant's alleged difficulties with § 3509(m) under the requirements of both due process and "ample opportunity." Thus, the O'Rourke court, like this Court, concluded that "ample opportunity" means, only at a minimum, the opportunity for inspection, viewing, and examination required by the Constitution.

⁴ This conclusion accords with those reached by the only courts to have previously considered the constitutionality of § 3509(m). See United States v. Johnson, 456 F. Supp. 2d 1016 (N.D.

been provided, the statute itself renders Knellinger's as applied constitutional challenge moot because the statute permits the Court to provide a copy of the materials to the defense. Here, as discussed below, the Court finds that ample opportunity has not been provided on the facts of this case, so there is no need further to consider Knellinger's as applied challenge to the statute.

C. Knellinger's Opportunity To Inspect, View, And Examine The Child Pornography In This Case

The United States contends that it has afforded an adequate opportunity for inspection, viewing, and examination by offering to provide a private room in the Richmond, Virginia offices of the Federal Bureau of Investigation where counsel and his experts can access the hard drive. Knellinger disputes that contention.

An evidentiary hearing was held on November 6, 2006 to resolve this factual dispute. In support of his position, Knellinger presented expert testimony from one computer forensic expert, two digital video experts, and a trial attorney with extensive experience handling child pornography cases.⁵ The United States

Iowa 2006); O'Rourke, No. CR 05-1126-PHX-DGC, 2007 WL 104901; United States v. Butts, No. CR 05-1127-PHX-MHM, 2006 WL 3613364 (D. Ariz. Dec. 6, 2006).

⁵ The United States challenges the relevance of the testimony provided by Knellinger's digital video experts because they do not have extensive experience in child pornography cases. (See United States Resp. in Opp. to Def.'s Post-Hearing Br. Concerning the Constitutionality of 18 U.S.C. § 3509(m) at 20-22.) However, while the experts have minimal experience in child pornography cases,

presented no evidence.

Knellinger's first witness, Mark Vassel, is a computer forensic expert who already has conducted an analysis of Knellinger's hard drive in this case. Vassel, however, does not need to view images of child pornography to conduct the sort of analysis in which he specializes, so, while he expressed some frustration with the strictures of § 3509(m), the statute apparently did not prevent him from doing his job. (See Evidentiary Hr'g Tr. ("Hr'g Tr.") 9, 33, Nov. 6, 2006.)

Knellinger's second witness, Louis Sirkin, is a trial lawyer based in Cincinnati, Ohio. Sirkin has extensive experience as a defense attorney in child pornography cases, and was primary counsel in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002). (Hr'g Tr. 75.) In Ashcroft, the Supreme Court of the United States struck down certain provisions of the Child Pornography Prevention Act of 1996 as overbroad. 535 U.S. at 258. The provisions were overbroad because they proscribed images that were neither obscene nor produced with real children. See id. at 250. Therefore, Sirkin noted, a defendant like Knellinger, who is not charged with violating obscenity laws, may argue that the child pornography he

they have extensive experience in the sort of analysis that would be conducted in a child pornography case. The experts are therefore qualified to assist the Court in understanding the type of analysis that Knellinger seeks to undertake. If the United States had wanted to challenge the substantive testimony of these two experts, it could have put on testimony from its own experts. The United States chose not to do so.

possessed was not produced using real minors.⁶ (Hr'g Tr. 83.) Sirkin himself has pursued that "viable defense" and has had child pornography analyzed by experts in order to determine whether or not the children depicted were real. (Id. at 120.) According to Sirkin, such an analysis is "absolutely essential" where a defendant intends to pursue that line of defense.⁷ (Id. at 87.)

Knellinger's final two witnesses were the types of digital video experts who could conduct the analysis described by Sirkin as "absolutely essential" in a case like Knellinger's. Both described the great cost and effort that would be required to conduct their analyses in a Government facility. Tom Owen, the third witness, testified that he would normally charge approximately \$135,000 to analyze the child pornography in this case, but that he would charge approximately \$540,000 if he had to analyze those materials away from his offices in a Government facility. (Id. at 163-64.) That figure does not include the cost of transporting the quite extensive collection of equipment that is necessary to his analysis, which would take approximately one week and three men to

⁶ Knellinger is charged in this case with transporting, attempting to transport, receiving, and possessing child pornography made only with real minors. See 18 U.S.C. § 2256(8)(A). That, of course, does not foreclose the defense that the images are not real minors but, instead, are computer-generated images.

