

# THE ADAM WALSH CHILD PROTECTION AND SAFETY ACT OF 2006: A VIOLATION OF THE CRIMINAL DEFENDANT'S SIXTH AMENDMENT RIGHTS TO CONFRONTATION AND COMPULSORY PROCESS

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## I. INTRODUCTION

On the anniversary of the abduction of Adam Walsh,<sup>1</sup> President George W. Bush signed the Adam Walsh Child Protection and Safety Act on July 27, 2006 (Adam Walsh Act). One of its more well-known purposes is to create a National Sex Offender Registry by incorporating data from state sex-offender registration systems.<sup>2</sup> A lesser-known purpose of the Adam Walsh Act, and the subject of this Article, is set forth in Title 18 Section 3509(m).<sup>3</sup> This Section states that the government must remain

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\* © 2008, Elizabeth C. Wood. All rights reserved. Assistant Editor, *Stetson Law Review*. B.S.B.A., University of Florida, 2004. J.D./M.B.A. Candidate, Stetson University College of Law, 2008. I would like to thank Jack King of the National Association of Criminal Defense Lawyers and Associate Dean Ellen Podgor for bringing my attention to this topic. I would also like to acknowledge the National Association of Criminal Defense Lawyers' (NACDL) *amicus curiae* brief submitted to the Eastern District of Virginia in *United States v. Knellinger*, which served as a starting point for this Article.

1. Adam Walsh was the son of John Walsh, host of the television program *America's Most Wanted*. America's Most Wanted, *About John Walsh*, [http://www.amw.com/about\\_amw/john\\_walsh.cfm](http://www.amw.com/about_amw/john_walsh.cfm) (accessed Mar. 26, 2008). Adam is believed to have been abducted by a convicted serial killer from a mall in Hollywood, Florida. America's Most Wanted, *Fugitive File for Adam Walsh Killer*, <http://www.amw.com/fugitives/case.cfm?id=39789> (last updated Aug. 14, 2007). Authorities found his remains two weeks after the abduction. *Id.* After the tragedy, John and his wife became advocates for legislation to find missing children, and they co-founded the National Center for Missing and Exploited Children. *About John Walsh*, *supra* n. 1.

2. 42 U.S.C. § 16919 (West Supp. 2007). This statute mandates that the Attorney General must maintain a national database, entitled the National Sex Offender Registry, at the FBI, listing all sex offenders and anyone else required to register in a state's sex-offender registry. *Id.* at § 16919(a).

3. 18 U.S.C.A. § 3509(m) (West Supp. 2007).

in possession of child pornography seized in connection with the offense, and the court can deny a defendant's request for duplicating the evidence "so long as the Government makes the property or material reasonably available to the defendant."<sup>4</sup>

Because most of today's child-pornography crimes occur through computers, computer-forensic-expert analysis is crucial to both the prosecution and the defense.<sup>5</sup> Consequently, the limitations in Section 3509(m) make it more difficult for experts for the defendant to develop a defense, and they discourage experts from working for defendants.<sup>6</sup>

Given the novelty of the Adam Walsh Act, few cases have addressed the constitutionality of Section 3509(m),<sup>7</sup> but the issue of whether a court should allow a defendant to have copies of child-pornography evidence is not new. Prior to the enactment of Section 3509(m), defendants argued that they were entitled to the evidence through Rule 16 of the Federal Rules of Criminal Proce-

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4. *Id.* Entitled "Prohibition on Reproduction of Child Pornography," Section 3509(m) says in its entirety:

- (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.

5. Expert witnesses are also important for determining whether the depicted child is real or virtual, an element that the government must prove to obtain a conviction in accordance with *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 254 (2002). For a discussion on *Ashcroft*, see *infra* notes 26–30 and accompanying text.

6. See *infra* nn. 109–113 and accompanying text (discussing the relatively small amount of funding provided by the court for paying an expert, combined with the necessity of viewing the material only in government-controlled locations, which places a heavy burden on any defendant's experts and likely contributes, along with the stigma of such cases, to make it difficult for a defendant to hire a computer-forensics expert).

7. See *infra* pt. III(C) (reviewing the cases that have interpreted Section 3509(m)).

ture or the Fifth and Sixth Amendments of the United States Constitution.<sup>8</sup>

Without a doubt, child pornography is a heinous crime, and the victims have a valid interest in stopping the further dissemination of the pornography.<sup>9</sup> On the other hand, a defendant charged with child pornography, facing the possibility of losing his freedom and liberty, also has a valid interest deserving equal attention.<sup>10</sup> Therefore, the purpose of this Article is to conduct an objective examination of Section 3509(m), balancing both the victim's and the accused's interests. Specifically, this Article argues that the Constitution guarantees a fair trial and defines the basic elements of a fair trial partially through the Sixth Amendment's Confrontation and Compulsory Process Clauses.<sup>11</sup> By limiting the defense counsel's access to child-pornography evidence and creating hurdles for employing forensic experts, Section 3509(m) hinders a defendant's Sixth Amendment rights to examine witnesses and offer testimony, therefore jeopardizing his constitutional right to a fair trial.

Part II of this Article sets forth the historical background, which includes the development of child-pornography legislation and cases leading up to the Adam Walsh Act. Part III evaluates the current state of child-pornography law by reviewing Section 3509(m) and the way courts have interpreted it thus far. Part IV argues that by not allowing the defense to have a copy of the child-pornography evidence, Section 3509(m) violates a defendant's rights to confrontation and compulsory process. Finally, Part V proposes that the best way to remedy Section 3509(m)'s constitutional problems is to allow the defendant to use Rule 16 of the Federal Rules of Criminal Procedure to obtain copies of the child-pornography materials.

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8. For a review of these cases, see *infra* Part II(B).

9. See *N.Y. v. Ferber*, 458 U.S. 747, 759 (1982) (discussing how the pornography is a permanent record of the child's abuse and how circulating the pornography further exacerbates the harm to the child).

10. A criminal defendant faces up to twenty years for each count of possessing, receiving, or transporting child pornography. 18 U.S.C. § 2252A(b)(1) (2006).

11. The Sixth Amendment's Assistance of Counsel Clause is also considered an element needed for fair trial. *In re Oliver*, 333 U.S. 257, 273 (1948). However, this Article will focus on only the Confrontation Clause and the Compulsory Process Clause.

## II. DEVELOPMENT OF CHILD-PORNOGRAPHY LAW

In order to understand how Section 3509(m) transpired, it is necessary to examine two areas. The first area is Congress' approach to child-pornography legislation and how the Supreme Court interpreted that legislation. The second area involves the court's previous management of discovery issues in child-pornography cases prior to the Adam Walsh Act.

### A. Development of Child-Pornography Legislation

Federal laws prohibiting child pornography are relatively recent. Congress did not pass the first statute until 1977.<sup>12</sup> Prior to the first statute's enactment, the availability of child pornography had increased due to the relaxed censorship standards of the 1960s.<sup>13</sup> However, by the late 1970s, public concern over the extent of child pornography spurred legislatures to act.<sup>14</sup> Among other things, the statute prohibited the manufacturing or "commercial distribution of obscene material involving" children under the age of sixteen, and it eliminated the open availability of child pornography in adult stores.<sup>15</sup>

In 1982, the Supreme Court ruled on a case that thereafter formed the constitutional basis for all child-pornography legislation. In *New York v. Ferber*,<sup>16</sup> the Court held that the First Amendment did not protect child pornography that depicted actual children, but it did protect images of child pornography not involving real children.<sup>17</sup>

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12. The statute was called the "Protection of Children from Sexual Exploitation Act of 1977." Pub. L. No. 95-225, § 1, 92 Stat. 7 (1978) (codified as 18 U.S.C. §§ 2251–2252). This statute established Chapter 110 in Title 18 U.S.C., which is entitled "Sexual Exploitation of Children." *Id.*

13. Over 250 child-pornography magazines were circulated around the country at that time. See Richard Wortley & Stephen Smallbone, *Child Pornography on the Internet*, 41 Problem-Oriented Guides for Police, Problem-Specific Guides Series No. 1, 1 (2006) (available at <http://www.cops.usdoj.gov/mime/open.pdf?Item=1729>) (discussing the history of child pornography).

14. *Id.*

15. Philip Jenkins, *Beyond Tolerance: Child Pornography on the Internet* 35 (N.Y.U. Press 2001).

16. 458 U.S. 747 (1982).

17. *Id.* at 765. *Ferber* recognized the distinction between actual and virtual child pornography by discussing how people over the statutory age who look young may permissibly be used in lieu of actual children for literary or artistic performances. See *Ashcroft*, 535

With the advent of the Internet in the mid 1980s, child-pornography legislation began addressing computer use and child pornography.<sup>18</sup> In 1988, Congress passed the Child Protection and Obscenity Enforcement Act.<sup>19</sup> This Act made it illegal to use a computer to transmit child-pornography images.<sup>20</sup> As computer technology and the Internet became increasingly accessible, child pornography began depicting images of virtual children.<sup>21</sup> Congress became concerned with the government's inability to prosecute child pornographers who possessed virtual child pornography.<sup>22</sup> In 1996, it passed the Child Pornography Prevention Act,<sup>23</sup> which expanded the definition of child pornography to include sexually explicit material that depicts persons who appear to be minors and material that conveys the impression that it depicts a minor.<sup>24</sup> These provisions criminalized material that did not fit within the traditional definition of child pornography, which allowed federal prosecutors to convict defendants without having to prove that the images depicted actual children.<sup>25</sup>

In *Ashcroft v. Free Speech Coalition*,<sup>26</sup> the Supreme Court had the opportunity to review the Child Pornography Prevention Act when the Free Speech Coalition challenged its constitutionality.<sup>27</sup> The Court held that the "appears to be" and "conveys the impression" language in the statute were unconstitutionally overbroad.<sup>28</sup>

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U.S. at 251 (discussing the language in *Ferber*, 458 U.S. at 763, that led *Ashcroft* to make that conclusion). Apparently, during the era of *Ferber*, which was prior to the advent of computers, "virtual" meant child pornography that depicted adults who looked like children rather than computer-generated images.

18. Wortley & Smallbone, *supra* n. 13, at 1.

19. 18 U.S.C. §§ 2251–2260A.

20. *Id.*

21. Virtual images are completely generated by a computer without the use of real children. Monique Mattei Ferraro & Eoghan Casey, *Investigating Child Exploitation and Pornography: The Internet, the Law, and Forensic Science* 237 (Mark Listewnik, Jennifer Soucy & Pamela Chester eds., Elsevier Academic Press 2005).

