

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

UNITED STATES OF AMERICA,

v.

Case No. 3:06CR126

DAVID LEROY KNELLINGER,
Defendant.

**BRIEF AMICUS CURIAE OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

COMES NOW the National Association of Criminal Defense Lawyers as *amicus curiae* in response to the Court's Order of September 18, 2006, and submits that 18 U.S.C. § 3509(m) violates the Fifth and Sixth Amendments of the Constitution of the United States.

I. Introduction

Congress recently enacted legislation that restricts a criminal defendant's access to evidence relevant to his or her defense in child pornography prosecutions:

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 [18 USCS § 2256]) 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* [18 USCS § 2256]), 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) (2006).

For our adversarial system to function properly, a criminal defendant must have a full and fair opportunity to develop and present evidence at trial. Due process and the Sixth Amendment secure these rights. Section 3509(m) affords a false promise of access to evidence by arbitrarily restricting the defendant's ability to analyze relevant evidence for effective use at trial. This restriction is unequal in application in that it limits only the defendant's, but not the government's, access to evidence. Furthermore, § 3509(m) does not proportionately serve the government's interest, and, even if it did, the government's interest does not override the defendant's constitutional right to develop the evidence. Accordingly, § 3509(m) violates the Sixth Amendment and due process.

II. Argument

A. Section 3509(m) infringes upon a criminal defendant's ability to prepare effectively for trial in violation of the Sixth Amendment.

The Sixth Amendment provides, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI. Section 3509(m) impermissibly impinges upon each of these rights.

1. The Confrontation Clause and the Compulsory Process Clause guarantee effective cross-examination and presentation of evidence.

The primary interest secured by the Confrontation Clause is the right to cross-examination. *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987). A “rule that precludes a defendant from access to information before trial may hinder that defendant’s opportunity for *effective* cross-examination at trial, and . . . such a rule equally may violate the Confrontation Clause.” *Id.* at 738 n.9 (Blackmun, J.) (writing for the majority, but expressing “the personal view of the author of this opinion”). The Compulsory Process Clause mandates that “criminal defendants

have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987).

In the context of analyzing child pornography for preparation of a defense to criminal prosecution, which often requires counsel to collaborate with an expert, these clauses serve similar functions. The Confrontation Clause guarantees effective cross-examination of a witness, in this case likely the government's expert. To make this right effective, a defense team must have unfettered access to images, whether exculpatory or inculpatory. The Compulsory Process Clause guarantees a defendant the right to present testimony effectively in his or her defense. This right also necessitates unfettered analysis so that an expert, counsel, or the defendant may offer the fruits of the analysis as evidence at trial. Section 3509(m) runs afoul of these provisions by restricting the defendant's right to prepare his or her defense so as to conduct effective cross-examination and present testimony effectively.

A central issue in many prosecutions for possession of child pornography will focus on whether the image meets the definition for "child pornography," *see* 18 U.S.C. § 2256, or whether it is speech protected under the First Amendment, *see Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256 (2002). Expert analysis, by the government and the defense, is crucial to this determination. *See United States v. Cadet*, 423 F. Supp. 2d 1, 4 (E.D.N.Y. 2006); *United States v. Aldeen*, No. 06CR31, 2006 U.S. Dist. LEXIS 24372, at *9-10 (E.D.N.Y. Mar. 22, 2006). Indeed, whether an image is "child pornography" is one of the elements of the government's case. Expert forensic analysis is also essential to determine other questions as to guilt and sentencing, including when the images were downloaded, how they were stored, and if, when, and by whom an image was viewed. *See United States v. Hill*, 322 F. Supp. 2d 1081,

1091-92 (C.D. Cal. 2004). This analysis may require review of and cross-referencing multiple images. Without an opportunity for meaningful discussion between the expert, counsel, and defendant, a comprehensive defense incorporating the expert's findings and the defendant's recollection of events is precluded. Section 3509(m)'s limitation on copying evidence restricts this crucial collaboration, especially where a defendant is incarcerated or, even more problematic, incarcerated and *pro se*.

The ability of the defense to develop expert testimony on these issues goes to the heart of the Sixth Amendment's protections. "[T]he Confrontation Clause's very mission [is] to advance 'the accuracy of the truth-determining process in criminal trials.'" *Tennessee v. Street*, 471 U.S. 409, 415 (1985) (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970)). The Compulsory Process Clause also promotes the search for truth: As an integral part of compulsory process, "[d]iscovery, like cross-examination, minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony." *Taylor v. Illinois*, 484 U.S. 400, 411-12 (1988). Section 3509(m) inhibits the defendant's ability to present evidence on his or her behalf and to prepare effective cross-examination of the prosecution's expert or other witnesses, thereby derailing the search for truth.