⁷ Sirkin also testified at length about many practical problems that § 3509(m) will create for defense attorneys. While helpful to the Court, a recitation of his testimony is not necessary here.

move, and which would require "a box truck... 20 feet long and 10 feet wide."⁸ (Id. at 152-53.)

Moreover, even if Owen were able to move his equipment to a Government facility, he would have concerns about its reliability after the move. (Id. at 165.) And, even if he thought his equipment was functioning properly, his personal ability to analyze the evidence thoroughly and carefully would be compromised to such a degree that he "wouldn't be able to service the client or the attorney" effectively. (Id. at 165-66.) The practical consequence of all these difficulties is that, while Owen's testimony indicates that it would be conceptually possible for Owen to conduct his time-consuming analysis in a Government facility, Owen would not agree to work on a case like Knellinger's because he could not feasibly move his equipment to, or properly do his work in, a Government facility. (Id. at 165.)

Knellinger's final witness, James Griffin, testified similarly. Griffin has never moved all of his digital video analysis equipment from his offices to another location, but he calculated that such an effort would take more than "several days" each time he was required to disassemble and transport his

⁸ It would be necessary for Owen or any other expert to bring his own equipment because the United States has not offered to provide the requisite equipment in a Government facility for the expert's use. (See Hr'g Tr. 268-69; United States' Resp. in Opp. to Def.'s Post-Hearing Br. Concerning the Constitutionality of 18 U.S.C. § 3509(m) at 22-23.) This is not surprising, because Owen's equipment costs approximately \$350,000. (Hr'g Tr. 167.)

equipment. (Id. at 232.) Like Owen, Griffin testified that he would also have to charge significantly more for his services if he conducted an analysis of child pornography outside his offices in a Government facility, even if transportation of his equipment were possible. (Id. at 235.) Finally, Griffin also testified that, although it might theoretically be possible to bring his own equipment to a Government facility and analyze the child pornography images outside his offices, he would not agree to work on a case like Knellinger's because of the difficulty associated with moving equipment to, and adequately performing his analytical work in, a Government facility. (Id. 242.)

In sum, Knellinger's witnesses established that assessment and presentation of a viable legal defense in Knellinger's case requires expert analysis and testimony, and that qualified experts could not reasonably be expected to agree to conduct the required analysis given the extremely burdensome practical effects of § 3509(m) on the reliable discharge of their obligations. The United States presented no witnesses or other evidence to controvert that offered by Knellinger.

Although the United States put on no evidence of its own, it was able, on cross-examination, to make two salient, but ultimately non-dispositive points: (1) that none of Knellinger's technical witnesses were aware personally of a case in which child pornography had been produced using entirely virtual children; and

(2) that the analysis sought by Knellinger could, in abstract theory, be conducted in a Government facility. The United States therefore argues that Knellinger is pursuing a "fairy tale" defense and that he has not made sufficient efforts to comply with § 3509(m). (United States' Resp. in Opp. to Def's Post-Hearing Br. Concerning the Constitutionality of 18 U.S.C. § 3509(m) ("United States' Resp.") at 5.)

The first point asks the Court to foreclose to Knellinger the opportunity to explore a potentially viable legal defense simply because it is novel. The United States has cited no authority to support the principle that a district court is empowered to intrude into the investigation and preparation of potential defenses in a criminal case at such a preliminary stage and, in so doing, to peremptorily preclude the development of a potential defense.⁹

Moreover, in Ashcroft, the United States argued that "the possibility of producing [child pornography] images by using computer imaging makes it very difficult for it to prosecute those who produce pornography by using real children," and that experts "may have difficulty in saying whether the pictures were made by

⁹ Of course, it always is appropriate for a district court to assess whether requested evidence may be relevant to the case and to the defense thereof when deciding whether the evidence must be made available to the defense. The United States has conceded that point by agreeing to make the hard drive available to Knellinger's counsel before § 3509(m) was enacted. Moreover, the record developed since then shows that the hard drive could form the basis for a viable defense. Neither § 3509(m) nor any other principle of law cited by the United States or known to the Court requires more.

