

OFFICE OF THE DISTRICT ATTORNEY
THIRD JUDICIAL DISTRICT OF KANSAS
Chadwick J. Taylor, District Attorney

J. Todd Hiatt, Assistant District Attorney
Shawnee County Courthouse
200 SE 7th Street, Suite 214
Topeka, Kansas 66608

March 2, 2012

To Whom It May Concern:

I am a Senior Assistant District Attorney with the Shawnee County District Attorney's office. I am currently assigned as a division chief in Division 2 where I litigate the major felonies in that division. I also charge and prosecute the majority of our sex crimes.

During my tenure, I have seen several cases where digital media containing suspected child pornography has been seized by law enforcement agencies and submitted for forensic analysis. In some cases, the child pornography consists of pictures found on the internet. In others, the child pornography is made by the local suspect. Sadly, the victims portrayed in these images are not just victims of the sexual abuse and exploitation shown in the images, but they must live with the knowledge these pictures are being copied, reproduced and downloaded all across the world.

Basis for Support of House Bill 2464

The law created by House Bill 2464 creates a framework where discovery of child pornography can be managed safely and responsibly during pending criminal litigation. This framework creates a predictable and reliable process for prosecuting and defending criminal cases involving child pornography in a way that ensures the pornography is not duplicated or unnecessarily disseminated. Simplifying this process and giving everyone a clear guide to managing child pornography will be far more efficient than litigating this issue on a case by case basis.

The process for discovery of child pornography created by House Bill 2464 allows defense counsel and defense experts to inspect, view, or examine the evidence of child pornography so long as the evidence remains in a secure facility. The examination can take as little or as long as required and when necessary can take place in a secure facility at a location that does not unduly burden the defendant or his experts. Finally, on motion and by order of the trial court, the defense experts may be able to secure copies of the evidence if they can show there is no reasonable alternative.

Discovery of evidence of child pornography is frequently the subject of litigation in cases of this type. Because House Bill 2464 is modeled on the Adam Walsh Act, 18 U.S.C. § 3509, there is a substantial body of persuasive case law that addresses many of the concerns and objections of litigants who would seek to obtain child pornography after the enactment of House Bill 2464. Between the framework provided by the proposed and the persuasive case law that

supports it, enactment of House Bill 2464 would bring stability and predictability to criminal discovery of child pornography without encroaching on the Constitutional rights of the accused.

Overview of Child Pornography in Criminal Cases

The typical scenario where child pornography is found establishes that the images are most often used to satisfy the sexual desires of an adult in a discrete, solo experience. However, we also have cases where an adult has used child pornography to groom, prepare, accustom or sexualize the child before the adult engages in sex acts with the children. In these cases, the images used may come from the internet or they may come directly from the perpetrator. The widespread use and ease of digital imaging makes the latter situation more and more common.

Not only are digital images increasingly easier to make, they are now more mobile and more easily copied than ever before. Local law enforcement has found them on cell phones, thumb drives, laptops, and desktop computers – digital media that has ready access to the internet. We have found them in all types of cases, both person and property crimes – sex cases, murder cases, theft cases, and even cases of domestic disturbance.

When law enforcement finds suspected child pornography, they ship the digital media on which the images are stored to a federal facility, Heartland Area Regional Computer Forensic Laboratory (HARCFL), or to a certified State laboratory, for further testing. The media is analyzed by federal agents and reports are generated detailing what was found and the location and nature of any suspect images. The media necessarily remains in the possession of HARCFL or the State lab for the testing process. Once analysis is complete, the media may or may not be returned to the local law enforcement agency that seized it.

HARCFL has strict protocols involving the reproduction of pornographic images and accessibility to such images. Among these protocols, there is a prohibition against distributing illegal images to anyone other than law enforcement. These protocols follow the requirements of the Adam Walsh Act. However, consistent with the Adam Walsh Act and the requirements of due process, HARCFL will allow defense experts to come on-site and perform independent testing of copies of seized hard drives. As a matter of fact, HARCFL will ship such copies to any secure government facility where their protocols against copying and distribution can be ensured.

Case Example

On October 6, 2009, the State of Kansas filed a Complaint alleging one count of rape with a child less than 14 years of age and one count of sexual exploitation of a child. The sexual exploitation charge arises from images of child pornography found on computers seized during the investigation. The allegations of rape and sexual exploitation in this particular case shared a nexus, which allowed the possessory charges and the rape charges to be brought in the same Complaint.

As part of the investigation into these allegations, the Topeka Police Department (TPD) seized several computers from the defendant. These computers were sent to HARCFL for testing. HARCFL began its examinations by making duplicate images of the hard drives. These duplicates were then used for testing and analysis. Once the testing was complete, HARCFL personnel reported their findings and the original hard drives were returned to TPD. HARCFL

also sent TPD CDs containing images suspected to be child pornography as found on the hard drives.

On February 26, 2010, the defendant filed a motion requesting that the Court order the State to turn over copies of the CDs containing child pornography, copies of the hard drives on which the child pornography was found, and copies of the duplicate media HARCFL made in order to do its testing. These copies containing child pornography were to be turned over to a private computer examiner. However, this examiner was not bound by the protocols and oversight provided by the government facility to prevent distribution of child pornography.

On March 30, 2010, the State filed a response in opposition citing the applicability of the Adam Walsh Act to the government facilities and agents in possession of the materials requested, as well as the criminal prohibition found in 18 U.S.C.A. 2252A.