22. See *Ashcroft*, 535 U.S. at 242 (discussing congressional findings that as imaging technology improved, it became more difficult to prove that a picture was produced using actual children).

23. 18 U.S.C. § 2256(8)(B), (D).

24. *Id.*

25. John P. Feldmeier, *Close Enough for Government Work: An Examination of Congressional Efforts to Reduce the Government's Burden of Proof in Child Pornography Cases*, 30 N. Ky. L. Rev. 205, 211 (2003).

26. 535 U.S. 234 (2002).

27. *Id.* at 234.

28. *Id.* at 256.

The Court reaffirmed that the First Amendment protects non-obscene sexual expression that does not portray actual children.<sup>29</sup> The Court emphasized the danger to First Amendment freedoms when laws are enacted that seek to control thought because “[t]he right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.”<sup>30</sup> As a result of *Ashcroft*, prosecutors must prove that the alleged child pornography depicts an actual, minor child.<sup>31</sup>

In 2003, Congress again attempted to address the challenges that federal prosecutors faced due to technological advances by passing the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (PROTECT Act).<sup>32</sup> The first provision defines child pornography as a visual depiction that “is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaged in sexually explicit conduct.”<sup>33</sup> The second provision bans child pornography that depicts an actual minor or image that appears to be a minor engaging in sexual activity.<sup>34</sup> Further, this provision provides that a prosecutor is not required to show as a requisite element that the “minor depicted actually exist[s].”<sup>35</sup> The Supreme Court has yet to review the PROTECT Act, but one commentator believes it will share the same fate as the Child Pornography Prevention Act of 1996 because the two provisions have similarly reduced the government’s burden of proof by expanding the definition of child pornography.<sup>36</sup>

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29. *Id.* at 251 (discussing *Ferber*’s holding that the First Amendment protects speech that is neither obscene nor the product of child abuse); *see supra* n. 17 (discussing the distinction made in *Ferber* between actual and virtual pornography).

30. *Id.* at 253. This reasoning was in response to the government’s argument that child pornography “whets the appetites of pedophiles and encourages them to engage in illegal conduct.” *Id.* The Court said this rationale could not sustain the provision because the mere tendency of speech to encourage an unlawful act is insufficient for banning it. *Id.*

31. Ferraro & Casey, *supra* n. 21, at 282.

32. 18 U.S.C. § 2252A(c).

33. *Id.* at § 2256(8)(B).

34. *Id.* at § 1466A(b)(2)(A).

35. *Id.* at § 1446A(c).

36. Feldmeier, *supra* n. 25, at 216–220 (arguing that the expanded definition of child pornography in the PROTECT Act is similar to the language that the Supreme Court struck down in *Ashcroft*).

## B. Cases prior to the Adam Walsh Act

Before the Adam Walsh Act, defendants could move to obtain copies of the child-pornography evidence under Rule 16 of the Federal Rules of Criminal Procedure.<sup>37</sup> Some courts would grant the motions while other courts would not.<sup>38</sup> The Fifth Circuit in *United States v. Kimbrough*<sup>39</sup> and the Eighth Circuit in *United States v. Horn*<sup>40</sup> decided the issue of whether the government should provide copies of the evidence to the defendant. Both circuits held that Rule 16 permitted the trial court to deny the defendant to copy the evidence.<sup>41</sup>

In *Kimbrough*, the defendant argued that the trial court's denial of his Rule 16 motion "violated his constitutional rights to due process and effective assistance of counsel."<sup>42</sup> The court held that any prejudice or technical violation of Rule 16 was insufficient to cause a constitutional deprivation.<sup>43</sup> In reaching this conclusion, the court considered the fact that the government offered to take the child pornography to the defendant's expert, who was located in another city, and to defense counsel's office.<sup>44</sup> The defendant argued that the amount of material seized and the time it took the government agents to review the material demonstrated that his defense counsel did not have a sufficient opportunity to review the material and obtain an expert for trial.<sup>45</sup> In rejecting the ineffective assistance-of-counsel argument, the court said that the time it takes the government to investigate and the number of documents that the government reviews are irrelevant in deciding

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37. Federal Rule of Criminal Procedure 16(a)(1)(E) provides as follows:

Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.

38. *E.g. U.S. v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995) (denying the motion for copies); *contra U.S. v. Hill*, 322 F. Supp. 2d 1081 (C.D. Cal. 2004) (granting the motion for copies).

39. 69 F.3d 723 (5th Cir. 1995).

40. 187 F.3d 781 (8th Cir. 1999).

41. *Kimbrough*, 69 F.3d at 731; *Horn*, 187 F.3d at 792.

42. 69 F.3d at 730.

43. *Id.* at 731.

44. *Id.*

45. *Id.*

whether a competent lawyer could prepare to defend the case in the available time.<sup>46</sup> The *Kimbrough* court also criticized the defendant's failure to describe what an expert examiner would need to do with the materials and what the analysis would have demonstrated.<sup>47</sup>

In *Horn*, the Eighth Circuit concluded that it was within the trial court's discretion to deny the defendant's motion for discovery.<sup>48</sup> The court found no error in the lower court's reasoning that it had the discretion through Rule 16 to deny, restrict, or defer discovery upon a sufficient showing.<sup>49</sup> The sufficient showing from the government was the fact that the child pornography constituted contraband.<sup>50</sup>

Although both of these appellate court opinions stand for the proposition that a defendant is not entitled to copies of the child-pornography material, it is worth noting that both cases were appeals from district courts that denied the discovery motions. The circuit courts did not reach the issue and, therefore, were not required to decide whether the court *could* grant the defendant's discovery motion. Consequently, these cases do not hold that a district court would abuse its discretion if it *were* to grant the defendant's discovery motion.<sup>51</sup> Furthermore, in both cases the courts found that the defendants failed to make compelling arguments as to any prejudice they suffered as a result of their motions being denied.<sup>52</sup> In fact, the court in *Horn* emphasized this

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46. *Id.*; but see *Hill*, 322 F. Supp. 2d at 1091 (rejecting the government's argument that the defense is not permitted to have copies of the materials partly because the thorough examination of the thousands of images involved in the case could take hours or even days of careful inspection).

47. 69 F.3d at 732. Defense lawyers now proffer this evidence to avoid the result in *Kimbrough*. E.g. *U.S. v. Flyer*, 2006 WL 2590460 at \*5 (D. Ariz. May 26, 2006) (explaining what the expert examinations would reveal, such as the date when certain images were downloaded onto the defendant's computer and how it would be significant if the images were downloaded when the defendant was not present).

48. 187 F.3d at 792.

49. *Id.* Federal Rule of Criminal Procedure 16(d)(1) states the following: "At any time, the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief."

50. *Horn*, 187 F.3d at 792.

51. The *Hill* court recognized this point when it rejected the government's argument, which was based on the holdings of *Kimbrough* and *Horn*. *Hill*, 322 F. Supp. 2d at 1091.

52. See *Kimbrough*, 69 F.3d at 731 (stating "Kimbrough has failed to demonstrate that any actual prejudice arose from his inability to procure copies of the charged items"); *Horn*, 187 F.3d at 792 (stating "Mr. Horn does not show how he was prejudiced by the trial

point when it said that in a proper case with sufficient showing, the trial court may have to grant the discovery motion.<sup>53</sup>

Although no appellate court has affirmed a grant of a defendant's discovery motion,<sup>54</sup> numerous district courts have granted the motions on the same basis as the appellate courts' denials. The most cited district court cases that have granted the defendants' discovery motions are *United States v. Hill*<sup>55</sup> and *United States v. Frabizio*.<sup>56</sup>

In *Hill*, the defendant made a Rule 16 motion requesting two mirror-image copies of the computer evidence, one for his attorney to use in preparing the defense and one for his forensic expert to analyze.<sup>57</sup> The court found that the defendant would be seriously prejudiced if his expert and counsel did not have copies of the materials.<sup>58</sup> The court reached this conclusion after analyzing Rule 16 and finding that it "clearly covers the items defendant has requested."<sup>59</sup> The court rejected the government's argument that because child pornography is contraband, defense counsel and his expert are required to examine the images within a government facility.<sup>60</sup> The court also rejected the government's analogy between the computer evidence and narcotics by reasoning that a narcotics analysis is a straightforward, one-time event, while a computer-forensic analysis is a longer event that requires the ability to reference back to the images.<sup>61</sup>

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court's ruling").

53. 187 F.3d at 792. The court in *United States v. Frabizio* also made this point when it rejected the government's reliance on *Kimbrough* and *Horn*. 341 F. Supp. 2d 47, 50 (D. Mass. 2004).

54. In some districts, whether the defendant is entitled to copies of the child pornography is not a frequently contested issue. For instance, in the Middle District of Florida, federal prosecutors take the position that Rule 16 does not require them to provide copies to the defense. See *supra* n. 49 and accompanying text. The standard procedure is to create a mirror hard drive for the defendant's expert, who then goes to the FBI office to view it. Telephone Interview with Cynthia Hawkins, Asst. U.S. Atty., M.D. Fla., Orlando Branch (Feb. 5, 2007).

55. 322 F. Supp. 2d 1081.

56. 341 F. Supp. 2d 47.

57. 322 F. Supp. 2d at 1091.

58. *Id.*

59. *Id.*

60. *Id.* This argument is based off the holdings from *Kimbrough* and *Horn*. See *e.g. supra* nn. 48–50 and accompanying text (discussing the holding from *Horn*).

61. *Hill*, 322 F. Supp. 2d at 1091. The government argued that the computer evidence is like narcotics and should therefore be examined in the government's laboratory under government supervision. *Id.*

The court accepted the defendant's ineffective assistance-of-counsel argument and concluded that his counsel would be unable to provide competent representation without "ready access to the materials that will be the heart of the government's case."<sup>62</sup> Further, after taking into account the expert's frequent interstate traveling and counsel's requisite need to access the evidence repeatedly for trial preparation, the court found the government's alternative inadequate and "unreasonably burdensome."<sup>63</sup> After making its ruling, the court adopted a protective order that provided guidelines directing the defense on how to handle the materials.<sup>64</sup> Some of the provisions included the following: maintaining the computer evidence in a locked file or cabinet at all times; viewing the material on computers that are not connected to a network; not allowing the defendant to view any graphic images; and returning the evidence to the FBI within 30 days of termination of the case.<sup>65</sup>

Similar to *Hill*, the court in *Frabizio* granted the defendant's motion to copy the evidence.<sup>66</sup> The government tried to distinguish the two cases on the facts—Frabizio's expert had to analyze only 33 images rather than the over 1,000 images that were involved in *Hill*.<sup>67</sup> The court disagreed and said that statement was an inaccurate representation of the defense expert's analysis because the expert was not only analyzing the materials but also reconstructing the analysis conducted by the government's forensic expert.<sup>68</sup> Notably, the court commented on the government's concerns about the risk of further dissemination and re-victimization.<sup>69</sup> It reasoned that the protective order addressed the further dissemination problem, and that re-victimization existed regardless of where defense counsel and the expert viewed the images.<sup>70</sup>

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62. *Id.* at 1092.

