



Kansas Bureau of Investigation

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House Judiciary Committee Testimony of Kyle Smith, Deputy Director Kansas Bureau of Investigation

In Support of HB 2464

January 30, 2012

Chairman Kinzer and Members of the Committee,

I appear today on behalf of the Kansas Bureau of Investigation in support of passage of HB 2464 which would help control the spread of contraband, protect child victims from being revictimized and reconcile a serious problem in criminal discovery.

The problem is that sometimes evidence is contraband – items that the very possession of which is a crime. Typically this involves illegal drugs but, tragically and more frequently, the evidence is graphic video, audio and images of young children being molested. In this digital age, the duplication and spread of such images is easy, quick and almost uncontrollable.

While defendants are absolutely and constitutionally entitled to discovery of the evidence against them – to see, and have their experts examine the evidence - they are not entitled to re-victimize the children.

Reproducing contraband, giving it to defendants and risking it being spread further is not only irresponsible, it is a crime under state and federal law - transmitting child pornography. 18 USC Sec 2252 (attached) makes it a felony to distribute these images. While there are affirmative defenses to that law, see subsection (c), use for court by defense attorneys or their experts is not one of them. In fact, the federal sentencing guidelines, sec. 2g2.2, does provide for a two step reduction in the sentence if there is no intent to distribute the image further, but it is still a felony to possess, regardless of intent.

Some defendants argue that a protective order will suffice, but due to the supremacy clause in the United States Constitution, a mere protective order by a state court judge will not nullify these federal statutes. And there are defendants that represent themselves, see attached news article, and giving them copies of the images would indeed re-victimize the children.

Unfortunately on rare occasions some defense attorneys have convinced judges to think that statutes do not apply to them and have ordered more contraband be created and given to

defendants. See the attached news story. On these rare occasions this puts a law enforcement officer and agent in a horrible dilemma: disobeying a court order or a federal law. As exploitation of children through human trafficking and pornography spreads, the need for clarification on this point will just keep growing.

Fortunately, balancing the need of defendants and protecting the victims and avoiding the creation and trafficking in child pornography has been worked out in the federal system. 18 USC Sec. 3509 (m), sets out a tested, practical and legal way for defendants' experts to examine the evidence without compromising the evidence or risking dissemination. SB 73 adopts this same procedure for use in Kansas courts. Essentially the contraband stays in the possession of the law enforcement agency but the defendant is given ample opportunity for inspection, viewing, and examination at a Government facility. The KBI Cyber Crime unit has utilized such a procedure in the past - we will now have it codified for use throughout the state.

I would be happy to answer any questions.

**US CODE TITLE 18 , PART II
CHAPTER 223 § 3509**

(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 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

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Man who admitted to molesting boys allowed to view child porn in Washington jail

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By GENE JOHNSON

The Associated Press

SEATTLE — Authorities in Washington state say they're outraged that a former pilot who's already admitted molesting young boys is being allowed to watch videos he made of the abuse while he sits in jail awaiting trial.

"The whole thing is just dirty," said Pierce County Sheriff's Detective Ed Troyer on Wednesday. "Now that victims know he's going to be watching this, they're going to feel victimized again. This is our call to action to get the law changed."

Washington's Supreme Court ruled in 2007 that upon request, prosecutors must give defense lawyers copies of evidence used to support child pornography charges — but it appears nevertheless rare that defense attorneys actually make that request.

The court's 8-1 decision said that granting copies of the materials was essential so that defense lawyers, their investigators and the defendants themselves could challenge the evidence — such as by arguing that the people depicted weren't really minors.

The high court set out guidelines for handling the material, saying that it should only be shown to defendants under the supervision of counsel, that defense attorneys would be personally liable for any unauthorized distribution, and that the material had to be promptly returned to law enforcement once the case concluded.

But the former pilot, Marc Weldon Gilbert, is representing himself. The judge in his case has allowed him to view the materials at the jail, and issued a ruling this week clarifying how those materials should be handled for security reasons.

The judge barred him from being alone when he reviews the videos and other evidence, set out on more than 100 compact discs.

He reviews them in a room visible to corrections officers with a defense investigator present, Troyer said. The jail requires him to turn his computer screen away from any doors or windows so other inmates don't see.

Gilbert used money, alcohol and manipulation to sexually exploit more than a dozen boys as young as 10 years old. He pleaded guilty in 2009 to federal charges, including sexual exploitation of a child, in exchange for a 25-year sentence. He still faces state charges in Pierce County.

Criminal defendants generally have a constitutional right to see the evidence against them so they can prepare for trial. That's always been a sensitive issue in child pornography cases, where many people are troubled by the notion that perverts might be allowed to continue viewing the illicit material that got them in trouble in the first place.

"We have to disclose when we intend to introduce cocaine in a drug case, but we don't give the defendant a kilo to take home and check out," Pierce County Prosecutor Mark Lindquist said. "It is not necessary for the defendant to view the child porn himself to assist in his defense."

