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**Senate Judiciary Committee**  
Testimony of Kyle Smith, Assistant Attorney General  
Office of Attorney General Derek Schmidt

In Support of SB 73  
February 14, 2011

Chairman Owens and Members of the Committee,

I appear today in support of passage of SB 73 which would help control the spread of contraband 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 pictures 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 see, and have their experts examine, the evidence being presented against them, they are not entitled to revictimize the children. Replicating contraband, giving it to defendants and risking it being spread further is not only irresponsible, it is transmitting child pornography, a crime under state and federal law. Unfortunately some judges think that statutes do not apply to them and have ordered more contraband be created and given to defendants. Sometimes a department is faced with a horrible dilemma of disobeying a court order or a federal law.

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), attached, 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.

Senate Judiciary

2-14-11

Attachment 4

## Federal Prohibition against reproducing child porn for discovery

### 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

*Session of 2011*

### SENATE BILL No. 73

By Committee on Judiciary

1-31

AN ACT concerning criminal procedure; relating to discovery; certain visual depictions; amending K.S.A. 2010 Supp. 22-3212 and repealing the existing section.

*Be it enacted by the Legislature of the State of Kansas:*

K.S.A. 2010 Supp. 22-3212 is Section 1. hereby amended to read as follows: 22-3212. (a) Upon request, the prosecuting attorney shall permit the defendant to inspect and copy or photograph the following, if relevant: (1) Written or recorded statements or confessions made by the defendant, or copies thereof, which are or have been in the possession, custody or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney; (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney; (3) recorded testimony of the defendant before a grand jury or at an inquisition; and (4) memoranda of any oral confession made by the defendant and a list of the witnesses to such confession, the existence of which is known, or by the exercise of due diligence may become known to the prosecuting attorney.

(b) (1) *Except as provided in subsection (j)*, upon request, the prosecuting attorney shall permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies, or portions thereof, which are or have been within the possession, custody or control of the prosecution, and which are material to the case and will not place an unreasonable burden upon the prosecution.

Except as provided in (2) subsections (a)(2) and (a)(4), this section does not authorize the discovery or inspection of reports, memoranda or other internal government documents made by officers in connection with the investigation or prosecution of the case, or of statements made by state witnesses or prospective state witnesses, other than the defendant, except as may be provided by law.

Except as provided in subsection (3) (e), this section does not require the prosecuting attorney to provide unredacted vehicle identification numbers or personal identifiers of persons mentioned in such books, papers or documents.

As used in this subsection, (4) personal identifiers include, but are not limited to, birthdates, social security numbers, taxpayer identification numbers, drivers license numbers, account numbers of active financial accounts, home addresses and personal telephone numbers of any victims or material witnesses.

If the prosecuting attorney does (5) provide the defendant's counsel with unredacted vehicle identification numbers or personal identifiers, the defendant's counsel shall not further disclose the unredacted numbers or identifiers to the defendant or any other person, directly or indirectly, except as authorized by order of the court.

If the prosecuting attorney (6) provides books, papers or documents to the defendant's counsel with vehicle identification numbers or personal identifiers redacted by the prosecuting attorney, the prosecuting attorney shall provide notice to the defendant's counsel that such books, papers or documents had such numbers or identifiers redacted by the prosecuting attorney.

Any redaction of vehicle (7) identification numbers or personal identifiers by the prosecuting attorney shall be by alteration or truncation of such numbers or identifiers and shall not be by removal.

If the defendant seeks discovery (c) and inspection under subsection (a)(2) or subsection (b), the defendant shall permit the attorney for the prosecution to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at any hearing, and which are material to the case and will not place an unreasonable burden on the defense. Except as to scientific or medical reports, this subsection does not authorize the discovery or inspection of reports, memoranda or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by prosecution or defense witnesses, or by prospective prosecution or defense witnesses, to the defendant, the defendant's agents or attorneys.

The prosecuting attorney and the (d) defendant shall cooperate in discovery and reach agreement on the time, place and manner of making the discovery and inspection permitted, so as to avoid the necessity for court intervention.

Upon a sufficient showing the (e) court may at any time order that the discovery or inspection be denied, restricted, enlarged or deferred or make such other order as is appropriate. Upon motion, the court may permit either party to make such showing, in whole or in part, in the form of a written statement to be inspected privately by the court. If the court enters an order granting relief following such a private showing, the entire text of the statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

Discovery under this section must (f) be completed no later than 20 days after arraignment or at such reasonable later time as the court may permit.

If, subsequent to compliance with (g) an order issued pursuant to this section, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under this section, the party shall promptly notify the other party or the party's attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this section or with an order issued pursuant to this section, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

For crimes committed on or after (h) July 1, 1993, the prosecuting attorney shall provide all prior convictions of the defendant known to the prosecuting attorney that would affect the determination of the defendant's criminal history for purposes of sentencing under a presumptive sentencing guidelines system as provided in K.S.A. 21-4701 et seq., and amendments thereto.

The prosecuting attorney and (i) defendant shall be permitted to inspect and copy any juvenile files and records of the defendant for the purpose of discovering and verifying the criminal history of the defendant.

*In any (j) (1) criminal proceeding, any property or material that constitutes a visual depiction, as defined in subsection (a)(2) of section 74 of chapter 136 of the 2010 Session Laws of Kansas, and amendments thereto, shall remain in the care, custody and control of either the prosecution, law enforcement or the court.*

*Notwithstanding (2) subsection (b), if the state makes property or material described in this subsection reasonably available to the defendant, the court shall deny any request by the defendant to copy, photograph, duplicate or otherwise reproduce any such property or material submitted as evidence.*

*For the (3) purpose of this subsection, property or material described in this subsection shall be deemed to be reasonably available to the defendant if the prosecution provides ample opportunity for inspection, viewing and examination of such property or material at a law enforcement facility by the defendant, the defendant's attorney and any individual the defendant may seek to qualify to furnish expert testimony at trial.*

K.S.A. 2010 Supp. 22-3212 Sec. 2. is hereby repealed.