63. *Id.* The government's alternative proposal was to allow the defense expert to analyze the evidence in the government's laboratory at scheduled times in the presence of a government agent. *Id.*

64. *Id.* at 1092–1094.

65. *Id.* For a more complete version of the protective order, see *infra* note 227.

66. *Frabizio*, 341 F. Supp. 2d at 51.

67. *Id.* at 48.

68. *Id.* at 51.

69. *Id.*

70. *Id.*

Four months prior to President Bush signing the Adam Walsh Act, the Eastern District of New York decided a child-pornography case that further bolstered the defense's case for allowing copies of the materials. Similar to *Hill* and *Frabizio*, the court in *United States v. Cadet*<sup>71</sup> held that Rule 16 entitled the defendant to copies of the evidence.<sup>72</sup> More importantly, the court considered the Advisory Committee's reasons for amending Rule 16 in 1974<sup>73</sup> and concluded that adopting the government's discovery restrictions "turns the mandatory discovery obligation of Rule 16(a)(1)(E) on its head."<sup>74</sup> The government argued that giving the defense copies of the materials would increase the risk of unlawful duplication and circulation of the material.<sup>75</sup> The court recognized the "subliminal implication" in this argument, which is that a defense attorney will be less responsible with the material than a government attorney.<sup>76</sup> The court said there is no greater risk in giving the defense copies than there is in giving the government copies.<sup>77</sup>

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71. 423 F. Supp. 2d 1 (E.D.N.Y. 2006).

72. *Id.* at 4.

73. The mandatory discovery provisions were instituted because of the following: [B]road discovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise . . . and by otherwise contributing to an accurate determination of the issue of guilt or innocence.

*Id.* at 3 (quoting Fed. R. Crim. P. 16 advisory comm. nn., 1974 amend.). During the 1950s and 1960s, a debate occurred involving the issue of whether to liberalize criminal defense discovery similar to the recent discovery reforms in civil discovery. Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure: Criminal Practice Series* vol. 4, § 20.1(a), 816–817 (2d ed. West Group 1999). Supreme Court Justice William Brennan, a leading advocate for expanding defense discovery, argued that the trial must be a "quest for truth" rather than a "sporting theory of justice." *Id.* at § 20.1(b), 817 (quoting William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for the Truth?* 1963 Wash. U. L.Q. 279, 279 (1963)). Furthermore, according to California Supreme Court Justice Roger Traynor, "[t]he truth is more likely to emerge when each side seeks to take the other by reason rather than by surprise." *Id.* at 817–818 (citing Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. Rev. 228, 249 (1964)).

74. *Cadet*, 423 F. Supp. 2d at 3.

75. *Id.*

76. *Id.*

77. *Id.* The *Hill* court also recognized the inadequacies of this argument when it granted copies of the materials to the defendant's attorney and expert. 322 F. Supp. 2d at 1092.

### III. THE CURRENT STATE OF CHILD-PORNOGRAPHY LAW

Congress' enactment of Section 3509(m) changed how federal courts regulate discovery in child-pornography cases. The cases have transformed from defendants obtaining copies through Rule 16 to courts effectively being forced to deny copies under the newly enacted statute. However, the defendant's need for seeking help from computer defense experts has not changed. Finally, the current state of child-pornography law would not be complete without acknowledging the repercussions a defendant faces upon conviction.

#### A. Defense Experts

Two defenses a defendant may use in a computer-child-pornography prosecution are (1) the image does not depict an actual child—rather, it is a digitally altered adult;<sup>78</sup> or (2) the defendant did not knowingly possess or receive the image.<sup>79</sup> In order to successfully carry out either of these defenses, the defendant must enlist the help of a computer-forensics examiner and/or a digital imaging expert.<sup>80</sup>

The computer-forensics examiner can determine how and precisely when<sup>81</sup> an image was downloaded on a computer.<sup>82</sup> This expert can also determine whether anyone attempted to delete the image.<sup>83</sup> In order to conduct this analysis, the examiner uses forensic software programs such as EnCase and Forensics Toolkit.<sup>84</sup> An average examination can take up to fifty hours.<sup>85</sup>

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78. 18 U.S.C. § 2252A(c)(1)(A)–(2) (2000).

79. The word “knowingly” is part of every crime listed under Title 18 U.S.C. Section 2252A.

80. Ian N. Friedman & Kristina Walter, *How the Adam Walsh Act Restricts Access to Evidence*, 31 Feb. Champion 12, 13 (Jan./Feb. 2007).

81. Determining when the child pornography was downloaded is an important issue in some cases. One computer defense consultant says he has had previous divorce cases where the pornography was downloaded on to the defendant's computer while he was away at work. Kevin Hoffman, *Devil's Advocate: A Well-Intentioned Predator Law Perverts Justice*, <http://www.clevescene.com/2006-11-29/news/devil-s-advocate/> (Nov. 29, 2006).

82. Friedman & Walter, *supra* n. 80, at 13.

83. *Id.*

84. These programs allow the forensics examiner to index data and search the computer for keywords associated with child pornography. *Id.* The programs also allow the examiner to search for hash values, each of which consists of a unique series of twenty-six numbers and letters that identify an image. *Id.*

A digital imaging expert can detect whether an image was manipulated with software programs such as Adobe Photoshop.<sup>86</sup> Given the increasing sophistication of digital imaging techniques,<sup>87</sup> whether the image is a real or virtual child cannot be determined by the naked eye.<sup>88</sup> A digital imaging expert may also compare the image in question with photographs from the National Center for Missing and Exploited Children database.<sup>89</sup>

### B. The Reasoning behind Section 3509(m)

In the wake of highly publicized, recent criminal cases involving sex predators and children,<sup>90</sup> Congress passed the Adam Walsh Act in the summer of 2006. Congress' reasoning behind Section 3509(m) of the Adam Walsh Act centers on the importance of protecting the child victims from repeated exploitation.<sup>91</sup> Specifically, each time the images are viewed represents a "renewed violation of the privacy of the victims and a repetition of their abuse."<sup>92</sup> Furthermore, according to Congress' reasoning,

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85. *Id.*

86. *Id.*

87. Graphic artists can manipulate images by air-brushing, cutting and pasting from one image to another, changing colors, stretching shapes, and creating images from scratch on the computer. *Frabizio*, 445 F. Supp. 2d at 154, n. 1.

88. *Id.* at 170; *but see U.S. v. Kimler*, 335 F.3d 1132, 1142 (10th Cir. 2003) (concluding that *Ashcroft* did not establish a categorical requirement for an expert to testify that the image is of a real child because juries are still capable of distinguishing between real and virtual children).

89. Friedman & Walter, *supra* n. 80, at 13. The National Center for Missing and Exploited Children (NCMEC) maintains a database of images known to be child pornography. Telephone Interview, *supra* n. 54. When prosecuting or defending a case, the attorneys will send the images to the NCMEC to see whether they match with any of the known pornographic images. *Id.*

90. Well-known examples include nine-year old Jessica Lunsford, who was sexually assaulted and murdered by a convicted sex offender in February 2005, and eleven-year old Carlie Brucia, who was also sexually assaulted and murdered in February 2004. America's Most Wanted, *Missing Children*, [http://www.amw.com/missing\\_children/brief.cfm?id=30448](http://www.amw.com/missing_children/brief.cfm?id=30448) (updated Mar. 7, 2007); *id.* at [http://www.amw.com/missing\\_children/brief.cfm?id=26631](http://www.amw.com/missing_children/brief.cfm?id=26631) (updated Nov. 17, 2005).

91. Pub. L. No. 109-248, § 501, 120 Stat. 587, 624 (2006). Asst. U.S. Atty. Alice Fisher testified in Congress that once the child pornography is created and posted on the internet, it becomes a permanent record of the abuse that will haunt the victim forever. Sen. Comm. on Com., Sci. & Transp., *Online Child Pornography Statement of Alice S. Fisher*, 109th Cong. 2 (Sept. 19, 2006).

92. 120 Stat. at 624. One defense attorney has taken the position that viewing the material for sexual gratification is what hurts the children, not when it is done as part of investigation. Tresa Baldas, *Face-Off over Evidence Review*, 29 Natl. L.J. (Dec. 1, 2006),

child pornography constitutes prima facie contraband and thus cannot be distributed to, or copied by, the defense.<sup>93</sup> For these reasons, Congress concluded that no copies can be furnished to the defense.<sup>94</sup> The congressional findings also state that the reproduction of the materials should be prohibited so long as the government makes reasonable accommodations for the defendant to mount his defense.<sup>95</sup>

### C. Cases That Have Interpreted Section 3509(m)

The constitutionality of Section 3509(m) has been challenged in a handful of cases thus far, and the number increases monthly.<sup>96</sup> In *United States v. Johnson*,<sup>97</sup> a district court held that this provision was “not unconstitutional on its face.”<sup>98</sup> In *United States v. Burkhardt*<sup>99</sup> and *United States v. Butts*,<sup>100</sup> the district courts granted the defendants’ motions to compel copies of the child-pornography evidence prior to Congress passing the Adam Walsh Act. However, both courts vacated those orders after the government filed motions to reconsider the orders in light of the Act.<sup>101</sup> In *United States v. Knellinger*,<sup>102</sup> the court held that Section 3509(m) was not unconstitutional but that the defendant was entitled to a copy of the child-pornography evidence.<sup>103</sup>

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<http://www.law.com/jsp/nlj> (quoting a public defender and co-chair of the forensic-evidence committee for the National Association of Criminal Defense Lawyers). Furthermore, according to this defense attorney, if a person were to take Congress’ reasoning one step further, would it mean that the court clerks, the judge, and the jury are prohibited from viewing the materials? *Id.*

93. 120 Stat. at 624.