using real children or by using computer imaging." 535 U.S. at 254. The rather obvious implication of that argument, of course, is that improvements in technology may make it increasingly difficult for laymen to distinguish pornography produced with real children from pornography produced with virtual children. Furthermore, the Supreme Court has recognized the potential availability of the defense that Knellinger wishes to develop. Id. at 254-55. And, this record establishes that a respected and competent lawyer has pursued this defense and has had child pornography analyzed by experts in assessing the availability of that defense. For the foregoing reasons and on this record, the Court is loath to foreclose to Knellinger the opportunity to explore the possibility that the child pornography at issue here was produced without the use of real children.¹⁰

As to the second point, the record here establishes that the defense theory being pursued by Knellinger requires a kind of analysis that cannot be conducted feasibly by outside experts in the facility as offered by the United States. Even though, as the United States pointed out, it is theoretically possible for outside experts to transport their equipment to a Government facility and

¹⁰ After Ashcroft, Congress amended its child pornography statutes in a manner that still proscribes certain computer-generated images of child pornography. See 18 U.S.C. 2256(8)(b). As noted above, however, Knellinger is not charged under that definition of child pornography, so Knellinger's proposed "virtual child" defense is viable in this case.

conduct their analyses on-site, the practical reality is that experts would not agree to such terms and that Knellinger ultimately would be prevented from conducting his analysis at all. Considering the testimony from the legal and technical experts in this case and the absence of any opposing evidence, the Court concludes that, at least in this case, the record permits no other factual conclusion.

The United States also argues that Knellinger's request to analyze the child pornography in this case is "disingenuous." (Id. at 3.) The United States argues that Knellinger has not yet hired an expert like Owen or Griffin to conduct the analysis, and that Knellinger has not contacted the United States about conducting such an analysis in a Government facility were an expert like Owen or Griffin hired. (Id. at 3-5.) A simple explanation for this, however, is that, as far as the Court can tell from the record, a reasonable expert would not agree to conduct the analysis required in this case because of the cost and difficulty of moving the necessary equipment to, and adequately providing the appropriate services in, a Government facility. Therefore, it would make sense that Knellinger has not yet hired an expert because Knellinger has not known whether or not he will be given a copy of the child pornography in this case. Moreover, the record provides good reason to conclude that Knellinger is not, as the United States puts it, simply engaging in "litigation for litigation's sake"

because of the great cost associated with conducting the analysis that the evidence shows to be appropriate here. (United States' Resp. at 5.)

Because the United States did not present evidence that contradicts the evidence put forth by Knellinger, and because Knellinger's witnesses were both credible and relevant, the Court accepts the showing made by Knellinger's experts as true. On this record, which includes the evidence from Knellinger's legal and technical expert witnesses, the Court finds that technical expert witnesses are a necessary component of the assessment and presentation of a viable legal defense that is available to Knellinger, and that the United States has not provided Knellinger an ample opportunity for those experts, or counsel in conjunction with the experts, to conduct the required analysis of the child pornography in this case at a Government facility. The Court further concludes that the analysis described by Owen and Griffin at the evidentiary hearing constitutes an "examination" within the plain meaning of 18 U.S.C. § 3509(m)(2).¹¹

Thus, under the terms of § 3509(m), it is necessary to order production of a copy of the hard drive to the defense. Production is necessary to ensure Knellinger an ample opportunity to conduct the examination described by Owen and Griffin at the evidentiary hearing, and to give his counsel an opportunity to participate in

¹¹ To "examine" means "to test by an appropriate method," and an "examination" is "the act or process of examining." Webster's Third New International Dictionary 790 (1961).

that examination in order to evaluate its ramifications for the legal defenses Knellinger might raise.¹²

However, the Court also is mindful that Knellinger has not yet advised that he has retained expert witnesses to examine the copy of the hard drive here at issue. And, the record establishes that a copy of the hard drive is of no use to the defense unless there is a defense expert to examine the copy. Therefore, it would be contrary to the provisions of § 3509(m) to require delivery of a copy of the hard drive unless the defendant promptly advises the Court that it has retained an expert witness for that purpose.