Moreover, preventing defense counsel or an expert from possessing a copy of alleged child pornography imposes an undue burden on counsel's preparation of a defense. *See Cadet*, 423 F. Supp. 2d at 3-4; *Aldeen*, 2006 U.S. Dist. LEXIS 24372 at *11-12; *United States v. Frabizio*, 341 F. Supp. 2d 47, 49 (D. Mass. 2004); *Hill*, 322 F. Supp. 2d at 1092. *But see United States v. Flyer*, No. CR05-1049, 2006 U.S. Dist. LEXIS 67958, at *13-15 (D. Ariz. May 26, 2006); *United States v. Husband*, 246 F. Supp. 2d 467, 469 (E.D. Va. 2003). A defendant's computer hard drive may contain thousands of images. Analyzing the images can take days.

Even where only a few images are at issue, an expert for the defense may have to analyze the methodology employed by the government's expert. Without further restrictions, the analysis is a substantial undertaking. Where every time the defense seeks to analyze the evidence, the expert, defense counsel, and the defendant, if he or she is able, must obtain the government's permission, travel to a government facility, and transport any necessary equipment, the burden is onerous.¹ To conduct a forensic analysis, an expert may require computers, computer programs, operating systems, and other tools. Additionally, an expert is likely to encounter greater operational difficulties in an unfamiliar setting that he or she could otherwise readily remedy in his or her usual office or laboratory. Even if the expert were familiar with the government's forensic equipment and the equipment was adequate, using it is not an option because of the potential to compromise work-product. These obstacles imposed by § 3509(m) interfere with a defendant's preparation and presentation of a defense; however, because § 3509(m) does not limit the government's access, it is no impediment to the government's preparation of its case.

The Compulsory Process Clause enshrines “the principle that the defendant must have a meaningful opportunity, at least as advantageous as that possessed by the prosecution, to establish the essential elements of his case.” *Taylor*, 484 U.S. at 408 n.13 (quoting Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 94-95 (1974)). Section 3509(m), however, codifies unequal opportunity. The restriction is one imposed by the government to which the government itself is not subjected. When the government retains sole custody of relevant evidence, the defendant's right to develop and present testimony and other evidence in his or her defense is compromised.

¹ The case *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995), is inapposite. Quite simply, § 3509(m) precludes the government's offer in that case to bring the alleged child pornography to defense counsel's office.

While § 3509(m) does not prevent a defendant from calling an expert to testify on his or her behalf at trial, it limits counsel's opportunity to prepare testimony effectively. That the restriction is one of degree does not diminish the erosion of a defendant's constitutional rights.

As the Supreme Court has explained:

The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Taylor, 484 U.S. at 408-09 (quoting *United States v. Nixon*, 418 U.S. 683, 709 (1974)). By restricting a defendant's access to evidence, § 3509(m) inhibits the right to prepare effective cross-examination and testimony in violation of the Confrontation and Compulsory Process Clauses.

2. Section 3509(m) impermissibly restricts counsel's ability to provide effective assistance.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court held that a criminal defendant is entitled to effective representation that is reasonable under the circumstances of the case. *Id.* at 688. This right guarantees that counsel will investigate and develop evidence in preparation for trial. *Id.* at 690-91. As discussed *supra*, Sec. II.A.1., § 3509(m) places an undue burden on the defendant's right to prepare a defense effectively. This impinges counsel's ability to provide effective assistance. Without a copy of the evidence, collaboration between counsel, an expert, and a defendant is hindered. If required on a frequent basis, on short notice, or after normal working hours, meaningful consultation where counsel and an expert can reference the images is precluded. Moreover, development of trial strategy in a government facility or using

government equipment to analyze the images unnecessarily risks disclosure of privileged work-product. See *United States v. Horn*, 811 F. Supp. 739, 745-46 (D.N.H. 1992) (holding that where defense culled a few documents for copying out of thousands held in the government's possession, the government's surreptitious duplication and retention of an additional copy of those few documents requested by the defense violated work-product privilege), *rev'd on other grounds*, 29 F.3d 754 (1st Cir. 1994) (noting that the prosecutor's copying of defense discovery was egregious misconduct, and reversing district court's award of attorneys' fees against the government). Thus, § 3509(m) constrains counsel's ability to provide an effective defense.

As recognized by Supreme Court jurisprudence, the rights secured by the Sixth Amendment entitle the defendant to present a case effectively. The restrictions imposed by § 3509(m) emasculate these rights.

B. Section 3509(m) imposes an arbitrary and unequal restriction on a defendant's access to relevant evidence in violation of Due Process.

The Due Process Clause of the Fifth Amendment ensures that the federal government will not deprive an individual of his or her liberty without due process. U.S. Const. amend. V. The rights secured by the Due Process Clause are broader than the rights provided for in the Compulsory Process or Confrontation Clauses. See *Ritchie*, 480 U.S. at 56 (majority opinion); *Love v. Johnson*, 57 F.3d 1305, 1312 (4th Cir. 1995). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). At a minimum, "the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." *Ritchie*, 480 U.S. at 57; *accord Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Where the defendant seeks to possess and analyze evidence that is contraband, various government interests may compete with the defendant's constitutional rights. However, "[i]n our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations." *Dennis v. United States*, 384 U.S. 855, 873 (1966).