94. *Id.*

95. *Id.*

96. This Article will only discuss four cases in detail, but a few others, which the Article does not discuss to the same extent, are *United States v. O'Rourke*, which held that Section 3509(m) was not unconstitutional because it comported with due process requirements, 470 F. Supp. 2d 1049, 1055 (D. Ariz. 2007), and *United States v. Glembin*, which denied the defendant’s motions for discovery and inspection. 2006 WL 2460866 at \*2 (D. Nev. Aug. 21, 2006).

97. 456 F. Supp. 2d 1016 (N.D. Iowa 2006).

98. *Id.* at 1019.

99. 2006 WL 2432919 (W.D. Pa. Aug. 21, 2006).

100. 2006 WL 3613364 (D. Ariz. Dec. 6, 2006).

101. *Burkhardt*, 2006 WL 2432919 at \*1; *Butts*, 2006 WL 3613364 at \*4.

102. 471 F. Supp. 2d 640 (E.D. Va. 2007).

103. *Id.* at 650.

The Northern District of Iowa was one of the first courts that had the opportunity to interpret and apply Section 3509(m) in *Johnson*.<sup>104</sup> The defendant argued that Section 3509(m) was unconstitutional because it infringed upon both his Fifth Amendment due process and fair trial rights and his Sixth Amendment right to effective assistance of counsel.<sup>105</sup> In holding that Section 3509(m) is not unconstitutional, the court reasoned that a defendant's constitutional rights are not unlimited and must sometimes "bow to accommodate other legitimate interests in the criminal trial process."<sup>106</sup> The court further concluded that the statute was reasonable<sup>107</sup> because it did not restrict what defendants were allowed to introduce at trial, only who could possess the child pornography.<sup>108</sup>

The *Johnson* court also held that Section 3509(m) was not unconstitutional as applied to the defendant.<sup>109</sup> The defendant argued that the statute restricted his access to a computer-forensics expert because he could not find an expert who could complete the investigation for \$500, the amount authorized by the court for retaining an expert at public expense.<sup>110</sup> In rejecting this argument, the court explained that the inability to find nonlocal experts who are willing to travel to Iowa to inspect the computer

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104. 456 F. Supp. 2d 1016.

105. *Id.* at 1018.

106. *Id.* at 1018–1019 (citing *U.S. v. Scheffer*, 523 U.S. 303, 308 (1998)).

107. The court also concluded that Section 3509(m) was a reasonable measure to ensure that the evidence will "not escape into the public domain." *Id.* at 1019. However, this reasoning—that defense attorneys are not trustworthy—sounds similar to the reasoning rejected by district courts in *Cadet* and *Hill*. See *supra* n. 76–77 and accompanying text (stating that courts have already dismissed the action that the evidence is less secure when defense attorneys view the material than when only the government has access to it). Furthermore, according to some members of the criminal defense bar, this reasoning is offensive because criminal defense attorneys are officers of the court, and there is no reason to believe that they or their forensic experts cannot be trusted with the material. Ltr. from Thomas W. Hillier, II, Fed. Pub. Defender, W.D. Wash., to Hon. F. James Sensenbrenner, Chairman of H. Jud. Comm. & Hon. John Conyers, Jr., Ranking Member of H.R. Jud. Comm., *Children's Safety and Violent Crime Reduction Act of 2005 (H.R. 4472)* 17 (Mar. 7, 2006) (copy on file with *Stetson Law Review*).

108. *Johnson*, 456 F. Supp. 2d at 1019. Contrary to this proposition, defense attorneys have argued that the *Johnson* court failed to recognize that whoever possesses the evidence directly affects the defense's ability to prepare for trial. Friedman & Walter, *supra* n. 80, at 15.

109. *Johnson*, 456 F. Supp. 2d at 1020.

110. *Id.* The cost of hiring such experts is not cheap. One defense expert testified that she charges a rate of \$200 an hour. *Flyer*, 2006 WL 2590460 at \*5.

evidence for the amount allowed by the court had nothing to do with the constitutionality of Section 3509(m).<sup>111</sup>

The defendant in *Butts* also argued due process and ineffective assistance-of-counsel violations as a result of Section 3509(m).<sup>112</sup> In rejecting the argument, the district court reasoned that the defense was given ample opportunity to review the evidence in accordance with Section 3509(m) because the government was willing to provide a secured empty office for the defendant's computer expert to run his computer "24/7."<sup>113</sup> The court further reasoned that the applicable standard for determining whether material is reasonably available to the defendant does not consider expense or location.<sup>114</sup> Therefore, the court need not take into account any financial or logistical difficulties that the defense may have as a result of the evidence being housed at the government offices.<sup>115</sup>

In *Knellinger*, the court conducted an evidentiary hearing in which three computer experts testified that the restrictions imposed by the Adam Walsh Act would discourage them from working with defendants in child-pornography cases.<sup>116</sup> One expert testified that he would have to hire a company to transport all of the equipment in his laboratory to a government facility in order to analyze the evidence, which would be "enormously expensive."<sup>117</sup> Another expert testified that the interruption to his business from having to move all of his laboratory equipment would be impractical.<sup>118</sup>

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111. *Id.*

112. *Butts*, 2006 WL 3613364 at \*1.

113. *Id.* at \*2. The government also assured the court that the expert could access the office whenever the government facility was open, he could use his cell phone while in the office, and he could have a locking safe to store his computer when away from the office. *Id.*

114. *Id.*

115. *Id.* at \*\*1-2. The district court in *Burkhart* used identical reasoning in holding that the defendant was no longer entitled to a copy of the materials. *See Burkhart*, 2006 WL 2432919 at \*1 (reasoning that expense or location of the expert is not relevant when determining whether the material is reasonably available); *but see supra* n. 63 and accompanying text (stating that the *Hill* court took into account the expert's frequent interstate traveling in finding the government's alternative inadequate).

116. 471 F. Supp. 2d at 646-648.

117. Larry O'Dell, *Technology Experts Call New Law Burdensome*, [http://www.timesdispatch.com/servlet/Satellite?c=MGArticle&cid=1149191546520&pagename=RTD/MGArticle/RTD\\_BasicArticle](http://www.timesdispatch.com/servlet/Satellite?c=MGArticle&cid=1149191546520&pagename=RTD/MGArticle/RTD_BasicArticle) (Nov. 6, 2006).

118. *Id.*

The experts testified that once inside the government facility their jobs were hindered even further.<sup>119</sup> For instance, one expert who had already done some work on the *Knellinger* case testified that an FBI agent supervised his activity and retrieved the computer files for him.<sup>120</sup> The expert also said he was not allowed to touch the keyboard.<sup>121</sup> Additionally, this expert testified that his ability to communicate freely with the defendant and his lawyers while within the government facility was also impaired.<sup>122</sup>

The *Knellinger* court concluded that Section 3509(m) was not unconstitutional; however, it did grant a copy of the evidence to the defense.<sup>123</sup> In concluding that the statute was not unconstitutional, the court's reasoning centered on a portion of Section 3509(m)(2)(B), which allows the court to order copies if the government does not provide "ample opportunity."<sup>124</sup> The court reasoned that a constitutional challenge to the statute will succeed only if the defendant can demonstrate that no application of this "safety valve" would be sufficient to protect the accused's constitutional rights, which *Knellinger* did not demonstrate.<sup>125</sup> Furthermore, the court concluded that it did not need to make a constitutional decision because the "ample opportunity" language in the statute allowed the court to grant the defendant's motion to copy the evidence based on the facts of the case.<sup>126</sup>

In granting *Knellinger's* motion for a copy of the evidence, the court took into account the defense experts' testimony from the evidence hearing and concluded that the government's offer to allow the defense experts to view the materials in a government office did not constitute ample opportunity.<sup>127</sup> The court further noted the "extremely burdensome practical effects" that Section

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119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. 471 F. Supp. 2d at 650.

124. *Id.* at 644–645.

125. *Id.*

126. *Id.* at 650. However, as one commentator has noted, this case may not have been the ripest case for deciding the constitutional issues. See Corey Rayburn Yung, *Sex Crimes, Adam Walsh Act and Access to Evidence*, [http://sexcrimes.typepad.com/sex\\_crimes/2007/02/index.html](http://sexcrimes.typepad.com/sex_crimes/2007/02/index.html) (Feb. 1, 2007) (stating "this wasn't the case to really test whether the relevant provisions of the Adam Walsh Act are constitutional because the judge limited his inquiry").

127. *Knellinger*, 471 F. Supp. 2d at 646–647.

3509(m) has on the experts and the practical reality that experts will not agree to take on these cases anymore because of the statute.<sup>128</sup>

#### D. The Repercussions of a Child-Pornography Conviction

A defendant convicted of child pornography faces a lengthy prison term, sex-offender registration, and many incidental social impacts that stem from the conviction and registration. In federal court, a defendant faces up to twenty years for each count of child pornography.<sup>129</sup> The numbers are high in state courts as well. For example, an Arizona man was recently given a 200-year sentence for possessing twenty child-pornography images (ten years per count).<sup>130</sup>

Sex-offender registration is another portion of the convicted child-pornography defendant's sentence.<sup>131</sup> Under the Adam Walsh Act, a defendant convicted of child pornography faces a registration period of anywhere from fifteen years to life, depending on the specifics of the crime.<sup>132</sup> The Act also mandates a fine and/or imprisonment of up to ten years for defendants who fail to register after moving to another state.<sup>133</sup> The registry, as many are well aware, is available on the internet for anyone to see. This publicity has led to vigilantism against the convicted sex offenders. For instance, a Washington man murdered two sex offenders in their own home.<sup>134</sup> He told the police that he planned the murders by viewing the sheriff's sex-offender website and then selecting two victims.<sup>135</sup>

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128. *Id.* at 648.

129. *Supra* n. 10.

130. *State v. Berger*, 134 P.3d 378, 379 (Ariz. 2006). The defendant appealed to the Arizona Supreme Court, claiming that his sentence was cruel and unusual punishment under the Eighth Amendment, but the Court upheld the sentence. *Id.* The defendant had no criminal record when he was arrested. Adam Liptak, *Locking Up the Crucial Evidence and Crippling the Defense*, N.Y. Times, <http://select.nytimes.com/2007/04/09/us/09bar.html> (Apr. 9, 2007).

131. 42 U.S.C.A. § 16913(a) (West Supp. 2007).

132. 42 U.S.C.A. §§ 16911, 16914.

133. 18 U.S.C.A. § 2250(a).

134. Komo News, *Man Surrenders in Slayings of Bellingham Sex Offenders*, <http://www.komotv.com/news/archive/4163086.html> (updated Aug. 31, 2006, 2:03 a.m. PDT).