In sum, the statute, § 3509(m), can be given a reasonable construction which avoids the need for a constitutional decision in this case. That construction simply requires the Court to ascertain on the basis of a record whether the statutorily required ample opportunity to examine, view, and inspect the hard drive has been given. If not, the statute permits a copy to be supplied. On this record, the ample opportunity has not been provided, and production of a copy, on certain terms, will be required.

¹² The United States has conceded that “[a]mple opportunity also requires that the defense is able to prepare any exhibits it deems necessary to be used in support of their case.” (See United States’ Resp. at 17.) That issue is not presently before the Court, so a mirror image copy of Knellinger’s hard drive will not be allowed, at this point, to be used by Knellinger’s experts or counsel to produce exhibits. That issue will be taken up, as necessary, at a later time.

CONCLUSION

For the foregoing reasons, Knellinger's motion to dismiss the indictment based on the unconstitutionality of § 18 U.S.C. § 3509(m) (Docket No. 46) is denied. However, because the Court also concludes that the United States cannot provide Knellinger an ample opportunity to inspect, view, and examine the child pornography listed in the Superseding Indictment, the Court, pursuant to 18 U.S.C. § 3509(m) (2), will order a mirror image copy of Knellinger's hard drive provided to Knellinger's counsel and made available to either Tom Owen or James Griffin if counsel for Knellinger certifies to the Court that the copy will be used for the assessment or presentation of a defense as discussed by Owen, Griffin and Sirkin during the evidentiary hearing held on November 6, 2006. Custody and use of that copy will be subject to an appropriate protective order that, inter alia, will punish any distribution or publication not authorized.

The Clerk of the Court is directed to send a copy of this Memorandum Opinion to all counsel of record.

It is so ORDERED.

/s/
Robert E. Payne
United States District Judge

Richmond, Virginia
Date: January 25, 2007

STATE OF ALASKA

DEPARTMENT OF LAW
CRIMINAL DIVISION CENTRAL OFFICE

SEAN PARNELL,
GOVERNOR

Mailing: PO Box 110300
Juneau, AK 99811-0300
Physical: 123 4th Street, Ste 717
Juneau, AK 99801
Phone: (907) 465-3428
Fax: (907) 465-4043

January 19, 2010

Senator Hollis French
Chair, Senate Judiciary Committee
Alaska State Capitol, Room 417
Juneau, Alaska 99801

Re: Senate Bill 222 – relating to sexual offenses
and domestic violence

Dear Senator French:

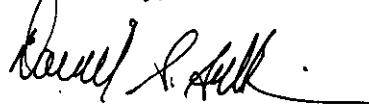
I am writing to respectfully request that you schedule Senate Bill 222 for a hearing in the Senate Judiciary Committee at your earliest convenience. SB 222 is one of several bills that the Governor has introduced to confront and help reduce the alarming and discouraging rate of sex offenses and crimes involving domestic violence in our state.

The bill makes important changes to several criminal laws. For example, it clarifies that accessing child pornography with and intent to view it is a crime. A recent court decision found that our statute requires more than viewing child pornography on a computer to be a crime. The bill responds to this decision. The bill also requires a person to register as a sex offender in our state if they are required to do so in another state. Alaska should not be a friendly destination to persons hoping to avoid sex offender registration by moving to our state.

A sectional analysis is attached that describes each provision of the bill.

Thank you for your consideration of this request.

Sincerely,



Daniel S. Sullivan
Attorney General

DSS:ADC: sf

SENATE BILL 222
SEXUAL ASSAULT AND DOMESTIC VIOLENCE
Sectional Analysis

Sections 1 and 2 correct an error made in 2007 when the legislature enacted AS 11.56.759, that adopted a class A misdemeanor if a sex offender violates specific conditions of probation or parole. One of the requirements of the crime is that the person have served the entire period of incarceration imposed for the crime. This is effective for probationers, but not for parolees, because a person is never on parole if he or she has served the entire period of incarceration. A member of the Parole Board brought this issue to our attention, because the statute has caused problems for the board in dealing with parolees. These sections remove parolees from the statute.

Section 3 rewrites AS 11.56.840, failure to register as a sex offender in the second degree. Although the proposal is similar to current law, it removes the requirement that the state prove a culpable mental state for the conduct of not registering or otherwise filing the required notices and information. The state would still be required to prove that the person knew he or she was required to register and failed to do so. The section also adopts an affirmative defense that unforeseeable circumstances outside the control of the person prevented him or her from registering, and that the person contacted the Department of Public Safety immediately upon being able to do so.