Section 3509(m) imposes an absolute prohibition on copying alleged child pornography for use in criminal defense. It further prohibits analysis of alleged child pornography in any location other than a government facility, be it a Federal Public Defender's Office or an expert's laboratory. The government, however, retains unlimited access to the evidence. This distinction is unjustified.

In analogous cases, courts have found that a defendant is entitled to disclosure and possession of privileged material or contraband for analysis and use in the defense. In *Ritchie*, the Court held that, under due process, the defendant's right to obtain exculpatory information from a child abuse report overrode the state's strong interests in shielding the vulnerable child victim and avoiding disclosure that would discourage other victims from reporting abuse. *Id.* 480 U.S. at 60-61; *see also Love*, 57 F.3d at 1315-16 (adhering to *Ritchie* on a factually identical case). As to the statute before this Court, the government's interest, even if it were appropriately tailored, is no greater than the government's interest in *Ritchie*.

In a prosecution for distribution of narcotics, due process provides a defendant a right to independent analysis of the contraband. *United States v. Noel*, 708 F. Supp. 177, 178 (W.D. Tenn. 1989). Analysis of a narcotic is a relatively rudimentary task to determine the nature and weight of the substance. *See Hill*, 322 F. Supp. 2d at 1091. Once a lab technician has prepared a

report, the defendant and his or her counsel need not refer back to the sample in preparing their case. Conversely, analysis of images of child pornography often requires a multifaceted analysis of the nature of the images, how they were stored, and whether and by whom they were viewed. *See supra*, Sec. II.A.1. The complexity of this analysis requires greater, not lesser access.

Attempting to justify the restrictions created by § 3509(m), the government asserts that duplication of child pornography continues and exacerbates the harm wrought upon the victim child. The Supreme Court has recognized the legitimacy of this interest. *See Ashcroft*, 535 U.S. at 249. As demonstrated in *Ritchie*, *Noel*, and *Smith*, it does not follow, however, that § 3509(m) serves this interest or, even if it did, that it is proportionate considering the limitation it places on the defendant's constitutional rights. "Restrictions on a criminal defendant's rights to confront adverse witnesses and to present evidence 'may not be arbitrary or disproportionate to the purposes they are designed to serve.'" *Michigan v. Lucas*, 500 U.S. 145, 151 (1991) (quoting *Rock v. Arkansas*, 483 U.S. 44, 56 (1987)).

A defendant has a legitimate interest conferred by the Constitution in unfettered access to evidence necessary to prepare an effective defense. Nothing indicates that a defense attorney, as an officer of the court, or an expert cannot be trusted to protect a copy of child pornography from dissemination. *See Cadet*, 423 F. Supp. 2d at 3-4; *Hill*, 322 F. Supp. 2d at 1092. As an additional disincentive, such dissemination could violate federal or state law as well as any protective order that a court deems appropriate. Neither using evidence of child pornography to prepare for trial nor offering it into evidence at trial constitutes the sort of harmful dissemination that could serve the government's interest. Furthermore, § 3509(m) inhibits only the defendant, not the government. Because § 3509(m) is arbitrary and disproportionate, it violates due process.

III. Conclusion

Based on the foregoing reasons, *amicus* counsel respectfully submit that § 3509(m) violates the Fifth and Sixth Amendments.

Respectfully submitted,

National Association of Criminal Defense Lawyers

By: _____
Counsel

Joel C. Hoppe (VSB# 48395)
Spotts Fain PC
411 E. Franklin St., Suite 600
P.O. Box 1555
Richmond, VA 23218-1555
(804) 697-2000
(804) 697-2100 (facsimile)

Barbara E. Bergman
Professor of Law
University of New Mexico School of Law
1117 Stanford, N.E.
Albuquerque, N.M. 87131
(505) 277-3304
Amicus counsel for the National Association of
Criminal Defense Lawyers

Certificate of Service

I hereby certify that a copy of the foregoing *Amicus* Brief was mailed on this 19th day of October, 2006 to the following:

Brian Hood
Assistant United States Attorney
600 E. Main St., Suite 1800
Richmond, VA 23219

Matthew Nelson
Assistant Attorney General

900 E. Main St.
Richmond, VA 23219

Alexandra R. Gelber
Trial Attorney, Child Exploitation and Obscenity Section
U.S. Department of Justice
1400 New York Ave., NW, Suite 600
Washington, DC 20005

Ian N. Friedman
Ian N. Friedman & Associates
Hoyte Block Building
700 W. St. Clair Ave., Suite 110
Cleveland, OH 44113

Dean Boland, Esq.
18123 Sloane Ave.
Lakewood, OH 44107

Christopher Collins
304 E. Main St.
Richmond, VA 23219

Joel C. Hoppe