135. *Id.*

2008] *Adam Walsh Child Protection and Safety Act of 2006* 1003

Because of these serious ramifications, it is even more necessary to ensure that a defendant charged with child pornography receives a fair trial. The best means of ensuring that the defendant receives a fair trial is to allow him to mount a strong defense, but as the rest of this Article argues, the Adam Walsh Act impedes the defendant's ability to create a strong defense and thus have a fair trial.

#### IV. INFRINGEMENT UPON THE RIGHT TO PRESENT A DEFENSE

Our Constitution guarantees every person a fair trial through the Due Process Clause; however, the basic elements of a fair trial are defined by the Sixth Amendment.<sup>136</sup> The Sixth Amendment provides that “in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . . .”<sup>137</sup> These two clauses are interpreted together as providing the defendant with an opportunity to present a defense by guaranteeing him the right to produce and present evidence through witnesses at trial.<sup>138</sup> However, Section 3509(m) infringes this right to present a defense, and in turn a fair trial, by impeding each of these clauses.

##### A. Sixth Amendment Confrontation Clause

The Confrontation Clause has been said to have found its way into the Sixth Amendment “with almost no notice.”<sup>139</sup> The Clause

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136. *Strickland v. Wash.*, 466 U.S. 668, 684–685 (1984). Some courts who have heard constitutional arguments regarding the Adam Walsh Act believe the Fifth Amendment provides the better framework for deciding these issues. See e.g. *O'Rourke*, 470 F. Supp. 2d at n. 2 (explaining that “[d]efendant's concerns [regarding the constitutionality of the Adam Walsh Act] are better addressed under the framework of due process, which supplies broader protection than the Sixth Amendment.”). Given that the Sixth Amendment defines the elements of a fair trial, it seems more logical to first examine the Sixth Amendment.

137. U.S. Const. amend. VI.

138. See generally Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567 (1978) (arguing that the two clauses provide different rights but both serve the same purpose, which is to give the defendant the right to present testimony).

139. Carol A. Chase, *The Five Faces of the Confrontation Clause*, 40 Hous. L. Rev. 1003, 1004 (2003).

is not as renowned as its other Sixth Amendment counterparts, and the Supreme Court did not consider its implications until 1895.<sup>140</sup> Regardless, the Confrontation Clause has come to provide the following two types of protection for the accused: (1) “the right to physically face those who testify against him”; and (2) the right to cross-examine witnesses.<sup>141</sup> Of these two types of protection, the heart of the Confrontation Clause is the right to conduct cross-examination<sup>142</sup> because the ability to cross-examine adverse witnesses is necessary to “ensur[e] the integrity of the fact-finding process.”<sup>143</sup> Additionally, cross-examination tests the credibility of a witness and the truth of his testimony.<sup>144</sup>

Whether a criminal defendant is denied his Confrontation right to cross-examine an adverse witness arises in three different contexts.<sup>145</sup> The first situation occurs when the court limits the defense’s cross-examination by not allowing certain avenues of inquiry.<sup>146</sup> The second situation occurs when “the witness’ inability to recall or the witness’ refusal to be cross-examined” limits the defense counsel’s cross-examination.<sup>147</sup> The third situation occurs when the defense counsel claims “that denial of pretrial discovery precludes the defendant’s ability to engage in effective cross-examination.”<sup>148</sup> The third context is at issue in this Section. On a few occasions, the Supreme Court has reached the issue of whether denying pretrial discovery precludes the defendant’s ability to engage in effective cross-examination. The two main cases discussing this issue are *Pennsylvania v. Ritchie*<sup>149</sup> and *Kentucky v. Stincer*.<sup>150</sup>

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140. *Mattox v. U.S.*, 156 U.S. 237 (1895).

141. *Pa. v. Ritchie*, 480 U.S. 39, 51 (1987).

142. *See Del. v. Van Arsdall*, 475 U.S. 673, 678 (1986) (calling the opportunity of cross-examination “[t]he main and essential purpose of confrontation”).

143. *Ky. v. Stincer*, 482 U.S. 730, 736 (1987).

144. *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

145. Chase, *supra* n. 139, at 1028.

146. *Id.* The judge has the discretion to limit the extent of cross-examination on an appropriate subject of inquiry. *Alford v. U.S.*, 282 U.S. 687, 694 (1931).

147. Chase, *supra* n. 139, at 1028; *see e.g. Del. v. Fensterer*, 474 U.S. 15, 22 (1985) (holding that the defendant’s right to confrontation was not violated even though the witness could not recall the basis of his expert opinion).

148. Chase, *supra* n. 139, at 1028. For an example of this situation, see the discussion of *Pennsylvania v. Ritchie*, *infra* nn. 151–159 and accompanying text.

149. 480 U.S. at 39.

150. 482 U.S. at 730.

In *Ritchie*, the Court had to determine whether the defendant, who was charged with different sexual offenses against his daughter, was entitled to confidential files held by a protective service agency that investigated cases of child abuse and neglect.<sup>151</sup> The file was important to the defense because it may have contained the names of favorable witnesses and exculpatory evidence.<sup>152</sup> Additionally, the defendant's daughter was the main witness for the prosecution.<sup>153</sup> After the defendant's conviction, he petitioned the Supreme Court, arguing that the agency's failure to disclose the file violated the Confrontation Clause because he could not effectively question his daughter.<sup>154</sup> The plurality held that the Confrontation Clause did not provide the defendant with an avenue for obtaining the evidence; to hold otherwise would transform the Confrontation Clause into a constitutional right to pretrial discovery.<sup>155</sup> The plurality further stated that the Confrontation Clause only guarantees "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."<sup>156</sup>

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151. 480 U.S. at 43–44.

152. *Id.* at 44.

153. *Id.*

154. *Id.* at 51.

155. *Id.* at 52. The Court reasoned that the caselaw does not support this view of the Confrontation Clause; rather, it is a trial right designed to regulate the types of questions asked on cross-examination. *Id.* Although the Court did not find the Confrontation Clause to be the appropriate method for compelling the discovery, it did reason that the Fifth Amendment Due Process Clause was a proper method. *Id.* at 56. Furthermore, the Court recognized that while the public interest in protecting that type of sensitive information was strong, it would not prevent disclosure in circumstances when it would be material to the defense. *Id.* at 57–58. Although this Article does not delve into the defendant's Fifth Amendment due process rights, it is important to note that this is another consideration for the courts when deciding whether Section 3509(m) is unconstitutional.

156. *Id.* at 53 (quoting *Fensterer*, 474 U.S. at 20). One scholar has argued that the Court has not expressly followed the plurality in later opinions. See Andrew Taslitz, *Ca-tharsis, the Confrontation Clause, and Expert Testimony*, 22 *Cap. U. L. Rev.* 103, 108 (1993) (arguing that the Court's reasoning in *U.S. v. Owens*, 484 U.S. 554 (1988), shows that the Court did inquire into whether the defendant was given an opportunity for "effective" cross-examination). In *Owens*, the Court found that the defendant did have an opportunity for effective cross-examination because he had "realistic weapons" for the cross-examination. 484 U.S. at 560. This is consistent with the third constitutional right given in the Sixth Amendment, which is the right to assistance of counsel. The Supreme Court has defined the right to assistance of counsel as meaning "the right to the *effective* assistance of counsel" given the connection between the existence of the constitutional right and the text of the Sixth Amendment. *U.S. v. Cronin*, 466 U.S. 648, 654 (1984) (emphasis added).

Justice Blackmun wrote separately in a concurring opinion because he did not accept the plurality's conclusion that the Confrontation Clause is a trial right that has no relevance to pretrial discovery.<sup>157</sup> He reasoned that when a court denies a defendant access to pretrial information that would make effective cross-examination of a crucial prosecution witness possible, the court may have denied the defense the minimally sufficient cross-examination at trial that the Confrontation Clause protects.<sup>158</sup> He disagreed that the mere opportunity to question the witness satisfies the Confrontation Clause; rather, he thought this reasoning would transform the Clause into an "empty formality."<sup>159</sup>

Justice Blackmun had the opportunity to elaborate on his argument when he delivered the Court's opinion in *Stincer*.<sup>160</sup> In a footnote, Justice Blackmun wrote that the Confrontation Clause is broader than the plurality's view in *Ritchie*.<sup>161</sup> He went on to restate that there are cases in which 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 thus that such a rule equally may violate the Confrontation Clause.<sup>162</sup>

In other words, Justice Blackmun believed that providing the defendant with the right to question the government's witnesses means nothing if the court impairs the defendant's discovery rights so that he cannot create effective questions to ask the witnesses.

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In *Cronic*, the Court said assistance is more than just appointment of counsel; the performance must also be adequate. *Id.* Similarly, the right to cross-examine is more than just the right to ask questions, it should also include the right to effectively cross-examine the government's witnesses.

157. *Id.* at 61 (Blackmun, J., concurring). In his dissent, Justice Brennan also disagreed with the plurality's interpretation of the Confrontation Clause. He said the right of cross-examination could be violated when the defendant is denied access to material that could be used as the basis for questions at trial. *Ritchie*, 480 U.S. at 66 (Brennan, J., dissenting).

158. *Ritchie*, 480 U.S. at 61–62.

159. *Id.* at 62.

160. *Stincer*, 482 U.S. at 738, n. 9. However, he did not get another chance to apply his views of the Confrontation Clause to this case because the defendant's opportunity to engage in *effective* cross-examination was not affected, and thus the Confrontation Clause was not implicated. *Id.*

161. *Id.*

162. *Id.* (quoting *Ritchie*, 480 U.S. 39 at 63–65).

Justice Blackmun's interpretation of the Confrontation Clause is applicable to the discovery issues connected with Section 3509(m). However, an obvious argument is that these Supreme Court cases discuss situations where the defendant was completely denied access to the evidence. Those cases are distinguishable from the situation posed by Section 3509(m) because the defendant is not completely denied access to the evidence. Justice Blackmun's reasoning is nevertheless applicable because, logically, there is a connection between adequate pretrial discovery and effective cross-examination.<sup>163</sup> The defense needs the pertinent evidence to decide what avenues to pursue when cross-examining expert witnesses. As previously discussed, expert witnesses are crucial to both the government and the defense, and the government will probably present witnesses to testify that the evidence is, in fact, child pornography.<sup>164</sup> Therefore, it is critical that the defense use its own expert witnesses to analyze the evidence in order to discredit the prosecution's expert witnesses during the trial.

