



Kansas Bureau of Investigation

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Senate Judiciary Committee

Testimony of Kyle Smith, Assistant Attorney General
Deputy Director, Kansas Bureau of Investigation
In Support of HB 2464
March 5, 2012

Chairman Owens 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 re-victimized 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.

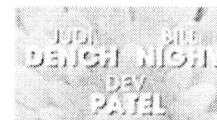
Reproducing contraband, giving it to defendants and risking it being spread further is not only irresponsible, it is a crime under state and federal law - transmitting child pornography. 18 USC Sec 2252 (attached) makes it a felony to distribute these images. While there are affirmative defenses to that 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.



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July 31, 2011

Furor Over Giving Rape Suspect Explicit Tapes

By KATHARINE Q. SEELYE

TACOMA, Wash. — When Weldon Marc Gilbert was a wealthy jet pilot, prosecutors say, he spent much of his time and money manipulating young boys. He used his high-priced toys, including a sea plane, a helicopter and a boat, to lure them, they say, then molested them and beat them. He captured much of the sexually explicit action with his video camera.

Mr. Gilbert created more than 100 videos of the boys, sometimes turning the camera on himself. In 2009, he pleaded guilty in federal court to 31 counts of producing child pornography involving 17 victims and was sentenced to 25 years in prison.

While Mr. Gilbert sits in jail here, he is preparing for another trial next month, this time on state charges of rape and molestation. In this case, he is acting as his own lawyer. And as such, he is allowed to review the evidence against him — including the pornographic videos — and watch them as often as he likes. Restricting his access could result in a mistrial.

Local law enforcement officials are furious, but there is not much they can do about it.

“It’s absurd and maddening,” said Mark Lindquist, the prosecutor for Pierce County, which includes Tacoma, where the state trial is to begin Sept. 19. While defendants normally can view evidence against them, Mr. Lindquist said, they are not usually allowed to possess it, particularly when it is contraband like pornography.

“Defense attorneys typically ask to see some portion of the pornography that will be used as evidence, review a nominal amount of it and leave,” Mr. Lindquist said. “I have never had a case where a defense attorney wanted to possess the pornography. We don’t turn cocaine over to defendants for them to personally check out.”

After a local television station, KOMO, reported the situation last month, there was a public protest at the jail here where Mr. Gilbert is being held. Many state legislators have vowed to change the law but they cannot do so in time to affect Mr. Gilbert's case. Mr. Lindquist said his office would draft language that would "pass constitutional muster," though he expects challenges from defense lawyers concerned about the rights of defendants.

Unlike most inmates, who follow their lawyers' advice not to discuss their cases with the news media, Mr. Gilbert, 50, who flew for U.P.S., is speaking out from behind bars.

He sent a four-page handwritten letter to Mr. Lindquist early last month, denouncing him and others for stirring up the outcry against him. He blamed officials for giving the public the impression that he was reviewing the tapes for his own prurient interests and noted that this was "ludicrous" since he had to look at them in a separate room monitored by corrections officers and with his private investigator present.

He told Mr. Lindquist to drop the charges because he was not guilty. He also suggested that Mr. Lindquist was pursuing the case for his own political advantage.

"Who, beside yourself, benefits from the second round of prosecution?" Mr. Gilbert asked.

In response, Mr. Lindquist said he did not give "a free pass" to criminals just because they were already serving time.

Then last week, Mr. Gilbert gave a jailhouse interview to KOMO, demonstrating, perhaps, why most lawyers tell their clients to stay silent.

"This whole issue should have never happened," Mr. Gilbert told KOMO. "I caused it. I'm guilty of it. I truly wish I could have taken it back. What I saw is a lot of fun, reliving the teenage years, absolutely loving my time around these young men."

But, he added, "Wrong behavior, shameful behavior is not necessarily the same as illegal behavior that deserves a life prison sentence."

Federal prosecutors have described Mr. Gilbert, who lived in an expensive house in Lake Tapps, just east of Tacoma, as a "master manipulator" who would groom his victims to gain their trust before abusing them.

"Gilbert saw each of the dozens of boys that he sexually abused as sex objects he could obtain by

giving them things,” federal prosecutors wrote a few years ago. He gave them money, cellphones, flying lessons, trips overseas, strippers and alcohol, they said — even help with their homework.

“His sexual sadism and his fascination with boys was the center of his life,” they wrote.

John Henry Browne, a lawyer from Seattle who represented Mr. Gilbert on the federal charges and helped arrange the deal under which Mr. Gilbert pleaded guilty, is acting as standby counsel in the state case. He said in an interview that Mr. Gilbert was exercising his constitutional rights and that they should be protected.

Mr. Browne also said that he — and Mr. Gilbert — had watched the videos a few years ago in preparing for the federal case. He said 90 percent of them were “silly” and described them as “birthday spankings.” The remaining 10 percent, he said, were “problematic.”

A Pierce County Superior Court judge has ruled that in any pretrial interviews Mr. Gilbert cannot directly ask questions of the young men involved, some of whom were under 16, the age of consent, at the time of the episodes, which began in 2001. Mr. Lindquist is asking that during the trial Mr. Gilbert be barred from directly cross-examining them on the witness stand.

But Mr. Gilbert argued in his television interview that he would be more sensitive in his questioning than anyone else because he knew the young men.

“The last thing I want to do is embarrass and humiliate them,” he said.