On April 13, 2010, the court ordered that the government should make copies of the digital media containing child pornography and provide these copies to the Court. The Court designated the defendant's counsel, one associate, and one unnamed expert as parties authorized to possess the digital media and when the media was not in the authorized parties' possession it would remain in a locked cabinet accessible only to the Court.

TPD and the FBI refused to comply with the Court's Order maintaining that the Adam Walsh Act, 18 U.S.C.A. § 2552A, as well as public policy required that copies of child pornography should not be distributed outside of law enforcement facilities or within the strict confines of the Court's trial record.

Over the next nine months, the case of child rape and sexual exploitation of a child stalled. The Court held additional hearings where it denied the attempts by TPD to intervene, contemplated holding the State in contempt, and then finally ordered the State to issue subpoenas on behalf of the defendant so that TPD and the FBI could obtain standing to argue their positions before the Court. Those arguments were made and the court determined that since the child pornography was in the possession of local law enforcement, the law enforcement agency would have to turn the child pornography over to the defendant's counsel through the Court. The law enforcement agency made a copy of child pornography and delivered it to the Court. The Court then delivered the child pornography to the defendant's counsel. Once the child pornography left the State's custody, we lost our ability to determine where it went or what happened to it while it was gone. Essentially, the State had released highly mobile, easily reproducible contraband into the community.

This case ultimately ended in a plea. The time between the crimes and formal charges was formidable, but the delay to litigate whether a civilian could lawfully possess child pornography was a fatal blow to the crimes charged. Several weeks after the case was resolved, the Court asked the DA's office to take possession of the child pornography. We refused. It is my understanding that the child pornography was kept in the Court's chambers until local law enforcement took possession from the Court.

Conclusion

Child pornography is ubiquitous. We see it more and more often across all socio-economic groups and we are seeing it stored in more and more places. The bill currently being considered would provide certainty in case of child pornography and would relieve the tension between federal criminal discovery law and state criminal discovery law. Enacting these provisions would eliminate the possibility that law enforcement agencies would take part in distributing child pornography and help ensure that child pornography seized as part of a criminal investigation would not find its way back out to the public. While I understand the defense bar's concerns with the proposed statute, the bill proposed, just like the Adam Walsh Act, adequately addresses such concerns. I would urge passage of the law as written.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Todd Hiatt', with a stylized flourish at the end.

J. Todd Hiatt
Senior Assistant District Attorney

Attachment: Letter to Rep. Lance Kinzer dated February 1, 2012

OFFICE OF THE DISTRICT ATTORNEY
THIRD JUDICIAL DISTRICT OF KANSAS
Chadwick J. Taylor, District Attorney

J. Todd Hiatt, Assistant District Attorney
Shawnee County Courthouse
200 SE 7th Street, Suite 214
Topeka, Kansas 66603

February 1, 2012

Representative Lance Kinzer
Chairman of the House Judiciary Committee
lance.kinzer@house.ks.gov

Representative Kinzer:

At last week's hearing on House Bill 2464, several questions were raised about the language in the bill and its federal counterpart commonly referred to as the Adam Walsh Act. As you may recall, I urged the committee to follow the language in the federal statute because it has been litigated repeatedly in federal court. This litigation has resulted in an interpretation that is clear, concise, and easy to follow. These decisions create powerfully persuasive authority for our own courts in the event the statute appears before our appellate courts.

The questions that were slated for follow-up from research included the similarity of the House Bill and the Adam Walsh Act. I have copied the relevant language from both in the table below.

HOUSE BILL 2464	18 U.S.C.A. § 3509; The Adam Walsh Act
<p>(j) (1) In any criminal proceeding, any property or material that constitutes a visual depiction, as defined in subsection (a)(2) of K.S.A.2011 Supp. 21-5510, and amendments thereto, shall remain in the care, custody and control of either the prosecution, law enforcement or the court.</p> <p>(2) Notwithstanding 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.</p>	<p>(m) Prohibition on reproduction of child pornography.--</p> <p>(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.</p> <p>(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.</p>

(3) For the 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.

(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.

In addition, questions were raised regarding the case law that interprets 18 USC 3509(m). This statute was enacted in July of 2006. Since then, this law has been applied in a variety of district court cases, and it has not been determined to be unconstitutional nor overly restrictive. See *United States v. O'Rourke*, 470 F.Supp.2d 1049 (D.Ariz.2007); *United States v. Knellinger*, 471 F.Supp.2d 640 (E.D.Va.2007); *United States v. Spivack*, 528 F.Supp.2d 103, 108 (E.D.N.Y. 2007); *United States v. Renshaw*, 2007 WL 710239 (S.D.Ohio 2007); *United States v. Doane*, 501 F.Supp.2d 897 (E.D.Ky.2007); *United States v. Sturm*, 560 F.Supp.2d 1021 (D.Colo.2007); *United States v. Battaglia*, 2007 WL 1831108 (N.D.Oh.2007); *United States v. Flinn*, 521 F.Supp.2d 1097 (E.D.Cal.,2007). It has been addressed as recently as March 2010 within the District of Kansas in *United States v. Bortnick*, 2010 WL 935842 (D.Kan 2010). All of these cases determined that § 3509(m) was consistent with due process. It only follows that using the same language in our version will be consistent with due process as well.

Thank you for your consideration. I hope this information assists you in evaluating House Bill 2464. If I can be of any further assistance, please let me know.

Sincerely,

/s/ Todd Hiatt

J. Todd Hiatt
Assistant District Attorney