Furthermore, a restriction is still a restriction even though it may not be absolute. In other words, although Section 3509(m) does not completely deny access to the defense, it still denies access to a certain extent. Since Congress passed the Adam Walsh Act, the typical scenario is for the United States Attorney to provide an empty office and a copy of the evidence for the defense to analyze within that office.<sup>165</sup> Further, the defense usually gets one to two days to view and analyze the materials during the hours in which the FBI or federal prosecutor's office is open.<sup>166</sup> The Supreme Court has said that the Confrontation Clause's "denial or

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163. Federal Rule of Evidence 705 sets out the evidentiary rule that an expert may be required to disclose underlying facts or data on cross-examination. Fed. R. Evid. 705. The Advisory Committee Notes discuss this provision of the rule and how it may be considered unfair to leave it up to the cross-examiner to bring out any facts or data that is unfavorable to the opinion. Fed. R. Evid. 705 advisory comm. nn. The Advisory Committee resolves this issue by assuming that the cross-examiner will have "advance knowledge which is essential for *effective* cross-examination." *Id.* (emphasis added).

164. *Supra* pt. III(A).

165. *E.g. O'Rourke*, 470 F. Supp. 2d at 1057 (providing the defense with an empty office in the United States Attorney's office with a copy of the evidence for expert analysis).

166. In some cases, the defense attorney's opportunity is even more limited. For example, a Washington state court gave a defense attorney only two opportunities to view the evidence in a secured location. Baldas, *supra* n. 92. If she wanted a third chance, she had to go before the court again. *Id.*

significant diminution calls into question the ultimate ‘integrity of the fact-finding process’ and requires that the competing interest be closely examined.”<sup>167</sup> As previously mentioned, at the heart of the Confrontation Clause is the right to cross-examine, and the purpose of cross-examination is to ensure the integrity of the fact-finding process.<sup>168</sup> When a statute limits access to key materials, the defense’s ability to prepare for trial is also limited. In turn, this limitation affects the defendant’s presentation to the fact-finder, thus affecting the integrity of the fact-finding process.

Additionally, because Section 3509(m) diminishes the defendant’s confrontation rights, the court should examine the competing interests that are at issue, which are the defendant’s constitutional right to present a defense and the government’s desire to protect children from re-victimization. Although both interests are substantial, it is important to remember that defense attorneys want these copies to investigate the case and prepare for trial, not for sexual gratification.<sup>169</sup> Furthermore, Congress should not assume that defense attorneys are more likely than the prosecution or other government employees to let this critical evidence get in the wrong hands.<sup>170</sup> Defense attorneys are also officers of the court with ethical responsibilities.<sup>171</sup>

In the same vein, the Supreme Court said in *Michigan v. Lucas*<sup>172</sup> that “[r]estrictions on a criminal defendant’s rights to con-

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167. *Chambers v. Miss.*, 410 U.S. 284, 295 (1973).

168. *Supra* nn. 141–143 and accompanying text.

169. Baldas, *supra* n. 92 (arguing that “viewing such material for sexual gratification is what hurts children, not when it is done as part of an investigation” in response to prosecutors’ claims that children are harmed every time a photograph is shown).

170. The court in *Cadet* addressed this point. *See supra* nn. 71–77 and accompanying text (reiterating the point that defense attorneys are officers of court and no more likely to leak sensitive material than are their prosecutorial counterparts). Also, it is just as likely that government employees could be capable of letting the child pornography escape into the public domain. *See e.g. Texas Prosecutor Kills Himself after Sex Sting*, <http://www.msnbc.msn.com/id/15592444/> (Nov. 6, 2006) (discussing an incident in which a Texas prosecutor committed suicide as the police tried to arrest him for soliciting sex with a minor online); U.S. Dept. of Justice, Press Release, *Austin Police Detective Pleads Guilty in Federal Child Porn Case* (available online at [http://www.usdoj.gov/usao/txw/press\\_releases/2005/McConnell.gp.pdf](http://www.usdoj.gov/usao/txw/press_releases/2005/McConnell.gp.pdf)) (accessed May 8, 2007) (discussing a former police officer’s guilty plea to federal child-pornography charges).

171. The Preamble of the Model Rules of Professional Conduct states that “[a] lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” Model R. Prof. Conduct preamble (1) (ABA 2006).

172. 500 U.S. 145 (1991).

2008] *Adam Walsh Child Protection and Safety Act of 2006* 1009

front adverse witnesses and to present evidence ‘may not be arbitrary or disproportionate to the purposes they are designed to serve.’”<sup>173</sup> Here, Congress created a restriction that seems disproportionate to the purpose that it is trying to serve, which is to prevent the child victims from being re-victimized. As the *Frabizio* court said, re-victimization exists regardless of where defense counsel and experts view the images.<sup>174</sup> Additionally, people will have to view these images and copies will have to be made in order for the government attorneys to prosecute defendants, for the defense attorneys to investigate, or for the jury to decide the cases. Therefore, a statute that infringes upon the defendant’s ability to present a defense, specifically the ability to cross-examine witnesses, for the purpose of minimizing images that will have to be seen in any event seems unfairly disproportionate.

#### B. Sixth Amendment Compulsory Process Clause

The Compulsory Process Clause is another part of the Sixth Amendment that provides the defendant with an opportunity to present a defense but that has been limited by Section 3509(m). The Clause provides that “in all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his or her favor.”<sup>175</sup> The Clause has not been the subject of many Supreme Court decisions;<sup>176</sup> nevertheless, it has come to mean the right to compel witnesses to attend court and “the right to have the witness’ testimony heard by the trier of fact.”<sup>177</sup> The Court has also defined the Clause as “in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies.”<sup>178</sup>

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173. *Id.* at 151.

174. 341 F. Supp. 2d at 51.

175. U.S. Const. amend. VI.

176. The plurality noted in *Ritchie* that the “Court has had little occasion to discuss the contours of the Compulsory Process Clause.” 480 U.S. at 55.

177. *Taylor v. Ill.*, 484 U.S. 400, 409 (1988) (citing *Wash. v. Tex.*, 388 U.S. 14, 19 (1967)).

178. *Wash. v. Tex.*, 388 U.S. at 19.

Chief Justice John Marshall, in *United States v. Burr*,<sup>179</sup> defined the term “witness” in the Compulsory Process Clause to include the right to secure both papers and testimony material to the defense.<sup>180</sup> Section 3509(m) violates the Clause for the following reasons: (1) it makes it difficult for the defense to secure the child-pornography evidence (“papers”) material to the defense; and (2) it makes it difficult for the defense to secure the testimony (of the computer-forensic experts) material to the defense.

*1. Papers Material to the Defense to Check the  
Prosecution’s Presentation of Evidence*

As previously argued, it is necessary under the Confrontation Clause for the defense to have copies of the child-pornography material.<sup>181</sup> However, another avenue to obtain the material is that the defense be entitled to copies of the evidence through the Compulsory Process Clause. The Supreme Court suggested that the Compulsory Process Clause grants a right to pretrial discovery in *United States v. Nixon*.<sup>182</sup> The case involved a pretrial subpoena for the production of tapes that recorded President Nixon’s personal conversations with the Watergate defendants.<sup>183</sup> In upholding the district court’s order requiring production, the Court derived its decision in part from the Compulsory Process Clause.<sup>184</sup> Additionally, the Court in *Ritchie* addressed the scope of the Compulsory Process Clause but notably did not suggest that the Clause embodied only trial rights.<sup>185</sup>

Moreover, scholars have argued that the Clause governs a criminal defendant’s access to evidence.<sup>186</sup> According to one com-

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179. 25 F. Cas. 30 (C.C. Va. 1807).

180. *Id.* at 34–35. In *Burr*, the defendant was charged with treason and sought a letter from President Jefferson that identified the defendant as the mastermind of the treasonous plot. Jean Montoya, *A Theory of Compulsory Process Clause Discovery Rights*, 70 Ind. L.J. 845, 869 (1995). The defendant sought the letter prior to trial, but the government objected. *Id.* The Court held that the defendant was entitled to the letter pretrial under the Compulsory Process Clause. 25 F. Cas. at 37–38.

181. *Supra* pt. IV(A).

182. 418 U.S. 683, 709 (1974).

183. *Id.* at 686.

184. *Id.* at 711.

185. Montoya, *supra* n. 180, at 867 (discussing the holding in *Ritchie*).

186. See generally Peter Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71 (1974) (arguing that discovery rights should be grounded in the Compulsory Process Clause); Montoya, *supra* n. 180 (arguing that the Compulsory Process Clause is the appro-

mentator, the Compulsory Process Clause should be used to enlarge the defendant's access to pretrial discovery so that he can check the prosecution's presentation of evidence and maintain an honest fact-finding process.<sup>187</sup> Furthermore, if compulsory process includes the right to check the prosecution's presentation of evidence at trial, the Clause is meaningless unless the defendant has access to, and can assess, the evidence before the trial.<sup>188</sup>

In coming to this conclusion, one scholar contextualized the Compulsory Process Clause within the Sixth Amendment and the right to counsel.<sup>189</sup> In *Powell v. Alabama*,<sup>190</sup> the Supreme Court said the right to counsel at trial without the right to counsel's pretrial assistance was "vain" because defense counsel could not hope to be effective at trial without pretrial preparation.<sup>191</sup> Similarly, the right to check the prosecution's presentation of evidence at trial would be "vain" because the defendant could not effectively check the prosecution's presentation of evidence at trial without access to it beforehand.<sup>192</sup>

In applying this reasoning to Section 3509(m), it is apparent that although the Section may appear to be a reasonable<sup>193</sup> method for protecting both parties' interests because it promises the defense access to the child pornography prior to trial, in reality the statute is an empty promise. The opportunity merely to

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priate source of certain criminal discovery rights).

187. Montoya, *supra* n. 180, at 867 (arguing that the Clause must allow for pretrial discovery because "the defendant cannot call a witness 'in his favor' without" pretrial discovery that would identify that witness); *but see* Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 Ind. L. Rev. 711, 793 (1976) (rejecting the argument that the general right to defend, including discovery rights, should be grounded in the Compulsory Process Clause because the Sixth Amendment provides specific guarantees "designed to cure certain specific obstacles imposed on the accused by common law").

188. Montoya, *supra* n. 180, at 867–868.

189. *See also supra* nn. 155–157 (comparing the Confrontation and the Assistance of Counsel Clauses).

190. 287 U.S. 45 (1932).

191. *Id.* at 59.