Section 4 would raise a form of harassment in the second degree (that is, with intent to harass or annoy another person, the person subjects the other person to offensive physical contact) to harassment in first degree if the offensive physical contact is by the offender touching the other person's genitals, anus, or female breast. Harassment in the first degree is a class A misdemeanor; the second degree offense is a class B misdemeanor. There have been prosecutions recently involving offensive touchings that occurred so quickly that the court concluded that the victim did not have time to convey lack of consent to the offender. The court reduced these charges from sexual assault to harassment in the second degree. This conduct is more serious than a class B misdemeanor; the bill would raise it to a class A misdemeanor.

Sections 5, 6, and 7 address a problem with Alaska law prohibiting possession of child pornography that was raised by a recent decision of the Alaska Court of Appeals, *Worden v. State*, 213 P.3d 144 (Alaska App. 2009). *Worden* held that our current statute does not prohibit a person from viewing child pornography on a computer; rather, the statute requires that the person must also save it on the computer to be considered to possess it. In response to this decision, the bill adopts the federal approach. It prohibits possession of child pornography, and it also prohibits a person from knowingly accessing child pornography on a computer with the intent to view it.

The bill also proposes an affirmative defense that is similar to federal law. The affirmative defense would address a situation where a person finds child pornography on their computer, and did not obtain it themselves. The defense requires that there are three or less depictions, and the person, without showing the material to another person except law enforcement, destroys the depictions or contacts law enforcement and turns it over to them.

Sections 8, 9, and 10 amend the crime that prohibits the electronic distribution of indecent material to minors by expanding the offense to prohibit any distribution of indecent material to minors.

Section 11 adds the crimes of human trafficking in the first and second degrees, distribution of child pornography, possession of child pornography, and distribution of indecent materials to minors to the crimes that are not eligible for a suspended imposition of sentence.

Section 11 also includes an amendment that removes "substantially" when describing a crime in another jurisdiction that may be a predicate conviction that would disallow the use of a suspended imposition of sentence for other offenses. This conforms with other statutes that require that a predicate offense in another jurisdiction be only similar to an offense in Alaska. Examples include AS 12.55.145(a) (presumptive sentencing), AS 11.41.320(a)(5) (third degree assault), and AS 11.41.110(a)(5) (murder in the second degree).

Section 12 adds to the conditions of probation that may be imposed on a person convicted of a sex offense. It gives the court discretion to order the person to submit e-mail addresses and other networking addresses to his or her probation officer, who would be required to give this information to the Troopers and to the local law enforcement agency. If the person was convicted of sexual abuse of a minor or an offense related to child pornography, it gives the court discretion to prohibit the person from using an Internet site, communicating with children under 16 years of age, or possessing or using a computer.

Section 13 amends the aggravating factor at sentencing that allows the court to increase a sentence above the sentencing range if the defendant knew that the victim was particularly vulnerable. It does this by adding the consumption of alcohol or drugs as factors that might make a victim particularly vulnerable.

Section 14 adds two new aggravating factors to the sentencing law. First, it allows the court to increase a sentence above the sentencing range for a crime against a person (AS 11.41) committed against a person that the defendant was dating or with whom the defendant has engaged in a sexual relationship. Second, it allows the court to increase the sentence if the defendant is convicted of sexual abuse of a minor in the second degree under AS 11.41.436(a)(2) (a person 16 years of age or older having sexual contact with a child under 13 years old), if the defendant is 18 years old or older.

Section 15 adds a new provision to sex offender registration law that requires a person present in Alaska, who is convicted of an offense out of state that requires registration in that jurisdiction, to register in Alaska. This requirement would apply even if Alaska does not have a criminal provision similar to the crime in the other state that requires registration there.

Section 16 amends Rule 16(b)(1)(A) by prohibiting the copying of child pornography as part of the discovery process in a criminal prosecution. It would allow defense counsel, the defendant, and defense experts to examine the material, but it must be kept in the custody and control of a law enforcement agency or the prosecuting authority. Federal law has a similar provision. 18 U.S.C.A. § 3509(m).

Sections 17 and 18 include the applicability and effective date provisions.