192. This reasoning seems in accordance with Justice Blackmun's views on the Confrontation Clause from *Ritchie* and *Stincer*. *Supra* pt. IV(A). The *Ritchie* plurality thought of the Confrontation Clause as purely a trial right, not a pretrial right for discovery. 480 U.S. at 52. However, the right should be examined from a pretrial perspective in order for the defendant to effectively cross-examine prosecution witnesses.

193. *See Johnson*, 456 F. Supp. 2d at 1019 (stating that "Congress adopted a reasonable measure to ensure that the child pornography used in criminal trials does not escape into the public domain").

view the material a few times before trial without allowing copies is “vain.” The defense counsel needs the copies so that it has the ability to refer back to the materials while preparing for trial.<sup>194</sup> Without the ability to do so, the defense counsel cannot hope to check the prosecution’s presentation of evidence at trial.

Furthermore, the defense needs access to the child-pornography evidence because it constitutes the “papers” that are material to the defense.<sup>195</sup> As the Supreme Court cases suggest, the Compulsory Process Clause provides a pretrial discovery right to access the evidence.<sup>196</sup> This right allows defense counsel to check the prosecution’s presentation of the evidence, a function of the Compulsory Process Clause. A statute that hinders the defendant’s access to the evidence will make that task even more difficult. One scholar observed “[t]hat there exists a close nexus between limited discovery in criminal cases and enhanced opportunities for prosecutorial suppression of evidence is self-evident. The power to control evidence is the power to conceal it.”<sup>197</sup> Child-pornography cases involving computer technology are already complicated enough for defense attorneys who might be unfamiliar with computers. Part of the defense counsel’s job is to question every aspect of the case against his client, everything from the forensics to the integrity of the government’s investigation.<sup>198</sup> In order to complete this job effectively, the defense counsel and especially the computer experts need one hundred percent access to the materials.

## 2. Testimony Material to the Defense

The second part of Chief Justice Marshall’s interpretation of the term “witness” means testimony material to the defense.<sup>199</sup> The Supreme Court in *Washington v. Texas*<sup>200</sup> recognized the defendant’s Sixth Amendment right to offer testimony from witnesses through the Compulsory Process Clause.<sup>201</sup> Although the

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194. *Hill*, 322 F. Supp. 2d at 1091.

195. *Id.*

196. *Supra* nn. 182–184 and accompanying text.

197. Bennett L. Gershman, *The New Prosecutors*, 53 U. Pitt. L. Rev. 393, 451 (1992).

198. Ian N. Friedman, *Defending Virtual Crimes*, 23 GPSolo 39, 39 (Jan./Feb. 2006).

199. *Burr*, 25 F. Cas. at 34–35.

200. 388 U.S. 14.

201. *Id.* at 19.

Court in that case did not specify that “witness” includes expert witnesses, one scholar believes that expert witnesses are included.<sup>202</sup>

The Fifth Circuit has indicated that the only means by which a defendant can defend against the prosecution’s expert testimony is to offer his own expert.<sup>203</sup> The same holds true for child-pornography cases because most defendants prosecuted for child-pornography offenses will have to hire computer-forensic experts.<sup>204</sup> However, given the difficulties that Section 3509(m) presents to the forensic experts, some have said that these experts are less likely to take on these cases due to the additional burden and expense.<sup>205</sup> Thus, in practice Section 3509(m) effectively denies defendants their right to these experts, which violates the Compulsory Process Clause.

The government could argue that Section 3509(m) does not deny the defense access to forensic experts. However, for all practical purposes, Section 3509(m) has denied the defense access to their services due to the additional costs,<sup>206</sup> which most defendants will be unable to afford, and the fact that most experts will no longer take these cases because of the difficulties created by Section 3509(m).

Additionally, one issue that could be central to the defendant’s case is whether the depicted child is an actual child.<sup>207</sup> The court in *Frabizio* concluded that due to the current state of technology, neither an expert witness nor a lay jury can determine whether the child in the image is real or virtual with the level of

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202. Peter Westen, *Compulsory Process II*, 74 Mich. L. Rev. 192, 203 (1975) (stating that “it is scarcely conceivable that defendants could be constitutionally denied the opportunity to call experts to give opinion evidence about such matters as fingerprints, bloodstains, sanity, and other matters that routinely arise in criminal litigation”). The Supreme Court in *Ake v. Oklahoma* did recognize the defendant’s constitutional right to expert assistance through the Fifth Amendment Due Process Clause. 470 U.S. 68, 76–77 (1985).

203. *White v. Maggio*, 556 F.2d 1352, 1356 (5th Cir. 1977).

204. *See supra* pt. III(A) (discussing the role of defense experts in child-pornography cases).

205. *See supra* nn. 116–128 and accompanying text (discussing the evidentiary hearing in *Knellinger*).

206. One expert in the *Knellinger* hearing testified that he usually charges about \$135,000 to complete the work in his own lab, but it would cost about four times that much to do it at the nearest FBI office. O’Dell, *supra* n. 117.

207. *See supra* pt. II(A) (discussing *Ashcroft*, which partly held that computer images that do not depict real children are protected by the First Amendment).

certainty needed in a criminal prosecution.<sup>208</sup> Therefore, a digital imaging expert will be an integral part of the process in determining whether the image is digitally manipulated or whether the image shows an actual child, in which case it can be matched with photographs from the National Center for Missing and Exploited Children database.<sup>209</sup> This task is too difficult and complicated for an attorney to undertake without the assistance of computer-forensic experts. However, if the experts refuse to take these cases, then this line of defense will be difficult for the defendant to use.

### V. SOLUTIONS

As argued in the previous section, there are many reasons why Section 3509(m) is constitutionally insufficient. Moreover, there are no easy solutions to this constitutional problem because both sides have compelling reasons for why they do or do not want copies made of the child pornography. When fashioning a solution, it is important to keep in mind what is reasonable. It should now be apparent that Section 3509(m) makes it unreasonably difficult for defendants to mount a strong defense. Further, although the court in *Knellinger* allowed the defense to make copies under Section 3509(m)'s "safety valve,"<sup>210</sup> this solution is only satisfactory if one is to presume that all other district courts will follow *Knellinger*'s reasoning. This result is unlikely, as illustrated by the ensuing discussion of the conflicting results reached by the district courts thus far. The better solution is to revert to the legal system used prior to the Adam Walsh Act, which allowed the court to grant discovery motions with protective orders through Rule 16 of the Federal Rules of Criminal Procedure.

#### A. "Ample Opportunity" Is Not a Satisfactory Standard

The *Knellinger* court used Section 3509(m)'s "ample opportunity" clause in determining whether the defendant should be enti-

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208. 445 F. Supp. 2d at 155.

209. See *supra* pt. III(A) (discussing the tasks of the defense experts in child-pornography cases).

210. 471 F. Supp. 2d at 644.

tled to copies of the child-pornography materials.<sup>211</sup> As the examples below indicate, whatever constitutes “ample opportunity” will be a pivotal issue in future child-pornography cases in federal court. Nevertheless, “ample opportunity” is a very general term that is difficult to narrowly define, and the courts have defined it in a conflicting manner thus far. Moreover, trying to defend a child-pornography defendant under Section 3509(m) will be difficult given conflicting precedent that courts have established.<sup>212</sup> For example, the issue of whether the defense team had “ample opportunity” to analyze the materials in an empty office within the prosecutor’s office has already produced mixed results. The *Knellinger* court found that “ample opportunity” is not met when the government provides an empty space in the United States Attorney’s office for the defense to analyze the child-pornography materials.<sup>213</sup> The court found that although it is theoretically possible for the defense experts to transport their equipment to a government facility and analyze the evidence, the defense experts may not agree to work under these conditions, and it ultimately prevents the defendant from conducting analysis needed to present his defense.<sup>214</sup> On the other hand, in *O’Rourke*, the government provided similar arrangements within the United States Attorney’s office, and the court found that the government provided “ample opportunity.”<sup>215</sup>

Another issue is whether the expense and burden stemming from Section 3509(m) affects the defendant’s “ample opportunity” to analyze the materials. The *Knellinger* court determined that the expense and burden caused by Section 3509(m) discouraged computer experts from taking child-pornography cases, and this discouragement in turn affected whether the defendant received “ample opportunity.”<sup>216</sup> However, the *Johnson* court essentially dealt with this same issue when the defendant argued that he could not find an expert who would work under burdensome conditions for \$500, but the court rejected this argument by concluding that it had nothing to do with the constitutionality of Section

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211. *Id.*

212. *See supra* pt. III(C) (discussing cases that have interpreted Section 3509(m)).

213. 471 F. Supp. 2d at 649.

214. *Id.*

215. 470 F. Supp. 2d at 1053, 1060.

216. 471 F. Supp. 2d at 649.

3509(m).<sup>217</sup> The defendant in *Butts*, similar to the defendant in *Knellinger*, also made arguments having to do with burden and expense, but the court rejected them reasoning that “ample opportunity” does not consider expense or location as relevant factors.<sup>218</sup>

One final point to consider is that assuming *arguendo* that analyzing the child-pornography materials in the government offices is reasonable for the defendant under the “ample opportunity” standard, then Congress’ justifications for passing Section 3509(m) are invalid. For example, one of Congress’ reasons for passing Section 3509(m) is that every instance of viewing the child pornography represents a repeated violation of the victim’s privacy.<sup>219</sup> Section 3509(m) does not effectively serve this interest if “ample opportunity” allows the defense, the prosecution, and the court to view the materials anyway.<sup>220</sup> Furthermore, if in any event the defense must view the materials, and thus the child’s privacy will have to be repeatedly violated, then why not go one step further and permit copies?<sup>221</sup>

#### B. The Best Solution: Rule 16 and Protective Orders

The best solution is to return to the legal system in place before the Adam Walsh Act, which allowed courts to grant the defendants’ motions for discovery with protective orders when good cause was shown under Rule 16 of the Federal Rules of Criminal Procedure.<sup>222</sup> Although this solution involves completely changing

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217. 456 F. Supp. 2d at 1020.

218. 2006 WL 3613364 at \*\*1–2.

219. *Supra* n. 92 and accompanying text.

220. One criminal defense lawyer stated that “[i]f you were to follow the logic of [Section 3509(m)] . . . you should not be able to present evidence to [twelve] jurors.” Liptak, *supra* n. 130 (quoting Ian N. Friedman, Knellinger’s lawyer).

221. The government’s answer to this question would be that child pornography is also *prima facie* contraband. *Supra* n. 93 and accompanying text. However, the government made this argument prior to Section 3509(m)’s enactment and some courts rejected it. *See e.g. Hill*, 322 F. Supp. 2d at 1091 (stating that a court would not abuse its discretion by ordering the government to produce the evidence requested by the defendant); *Cadet*, 423 F. Supp. 2d at 2–3 (stating that it is more likely that the defendant would be harmed by limited access to the evidence than there is that the evidence would be leaked to the public by the defense).

222. Federal Rule of Criminal Procedure 16(d)(1) says the court may “for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief.” The next section further states the court may order the following: “[a] party to permit the discovery

Section 3509(m), it is the best answer because it is reasonable for all parties who must resolve the case, including the government, the defense attorneys, and the defense experts. Clearly, Rule 16 was the best avenue for obtaining copies of the evidence prior to the Adam Walsh Act. Congress would not put forth the effort to pass a statute expressly disallowing defendants from using Rule 16 if the courts were not granting the defendants' Rule 16 motion. Furthermore, it appears that Congress wanted the court to retain some discretion, and the best way for the courts to use its discretion is through Rule 16.

The opposing argument is that this solution is not best for the victims. Understandably, the victims and their families have an interest in making sure that no one else views or copies the pornography. Unfortunately, however, re-victimization will occur regardless of where the defense team views the images. Additionally, the victim's main concern is presumably that no one else views these materials in a way that could be harmful to him or her.<sup>223</sup> Protective orders are the best way of ensuring that this problem does not happen because a court can prohibit or limit the defendant from viewing the materials.<sup>224</sup>

Prior to the Adam Walsh Act, courts were more willing to grant Rule 16 motions, presumably because judges did not have a provision like Section 3509(m) standing in the way that said "a court shall deny . . . any request by the defendant to copy" the materials. Even after Congress passed the Adam Walsh Act, the *O'Rourke* court said it would have granted the motion to copy the evidence under Rule 16 if not for the explicit language in the statute forbidding the court to do so.<sup>225</sup> Additionally, of the few courts that have decided whether a defendant is entitled to copies of the child-pornography evidence under 3509(m), only one court

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or inspection; specify its time, place, and manner; and prescribe other just terms and conditions." Fed. R. Crim. P. 16(d)(2)(A).

223. *See supra* n. 165 (arguing that the children are hurt when the pornography is viewed for sexual gratification, not when viewed for investigatory purposes).

224. *See infra* n. 227 (ordering that the defendant was prohibited from accessing or viewing any images containing actual or alleged child pornography without the Court's permission).

225. 470 F. Supp. 2d at 1054 n. 1 (concluding that it would grant a copy of the hard drive to the defense if not for the Adam Walsh Act because the evidence falls within the ambit of Rule 16).

has granted copies.<sup>226</sup> Therefore, even though the “so long as” language in Section 3509(m) gives the appearance of allowing for judicial discretion, courts seem hesitant to use it.

Also, prior to the Adam Walsh Act, courts could grant protective orders together with motions to copy evidence. The courts’ protective orders addressed every issue and it therefore seemed like a good way to protect the evidence. For example, the court in *Hill* granted the defendant’s motion for discovery with a protective order that included provisions compelling defense counsel to keep the computer evidence in a secure location at all times, forbidding the defendant from viewing the evidence, and forbidding defense counsel from making any further copies.<sup>227</sup>

226. The court in *Knellinger* granted copies, while the courts in *Johnson*, *O’Rourke*, *Butts*, *Burkhart*, and *Glembin* did not grant copies. For a discussion of these cases, see *supra* Part III(C).

227. Pertinent portions of the protective order included the following:

- (1) The government shall provide defendant’s counsel . . . a copy of the [evidence]. Defense counsel shall maintain copies of the retained computer evidence as follows:
    - (a) Copies of the retained computer evidence shall be maintained by defense counsel in accordance with this Order, and shall be used by counsel and employees of the [defense counsel] designated by defense counsel solely and exclusively in connection with this case (including trial preparation, trial and appeal).
    - (b) Copies of the retained computer evidence shall be maintained by defense counsel in a locked file or cabinet at all times, except while being actively utilized as provided for in this Order.
    - (c) A copy of this Order shall be kept with the copies of the retained computer evidence at all times.
    - (d) Copies of the retained computer evidence shall be accessed and viewed only by defense counsel and staff employed by defense counsel.
    - (e) Defendant himself shall not be permitted to access or view any graphic image file containing actual or alleged child pornography . . . without petition and prior order of this Court.
    - (f) Any computer into which copies of the retained evidence may be inserted for access and operation shall not be connected to a network while a copy of the retained evidence is inserted into any computer.
- \* \* \*
- (h) In no event shall any graphic image containing actual or alleged child pornography be copied, duplicated, or replicated, in whole or in part, including duplication onto any external media.
- (2) The government shall provide defendant’s expert . . . a copy of all of the Encase evidence files relating to this case . . . .
  - (3) Within 30 days of termination of this matter (including the termination of any appeal), defense counsel shall return (or cause the return of) copies of the retained computer evidence and the Encase evidence files to . . . the Federal Bureau of Investigation.

One argument against this solution is that protective orders are just that—orders. The judge is not physically in the defense counsel's office making sure everyone abides by the order. However, according to the Federal Defender's office in the Southern District of New York, it has never had difficulties enforcing the orders.<sup>228</sup> Furthermore, the government's attorneys and experts are allowed to make copies.<sup>229</sup> Why should it be assumed that the government will not use the images in a harmful way but defense attorneys will?<sup>230</sup>

There is no reason why this solution is not reasonable for the government. First, the government had to provide copies prior to the Adam Walsh Act if the court so ordered; therefore, there is no reason why it would now be unreasonable to provide copies upon a successful Rule 16 motion. Furthermore, Congress' reasoning is that every instance of viewing child-pornography images represents a renewed violation to the victims.<sup>231</sup> A protective order would solve this problem because it could limit the number of people who can view the materials. Additionally, if Congress is concerned with further distribution, then the protective order also solves this problem because the copies must be returned to the government at the end of the case.

The proposed solution is reasonable for the defense attorneys for several reasons. First, it would let the attorney see the materials whenever necessary, thus allowing him to effectively represent his client. Also, it would resolve the Confrontation Clause violation because the defense attorney's unfettered access to the materials would allow him to effectively cross-examine government witnesses and experts. The Compulsory Process Clause violation would also be resolved because the defense attorney could better test the prosecution's case with complete access to the child-pornography evidence.

Finally, the solution is reasonable for the defense experts and would most likely encourage them to take these cases because computer-forensic experts would not have to relocate their equip-

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*Hill*, 322 F. Supp. 2d at 1092–1093.

228. *U.S. v. Aldeen*, 2006 U.S. Dist. LEXIS 24372 at \*11 (E.D.N.Y. Mar. 22, 2007).

229. See Ferraro & Casey, *supra* n. 21, at 275 (stating that it is “accepted practice” for the examiner to conduct his examination on an exact duplicate, rather than the original).

230. *Supra* nn. 168–170 and accompanying text.

231. 120 Stat. at 624.

ment in order to analyze evidence at government offices. Therefore, it would not be such a financial burden on the defendant if the expert could analyze the evidence at his own office.

A final point to consider is why Congress, although possessing the power to amend federal rules of procedure,<sup>232</sup> changed a general rule of federal criminal discovery based on the crime that is charged. As the *O'Rourke* court stated, Rule 16 is applicable to all other offenses except child pornography.<sup>233</sup> However, this limitation goes against the ideals that Justice William Brennan argued for in liberalizing discovery for criminal defendants during the 1960s, part of which provided the basis for Rule 16.<sup>234</sup> Discovery is a truth-seeking tool, and the more liberal discovery is, the better the chances are for revealing the truth.<sup>235</sup> Although Congress is not completely limiting a defendant's access to discovery, it is limiting the defendant's use of a common discovery tool that is available in all other types of criminal cases. Furthermore, Congress has replaced the common discovery tool with one that has so far had conflicting results.

Most importantly, the implication in all of this seems to be that a person accused of child pornography is probably guilty anyway; therefore, the defendant does not need a copy of the evidence. A child-pornography defense attorney said, prior to the Adam Walsh Act, if a judge rules that the defense must analyze the evidence in a government office, then he has in effect already determined that the evidence is actual child pornography.<sup>236</sup> Again, this situation mirrors the discovery debate in the 1960s. Justice Brennan always believed the implication in the argument against discovery was that the accused is guilty, so the defendant

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232. *Knellinger*, 471 F. Supp. 2d at 643 (discussing Congress' power to enact statutes that amend existing rules of federal rules of procedure).

233. 470 F. Supp. 2d at 1053 (explaining how Congress changed the rules for child-pornography cases by enacting the Adam Walsh Act).

234. See Fed. R. Crim. P. 16 advisory comm. n. 1966 Amend. (citing Justice Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth*, 1963 Wash. U. L.Q. 279 (1963)).

235. Brennan, *supra* n. 234, at 291.

236. Ian N. Friedman, *Pre-Trial Preparation in Computer Child Pornography Cases: Combating the Watering Down of Ashcroft v. Free Speech Coalition in State Prosecutions*, <http://www.computersexcrimes.com/articles/article010.pdf> (Dec. 9, 2005).

2008] *Adam Walsh Child Protection and Safety Act of 2006* 1021

has no complaint that his counsel is denied access to the evidence.<sup>237</sup>

## VI. CONCLUSION

As one commentator put it, “[the Adam Walsh Act] was a very well-meaning law, but it’s un-American.”<sup>238</sup> There is no doubt that child pornography is a huge problem in this country that must be controlled, and Congress’ efforts to manage the problem are commendable. However, justice is not served when the accused is convicted without a fair trial; considering the harsh penalties that a defendant faces upon a child-pornography conviction, it is imperative that he receive a fair trial. Section 3509(m) does not afford the defendant a fair trial because it violates his Sixth Amendment rights to confrontation and compulsory process. More specifically, it violates the Confrontation Clause by not affording the defendant sufficient pretrial discovery to effectively cross-examine the government’s expert witnesses. Also, Section 3509(m) violates the Compulsory Process Clause by limiting the papers needed to check the prosecution’s presentation of evidence and limiting access to expert testimony material to the defense. Congress must recognize these constitutional violations and understand that the best solution to this problem is to let courts decide whether the defendant is entitled to copies of the child-pornography evidence through Rule 16 of the Federal Rules of Criminal Procedure.

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237. Brennan, *supra* n. 234, at 287.

238. Hoffman, *supra* n. 81 (quoting Jack King of the National Association of Criminal Defense Lawyers).